



Section 1 of the Capper-Volstead Act has been correctly interpreted to exempt the following from application of the antitrust laws:

1. The elimination of competition among members of such cooperatives by the cooperatives' establishment of prices (including minimum prices) and terms and conditions under which the grower/producer may market products. See, In the matter of Central California Lettuce Producers Cooperative, et al., 90 F.T.C. 18 (1977); Northern California Supermarkets, Inc. v. Central California Lettuce Producers Co-op, 413 F. Supp. 984 (N.D. Cal. 1976), aff'd, 580 F.2d 369 (9th Cir. 1978) cert. denied, 439 U.S. 1090 (1979).
2. The fixing of prices, as between cooperatives, without the formality of a separate organization or marketing agent in common, at which the cooperatives or their members will sell their products. See, Treasure Valley Potato Bargaining Ass'n., et al. v. Ore-Ida Foods, 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974); GVF Cannery, Inc. v. California Tomato Growers Ass'n, Inc., 511 F.Supp. 711 (N.D. Cal. 1981).
3. The achievement of monopoly power by combinations of cooperatives, unaccompanied by predatory conduct. See, Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981), aff'd, 715 F.2d 520 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981).

We are aware of the Commission Staff's contention, expressed in its 1976 Report on Agricultural Cooperatives, that inter-cooperative mergers are not exempt from the antitrust laws. See, Bureau of Competition, Federal Trade Commission, Staff Report on Agricultural Cooperatives 52-53 (1975). For at least the following reasons, we believe that position to be in error.

1. It was articulated before the decisions in Kinnett and Fairdale Farms.
2. In the same section of the Report, and based upon the same line of reasoning, the Staff concluded that inter-cooperative "combinations and conspiracies" were also not exempt, notwithstanding the decision to the contrary in Treasure Valley. The Staff position was

wrong. Treasure Valley was indeed inconsistent with the Staff's position. Subsequent decisions in GVF Cannery, supra, Kinnett, supra, and, Northern California Supermarkets, Inc., supra, and the reasoning thereof adequately demonstrate so.

3. Finally, and perhaps most significantly, the Federal Trade Commission itself has, since publication of the Staff report, taken a directly contrary position. In its brief filed with the 9th Circuit Court of Appeals in Sunkist Growers, Inc. v. Federal Trade Commission, et al., (No. 79-3091), the Commission stated: "[i]t is clear that the exemption provided by section 1 of Capper-Volstead and section 6 of the Clayton Act extends not only to the formation of a cooperative but also to: [t]he achievement of monopoly power by the cooperative . . . through mergers between producer cooperatives." Brief for Appellees and Cross-Appellants at 36, Sunkist Growers, supra.

Accordingly, we are satisfied that the merger proposed is exempt from application of the antitrust laws within the meaning of Section 7A(c)(5) of the Clayton Act and is therefore exempt from pre-merger notification requirements. We request that you confirm, as correct, our understanding.

Very truly yours,

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6/4/91. John Synple advised [REDACTED] that the issue of whether mergers between agricultural cooperatives are exempt from the antitrust laws is still not resolved. The position of the PMN office is that they are not "specifically exempt" from the antitrust laws by (c)(5) of the HSR Act since neither Section 1 of Capper-Volstead or Section 6027 of the Clayton Act or court decisions interpreting such sections have specifically address the issue. The 1/28/77 report of the National Commission for the Review of the Antitrust Laws and the 1976 Commission Staff Report generally seem to conclude that such mergers are not - or may not - be exempt. [REDACTED]

RTS/mll