

1

AGRICULTURAL ANTITRUST: CASES AND ISSUES

AALA Agricultural Law Symposium
October 7, 2016
Oklahoma City, OK

2

John C. Monica, Jr.

- John is Partner-in-Charge of the Washington, D.C. office of **Porter, Wright, Morris & Arthur, LLP** where he has concentrated on defending farmers and agricultural producers in a variety of antitrust cases nationwide. His numerous professional articles and presentations include "Protecting Cooperatives from Antitrust Liability," published in 2015 in USDA's *Rural Cooperatives* magazine. He has deep experience defending complex consumer class actions and federal multidistrict antitrust litigation in various courts nationwide. He has also represented individual farmers in unique antitrust cases involving novel issues in state courts. Porter Wright is an Ohio-based law firm and was praised in U.S. News/Best Lawyers "Best Law Firms," as "probably the best firm in the nation for understanding and handling Capper-Volstead antitrust actions. Their knowledge in this area is unsurpassed and they are extremely good to work with." John received his law degree from George Washington University with honors and his undergraduate degree from Northwestern University. He is a member of the Virginia State Bar, Antitrust Franchise & Trade Regulation Section; Maryland State Bar Association, Agricultural Section; District of Columbia Bar, Antitrust and Consumer Law Section; American Bar Association Section of Antitrust Law, Agriculture, and Trial Litigation Committees; and the American Agriculture Law Association. John, his wife, and two teenage daughters currently live in Manassas, Virginia. He has previously lived in Missouri, Kansas, Illinois, and Ohio.

3

James Pizzirusso

- Jamie is a partner in the Washington, D.C. office of **Hausfeld LLP** – widely regarded as one of the top plaintiffs' competition firms in the United States and the world. He has a diverse practice focusing on antitrust law (with an emphasis in agriculture), as well as consumer protection law (chair of the practice group). In addition to practicing law, he has served as a Visiting Professor at George Washington University Law School. In the antitrust arena, he often represents clients (both direct purchasers and farmers) alleging price fixing, monopolization, and collusion in various agricultural sectors and he has written and spoken extensively on the Capper Volstead Act. James is one of Hausfeld's principal attorneys in antitrust cases involving agricultural products such as eggs, potatoes, milk, and packaged seafood. He successfully resolved the claims of numerous farmers and landowners in Barbados who suffered reduced crop yields and property damages as a result of a massive jet fuel spill. He has also represented farmers and other entities seeking damages related to unauthorized releases of genetically modified crops. He serves as Vice Chair of the American Bar Association's Agriculture and Food Antitrust Committee. Additionally, The Benchmark Plaintiff Guide to America's Leading Plaintiff's Firms and Attorneys has recognized James as one of the country's top "Antitrust Litigation Stars" and one of DC's "Local Litigation Stars." James received his law degree from George Washington University (with honors) and his undergraduate degree from the University of Tennessee (summa cum laude).



5

Agricultural Antitrust Cases

- There is nothing unique about the milk, egg, mushroom, tuna, or potato industries that makes them more susceptible to antitrust litigation than any other major agricultural sector.
 - Counterpoint: except for the tuna industry, these commodity groups were growing in concentration and vertical integration, and had near industry-wide cooperatives
- Cooperatives and farmers that become the target of antitrust class actions can face millions of dollars in alleged damages.
- Every farmer and cooperative needs to have antitrust policies and procedures in place and a system to actually monitor for compliance.

6

Federal Law: Sherman Act § 1

- “Every contract, combination...or conspiracy, in restraint of [interstate] trade or commerce...is declared to be illegal.”
- “Every person who [violates section 1] shall be deemed guilty of a felony, and...shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both...”

7

Department of Justice Guidelines

- In its most common form, **price fixing** is an agreement to raise the price of a product or service to or by a specific amount, e.g., all widget manufacturers agree to a 5 percent increase in price effective June 1.
 - Examples include agreements to eliminate discounts to all customers or certain types of customers; agreements to adopt a specific formula for the computation of selling prices; and agreements not to advertise prices or to refuse to sell the product through any bidding process.
- Agreements to **reduce supply** have also been treated by the Courts as price fixing.

8

State Laws: 50

- For example, **Kansas Stat § 50-112** (Trusts, combinations and agreements in restraint of trade and free competition declared unlawful) provides:
 - Except as provided in K.S.A. 2015 Supp. 50-163, and amendments thereto, all **arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition** in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, **designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles**, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

9

Capper-Volstead Act of 1922

- Persons engaged in the production of agricultural products...may act together...in collectively processing, preparing for market, handling, and marketing...such products. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes:
- *Provided, however,* That such associations are operated for the mutual benefit of the members...and conform to one or both of the following requirements:
 - First. That no member of the association is allowed more than one vote...or,
 - Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
 - and in any case to the following:
 - Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

10

Fishermen's Collective Marketing Act

- Persons engaged in the fishery industry, as fishermen...may act together in associations, corporate or otherwise,...in collectively catching, producing, preparing for market, processing, handling, and marketing...such products of said persons so engaged.
- Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes:
- However:
 - No member of the association is allowed more than one vote; or the association cannot pay dividends on stock or membership capital in excess of 8 per centum per annum.
 - And the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

11

Exemption from Liability, Not Litigation

- Despite the exemptions from antitrust liability embodied in the Capper-Volstead Act and the Fishermen's Collective Marketing Act, agricultural and fishing cooperatives have been and are the subject of numerous antitrust actions.
- Three main arguments:
 - The structure of the cooperative does not conform to the requirements of the law, e.g., not all members are "farmers;"
 - The conduct is not protected under the statute, e.g., pre-production versus post-production supply restraints; or
 - Whether a cooperative or its members are exempt if they have a "good faith" belief that they are compliant with the requirements of Capper-Volstead

12

Who Are the Plaintiffs?

- Direct Purchasers:
 - Grocery Store Chains
 - Food Service Companies
 - Food Processors
 - Restaurants
 - Wholesalers
 - Brokers
- Class Actions
 - Direct Purchasers (same as above)
 - Indirect purchasers
 - generally made up of individual consumers, but can include such companies nursing homes and hospitals who purchase agricultural products from a wholesaler for consumption by its residents or employees

Fed. R. Civ. P. 23. Class Actions

- (a) A class must meet the following four requirements, commonly known as:
 - numerosity;
 - commonality;
 - typicality; and
 - adequacy.
- (b) A court must also find that one of the following requirements are met:
 - (1) that separate actions risks either inconsistent adjudications which would establish incompatible standards of conduct for the defendant or would be dispositive of the interests of others;
 - (2) that defendants have acted or refused to act on grounds generally applicable to the class;
 - (3) that there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

In re: Processed Egg Products Antitrust Litigation (E.D. Pa.)

- Purported Anticompetitive Conduct:
 - Animal husbandry program initiated by cooperative that increased cage sizes for egg-laying hens was an alleged subterfuge to reduce the number of eggs produced and increase prices.
 - Joint/collective exports initiated by cooperative were an alleged subterfuge to reduce domestic egg supply and increase prices.
 - Hen culls and coordinated molting recommended by the cooperative were an alleged subterfuge to reduce domestic egg supply and increase prices.
- Status:
 - First filed in the fall of 2008; currently pending in federal court in Philadelphia.
 - Several Defendants have settled for over \$63,000,000.
 - Waiting for ruling on dispositive motions; no trial dates set.
 - Seeking c. \$3,000,000,000.00 in damages, trebled, and attorneys' fees.

Egg Defendants

- UEP
- USEM
- Cal-Maine
- Moark
- Sparboe
- Michael Foods
- MidWest
- Sauder
- Hillandale
- Daybreak
- Ohio Fresh
- NuCal
- Rose Acre
- National Foods
- Weaver Brothers

Direct Action Plaintiffs

- Kraft Foods Global, Inc.
 - The Kellogg Company
 - General Mills, Inc.
 - Nestle USA, Inc.
 - Safeway
 - Walgreen Co.
 - Hy-Vee, Inc.
 - Conopco, Inc.
 - Kroger Co.
 - Albertsons LLC
 - Supervalu, Inc.
 - The Great Atlantic & Pacific Tea Company, Inc.
 - H.E. Butt Grocery Company
 - Roundy's Supermarkets, Inc.
 - C&S Wholesale Grocers, Inc.
 - H.J. Heinz Company, L.P.
 - Publix Super Markets, Inc.
 - Winn-Dixie Stores, Inc.
 - Giant Eagle, Inc.
- Plus 2 Class Actions:**
Direct Purchasers & Indirect Purchasers



16

In re: Packaged Seafood Products Antitrust Litigation (Tuna) (S.D. Cal.)

- Purported Anticompetitive Conduct:
 - Starting in 2008, the big 3 canned tuna companies allegedly agreed to reduce can sizes, but maintain prices
 - In 2011, the same companies allegedly coordinated to increase the list price of canned tuna
 - They also allegedly agreed to limit sales and promotional pricing, and to not offer "FAD free" products to customers
- Status:
 - The MDL Transfer order was entered Dec. 9, 2015; combining 62 litigations
 - Still early – Defendants have moved to dismiss
 - In April 2016, the DOJ asked the Court to stay discovery until after the grand jury verdict in their parallel investigation

17

<p style="text-align: center;">Tuna Defendants</p> <ul style="list-style-type: none"> • Bumble Bee Foods LLC, • Tri-Union Seafoods LLC, • Starkist Company, and • Tri Marine International, Inc. • King Oscar, Inc. • Dongwon Industries Co. Ltd. • Thai Union Frozen Products PCL • Dongwon Industries Co. Ltd • Del Monte Foods Company 	<p style="text-align: center;">Direct Action Plaintiffs</p> <ul style="list-style-type: none"> • Affiliated Foods, Inc. • Associated Grocers of New England, Inc. • North Central Distributors, Llc • Cash-Wa Distributing Co. of Kearney, Inc. • Umi Stores, Inc. • Western Family Foods, Inc. • Associated Food Stores, Inc. • Giant Eagle, Inc. • McLane Company, Inc. • Meadowbrook Meat Company, Inc. • Associated Grocers, Inc. • Bi-Lo Holding, Llc • Winn-Dixie Stores, Inc • Albertsons Companies, Llc • H.E. Butt Grocery Company • Lesgo Personal Chef Llc • Publix Super Markets, Inc. • Wakefern Food Corp. • Wegmans Food Markets, Inc. • Meijer Distribution, Inc. and Meijer, Inc. • W Lee Flowers & Co Inc • Affiliated Foods Midwest Cooperative, Inc. • Brookshire Brothers, Inc. and Brookshire Grocery Co.
---	---

Plus 2 Class Actions:
Direct Purchasers & Indirect Purchasers

18

In re: Fresh & Processed Potatoes Antitrust Litig. (D. Idaho)

- Purported Anticompetitive Conduct:
 - Plaintiffs allege Defendants engaged in a price-fixing and supply management conspiracy through regional and nationwide cooperatives formed in 2004.
 - Defendants allegedly coordinated several restrictive actions: (1) limiting potato planting acreages; (2) paying farmers to destroy existing stock or not to grow additional potatoes; and (3) reducing the overall number of potatoes available for sale.
 - Plaintiffs allege Defendants' cooperatives took numerous, overt actions that destroyed the applicability of the Capper-Volstead Act's immunity such as (1) including in their membership rolls packers and other ineligible business; (2) coordinating with foreign grower associations; and (3) engaging in pre-planting supply restrictions.
- Status:
 - DPP Settlement Agreement - \$19.5 million; IPP Settlement Agreement - \$5.5 million; IPP and DPP settlements were approved as to all Defendants
 - Dispositive motions are due in Kansas tag-along action (AWG) on September 23, 2016.

19

Potato Defendants

- United Potato Growers of Idaho, Inc.
- United Potato Growers of America, Inc.
- United II Potato Growers of Idaho, Inc.
- Albert Wada
- Wada Farms, Inc.
- Wada Farms Potatoes, Inc.
- Wada-Van Order Potatoes, Inc.
- Wada Farms Marketing Group, LLC
- Cedar Farms
- Dole Fresh Vegetables, Inc.
- Dole Food Company, Inc.
- Blaine Larsen Farms, Inc.
- Potandon Produce LLC
- General Mills, Inc.
- Michael Cranney db/a Cranney Farms
- Cornelson Farms, Inc.
- Snake River Plains Potatoes, Inc.
- Driscoll Potatoes, Inc.
- Lance Funk db/a Lance Funk Farms
- Rigby Produce, Inc.
- Pleasant Valley Potato, Inc.
- Raybould Brothers Farms LLC
- RD Offutt Co.
- Idahoan Foods, LLC
- Pro Fresh, LLC
- Bayer Cropscience LLP
- KCW Farms, Inc.
- Kim Wahlen db/a Kim Wahlen Farms
- Idahoan Food, LLC f/a North American Foods, LLC

Direct Action Plaintiffs

- Associated Wholesale Grocers, Inc.
- Winn-Dixie Stores, Inc.
- Bi-Lo Holding, LLC

Plus 2 Class Actions:

- Direct Purchasers & Indirect Purchasers



20

In Re: Mushroom Direct Purchaser Antitrust Litigation (E.D. Pa.)

- Purported Anticompetitive Conduct:
 - Beginning in January 2001, Eastern Mushroom Marketing Cooperative (“EMMC”) and its members, which control 60 percent of the common table variety of mushrooms, allegedly agreed to set increased minimum prices that were, on average, 8% higher than the prevailing rate in the United States.
 - To support the purported artificial price increases, the Defendants allegedly began to eliminate competing mushroom supply by purchasing mushroom farms and reselling them at a loss, attaching to the sales deed restrictions prohibiting the growing of mushrooms on the property.
 - EMMC members also allegedly interfered with non-members' ability to sell at lower prices through group boycotts – either agreeing not to sell to such growers who needed fresh mushrooms to meet short-term supply needs and/or selling mushrooms to those growers at inflated prices.
- Status:
 - DPP Complaint filed Feb. 10, 2006; no direct or indirect purchaser actions
 - The motion for class certification, as well as a number of motions for summary judgment, are currently pending; Capper-Volstead ruling has been appealed to the 3d Circuit
 - No specific demand for damages made yet

21

Mushroom Defendants

- Eastern Mushroom Marketing Coop, Inc.
- Kaolin Mushroom Farms, Inc.
- To-Jo Fresh Mushrooms, Inc.
- Cardlie Mushrooms, Inc.
- Cardlie Bros. Mushrooms Packaging
- Monterey Mushrooms, Inc.
- Philips Mushrooms Farms, Lp.
- Franklin Farms, Inc.
- Modern Mushrooms, Inc.
- Sher-Rockee Mushroom Farm
- C&C Carriage Mushroom Co.
- John Pia
- John Does 1-100
- Brownstone Mushroom Farms, Inc.
- Country Fresh Mushroom Co.
- Creekside Mushrooms Ltd.
- Robert Feranto, Jr., Bella Mushroom Farms
- Forest Mushrooms, Inc.

- Gaspari Bros, Inc.
- Gino Gaspari & Sons, Inc.
- Giorgi Mushroom Company
- Giorgio Foods, Inc.
- Harvest Fresh Farms, Inc.
- Jim Farms, Inc.
- Kitchen Pride Mushrooms
- Leone Pizzini And Son, Inc.
- Louis M. Marson, Jr., Inc.
- Lrp Mushrooms Inc.
- Lrp-M Mushrooms LLC
- M.D. Basciani & Sons, Inc.
- Mario Cutone Mushroom Co., Inc.
- Masha & Toto, Inc. T/A M&T Mushrooms
- Mushroom Alliance, Inc.
- Oakshire Mushroom Farm, Inc.
- Michael Pia
- Quincy Farms
- South Mill Mushroom Sales, Inc.
- United Mushroom Farms Cooperative, Inc.
- W&P Mushroom Inc.
- Quincy Farms



In re: Fresh Milk Pricing Antitrust Litig. (N.D. Cal. & S.D. Ill.)

- Purported Anticompetitive Conduct:
 - Plaintiffs challenge a multi-year dairy herd retirement program conducted through a large Capper-Volstead cooperative, National Milk Producers Federation. Plaintiffs allege that dairy farmers were paid by the cooperative to voluntarily retire complete herds and stay out of the market for one year.
 - The program allegedly eliminated over 1.5 million dairy cows and removed over 9.55 pounds of raw milk from the market, through a combination of herd retirement programs, reduced production marketing programs, and export subsidy programs. Raw milk prices allegedly increased \$95, with wholesale and retail prices following.
 - Cooperative assessments funded the buyouts, and plaintiffs allege that twenty-eight hundred small farmer participants found it impossible to reenter the market after the one-year hiatus because of a continuing oversupply of milk.
 - Plaintiffs' primary Capper-Volstead challenge is based on the pre-production nature of the cooperative's supply management activities. Also, they allege that participation was open to independent farmers not affiliated with a cooperative.
- Status:
 - Pending motion for preliminary approval of a \$52 million settlement (Aug. 12, 2016).
 - There are also pending motions for summary judgment and to decertify the IPP classes (N.D. Cal.)
 - Pending motion to certify DPP classes (S.D. Illinois)
 - JPML has refused 3 times to consolidate the matters

Milk Defendants

- Agrimark, Inc.,
- Dairy Farmers of America, Inc.,
- Dairylea Cooperative Inc.,
- Land O'Lakes, Inc.,
- National Milk Producers Federation
- Southeast Milk, Inc.
 - (in Winn-Dixie action only)

Plaintiffs

- Direct Purchaser Class
 - N.D. California
- Indirect Purchaser Classes
 - S.D. Illinois
- Winn-Dixie recently filed in M.D. Florida
 - March 2016



What are Farmers and their Cooperatives to Do?

- Many open questions – very little recent appellate law on Capper-Volstead or related issues
 - Hard to counsel clients
 - Potential malpractice exposure
- Problems tend to occur with: (1) large "information" cooperatives; (2) pre-production supply management activities; (3) rising market prices
- Little appetite for government enforcement efforts, private plaintiffs tend to target low hanging fruit
- Hopefully will receive more clarity soon from the Court in *Eggs* and *Mushrooms*
- Indemnification possibilities present difficulties

Thank you!

John Monica
Porter, Wright, Morris & Arthur, LLP
(202) 778-3050 • jmonica@porterwright.com

James Pizzirusso
Hausfeld LLP
(202) 540-7201 • jpizzirusso@hausfeld.com
