



The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions

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O'MELVENY & MYERS LLP

Topics

- Overview of Capper-Volstead Act
- History and policy
- Current issues
- Supply restraints

The presentation and discussion are provided for general educational purposes. They are not intended to and do not constitute specific legal advice for any particular matter or situation. The views and opinions expressed by the presenters reflect their own views, not necessarily the views of O'Melveny & Myers LLP, its attorneys or clients.



Sources

- C. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ABA Antitrust Section's The Antitrust Source (Dec. 2010)
- K. O'Rourke & A. Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, Vol. 19, No. 2, Competition, The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California, pp. 69 *et seq.* (Fall 2010)

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Capper-Volstead Act

- “Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers ***may act together*** in associations, corporations or otherwise, with or without capital stock, ***in collectively processing, preparing for market, handling, and marketing*** in interstate and foreign commerce, such products or persons so engaged.
- “Such associations may have marketing agencies in common; and such associations and their members ***may make the necessary contracts and agreements to effect such purposes....***”

-- Capper-Volstead Act, 7 U.S.C. § 291 (emphasis added)



Membership 'Purity' Required

- *National Broiler Marketing Ass'n v. U.S.*, 436 U.S. 816, 824 (1978) (exemption rejected; a few members neither owned a breeder flock of chickens or a hatchery, nor owned a grow-out facility to raise their own chicks)
- *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 395-96 (1967) (exemption rejected; 15% of members were packers, not fruit growers)
- *In re Mushroom Direct Purchaser Antitrust Litig.*, 621 F. Supp. 2d 274, 286 (E.D. Pa. 2009) ("*Mushrooms II*") (exemption rejected; mushroom farmer signed up his family's distribution business as a cooperative member; should have signed up the family farming business)
- *Cf. Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1186 (8th Cir. 1982) (exemption upheld; where non-qualifying entities contributed only nominal dues or donations to the cooperative and did not vote or participate in its governance or affairs, the cooperative did not lose its exemption)



Non-Exempt 'Predatory' Acts

- interfering with shipments to non-members
- inducing a producer to switch its marketing outlets from the area of direct competition with the cooperative
- boycotting business to compel it to deal with cooperative
- using economic power (e.g., loans) to compel dealings with cooperative
- buying out competitor at exorbitant price to eliminate competition,
- conspiring with retail outlets to fix resale prices, and/or
- tying conditions involving the use of trucking

Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 216 (9th Cir. 1974) (cataloging non-exempt activities from case law)



'Price Fixing' is Exempt

- Issue: Is price fixing by cooperative members exempt even when price fixing arguably is not part of or furthering the statutorily permitted purpose of joint “marketing”?
- Yes. “It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.”

Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop.,
413 F. Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978),
cert. denied, 439 U.S. 1090 (1979)



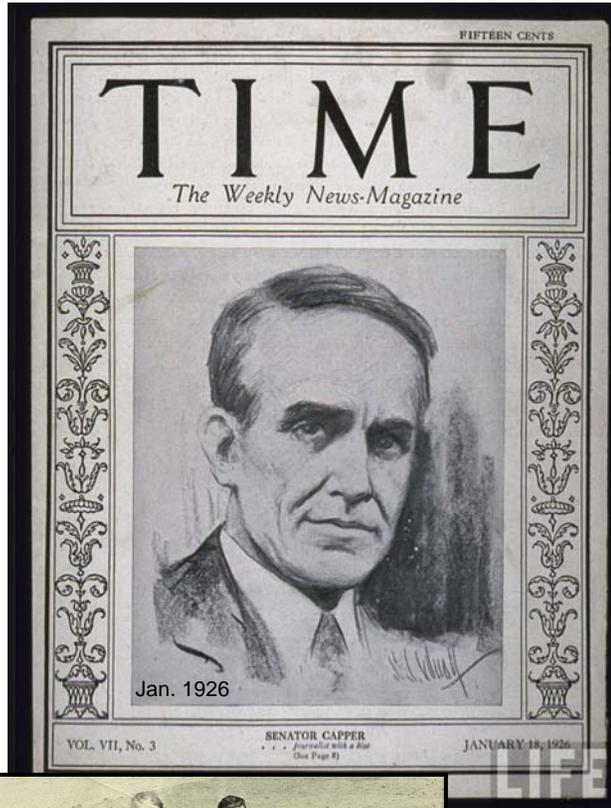
Capper-Volstead Act's Purpose

- Give the farmer the same right to bargain collectively that is already enjoyed by corporations
- Permit farmers to band together “to survive against the economically dominant manufacturing, supplier, and purchasing interests with which they had to interrelate”

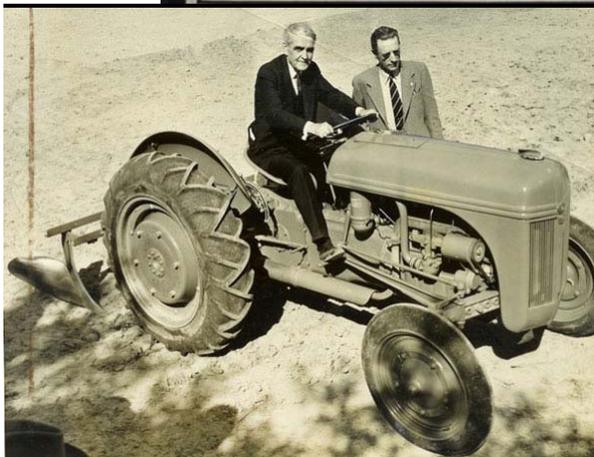
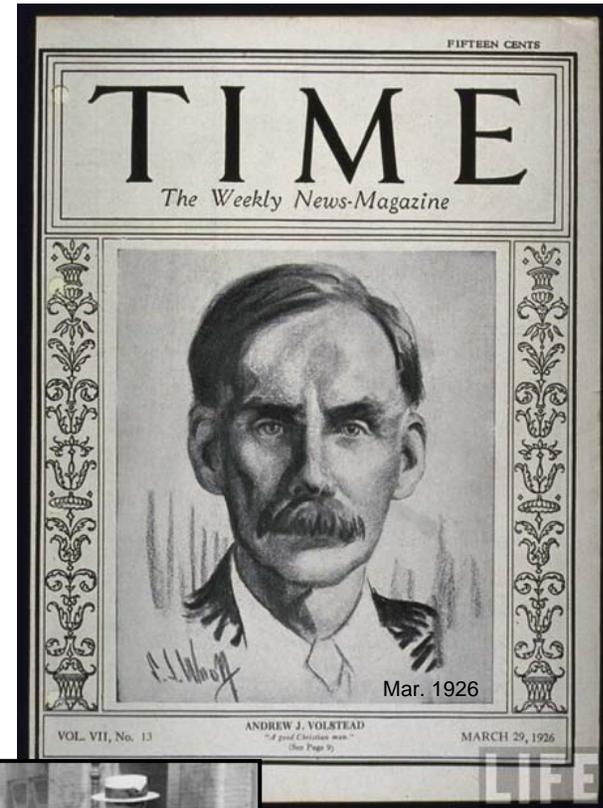
National Broiler Marketing Ass'n v. U.S., 436 U.S. 816, 830 (1978) (Brennan, J., concurring) (and referring to the Act as “populist legislation”)



Sen. Arthur Capper (R-Kan.)
Kansas Governor / 30-yr. U.S. Senator



Rep. Andrew Volstead (R-Minn.)
Lawyer / 20-yr. U.S. Congressman



The Volstead Act (aka National Prohibition Act of 1919) enabled enforcement of prohibition in 1920

Capper-Volstead 90-Years Later

- Huge agri-business today
- Cooperatives team up with other cooperatives
- Policy still served?



U.S. Dep't of Justice



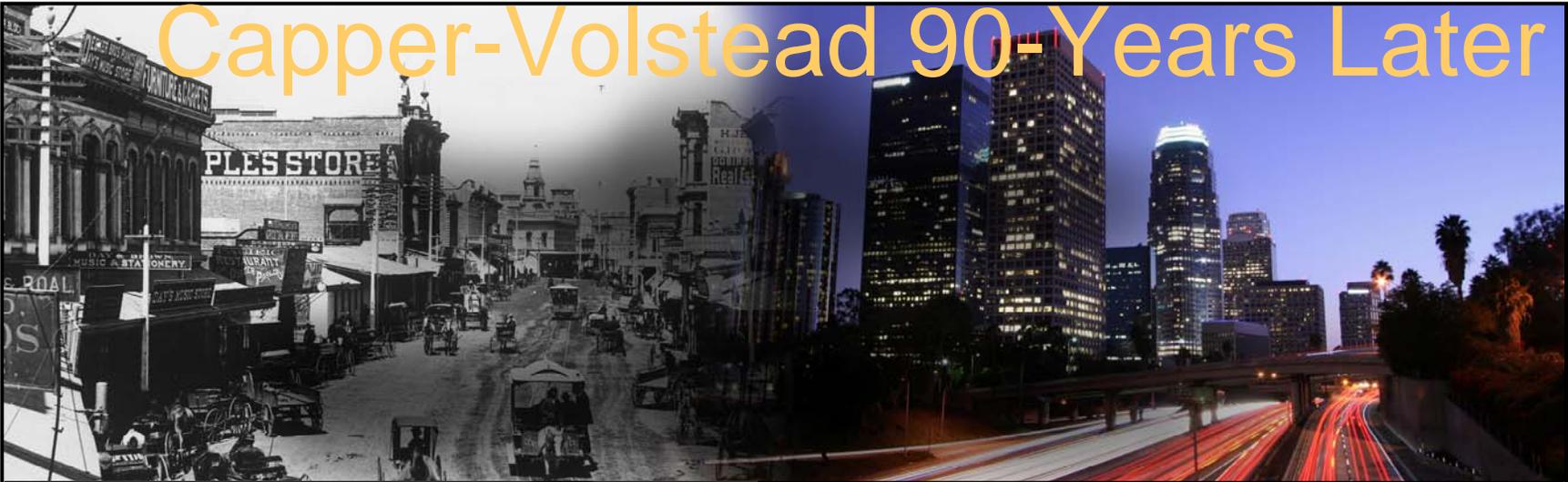
Christine A. Varney
Assistant Attorney General,
Antitrust Division

“Well, and Senator, it does seem to me 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.”

-- Ass't AG Christine Varney (Sept 9, 2009)



Capper-Volstead 90-Years Later



- Over 3,000 farmer cooperatives across the US
- Members include a majority of our nation's two million farmers
- Cooperatives had total business volume of \$191.1 billion in 2008
- Cooperatives had total assets of \$57 billion in 2008
- Cooperative members employ an estimated 250,000 people



2007 Antitrust Modernization Report

- Statutory immunities should be disfavored.
- They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

Antitrust Modernization Report (Apr.2007), p.350 (Recommendation No. 57)



DOJ's Historical View of Supply Restraints by Ag Co-ops



- 1950s: Division filed civil suits against cooperatives that allegedly implemented production limits
- 1968: Division issued business review letter refusing to approve wheat-growers' proposal to limit members' production
- 1970s: Division challenged cooperative's production limits, though the Division later dropped the allegations
- 1977: Division report reviews Act's legislative history, finding evidence that Congress was concerned about cooperatives restricting supply



FTC's View of Supply Restraints by Ag Co-ops



- 1977: Price fixing is exempted, but a “different issue would be presented if ***it were alleged and proven that a cooperative had sought to limit production even among its own members***, thus shutting off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumventing the important procedural safeguards of the AMAA [Agricultural Marketing Agreement Act of 1937].”

Central Cal. Lettuce Producers Coop., 90 F.T.C. 18, 102 n.20 (1977)



FTC's View (cont'd)



- “Congress' attitude toward production controls provides an additional indication that it did not regard the corporation as the model around which the Capper-Volstead exemption would be built.

Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability.

Nevertheless, there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production.”

Central Cal. Lettuce Producers Coop., 90 F.T.C. at 102 n.20



U.S. Dep't of Agriculture's Position

- “it is not legal for cooperatives to control members’ production. The basic role of cooperatives is to market the available supply in the most effective manner possible, not to limit production.”



See C. Varney, ABA Antitrust Section's The Antitrust Source, p.7 n.42 (Dec. 2010) (citing DOA reports and position statements)



Arguments in favor of exempting supply restraints by Ag Co-ops...

- Act's text: "processing, preparing for market, handling, and marketing" arguably encompass the full range of farming activities, from pre-planting, through harvest and processing, to sale
- Likewise, "preparing [products] for market" arguably includes determining how much to produce; and "marketing" includes determining how much to produce for market



Arguments in favor...

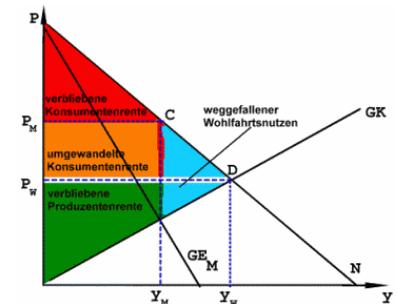
- Definition of marketing: As part of “marketing,” cooperatives are allowed to withhold a portion of their members’ output from the market—for example, destroying it or donating it to charity. More efficient to permit them to accomplish this directly with production limits.
- Economic efficiency and common sense: It is counterintuitive to permit destruction of crops post-harvest but to deny coordination upfront in the planting of those crops. Such an outcome results in unnecessary costs, wasted resources, opportunity costs, and negative environmental impacts.



Arguments in favor...

- Economic theory: If price fixing is allowed, why not supply control? No difference in economic theory:
 - “Following the formation of a price-fixing cartel, each firm will restrict output to the point where its marginal revenue (mr) equals its marginal cost (MC) -- that is, *each firm will reduce output from Q_1 to Q_2 .*”

Philip E. Areeda, Herbert Hovenkamp & Roger D. Blair, IIA
Antitrust Law, ¶ 395a, p.377 (3d ed. 2007)



- Legislative history: Some statements indicate that particular legislators contemplated cooperatives managing the production of their members



Arguments in favor...

- Legislative history (cont'd): Some members of Congress stated that the Act would treat cooperatives like single corporate entities, allowing them to act in the same fashion as the large corporations farmers faced when they went to sell their products.
- As Senator Capper himself explained, “[t]he Capper-Volstead bill . . . was designed simply to give the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years.”



Arguments in favor...

- Administrative remedy: If supply controls raise prices too high, there is an administrative solution in the Act itself:

“[I]f the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing....requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade....”

-- Capper-Volstead Act, 7 U.S.C. § 292



Arguments against an exemption for supply controls by Ag co-ops

- Statutory interpretation
 - Principles of statutory construction suggest that where a statute includes an explicit list, items not included in the list should not be read into the statute
 - Does supply control fit within the dictionary definition of “marketing” adopted by the Ninth Circuit:
 - “The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information.”



Arguments against...

- Legislative history:
 - Sen. A. Capper, 1921, implicitly considered supply control outside his proposed legislative exemption:

“But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard.

“With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply.”



Arguments against...

- Case law:

Alexander v. National Farmers Organization, 687 F.2d 1173, 1182 (8th Cir. 1982) (“Co-ops cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by co-ops alone.”)

- See also:

C. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ABA Antitrust Section’s The Antitrust Source, pp.5-6 (Dec. 2010)



DOJ's View in 2010: Stay Tuned



“This...issue...provides an intellectual challenge to lawyers and judges, but, much more importantly, it has great practical consequences for farmers and the agricultural community as a whole.

“As cases make their way through the court system, the Division will continue to monitor developments closely and evaluate any potential impacts on enforcement of the antitrust laws.”

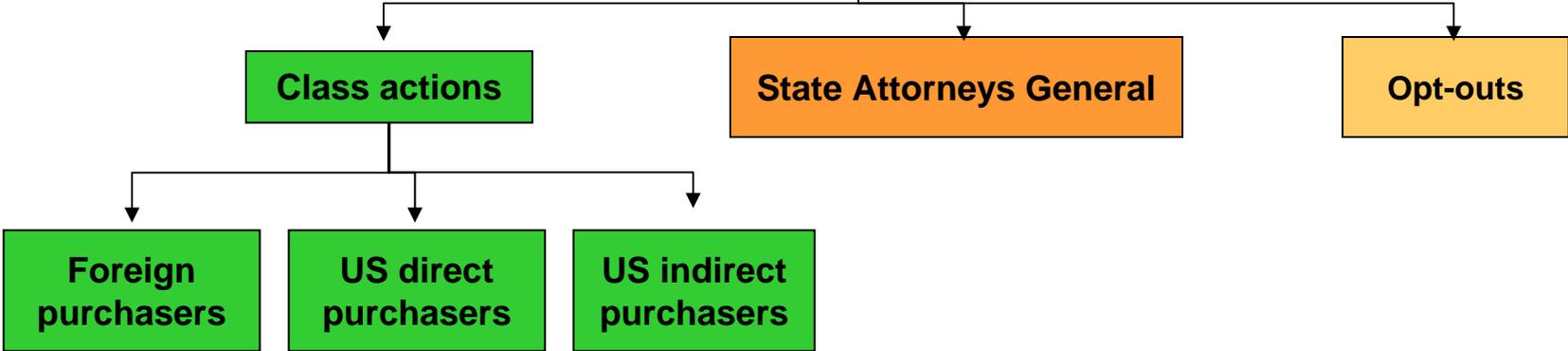
C. Varney, ABA Antitrust Section's The Antitrust Source, p.8 (Dec. 2010)



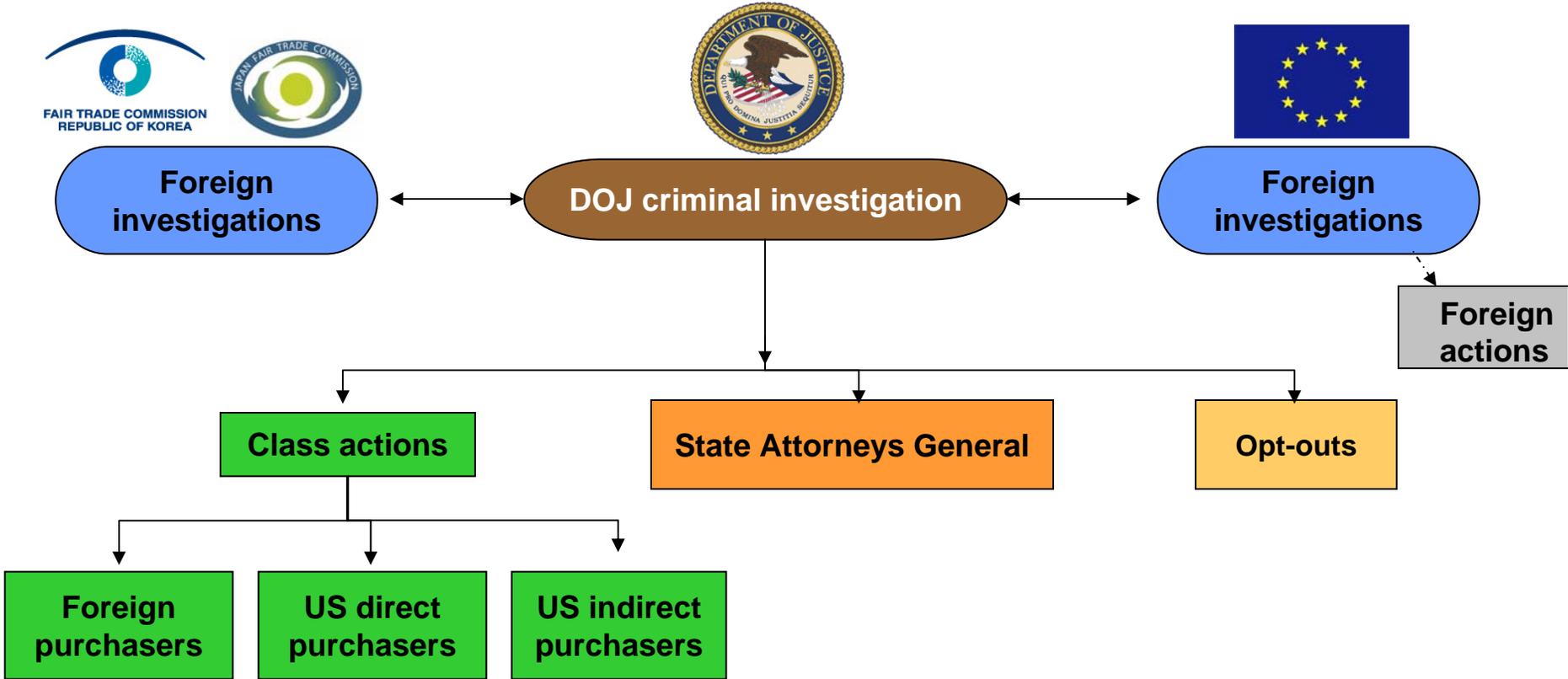
Government Investigations Lead to Substantial Civil Litigation



DOJ criminal investigation



Government Investigations Lead to Substantial Civil Litigation



Role Reversal

- Private civil actions ‘may’ lead DOJ to renew its historical position against an antitrust exemption for supply control orchestrated by agricultural cooperatives, or not:
 - “As cases make their way through the court system, the Division will continue to monitor developments closely and evaluate any potential impacts on enforcement of the antitrust laws.”

C. Varney, The Antitrust Source, p.8 (Dec. 2010)

- Stay tuned...



Sun Setting on Capper-Volstead Act -- or Not



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Andrew Frackman is a partner in O'Melveny's New York office and a member of the Antitrust & Competition and Securities Litigation Practices. Andrew is one of the Firm's most experienced trial lawyers, having tried, as lead or co-lead counsel, 20 cases or arbitrations through the close of evidence or arbitral award. His trial experience has involved such diverse disputes as antitrust, contract/commercial, intellectual property, insurance coverage, and federal tax claims.

Illustrative Professional Experience

Antitrust / Class Actions

In re IPO Antitrust Litigation, decided by the Supreme Court sub nom. *Credit Suisse Securities (USA) LLC, et al. v. Billing*, 127 S.Ct. 2383 (2007). Represented **Robertson Stephens** and **Banc of America Securities** in this leading case on the implied immunity doctrine in which defendants successfully dismissed the action

In re Compensation of Managerial, Professional and Technical Employee Antitrust Litigation. Represented **ExxonMobil** and served as lead defense counsel defending claims that the defendant oil companies violated Sherman Act §1 to reduce pay of employees. Successfully defeated class certification twice and prevailed on summary judgment. 2006 WL 38937 (D.N.J. 1/5/06); 2006 WL 361383 (D.N.J. 2/15/06); 2008 WL 3887619 (D.N.J. 8/20/08)



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Ken O'Rourke heads up O'Melveny's Los Angeles Litigation Practice. He has 25 years experience litigating large, complex disputes including international cartel antitrust cases, monopolization cases, class actions, and technology and intellectual property cases.

Ken is a member of both the Antitrust & Competition Practice and the Intellectual Property & Technology Practice within the firm's Litigation Department.

Illustrative Professional Experience

Antitrust / Class Actions

Lead counsel defending alleged international cartel / price fixing cases, including hundreds of direct and indirect purchaser antitrust class actions, antitrust complaints filed by dozens of State Attorneys' General, and antitrust cases brought by settlement class "opt outs" asserting price fixing violations under federal and state antitrust and unfair competition laws

Activities

Chair, The Antitrust Litigation Forum (www.AntitrustLitigationForum.com)

Vice Chair-Programs, Executive Committee of the California State Bar Antitrust Section

Author and frequent speaker on antitrust topics

