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Legal Rights of Producers to Collectively Negotiate

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LEGAL RIGHTS OF PRODUCERS TO COLLECTIVELY NEGOTIATE

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Since agricultural products are produced by numerous and often scattered individual producers, the marketing and bargaining position of individual producers will be adversely affected unless they are free to join together voluntarily in cooperative associations. . . . Membership

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of a producer in . . . a cooperative association . . . can only be meaningful if a handler of agricultural products is required to bargain in good faith with an agricultural cooperative association . . . as the representative of [its] members . . . .

I. INTRODUCTION

Farmers\(^2\) are too often "price takers, not price makers."\(^3\) When an individual farmer sits down at the table to negotiate terms of sale for this year's crop, the buyer frequently represents a major agribusiness firm whose resources dwarf those of the farmer. The purchasing firm may have a multitude of potential sellers, often times located throughout the United States or even the world. The farmer may have only one, or a limited number, of potential buyers. As a result, the farmer must take the price that is offered. Farmers can respond to this marketplace imbalance by joining together in cooperative\(^4\) bargaining associations to negotiate with buyers on a collective basis.\(^5\)

This Article will examine the rationale for cooperative farmer bargaining and explore federal and state statutes that promote collective negotiation activities by producers. In addition, this Article will discuss federal pre-emption of state laws by the Agricultural Fair Practices Act (AFPA) and will explain policy options for better marketplace balance and steps for farmers to take to achieve a fair price for their products.

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2. A farmer is defined as one "engaged in agricultural pursuits as a livelihood or business." Skinner v. Dingwell, 134 F.2d 391, 393 (8th Cir. 1943).
3. "[Farmers] are price takers, not price makers. They are often in a position of having but one or two buyers for their production; rarely do several buyers compete for what they produce." RALPH B. BUNJE, COOPERATIVE FARM BARGAINING AND PRICE NEGOTIATIONS, U.S. DEP'T OF AGRIC. COOP. INFO. REPORT No. 26 40 (1980). Mr. Bunje served for 25 years as president and manager of the California Cling Peach Association.
4. A cooperative is "[a] corporation [or association] organized for the purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it." United Grocers, Ltd. v. United States, 186 F. Supp. 724, 733 (N.D. Cal. 1960).
This Article concludes by asserting that cooperative farm bargaining would result in a more stable and prosperous farm sector.

II. RATIONALE FOR COOPERATIVE FARMER BARGAINING

Individual farmers negotiate from a disadvantageous position. Farmers who join together to form a producer bargaining association improve their bargaining position five ways. First, a bargaining association helps to improve a farmer's bargaining position in relation to the farmer's relative size and assets. A commercial buyer has the economic power and size to overwhelm an individual farmer. An association, representing a significant share of grower production, can approach all potential buyers and negotiate on the combined strength of its producer members.

Second, a bargaining association can control the timing of the sale of crops. Individual farmers are easy prey for a buyer who is able to wait until late in the marketing cycle to make an offer. An association can influence the timing of negotiations and develop sliding scale prices that reflect changes in total production and thereby reduce the buyer's incentive to manipulate timing.

Third, a bargaining association would improve the market intelligence available to farmers. Many individual farmers lack the time to analyze the market in order to maximize profits for their products. As a result, many farmers are forced to rely on the buyer's market intelligence. An association, on the other hand, can hire staff to develop accurate, timely mar-

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7. A "producer" is any person producing agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower. 7 U.S.C. § 2302(b) (1988). However, those producing cotton or tobacco are exempted from the Act. Id. § 2302(e). The Act applies to all producers, including individuals, partnerships, corporations, or associations. Id. § 2302(c).
8. Bunje, supra note 3, at 40.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 41.
14. Id.
15. Id.
16. Id.
ket information.\textsuperscript{17}

Fourth, a bargaining association gives farmer's products a "home."\textsuperscript{18} If farmers must have a home for their produce, and there are a limited number of buyers, farmers can be forced to compromise on terms of sale, price, or both.\textsuperscript{19} An association can help farmers develop a market plan to control the product's market and the timing of entry into the market.\textsuperscript{20}

Finally, a bargaining association can control the final terms of a sale.\textsuperscript{21} When negotiating with individual farmers, buyers can delay payment to make maximum use of grower's resources to finance the crop.\textsuperscript{22} A bargaining association, however, can force buyers to pay in a timely manner, thus sheltering farmers' resources.\textsuperscript{23}

Lawmakers have recognized that a marketplace imbalance exists and have taken steps to enhance the producer's economic position. The Agricultural Fair Practices laws enacted on both the state and federal levels provide inducements for producers to gain market strength through group action.\textsuperscript{24}

\section*{III. Federal Statutes}

\subsection*{A. Sherman Act}

While farmers may choose to negotiate with processors on a cooperative basis, many remain independent business people. However, antitrust laws constrain their collective conduct. A brief sketch of applicable antitrust law provides a foundation for the existing public policy support of collective negotiation by farmers.

In 1890, the Sherman Act, the first antitrust statute, was en-

\begin{itemize}
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id. at 42.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} The Agricultural Fair Practices Act of 1967 (AFPA) was passed despite opposition from processors and handlers. The AFPA does not allow processors or handlers to prevent association membership or discriminate against member-growers with respect to prices and other terms of trade. Iskow, \textit{supra} note 5, at 12-2. The Capper-Volstead Act enables agricultural producers to act collectively and jointly market their products without violating federal anti-trust laws. \textit{See} 7 U.S.C. \textsection \textsection 291-292 (1988).
\end{itemize}
acted. The Sherman Act remains the most important limitation on group action by agricultural producers. Section one of Sherman makes it a criminal felony to contract, combine, or conspire to restrain trade. Section two provides that any person who monopolizes or attempts to monopolize any part of commerce is guilty of a felony.

The Sherman Act does not contain clear and concise language. The statute fails to define key terms such as "restrain trade" and "monopolize." Further, a literal reading of section one would paralyze commerce. Every contract limits the freedom of the parties and therefore restrains trade in some manner. Thus, the courts devised the "rule of reason" and the "rule of per se illegality" to apply the Sherman Act on a case-by-case basis.

1. Rule of Reason

The "rule of reason" as applied to the Sherman Act, prohibits conduct which "unreasonably" restrains trade or monopolizes commerce. The United States Supreme Court adopted the rule of reason to apply the Sherman Act in a logi-

25. See 15 U.S.C. §§ 1-8 (1988). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Id. § 1.

26. See id.

27. Id. "Every person who shall make any contract or engage in any combination or conspiracy hereby declared [by §§ 1-7 of this Title] to be illegal shall be deemed guilty of a felony . . . ." Id.

28. Id. § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Id.

29. Restraint of trade means unreasonable restraints of trade which are illegal per se restraints interfering with free competition in business and commercial transactions which tend to restrict production, affect prices, or otherwise control market to detriment of purchasers or consumers of goods and services. Klor's v. Broadway-Hale Stores, 255 F.2d 214, 230 (9th Cir. 1958). Monopoly, as prohibited by Section two of the Sherman Antitrust Act, has two elements: (1) Possession of monopoly power in relevant market, and (2) willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

30. Under the rule of reason, the legality of restraint on trade is determined by weighing all factors, such as the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose or end sought to be attained. United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 463 (D.C. 1975) (citing Board of Trade v. United States, 246 U.S. 231, 238 (1918)).

cal manner. The courts have never determined, however, whether collective negotiation by individual farmers constitutes an unreasonable restraint of trade. Nevertheless, the courts developed a second test that unmistakably limits such conduct.

2. Rule of Per Se Illegality

Activities such as price fixing and dividing markets are plainly anti-competitive and are thus labeled "illegal per se." Unfortunately, agricultural producers required special protection from the rule of per se illegality because the main purposes of cooperative bargaining and marketing—e.g., to agree on pricing policy and to whom they will sell products—were considered illegal per se.

B. Clayton Act (Section Six)

Congress first recognized producers' needs for limited antitrust protection when it passed the Clayton Act in 1914. Section six of Clayton exempted the mere organization of labor and agricultural organizations without capital stock from the rigors of antitrust scrutiny.

1981) (stating Section one of the Sherman Act only prohibits contracts, combinations or conspiracies that unreasonably or unduly restrain trade).

32. See Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911); Board of Trade, 246 U.S. at 238.


34. Certain types of business agreements are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement has actually injured market competition. BLACK'S LAW DICTIONARY 1142 (6th ed. 1990).

35. See Loewe v. Lawlor, 208 U.S. 274, 301 (1908) (stating Sherman Act makes no distinction between classes and does not exempt organizations of farmers and laborers); Reeves v. Docarah Farmers' Coop. Soc., 140 N.W. 844, 848 (Iowa 1913) (holding hog producers cooperative was an illegal restraint of trade where it required members to forfeit profits to cooperative if members sold produce to any other buyer than the cooperative); Ford v. Chicago Milk Shippers' Ass'n, 39 N.E. 651, 656 (Ill. 1895) (holding milk producer associations were within the purview of the Sherman Act).


Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organiza-
Section six of the Clayton Act is a clear expression by Congress that forming a cooperative is not a violation of the anti-trust laws. Section six, however, does not indicate the types of activity such an association may lawfully engage in. Furthermore, the benefit of the Clayton Act is limited because it only applies to non-stock organizations.

C. Capper-Volstead Act

Agricultural leaders recognized the shortcomings of the cooperative provision in the Clayton Act. After several years of intense congressional education, farmers secured the enactment of the Capper-Volstead Act in 1922. Capper-Volstead has two provisions. Section one sets out who is covered by the Act, how they must operate to receive its protection, and what actions are protected from antitrust liability. Section two protects the public from harmful conduct by cooperatives.

The Act empowers the Secretary of Agriculture to prevent cooperatives from abusing their market power to unduly enhance the price of products they market. Once an abuse has
been found, the Secretary of Agriculture shall issue an order directing such association to cease and desist such conduct.  

1. Qualification Standards

To be eligible for Capper-Volstead protection, a cooperative must conform to specific organizational requirements. First, membership is limited to persons engaged in the production of agricultural products. This group includes farmers, planters, ranchers, dairymen, and nut or fruit growers. Second, members are not allowed more than one vote because of the amount of stock owned or dividends on membership equity may not exceed eight percent per year. Third, the value of products marketed for members must exceed the value of products marketed for nonmembers.

2. Protected Activity

Capper-Volstead gives producers marketing alternatives that otherwise may be considered violations of antitrust laws. Producer-members of a cooperative may agree among themselves not only on the prices they will receive for their products but also on all reasonable terms of sale.

Producer-members of one cooperative can collectively market their products with producer-members of another cooperative by using a common marketing agent, forming a federation, or simply working together to accomplish legiti-

50. Id.
52. An agricultural producer is someone performing traditional farming activity such as tilling the soil and tending to animals. See National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978), aff'g 550 F.2d 1380 (1970).
53. See 7 U.S.C. § 291 (setting out who is covered, how they must operate and what actions are protected).
54. Id.
55. Id.
57. Maryland Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960).
mate marketing objectives. Producers may, through a single cooperative or in combination with other cooperatives, "obtain monopoly power in a given market so long as it is achieved through natural growth, voluntary confederation and without resort to predatory or anti-competitive practices."

The term "marketing" has been broadly interpreted in the Capper-Volstead context. Producers, through their cooperative, have integrated forward throughout the marketing chain. Land O'Lakes, Ocean Spray, Welch, and Sun-Maid are cooperatives that place member's farm products right on the grocery store shelf. Producers are "marketing" when their activity is restricted to negotiating with processors on price and terms of sale, without the cooperative ever taking title or possession of any agricultural product. Marketing under Capper-Volstead may involve the cooperative establishing a price below which no member will sell the product.

3. Unprotected Activity

Capper-Volstead provides only limited antitrust protection. The Act allows producers an opportunity to enhance

62. Land O'Lakes, Inc., P.O. Box 116, Minneapolis, MN 55440.
64. National Grape Coop. Ass'n, Inc., 2 South Portgage Street, Westfield, NY 14787.
65. Sun-Maid Growers of Cal., 13525 South Bethel Avenue, Kingsbury, CA 93631-9232.
69. The Act provides that the antitrust protection lies within sole discretion of the Secretary of Agriculture. 7 U.S.C. § 292. If the Secretary of Agriculture believes that the association is monopolizing or restraining trade, the Secretary must serve a complaint upon the association. The association may then rebut the allegations in the complaint by showing why they are not monopolizing or restraining trade and why a cease and desist order should not be issued. Id.
their marketing power. The Act, however, places reasonable restraints on that power.\textsuperscript{70} Even though an activity is not protected by Capper-Volstead, the activity is not necessarily unlawful. Rather, the rules of reason\textsuperscript{71} and \textit{per se} illegality\textsuperscript{72} test the legality of a particular activity under antitrust standards.

Collective action is restricted to producers and associations of producers.\textsuperscript{73} The Act forbids anti-competitive agreements and conduct between a cooperative of producers and distributors, labor officials, and other nonproducers.\textsuperscript{74} Acquisition of a noncooperative business may lead to antitrust liability if the effect of the acquisition is to substantially reduce competition.\textsuperscript{75}

Further the Act will not protect even a single, properly structured cooperative if its actions are predatory \textit{and} it obtains a monopolistic power through anti-competitive practices rather than through means involving its natural growth.\textsuperscript{76} Predatory conduct is activity that is anti-competitive and has no business justification.\textsuperscript{77} Conduct the courts have found predatory includes discriminatory pricing, coercing persons to join a cooperative, picketing, boycotting, and thinly veiled threats of violence to exclude nonmembers from the market.\textsuperscript{78}

Under Capper-Volstead, cooperatives are prohibited from

\begin{itemize}
  \item \textsuperscript{70} Persons producing agricultural products may act together in associations and collectively prepare their products for market. \textit{Id.} § 291. These individuals cannot, however, form a monopoly or unreasonably restrain trade in interstate or foreign commerce to the extent that prices are unduly enhanced. \textit{Id.} § 292.
  \item \textsuperscript{71} See supra notes 30-32 and accompanying text.
  \item \textsuperscript{72} See supra notes 33-35 and accompanying text. See also Legal Rights, supra note 51, at 10-2.
  \item \textsuperscript{73} 7 U.S.C. § 291.
  \item \textsuperscript{74} United States v. Borden Co., 308 U.S. 188, 205 (1939). To find otherwise would allow co-conspirators to completely control the supply of this agricultural product. \textit{Id.} This is the type of conduct that the Sherman Anti-Trust Act was designed to prevent. See Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 469 (1960). The \textit{Borden} court simply stated that "[s]uch a combined attempt of all the defendants, producers, distributors and their allies to control the market finds no justification in § 1 of the Capper-Volstead Act." \textit{Borden}, 308 U.S. at 205.
  \item \textsuperscript{75} Maryland & Virginia Milk Producers Ass'n, 362 U.S. at 463.
  \item \textsuperscript{76} Alexander v. National Farmers Org., 687 F.2d 1173, 1182 (1982).
  \item \textsuperscript{77} \textit{Id.} at 1183. Even lawful contracts and business activities may make up a pattern of conduct that is predatory. \textit{Id}.
  \item \textsuperscript{78} See Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1044 (2d Cir. 1980); Gulf Coast Shrimpers & Oysterman's Ass'n v. United States, 236 F.2d 658, 665 (5th Cir. 1956).
\end{itemize}
unduly enhancing prices.\textsuperscript{79} Consumers are shielded from price gouging by a cooperative that acquires substantial market power.\textsuperscript{80} A cooperative can obtain monopoly power but cannot abuse it.\textsuperscript{81} To date, no cooperative has "unduly enhanced" prices.

D. Agricultural Fair Practices Act of 1967

Collective negotiation by agricultural producers received additional support with the enactment of the Agricultural Fair Practices Act of 1967 (AFPA).\textsuperscript{82} Impetus for the AFPA came from the experiences of various grower groups in the early 1960's.\textsuperscript{83} Processors resisted efforts by Arkansas broiler producers,\textsuperscript{84} Ohio tomato growers,\textsuperscript{85} California fruit and vegetable growers,\textsuperscript{86} and others to negotiate on a collective basis. Existing laws were ineffective at balancing the market power disparity between producers and processors.\textsuperscript{87}

As introduced, the AFPA strongly promoted agricultural bargaining by prohibiting unfair practices by processors.\textsuperscript{88} After an extensive legislative battle, the law made the unfair practices provisions applicable to grower groups as well as processors, and protected certain processor practices that have curtailed producer gains.\textsuperscript{89}

1. Prohibited Practices

The AFPA does not give agricultural producers a free reign in collective bargaining. Section four of the AFPA\textsuperscript{90} makes it unlawful for any handler to engage in several courses of conduct.\textsuperscript{91} A handler cannot coerce a producer to join or refrain from joining an association of producers, or refuse to deal with

\begin{itemize}
  \item \textsuperscript{79} 7 U.S.C. § 292 (1988).
  \item \textsuperscript{80} Id.
  \item \textsuperscript{81} Fairdale Farms, 635 F.2d at 1045.
  \item \textsuperscript{82} 7 U.S.C. §§ 2301-06 (1988).
  \item \textsuperscript{83} RANDALL E. TORGERSON, PRODUCER POWER AT THE BARGAINING TABLE, A CASE STUDY OF THE LEGISLATIVE LIFE OF S. 1093-18 (1990).
  \item \textsuperscript{84} Id. at 7-12 (summarizing Arkansas Broiler case).
  \item \textsuperscript{85} Id. at 3-7 (summarizing Ohio Tomato case).
  \item \textsuperscript{86} Id. at 12-17 (summarizing California Raisin Growers case).
  \item \textsuperscript{87} Donald A. Frederick, Agricultural Bargaining Law: Policy in Flux, 43 ARK. L. REV. 679, 682 (1990).
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} 7 U.S.C. § 2303 (1988).
  \item \textsuperscript{91} A "handler" is defined under the Act to include both buyers and producer
\end{itemize}
a producer because the producer joins such an association. 92 Nor can a handler discriminate against a producer with respect to price, quantity, quality, or other terms of purchasing and handling agricultural products because the producer joins an association. 93 A handler is barred from coercing a producer to sign or breach a contract with an association or another handler, 94 paying or loaning money to induce a producer not to join or to cease belonging to an association, 95 and making false statements about the finances, management, or activities of an association. 96

2. Disclaimer Clause

Section five of the AFPA, entitled "Disclaimer of intention to prohibit normal dealings," is the biggest obstacle to effective producer bargaining. 97 Under the disclaimer clause, a processor may not refuse to deal with a producer because that producer joins a cooperative association. However, the processor can use any reasonable pretext other than association membership to refuse to do business with an association member. 98 Also, a handler can lawfully refuse to deal with a producer association attempting to negotiate on behalf of its producer-members. 99

E. Packers and Stockyards Act of 1921

The Packers and Stockyards Act of 1921 (P & S Act) 100 provides additional legal protection for livestock and poultry producers. Under Section 202 of the P & S Act, no packer or live poultry dealer may lawfully engage in or use any unfair, unjust

associations. Id. § 2302(a). The purpose of the Act is to establish standards of fair practices for handlers in their dealings in agricultural products. Id. § 2301.

92. Id. § 2303(a).
93. Id. § 2303(b).
94. Id. § 2303(c).
95. Id. § 2303(d).
96. Id. § 2303(e).
97. Id. § 2304. This section provides, "[n]othing in this Chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer’s membership in or contract with an association of producers, nor require a handler to deal with an association of producers." Id.
98. Id.
99. Butz v. Lawson Milk, 386 F. Supp. 227, 240 (N.D. Ohio 1974). However, a handler still cannot refuse to deal with a producer based solely upon legal justification that the producer joined an association. Id.
discriminatory, or deceptive practice. Nor may a packer or dealer devise or give unreasonable preference to any person or locality or subject any person or locality to unreasonable prejudice or disadvantage.

In 1987, the P & S Act was amended to include those live poultry dealers who "obtain live poultry by purchase or under a poultry growing agreement." Prior to the 1987 amendment, most of the opportunities for collective agreements in the poultry industry were with integrators who did not sell live birds and were beyond the scope of the P & S Act. With the 1987 amendment, poultry grower associations now have the P & S Act as additional protection against discriminatory conduct by processors.

IV. STATE STATUTES

A. Common Provisions

A number of states have enacted laws reflecting public policy support for collective negotiation by agricultural producers. While no two state laws are identical, common provisions do appear among jurisdictions. One standard feature is a statement of prohibited or unfair practices for processors, based on the prohibited practices Section of the AFPA.

101. *Id.* § 192(a).
102. *Id.* § 192(a).
103. *Id.* § 182(10).
108. See *infra* notes 109-117 and accompanying text.
109. See MINN. STAT. § 17.696(1)-(a)-(f) (1992) (stating handler shall not intimidate or discriminate against a producer through the use of unsubstantiated financial reports or price fixing); CAL. FOOD & AGRIC. CODE § 54431(a)-(d) (West 1986) (prohib-
Several states require processors to engage in "good faith" negotiations with producer associations. While the definition of "good faith" is difficult to establish and even more difficult to enforce, commentators have developed some guidelines. For example, when a processor cannot find a better offer than the one received from a producer association but accepts an alternative offer anyway, the processor has not bargained in "good faith."

A statute may include a specific dispute resolution mechanism including mediation, conciliation or arbitration to resolve these dilemmas. Only one state makes settlement mandatory. In all other jurisdictions, either party can refuse to sign a contract.

Some states include a requirement that a processor deduct a portion of the amount due a producer and send the money

retained to the producer's association at the producer's request. In two instances, an advisory committee was established to study and report on the effectiveness of the state act.

B. Minnesota Agricultural Contracts Law

In 1990, Minnesota enacted legislation to protect producers from losses on major investments required to comply with a contract for agricultural commodities. Minnesota's statute appears to be the only statute to provide specific protection for producers who make significant investments in reliance on contracts offered by processors.

The law prohibits a purchaser of agricultural commodities—except under certain circumstances—from terminating or canceling a contract requiring significant initial investment. The purchaser may only terminate the contract if two requirements are met: first, the producer must receive at least 180 days advance written notice prior to the cancellation; and second, the producer must be reimbursed for damages to the buildings or equipment originally required under the contract.

Minnesota law requires all contracts for an agricultural commodity to provide for resolution of disputes by either mediation or arbitration. The statute also presumes an implied obligation of good faith by both parties. Either party may recover damages, court costs and attorney fees if a court deter-

116. See CAL. FOOD & AGRIC. CODE § 58451 (West 1986) (requiring payment only if nonprofit agricultural organizations are implicated); IDAHO CODE §§ 22-3901-22-3906 (1978) (requiring deduction to be paid over to nonprofit agricultural association); N.J. REV. STAT. § 4:13-26.1 (1973) (stating failure to comply with the deduction requirement may create civil liability).

117. See CAL. FOOD & AGRIC. CODE §§ 54441-46 (West 1986); WASH. REV. CODE § 15.83.110 (1992) (stating committee was to report on all issues related to Act).

118. MINN. STAT. § 17.92 (1992) (applying statutory protections to investments in buildings and equipment that cost in excess of $100,000 and have a useful life of five years).

119. A contract may be terminated immediately if the grounds for termination are "(1) voluntary abandonment of the contract relationship by the producer; or (2) conviction of the producer of an offense directly related to the business conducted under the contract." Id. § 17.92 (3).

120. Id. § 17.92(1).

121. Id.

122. Id. § 17.91.

123. Id. § 17.94.
mines the contract was breached in bad faith.124

V. Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing & Bargaining Board.125

Federal Pre-emption Under AFPA

As originally enacted, the Michigan Agricultural Marketing and Bargaining Act (MAMBA)126 created a form of agency shop for agriculture.127 A producers' association—representing both a majority of the producers and a majority of the production of a commodity in a prescribed geographic area—could apply to the state for accreditation as the exclusive bargaining agent for all producers of that commodity in that area.128

Upon certification, all producers of the commodity, regardless of whether they chose to join the association, had to abide by the contracts the association negotiated with processors.129 Non-members could also be required to pay a service fee to the association.130

Under the authority of the MAMBA,131 the Michigan Agricultural Cooperative Marketing Association (MACMA)132

124. Id.
128. Under Michigan's system, if an association's membership constitutes more than 50% of the producers of a particular commodity and its members' production accounts for more than 50% of the commodity's total production, the association may apply to the state Agricultural and Marketing and Bargaining Board for accreditation as the exclusive bargaining agent for all producers of that particular commodity. Michigan Canners & Freezers Ass'n, 467 U.S. at 466. If the Board found the association met the qualification requirements, the board authorized the association to act as the agent for all of the producers of that commodity, regardless of whether they chose to become members of the association. Id. at 466-468. Nonmembers were then required to abide by the terms of the contracts the association negotiated with processors and to pay a service fee to the association. Id. at 468.
129. "Although the Michigan Act does not explicitly prohibit a producer represented by an accredited association from negotiating directly with a processor, it does prohibit the processor from negotiating with such a producer." Id. at 469.
130. Id. at 462.
132. MACMA is a cooperative association of producers formed to protect the rights of its members in the market. Membership in the association is purely voluntary.
maintained exclusive authority as the sales and bargaining representative for the state's asparagus producers. Accordingly, MACMA negotiated contracts for the state's asparagus producers that bound all producers. In *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*, non-member producers brought suit seeking a declaratory judgment that the federal AFPA preempted the MAMBA provisions requiring mandatory adherence to contracts negotiated by a producer association.\(^{139}\)

The Michigan Canners and Freezers challenged the MAMBA on three grounds. First, the association argued that the MAMBA's provisions were pre-empted by AFPA.\(^{134}\) Second, the Canners and Freezers argued that the MAMBA's provisions exceeded Michigan's police power.\(^{135}\) Third, the non-member producers argued that the provisions exceeded the scope of the Act's title and thus violated the Michigan Constitution.\(^{136}\) The Michigan Supreme Court rejected all three claims.\(^{137}\)

On appeal, the United States Supreme Court reversed, stating that the Michigan Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [AFPA]."\(^ {138}\) The Court further stated that the Michigan Act coerced non-member producers to incur the same effects as association members—a practice forbidden by AFPA.\(^ {139}\) This coercion served to force non-members to become de facto members of the association.\(^ {140}\) Basing its decision on these conflicts of Michigan law and the AFPA's professed purpose of shielding producers from coercion, the Supreme Court found the Michigan Act to be preempted by the AFPA.\(^ {141}\)

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134. *Id.* at 136.
135. *Id.*
136. *Id.*
137. *Id.* at 142-143.
141. *Id.* at 478.
VI. POLICY OPTIONS FOR BETTER MARKETPLACE BALANCE

A. Weaknesses in Existing Law

The Capper-Volstead Act gives producers a limited antitrust exemption to form cooperatives and collectively negotiate with processors.142 The AFPA and P & S Acts prevent processors from blatantly discriminating against growers because of association activity.143 These Acts do not provide any additional support for growers.

Several states with significant agricultural production have found the federal statutes insufficient to adequately protect legitimate grower interests. These states have enacted laws to further promote farm bargaining.144 The Supreme Court’s decision in Michigan Canners & Freezers Ass’n145 raises questions about state laws that provide rights to producers beyond those accorded by the AFPA or possibly conflict with the AFPA.146 According to Michigan Canners & Freezers Ass’n, these state laws may be vulnerable to legal attack through preemption principles.147

The disclaimer clause of AFPA provides that “[n]othing in this chapter shall . . . require a handler to deal with an association of producers.”148 The provision may call into question state statutes requiring a processor to negotiate in good faith with a producer association. The disclaimer clause also raises

143. Baldree v. Cargill, Inc., 758 F. Supp. 704 (M.D. Fla. 1990), aff’d, 925 F.2d 1474 (11th Cir. 1991). The president of a contract poultry growers’ association, supported by USDA and the Department of Justice, convinced the court he was terminated by his processor because of association activity. Id. at 706-07. The court issued a preliminary injunction ordering the processor to reinstate normal business relations with the grower. Id. at 707. The court found a substantial likelihood the grower would prove the processor’s actions were unfair, unjustly discriminatory and deceptive practices in violation of the P & S Act, 7 U.S.C. § 192, and coercion, intimidation and discrimination against association members, in violation of the AFPA, 7 U.S.C. § 2303. Id. at 706.
146. Id. at 469-78.
147. Id.
concerns over how far a state can go in compelling a processor to accept third-party intervention in the negotiation process.149

From the producer's perspective, other weaknesses exist in legislation, particularly at the federal level. Under the disclaimer clause of the AFPA, processors can terminate producer contracts for virtually any reason other than the producer's participation in a cooperative.150 Because of this narrow coverage, processors could easily formulate a legitimate reason justifying termination regardless of whether cooperative participation was the real motivation behind the termination of the contract.

Federal law is devoid of procedures to facilitate negotiations between a processor and a grower association. Often, if the parties are able to sit down and talk with a neutral, trained outside person, differences can be resolved and amicable agreements can be reached. While several states have undertaken to provide professional assistance in the negotiation process,151 the federal government has not found it appropriate to offer this service on a nationwide scale.

Penalties under federal law for violating producer rights are modest, at best. Private parties can collect damages and attorney's fees.152 The cost of private litigation, however, forces most grower associations to rely on the government to pursue their cause.

Even when the government files suit on behalf of a grower association, the only remedy available is a civil complaint re-

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149. While the disclaimer clause is neither an explicit expression of Congressional intent to preempt state law or to occupy an entire field of regulation, neither was the language struck down in *Michigan Canners & Freezers Ass'n*. To find preemption under AFPA, the Supreme Court held that it need only find a provision of the Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984). The Court focused on how "the theme of voluntariness" in the prohibited practices section of AFPA applies to producers, but that same approach might be expanded to disclaimer clause protections for processors. *Id.* at 471.

150. 7 U.S.C. § 2304.


152. 7 U.S.C. § 2305(c).
questing preventive relief to bar further illegal conduct.\textsuperscript{153} As a result, the Justice Department is reluctant to expend the resources necessary to pursue these cases. Even if the case is successful, the processor is no worse off than if it had not violated the law initially. Current enforcement tools provide little inducement for voluntary compliance on the part of processors.

Federal law does little to facilitate purposeful bargaining. State law that exceeds the scope of the AFPA is exposed to possible federal preemption charges. The lack of uncompromised public policy support puts producer associations in a "chicken-or-the-egg" situation. Producers are reluctant to join an association until the association has shown the ability to withstand processor pressure. Yet, an association cannot obtain significant bargaining power until its membership represents a large enough share of production that the processor has to respect the association.

Some producer groups have developed sufficient market presence to command processor attention.\textsuperscript{154} Many other producers, however, remain unorganized or unable to become a force in their industry. A more favorable public policy toward agricultural bargaining would facilitate stronger, more effective farmer associations.

\textbf{B. Steps to Improve Producer Bargaining Power}

Repealing the disclaimer clause would eliminate the AFPA language that states that handlers and producers are not required to deal with producer associations.\textsuperscript{155} This repeal would remove the cloud over state laws that promote good faith negotiation and third party assistance in reaching a settlement. In addition, repealing the disclaimer clause would remove any inference that processors can refuse to do business with an association member for reasons other than member-

\textsuperscript{153} Id. § 2305(b).


\textsuperscript{155} "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." 7 U.S.C. § 2304.
ship in the association. 156

Producers could also benefit from an amendment designating failure to bargain in good faith as a prohibited practice under section four of the AFPA. To avoid self-contradiction, an amendment requiring good faith bargaining should be accompanied by a repeal of at least that portion of the disclaimer clause which states that handlers do not have to deal with producer associations. 157 These amendments would insure that some discussion or negotiation would occur. Once the parties are talking there is reason to hope for a negotiated contract. In addition, producers who fail to engage in honest negotiation could be subject to legal action or sanctions.

Good faith, however, is a vague and subjective standard. Establishing a lack of good faith is difficult. Therefore, some additional means of promoting good faith negotiation would be appropriate. States that have experimented with dispute resolution mechanisms have relied on involvement by a disinterested third party in the negotiation process. 158 Mediation and conciliation have particular appeal by encouraging settlement of disputes without disrupting the marketplace by forcing parties to accept contract terms against their will. 159 One good model for a national dispute resolution procedure is the conciliation process in use in California. 160 The conciliation process allows any party to request conciliation. Requests are made to a state board. If the board feels that conciliation would be helpful, the board will appoint a conciliator. The conciliator will promote discussion and negotiations between the parties. However, the conciliator has no authority to make a decision that is binding upon the parties. 161

Producers who farm under contract for a processor would benefit from legislation like Minnesota's Agricultural Contracts law. 162 In the poultry industry, for example, farmers make

156. Id.
157. Id.
159. ISKOW, supra note 5, at 12-7 (stating that in most cases the decision of an arbitration board is final and binding on the parties).
161. Id.
162. MINN. STAT. § 17.92 (1992). Minnesota law requires that a contractor may not terminate or cancel a contract until the producer has been given written notice and has been reimbursed for damages incurred (this applies to investments in build-
substantial capital investments on the promise of a processor to provide baby chicks that the farmer raises to slaughter weight. The farmer becomes dependent on the integrated poultry company for birds to raise and has little power to negotiate reimbursement if the processor can cut off the grower’s supply of birds at will. Protecting the farmer’s investment against arbitrary contract termination provides the security to engage in meaningful negotiation.

Finally, the Secretary of Agriculture should have the authority to assess civil administrative penalties for AFPA and P & S Act violations. Processors would be more careful about complying with the AFPA requirements if the Secretary of Agriculture had the authority to assess civil penalties for violations of its provisions. Some state agencies have administrative enforcement authority. Maine and Washington provide for civil penalties of up to $5,000 for each violation of state agricultural bargaining laws. The maximum fine in California is $10,000.

Other federal agricultural programs authorize USDA civil penalties. Several federal laws to promote orderly marketing of specific commodities empower the Secretary of Agriculture to assess civil penalties of not less than $500 or more than $5,000 for each violation.

Poultry and livestock producers face similar limitations under the P & S Act. Although the Secretary of Agriculture has enforcement authority over packers, there is no corre-


166. See, e.g., Egg Research and Consumer Information Act, 7 U.S.C. § 2714(b)(1) (1988); Potato Research and Promotion Act, Id. § 2621(b)(1); Honey Research, Promotion, and Consumer Information Act, Id. § 4610(b)(1).

167. Id.

168. See 7 U.S.C. §§ 192, 193, 195. Section 192 enumerates specified unlawful practices applicable to both packers and live poultry dealers. Id. § 192. Section 193 allows the Secretary of Agriculture to enforce section 192. Id. § 193. Section 195 provides for penalties consisting of fines between $500 and $10,000, or imprisonment of six months to five years, or both. Id. § 195.
sponding authority with regard to live poultry dealers.\textsuperscript{169} Appropriate administrative enforcement power at USDA would place initial responsibility for reviewing potential violations in the hands of those persons most familiar with the intent of the law and who also possess the expertise to evaluate whether punitive action is appropriate in a given factual context.

VII. CONCLUSION

Collective negotiation by agricultural producers has been an important factor in increasing farm income. Farm bargaining is an economic self-help strategy that could be an even more effective tool for producers if additional public policy encouragement were available. Producers should be given impetus to form cooperative associations and enter into contract negotiation with processors. The result would be better economic balance in agricultural markets and a more stable and prosperous farm sector.

\textsuperscript{169} Id. § 193.