U.S. Antitrust Chief Clarifies Capper-Volstead Exemptions Re: DFA

by Pete Hardin

The Assistant Attorney General for Antitrust at the United States Department of Justice – Makim Delrahim — submitted a "Statement of Interest" to the federal District Court in Vermont on July 27, 2020.

A jury trial in the *Sitts vs. DFA* case is scheduled for September 30, 2020 before federal judge Christina Reiss of the District Court of Vermont. That July 27, 2020 statement to the Court by the top federal antitrust official appears designed to clarify complex issues involving defendant DFA's claims of cooperatives' exemptions from federal antitrust laws, in light of alleged violations of the federal Clayton and Sherman antitrust laws. Judge Reiss faces some highly complex issues in the *Sitts* case. It's clear that federal Antitrust officials in Washington, D.C. are providing current legal guidelines to assist judge Reiss' navigating those complexities.

The *Sitts* case is the second Northeast dairy antitrust class action against DFA and others overseen by Reiss. The first case – the *Allen* case — ended with a $50 million settlement by DFA. However, over 100 members of the class in the *Allen* case, plus a few Class Representatives, deemed that $50 million settlement grossly inadequate. Dissidents "opted out" of that settlement and later filed a second civil class action against DFA and Dairy Marketing Services, LLC (a DFA subsidiary).

Sources report that during discovery in the *Sitts* case, plaintiffs' attorneys have dug deep into DFA's murky web of finances that interconnect the nation's largest dairy producers cooperative and its hundreds of joint ventures and subsidiaries.

Through both the *Allen* and *Sitts* cases, defendants' attorneys have gone to great lengths to repeatedly delay matters. Judge Reiss' patience seems to be stretched thin by DFA. On September 27, 2019, Reiss issued a stinging refusal to DFA's motion to summarily dismiss (i.e., throw out) the *Sitts* case. That September 27, 2019 decision noted, in part, that DFA had clearly violated a then still-binding portion a 1977 Consent Decree with the Antitrust Division. Further, Reiss noted that DFA had also violated certain settlement terms in the *Allen* case. The trial for *Sitts* was originally scheduled for early July 2020. But Covid-19 events intervened, bumping back the jury trial until September 30.

The Delrahim Statement of Interest closely analyzes exemptions granted to agricultural cooperatives by the Capper-Volstead Act – a federal law dating back to 1922. Specifically, Delrahim's 15-page document focuses on questions of cooperatives' antitrust exemption, with specific focus on DFA. Language in that Statement of Interest is terse, narrowly defining exemptions that the Capper-Volstead Act provides to agricultural cooperatives.

To best summarize Delrahim's Statement of Interest to the District Court in Vermont, *The Milkweed* will reprint selected quotes and offer our lay analyses (in parentheses).

> **"The United States also has an interest in ensuring that the protections of the antitrust laws are applied widely, so that the competition those laws protect benefits not only purchasers of goods and services but also sellers of good and services – such as farmers selling their produce."** (p. 1.)

(Analysis: The Clayton Act and Sherman Act were created over a century ago, in great part to protect farmers from giant processors of farm products. The irony, nearly a century after the 1922 creation of Capper-Volstead, is that a dairy farmers' own cooperative has become a major processor, accused of shorting the value of members' milk incomes.)

> **"It would be inconsistent with the Act's text and purpose to allow a defendant to use the Act as a shield when it acts as a food processor or exercises monopsony power to harm individual farmers."** (p. 1)

(Analysis: DFA's bottom-to-top control of dairy, particularly in fluid milk processing in certain regions, may not use Capper-Volstead as a defense if individual farms are being financially harmed by the cooperative's actions. DFA members' milk checks regularly feature massive, nebulous deductions for marketing costs.

By definition, a monopsony is a market structure in which a single buyer substantially controls the market as the major purchaser of goods and services.)

> **"The Capper-Volstead Act does not protect a cooperative's agreements with non-cooperatives, and it should not protect agreements between cooperatives that have nothing to do with 'processing, preparing for market, handling, and marketing' the cooperatives' products."** (p. 1)

(Analysis: DFA owns and operates over 200 joint ventures and subsidiaries – many of which are not considered protected by Capper-Volstead Act exemptions. Thus, DFA's internal self-dealing – i.e., transactions selling members' milk to DFA-owned processing businesses – may be challenged if the net result of those deals fails to enhance members' milk revenues. In a separate matter, the September 27, 2019 refusal of DFA's motion for summary dismissal by judge Reiss noted how DFA and Agri-Mark – another dairy cooperative that operates in the Northeast – had agreed not to solicit each other's members. Such an agreement would seem to be outside Capper-Volstead protections.)

> **" … the defendant bears the burden of showing that the Act encompasses its alleged monopsonization."** (p. 2.)

(Analysis: Historically, DFA's attorneys have tried to place the burden of proof on plaintiffs' lawyers to prove DFA's actions violated Capper-Volstead Act exemptions. Not so. The burden of proof is on the defendants, DOJ's Antitrust Division asserts.)

Monopsony is the term for a buyer having monopoly power on the buying side of the market—being the only or the very dominant buyer in the market. Thus, DFA has alleged monopsony power in the buying of milk in areas of the Northeast.

> **"Consistent with those precedents, courts have interpreted the Capper-Volstead Act narrowly to protect efforts to increase farmers' bargaining power against corporate food handlers, *but not as a shield insulating monopsonies from the antitrust laws*."** (p. 4.)

(Analysis: Capper-Volstead offers no protection from acts by cooperatives that harm financially harm members or other farmers.)

> **"The Court has held, for example, that an exempt agricultural cooperative under the Capper-Volstead Act loses its exemption if it conspires with nonexempt parties."** (p. 7.)

(Analysis: DFA is in trouble on this one, starting with self-dealing with DFA's joint ventures and affiliates, to long-term deals with proprietary dairy processors, including Dean Foods.)

> **"To the extent that Plaintiffs show at trial that DFA violated the Sherman Act in reaping profits as a handler or processor from lower milk prices (*see id.* at 471), rather than 'for the mutual benefit of the members thereof, *as such producers.*" 7 U.S.C #291 (emphasis added), it would turn the Act on its head to allow DFA to use the Act as a legal shield."** (p. 8.)

(Analysis: What? Allegations that DFA's processing subsidiaries would reap profits by depressing milk prices to farmers? Shocking!)

> **" … to the extent that DFA made anticompetitive agreements with other cooperatives that were unrelated to 'processing, preparing for market, handling, and marketing' the cooperatives' products … such as non-solicitation agreements that restrict competition for cooperative membership … Capper-Volstead protection should not apply.** (p. 9)

(Analysis: Documents entered into evidence in the *Sitts* case revealed that DFA and Agri-Mark – a co-op with membership in New England and eastern New York State – agreed not to solicit each others' members. Draw your own conclusions.)

In conclusion …

DFA's behaviors are under legal duress on several fronts. Besides the pending September 30 trial in federal court in Vermont, the Arkansas Attorney General has been hounding DFA over dramatic underpayments to members for their milk. Further, the Arkansas Attorney General is probing DFA's alleged coercion that pushed out all other buyers of farm milk in that state.

Long-time observers have puzzled over DFA's alleged anti-competitive antics and federal antitrust enforcers' decades-long, somnambulant oversight regarding DFA. But this meticulously-researched and written Statement of Interest send by Assistant Attorney General Delrahim to the Federal District Court may represent a stunning new chapter in federal dairy oversight. Why?

First of all, DFA basically boxed federal antitrust officials into sanctioning most of DFA's proposed acquisitions of milk plants from the recent Dean Foods bankruptcy. There were few alternatives, and the bankruptcy judge seemed hell-bent to ignore alternatives and shove most of the Dean Foods plants to DFA.

Second, *The Milkweed* hears rumors that DOJ antitrust officials are having gastric distress over the proposed group of investors angling to acquire the former Dean Foods fluid milk plant at Chemung, Illinois. As part of an agreement with DFA last spring, DFA is under orders to sell off that plant. However, there has been no announcement of DOJ's approving sale of the Chemung plant to another entity. (The rumor mill states that among the proposed investors in the Chemung plant, parties now affiliated with DFA are involved.)

Third, federal officials have recently started an investigation into pricing actions in two sectors of the meat industry – beef and broilers. In those sectors, allegations of collusion involving major processors have arisen. (In broilers, Tyson has agreed to cooperate with federal investigators, a trade-off for a lighter set of penalties.) Maybe … just maybe … practices among meat industry giants – often foreign-owned – have become too great for federal antitrust officials to ignore. Giant processors in the human quality protein sector – dairy and meat – have perhaps been too blatant in squeezing the food chain – from the bottom (farmers) to the top (consumers). Additionally, some elected representatives are calling for an investigation of domestic pork prices charged to consumers earlier in 2020, as well as levels of pork exports.

Rather arrogantly, DFA dismissed the DOJ's 15-page "Statement of Interest" to the Vermont District Court as "unsolicited." DOJ doesn't have to seek any party's approval to weigh in on a case in the federal court system.

DFA: +$250 million paid in penalties & settlements

DFA's long history in commodity price manipulations and antitrust cases has eee the co-op pay out around $300 million in penalties and settlements.

Here are a few of those entanglements which bled several hundred million dollars from DFA's coffers:

$12-$14 mil. paid to U.S. gov't for illegal activities in dairy futures/options that occurred in 2004.

$45 mil. to settle civil lawsuit regarding CME commodity manipulations.

$140 mil. to settle Southeast antitrust class action.

$50 mil. to settle Northeast antitrust class action.

$15 million (???) to settle civil suit re: 2004 cheese price manipulations at CME; case filed by "Killer Whale" (Mark Anderson).

These settlements do not include the DairyAmerica milk powder price – fixing settlement, or the various settlements involving National Milk Producers Federation's CWT program.