Concentrated Ag Markets – Possible Producer Response?

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Overview

In a blog article last week https://lawprofessors.typepad.com/agriculturallaw/2020/05/doj-to-investigate-meatpackers-whats-it-all-about.html I noted that the Trump Administration and various state Attorneys General have called upon the U.S. Department of Justice (DOJ) to investigate the pricing activities of the major meatpackers. Aside from the economics of the situation and DOJ investigations, is there another approach that agricultural producers can take to enhance markets for their products? This question is of particular importance at the present time. Indeed, there may be a way for ag producers to work together to enhance prices for their products in a way that the law favors.

Collective action of agricultural producers to enhance markets for their products – it's the topic of today's post.

Historical Background – The Capper-Volstead Act

The National Board of Farm Organizations passed a resolution in 1917 urging the Congress to amend the antitrust laws to clearly permit farm organizations to make collective sales of farm, ranch and dairy products. This was the beginning of a concerted drive for further legislation to resolve the problems and issues facing agricultural co-ops, and ultimately resulted in the enactment of the Capper-Volstead Act (Act) in 1922. *7 U.S.C. 291*. The purposes of the Act were to remedy two problems encountered under Section 6 of the Clayton Act. While Section 6 of the Clayton Act provided a basic exemption for agricultural organizations from application of the Sherman and Clayton Acts (i.e., antitrust law), it limited the exemption to organizations that did not have capital stock and, furthermore, Section 6 did not specifically sanction certain co-op marketing activities.

The Act provides that "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers, may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." *Id.* As such, the Act extended the Section 6 Clayton exemption to capital stock agricultural co-ops comprised of agricultural producers. These co-ops can have marketing agencies in common and their members can make the necessary contracts and agreements to effect such purposes. However, agricultural co-ops must be operated for the mutual benefit of the members and no member of the association can be permitted more than one vote because of the amount of stock or membership capital owned, or the co-op cannot pay dividends on stock or membership capital in excess of 8 percent per year. Most co-ops comply with both requirements as a matter of practice or because their state statute requires both. In addition, the co-op is prohibited from dealing in the products of nonmembers to an amount greater in value than are handled by it for members. Without these special provisions, agricultural marketing co-ops probably could not exist. The member farmers likely would be engaged in prohibited price fixing.

The grant of immunity from antitrust charges is further limited by Section 2 which empowers the Secretary of Agriculture to issue cease-and-desist orders when an organization exempt from antitrust restrictions is found to be monopolizing or restraining trade, to the extent that the price of any agricultural product is unduly enhanced. *7 U.S.C. § 292* While this does not give the Secretary of Agriculture primary or exclusive jurisdiction over such organizations, they can still be sued under the antitrust laws for exceeding the exemption granted.

An agricultural co-op must satisfy two requirements in order to be shielded by the Act from antitrust liability. First, the organization must be involved in the "processing, preparing for market, handling, or marketing "of the agricultural products of its members. *7 U.S.C. § 291* Thus, the exemption has been held not to apply to the activities of firms or persons operating packing houses. *Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), reh'g denied, 390 U.S. 930 (1968).* Second, the organization claiming to be immunized from liability must be composed of "members" that are "producers of agricultural products" or cooperatives composed of such producers. 7 U.S.C. § 291 As such, the exemption does not cover the activities of an association consisting in part of persons engaged in "production" and in part of persons not so engaged. For example, in *In re Mushroom Direct Purchaser Antitrust Litigation, 621 F. 2d 274 (E.D. Pa. 2009),* the court held that the fact that one member was a non-farmer processor barred the application of the Act's exemption. A non-farmer member had power to participate in control and policymaking of co-op through voting. However, non-producer associate members with no control over the co-op are not statutory "members" and do not strip the co-op of its exempt status. *See, e.g., Agritronics Corporation v. National Dairy Herd Assoc., Inc., 914 F. Supp. 814 (N.D. N.Y. 1996).*

The United States Supreme Court has construed the Section 1 exemption restrictively by denying exempt status to a broiler chicken nonprofit marketing and purchasing co-op, in which nine of the 75 members did not own breeder fowl. Although the nine were vertically integrated into other processing stages of the broiler industry, their failure to raise their own breeder fowl took them outside the term "farmers" as used in the Act. The Court made it clear that the exemption only applies if all participants in the organization qualify under the Act. *National Broiler Marketing Association v. United States, 436 U.S. 816 (1978).* While the Court did not address the question of whether an integrated agribusiness would always be a disqualified participant in an association (and thereby cause the association to lose its exempt status) that is otherwise protected by the Act, a concurring opinion in the case indicated that determination is to be made on a case-by-case basis by analyzing the nature of the association's activities, the degree of integration of its members, and the functions that are historically performed by farmers in the industry. In a 2011 case, the United States District Court for the District of Idaho followed the approach set forth by the concurring opinion in *National Broiler* and declined to adopt a bright-line rule that any degree of vertical integration either disqualifies a farming operation from participating in a Capper-Volstead eligible association, or is irrelevant in such a determination. *In re Fresh and Process Potatoes Antitrust Litigation, 834 F. Supp. 2d 1141 (D. Idaho 2011).*

Even if the Act's Section 1 exemption applies and a particular co-op qualifies for the exemption, the exemption does not legalize activities which are coercive, such as boycotts aimed at forcing nonmembers to join the co-op. While co-op price fixing has been held to be permissible under the Act's Section 1 exemption, a boycott to force nonmembers to adhere to prices established by the co-op has been held to not be within the scope of the exemption. *Maryland & Virginia Milk Producers Ass'n., Inc. v. United States, 362 U.S. 458 (1960).*

Permissible activities allowed by the Act include agricultural producers acting together in associations to collectively process, prepare for market, handle and market products. Producers in one association can agree on marketing practices with producers of another association by informal

means, by use of a common marketing agent, or through a federation. Cooperatives formed under the Act are not totally exempt from the scope of the antitrust laws. Such a cooperative may lose its limited antitrust exemption if it conspires or combines with persons who are not producers of agricultural products. For example, a dairy cooperative combined with labor officials, municipal officers and other non-producers to seek control of the supply of fluid milk in the Chicago area by paying to producers artificially high noncompetitive prices. Any immunity that the dairy co-op might have had under Section 6 of the Clayton Act or under Section 1 of the Act was lost. *United States v. Borden Co., 308 U.S. 188 (1939)*.

Similarly, Section 2 of the Act does not protect co-ops that unduly enhance prices of agricultural products. That is particularly the case if price enhancement is the result of production limitations. As noted above, the Act allows agricultural producers to act together to process, prepare for market, handle and market an agricultural product after it has been planted and harvested. Thus, by its terms, the Act does not apply to production limitations, acreage limitations or collusive crop planning. *See In re Fresh and Process Potatoes Antitrust Litigation, No. 4:10-MD-2186-BLW, 2011 U.S. Dist. LEXIS 138777 (D. Idaho Dec. 2, 2011); "A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, p. 68 (1977), Dkt. 111-114, Ex. M.; Farmer Cooperatives in the United States," Cooperative Information Report 1, Section 3, USDA, Rural Business – Cooperative Service, p. 17 (1980, reprinted 1990), Dkt. 111-116, Ex. O.*

While the Secretary of Agriculture can enforce Section 2 by investigating complaints of undue price enhancement, there has not yet been a case where the evidence has been deemed sufficient to warrant a hearing. The U.S. Department of Justice, the Federal Trade Commission, and private parties may bring actions against a co-op when the alleged conduct is not protected by the Act or in the first instance when the co-op failed to meet the Act's organizational requirements.

Other Laws Granting Limited Immunity to Agricultural Co-ops

The Cooperative Marketing Act. The Cooperative Marketing Act of 1926 permits agricultural producers and their associations to legally acquire and exchange past, present and prospective data concerning pricing, production and marketing. This information may also be exchanged through "federations" of co-ops and by or through a common agent "created or selected" by the producers, co-op, or federation.

The Robinson-Patman Act. The Robinson-Patman Act became law in 1936 and focuses on price discrimination between or among purchasers. In general, Robinson-Patman prohibits sellers from charging different prices for commodities of "like grade and quality" if the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly". However, price discrimination is lawful if the price differential is justified by savings in the cost of manufacture, sale or delivery resulting from the differing methods or qualities in which such commodities are sold or delivered to such purchasers or the price difference is the result of changed market conditions. It also provides that co-op patronage refunds will not be characterized as illegal rebates with respect to sellers of products.

The Agricultural Marketing Agreement Act. Under the Agricultural Marketing Agreement Act (AMAA) of 1937, the Secretary of Agriculture is authorized "to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof in interstate or foreign commerce or which "directly burdens, obstructs, or affects" such commerce. *7 U.S.C. § 608*. A marketing agreement is a formal, but voluntary agreement between the Secretary and handlers of a particular agricultural commodity. The purpose of a marketing agreement and order is "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish"

reasonable prices which farmers receive for their agricultural commodities. Marketing agreements affect the quality, size and quantity of an agricultural commodity shipped to markets and are essentially self-help mechanisms to advance the economic interests of the industry. Marketing agreements exist for a wide variety of agricultural crops including raisins grown in California, avocados grown in Florida, and papayas grown in Hawaii. The AMAA provides that "[t]he making of any such agreement shall not held to be a violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful." The AMAA was upheld as constitutional in *United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939)*.

The Agricultural Fair Practices Act. The Congress enacted the Agricultural Fair Practices Act (AFPA) in 1968 to correct what was perceived to be an imbalance in bargaining position between producers and processors of agricultural products. Because the marketing and bargaining positions of individual farmers may be adversely affected if they are unable to join freely together in co-op organizations, the AFPA makes it unlawful for either a processor or a producers' association to engage in practices that interfere with a producer's freedom to choose whether to bring products to market individually or to sell them through a producers' coop. The AFPA does not prohibit other discriminatory practices by handlers of agricultural products, nor does it require them to deal with or bargain in good faith with a co-op. The AFPA pre-empts certain provisions of state agricultural marketing and bargaining laws.

Conclusion

The present economic conditions in much of agriculture are difficult. The DOJ investigation is just another investigation in a long line of investigations involving the meat packing industry. As an alternative, ag producers do have other options to market their products with some degree of legal protection from antitrust laws. Overcoming obstacles to forming such marketing organizational alliances may presently be very important.