

## **Not Even One Non-Producer Member**

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The Capper Volstead Act, often called the “Magna Carta” of U.S. agricultural cooperatives was passed to correct unintended consequences. The Sherman Anti Trust Act of 1890 was passed to curb the monopolistic behavior of large banks and railroads. The first groups prosecuted under the act were farm associations and labor union. The problem was that any time two or more farmers collectively marketed crops they were in essence two businesses “colluding” to improve their market position. Congress attempted to clarify that farm associations were not the intended target of the Sherman Anti Trust Act in the Clayton Antitrust Act of 1914 but that language proved to be too vague. Agricultural producers were finally given explicit permission to form cooperatives and otherwise collectively market their commodities in the Capper Volstead Act of 1922.

While the term “cooperative” is never mentioned in the Capper Volstead Act it did define structural requirements for agricultural associations in order to qualify for limited exemption from anti-trust restrictions. Those requirements quickly became part of cooperative incorporating statutes at the state level. In order to take advantage of the Capper-Volstead Act, a cooperative’s members must be “persons engaged in the production of agricultural products.” Cooperatives with non-producer members are ineligible for Capper-Volstead protection. This “producer” membership requirement has been targeted in lawsuits when a cooperative strives to make sure that all of its members are actual producers but fails to achieve perfection.

One U.S. Supreme Court decision indicated that “it is not enough that a typical member qualify, or even that most members qualify.” This has been interpreted to mean that the existence of even one non-producer members results in the cooperative losing Capper Volstead protection. The “not even one” requirement is also considered to flow up to the regional cooperative. In order for a regional cooperative to have Capper Volstead protection, its local members must also be Capper Volstead compliant.

Bargaining or pooling cooperatives clearly need Capper Volstead protection. In the absence of the Act’s exemption their very structure could be challenged under the Sherman Anti Trust Act. The question of the necessity for the Act’s protection for a marketing cooperative that buys commodities from its members is more complex. The fact that many grain marketing cooperatives have decided to function as pooling cooperative in order to manage the Section 199 Domestic Production Activities Deduction creates another wrinkle. All of those issues relate to the question of how important is it for an agricultural cooperative to maintain 100% producer membership.

I’ll share more thoughts on this topic in my next newsletter. Happy Holidays!

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