

**Vermont Attorney General's Report:
The Capper-Volstead Act and the
Northeast Dairy Fluid Milk Market**

Pursuant to Sec. 5 of Act 48 of the Acts of the 2009 Legislature

January 2010

Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609

Principal authors:

Sarah London, Assistant Attorney General
Diane E. Zamos, Assistant Attorney General

The Capper-Volstead Act and the Northeast Dairy Fluid Milk Market

Pursuant to Sec. 5 of Act 48 of the Acts of the 2009 Legislature

Summary

At the Legislature's request, the Attorney General's Office has compiled information regarding the Capper Volstead Act and explored the feasibility and costs to undertake a study of the Northeast fluid milk market.¹ It is well known that parts of the dairy industry, specifically cooperatives and dairy processors, have become increasingly concentrated over the last decades. The declining price of milk paid to Vermont farmers suggests that the industry's structure as a whole does not benefit farmers. The Capper Volstead Act provides antitrust immunity to certain actions of agricultural cooperatives such as setting an agreed price for milk. It does not create blanket antitrust immunity for co-ops, however. In addition, the Act protects only those cooperatives that are "operated for the mutual benefit of the members thereof." 7 U.S.C. § 291. Private antitrust plaintiffs in Vermont and Tennessee have recently sued Dairy Farmers of America (DFA) and Dean Foods, Inc., alleging in part that DFA is not operated for the benefit of

¹ Specifically, the Legislature requested the following in Section 5 of Act 48:

(b) Therefore, the attorney general shall undertake, in cooperation with attorneys general of other states when possible, a study of the Northeast fluid milk market and the Vermont segment of that market and further work with the United States Congress and the United States attorney general to investigate possible anticompetitive practices of dairy cooperatives, processors, and retail firms operating in the Vermont marketplace.

....

(d) Therefore, the milk commission is directed to work with other entities such as the Vermont attorney general, attorneys general from other states, milk regulatory entities from other states, the United States attorney general, and the Vermont congressional delegation to investigate why dairy cooperatives have not been able to use the Capper-Volstead Act to stabilize and raise dairy prices in the Northeast dairy market and to consider whether operation of the Capper-Volstead Act continues to serve its intended purpose and function in the public interest.

its members. Sections I and II below summarize the scope of the Capper Volstead Act's protections and recent antitrust developments in the dairy context.

As to the study of the Northeast fluid milk market and the Vermont segment of that market, the Attorney General's Office, the Agency of Agriculture, Food and Markets, and the Vermont Milk Commission do not have the requisite expertise on staff to conduct such a study.² Inquiry by the Attorney General's Office into the minimum qualifications needed to conduct the study revealed that economists with the requisite expertise cannot be found in Vermont. Preliminary estimates to retain qualified economic experts and the time needed to perform analysis of data ranged from \$30,000.00 and one year for academic researchers, to \$100,000.00 and three to six months for a commercial economic consulting firm. One out-of-state expert, Dr. Scott Brown, Program Director of the University of Missouri's Food and Agricultural Policy Research Institute, summed up the magnitude and complexity of the task at hand: "In five paragraphs the Vermont legislature has asked some of the most difficult questions they can about the effects of the structure of the dairy industry on all markets. . . .There are no quick, easy answers to these questions." Section III below summarizes the expert qualifications, projected costs and timelines, and issues related to the study and inquiry of the dairy industry anticipated by Sec. 5 of Act 48.

² Vermont Secretary of Agriculture Roger Allbee reports that the Milk Commission has not had dedicated staff, funding for contracted services, or funding to reimburse the Agency for administrative work since January 2009. The Secretary of Agriculture is statutorily designated as the Chair of the Milk Commission and serves for no compensation. *See* 6 V.S.A. §§ 2922, 2923.

I. THE CAPPER VOLSTEAD ACT

The Capper Volstead Act was passed in 1922 in an attempt to improve the market power of farmers. The Act, 7 U.S.C. §§ 291, 292,³ permits those “engaged in the production of agricultural products” to coordinate the processing, marketing, and price of their products through the formation of cooperatives. The Act is limited in scope: it only protects cooperatives of “producers,” and it only protects coordination *among* producers. As discussed more fully below, the Act does not protect cooperatives with non-farmer, i.e., non-producer, members, and it does not permit cooperatives to set prices with processors or distributors.⁴

To obtain protection under the Capper Volstead Act, a cooperative must meet certain requirements with respect to its members, structure, and activities. All members of the co-op must produce agricultural products. A cooperative will lose Capper Volstead protection if it includes just one “middleman” who only owns processing operations.⁵ In addition, the co-op must be “operated for the mutual benefit of the members.” 7 U.S.C. § 291. The Act allows a cooperative to take the form of a corporation. *Id.* There is no limit as to size or to the association of multiple cooperatives.⁶

³ The Act states: “Persons engaged in the production of agricultural products . . . may act together in associations . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.” 7 U.S.C. § 291. “Persons” include “farmers, planters, ranchmen, dairymen, [and] nut or fruit growers.” *Id.*

⁴ *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939) (Capper Volstead does not protect cooperative of milk producers’ attempt to conspire with distributors, labor union, and municipal officers to fix price paid to members).

⁵ *Nat’l Broiler Marketing Ass’n v. United States*, 436 U.S. 816, 822-23 (1978) (requiring “all” association members to be qualified to act collectively and finding that agreements between producers and middlemen processors are not covered by Capper Volstead); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) (no Capper Volstead protection to cooperative where small number of members owned and operated packing houses and did not grow agricultural products). Lower courts continue to adhere to this rule. *See, e.g., In re Mushroom Direct Purchaser Antitrust Litigation*, No. 06-0620, 2009 WL 838490 (E.D. Pa. March 26, 2009) (no Capper Volstead immunity for cooperative where one member was a non-farmer processor).

⁶ *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (rejecting challenge to cooperative on basis that it comprised three different cooperatives); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980) (similar in dairy industry).

As to protected activities, the Act only applies to the “processing, preparing for market, handling or marketing” of agricultural products. The U.S. Supreme Court has held that “marketing” includes price-fixing.⁷ These protections are not absolute, however. A cooperative “may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harassment, boycotts, coerced membership, and discriminatory pricing. Neither may it use its legitimately acquired monopoly power in such a manner as to stifle or smother competition.” *Fairdale Farms, Inc. v. Yankee Milk Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980) (citations omitted). Courts have found antitrust liability when a cooperative enters into agreements with non-producers for the purpose of acquiring monopoly power.⁸

With certain limitations, cooperative members may, therefore, act *within* their associations without fear of antitrust prosecution, and in particular may set prices for their products. They may not, however, gain or maintain monopoly control by any actions forbidden to corporations, nor may they otherwise conspire with non-cooperatives to restrain trade.

II. RECENT DEVELOPMENTS

The largest and most powerful dairy cooperative in the country is Dairy Farmers of America (DFA). DFA owns and has agreements with several, diverse entities. The precise number of DFA’s processor agreements is not publicly available. Private antitrust plaintiffs allege that DFA’s agreements with Dean Foods, Inc., and National Dairy Holdings, L.P., the two

⁷ *Maryland and Virginia Milk Producers Ass’n v. United States*, 362 U.S. 458, 466 (1960).

⁸ *In re Mushroom Direct Purchaser Antitrust Litigation*, 2009 WL 838490 at *11 (cooperative violated Sherman Act in fixing prices with non-cooperative distributors).

largest milk bottlers in the United States, have vested DFA with control of access to 70 to 77% of the fluid Grade A milk bottling capacity in parts of the country.⁹

The Department of Justice has brought actions against DFA to prevent it from acquiring non-agricultural cooperatives under the Clayton Act – again, the Capper Volstead Act does not exempt such mergers from normal antitrust scrutiny.¹⁰ With respect to processors, both the Vermont Attorney General’s Office, joined by the New England states, and DOJ reached separate settlements in 2001 regarding Suiza Food Corporation and Dean Foods.¹¹ For the most part, however, the bounds of Capper Volstead immunity of cooperatives have not been tested by either DOJ or state attorneys general in the last ten years. There is ongoing antitrust litigation entitled *In re Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008). The case involves multiple class action lawsuits against Dean Foods, National Dairy Holdings, and DFA, among others, alleging conspiracies to reduce prices paid to farmers and to raise prices charged to direct purchasers of processed milk. The plaintiffs’ claims have survived initial Capper Volstead Act defenses and the case is in discovery.

There is now similar litigation in Vermont. On October 8, 2009, a private class action was filed in Burlington in the U.S. District Court for the District of Vermont. The complaint

⁹ *In re Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008) (alleged control of 77% of southeast market); Complaint in *Allen v. Dairy Farmers of America*, Docket No. 2:09-cv-00230-wks, filed Oct. 8, 2009 (alleged control of 70% of northeast market).

¹⁰ See <http://www.justice.gov/atr/cases/f243800/243875.htm> for DOJ’s settlement regarding DFA’s acquisition of Southern Belle Dairy, a milk processor; see <http://www.justice.gov/atr/cases/f4700/4783.htm> for DOJ’s settlement regarding DFA’s acquisition of SODIAAL, a butter company.

¹¹ In 2001, DOJ reached an agreement with Dean Foods and Suiza Foods Corporation that required divestiture of eleven dairy processing plants as a condition of the companies’ merger. See http://justice.gov/opa/pr/2001/December/01_at_652.htm describing 2001 merger agreement. Under the terms of the agreement, all eleven dairy processing plants were divested to National Dairy Holdings, which was fifty percent owned by DFA at the time. Prior to the Dean-Suiza merger, the Vermont Attorney General’s Office, joined by the five other New England states and supported by the National Association of Attorneys General, challenged Suiza’s purchase of Stop & Shop’s processing plant in Readville, Massachusetts, and Suiza’s proposed exclusive supply agreement with the supermarket chain. The resulting settlement required Suiza to make its New England processing plants available to Suiza’s competitors for five years and required that Stop & Shop be permitted to sell competitors’ brands of milk.

alleges unlawful monopsony¹² and monopoly of Dean Foods, DFA, Hood, and Dairy Marketing Services, a marketing agency created in part by DFA. The plaintiffs' allegations include claims that the defendants coerced farmers into joining DFA in order to get access to bottling plants owned by Dean Foods, and that all of the defendants conspired to artificially lower the price of milk paid to farmers. The proposed class of plaintiffs is all dairy farmers who produced Grade A milk within Order 1 and sold Grade A milk through DMS in Order 1 during any time from October 9, 2005 to the present.

As for recent, public governmental actions, on August 6, 2009, Senators Bernie Sanders, Chuck Schumer, and Russ Feingold sent a request for action to the Chief of the Department of Justice's Antitrust Division, Christine Varney.¹³ In it they summarized their understanding that DOJ had conducted a twenty-six month investigation of the dairy industry, and that career DOJ lawyers recommended that enforcement action be taken against some of the dairy industry's biggest firms such as Dean Foods, DFA, and National Dairy Holdings. The Senators urged DOJ to "re-examine the evidence gathered during this investigation and take any appropriate action."

DOJ has made no public statement regarding an antitrust investigation against DFA and Dean Foods. On September 19, 2009, Christine Varney testified regarding antitrust issues in the dairy industry at a Senate Judiciary hearing convened in St. Albans, Vermont. She "assure[d]" the Committee that DOJ is "committed to a careful and comprehensive examination" of the dairy market.¹⁴ DOJ has announced it will be conducting "workshops" in conjunction with the U.S. Department of Agriculture on antitrust issues in agriculture starting in 2010.¹⁵ A dairy workshop

¹² Whereas "monopoly" is concentration among sellers, "monopsony" is concentration among buyers.

¹³ See <http://www.vermontagriculture.com/news/2009/VarneyDairy8-6-09.pdf>.

¹⁴ See <http://www.usdoj.gov/atr/public/testimony/250178.pdf>.

¹⁵ See <http://www.justice.gov/atr/public/workshops/ag2010/index.htm>.

will be held in Madison, Wisconsin on June 7, 2010. According to DOJ staff attorneys, one topic to be discussed is the Capper Volstead Act.

The Vermont Attorney General's Office is one of a few states to recently revive a multistate antitrust working group devoted to agriculture generally, including dairy. The Vermont Attorney General's antitrust staff currently meets with this group monthly by phone and bi-weekly with a subset of the group and DOJ staff to ensure that issues regarding Vermont's dairy industry are addressed both in writing and through panelists at the DOJ/USDA workshops. To this end, the Attorney General's Office has actively solicited comments from farmers and anyone with antitrust-related concerns regarding the dairy industry. The Attorney General's Office continues to work to ensure that it and DOJ antitrust staff work together to the extent possible through collaboration on the workshops and otherwise. In addition, and in cooperation with Senator Sanders's office, the Attorney General's Office has provided information to the public for submitting antitrust-related dairy concerns at <http://www.atg.state.vt.us/issues/antitrust.php>.

III. THE STUDY OF THE NORTHEAST FLUID MILK MARKET

A study of the fluid milk market, and an inquiry into possible anti-competitive practices, is factually and legally specialized and complex, requiring significant resources to complete. The Office of the Attorney General does not have an economist on staff with the requisite expertise, nor the fiscal resources needed to contract with specialized economists to conduct and complete the study.

Assuming the "Northeast fluid milk market" and "operating in" can be defined with specificity, a study would require dedicated resources from the Legislature for contracted experts. Expertise in four areas would be required. In addition to legal expertise provided by the

Attorney General, and assuming the necessary data can be gathered from public sources or eventually compelled through legal process, three specialized economists are critical to completing the study. Two experts in the field, Dr. Andrew M. Novakovic and Dr. Mark W. Stephenson of Cornell University's Program on Dairy Markets and Policy in the College of Agriculture and Life Sciences, have advised:

Economists come in many flavors. Some of us understand dairy markets. Some of us are exceptionally good at empirical analysis. Some of us are expert in industrial organization and business behaviors (i.e. competition). No single person is expert in all of the above. Thus, you would likely want a team of people to be involved in any such study. If you choose two of the three, the weak link will become readily apparent, regardless of which two you pick.

Even if the required economic expertise were at hand, these two experts advised that the scope and breadth of the study envisioned by the Legislature in Act 48 is difficult to discern from its plain language.

Vermont is a well defined place, but the term "Northeast" has many connotations for fluid milk, its markets and the players in the market. It could mean the six New England states. That connotation, however, may not be appropriate because New York provides a large supply of fluid milk for New England's processors. The "Northeast" could also be the area comprising the Northeast Federal Milk Marketing Order. This includes the six New England states, Virginia, Delaware, Maryland, New Jersey, and portions, but not all of, of Pennsylvania. Again, it does not include New York which provides a significant percentage of milk processed in New England. The Act 48 study implies the analysis of data originating in perhaps a dozen or more states.

A study would take considerable time once economic experts are hired. A timeline for completion could be disrupted if data is not readily available from public sources and must be

compelled through legal process. Most of the data needed to assess competition is private information and not publically available. Data about buyers of fluid milk can sometimes be acquired from suppliers. Suppliers, however, may believe they could jeopardize their business relationships by divulging information about buyers. Ready access to data needed to undertake an inquiry into anti-competitive practices as contemplated by Act 48 is unlikely without formal, time-consuming legal process.

Assuming that “Northeast” can be defined and relevant data on prices paid at each level of transaction can be obtained, one expert suggested that a similar data set for another region of the country would be needed. A second region’s data is needed to discern, comparatively, the level of competition in the various markets being studied.

Depending on the depth and breadth of the study, the preliminary estimates for the required economic experts range from \$30,000.00 and a minimum of one full year, if completed by graduate level academic researchers, to \$100,000.00 or more and three to six months, if completed by a commercial consulting company. These estimates do not include state staff time costs associated with legal expertise, preparing material for a competitive bidding process to hire economists, negotiating and managing the contracts, or interpreting the economic analysis within the framework of relevant state and federal law.