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“For the Mutual Benefit of Members Thereof”: Attacking Capper-Volstead Immunity and Challenging Dairy Cooperative Power

Eduardo Castro†

Kyle Kurt was a dairy farmer for eighteen years.¹ He owned a small herd of Holstein dairy cows, which he milked twice a day, 365 days a year.² But with changes in the economy, farming was no longer possible as a way of life, and he was forced to auction off his herd, his milking equipment, his tractors, and his other farm supplies.³ “It’s pretty tough waking up every morning, going to the barn, and not being able to pay your bills, especially when you’re putting in that many hours,” he said. “Something’s got to change or the small farms are going to be gone.”⁴

Kyle’s story is, sadly, not unique. Across rural America, small- and medium-sized farms are disappearing.⁵ While there are many

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1. Rick Barrett, *As Dairy Crisis Crushes Farmers, Wisconsin’s Rural Identity in Jeopardy*, MILWAUKEE J. SENTINEL (Apr. 13, 2018, 10:38 AM), <https://www.jsonline.com/story/money/2018/04/13/dairy-crisis-crushes-farmers-wisconsins-rural-identity-jeopardy/511881002/> [https://perma.cc/T2UJ-9X8A].

2. *Id.*

3. *Id.*

4. *Id.* (quoting dairy farmer Kyle Kurt).

5. See U.S. DEP’T AGRIC., 2012 CENSUS OF AGRICULTURE HIGHLIGHTS: DAIRY CATTLE AND MILK PRODUCTION (Oct. 2014), https://www.nass.usda.gov/Publications/Highlights/2014/Dairy_Cattle_and_Milk_Production_Highlights.pdf [https://perma.cc/7SDM-X5JT] [hereinafter 2012 CENSUS OF AGRICULTURE]. Measuring the size of farms is an inexact science. In the dairy industry, relevant measures include cow herd headcounts and profits from sales. For the purposes of this Note, small- and medium-sized dairy farms are farms making less than \$1 million in sales, or farms that have fewer than 1,000 cows. James M. MacDonald, Robert A. Hoppe & Doris Newton, *Three Decades of Consolidation in U.S. Agriculture*, ECON. RESEARCH SERV., U.S. DEP’T AGRIC., 2018, at 1, 8 (Econ. Info. Bulletin No. 189), <https://www>

factors contributing to this decline, one factor is undeniable: the increasing consolidation of agriculture is making it harder for small- and medium-sized farmers to remain viable. Nowhere is this trend more manifest than in the dairy industry.⁶

Antitrust law should be a check against such consolidation and rising inequality.⁷ However, because the structure of the dairy industry is largely carried out through cooperatives, the industry as a whole has escaped scrutiny under the Sherman Act and the Clayton Act. This lack of attention is due to the Capper-Volstead Act.⁸ Passed in 1922, the Act granted immunity from antitrust scrutiny for farmers that organized together to bargain, process, and market their agricultural products in cooperatives.⁹ The Capper-Volstead Act was seen as offering farmers countervailing power to organize against purchasers and processors and allowing them to distribute and market their products more efficiently.¹⁰ But since 1922, cooperatives have grown into massive organizations, with a handful of cooperatives wielding outsized control in the dairy markets.¹¹ Despite no longer needing elevated negotiating power, these cooperatives remain protected from antitrust scrutiny under the Capper-Volstead Act.

w.ers.usda.gov/webdocs/publications/88057/eib-189.pdf?v=43172 [https://perma.cc/29A9-9R4K].

6. See DENNIS A. SHIELDS, CONG. RESEARCH SERV., R41224, CONSOLIDATION AND CONCENTRATION IN THE U.S. DAIRY INDUSTRY 11 (2010); David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61 (2010) (concluding that concentration exists in all major agriculture markets and calling for corrective action); See also Rick Barrett, *'Struggling to Tread Water': Dairy Farmers Are Caught in an Economic System with No Winning Formula*, MILWAUKEE J. SENTINEL (May 16, 2019, 5:00 AM), <https://www.jsonline.com/in-depth/news/special-reports/dairy-crisis/2019/05/16/wisconsin-dairy-farms-closing-milk-prices-drop-economics-get-tough/3508060002/> [https://perma.cc/9Y59-UW8W] (attributing other factors as contributing to the decline of the dairy industry: a global surplus of milk, a trade war, and volatile milk prices) [hereinafter Barrett, *Struggling to Tread Water*].

7. See generally Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (arguing that the increasing inequality in our market demands revival and reform in antitrust jurisprudence and policy); Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, ATLANTIC (2018), <https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/> [https://perma.cc/N9SQ-XZVH] (detailing the ever-growing school of thought on how the outsized powers of monopolies are contributing to growing inequality in the current economy).

8. Capper-Volstead Act §§ 1–2, 7 U.S.C. §§ 291–92 (2018).

9. *Id.*

10. Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ANTITRUST SOURCE, Dec. 2010, at 1, 2.

11. SHIELDS, *supra* note 6, at 11.

Yet, the Capper-Volstead Act does not provide complete immunity for agricultural cooperatives. While Capper-Volstead litigation has focused on whether the structure or conduct of the cooperative falls within the purview of the granted immunity, until recently, litigants have often overlooked a small provision in the language of the Act. Section 1 of the Act states that for a cooperative to receive immunity, it must be “*operated for the mutual benefit of the members thereof . . .*”¹² As cooperatives have accrued more control of the dairy industry, and smaller farmers have seen their own power diminish, this language provides a powerful tool for litigants to pierce the veil of Capper-Volstead protection.

This Note unfolds in two parts. Part I offers an overview of inequality in rural America and the challenges posed by a changing dairy industry and cooperative structures to small- and medium-sized dairy farmers. Next, this section provides background on the Capper-Volstead Act, its foundational jurisprudence, and, as a case study, the harmful practices of the largest dairy cooperative in the United States, the Dairy Farmers of America. Part II considers the types of arguments litigants can make to overcome Capper-Volstead immunity. By exploring arguments already made by plaintiffs in litigation against Dairy Farmers of America, and offering new ones, Part II explains three ways potential plaintiffs can show that cooperatives have not operated for the “mutual benefit of the members . . .” These methods are (1) arguing that a cooperative’s coercive actions have been a detriment to its members, (2) arguing that poor governance and management has impeded the cooperative from operating for the benefit of its members, and (3) demonstrating financial losses due to the cooperative’s actions. Pursuing litigation and attacking this language specifically offers litigants several advantages for addressing structural inequality in the dairy industry. Ultimately, this Note argues that the “mutual benefit” language of the Capper-Volstead Act can be a new sword to combat the cooperatives that are unfairly using their power to hurt small and medium farmers, and therefore, should be exposed to antitrust liability.

12. 7 U.S.C. § 291 (2018) (emphasis added).

Part I. Background

A. Rural Inequality and the Dairy Industry

Rural America encompasses striking levels of inequality.¹³ The rural population has declined steadily since 2010, a trend that has only recently begun to reverse.¹⁴ Despite the halt in the population decrease, 42% of rural counties still witnessed decreased net migration between 2012 and 2017.¹⁵ Rural Americans are also more likely to experience poverty when compared to their urban counterparts, and the urban-poverty gap actually increased between 2013 and 2017.¹⁶ Most troubling, nearly one in four rural children are poor, and 61% of all rural counties experience high child poverty rates.¹⁷

Increasing inequality in rural America has coincided with the decline of agriculture. In February of 2018, the U.S. Department of Agriculture predicted that net farming income would reach its lowest level since 2002, with the median farm income projected to be *negative* \$1,316.¹⁸ This decline has reverberated harshly in the dairy industry; 2018 was the fourth straight year dairy prices were below the cost of production.¹⁹ In 2018, a gallon of milk cost a farmer

13. The 2016 election catapulted rural America into the public consciousness. See, e.g., Chad Shearer, *The Small Town-Big City Split that Elected Donald Trump*, BROOKINGS INST. (Nov. 11, 2016), <https://www.brookings.edu/blog/the-avenue/2016/11/11/the-small-town-big-city-split-that-elected-donald-trump/> [<https://perma.cc/GC98-Q6HH>] (“The results suggest that metropolitan America is feeling somewhat optimistic about its social and economic direction, while small town/rural America is increasingly anxious about its future.”); J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016) (recounting one man’s life growing up in rural Appalachia and shining a light on the plight of rural America).

14. ECON. RESEARCH SERV., U.S. DEPT AGRIC., ECON. INFO. BULLETIN NO. 200, RURAL AMERICA AT A GLANCE, 1–2 (2018), <https://www.ers.usda.gov/webdocs/publications/90556/eib-200.pdf?v=5899.2> [<https://perma.cc/4PHE-FKAV>].

15. *Id.* at 2.

16. “The rural poverty rate was 16.4[%] in 2017, compared with 12.9[%] for urban areas.” *Id.* at 5. While Whites make up the majority of those living in poverty in rural America, poverty rates still remain higher among racial and ethnic minority groups in these areas, especially for Black Americans and Native Americans. *Id.*

17. Tracey Farrigan, *Child Poverty Heavily Concentrated in Rural Mississippi, Even More So Than Before the Great Recession*, ECON. RESEARCH SERV., U.S. DEPT AGRIC. (July 2, 2018), <https://www.ers.usda.gov/amber-waves/2018/july/child-poverty-heavily-concentrated-in-rural-mississippi-even-more-so-than-before-the-great-recession/> [<https://perma.cc/W7Q4-44SH>].

18. Siena Chrisman, *Is the Second Farm Crisis Upon Us?*, CIVIL EATS (Sept. 10, 2018), <https://civileats.com/2018/09/10/is-the-second-farm-crisis-upon-us/> [<https://perma.cc/SM76-AFDJ>].

19. *Id.*

approximately \$1.90 to produce, but farmers only received a sales price of \$1.35 per gallon.²⁰ Larger farming operations and cooperatives can bear the brunt of these price declines, but these fluctuations make farming for people like Kyle Kurt unsustainable. The U.S. Department of Agriculture reported in January of 2018 that the total number of dairy farms in the United States had dropped 3% in the last year alone, and approximately 17,000 dairy farms have closed in the last decade.²¹ Even in places like Wisconsin, where dairy is the lifeblood of many local economies, the state lost upwards of 700 dairy farms—almost two a day—in 2018.²²

As it has become increasingly harder for small and medium farms to remain viable in the industry, there has been an alarming spike in the rate of suicides among farmers. Studies have found that farmers experience suicide at rates well above other occupations.²³ Farm advocacy groups are now offering stress management seminars for farmers.²⁴ Because this epidemic has become so severe, it has even prompted rare, bipartisan responses at the federal level.²⁵

A cause of this growing inequality has been the increasing consolidation of the dairy industry across the supply chain. Between 1987 and 2012, the inventory midpoint for the number of cows on a

20. *Id.*

21. *Id.*

22. Barrett, *Struggling to Tread Water*, *supra* note 6.

23. Wendy Jeannette Wehrman Ringgenberg, Trends and Characteristics of Occupational Suicide and Homicide in Farmers and Agriculture Workers, 1992–2010 (May 2014) (unpublished M.S. thesis, University of Iowa) (on file with the University of Iowa Library system); *see also* Nora G. Hertel, *Depression Is Part of Your Life: Farmers Get Real on Stress, Mental Health in Minnesota*, ST. CLOUD TIMES (Dec. 14, 2018, 6:00 AM), <https://www.sctimes.com/story/news/2018/12/14/farmers-stress-mental-health-central-minnesota/2274945002/> [<https://perma.cc/FG2Q-SLN2>] (describing how the University of Minnesota Extension program has organized workshops aimed at curbing depression and suicide).

24. Madison Iszler, *Dairy Farmers Struggle with Price Slump, Depression and Suicide*, TIMES UNION (May 13, 2018), <https://www.timesunion.com/news/article/Dairy-farmers-struggle-with-price-slump-12904574.php> [<https://perma.cc/9248-5S46>].

25. *See* Nora G. Hertel, *Emmer Bill Would Tackle Farmer Suicide, Mental Health*, ST. CLOUD TIMES (Mar. 14, 2018), <https://www.sctimes.com/story/news/local/2018/03/14/congressman-emmer-has-proposed-bill-offer-mental-health-programs-mitigate-farmer-suicides-possibly-j/423513002/> [<https://perma.cc/E8EU-2SF3>] (describing a U.S. House bill that would support local mental health services to farmers and ranchers in the United States); *Farmers First Legislation Boon for Struggling Farmers*, WIS. ST. FARMER (Apr. 19, 2018, 3:57 PM), <https://www.wisfarmer.com/story/news/2018/04/19/farmers-first-legislation-boon-struggling-farmers/533997002/> [<https://perma.cc/6G67-A4AS>] (discussing a bipartisan bill in the Senate to expand mental health services for farmers).

dairy farm grew from 80 to 900 cows.²⁶ In addition, from 2007 to 2012, the proportion of milk cow inventory on smaller operations declined, while the proportion on larger operations increased.²⁷ In short, smaller operations became smaller; bigger operations became bigger. This concentration is also highly evident in the buyers' market, which includes processors and retail stores.²⁸ For example, Dean Foods, a fluid milk processor, controls about 40% of the entire fluid milk processing market in the United States.²⁹ Vertical strategic alliances are prevalent in several regional markets as well, where processors and buyers are entering into exclusive supply agreements with certain cooperatives.³⁰

Additionally, this consolidation has manifested in the cooperative model for agricultural business broadly, and with dairy cooperatives specifically.³¹ When the Capper-Volstead Act was passed in 1922, most cooperatives were local organizations of farmers and of similar size.³² Almost one hundred years later, the size of cooperatives would be unimaginable to the drafters of the Act. Of the one hundred largest cooperatives in the United States, the smallest had revenues in excess of \$300 million and assets worth \$43 million.³³ By the 1990s, the volume of products handled by cooperatives had grown to \$112.2 billion.³⁴ In 2008, the top four cooperatives in the United States accounted for 40% of the country's milk production.³⁵ Today, the largest cooperative, Dairy Farmers of America, Inc., (DFA) buys milk from 18,000 farmer-members and controls almost a third of the nation's raw milk supply.³⁶

26. MacDonald et al., *supra* note 5, at 36.

27. 2012 CENSUS OF AGRICULTURE, *supra* note 5, at 2.

28. HIROMITSU MIYAKAWA, AM. ANTITRUST INST., COMPETITIVE ISSUES IN THE DAIRY INDUSTRY: THE PENDING DFA/NDH/HOOD TRANSACTION 10 (2004).

29. *Id.*

30. *Id.*

31. Keri Jacobs, *Ag Cooperatives Consolidating, Too*, AG DECISION MAKER (Iowa State Univ. Extension & Outreach) May 2017, at 3.

32. Donald M. Barnes & Christopher E. Ondeck, *The Capper-Volstead Act: Opportunity Today and Tomorrow*, Paper Presented at National Council of Farmer Cooperatives' National Institute on Cooperative Education (Aug. 5, 1997), *reprinted in* U. OF WIS. CTR. FOR COOPERATIVES, <http://www.uwcc.wisc.edu/info/capper.html> [<https://web.archive.org/web/20180811114231/http://www.uwcc.wisc.edu/info/capper.html>].

33. Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 481 (2013) [hereinafter Carstensen, *Obsolete Statutes*].

34. *See* Barnes & Ondeck, *supra* note 32.

35. SHIELDS, *supra* note 6, at 11.

36. John Burnett, *Independent Farmers Feel Squeezed by Milk Cartel*, NPR (Aug.

Consolidation leaves smaller dairy farmers with little market power. First, smaller operations are ill-equipped to endure volatile markets for milk, making it nearly impossible for them to operate—let alone compete—against their larger counterparts.³⁷ Second, because dairy cooperatives play such an essential role in the marketing and processing of raw fluid milk, independent farmers and smaller dairy cooperatives are forced to accept lower prices for milk or be frozen out of markets altogether.³⁸ As Nate Wilson, a retired farmer and writer for a dairy industry newsletter stated, “co-ops would battle each other for market share, lowering the price to the processor till the processor bought from *somebody*. It was always to the detriment of the farmer.”³⁹ In places like New England, some cooperatives have refused to purchase milk from small dairy farms if the farmers rejected the cooperatives’ purchasing terms, leaving these farmers with no way to bring their milk to market.⁴⁰

Cooperatives also exert their power over small dairy farms in less subtle ways. Often, large cooperatives are vertically integrated along the entire supply chain, made up of not just processing or bottling plants, but also hauling operations and health code inspectors.⁴¹ If cooperatives are the sole providers of these essential services, they can use access to them as leverage to prevent small farmers from leaving the cooperative.⁴² In some instances, cooperatives have used the specter of a health code violation, or

20, 2009), <https://www.npr.org/templates/story/story.php?storyId=112002639> [https://perma.cc/XGF3-MBCE].

37. Jim Dickrell, *Consolidation of Dairy Industry is Changing Market Dynamics*, FARM J. (Nov. 1, 2018), <https://www.milkbusiness.com/article/consolidation-of-dairy-industry-changing-market-dynamics> [https://perma.cc/2N7P-996R]. See generally Anna-Lisa Laca, *The Death of the Mid-sized Dairy*, WIS. STATE FARMER (June 14, 2018), <https://www.wisfarmer.com/story/news/2018/06/14/death-mid-sized-dairy/679979002/> [https://perma.cc/U735-24LJ] (“When it comes to surviving current market forces, Covington says large and small [boutique style] farms will be in positions to ride the waves, while mid-sized farms will likely be forced out of business.”).

38. MIYAKAWA, *supra* note 28, at 1–2.

39. Lela Nargi, *What’s Behind the Crippling Dairy Crisis? Family Farmers Speak Out*, CIVIL EATS (Nov. 5, 2018), <https://civileats.com/2018/11/05/whats-behind-the-crippling-dairy-crisis-family-farmers-speak-out/> [https://perma.cc/L73K-G9LH].

40. See Rebecca Carballo, *Cooperative Mergers Reduce Options for Dairy Farmers*, MILWAUKEE J. SENTINEL (Feb. 17, 2017), <https://www.jsonline.com/story/money/business/2017/02/17/cooperative-mergers-reduce-options-dairy-farmers/97461556/> [https://perma.cc/TJ2N-6Y3G].

41. See John Christensen, *Dairy Farms in Crisis, Part II*, CHRON.-EXPRESS (June 1, 2018), <https://www.chronicle-express.com/news/20180601/dairy-farms-in-crisis-part-ii> [https://perma.cc/6TJWJ-YQR4].

42. See *id.*

have arbitrarily administered one, to suppress farmers' milk prices or prevent them from seeking business elsewhere.⁴³

Whether it be through consolidation, vertical integration, or brass-knuckle coercion, the goal of these tactics is for the cooperative to amass as much control as possible in a particular market. When they do, small farmers have no other choice to bring their milk to market and must accept the terms of the cooperative.⁴⁴ As a result, cooperatives can set prices artificially low when buying from farmers, and extract greater profits when they sell further down the supply chain.⁴⁵ For example, in recent litigation, it came to light that a provision in a supply chain agreement between DFA and a processor required DFA farmers to sell their raw milk at the lowest price in the marketplace.⁴⁶

The growing size of these organizations raises questions of whether cooperatives are truly accountable to their members. While dairy cooperatives are structured to ensure that each member has a vote in major decisions affecting the cooperative, when membership rolls number in the thousands and span several states, experts are worried that the interests of small farms are being ignored.⁴⁷ Additionally, the growing size of cooperatives makes it increasingly difficult for members to reign in self-serving managerial actions. Unlike large corporations, which are subject to accounting systems, information disclosure, auditing, and regulation, cooperatives have no mechanisms to ensure transparency or that managerial decisions are subject to membership approval.⁴⁸ As a result, cooperatives like DFA have frequently acquired interests in processing plants or entered into joint ventures which have operated to the detriment of their own members, but served as a financial boon for management and

43. See Leah Douglas, *How Rural America Got Milked*, NEW FOOD ECON. (Jan. 18, 2018), <https://thecounter.org/how-rural-america-got-milked/> [<https://perma.cc/JPJ6-F9WJ>] (“[Dairy Farmer Garrett Sitts] charges that milk inspectors controlled by his own co-op, Dairy Farmers of America, threatened him and many other farmers with health care violations if they dared to raise questions about DFA’s business practices.”).

44. See *id.*

45. See Andrew Martin, *In Dairy Industry Consolidation, Lush Pay Days*, N.Y. TIMES (Oct. 27, 2012), <https://www.nytimes.com/2012/10/28/business/in-dairy-industry-consolidation-lush-paydays.html> [<https://perma.cc/VQC4-6C5L>].

46. See *id.*

47. See Carballo, *supra* note 40.

48. Carstensen, *Obsolete Statutes*, *supra* note 33, at 479–80.

business partners.⁴⁹ Some of these ventures resulted in million dollar payoffs for those with close ties to DFA management.⁵⁰

Typically, small farmers could turn to the Sherman and Clayton Acts' provisions to counter the harms of consolidation and anticompetitive actions. In fact, empirical evidence has shown that statutory protections from these kinds of behaviors are much more likely to ensure that markets remain competitive.⁵¹ However, because of the Capper-Volstead Act, many of these cooperatives are shielded from such scrutiny.

B. *The Capper-Volstead Act*

The Capper-Volstead Act was born out of the desire to protect small farmers. In the late nineteenth century, the cooperative model was emerging as a way for individual farmers to negotiate against large, rapidly consolidating businesses.⁵² To gain equal footing against these large buyers and to mitigate operation costs, farmers started to band together in the processing and marketing of commodities.⁵³ However, in 1890, with the passage of the Sherman Act, cooperatives were exposed to antitrust liability because the law prevented farmers and businesses alike from "combining or conspiring" together.⁵⁴ Indeed, prior to the passage of the Capper-Volstead Act, a number of states had brought suits against cooperatives under their respective antitrust statutes.⁵⁵ By 1922, cooperatives were thriving and prevalent in several agricultural sectors.⁵⁶ Thus, to ensure that cooperatives were protected from antitrust scrutiny, Congress passed the Capper-Volstead Act.⁵⁷

The legislative history of the Capper-Volstead Act makes clear that Congress sought to restructure the agricultural industry to

49. See, e.g., Martin, *supra* note 45.

50. See *id.*

51. Peter C. Carstensen, *Comments for the United States Departments of Agriculture and Justice Workshops on Competition Issues in Agriculture*, in LEGAL STUDIES PAPER SERIES 2010, at 20–21 (Univ. Wis. Law Sch., Paper No. 1103, 2010).

52. Analce Heach Leach, *The Almighty Railroad and the Almighty Wal-Mart: Exploring the Continued Importance of the Capper-Volstead Act to the American Farmer and the Agricultural Marketplace*, 32 *HAMLIN J. PUB. L. & POL'Y* 261, 268 (2010).

53. *Id.*

54. *Id.* at 269.

55. Carstensen, *Obsolete Statutes*, *supra* note 33, at 464.

56. Leach, *supra* note 52, at 271.

57. Carstensen, *Obsolete Statutes*, *supra* note 33, at 465.

benefit farmers and consumers, with the cooperative model as the agent of this change.⁵⁸ Senator Kellogg said in his introduction of the bill, “[t]he main object of the cooperative association is to get reasonable prices for the farmer, principally through lessening the cost of marketing and selling his products and cutting down the difference between what the farmer receives and what the public finally pays.”⁵⁹ Legislators intended the Capper-Volstead Act to be an important safeguard for farmers and consumers.⁶⁰ The drafters of the Act widely viewed predatory middlemen and buyers as the direct cause of the existing market imbalance, exploiting both producers and consumers alike. For the 62nd Congress, the Capper-Volstead Act represented a counterweight against them.⁶¹ Lastly, the drafters also had a clear vision of who the bill was intended to help: small, individual farmers.⁶²

The Capper-Volstead Act contains only two sections, which outline the contours of the granted immunity for cooperatives. Section 2 of the Act authorizes the Secretary of Agriculture to oversee and regulate the conduct of cooperatives if any cooperative “monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced.”⁶³ Section 1 of the Act defines the mandatory structure of the cooperative in order to receive Capper-Volstead immunity.⁶⁴ First, it limits immunity to cooperatives only made up of “persons engaged in the production of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers.”⁶⁵ Second, these cooperatives may “collectively” participate in “processing, preparing for market, handling, and marketing in interstate and foreign commerce, such

58. *Id.*

59. 62 CONG. REC. 2049 (1922).

60. *Id.*

61. 62 CONG. REC. 2059 (1922) (Statement of Sen. Capper) (“There is a wide margin representing the rake-off of the speculative middleman.”).

62. *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 830–31 (1978) (Brennan, J., concurring in part and dissenting in part) (“At the time the Capper-Volstead Act was enacted . . . [t]he economic model was a relatively large number of small, individual economic farming units which actually tilled the soil and husbanded animals”); *see also* 62 CONG. REC. 2257 (1922).

63. 7 U.S.C. § 292 (1922). However, the Secretary of Agriculture has never used this power. Varney, *supra* note 10, at 4 n.26. Additionally, the Supreme Court has ruled that the Secretary does not have sole jurisdiction over antitrust law enforcement in Section 2 of the Act. *United States v. Borden*, 308 U.S. 188, 204 (1939) (rejecting the argument that judicial power cannot be invoked unless the Secretary of Agriculture acts).

64. 7 U.S.C. § 291 (1922).

65. *Id.*

products of persons so engaged.”⁶⁶ However, this conduct is only allowed if, “such associations are *operated for the mutual benefit of the members thereof*, as such producers”⁶⁷

Much of the litigation interpreting the Capper-Volstead Act has focused on whether the structure of a cooperative meets the requirements of Section 1 or whether the conduct of the cooperative is not protected by the Act. Courts have strictly interpreted who qualifies as a “producer” under the Act. The presence of even one non-producer member is sufficient to destroy immunity protection.⁶⁸ Additionally, the case law has not definitively ruled at what point a vertically integrated cooperative would fall outside the boundaries of the Act. Yet, Justice Brennan, in a concurring opinion, suggested that “[a]t some point along the path of downstream integration, the function of the [Capper-Volstead] exemption for its intended purpose is lost”⁶⁹

The Capper-Volstead Act does not allow for cooperatives to achieve market dominance through exclusionary or predatory acts. Several court cases have identified behavior from cooperatives that will exempt them from Capper-Volstead immunity. In *Maryland & Virginia Milk Producers Ass’n v. United States*, the Supreme Court was explicit that “[the Act] does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way.”⁷⁰ The Court ultimately ruled that activities, like

66. *Id.*

67. *Id.* (emphasis added). The rest of Section 1 reads:

[A]nd conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

68. See *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) (finding that a cooperative was not entitled to immunity because certain members were not actual growers but instead private packing houses); see also *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816 (1978) (holding that a cooperative of chicken growers and processors were not entitled to Capper-Volstead protection when some members were simply processors).

69. *Nat’l Broiler Mktg. Ass’n.*, 436 U.S. at 836 (Brennan, J., concurring).

70. *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 466–67 (1960).

attempting to exclude and eliminate non-affiliated cooperatives and producers, interfering with truck shipments, and engaging in boycotts of particular buyers all fell outside the “legitimate objects’ of a cooperative.”⁷¹ In an Eighth Circuit case, *Alexander v. National Farmers Organization*, the court found that overt attempts at boycotting independent purchasers, supply-shortening, and purposefully delaying deliveries to independent producers by the cooperative’s hauling operation were predatory.⁷² To date, courts have declined to articulate an exact standard to describe what may be “exclusionary or predatory conduct.”⁷³ Despite the ambiguity in the jurisprudence, courts have consistently interpreted antitrust exemption for cooperatives strictly and narrowly.⁷⁴

Surprisingly, few courts have interpreted the meaning of the language “operated for the mutual benefit of members thereof”⁷⁵ The most significant discussion has come from the Supreme Court in *Case-Swayne Co. v. Sunkist Growers, Inc.*⁷⁶ There, a producer of orange juice alleged conspiracies to restrain trade in violation of Section 1 of the Sherman Act, and Sunkist countered that their actions were protected under the Capper-Volstead Act.⁷⁷ The Court found Sunkist was not entitled to immunity because, although constituting a small number of non-grower members, the makeup of the cooperative did not fall within the “quite specific terms to producers of agricultural products.”⁷⁸ Sunkist argued that the non-producer members’ participation ultimately helped the entire association. This argument was rejected by the Court:

[T]he proviso in [Section] 1—“[t]hat such associations are operated for the mutual benefit of the members

71. *Id.* at 468.

72. *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1187, 1195–96 (8th Cir. 1982). *But see* *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30 (2d Cir. 1983) (upholding a cooperative’s use of its market power to boycott certain buyers unless they changed their prices).

73. Carstensen, *Obsolete Statutes*, *supra* note 33, at 487.

74. *Id.*

75. 7 U.S.C. § 291 (2018).

76. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 393–94 (1967). At least one other case has discussed this language, finding that a cooperative having ties to a state university extension program did not indicate that the cooperative was operating to the mutual benefit of its members. *Agritronics Corp. v. Nat’l Dairy Herd Ass’n*, No. 94-CV-0066, 1994 WL 542203, at *6 (N.D.N.Y. Sept. 22, 1994).

77. *Case-Swayne, Co.*, 389 U.S. at 389–90.

78. *Id.* at 393.

thereof”— . . . was designed to insure [sic] that qualifying associations be *truly organized and controlled by, and for, producers*. In short, Congress was aware that even organizations of producers could serve a purpose other than the mutual obtaining of a fair return to their members, as producers, . . . and the proviso adds a measure of insurance that such organizations do not gain the Act's benefits.⁷⁹

Even in 1968, the Court contemplated that cooperatives may not always operate for the mutual benefit of its own members.

More recently, two antitrust cases against the dairy industry have involved claims of Capper-Volstead immunity and the question of whether the cooperatives at issue truly operated for the mutual benefit of their members.⁸⁰ Both cases involved DFA. In the first case, *In re Southeastern Milk*, a group of independent farmers and DFA cooperative members brought suit against DFA, Dean Foods, and National Dairy Holdings (NDH) for conspiring to depress prices and engaging in anticompetitive behavior.⁸¹ Allegedly, Dean Foods and NDH, the two largest milk bottlers in the United States, entered into long-term, full-supply agreements with DFA in the Southeastern region of the country.⁸² In doing so, DFA gained access to 77% of the fluid Grade A milk bottling capacity in the Southeast, and due to regulatory requirements, all DFA members and independent dairy farmers in the region were required to dedicate a certain amount of their raw milk supply for bottling.⁸³ To exert even more control over the market, DFA established the Southern Marketing Agency (SMA), a marketing and hauling cooperative, and forced independent farmers to join the cooperative in order to gain access to the bottling plants.⁸⁴

79. *Id.* at 393–94 (emphasis added) (quoting Capper-Volstead Act, § 1, 7 U.S.C. § 291 (2018)).

80. Other recent antitrust litigation in the dairy industry has also examined whether herd retirements of cooperative members constitutes conduct falling outside the protections of the Capper-Volstead Act. While the plaintiffs alleged that each cooperative at issue had not operated for the “mutual benefit of its members thereof,” herd retirement was a residual issue in the litigation, which eventually settled. See Class Action Complaint ¶ 100, *Edwards v. Nat'l Milk Producers Fed'n*, No. 4:11-cv-4766, 2011 WL 4802918 (N.D. Cal. Sept. 26, 2011). *But cf.* Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 451 (2015) (arguing that actions to reduce supply in order to enhance prices are protected conduct under the Capper-Volstead Act).

81. *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2008 WL 2368212, at *1 (E.D. Tenn. June 6, 2008).

82. *Id.*

83. *Id.*

84. *Id.* at *2.

Additionally, SMA required the DFA members to pay excessive fees and dues through its hauling operations.⁸⁵ Once Dean, DFA, and NDH had gained control of vast amounts of the market, they began pooling and flooding substantial quantities of Grade A milk produced outside the Southeast into the market with the intent of depressing prices.⁸⁶

In *Allen v. Dairy Farmers of America, Inc.*, a similar scheme was alleged, this time in the Northeast.⁸⁷ There, DFA attempted to assume control of the market by “tying up access to milk bottling plants in the Northeastern United States through unlawful exclusive supply agreements,” and then coerced independent members to join its own marketing agency.⁸⁸ DFA then fixed “artificially low levels” for fluid raw milk prices compared to what farmers would have otherwise received in a competitive marketplace.⁸⁹ Moreover, the *Allen* plaintiffs described in vivid detail the ways that DFA and its marketing cooperative, Dairy Marketing Services, coerced independent farmers to join the cooperative and retaliated against its own members if they sought to leave the cooperative.⁹⁰ These actions included threatening to find dubious health code violations on members, imposing exorbitant charges on cooperatives or farmers, and entering into “unwritten agreement[s]” to not accept the business of farmers in other cooperatives.⁹¹

The plaintiffs in *Southeastern Milk* and *Allen* have since settled their class action suits.⁹² Interestingly, the plaintiffs in both

85. *Id.*

86. *Id.*

87. *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 331 (D. Vt. 2010).

88. *Id.*

89. *Id.*

90. Revised Consolidated Amended Class Action Complaint and Jury Demand ¶¶ 157, 161–72, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-00230-cr, 2011 WL 1523763 (D. Vt. Apr. 13, 2011) [hereinafter Revised Consolidated Amended Class Action Complaint, *Allen*].

91. *Id.* Many of these allegations may be borne out soon in litigation. A group of the *Allen* plaintiffs eventually opted out of a settlement agreement with DFA. In October of 2019, a district judge in Vermont denied DFA’s motion for summary judgment, allowing these plaintiffs’ Sherman Act claims to go to trial. Specifically, the judge held a jury could find DFA acquired monopoly power in a “predatory fashion,” exempting DFA from Capper-Volstead immunity. *Sitts v. Dairy Farmers of Am., Inc.*, No. 2:16-cv-287, 2019 WL 4739533, at *34 (D. Vt. Sept. 27, 2019).

92. See Danyll W. Foix, *Litigating Capper-Volstead Cases: Developments and Insights from Recent Decisions*, 4 A.B.A. ANTITRUST SEC. AGRIC. & FOOD COMM. E-BULL. 6–10 (2013), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at800006_newsletter_2013spring.authcheckdam.pdf

cases alleged that the actions taken by DFA, both in their coercive acts and attempts to depress the price of milk, precluded the possibility of the cooperative operating for the mutual benefit of its members.⁹³ But because both cases settled, the courts have not ruled on the question of when and how a cooperative may not operate for the mutual benefit of its members.

Part II: Analysis

The language in Section 1 of the Capper-Volstead Act requiring that cooperatives be “operated for the mutual benefit of the members thereof” to receive immunity provides fertile ground to attack claimed antitrust immunity for powerful cooperatives and address the harmful cooperative practices that hurt small and medium dairy farms. This Section presents arguments articulated by the plaintiffs in *Allen* and *Southeastern Milk*, as well as new ones. Specifically, potential plaintiffs can, and should, attack claimed immunity of cooperatives on three grounds: demonstrating that a cooperative has taken coercive actions against its own members, that the governance and management of the cooperative has not represented the interest of its members, or that the cooperative’s actions have resulted in financial losses to its members. Furthermore, pursuing litigation against cooperatives and undermining claimed immunity on these grounds is an advantageous and effective way to address the structural inequality that exists in the dairy industry.

A. Coercive Acts

One method plaintiffs can use to demonstrate that a cooperative is not “operated for the mutual benefit” of its members is by arguing that certain coercive acts taken by the cooperative against its members are *per se* violations. As discussed in *Allen* and *Southeastern Milk*, DFA engaged in a number of coercive practices aimed at its own members. Some of these included unspoken

[<https://perma.cc/BQQ3-MNVV>]. A group of the class members in *Allen* have since decided to continue the suit against DFA. See *Sitts*, 2019 WL 4739533 at *1.

93. See Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶ 269; Plaintiff’s Opposition to Defendant Southern Marketing Agency’s 12(b)(6) Motion to Dismiss Plaintiffs’ Complaint for Failure to State a Claim, at 7–8, *Scott Dairy Farm, Inc. v. Dean Foods Co.*, No. 2:07CV00208 58, 2007 WL 4920044 (E.D. Tenn. Nov. 28, 2007) [hereinafter Plaintiff’s Opposition to Defendant Southern Marketing Agency’s 12(b)(6) Motion to Dismiss, *In re Se. Litig.*]. *Scott Dairy Farm* is a case in the *Southeastern Milk* multidistrict litigation.

agreements among competing cooperatives to deny business to non-members, retaliation against its own members for considering to leave, and the imposition of excessive fees and costs on hauling operations.⁹⁴ In arguing these actions *per se* destroy Capper-Volstead immunity, plaintiffs can point to the case law defining “predatory conduct” from Section 2 of the Act to inform a court’s interpretation of the mutual benefit language in Section 1.⁹⁵

The “predatory conduct” cases illustrate how coercive behaviors against other cooperatives is contradictory to the Capper-Volstead Act, and that this behavior is not for the mutual benefit of its members. *Maryland & Virginia Milk Producers* stands for the proposition that actions taken by cooperatives to exclude or eliminate producers or cooperative associations through boycotts are not Capper-Volstead protected behavior.⁹⁶ This behavior is similar to the “unwritten agreements” into which the DFA entered with other cooperatives to ensure that its members could not find business elsewhere.⁹⁷ Additionally, both *Maryland & Virginia Milk Producers* and *Alexander* castigated the ways the cooperative used hauling operations to exert pressure on independent producers and cooperatives as unlawful.⁹⁸ In the cases of *Allen* and *Southeastern Milk*, hauling operations and excessive costs on producers were precisely the ways that DFA retaliated against its own members. And, more broadly, it was the vertical nature of DFA’s operation itself that ensured compliance from its own members. Just like the cooperatives in *Maryland & Virginia Milk Producers* and *Alexander* used their vertical structure in a predatory fashion, the manner in which DFA used its vast vertical structure to leave farmers with no other avenues to bring their raw milk to market can be analogized to the existing Section 2 jurisprudence.

Potential defendants will likely counter that this case law can only be limited to actions taken by cooperatives against other

94. Amended Class Action Complaint, *Allen*, *supra* note 90, ¶¶ 3, 157, 161–72; Corrected Consolidated Amended Complaint at ¶ 3, *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2008 WL 5190885 (E.D. Tenn. June 6, 2008).

95. A common rule of statutory construction is that “[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute.” *Smith v. United States*, 508 U.S. 223, 233 (1993). Indeed, the mutual benefit language must be informed by the Capper-Volstead Act in its entirety.

96. *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 468 (1960).

97. Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶¶ 3, 161–72.

98. *Md. & Va. Milk Producers*, 362 U.S. at 469; *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1187, 1195–96 (8th Cir. 1982).

cooperatives. But as Justice Black stated in his opinion in *Maryland & Virginia Milk Producers*, the Capper-Volstead Act does not allow cooperatives “unrestricted power to restrain trade or to achieve monopoly”⁹⁹ While these cases examine the behavior of cooperatives taken against other cooperatives, the same actions taken by DFA are aimed to compel the subservience of its members to the cooperative. This behavior restrains trade by preventing members from possibly seeking better prices in a different cooperative and maintains DFA’s market dominance. These actions thrust exacting costs upon cooperative members in the name of preserving the cooperative’s market power. Applying the holdings and reasoning from Section 2 “predatory conduct” cases to actions taken by cooperatives against their own members is one avenue to challenge Capper-Volstead immunity.

B. Governance Arguments

Potential plaintiffs should also argue that when the management of the cooperative comes at the detriment of individual members, the cooperative has not acted for the mutual benefit of members and should lose Capper-Volstead immunity. As mentioned above, the governance structure of large cooperatives has resulted in little transparency and accountability for poor managerial decisions.¹⁰⁰ Such problematic structures have allowed managers to exploit markets, enter into business deals that have questionable benefits for producers, and allocate the profits of these exploits to themselves and their business partners.¹⁰¹ These kinds of practices do not mutually benefit members of the cooperative, and can be challenged to show that cooperatives are not entitled to Capper-Volstead immunity.

When considering potential antitrust litigation against a cooperative, there are several aspects of the cooperative’s governance structure plaintiffs should scrutinize to see if management decisions or business ventures are truly being made in the members’ interest. First, potential plaintiffs should examine exactly who is benefiting from the cooperative’s business ventures. As was illustrated in *Allen*, it appeared that a close associate of the CEO of DFA earned \$100 million for his stake in milk plants, but the partner had paid only \$6.9 million for the plants two years

99. *Md. & Va. Milk Producers*, 362 U.S. at 467.

100. See *supra* Part I; Carstensen, *Obsolete Statutes*, *supra* note 33, at 479–80.

101. Carstensen, *Obsolete Statutes*, *supra* note 33, at 481.

earlier.¹⁰² Often, these kinds of ventures exploit the investment, equity, and debt of the cooperative's members.¹⁰³ If management cannot justify these kinds of deals, then cooperative management is not operating for the mutual benefit of its members and cannot be entitled to antitrust immunity.

Plaintiffs should also examine deals by cooperatives that significantly expand their interest in processing plants. The U.S. Department of Agriculture does not require that any profits made from joint ventures or processing operations go to producer members of cooperatives.¹⁰⁴ Especially when cooperatives enter contracts with processors to offer raw fluid milk from producers at the lowest price in the markets, entering such lopsided ventures is clearly a detriment to producer members.¹⁰⁵

When cooperatives enter into joint ventures with processors for interest in processing plants, management inherently enters into a conflict of interest. While the cooperative's goal is to obtain the highest price for its members' milk, a processor's interest is to obtain the lowest price possible from the producer.¹⁰⁶ Given that management is not required to share any profits gained in processing, management has great incentive to align its interest with the processors, rather than the individual members. Indeed, DFA's income from processing comprised 60% of its net income in 2016, which was not shared with farmer members.¹⁰⁷ If this occurs, plaintiffs should argue that taking these kinds of significant interests in processing plants will ensure the cooperative does not operate for the members' mutual benefit.

102. *Compare* Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶¶ 74, 124 (discussing the \$100 million payment of the promissory note, though other financial information is redacted), *with* *Martin*, *supra* note 45 (suggesting, through context, although redacted, the same amount of money).

103. Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶ 184.

104. *Id.* ¶ 189.

105. *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 331 (D. Vt. 2010).

106. Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶ 62.

107. Leah Douglas, *Farmer's Case Against Giant Dairy Co-Op Will Go to Trial*, MEREDITH AGRIMEDIA: SUCCESSFUL FARMING (Oct. 2, 2019), <https://www.agriculture.com/news/business/farmers-case-against-giant-dairy-co-op-will-go-to-trial> [<https://perma.cc/DG4G-827J>]. Recently, Dean Foods, the largest milk processor in the United States, filed for Chapter 11 bankruptcy. They have since announced they are in negotiations with DFA to have the cooperative buy the entire company. Jordan Valinsky, *America's Largest Milk Producer Files for Bankruptcy*, CNN BUS. (Nov. 12, 2019), <https://www.cnn.com/2019/11/12/business/dean-foods-bankruptcy/index.html> [<https://perma.cc/NM3R-UCKJ>].

Moreover, this argument is bolstered by Justice Brennan's concern in *National Broiler*. In his concurrence, he noted that at a certain point of vertical integration by the cooperative, it no longer meets its intended purpose under the Capper-Volstead Act.¹⁰⁸ Brennan's concurrence went to great lengths to discuss the possible ramifications of allowing processors, whose sole function is processing, to be granted Capper-Volstead immunity. In his opinion, this would lead the "behemoths of agribusiness" to accrue unfettered power and the "exploitation and extinction" of farmers at the hands of "men who control the avenues and agencies" that bring milk to market.¹⁰⁹ The DFA litigation makes abundantly clear that Brennan's concerns were realized: that vertically integrating milk processing and hauling operations led to the "exploitation and extinction" of farmers at the hands of the cooperatives. This kind of integration, therefore, should exempt these cooperatives from Capper-Volstead immunity.¹¹⁰

As noted earlier, cooperatives—even large cooperatives such as DFA—are not required to perform any kind of financial disclosure, nor are their managerial decisions subject to member approval. This lack of requirement or approval makes accessing cooperative business documents difficult. In some cases, cooperatives have been outright hostile to allowing members access to these documents.¹¹¹ While the applicable litigation procedure seems like a hurdle to making governance arguments against Capper-Volstead immunity, it offers the potential for plaintiffs to obtain these documents in discovery. Courts have affirmed that Capper-Volstead immunity is necessarily a fact-intensive inquiry, and thus, if pleadings are sufficient, cannot be adjudicated on Federal Rule of Civil Procedure 12(b)(6) grounds.¹¹² Therefore, if plaintiffs reach discovery, these documents can be accessed.

108. *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 834–36 (1978) (Brennan, J., concurring).

109. *Id.* at 834–35 (quoting 62 CONG. REC. 2058 (1922)).

110. *But see* David P. Clairborne, *The Perils of the Capper-Volstead Act and Its Judicial Treatment*, 38 WILLAMETTE L. REV. 263 (2002) (arguing that the Capper-Volstead Act would *permit* vertically integrated processors to be immune from antitrust scrutiny).

111. Revised Consolidated Amended Class Action Complaint, *Allen*, *supra* note 90, ¶ 190.

112. Foix, *supra* note 92, at 8.

C. *Showing Pecuniary Losses*

Finally, plaintiffs can show that both coercive actions and governance problems that result in financial losses to members illustrate that the cooperative is not being operated for the members' mutual benefit. Prime examples are the actions taken by DFA in the *Allen* and *Southeastern Milk* cases. In both cases, the plaintiffs alleged that supply agreements that DFA entered into with milk bottling processors ultimately resulted in depressed prices for raw milk.¹¹³ The plaintiffs intended to present expert witnesses illustrating the actual financial losses experienced by members from the actions.¹¹⁴ To explain hauling contracts or effects from consolidation, plaintiffs can admit expert testimony to illustrate how they suffered financial losses because of these actions, and therefore, defendants are not acting for the mutual benefit of the cooperative's members. Finally, following the DFA merger in *Allen*, where the cooperative took out a significant interest in a number of processing plants, the plaintiffs had demonstrated exactly how this deal hurt their members' financial interest. Over the alleged antitrust period, the plaintiffs demonstrated that the price for raw fluid milk declined, while processors' margins saw gains over the same period.¹¹⁵

D. *Mutual Benefit Language and Litigation as a Preferred Strategy to Address Inequality in the Dairy Industry*

Using mutual benefit language to litigate antitrust claims against cooperatives is advantageous for several reasons. First, given the dearth of case law interpreting the language, it provides space for creative arguments and allows litigants to mold claims to address truly egregious practices of cooperatives, like coercive hauling contracts, discrimination based on the size of farmers, and price manipulation. Second, litigants have a statutory interpretation advantage against cooperatives, in that exemptions from antitrust laws must be construed narrowly.¹¹⁶ Finally, it is a measured way to pursue antitrust violations against the

113. See Revised Consolidated Amended Class Action Complaint, *Allen*, supra note 90, ¶¶ 3–4, 30; Plaintiff's Opposition to Defendant Southern Marketing Agency's 12(b)(6) Motion to Dismiss, *In re Se. Litig.*, supra note 93, at *1, *7–9.

114. *In re Se. Milk*, No. 2:08-MD-1000, 2012 WL 1981511, at *3 (E.D. Tenn. June 1, 2012).

115. Revised Consolidated Amended Class Action Complaint, *Allen*, supra note 90, ¶ 193.

116. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

cooperatives. Cooperatives are an indispensable part of the dairy industry, and more often than not, truly represent the interests of their members.¹¹⁷ Some have even proposed the use of cooperatives as a way to combat monopoly power.¹¹⁸ Challenging cooperatives through this language can ensure that only cooperatives that truly act against the interests of their members are denied Capper-Volstead immunity.

Also, litigation as a strategy to remedy this inequality is much more achievable than the alternative of pursuing change through the political arena. Since the 1970s, the Department of Justice has frequently re-examined the utility of the Capper-Volstead Act to meet the current realities of the dairy industry. Each time, the Capper-Volstead Act remained untouched.¹¹⁹ In fact, when the U.S. Assistant Attorney General for Antitrust went so far as to say that “an examination of whether the law is serving its intended purposes may lead to a conclusion that it is not the right law for the state of the industry at this time,”¹²⁰ she was met with a “tsunami” of pushback from farmers and legislators.¹²¹ Additionally, reform at the local level is unlikely to seriously address the challenges posed by large cooperatives, given that many cooperatives now span several states.¹²² The “iconic status” of the Capper-Volstead Act among politicians and farmers alike makes policy changes effectively untenable.¹²³

Some may argue that the dearth of case law interpreting the meaning of the mutual benefit language demonstrates that this part of the Capper-Volstead Act is inconsequential. That is simply not the case. The structure of Section 1 of the Act makes clear that “operat[ion] for the mutual benefit” of producers, even though not explicitly enumerated, is a required element to receive Capper-

117. See Douglas, *supra* note 43 (illustrating how Westby Cooperative Creamery has sustained the rural, local economy).

118. See Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST. L. REV. 1 (2019).

119. Kenneth R. O'Rourke & Andrew Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SECTION ST. B. CAL., Fall 2010, at 69, 71–72.

120. *Id.*

121. Carstensen, *Obsolete Statutes*, *supra* note 33, at 496.

122. *Id.*

123. *Id.* at 462–63.

Volstead protection.¹²⁴ The legislative history of the Act and its subsequent jurisprudence reinforce this notion.

The legislative history of the Capper-Volstead Act shows that it was intended to protect small, individual producers from greedy “middlemen.” One express concern during the bill’s debate was that individual farmers were prone to financial exploitation, and therefore, organizing in this manner would improve their market position.¹²⁵ The mutual benefit language ensured that individual producers would truly reap the benefits of the cooperative, not suffer at its hands. Indeed, the legislative history demonstrates that some current-day cooperative management would almost certainly draw the ire of the Capper-Volstead Act’s drafters. One Senator stated during the bill’s deliberations that “a policy cannot always exist under which those who toil must toil at a loss and contribute to those who neither toil nor spin, but sit in their palaces at mahogany desks and draw in the rake-off in the shape of a middleman’s profit.”¹²⁶ During the time of the allegations against DFA, its CEO made \$31.6 million during his seven-year tenure.¹²⁷

Moreover, the case law has paid special attention to the original intent of the Act to protect small farmers. In *National Broiler*, Justice Brennan stated “[i]t was the disparity of power between the units at the respective levels of production that spurred this congressional action.”¹²⁸ As Justice Marshall laid out in his majority opinion in *Case-Swayne*, the statute was crafted with small dairy farmers in mind: “qualifying associations [should] be truly organized and controlled by, and for, producers.”¹²⁹ The Court realized that the drafters were well-aware that cooperatives could potentially operate for interests other than “the mutual obtaining of a fair return to their members”¹³⁰ While perhaps the drafters did not contemplate that the management of cooperatives would generate upwards of \$31.6 million in salaries and pursue deals largely to enrich management and shareholders,¹³¹ the purpose of the Act is unequivocal. The Act was meant to help protect the model

124. 7 U.S.C. § 291 (2018).

125. Clairborne, *supra* note 110, at 286.

126. 62 CONG. REC. 2261 (1922) (statement of Sen. Norris).

127. Martin, *supra* note 45.

128. Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816, 830–31 (1978) (Brennan, J., concurring).

129. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 386, 394 (1967).

130. *Id.*

131. See Martin, *supra* note 45.

of “small, individual, economic farming units,” and the mutual benefit language embodies that sentiment.¹³² Thus, the language is an indispensable provision of the Act and can be the basis for valuable litigation.

Litigating under this clause, however, is not without challenges. Namely, if some members of a cooperative want to pursue litigation against the entity, but others do not, the proposition that the cooperative has not operated for the mutual benefit of its members could be undermined. Justice Harlan raised a similar concern in *Case-Swayne*, where he expressed concern that imposing the harsh punishments of antitrust violations against cooperatives would ultimately burden the individual members themselves.¹³³

These concerns can be addressed procedurally. Both *Southeastern Milk* and *Allen* ultimately certified classes against the defendants. In *Allen*, the court simply certified two subclasses of DFA class members: those who believed that DFA was subject to antitrust scrutiny and members with “divergent interests.”¹³⁴ And while some class members may disagree with the claims, the court in *Southeastern Milk* appeared to be open to still finding the cooperative had not operated for members’ mutual benefits.¹³⁵ The plaintiffs during the class certification phase proffered witness testimony that the cooperatives ultimately affected all members.¹³⁶ The court held “[i]f plaintiffs can prove at trial that all members of the DFA subclass have been equally harmed by illegal acts committed by the defendants, the requirements of Rule 23(a)(4) are met.”¹³⁷

Conclusion

The mutual benefit language of the Capper-Volstead Act offers potential grounds to challenge antitrust immunity claimed by cooperatives. Rural America is facing unprecedented levels of inequality. As small and medium dairy farms are disappearing, so is the profound sense of identity and the lifeblood of many rural

132. See *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 830–31.

133. See *Case-Swayne Co.*, 389 U.S. at 397 (Harlan, J., concurring in part and dissenting in part).

134. *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230, 2012 WL 5844871, at *6–7 (D. Vt. Nov. 19, 2012).

135. *In re Se. Milk Litig.*, No. 2:08-MD-1000, 2012 WL 1981511, at *3 (E.D. Tenn. June 1, 2012).

136. *Id.*

137. *Id.*

communities. Increasing consolidation and the outsized power of large cooperatives are in part to blame. One way to combat this trend is through increased antitrust action and challenging claimed immunity under the Capper-Volstead Act. For this immunity to be granted, cooperatives must demonstrate that they operate for the mutual benefit of members. Plaintiffs should utilize this overlooked language to pierce the veil of immunity. They can do so by challenging coercive actions taken by cooperatives against their members, scrutinizing misguided governance decisions, and demonstrating financial losses caused by cooperative actions. Pursuing litigation with this language poses several advantages for litigants, as well. Ultimately, this language can be a tool to protect those who depend on their modest herds and humble plots to make a living and ensure that a vanishing way of life is not lost forever.