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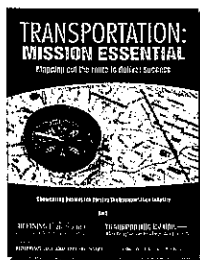
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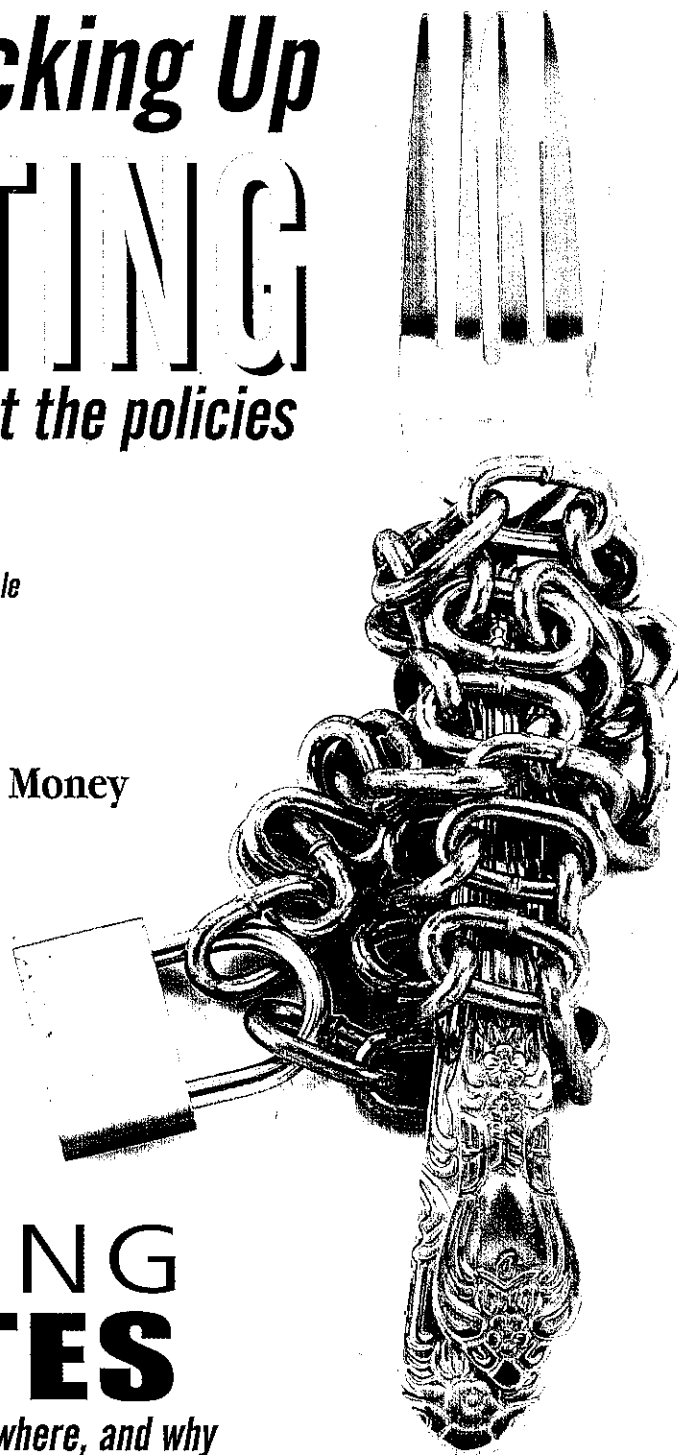
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Federal Trade Laws that Shape Business Practices

By
MICHAEL H. ERDMAN, ESQ.

The affects that produce professionals should know

This article briefly describes three significant federal trade statutes—the Sherman Antitrust Act, the Co-operative Marketing Associations Act, and the Agricultural Fair Practices Act—each of which shapes the marketing and other business practices of produce professionals throughout the United States. The term *trade statutes* as used in this article refers to acts of Congress that relate to commerce in general or a particular industry; while the Perishable Agricultural Commodities Act (PACA) is a trade statute, its focus upon licensure, transactions, grievances, etc. is beyond the scope of this article.

The three trade statutes discussed here are important to producers of agricultural products because they directly impact the manner in which such producers can market or sell their product (e.g., the propriety of agreements with rivals relating to price, output, or allocation of geographic markets). A working knowledge of these statutes is essential in order for an agricultural producer to know whether his or her business practices are protected by law or considered illegal and thus subjecting the producer to civil and possibly criminal liability.

Sherman Antitrust Act

One of the most frequently utilized federal trade statutes by private litigants and the federal government is



business, and copyright/trademark infringement matters. He has appeared before state and federal courts, as well as various state and local administrative bodies and arbitration panels.

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the Sherman Antitrust Act. While the statute was enacted back in 1890, it remains one of the bedrocks of federal antitrust law. Section 1 of the Sherman Act provides that “[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is hereby declared to be illegal.” Thus, Section 1 targets collective action (although parallel conduct may suffice) that restrains trade.

Such restraints may relate to price or non-price terms and typically consist of horizontal (i.e., between producers to set prices) or vertical (i.e., between a producer and a distributor to maintain price minimums) agreements, as

Key Elements

Three significant federal trade statutes shape the marketing and other business practices of produce professionals throughout the United States. The three laws are highlighted here.

- Unless otherwise exempted, the Sherman Act applies to the conduct of producers, cooperatives, joint ventures, and associations.
- The Co-operative Marketing Associations Act provides a limited exemption from the antitrust laws to qualified associations of farmers, planters, ranchmen, dairymen, and nut or fruit growers.
- The Agricultural Fair Practices Act is designed to protect agricultural producers who form or join agricultural associations.

To learn more about each key element, look for the — throughout the article.

well as agreements to divide markets, boycott rivals, or tie products. However, while the law uses the phrases "every" and "restraint of trade," the courts have consistently interpreted Section 1 to bar only *unreasonable* restraints of trade. The courts employ multiple schemes to analyze the reasonableness of any given restraint, depending upon the nature thereof.

— Unless otherwise exempted, the Sherman Act applies to the conduct of producers, cooperatives, joint ventures, and associations, among others. Examples of joint efforts that would be prohibited by the Sherman Act include agreements to restrict the output of certain commodities and/or fix the price quoted for the same to distributors. Violations are typically prosecuted by private litigants, the United States Department of Justice, or the Federal Trade Commission. Violators may be exposed to both civil and criminal liability, which could include an injunction, treble damage award (i.e., tripling damages allowed by state statute in certain types of cases), payment of opponent's attorneys' fees and costs, incarceration, and fines. Of course, the Sherman Act prohibits or restricts other conduct as

well (e.g., monopolization and attempts to monopolize), but this article is limited to Section 1.

Co-operative Marketing Associations Act

— In 1922, responding to a depression of agricultural prices in the years following World War I, Congress enacted, and the president signed, the Co-operative Marketing Associations Act, commonly known as the Capper-Volstead Act. This act provides a limited exemption from the antitrust laws (including Section 1 of the Sherman Act) to qualified associations of farmers, planters, ranchmen, dairymen, and nut or fruit growers.

Because of the perishable nature of agricultural and ranching products, it was long recognized that farmers and ranchers (and others similarly situated) were particularly at the mercy of buyers and middlemen with respect to the prices paid for their products. Unlike a producer of dry or durable goods, a producer of apples, for example, faced with what it regarded as an unreasonably low price offer for its goods, was not in a

position to pull its products from the marketplace to wait until a better offer came along. Within a matter of days, the apples would rot and become worthless.

That harsh reality—coupled with the fact that in the early decades of the Twentieth Century, most farms, orchards, and ranches were small family-owned enterprises—gave rise to a call for legislative action to give such small farmers and ranchers special protection from the antitrust laws that would normally apply to producers of agricultural goods.

Capper-Volstead expanded the pre-existing limited exemption from the antitrust laws for labor organizations and human labor generally contained in the Clayton Antitrust Act (enacted in the U.S. to remedy antitrust law deficiencies created under the Sherman Antitrust Act) to include voluntary cooperative associations formed for the purposes of producing, handling, and marketing agricultural and farm or ranch products, including those associations that are capitalized, but only if "no member of the association is allowed more than one vote because of the amount of stock or membership capital he [or she] may

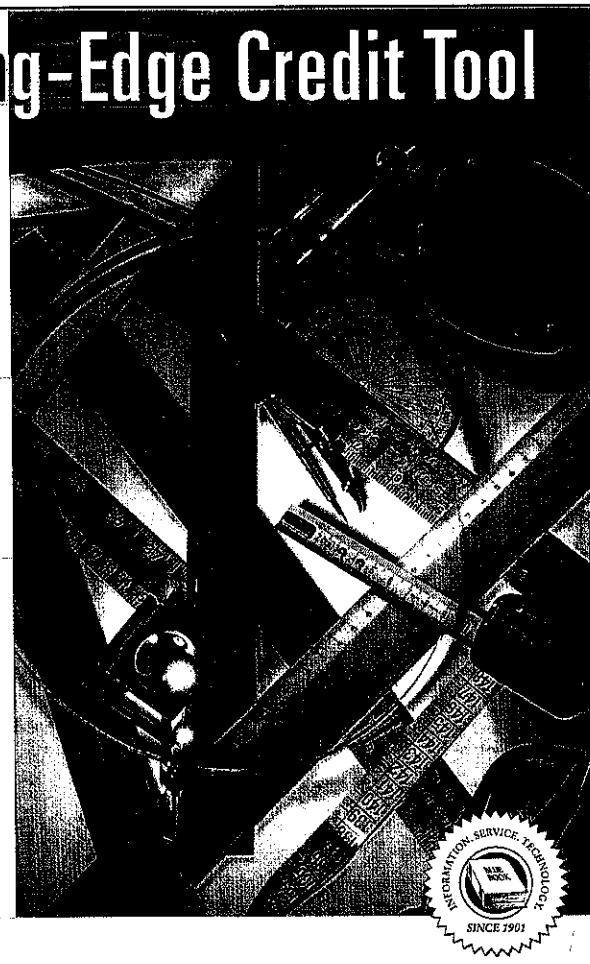
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Federal Trade Laws that Shape Business Practices

own therein, or . . . that the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum."

Now, with the protection of the Capper-Volstead Act, farmers, ranchers, and agricultural producers in general can band together (without fear of antitrust reprisal) and in the limited frame of an agricultural association, among other things: set prices by which their goods will be sold, limit output of goods, and restrict the geographical area in which such goods would be sold—all activities that would normally be illegal under the antitrust laws.

This exemption, however, is neither unlimited nor absolute. The Capper-Volstead Act permits the secretary of agriculture to file a complaint against any association that, in the Secretary's opinion, "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." This provision, with its admittedly vague standard of monopolization and restraint of trade, is designed to ensure that, at the discretion of the agriculture department, the interests of the consuming public will not be totally subject to the decisions of agricultural associations.

Importantly, the restraints imposed by the association must only be between association members and cannot include or involve any third parties. Therefore, the antitrust exemption would not extend to an agreement between a qualified association and, for example, a middleman distributor, to limit sales of a particular agricultural product in a restricted geographic area. While the members of the association could agree among themselves to

such a restriction, once they bring the third party into the deal, the antitrust exemption no longer applies.

Also, all (not "many" or "most") of the members of the association, must be engaged in businesses (e.g., farming, ranching, etc.) that the act specifically mentions. The inclusion of any persons in the association who do not engage in such business will cause the entire organization to lose its exemption. Thus, continuing with the example in the preceding paragraph, if the middleman distributor of agricultural goods, who is not himself or herself a farmer, becomes a member of the association, the association will lose its antitrust exemption.

Backed by the protection of the Capper-Volstead Act, the agricultural association can be a valuable and effective tool for farmers, ranchers, and others in their continuing struggle to achieve financial parity with their non-agricultural wage-earning and product-producing brethren in American society.

Agricultural Fair Practices Act

— Somewhat related to the Capper-Volstead Act is the Agricultural Fair Practices Act. This law, enacted in 1968 and designed to protect agricultural producers who form or join agricultural associations, makes it unlawful for anyone (including handlers of produce) to engage in any of the following practices:

1. to coerce any producer in the exercise of his or her right to join and belong to an association of producers, or to refuse to deal with any producer because of the exercise of such rights;

2. to discriminate against any producer with respect to price, quantity, or other term

of purchase, acquisition, or handling of agricultural products because of his/her membership in or contract with an association of producers;

3. to coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers;

4. to pay or loan money, or give anything of value, or offer any inducement or reward to a producer for refusing to or ceasing to belong to an association of producers;

5. to make false reports about the finances, management, or activities of associations of producers or handlers;


6. to conspire, combine, agree, or arrange with any person to do anything in violation of the act.

Accordingly, as an example, the act prohibits anyone from coercing a producer to refrain from joining, or to terminate membership in, an association of producers. Another section of the act, designed to protect the handlers of produce, provides that notwithstanding the foregoing prohibitions, any handler is free, in effect, to deal or not to deal with any association of producers.

The act can be enforced in two basic ways: by the secretary of agriculture's request to the attorney general to file a civil lawsuit in federal court seeking an injunction to prevent or set aside any practices found to be in violation of the act and/or by the filing of a private civil suit in federal court by any person injured or about to be injured as a result of any violation of the Act. In the case of such private lawsuit, the court, in its discretion, may award the prevailing party a reasonable attorneys' fee as part of the relief granted.

Of course, this article provides only a brief introduction to the Sherman Act, Capper-Volstead Act, and Agricultural Fair Practices Act. Obviously, numerous issues arise that require knowledge of factual particularities and statutory interpretation before one can draw any conclusions or make any recommendations. As a produce professional, you should now have some general familiarity with one type of antitrust prohibition, limited immunity for certain producer associations, and legal protections for members of such associations. **BP**

Note: The views expressed in this column are those of the author and do not necessarily reflect the views of Blueprints or Produce Reporter Co. nor are they intended as legal advice. Please consult an attorney for more information.

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