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Citations:

Bluebook 21st ed.

Sarah R. Phillips, The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act, 124 Dickinson L. REV. 175 (2019).

ALWD 7th ed.

Sarah R. Phillips, The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act, 124 Dickinson L. Rev. 175 (2019).

APA 7th ed.

Phillips, S. R. (2019). The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act. Dickinson Law Review, 124(1), 175-202.

Chicago 17th ed.

Sarah R. Phillips, "The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act," Dickinson Law Review 124, no. 1 (Fall 2019): 175-202

McGill Guide 9th ed.

Sarah R. Phillips, "The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act" (2019) 124:1 Dickinson L Rev 175.

AGLC 4th ed.

Sarah R. Phillips, 'The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act' (2019) 124 Dickinson Law Review 175.

MLA 8th ed.

Phillips, Sarah R. "The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act." Dickinson Law Review, vol. 124, no. 1, Fall 2019, p. 175-202. HeinOnline.

OSCOLA 4th ed.

Sarah R. Phillips, 'The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act' (2019) 124 Dickinson L Rev 175

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# The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act

Sarah R. Phillips\*

## ABSTRACT

Agriculture plays a fundamental role in the U.S. economy as a multibillion-dollar industry that feeds people all over the world. However, over the past decade, the dairy industry in particular has changed from a reliable sector of the greater agricultural industry into an unsettled, politically-charged, and fractured group. Dairy farmers' consistently receiving low milk prices has facilitated this divide. Tired of being ignored and underpaid, dairy farmers are demanding change in the current dairy market structure.

Federal Milk Marketing Orders and a variety of statutes regulate the dairy industry, but the 1922 Capper-Volstead Act remains the most notable piece of legislation in the dairy industry. The Capper-Volstead Act provides antitrust exemptions for dairy cooperatives to market, buy, and sell milk from member farmers to processors and distributors. A majority of the country's dairy farmers are members of a few exclusive dairy cooperatives, giving those cooperatives market dominance. The Capper-Volstead Act was effective but is no longer functioning as Congress originally intended. As a result, dairy cooperatives have experienced unfettered and unregulated growth and now manage the milk supply and control almost every aspect of production from cow to grocery store.

The types of cooperatives that qualify for antitrust protection are unclear, and very few court cases clarify how to control the otherwise-autonomous cooperatives. The Capper-Volstead

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\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2020. I would like to thank my editors—Cliff Kelly, Becca Marsnik, Emily Mowry, and Griffin Schoenbaum—for helping me draft the best version of this Comment. I would also like to thank my parents, Rich and Peggy Phillips, for providing support and encouragement throughout the writing process. Finally, I would like to thank Daniel Lyness and all of the American Dairy Farmers for remaining committed and dedicated to a noble profession and for maintaining faith that better days are to come.

Act desperately needs revisions to delineate the cooperatives' roles and responsibilities and to grant a stronger supervisory role to the U.S. Secretary of Agriculture. Making these revisions would help to ensure better cooperative practices and fairer milk prices for dairy farmers.

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#### I. INTRODUCTION

The U.S. dairy industry is facing a crisis.<sup>1</sup> Since 1970, 93 percent of American dairy farms have closed due to an inability to financially support their businesses, leaving only around 40,000

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1. *Dairy: Family Farmers in Crisis*, FARMAID (August 16, 2018), <http://bit.ly/2Fde0C1> [<https://perma.cc/NA6P-945J>].

dairy farms in the entire country—as opposed to nearly 640,000 dairy farms in 1970.<sup>2</sup> If Congress does not take steps to fix the current system in which the United States buys, processes, and sells dairy products, those items will soon be scarce on grocery store shelves.<sup>3</sup>

The modern dairy industry crisis is nothing new. In 1922, Congress enacted the Capper-Volstead Act<sup>4</sup> in an effort to help American dairy farmers work together to receive a fair price for their milk.<sup>5</sup> However, while the Capper-Volstead Act was effective in its early years, the failure to adjust it to the modern dairy industry and to the cooperative system in which the industry currently operates has allowed for the unchecked, anti-competitive growth of a select group of dairy cooperative conglomerates.<sup>6</sup> The conglomerates' unmonitored growth and Congress's failure to supervise the dairy cooperatives' increasingly anti-competitive practices have contributed significantly to the desperate, financially unstable situation in which many American dairy farm families find themselves.<sup>7</sup>

Part II of this Comment will examine the history of the U.S. dairy industry and the development of the country's stance and policy regarding the legality of agricultural cooperatives.<sup>8</sup> This examination will discuss the dairy industry's general development<sup>9</sup>; antitrust law's growth in the United States and antitrust exemption laws' impact on agricultural cooperatives<sup>10</sup>; the Capper-Volstead Act's growth and its reception from the dairy farming community<sup>11</sup>; the dairy industry's current climate<sup>12</sup>; the structure, organization, and method by which dairy cooperatives operate and control the dairy supply system<sup>13</sup>; and the Capper-Volstead Act's shortfalls.<sup>14</sup>

Part III of this Comment will recommend overhauling the Capper-Volstead Act and revising §§ 1 and 2 of the Act. The recommended revisions offer clear and definitive language, including a strict application of antitrust immunity qualifications under the

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2. *Id.*

3. *Id.* As of July 2018, dairy farmers received milk prices about 30 percent below the average cost of production. *Id.*

4. Capper-Volstead Act, 7 U.S.C. §§ 291–292 (2018).

5. *Infra* Part II.C.

6. *Supra* note 1.

7. *Id.*

8. *Infra* Part II.

9. *Infra* Part II.A.

10. *Infra* Part II.B.

11. *Infra* Part II.C.

12. *Infra* Part II.D.

13. *Infra* Part II.D.

14. *Infra* Part II.E.

Capper-Volstead Act.<sup>15</sup> Additionally, increasing the U.S. Secretary of Agriculture's power strengthens dairy cooperative policing.<sup>16</sup> Incorporating supply management principles into future legislation governing the dairy industry also provides a plausible solution to the ongoing crisis.<sup>17</sup> Understanding the development of the nation's dairy industry and the applicable antitrust laws is crucial to reckoning with both the shortcomings and the needed improvements of the Capper-Volstead Act.<sup>18</sup>

## II. BACKGROUND

### A. *Agriculture in the United States*

The dairy industry has been a fundamental part of the American agricultural system since the early 1600s, when Europeans imported cattle into the early colonies.<sup>19</sup> As education and technology advanced in the 1800s, dairy farmers and industry specialists worked to improve milk production by trying to better understand genetics so as to advance dairy cattle's development.<sup>20</sup> Mass migrations of people from rural areas to urban areas spurred the need for technological advancement because dairy products now needed to be shipped longer distances from the rural farms to city consumers.<sup>21</sup> In 1895, the country's dairy industry had become so large that it required additional government support.<sup>22</sup> The U.S. government created the Dairy Division of the U.S. Department of Agriculture (USDA) to promote, to regulate, and to support the American dairy farmer.<sup>23</sup>

Since the establishment of the United States, American farmers have cooperated to produce, to market, to buy, and to sell agricultural commodities; but the cooperation's form has changed as

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15. *Infra* Part III.A.2.

16. *Infra* Part III.A.3.

17. *Infra* Part III.B.

18. *Infra* Part II.E.

19. *The American Dairy Industry: Early History*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. LIBRARY, <http://bit.ly/2wX6AOU> [<https://perma.cc/B5P2-2XXX>] (last visited June 10, 2019).

20. *Id.*

21. *Id.* ("Significant inventions such as commercial milk bottles, milking machines, tuberculin tests for cattle, pasteurization equipment, refrigerated milk tank cars, and automatic bottling machines contributed towards making milk a healthful and commercially viable product.").

22. *The American Dairy Industry: USDA Contributions to Dairying*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. LIBRARY, <http://bit.ly/2IoaXZT> [<https://perma.cc/7B8R-XBUU>] (last visited June 11, 2019).

23. *Id.*

markets have modernized.<sup>24</sup> A worker-operated store in England was one of the earliest models of large-scale industry cooperation.<sup>25</sup> The principles from this store's operation carried over to the early American cooperative models which drove modern cooperative formation.<sup>26</sup>

In a market where individuals determine their actions based on self-interest, the dairy farmer—the actual producer—will always receive the lowest milk price and see the smallest profit margins.<sup>27</sup> The individual dairy farmer, operating as a single unit, has little-to-no bargaining power relative to the middlemen's bargaining power; the dairy farmer must sell to the processing facility to get the product to the consumer.<sup>28</sup> Dairy farmers who act individually and attempt to bargain with a distributor or processor operate at a disadvantage because their “production and other activities have such a small effect on total production that [they] must accept the price and terms that buyers offer in the market.”<sup>29</sup>

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24. David P. Claiborne, Comment, *The Perils of the Capper-Volstead Act and Its Judicial Treatment: Agricultural Cooperation and Integrated Farming Operations*, 38 WILLAMETTE L. REV. 263, 272 (2002).

25. *Id.* Early American cooperative models “derive [ ] from a worker-operated store in Rochdale, England.” *Id.*

26. *See id.* (discussing the worker-operated store's principles that were considered successful at generating cooperation to contribute positively to the business model, including “participation according to contribution of goods (patronage), business or services performed at cost with net returns paid to members based on patronage (patronage dividends), democratic control (one person—one vote), limited dividends on capital investments, and ownership limited to patrons”).

27. *See id.* at 264. Generally, farmers sell their product to a dairy processing facility, which is then in charge of processing, bottling, packaging, and selling the product to the store or entity for a certain price, which includes a mark-up so that the processing facility earns a profit. Telephone Interview with Jared Weeks, Owner and Operator, Hun-Val Dairy Farm, LLC (Sept. 27, 2018). The store or entity then sells the product to the final consumer with an additional mark-up for a profit margin at this stage as well. *Id.* At the end, the milk price the consumer pays and the milk price the farmer receives are widely different because a desire to increase profit margins incentivizes the middleman (the processing facility) to act in self-interest and to pay the farmer the least amount possible. *Id.*

28. *See* Claiborne, *supra* note 24, at 264. Traditional commercial dairy farmers have no choice but to sell their milk to a processing plant which pasteurizes and homogenizes the milk before it can be sold to consumers. Weeks Interview, *supra* note 27; *see also* Mandatory Pasteurization for All Milk and Milk Products in Final Package Form Intended for Direct Human Consumption, 21 C.F.R. § 1240.61 (2018). Unless dairy farmers have facilities onsite to pasteurize their milk (which most do not because of the high infrastructure cost and significant time requirement), they must sell to the processor who is free to use market power to charge whatever milk price they choose. Weeks Interview, *supra* note 27.

29. Claiborne, *supra* note 24, at 264–65; *see also* David L. Baumer et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 195–201 (1986) (discussing buyers' monop-

In 1875, National Grange Convention<sup>30</sup> attendees worked to develop a policy that encouraged farmers to actively make an effort to cooperate when bargaining with large-scale producers and buyers.<sup>31</sup> By the 1890s, business cooperation among American farmers was a generally-accepted practice, but many farmers and industry groups were unsure of what specific limits of cooperation the federal government would tolerate.<sup>32</sup> The need for clarification, paired with the demand for farmer cooperation protection, ultimately spurred the development of antitrust law exemptions specific to the U.S. agriculture industry.<sup>33</sup>

### B. Antitrust Law Development in Agriculture

An opposition to monopolies has always, in some form, been ingrained in the general principles that govern the free market; the public interest demands that people and entities compete fairly.<sup>34</sup> Opposition to unfair market practices by small and mid-size business entities continues on the grounds that monopolies impair the citizen's ability to make the free choice to purchase the best product at the price the citizen deems appropriate.<sup>35</sup> The accompanying price enhancement that flows from monopolies "seriously affects the cost of living and is a matter that concerns adversely every individual except the owner of the right to monopolize."<sup>36</sup>

By the 1890s, unclear antitrust laws, which allowed for unrestricted competition, failed to afford the average U.S. citizen an equal opportunity to access wealth, services, and business opportunities.<sup>37</sup> Senator John Sherman led Congress in drafting a bill that

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sony power in the market and how that power enables buyers to demand lower prices and withhold purchases).

30. NATIONAL GRANGE: OF THE ORDER OF THE PATRONS OF HUSBANDRY, <http://bit.ly/2Xd8Tfr> [<https://perma.cc/6483-S2S7>] (last visited June 11, 2019) (explaining that the National Grange Convention is a meeting of National Grange members to discuss policy issues related to the American agricultural system).

31. Claiborne, *supra* note 24, at 273.

32. *Id.*

33. *Id.*

34. RICHARD S. HARVEY & ERNEST W. BRADFORD, A MANUAL OF THE FEDERAL TRADE COMMISSION 72 (1916) (ebook).

35. *See id.*

36. *Id.* This sentiment forms the foundation from which this Comment will explore the restraints and negative implications that the Capper-Volstead Act places on both the individual dairy producers and the consumers. *See infra* Part II.

37. *See id.* (describing the shift in power when independent groups combined, leaving a small number of multi-level firms controlling and marking off certain areas of trade for exclusive control). The Standard Oil Company was able to extinguish any competition based on its sheer size alone; smaller competitors could not match the time or expenses to keep up with the monopolist. *Id.*

aimed to protect farmers against the “unfair methods of competition in commerce.”<sup>38</sup> Price-fixing and output-control agreements are the two most damaging practices of monopolies; and, in 1890, in an effort to control those two practices, Congress enacted the Sherman Antitrust Act, which has continued to be a linchpin of antitrust law governing modern markets and economies in the 21st Century.<sup>39</sup>

### 1. *The Sherman Act and Milk Antitrust Litigation*

Contemporary dairy cooperative antitrust litigation focuses on claims that allege violations of §§ 1 and 2 of the Sherman Antitrust Act.<sup>40</sup> A claim under § 1 of the Sherman Antitrust Act “must allege ‘(1) concerted action, (2) by two or more persons that (3) unreasonably restrains trade.’”<sup>41</sup> Section 2 of the Sherman Antitrust Act “makes it unlawful for any person to monopolize, attempt to monopolize, or conspire with another to monopolize, trade.”<sup>42</sup> A claim under this section must allege “(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy.”<sup>43</sup>

A plaintiff can present an antitrust violation claim by alleging that the defendant, by way of either horizontal or vertical integra-

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38. *Id.* at 74–76.

39. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012); *see* Claiborne, *supra* note 24, at 273–275. The Supreme Court has defined monopoly as “‘the power to control prices or exclude competition.’” *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quoting *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

40. *See* *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 460 (1960) (discussing allegations of violations of § 2 of the Sherman Antitrust Act); *Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.)*, 739 F.3d 262, 268 (6th Cir. 2014) (discussing allegations of Sherman Antitrust Act violations via unlawful merger); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 330 (D. Vt. 2010) (discussing allegations of violations of Sherman Antitrust Act §§ 1 and 2 via conspiracy to fix prices); *Agritronics Corp. v. Nat’l Dairy Herd Ass’n*, 914 F. Supp. 814, 818 (N.D.N.Y. 1996) (same); *Ewald Bros., Inc. v. Mid-America Dairymen, Inc.*, 877 F.2d 1384, 1385 (8th Cir. 1989) (discussing allegations of Sherman Antitrust Act violations via the Cooperatives Working Together Program); *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1179 (8th Cir. 1982) (discussing allegations of Sherman Antitrust Act violations); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1038 (2d Cir. 1980) (same); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 611 (M.D. Ga. 1981) (same).

41. *Allen*, 748 F. Supp. 2d at 332 (quoting *In re Nine W. Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 190 (S.D.N.Y. 2000)).

42. *Fairdale Farms, Inc.*, 635 F.2d at 1040; *see also* *AD/SAT v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999).

43. *Allen*, 748 F. Supp. 2d at 332.



tion, illegally conspired to monopolize and restrain trade.<sup>44</sup> Horizontal restraint of trade occurs when competitors who are at the same level within the market enter into agreements, and vertical restraint of trade occurs when entities or competitors at different levels of the market enter into agreements.<sup>45</sup> Courts analyze claims of horizontal illegal conspiracy under the *per se* rule, which provides that the accused's actions are illegal when they are clearly unreasonable in their anticompetitive efforts.<sup>46</sup> However, in recent years, courts have been hesitant to apply the *per se* rule and have agreed to reserve it for only clear-cut cases of restraint of trade.<sup>47</sup>

The other standard under which courts analyze antitrust claims is the rule of reason analysis.<sup>48</sup> When a plaintiff alleges a vertical restraint of trade, and now, occasionally, when a plaintiff alleges a horizontal restraint of trade, courts use the rule of reason analysis.<sup>49</sup> This analysis requires the plaintiff to "show that the restraint produced anticompetitive effects within the relevant product and geographic markets."<sup>50</sup> No matter which type of restraint of trade allegation appears in the complaint, the plaintiff must also sufficiently plead and demonstrate an injury suffered as a direct result of the alleged restraint of trade.<sup>51</sup>

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44. *Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Se. Milk Antitrust Litig.)*, 801 F. Supp. 2d 705, 718–19 (E.D. Tenn. 2011); *see also* *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988) ("Courts have discerned two major types of antitrust conspiracies to restrain trade: horizontal and vertical.").

45. *Sweetwater Valley Farm*, 801 F. Supp. 2d at 718–19. A level within the marketplace references a stage in the market, i.e., production, processing, marketing, or distribution. *Food Lion, LLC*, 739 F.3d at 272.

46. *Sweetwater Valley Farm, Inc.*, 801 F. Supp. 2d at 719. "The *per se* rule should be applied only in 'clear cut cases' of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts." *Id.* (citing *NHL Players Ass'n. v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)).

47. *Id.* at 718.

48. *Id.*

49. *Id.*

50. *Food Lion, LLC*, 739 F.3d at 270 (explaining that the courts must use the rule of reason to analyze the product market to look for anticompetitive injury when manufacturers and distributors agree to cooperate). Courts must use this fact-specific analysis because the courts do recognize that some vertical agreements between entities at different stages of the process can have redeeming qualities, like distribution efficiencies. *Id.*

51. *Id.*

C. *Implementation of the Capper-Volstead Act*

In the early 1900s, small, family-operated dairy farms dominated the U.S. agricultural landscape.<sup>52</sup> Dairy farming was a stable, no-risk career choice because everyone drank milk and used butter.<sup>53</sup> After World War I, demand for fluid milk fell, and dairy farmers received drastically reduced amounts in their milk checks.<sup>54</sup> In 1908 and 1911, two federal courts found that the Sherman Antitrust Act prohibited “combinations of labor” as well as “combinations of capital.”<sup>55</sup> These court decisions solidified the fear that farmers would be next to face federal prosecution, deterring dairy farmers from forming and participating in cooperative organizations.<sup>56</sup> Farmer outcry demanded fair and stable milk prices as well as improved product processing and marketing.<sup>57</sup>

In response to this outrage, Congress passed supplemental legislation to clarify the Sherman Antitrust Act and to exempt farmer

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52. See Peter Carstensen, *Agriculture Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 462 (2013).

53. Telephone interview with Peter Carstensen, Professor of Law Emeritus, University of Wisconsin Law School (Jul. 11, 2018) (discussing the dairy industry’s relatively low barriers to entry). In the early 1900s, becoming a dairy farmer was considered a respectable career and gave families a desirable way to raise their families; and, as a result, many small, family-run dairy farms emerged across the country. *Id.*

54. *Id.* The milk check reflects the price per 100 pounds of milk shipped and multiplied out depending on the total pounds of milk that farmer produced and shipped. Weeks Interview, *supra* note 27. If the price per 100 pounds is reduced, even if production remains the same, the farmer will ultimately receive a smaller paycheck. *Id.*

55. Claiborne, *supra* note 24, at 275; *Loewe v. Lawlor*, 208 U.S. 274, 302 (1908); *Steers v. United States*, 192 F. 1, 1 (6th Cir. 1911). Combinations of capital and labor occur when a group of individuals pool their assets and resources to increase their collective bargaining power. Claiborne, *supra* note 24, at 275.

56. Claiborne, *supra* note 24, at 275; see also *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1040 (2d Cir. 1980). “A cooperative can be defined as a legal business entity created under state law that is owned and operated for the purpose of benefiting those individuals who use its services.” *Cooperatives—An Overview*, THE NAT’L AGRIC. L. CTR., <http://bit.ly/2WPrCcM> [<https://perma.cc/D5SV-U42F>] (last visited on June 11, 2019). Generally, a cooperative embodies four unique principles, “(1) it is owned and democratically controlled by the individuals that use its services; (2) the returns that its members receive on their individual financial investments into the cooperative are limited; (3) it is financed mostly by its members and those who use the cooperative; and (4) it distributes net margins to its members in proportion to their use of the cooperative.” *Id.*

57. Carstensen, *supra* note 52, at 465. The small-scale cooperation that had been taking place quickly vanished with the introduction of antitrust law. *Id.* Farmers were fearful of prosecution but felt that their lacking the ability to band together caused the large processors and marketing companies to easily dominate them. *Id.*

cooperatives from antitrust prosecutions.<sup>58</sup> In 1914, Congress passed the Clayton Act in an attempt to provide antitrust law protection for private agricultural cooperatives.<sup>59</sup> The Clayton Act permitted the formation of labor, agricultural, and horticultural organizations, which seemingly covered farmer cooperatives.<sup>60</sup> However, dairy farmer cooperatives began once again to fear federal prosecution for cooperation because the Clayton Act did not define the types of activities in which cooperatives could legally participate and engage.<sup>61</sup>

In a third attempt to protect agricultural operations and clarify agricultural cooperative protection, Congress enacted the Capper-Volstead Act in 1922.<sup>62</sup> Congress “wanted and expected farmers to be represented by strong and effective cooperatives . . . [to afford the farmers the] same ‘unified competitive advantage’ available to businessmen acting through corporations.”<sup>63</sup> Congress’s intention in enacting the Capper-Volstead Act was “to permit agricultural producers to join together to process, prepare, and market agricultural products without fear of prosecution under the antitrust laws.”<sup>64</sup> Congress hoped to provide protection for the farmers who needed assistance in navigating the market and in protecting their economic interests.<sup>65</sup>

The Capper-Volstead Act grew out of farmers’ dissatisfaction with the Clayton Act.<sup>66</sup> Farmers and industry leaders continued to lobby for additional legislation that would provide clearer and

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58. See Carla Tolbert Cook, Note, *Antitrust Action Against Milk Marketing Cooperatives—Shaking Up the Milk Industry*, 34 *DRAKE L. REV.* 493, 495 (1984).

59. Clayton Act, 15 U.S.C. §§ 12–27 (2012); see also Cook, *supra* note 58, at 495 (discussing that § 16 of the Clayton Act, which is the specific section that provides for cooperative protection, was the result of Congress again being asked to consider an exemption for farmer cooperatives).

60. Clayton Act, 15 U.S.C. § 17 (2012); see also Carstensen, *supra* note 52, at 464.

61. Claiborne, *supra* note 24, at 276 (discussing that farmers perceived the Clayton Act to be unsatisfactory because it failed to truly protect cooperatives’ customary practices). Industry leaders and cooperative executives soon realized the Clayton Act’s shortcomings and continued their efforts to demand additional clarification and protection for agricultural cooperatives. *Id.*

62. Capper-Volstead Act, 7 U.S.C. §§ 291–292 (2018); see also Cook, *supra* note 58, at 496.

63. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1043 (2d Cir. 1980) (citing *Md. and Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 466 (1960)).

64. *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981).

65. *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 827–28 (1978).

66. Claiborne, *supra* note 24, at 276. The American Farm Bureau, founded in 1920, set up an office in Washington, D.C., to better advocate for improved legislation. *Id.*

stronger protections for farmers and their agricultural cooperatives.<sup>67</sup> The Capper-Volstead Act went through two years of floor debates, amendments, and deliberations before President Harding ultimately signed and enacted it on February 18, 1922.<sup>68</sup>

The Capper-Volstead Act provides, in § 1, antitrust immunity for people, cooperatives, or entities who are:

engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers [and permits them to] 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.<sup>69</sup>

Congress also included requirements that the cooperatives must follow to receive Capper-Volstead Act protection.<sup>70</sup> To receive the protection, the cooperative must: (1) be “operated for the mutual benefit of the members,” (2) not “allow[ ] [a member] more than one vote because of the amount of stock or membership capital he may own,” (3) limit the amount of dividends that can be paid, and (4) deal primarily in the products of its members.<sup>71</sup>

Section 2 of the Capper-Volstead Act authorizes the U.S. Secretary of Agriculture to order any cooperative found to have “unduly enhanced” any agricultural product’s price to cease and desist.<sup>72</sup> The USDA does not provide any guidance as to who protected individuals are or which activities or business practices qual-

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67. VICTORIA SAKER WOESTE, *THE FARMERS BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA 1865-1945*, at 157 (1998) (explaining the importance of agriculture advocate groups—including the American Farm Bureau, the National Milk Producers Federal, the National Grange, and the National Farmers Union—in lobbying for the passage of legislation, which ultimately resulted in Congress’s passing the Capper-Volstead Act).

68. *See* Claiborne, *supra* note 24, at 281–87 (discussing the numerous floor debates that centered around who would be entitled to Capper-Volstead Act protection and who would monitor and enforce the Capper-Volstead Act’s provision). Ultimately, Congress settled on limiting protection to producers and gave monitoring and enforcement powers to the Secretary of Agriculture. *Id.*

69. Capper Volstead Act, 7 U.S.C. § 291 (2012).

70. *Id.*

71. *Id.*

72. Capper Volstead Act, 7 U.S.C. § 292 (2012). The U.S. Secretary of Agriculture may order the cooperative to “cease and desist” engaging in unfair business practices that result in a burdensome price increase for the consumer. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1040 (2d Cir. 1980). These activities might include price-fixing agreements, output control agreements, or other market-manipulating agreements or plans that have the effect of binding a majority of the market to one pricing and production structure. *Id.*

ify.<sup>73</sup> The USDA does not impose any cooperative size limits, so agricultural cooperatives and their member farmers are left to determine for themselves which people and what activities qualify for Capper-Volstead Act protection.<sup>74</sup>

#### *D. Current Climate of U.S. Dairy Industry Competition*

Additional legislation and government programs play a role in cooperatives' growth and in the dairy industry's function in the U.S. economy.<sup>75</sup> Understanding the milk price calculation model is critical to understanding the current state of the dairy industry climate and market, as well as the general interplay between modern cooperatives and the milk price structure.

##### *1. The U.S. Dairy Industry Structure*

The modern dairy farmer faces a different climate today than he faced 50 years ago.<sup>76</sup> Currently, dairy farmers are struggling to generate revenue that exceeds their monthly operating costs.<sup>77</sup> The convoluted, complex, and mysterious dairy pricing system is not helping either.<sup>78</sup> Dairy farmers find it nearly impossible to plan ahead with certainty for future expenses or bad months because they can never be certain about the price they will actually receive for the amount of milk they ship each month.<sup>79</sup>

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73. Carstensen, *supra* note 52, at 467.

74. 7 U.S.C. § 455 (2012); *see also* Carstensen, *supra* note 52, at 467. To strengthen the Capper-Volstead Act protections, Congress passed the Cooperative Marketing Act in 1926 to explicitly authorize "the sharing and coordination of marketing information among cooperatives." *Id.*

75. Carstensen, *supra* note 52, at 469.

76. Weeks Interview, *supra* note 27 (discussing the current state of the market, the procedures he runs through as a business owner, and the challenges he is currently facing).

77. *Id.* (explaining that the cost of raising, feeding, and caring for his herd of dairy cows exceeds his milk check at the end of each month).

78. *Id.* (discussing the complex and mysterious method that is used to determine the price per 100 pounds of milk). The system's unpredictable nature makes it hard for dairy farmers to plan ahead when it comes to determining when to make big purchases, such as new equipment, and when to save money in anticipation of a poor milk check. *Id.*

79. *Id.* (describing the system used by the industry to pay dairy farmers). A trucking company picks up dairy farmers' milk according to a regularly scheduled time. *Id.* This time can be every other day, every day, or sometimes twice a day; after pick-up, the truck takes the milk to the designated processing plant. *Id.* The farmers do not receive their milk check until the end of the following month. *Id.* That check represents the price of milk paid out per 100 pounds produced, minus cooperative fees, trucking fees, and other miscellaneous expenses. *Id.* The amount left over (usually around two dollars less than the starting pay price per 100 pounds) becomes the mailbox milk price, which is the actual milk price farm-

Dairy farmers' membership in a cooperative is a choice, but many farmers find it hard to turn down the security and marketing power that a large cooperative offers.<sup>80</sup> Dairy Farmers of America (DFA), the largest dairy cooperative in the United States, has over 18,000 members located across the country.<sup>81</sup> DFA also "owns thirty-one plants that process milk into a wide range of products, has joint ventures with a number of large food manufacturers, and reported \$13 billion in revenue."<sup>82</sup> At one point, DFA member farmers produced approximately 35.8 billion pounds of milk annually.<sup>83</sup>

## 2. Modern Dairy Cooperatives

Modern dairy cooperatives have typically operated in the market in one of three ways: "(1) vertically integrated processors of members' products, (2) intermediaries that market their members' products, or (3) bargaining agents on behalf of their members with buyers for process and other terms that the buyer will observe in obtaining the agricultural products directly from the members."<sup>84</sup> However, since the 1960s, a fourth operating method has developed for the modern agricultural cooperative.<sup>85</sup> Cooperatives now operate as pure cartels within the system and are:

vertically integrated from production to direct sales of finished goods. The "cooperative" provides a forum in which the "members" agree on the prices or other terms they will charge their buyers. This approximates a pure cartel in which the cooperative

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ers receive for their product. *Id.* Dairy farmers do not know what their mailbox price will be until the end of the following month. *Id.*

80. *Id.* (explaining that not all dairy farmers are mandated to be cooperative members). Dairy farmers may elect either to sell their milk through a cooperative or to contract privately with a processing plant. *Id.* Once a dairy farmer is a member of the cooperative, the cooperative must pick up the milk from the farmer and then market and sell it. *Id.* The benefit of joining a cooperative is that the cooperative cannot drop the farmer from the business like a processing plant can. *Id.* Although processing plant contracts may yield slightly higher prices per 100 pounds of milk, the processing facilities have the discretion to terminate contracts at any time. *Id.* The individual dairy producers must bargain for themselves to find a new processor, a task that is exceedingly difficult in the modern market. *Id.* The security of guaranteed pick-up and collective bargaining power has made cooperatives so popular and persistent, despite their current flaws. *Id.*

81. Carstensen, *supra* note 52, at 479.

82. *Id.*

83. CARL E. ZURBORG, A HISTORY OF DAIRY MARKETING IN AMERICA 209 (2005).

84. Carstensen, *supra* note 52, at 472.

85. *Id.*

only provides a vehicle for the parties to agree how they will compete with each other.<sup>86</sup>

When cooperatives act as processors, they act similarly to other business entities.<sup>87</sup> Some of these processor cooperatives have developed well-recognized brand names, such as Land O'Lakes, that bring added value to the product.<sup>88</sup> Before the Capper-Volstead Act, the U.S. government treated dairy farmer cooperatives as unlawful and consistent with exclusionary market practices.<sup>89</sup> However, these types of cooperatives have expanded and flourished because of the Capper-Volstead Act.<sup>90</sup>

When cooperatives act as sales agents or intermediaries, they are known as cooperatives serving as marketing agents.<sup>91</sup> The cooperatives can handle the milk from farmer to processor, which ultimately brings more value to the member.<sup>92</sup> In the alternative, cooperatives can simply serve as bargaining agents and negotiate the direct sale of milk from farmers to buyers.<sup>93</sup> Offsetting this role as bargaining agent provides the opportunity for downstream buyers who want to look for cheaper prices to engage in negotiations with noncooperative members.<sup>94</sup> If cooperatives were to demand excessive prices, downstream buyers would contract easily with noncooperative members at a lower but reasonable price.<sup>95</sup>

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86. *Id.*

87. *Id.* (describing a processor's role as one which incorporates the many levels of moving the product from farm to consumer, including buying from farmers, processing—which includes pasteurization and homogenization, and reselling to the outlet by which the product will reach consumers).

88. *Id.* at 472–73. Processor-cooperatives developing well-known brand names is not a phenomenon limited to the dairy industry. *Id.* at 472. This phenomenon has resulted in the development of the Sunkist, Sun Maid, Welch's, and Ocean Spray brands. *Id.*

89. *Id.* at 473.

90. *Id.*

91. *Id.*

92. *Id.* at 474. The additional value stems from the logistics and expensive processing and bottling procedure. Weeks Interview, *supra* note 27. Cooperatives choose to handle those aspects rather than require the dairy farmer to develop such infrastructure and network to complete all of the intermediary steps to get the milk on the grocery store shelf. *Id.*

93. *Id.* Cooperatives that operate this way function much like unions and are responsible for negotiating “contracts that cover their members’ transactions with the buyers.” *Id.*

94. Carstensen, *supra* note 52, at 474. Finding dairy farmers who are not part of a cooperative, however, is increasingly rare. Weeks Interview, *supra* note 27. Without noncooperative members who are not bound by the prices cooperatives set, downstream buyers struggle to find anyone willing and able to negotiate for a cheaper purchase price than what the cooperatives offer. Carstensen, *supra* note 52, at 474.

95. Carstensen, *supra* note 52, at 474.

The support for this theory stemmed from the dairy industry's low barriers to entry, but such low barriers are hardly the case now.<sup>96</sup> The present high barriers to entry have caused concern for a cooperative's ability to artificially manipulate milk prices without the threat of easily accessible, noncooperative members for the downstream buyers to seek out if they want to bargain for a different milk price.<sup>97</sup>

### 3. *Federal Milk Marketing Orders*

Though not often mentioned in Capper-Volstead Act litigation or analysis, crucial in understanding dairy cooperatives' unique power is the Federal Milk Marketing Orders' (FMMOs) basic structure.<sup>98</sup> The Agricultural Adjustment Act gave the U.S. Secretary of Agriculture authority to set up and utilize the Federal Milk Marketing Order Programs.<sup>99</sup> The Agricultural Marketing Agreement Act of 1937 amended the Agricultural Adjustment Act and is the legal foundation for modern FMMOs.<sup>100</sup> FMMOs regulate processors and handlers in defined geographic marketing areas by using audits to ensure they implement proper procedures.<sup>101</sup> The FMMOs also

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96. Weeks Interview, *supra* note 27. Currently, building new infrastructure is the highest cost of constructing a new facility. *Id.* New infrastructure often requires loans that end up coming from a government lending agency because banks are extremely hesitant to make large loans to a start-up dairy farm given the volatility and unpredictability of the dairy market. *Id.* High infrastructure cost is in addition to the cost of purchasing cattle (both milk cows and young stock), equipment, feed, milking equipment, and basic care equipment. *Id.* Dairy farmers' inability to find a market in which to ship their milk makes it even more difficult to enter the industry as a new farmer. *Id.* Record low milk prices have been consistent for some time; and, as a result, cooperatives and private processors alike are unwilling—and simply financially unable—to take on new farmers. *Id.* These cooperatives and private processors struggle to market and sell the milk they already agreed to take. *Id.*

97. Carstensen, *supra* note 52, at 474; *see also* Weeks Interview, *supra* note 27 (explaining that starting up a new dairy farm is extremely difficult, so the likelihood that new farmers will enter the market as nonmembers who can bargain independently for different, lower prices with downstream buyers is increasingly low).

98. Carstensen, *supra* note 52, at 469; *see also* *United States v. Borden Co.*, 308 U.S. 188, 191 (1939).

99. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 602 (2012); *see also* ZURBORG, *supra* note 83, at 168.

100. ZURBORG, *supra* note 83, at 168.

101. *Id.* at 175; *see also* Carstensen, *supra* note 52, at 471. FMMOs establish certain provisions under which dairy processors purchase fresh milk from dairy farmers supplying a marketing area. *Federal Milk Marketing Orders*, UNITED STATES DEP'T OF AGRIC.: AGRIC. MARKETING SERVICES, <http://bit.ly/2RldV3P> [<https://perma.cc/2GK6-QPEL>] (last visited June 11, 2019). Federal order provisions refer to dairy processors as handlers and dairy farmers as producers. *Id.* A marketing area is generally defined as a geographic area where handlers compete



have the power to regulate commodities' grading.<sup>102</sup> The unique feature of FMMOs is that the cooperative receives the proxy votes of all its member farmers when it operates within one such order.<sup>103</sup>

If a cooperative can get enough individual farmers in an FMMO to become cooperative members, the cooperative can control the majority of votes in that marketing area and create regulations or policies that favor its business organization.<sup>104</sup> Even if those policies are contrary to the individual members' interests, the cooperative can still enact policies by controlling a majority of the proxy votes.<sup>105</sup> For example, cooperatives can enact policies that restrict output or limit product sales to certain markets, even if members would prefer to increase output.<sup>106</sup>

However, to incentivize membership to gain proxy votes, cooperatives can also enact policies that create better avenues for selling dairy products, allowing members to receive better milk prices and incentivizing additional membership.<sup>107</sup> These policies leave out nonmembers, who either leave the industry or join the cooperative, creating a cycle that leads to cooperative dominance in the marketplace.<sup>108</sup>

#### *E. Capper-Volstead Act Tensions*

The lack of clarity regarding the Capper-Volstead Act's limited restrictions and the courts' failure to provide clear, practical guidance that satisfies individual farmers' concerns create major tensions in the U.S. dairy industry.<sup>109</sup> Litigants use the Capper-Volstead Act as an affirmative defense: plaintiffs file claims alleg-

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for packaged fluid milk sales, although other factors may be considered when determining the boundaries of a marketing area. *Id.* The FMMOs "serve to maintain stable marketing relationships for all handlers and producers supplying marketing areas, thus facilitating the complex process of marketing fresh milk." *Id.*

102. For example, fluid milk is USDA Grade A, while milk used for making cheese is USDA Grade B. Weeks Interview, *supra* note 27.

103. Carstensen, *supra* note 52, at 471. The individual farmers located and operating within a defined region control the FMMOs within that same region. *Id.*

104. *Id.* at 472. The cooperative controls the majority of votes because it receives the proxy vote of farmers who join. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* By incentivizing membership with favorable policies, such as more efficient distribution methods and improved milk prices, cooperatives make it more likely that farmers in their marketing area join. *Id.*

108. *Id.*

109. Weeks Interview, *supra* note 27 (explaining that dairy farmers are frustrated with the lack of change in dairy cooperatives' practices, even though many dairy farmers have attempted to bring light to the manipulation by filing lawsuits).

ing Sherman Antitrust Act violations, and defendants respond by stating that the Capper-Volstead Act's exemptions protect them from liability.<sup>110</sup> Recent court cases have focused on cooperative actions that affect the supply and price of milk.<sup>111</sup>

### 1. *Supply Management Versus Price-Fixing Agreements*

Dairy cooperatives that qualify for Capper-Volstead Act immunity can engage in price-fixing agreements with other dairy cooperatives.<sup>112</sup> These agreements may not, however, extend to conduct that would restrain trade, suppress competition, or fall “outside the ‘legitimate objects’ of a cooperative.”<sup>113</sup> The Capper-Volstead Act's vague language—coupled with the few cases that actually ask the question, “What can dairy cooperatives do?”—lends itself to unclear interpretation.<sup>114</sup>

Tensions arise because courts typically interpret the Capper-Volstead Act's language to permit cooperatives or associations of

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110. *See, e.g., In re: Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1150 (D. Idaho 2011).

111. *Infra* Part II.E.3

112. *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 344–46 (D. Vt. 2010) (“[The Capper-Volstead Act] grants dairy cooperatives antitrust immunity with respect to price-fixing agreements with other dairy cooperatives. . .”); *see also Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 822 (1978).

113. *Allen*, 748 F. Supp. 2d at 345 (citing *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 468 (1960)). A recently settled, high-profile case dealt with allegations by an animal rights group against the Cooperatives Working Together (CWT) program for its herd retirement initiative. *See generally Edwards v. Nat'l Milk Producers Fed'n*, No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. 2014). CWT is the joint effort of several dairy cooperatives to create and execute programs aimed at increasing the price of milk and stimulating improved market conditions for dairy products. *Id.* at \*5. Participating cooperatives include some of the largest in the country, such as Dairy Farmers of America, Inc., (DFA); Land O'Lakes, Inc.; Dairy Lea Cooperative, Inc.; and Agri-Mark, Inc. *Id.* at \*4. In 2009, as part of its larger initiative to increase milk prices, CWT facilitated a program that incentivized farms to engage in a herd retirement program. *Id.* at \*5. This program paid farmers per head of cattle to send their cattle to market and agree not to reenter the dairy farming business for at least one year. *Id.* The plaintiffs in this case alleged that defendant CWT artificially inflated and manipulated the price of milk and other dairy products because of this supply management practice. *Id.* In 2016, the parties entered into a settlement agreement for 52 million dollars. Dave Natzke, *Cooperatives Working Together Settles “Herd Retirement” Lawsuit for \$52 Million*, PROGRESSIVE DAIRYMAN (September 13, 2016), <http://bit.ly/2IOkurM> [<https://perma.cc/F5K7-4E6>]. Even though the U.S. Department of Justice and the USDA vetted and approved the herd retirement program, the plaintiffs argued that the actual program allowed a majority of cooperatives to control pre-production milk supply by removing cows and controlling the quantity of product in the marketplace rather than by engaging in post-production marketing programs. *Id.*

114. Carstensen, *supra* note 52, at 487.

cooperatives to engage in price-fixing agreements but not agreements that seemingly manipulate supply.<sup>115</sup> Courts reason that price-fixing agreements are a type of marketing and that the Capper-Volstead Act specifically enumerates marketing as a protected activity.<sup>116</sup> To illustrate the confusion, consider defendant cooperatives' reasoning for claiming Capper-Volstead Act protection for agreements that touch product supply: the cumulative impact of removing cows from the total herd numbers decreases the supply and, therefore, increases raw milk prices.<sup>117</sup> Courts have expressly permitted cooperatives to enter into price-fixing agreements.<sup>118</sup> However, courts have not provided specific guidance other than over traditional price-fixing agreements.<sup>119</sup>

## 2. *Qualification as a Producer*

The Capper-Volstead Act's broad and undefined terms have also left the dairy industry's entities unsure of who qualifies for protection.<sup>120</sup> The Capper-Volstead Act's language extends protection only to "persons engaged in the production of agricultural prod-

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115. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039 (2d Cir. 1980). The plaintiffs alleged that the Capper-Volstead Act did not permit associations of cooperatives—like CWT—to engage in price-fixing agreements; both the District Court and the Second Circuit rejected this proposition. *Id.* By contrast, other courts adhere to the view that agreements manipulating the actual supply of raw milk are not permitted. *Edwards*, 2014 WL 4643639, at \*5.

116. *See Fairdale Farms, Inc.*, 635 F.2d at 1040 ("The establishment of price is an integral part of marketing."). Because the ability to set milk prices is considered part of the marketing function of a cooperative, the practice would not "subject a cooperative to antitrust liability." *Id.*

117. Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 451, 462 (2015).

118. *Fairdale Farms, Inc.*, 635 F.2d at 1039.

119. Carstensen, *supra* note 52, at 487. A decision from the court in *Edwards v. Nat'l Milk Producers Fed'n* could have answered the question posed (i.e., Are there limitations to Capper-Volstead Act protection when cooperatives with the aim and effect to influence price engage in agreements that control supply?) and provided clearer guidance. Natzke, *supra* note 113. As of October 2018, CWT is still a functioning program working toward "creating new export market opportunities and continuing to look for innovative ways to increase sales of milk and dairy products for participating cooperatives." *Id.*

120. Carstensen, *supra* note 52, at 480. This concern is important, as the complexity of cooperatives is increasing. *Id.* Today, cooperatives have numerous processing plants that handle a variety of products and are often members of various joint ventures with large food manufacturers. *Id.* at 479. DFA has over 18,000-member farmers across the country, owns 31 processing plants, and is a party to many joint ventures. *Id.* The problem becomes determining who qualifies for Capper-Volstead Act immunity when a plaintiff alleges Sherman Antitrust Act violations against the cooperative. *Id.* Is only the cooperative protected, or do the Capper-Volstead Act protections also reach the businesses and business partners of that cooperative? *Id.*

ucts.”<sup>121</sup> Production encompasses many stages, including raising, growing, breeding, processing, hauling, and marketing.<sup>122</sup> The challenge lies in determining who is a producer.<sup>123</sup> In the landmark case, *National Broiler Marketing Association v. United States* (“*National Broiler*”),<sup>124</sup> which addressed the poultry market—not the dairy industry—the Supreme Court used the Capper-Volstead Act’s legislative history to determine that a member of the cooperative who did not own a flock, hatchery, or grow-out facility and who entered the market only at the final stages of production is not an entity or person meant to receive protection under the Capper-Volstead Act.<sup>125</sup>

The *National Broiler* case involved a complex look into the broiler chicken market and the National Broiler Marketing Association, a cooperative association organized under Georgia law.<sup>126</sup> The plaintiffs alleged Sherman Act violations against their poultry cooperative, and the defendant cooperative responded by alleging “that its status, as a cooperative association of persons engaged in the production of agricultural products, sheltered it from antitrust liability” under the Capper-Volstead Act.<sup>127</sup> Innovations in the broiler market both improved efficiency and increased departmentalization.<sup>128</sup>

A single, integrated entity likely owned the flock and the processing plant.<sup>129</sup> However, the entity itself was not physically part of the broilers’ production, a responsibility left to the chicken farmers who had independent contracts with the entity.<sup>130</sup> Because

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121. Capper-Volstead Act, 7 U.S.C. § 291 (2012); see also Cook, *supra* note 58, at 497 (explaining that those not engaged in production—i.e., a producer—are not afforded protection and that “any cooperative with non-producer voting members will lose its exemption” granted by the Capper-Volstead Act).

122. 7 U.S.C. § 291 (2012).

123. Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816, 820 (1978).

124. Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816 (1978).

125. *Id.* at 827–28 (reasoning that those individuals or entities not part of any of the specified stages could not qualify as producers).

126. *Id.*

127. *Id.* at 818.

128. *Id.* at 821. For example, eggs are no longer hatched where they are laid, and chicks are raised in different locations than where they are hatched. *Id.*

129. *Id.* Previously, different individuals who specialized in a specific stage of the process would control that part of production. *Id.*

130. *Id.* The broiler market worked in the following way: the integrated entity (who was a member of the cooperative) owned the flock and contracted with independent growers for the raising and grow-out period of the chicks. *Id.* The entity hatched the chicks at their hatchery then delivered the flock to the contracted independent grower. *Id.* The independent grower was responsible for feeding, providing veterinary services, building the chicken barn, paying the utility bills, hiring and managing employees, and paying other costs associated with the

the high-level entity that merely organized the transition of the flock from location to location only involved the type of business investment that Congress did not intend to protect, the entity could not receive Capper-Volstead Act protection.<sup>131</sup>

Justice Brennan's concurring opinion in *National Broiler* emphasized Congress's lack of intent to afford antitrust liability protection to middlemen and processors.<sup>132</sup> The opinion raises a concern for vertically integrated cooperatives that also own marketing entities and processing facilities.<sup>133</sup> The concern is that those vertically integrated cooperatives may lose the producer status that affords them Capper-Volstead Act protection.<sup>134</sup> Although *National Broiler* provides an effective and clear framework for the broiler market, key dairy industry influencers still have questions about the definitions of dairy producers.<sup>135</sup>

### 3. *Recent Dairy Cooperative Litigation*

The 2000s have plagued the American agricultural industry with low prices, volatile market shifts, and increased litigation.<sup>136</sup> Two dairy industry antitrust cases have been at the forefront of industry news, as many farmers demand better practices and transparency from their cooperatives in the face of extremely low milk prices.<sup>137</sup>

In *Food Lion, LLC v. Dean Foods Company*,<sup>138</sup> plaintiffs sued Dean Foods and other dairy holding companies, alleging a conspiracy to inhibit competition, to restrain trade, and to monopolize the dairy industry.<sup>139</sup> Plaintiffs claimed that the dairy cooperative's un-

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grow-out period for the chicks. *Id.* When the flock grew to maturity, the entity picked up and transported the flock to its own processing facility. *Id.*

131. *Id.* at 828.

132. *Id.* at 834–36.

133. Don T. Hibner, *Allegations of Conspiracy to Limit Crop Production: Ripe for Analysis Under Capper-Volstead*, MARTINDALE (December 29, 2011), <http://bit.ly/2FcZZo2> [<https://perma.cc/7ZHZ-2BSX>].

134. *Id.*

135. *Id.*

136. *Agricultural Products Home*, CME GROUP, <http://bit.ly/2IM6mQ5> [<https://perma.cc/SB5R-VQLC>] (last visited Dec. 14, 2018) (showing the volatile highs and lows of the milk price over the last year).

137. See *Food Lion, LLC v. Dean Foods Co.* (*In re Se. Milk Antitrust Litig.*), 739 F.3d 262, 268 (6th Cir. 2014); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 330 (D. Vt. 2010); see also Weeks Interview, *supra* note 27 (explaining that many farmers are frustrated with the consistently low milk prices and believe that the cooperatives should be doing more or trying something new to increase the price of milk).

138. *Food Lion, LLC v. Dean Foods Co.* (*In re Se. Milk Antitrust Litig.*), 739 F.3d 262 (6th Cir. 2014).

139. *Id.* at 268.

checked growth through its acquisition of grocers, processors, and marketing firms resulted in a conglomerate of entities that was able to control the milk supply at every step and to thereby manipulate the milk price.<sup>140</sup> The plaintiffs alleged that these conspiracies occurred via sweetheart deals, kickbacks, and preferential treatment among the various cooperatives and their respective processing and bottling facilities in a complicated web of mergers, sales, and joint ventures.<sup>141</sup>

The *Food Lion* case turned on whether the Court should apply the default analysis, the *per se* rule, or the rule of reason.<sup>142</sup> Ultimately, the *Food Lion* case settled, and the Supreme Court never clarified the remaining questions and concerns about cooperatives' unchecked power and ability to own, to operate, to buy, to sell, and to merge with a conglomerate of other facilities.<sup>143</sup>

*Allen v. Dairy Farmers of America, Inc.*<sup>144</sup> also centered on allegations of Sherman Antitrust Act violations against DFA and alleged that the cooperative unlawfully created a monopsony<sup>145</sup> in the Northeast by tying up the milk supply and by entering into unlawful supply management agreements.<sup>146</sup> The allegations also focused on the complex relationships between DFA, DFA's processing plants, Dairylea Cooperative, Inc. (a dairy cooperative that is a competitor of DFA), and Dairy Marketing Services, LLC (DMS) (an entity that markets, processes, and hauls milk).<sup>147</sup> DFA and Dairylea jointly own DMS.<sup>148</sup>

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140. *Id.* at 268–269.

141. *Id.*

142. *Id.* at 273.

143. See Eric Kroh, *Dean Foods, Food Lion Settle Antitrust Suit on Trial's Eve*, LAW360 (March 27, 2017, 4:05 pm), <https://bit.ly/2lCuQ6b> [<https://perma.cc/Y3P2-8KZB>] (describing the case's history subsequent to the 6th Circuit's ruling). The Supreme Court denied certiorari to *Food Lion* after the appeal of the 6th Circuit decision. *Dean Foods Co. v. Food Lion, LLC*, 135 S. Ct. 676, 677 (2014). Later attempts to revive *Food Lion* and to certify it as a class action suit were unsuccessful. See Kroh, *supra* note 143. These unresolved legal questions still present concerns for farmers in today's U.S. agricultural community. See Weeks Interview, *supra* note 27 (reflecting on dairy farmer meetings in which the common opinion centered around the concern that these unresolved cases seemed to allow cooperatives to manipulate the market with unchecked power).

144. *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323 (D. Vt. 2010).

145. See *Monopsony*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining monopsony power as "a market situation in which one buyer controls the market").

146. *Allen*, 748 F. Supp. 2d at 331.

147. *Id.* at 330.

148. *Id.* For clarification, Dairylea and DFA own DMS, meaning two would-be competitor cooperatives own a dairy product marketing service together. *Id.*

Farmers across the country hoped that the *Allen* case would set guidelines and provide limitations on DFA's seemingly overpowering reach.<sup>149</sup> DFA and the other named defendants won a partial motion to dismiss, citing immunity under the Capper-Volstead Act protections.<sup>150</sup> Ultimately, the *Allen* case settled without providing a true answer as to the limits of cooperatives' Capper-Volstead Act protection.<sup>151</sup>

While the courts and interested parties continue to discuss what the unclear litigation results mean for current cooperative practices, dairy farmers continue to suffer.<sup>152</sup> The future of this country's dairy industry has reached a critical point.<sup>153</sup> Although the Capper-Volstead Act had good intentions and was initially sufficient, its outdated language and structure has allowed dairy cooperatives to grow unchecked to the detriment of the member farmers.<sup>154</sup> An additional factor in the already-tense situation is the dairy farmers' claims that the cooperatives personally exploit and ignore their members.<sup>155</sup> Any solution to the Capper-Volstead Act dilemma must consider dairy farmers' frustrations and growing distrust and dissatisfaction with their cooperatives.<sup>156</sup>

### III. ANALYSIS

#### A. *Capper-Volstead Act Reform*

Although reforming the Capper-Volstead Act is not currently a popular solution, modified guidelines are necessary to better regulate antitrust violations in the dairy industry.<sup>157</sup> Allowing the status quo to continue will not alleviate dairy farmer frustration or decrease the number of alleged antitrust violations.<sup>158</sup>

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149. Weeks Interview, *supra* note 27. This suit was the first challenge to supposedly competing cooperatives' being jointly-owned entities and working together to market and sell dairy products. *Id.*

150. *Allen et al v. Dairy Farmers of America*, COHEN MILSTEIN, <http://bit.ly/2IJjwgC> [<https://perma.cc/XXW2-P6UP>] (last visited Nov. 9, 2018).

151. *Id.*

152. Weeks Interview, *supra* note 27 (explaining that the court decisions and settlements have not changed how the cooperatives operate and that milk prices have not improved).

153. *Id.* Many dairy farms are barely making enough money to cover their bills and will continue to shut down unless milk prices increase, costs decrease, or new market opportunities become available. *Id.*

154. Carstensen, *supra* note 52, at 493.

155. *Id.*

156. *Id.*

157. *Id.* at 496.

158. Weeks Interview, *supra* note 27 (noting that more dairy farms will continue to close because of the difficulty of operating a profitable business in the current agricultural climate).

### 1. *Prioritization of Each Individual Farmer's Interests*

Prior to drafting new Capper-Volstead Act language, farmers and legislators need to determine whose needs should take priority: the farmers' needs or the cooperatives' needs.<sup>159</sup> Some agricultural scholars and dairy industry specialists recommend developing a system that promotes strong agricultural organizations with the freedom to make decisions and to implement programs helping dairy farmers via whatever means those organizations deem appropriate.<sup>160</sup> Others in the dairy industry recommend completely restructuring the cooperative program with a focus on protecting and promoting each individual dairy farmer's interests.<sup>161</sup> To meet consumers' growing demand for local foods and a "know-your-farmer" approach to food purchases, any new guidelines or regulations should prioritize the individual farmer over the large organization.<sup>162</sup>

Ultimately, the modern individual dairy farmer is a farmer with whom consumers want to interface and who takes a hands-on approach to the production process.<sup>163</sup> New legislation needs to protect this modern dairy farmer.<sup>164</sup> The biggest form of protection that farmers need is stable and realistic milk prices.<sup>165</sup> A consistent milk price would allow dairy farmers not only to support their farms but also to invest in new technologies to improve animal care and sustainable practices.<sup>166</sup> Controlling and limiting the size of cooperatives—essentially shrinking their reach and dominance over the market—should be the priority of any new dairy industry legislation.<sup>167</sup> Without new legislation that puts the individual dairy farmer's prosperity first, cooperatives will continue to use their size and market reach to manipulate milk prices in their favor.<sup>168</sup>

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159. Claiborne, *supra* note 24, at 310.

160. *Id.*

161. Carstensen, *supra* note 52, at 493–95.

162. Weeks Interview, *supra* note 27. A "know-your-farmer" approach to food purchases involves consumers' buying local products, knowing from whom and from where their food originated, and learning how their food is grown and made. *Id.* More farmers are taking advantage of these types of market opportunities to make ends meet. *Id.* For example, some dairy farmers have started making and selling their own cheese or yogurt. *Id.* See also Carstensen, *supra* note 52, at 493.

163. Weeks Interview, *supra* note 27.

164. *Id.*

165. *Id.*

166. *Id.*

167. Carstensen, *supra* note 52, at 493–96.

168. *Id.*



## 2. *Definition of Qualifications for Capper-Volstead Act Protection*

Though *National Broiler Court* defined who is a producer in the broiler industry,<sup>169</sup> the Court's definition does not translate well to the dairy industry because the industries are simply too different.<sup>170</sup> Affording protection to producers without clearly defining who qualifies as a producer allows for the growth and dominance of cooperatives.<sup>171</sup> The next cooperative-governing piece of legislation must include a clear set of criteria that outlines who can be a member of a cooperative.<sup>172</sup> Furthermore, no entity that itself does not participate in "the processing, marketing or bargaining services" should be permitted to participate in the cooperative.<sup>173</sup> Such legislation should follow the *National Broiler Court's* rationale.<sup>174</sup>

In the effort to clearly define dairy producers, a portion of Congress' consideration must focus on addressing cooperatives' mergers and acquisitions, processing facilities, marketing firms, and retailers within the dairy industry.<sup>175</sup> An assumption that the cooperatives which currently own multiple different facilities (like DFA) would willingly give up or sell off entities worth millions of dollars to comply with a definition of producer targeting only individual farmers or smaller cooperatives is unrealistic.<sup>176</sup> However, exempting certain activities to determine which cooperatives receive protection is an unworkable and impractical solution.<sup>177</sup> Often, marketing and bargaining can overlap, and activities that seem like marketing could also be categorized as bargaining.<sup>178</sup> Granting cooperative legal status to only those cooperatives involved in certain activities could quickly become a similarly unclear standard and would result in little to no change for individual farmers.<sup>179</sup>

The new dairy producer definition should account for dairy cooperatives engaged in various activities but should also set a clear rule specifying that entities that do not participate in processing,

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169. See *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978).

170. See *supra* note 125 and accompanying text.

171. Carstensen, *supra* note 52, at 493.

172. *Id.*

173. *Id.*

174. See *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 827-29.

175. Carstensen, *supra* note 52, at 497.

176. *Id.*; see also *supra* note 147 and accompanying text (discussing how DFA owns multiple facilities).

177. Carstensen, *supra* note 52, at 497.

178. *Id.*

179. *Id.*

marketing, or bargaining are not producers under the Capper-Volstead Act.<sup>180</sup> Allowing subsidiaries of larger cooperatives with no direct role in any of those activities to be classified as producers permits dairy cooperatives to unfairly receive antitrust protection, facilitating their growth and dominance.<sup>181</sup> The new dairy producer definition needs to focus on protecting only those dairy producers directly serving the farmer members' processing, marketing, and bargaining needs.<sup>182</sup>

### 3. *Stronger Role for the U.S. Secretary of Agriculture*

Section 2 of the Capper-Volstead Act grants power to the U.S. Secretary of Agriculture to monitor and to shut down dairy cooperatives causing severe milk price concerns for consumers.<sup>183</sup> While the U.S. Secretary of Agriculture has the power to monitor cooperatives to protect consumers from paying exorbitant milk prices, Congress needs to expand the Secretary's power to also allow him to protect dairy farmers from receiving unfair milk prices.<sup>184</sup> However, dairy farmers' goal in challenging the current Capper-Volstead Act is never to receive milk prices so high that they negatively impact consumers.<sup>185</sup> Dairy farmers' goal in seeking legislative reform is simply to earn a livable and fair wage.<sup>186</sup>

Congress's including § 2 of the Capper-Volstead Act indicates that Congress intended to give the U.S. Secretary of Agriculture a method to monitor cooperatives' anticompetitive growth and development.<sup>187</sup> In other words, Congress did not intend the Capper-Volstead Act to be an all-encompassing, free pass for cooperatives' unchecked growth and anticompetitive business practice development.<sup>188</sup> Unfortunately, for a number of reasons,<sup>189</sup> the U.S. Secretary of Agriculture has never used § 2 to enforce restrictions against

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180. *Id.*

181. *See id.* at 498.

182. *Id.*

183. 7 U.S.C. § 292 (2012); *see also* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1038 (2d Cir. 1980). The U.S. Secretary of Agriculture seldom uses this controlling power. *Id.*

184. Peck, *supra* note 117, at 488.

185. *Id.*

186. *Id.*

187. Peck, *supra* note 117, at 491.

188. *Id.*

189. An analysis of the reasons for lack of enforcement of § 2 by the Secretary of Agriculture is beyond the scope of this Comment. For such a discussion, see generally E. V. Jesse et al., *Interpreting and Enforcing Section 2 of the Capper-Volstead Act*, 64 AM. J. AGRIC. ECON. 431 (1982).

cooperatives.<sup>190</sup> In the spirit of providing a mechanism for overseeing dairy cooperatives' participating in anticompetitive behavior,<sup>191</sup> § 2 of the Capper-Volstead Act needs to be reshaped to give the U.S. Secretary of Agriculture not only the authority but also the incentive to police dairy cooperatives.<sup>192</sup> Without any legislative oversight, dairy cooperatives are free to continue manipulating milk prices for both consumers and farmers with very little risk of consequences.<sup>193</sup>

### *B. Feasibility of Implementing a Supply Management Program*

Dairy farmers' frustration with a few large dairy cooperatives' unchecked power and freedom ultimately stems from the unlivable wage that dairy farmers receive.<sup>194</sup> Although the dairy farming community has never generally accepted or implemented supply management, many dairy farmers are looking to neighboring countries' examples and calling for the U.S. dairy industry to seriously consider incorporating supply management practices into future legislation.<sup>195</sup> Basic supply management practice uses a quota system, which allots a certain amount of milk production per farm operation based on the country's or region's demand.<sup>196</sup>

Oversupply of dairy and other agricultural products has been a recurring problem for U.S. agricultural producers.<sup>197</sup> The Capper-Volstead Act provides protection to post-production price-fixing agreements, a form of supply management.<sup>198</sup> However, exempting pre-production practices under the Capper-Volstead Act could provide the relief from low milk prices that dairy farmers seek.<sup>199</sup> Re-

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190. Peck, *supra* note 117, at 470–471. No U.S. Secretary of Agriculture has ever used the power granted to him in § 2 of the Capper-Volstead Act to monitor a cooperative, “so little guidance exists as to its meaning.” *Id.* at 471.

191. Carstensen, *supra* note 52, at 493.

192. Peck, *supra* note 117, at 491.

193. *Id.*

194. See Weeks Interview, *supra* note 27 (explaining that dairy farmers are not able to make enough money to cover monthly expenses).

195. *Id.* Canada's dairy industry currently operates under a supply management system. *Id.*

196. *Id.* The regulating body determines the volume of dairy products needed and allocates production limits to farms. *Id.* This oversight ensures that milk prices do not drastically drop in a short period of time due to an oversupply. *Id.* Ultimately, the goal is to provide a stable, consistent, and fair milk price to the dairy farmers. *Id.* Further discussion of supply management practices is beyond the scope of this Comment.

197. Yuliya Bolotova, *Agricultural Supply Management and Antitrust in the United States System of Agribusiness*, 17 INT'L FOOD AND AGRIBUSINESS MGMT. REV. 53, 67 (2014).

198. *Id.* at 68.

199. Weeks Interview, *supra* note 27; see also Peck, *supra* note 117, at 496.

stricting the milk supply is not the most popular solution among dairy farmers,<sup>200</sup> but dairy farmers may be wise to consider such a restriction's price stability benefits.<sup>201</sup>

Congress taking the control of the fluid milk supply out of producers' and cooperatives' hands would limit the detrimental control that cooperatives have over the system.<sup>202</sup> As a result, cooperatives would not be as free to change milk prices since an oversupply of milk would not exist; rather, cooperatives would be working with a predetermined supply of milk that would fill the exact market demand.<sup>203</sup> Supply management principles would be a valuable addition to dairy industry regulation and would work in tandem with revised Capper-Volstead Act language to limit the dairy cooperatives' otherwise-unchallenged power to control the milk supply.<sup>204</sup>

Congress, via the USDA and U.S. Secretary of Agriculture, needs to determine, create, and assign fluid milk quotas to dairy farms.<sup>205</sup> These quotas need to be realistic: high enough to allow dairy farmers to produce enough fluid milk to earn a sustainable living but low enough to prevent excess fluid milk from flooding the market.<sup>206</sup> Congress should apply these supply management principles to the pre-production phase.<sup>207</sup>

Cooperatives should not have the power to control the supply of dairy in the market after production.<sup>208</sup> Cooperatives have too many varying interests at all levels of production and cannot be trusted to control the supply in a way that ensures fair milk prices for dairy farmers.<sup>209</sup> Giving the power to determine fair and realistic production limits to a neutral party, ideally Congress and the U.S. Secretary of Agriculture, would restrict cooperatives' ability to manipulate milk prices.<sup>210</sup>

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200. Weeks Interview, *supra* note 27. Dairy farmers who own large-scale operations with their extended families are more often than not opposed to supply management. *Id.* Their economy of scale allows them to better absorb low milk prices by increasing the size of their herd and therefore increasing production, sometimes milking as many as 5,000 dairy cows in one operation. *Id.*

201. Peck, *supra* note 117, at 496.

202. *Id.*

203. *Id.*

204. *Id.*

205. Bolotova, *supra* note 197, at 68.

206. *Id.*

207. *Id.*

208. *Id.*

209. See Carstensen, *supra* note 52, at 490–91.

210. See Bolotova, *supra* note 197, at 71.

## IV. CONCLUSION

The Capper-Volstead Act, though once a sufficient control on dairy cooperatives, is no longer functioning as Congress originally intended.<sup>211</sup> The Capper-Volstead Act's failure to provide modern-day dairy cooperatives with clear guidelines about activities exempted from antitrust prosecution has allowed a select-few cooperatives to control a majority of the U.S. dairy industry.<sup>212</sup> With this control, these dairy cooperatives have been manipulating the country's fluid milk supply as well as the milk price that dairy farmers receive.<sup>213</sup>

Congress needs to revise the Capper-Volstead Act.<sup>214</sup> Strict guidelines that determine who can function as a dairy cooperative, an outline of those activities in which a dairy cooperative can engage, and a stronger regulatory power for the U.S. Secretary of Agriculture all need to be part of the revised law.<sup>215</sup> Without Congress' implementation of methods to halt dairy cooperatives' monopolistic growth, dairy farmers and the health of the U.S. dairy industry will continue to suffer.<sup>216</sup>

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211. *See supra* Part II.E.

212. *See supra* Part II.E.

213. *See supra* Part II.E.

214. *See supra* Part III.

215. *See supra* Part III.

216. *See supra* Part III.