

## ANTITRUST LAW SOURCE PODCAST

### WITH JAY LEVINE

#### Episode 56: Part 2: Capper Volstead, past, present and future

*The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.*

Intro: Welcome to Porter Wright's Antitrust Law Source.

**Jay:** Good morning, good afternoon, or good evening, depending on when you're listening to this. This is Jay Levine, your host of Antitrust Law Source. And I am delighted to be joined again by Don Barnes, my co-chair here at Porter Wright. How're you doing, Don?

**Jay:** I'm doing fine, Jay.

**Jay:** So this is the second in our series on the Capper Volstead Act, agricultural antitrust in general. We had hoped to do this series of podcasts in 2022 when it was the 100th anniversary of the Capper Volstead Act, so let's all just pretend it's still the anniversary year. And celebrating that. But let's get right to it.

We sort of talked a lot about sort of how Don got into antitrust, it was fortuitous, but also serendipity on how we got into it, and sort of how it has changed a little bit over the years. But let's backtrack for a moment and talk about why there is a Capper Volstead Act and what is the Capper Volstead Act. So as everybody should hopefully know by now, because I'm sure you have listened to all of my podcasts. Don's like cracking up because I'm sure he has memorized them all. You know, there are three major antitrust statutes. There's Section One of the Sherman Act. Well, it's the Sherman Act, but it's Section One which deals with agreements and restraint of trade. There's Section Two which deals with monopolization, attempted monopolization and conspiracies to monopolize. And then there is the Clayton Act, which actually has a lot of different parts to it. It is Section Seven deals with mergers and acquisitions Seven-Eight deals with the Hart Scott Rodino Act. Section Four deals with essentially injury and damages. But the Clayton Act also provided, what was felt to be, a much needed exemption to the antitrust laws for certain industries and Don, what exactly did the Clayton Act do vis a vis agriculture?

**Don:** It basically laid the groundwork for the Capper Volstead Act exemption. Just a little bit of history, the movement to provide an exemption for collective activity on behalf of farmers actually originated back in the Sherman Act days.

**Jay:** Right.

**Don:** The Sherman Act was passed in part because of agitation by the farm community against the railroads. Farmers were thought they were getting ripped off by the trusts including the railroads, the big food processors. So that's where the movement really sort of started. That was 1890, approximately and

**Jay:** 1890, you're right.

**Don:** We move forward to the Clayton Act. As part of the Clayton Act, there is a provision which basically says and I'll give you a short quote, "the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof. Nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." That's the origin,

**Jay:** Right.

**Don:** Legislative origin of the Capper Volstead Act.

**Jay:** And now that was 24 years after the Sherman Act.

**Don:** Correct.

**Jay:** So, there was the Sherman Act, and then people woke up and realized that it might prohibit labor and agricultural producers from joining together to do things that from a legislative and policy perspective, we wanted them to be able to do, which, from labors is obviously, you know, unions collectively bargain, the wages, which is essentially price fixing on the wage side, if they didn't have an exemption. And sort of the same thing for agriculture. Why was it deemed so necessary that agricultural entities/producers be able to get together?

**Don:** There were really a couple of reasons. One reason was the imbalance of bargaining power between the middleman the people who were purchasing the agricultural commodities, and the farmers.

**Jay:** We alluded to that in the last part, correct.

**Don:** Farmers were disorganized and by that, I mean they didn't have an associate or strong associations back then.

**Jay:** Right.

**Don:** Before the Clayton Act was passed, some farm organizations were being sued under the antitrust laws, which provided more impetus for the passage of Capper Volstead. Another reason was the fact that after World War One, farmers were selling their land, they couldn't make a decent living. So they were moving off the land. The young people were not attracted to farming. So the number of farms was decreasing. There was a concern that the total agricultural production of the United States was decreasing at an alarming rate. And that, heaven forbid, if there was another major war, ok, that the United States would not have the capacity to produce the foodstuffs necessary to go forward. So that was another impetus for the passage of the Act.

**Jay:** It's funny, because when we attend these agricultural conferences, and the like, you know, thinking of one speaker in particular, he often refers to agriculture and food supply chain as a national security issue.

**Don:** Exactly.

**Jay:** You know, obviously, putting anthrax in the water supply is one thing, but if you don't have enough food to feed your people, that is going to cause and foment, all sorts of issues that can really cause a threat to national security.

**Don:** Exactly. And that was one of the reasons for strengthening the Clayton Act exemption.

**Jay:** So let's stop there. So we have the Clayton Act, there's a perception that we have to allow farmers to band together to sell their products so that, a: they can make a decent wage or decent profit, and will entice people to be farmers. We're moving away from an agrarian society at that point. The Industrial Revolution already happened and we need to essentially make sure that there's enough people willing to do the job. And so we allow them to assemble together to do something that otherwise the antitrust laws would forbid. Okay, that's 1914.

**Don:** Right.

**Jay:** Now, why wasn't that good enough? Why, eight years later, did we have to pass the Capper Volstead Act?

**Don:** Well, there was one reason in particular, among others, but the principal reason if you recall, the language of Section Six of the Clayton Act itself.

**Jay:** Burned in my memory.

**Don:** Okay. It only applies to entities, associations of producers without capital stock.

**Jay:** Why did they do that?

**Don:** It was, again, as many of the statutes evolve, it was a compromise in the legislation. They felt that they didn't want to create more trusts. Okay.

**Jay:** Right.

**Don:** So if they required that the labor organizations, the combination of labor, and combinations involving agricultural producers, were, quote, not for profit.

**Jay:** Right.

**Don:** Okay. They would not rise to the level of the trusts that had just been reined in, by the Sherman Act.

**Jay:** So we were hoping that by forcing them to be not for profit, that they would be of a certain ilk that wouldn't, I guess, engage in activity that they had found to be, you know, prohibited and be problematic. Okay.

**Don:** And also, in addition to permitting a cooperatives to basically become for profits, so to speak, or sport, right, issue stock?

**Jay:** Yeah.

**Don:** Okay. There was a feeling that that would strengthen the cooperatives themselves and make them stronger. In addition, there was a strong sense by the authors of the Act by the proponents of the Act, that they needed to put some meat on the bones of the Clayton Act. They

needed to give some definition to what the farmers could and perhaps couldn't do. They wanted to more clearly define what the Act would cover. What the limited antitrust exemption would cover. Now, they didn't totally succeed as history would prove it.

**Jay:** Thank God because it's given us you know, work.

**Don:** Exactly, exactly.

**Jay:** So okay, so we have this fairly loosey goosey exemption for agriculture in the Clayton Act, but it only applies if the association does not issue capital stock. So now, eight years later, they felt that we want cooperatives, if they so choose, to be able to issue capital stock plus we want to put some, as you put it, meat on the bones. And by the way, this is true for labor too. Labor has the LaGuardia Act and the and their own that have "put meat on the bones" to Section Six of the Clayton Act as well. But okay, so in politics, this wasn't a very long time afterwards, when eight years afterwards, they said, Okay, we're going to do this. So clearly, and people should realize, you know, at the same time, the Capper Volstead Act was enacted just at the sort of the beginning of the Depression.

**Don:** Correct. So in the midst of prohibition, or very close to prohibition.

**Jay:** Ah, as a matter of fact, so nobody could drink so that's why they had to do something.

**Don:** Yeah. The one of the sponsors, Representative Volstead, had been famous before his sponsorship of the Capper Volstead Act. He had been famous for the Volstead Act.

**Jay:** Right, right. Of course.

**Don:** They, which put enforcement provisions into the 18th Amendment, which banned alcoholic beverages which

**Jay:** Ah, thank god that got appealed. But that will be another podcast. Okay. So in 1922, they passed the Capper Volstead Act. Obviously, one of the provisions is allowing the exemption to exist for associations that issue capital stock.

**Don:** Correct.

**Jay:** There's a checklist. But before we get to the checklist, one of the interesting things is it's not just an exemption, per se, right. It basically says you're allowed to have these associations, but doesn't say you were exempt from the antitrust laws, it says it won't be prohibited under the antitrust laws to have those kinds of associations. What did the Capper Volstead Act provide the terms of substantive protection to associations? If they meet the checklist? And we'll deal with the checklist in a minute.

**Don:** What it did was it first defined the structural requirements,

**Jay:** Right.

**Don:** that an association must comply with. So before you even start discussing whether the activity of that co-op is exempt, it's got to be structured properly. Okay, so first of all, gotta meet the structure, as defined in the statute. Then, then once the structure is met, then you've got to be concerned about the conduct. And there, there's not a lot of guidance itself in the statute. It

says coops must be operated for the, quote, mutual benefit of its members. Well, what does that mean? Well, that's a provision that has had very, very little attention in court or in scholarly treatises. So there's, there's some guidance as to as to conduct but it's, you know, it's it's not very defined. And it's

**Jay:** Right.

**Don:** it's basically evolved into judge made law. Interpretations as to what you can do, what a call can do and what a call can't do.

**Jay:** Okay. So it has to be formed for the mutual benefit of its of its members,

**Don:** As such producers.

**Jay:** As such producers. Now, the interesting we keep saying cooperative, right? The word cooperative is not found in the statute, right?

**Don:** That's correct. It refers to an association of producers. And you're right. The word cooperative is nowhere found in the statute itself.

**Jay:** Now, I believe DOJ has taken the position that the Capper Volstead Act can only apply if there is a corporately formed and duly formed cooperative.

**Don:** You're correct. Actually, there's dicta. There's a footnote in a case where the government has said exactly that.

**Jay:** Right.

**Don:** And I believe that case, I don't have to cite off the top of my head, but

**Jay:** shocking.

**Don:** Well, it is I believe it in I believe in involved. lobstermen lot case involving lobster. And there was an agreement that the fishermen would not fish because there was an oversupply. They wanted to get the prices up. And they did not have a formal incorporated association. So they just informally agreed. Well, okay, Joe, keep your boat in the dock.

**Jay:** Right.

**Don:** Yeah, well, I'll keep mine in the dock as well. Well, the government took the position in his in a footnote that the Act didn't apply to that conduct. But you had to have a formal association. Now. I personally disagree with that.

**Jay:** Right.

**Don:** that approach. And I think if you look at the legislative history, Read, it's not defined. In other words, an association of producers is not defined.

**Jay:** So it doesn't have to be organized in a specific manner. Or at least that's the argument.

**Don:** That's correct. And there's there is some case authority to support that proposition. There's a district court case, which essentially said that in order to meet the structural requirements in the act, there's no particular form that must be followed.

**Jay:** Right. It's interesting, and I mentioned that only because we use cooperative because as a practical matter, it most of the issues arise with duly formed cooperatives. But the issues can happen, you can have two next door neighbor, farmers, they get together they want a price fix, arguably, that's an association of farmers.

**Don:** Right.

**Jay:** So the other thing is, and, again, there's some more requirements, but I want to get this out. You know, we had talked about who was a farmer, it means that the Volstead Act is persons engaged in the production of agricultural products as farmers planters ranch, and dairyman nut or fruit growers, and that they can act together in association, corporate or otherwise. So, you know, again, that there's a lot to go through there, you can be engaged in the production of agricultural products. But if you're not as one of those kinds of enumerated figures, then the statute does not apply to you.

**Don:** Right.

**Jay:** You do one of those enumerated figures. But if you're not engaged in the production, if the conduct we're talking about is that engaged in the production of an agricultural product, also the it doesn't apply, without corporate or otherwise, again, well, you know, we think our arguments about not needing a cooperative structure are the right ones. But time does tell. Before we end today's podcast, though, the thing is, then, I guess this is the real meat on the bones. The Capper Volstead Act says that they can do now what exactly is the axis marketing agencies?

**Don:** Marketing agency in common.

**Jay:** Okay.

**Don:** that's correct. The coop and their members may make the necessary contracts and agreements to effect such purchases

**Jay:** Right.

**Don:** Then the mutual benefit language comes in provided that the associations are operated for the mutual benefit of the members. They're asked such producers, and then conform to some additional structural requirements.

**Jay:** So before we end that, it's the ma'am marketing agencies in common and then the necessary contracts and agreements to effect such purposes. Again, we have never used the word price.

**Don:** No.

**Jay:** What courts have interpreted this to cover what kind of conduct

**Don:** Exactly in fact, the leading case on coop price fixing is a Ninth Circuit case involving its **Treasure Valley Potato Bargaining Association versus Ore Ida**. And in that case,

**Jay:** Love their fries.

**Don:** Very clearly, very clearly, without question. The Ninth Circuit said, price fixing is encompassed within the term marketing.

**Jay:** Right.

**Don:** And therefore, coops members can fix prices.

**Jay:** Now, the legislative history, I assume bears out that marketing was meant to include price fixing.

**Don:** Yeah, there's support for that in the legislative history. Now there's debate. You know, the Capper Volstead Act was introduced a couple of different times. It was originally introduced in 1920. And never made it to a vote. It was then in committee again, it was in an amendment again. Finally, it was passed in 22. So it was sort of in the process for a couple of years before the final language was agreed upon.

**Jay:** Frankly, if it didn't cover price fixing, one would question why we needed it at all right?

**Don:** Exactly.

**Jay:** I mean, otherwise, what evil isn't remedy?

**Don:** Exactly.

**Jay:** So now we we've gotten sort of a little bit of the meat and potatoes, but yet and before we end off, there's a couple of interesting sort of requirements that are in the statute.

**Don:** It must be organized either as one member one vote, to basically maintain the democratic structure of the coop, or the association cannot pay dividends on stock or membership capital in excess of eight percent per ann. The reason for that limitation was again, there was a sense among a number of members of Congress, that by limiting the amount of dividends, it would discourage any power grabs by outside interests. So for example, a major food processor,

**Jay:** Right.

**Don:** Couldn't set up a tomato garden in the backyard and the corporate headquarters, join a coop, buy up the cooperative debt, so to speak, and earn exorbitant rates, it wouldn't be a draw, right to bring in outside investors,

**Jay:** and also one member, one vote, keeping it democratic or by keeping it with the kind of small farmer look.

**Don:** Exactly. And the last requirement specified in the act, the association could not deal in the products of non members to an amount greater in value than such as are handled by it for members. That's what has become known as the 50%.

**Jay:** Right. And again, that sort of keeps in for the in, you know, essentially, you're doing this for the members on behalf of the members for the people of the people, by the people. So, okay, well, you know, that sort of outlines what the Capper Volstead Act is, and I think we're reaching about 35 minutes here. So we'll probably, we'll probably end the podcast here. But then I think

our next podcast will talk a little bit about what other statutes exist. And then I would like to talk to you a little bit about sort of where USDA has been in all of this. You guys can't see it, but Don just rolled his eyes.

**Don:** Yeah. That would be an interesting discussion.

**Jay:** So for now, I am Jay Levine, your host of Antitrust Law Source and editor of the blog. I can be reached at the letter [jlevine@porterwright.com](mailto:jlevine@porterwright.com) or a JayLLevine on Twitter, LinkedIn, no Instagram or Facebook. Really, but Don can be reached at

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**Jay:** Have a great day everyone.

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