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Cover Page Footnote

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THE CHICKENS FINALLY COME HOME TO ROOST: JUDICIAL OVERSIGHT OF AGRICULTURAL ANTITRUST SETTLEMENTS

Christian M. Sullivan[*]

The agricultural industry has long enjoyed an exception from antitrust laws under the Capper-Volstead Act of 1922, which exempts agricultural cooperatives from federal antitrust scrutiny. Accordingly, large agricultural associations and cooperatives have formed, leading to the coagulation of many food products' industries into giant collectives. As these collectives have grown, small farmers have joined together to file private antitrust enforcement actions against these conglomerates. To combat these enforcement actions, agricultural collectives have paid out large settlement sums to quash these private actions and ensure that their operations continue smoothly.

Private enforcement actions are a key tool for ensuring a free and fair market. When defendants like large agricultural associations in a private enforcement action settle, the settlement often occurs at the expense of a class of individuals and businesses that is harmed by the associations' continued anticompetitive conduct. Moreover, these settlements deprive courts of a case or controversy to further develop law and policy concerning antitrust and agriculture. Although government agencies such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC) can pursue legal action against these defendants, federal action is often delayed and may have little impact on the market.

This Note proposes judicial review of private antitrust settlements as a method to ensure that these private settlements lead to effective changes in anticompetitive conduct from

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cartels. Drawing from the role of consent decrees in the DOJ's civil antitrust litigation and Delaware courts' scrutiny of "disclosure only" settlements in corporate mergers and acquisition (M&A) litigation after In re *Trulia, Inc. Stockholders Litigation, this Note argues that judicial review is a powerful instrument that can be used to ensure fair settlements that minimize the effects of anticompetitive conduct in the agricultural industry.*

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I. INTRODUCTION

Nested between the rolling green hills and lake country of Northeast Georgia, chicken farmers and processing plants operate as they have for generations.[1] Multi-generational family operations such as Fieldale Farms[2] operate alongside multi-national corporations such as Pilgrim's Pride[3] to fuel the nation's insatiable appetite for chicken.[4] For residents of northeast Georgia, the sight of large tractor-trailer trucks loaded to capacity with chicken coops with snow-white chicken feathers flying in the truck's wake is as ordinary as apple pie.

This bucolic image of lily-white chicken feathers belies the contentious nature of America's poultry industry. Poultry processing plants are regularly portrayed as dangerous, understaffed, and unsafe work-places.[5] Furthermore, increased national demand for chicken allows processors to bid low prices for large outputs, relegating chicken growers to some of the country's

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[1] *See, e.g.*, FIELDALE FARMS CORP., http://www.fieldale.com/site (last visited Feb. 28, 2023) (characterizing Fieldale Farms as a fifty-year-old family business in Northeast Georgia).

[2] *See id.* (detailing Fieldale Farms' business as one of the "largest independent producers in the world").

[3] *See* Pilgrim's—Gainesville (@PilgrimsGainesvilleGA), FACEBOOK, https://www.facebook.com/PilgrimsGainesvilleGA/ (last visited Aug. 16, 2022) (identifying one Pilgrim's Pride poultry processing operation "in the foothills of north Georgia, 'the Chicken Capital of the World'").

[4] *See* Roberto A. Ferdman, *Look at What Our Obsession with White Meat Has Done to Chickens*, WASH. POST (Mar. 12, 2015, 11:52 AM), https://www.washingtonpost.com/news/wonk/wp/2015/03/12/our-insatiable-appetite-for-cheap-white-meat-is-making-chickens-unrecognizable/ (charting America's drastic increase in chicken consumption since the early 1900s).

[5] *See, e.g.*, Richard Fausset & Miriam Jordan, *A Georgia Chicken Town Reels After a Plant Disaster*, N.Y. TIMES (July 23, 2021), https://www.nytimes.com/2021/01/29/us/poultry-plant-nitrogen-gainesville-georgia.html (recounting how a ruptured nitrogen line at a chicken processing plant killed six workers); Christopher Quinn, *Ga. Poultry Producers Scratch for Workers Amid Rising Demand, Prices*, ATLANTA J.-CONST. (May 19, 2021), https://www.ajc.com/news/ga-poultry-producers-scratch-for-workers-amid-rising-demand-prices/AOBN7F6ZRZC2PPBDWDYUOECSY4/ (discussing chicken processing facilities' struggles to hire workers); Zachary Hansen, *2 Tyson Chicken Factory Workers Die from COVID-19 in South Georgia, Union Says*, ATLANTA J.-CONST. (Apr. 8, 2020), https://www.ajc.com/news/breaking-news/tyson-chicken-factory-workers-die-from-covid-south-georgia-union-says/XkBThvQZAPR1SQu25MGcBJ/ (reporting the coronavirus-related deaths of two Tyson Foods plant employees after maskless workers were placed in close quarters).

poorest farmers.[6] But a more important, yet less salient issue concerning poultry, and the agricultural industry as a whole, is completely flying under the public's radar: agricultural cooperatives' increasing concentration of monopoly power.[7]

Antitrust law assumes that the public benefits from market competition.[8] Accordingly, antitrust policy aims to protect market competition by enjoining anticompetitive behavior.[9] Although courts' and scholars' definitions of anticompetitive behavior differ,[10] courts generally agree that certain behavior, including price-fixing and market allocation, is anticompetitive.[11]

Yet agriculture's statutory exemptions sweep away settled principles of antitrust law, explicitly authorizing the formation of large cooperatives, voluntary associations of farmers, to engage in price-fixing and market allocation[12] to counter farmers' unique economic stressors.[13] Cooperatives have since exploited these

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[6] *See* PEW CHARITABLE TRUSTS, THE BUSINESS OF BROILERS: HIDDEN COSTS OF PUTTING A CHICKEN ON EVERY GRILL 1 (2013), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/peg/publications/report/businessofbroilersreportthepewcharitabletrustspdf.pdf ("A 2001 study . . . revealed that 71 percent of growers whose sole source of income was chicken farming were living below the poverty line.").

[7] "Monopoly power is the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co. (*Cellophane)*, 351 U.S. 377, 391 (1956). Firms can achieve monopoly power through combining their individual market power through mergers, agreements, or internal growth. *See* Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 251–52 (1987) (discussing ways to attain monopoly power). "Market power is the ability to raise prices above those that would be charged in a competitive market." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984). For a discussion of agricultural cooperatives' accumulation of monopoly power, see *infra* Part IV.

[8] *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

[9] *See id.* ("The heart of our national economic policy long has been faith in the value of competition." (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951))).

[10] *See infra* section II.C for an overview of antitrust scholarship.

[11] *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (reiterating the inherent illegality of market allocation and horizontal price-fixing).

[12] *See* Co-operative Marketing Associations Act (Capper-Volstead Act), 7 U.S.C. § 291 (authorizing farmers to form price-fixing cooperatives).

[13] *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 825–26 (1978) ("By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.").

statutory exemptions to aggregate market power and dominate geographic markets.[14] Furthermore, cooperatives have wielded their overwhelming monopoly power to force farmers to participate in industry-wide price-fixing schemes.[15] Nowhere has this behavior been more evident than Georgia's poultry industry, where both family operations and larger corporations have been implicated in a recent price-fixing scheme.[16]

Efforts have been made to counter anticompetitive behavior in the agricultural industry. For example, the Biden administration issued an executive order on competition policy calling for greater antitrust scrutiny of the agricultural industry.[17] But given the unlikelihood that this order will alter cooperative behavior,[18] small farmers and consumers have filed class action lawsuits against agricultural cooperatives to enjoin anticompetitive behavior.[19] To date, defendants have moved quickly and successfully to settle for substantial sums whenever these agricultural antitrust class action lawsuits are brought before courts.[20] Through settlement,

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[14] *See* Dan Kaufman, *Is It Time to Break Up Big Ag?*, NEW YORKER (Aug. 17, 2021), https://www.newyorker.com/news/dispatch/is-it-time-to-break-up-big-ag (recounting dairy farmers' struggles to sell to anyone but Dairy Farmers of America, the nation's largest dairy cooperative).

[15] *See id.* (discussing dairy cooperatives' price-fixing schemes on the Chicago Mercantile Exchange).

[16] *See* Kelly Hayes, *Bought Chicken Over the Last Decade? You Could Be Eligible for Settlement Payment*, FOX5ATLANTA (Sept. 14, 2021), https://www.fox5atlanta.com/news/bought-chicken-over-last-decade-you-could-be-eligible-for-settlement-payment (discussing an alleged price-fixing conspiracy among Fieldale Farms, Mar-Jac Poultry, Pilgrim's Pride, and Tyson Foods in Georgia).

[17] *See* Exec. Order No. 14036, 86 Fed. Reg. 36,987, 36,992–93 (July 9, 2021) (ordering the Secretary of Agriculture "to address the unfair treatment of farmers and improve conditions of competition" through prohibiting unfair practices and improving farmers' access to retail markets).

[18] *See generally id*. (omitting explicit mentions of cooperatives).

[19] *See, e.g.*, *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 779 (N.D. Ill. 2017) (alleging a price-fixing conspiracy among chicken companies); *In re* Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 713 (E.D. Pa. 2011) (alleging a price-fixing conspiracy among egg producers); *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1148–49 (D. Idaho 2011) (alleging a price-fixing conspiracy by a potato cooperative).

[20] *See, e.g.*, Jacob Bunge, *Fieldale Farms Offers to Pay $2.25 Million to Settle Chicken-Pricing Lawsuit,* WALL ST. J. (Aug. 7, 2017, 4:39 PM), https://www.wsj.com/articles/fieldale-farms-offers-to-pay-2-25-million-to-settle-chicken-pricing-lawsuit-1502138346 (reporting a $2.25 million settlement offer by Fieldale Farms, separate from the other thirteen agricultural defendants); Kaufman, *supra* note 14 (recounting the Dairy Farmers of America's $140 million and $50 million settlements for alleged price-fixing conspiracies).

cooperatives evade formal adjudication and continue their anticompetitive schemes in other markets.[21] Moreover, without a case or controversy, a court cannot hear a dispute, enjoin anticompetitive conduct, nor refine the confines of acceptable behavior in agricultural markets.[22]

This Note proposes judicial review of private enforcement settlements in agricultural antitrust cases as a solution to courts' conundrum. Judicial oversight of settlements allows courts to prevent parties from entering into inequitable settlement agreements that exchange meritorious plaintiff claims for mass buy-outs.[23] By signaling to relevant market players that certain anticompetitive behavior is unacceptable, settlement review can diffuse the concentrated market power amassed by agricultural cooperatives.[24] Furthermore, a court order reviewing a settlement can operate as quasi-precedent within a district court by signaling to judges and policymakers that change is necessary.[25]

Crucially, however, settlement review is not a trial, but rather an intervening mechanism that investigates the underlying claims without conducting significant fact-finding and analysis.[26] Accordingly, a model of judicial review of settlements should be an intermediate standard. Fortunately, an intermediate standard of review exists in antitrust law: the "quick look."[27] Under the abbreviated inquiry of quick look, courts ask whether an individual with a rudimentary understanding of economics would consider the

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[21] *See, e.g.,* Kaufman, *supra* note 14 (identifying how the Dairy Farmers of America paid $12 million out in a 2008 settlement for manipulating milk prices on the Chicago Mercantile Exchange and subsequently settled another lawsuit for $140 million for fixing milk prices in the southeastern United States); *see also infra* note 153 and accompanying text.

[22] *See* U.S. CONST. art. 3, § 2 (requiring plaintiffs appearing before federal courts to present a case or controversy).

[23] *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (highlighting judges' fiduciary duties to plaintiffs in mass settlements).

[24] *See* Joshua D. Wright & Douglas H. Ginsburg, *The Economic Analysis of Antitrust Consents*, 46 EUR. J.L. & ECON. 245, 257 (2018) (detailing how settlements signal agency priorities to relevant industry players).

[25] *See infra* Part V for a discussion of how settlements can establish precedents.

[26] *See* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 59 (1999) ("[J]udicial review of settlement is a hybrid between trial and settlement.").

[27] See *infra* section I.B.*3* for more on quick look analysis.

behavior anticompetitive.[28] Similarly, a judge's quick look at a settlement would require courts to determine whether an individual with a basic comprehension of agricultural economics would believe the settlement to be fair and reasonable. To determine settlements' fairness and reasonableness, this standard should import other models of judicial review such as antitrust consent decrees and disclosure-only settlements.[29] Combining these models with agricultural antitrust, a fair and reasonable settlement is any settlement that is in the public interest of a relevant market and provides material benefits that are narrowly tailored to address the plaintiffs' injuries. Through this framework, courts will provide relief to the long-suffering farmers within established confines of judicial power.

This Note proposes a quick look model of judicial review for private agricultural antitrust settlements as a mechanism for the continued development of agricultural competition law. Part II summarizes the standards of review and underlying debate within antitrust law. Part III explains how agricultural cooperatives have exploited statutory exemptions to accumulate excessive market power. Part IV examines two models of judicial review of settlements—consent decrees and corporate disclosure settlements—and identifies helpful aspects of each model. Part V presents the quick look model of judicial review of agricultural settlements.

II. AN OVERVIEW OF ANTITRUST LAW

This Part explains the basics of the "antitrust laws," their associated common law, and scholarly debate regarding antitrust's ultimate goals. Although agriculture is largely exempt from many antitrust regulations,[30] a general overview of antitrust statutes provides the foundation for a novel regime of judicial review. Through common law interpretations of these fundamental statutes, the U.S. Supreme Court has formulated varying standards

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[28] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (delineating the basic framework of quick look analysis).

[29] See *infra* Part IV for a discussion of existing judicial review models.

[30] *Compare* 15 U.S.C. § 1 (generally prohibiting horizontal and vertical price-fixing), *with* 7 U.S.C. § 291 (permitting agricultural cooperatives' price-fixing schemes).

of review for contested anticompetitive behavior.[31] These levels of review are instructive in crafting a regime of judicial review for private enforcement settlements because they define a spectrum of appropriate judicial scrutiny for different behavior. However, these antitrust statutes and judicial standards of review must be contextualized within a contemporary antitrust debate that is continually re-evaluating whether consumer welfare or overall market health should be antitrust's guiding dogma.[32]

A. ANTITRUST'S STATUTORY FRAMEWORK

The Clayton Act, the Sherman Act, and the Federal Trade Commission Act (FTCA) compose antitrust's tripartite statutory framework.[33] These acts all serve the primary goal of antitrust law: to enjoin business organizations from conspiring to exert their combined market power to suppress fair competition.[34] Specifically, these three statutes regulate two broad categories of restraints on trade: horizontal restraints and vertical restraints.[35] Horizontal restraints occur when competitors within the same level of production, distribution, or supply cooperate to accumulate market

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[31] *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897) (articulating per se illegality); Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238–41 (1918) (formulating the rule of reason); *Cal. Dental Ass'n*, 526 U.S. at 770 (explaining quick look analysis).

[32] *See infra* section II.C.

[33] *See* Sherman Act, 15 U.S.C. §§ 1–7 (targeting trusts and combinations); Clayton Act, 15 U.S.C. §§ 12–27 (prohibiting specific anticompetitive conduct); Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (establishing the Federal Trade Commission's (FTC's) jurisdiction and enforcement powers).

[34] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914) (noting the Clayton Act's prohibition of below-cost pricing "with the . . . intent to . . . destroy . . . the business of a competitor"); *see also* FTC v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966) (interpreting the FTCA to grant the FTC the authority to regulate trade practices violating the Sherman and Clayton Acts).

[35] *Compare* Sherman Act, 15 U.S.C § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."), *with* Clayton Act, 15 U.S.C. § 14 ("It shall be unlawful for any person engaged in commerce . . . [to] fix a price . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . where the effect of such [a] . . . contract . . . may be to substantially lessen competition . . . ."). The FTCA incorporates the Sherman and Clayton Acts. *Brown Shoe Co.,* 384 U.S. at 321.

power within the relevant sector.[36] Examples of prohibited horizontal restraints on trade include price-fixing,[37] market division agreements,[38] boycotts,[39] and agreements among horizontal competitors organized by a vertical player known as hub-and-spokes conspiracies.[40] Vertical restraints are arrangements among players at different levels of the production, distribution, or supply process (i.e., agreements between the manufacturer and distributor, or agreements between the distributor and retailer).[41] Customary vertical restraints include exclusive distributorships, tying arrangements,[42] and resale price maintenance.[43] Despite their distinct differences, the antitrust laws group horizontal and vertical restraints together as agreements to restrain trade.[44]

Chief among all evils addressed by the Sherman and Clayton Acts and the FTCA is monopoly.[45] Monopolies can be formed

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[36] *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints . . . .").

[37] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*.").

[38] *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 611–12 (1972) (holding that territorial restrictions on retailing a company's products are illegal under the Sherman Act).

[39] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been . . . forbidden . . . ."). *But see* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296 (1985) (allowing boycotts of a cooperative's members in order to enforce cooperatives' membership rules).

[40] *See*, *e.g.*, United States v. Apple, 791 F.3d 290, 322 (2d Cir. 2015) (chastising Apple for orchestrating a horizontal price-fixing conspiracy among book publishers).

[41] *See Bus. Elec. Corp.*, 485 U.S. at 730 ("Restraints . . . imposed by agreement between firms at different levels of distribution [are] vertical restraints.").

[42] Tying arrangements tie the sale of a good to the sale or prohibition of a sale of another good. *See* 15 U.S.C. § 14 (prohibiting fixing a price "on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor").

[43] Resale price maintenance involves agreements on the maximum or minimum resale price for a good. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 894 (2007) (discussing the competitive effects of minimum resale price agreements).

[44] *See* 15 U.S.C. § 14 (instituting a blanket prohibition on price-fixing or output restrictions instituted to "substantially lessen competition"); *id.* § 1 ("Every contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal.").

[45] *See* Sherman Act, 15 U.S.C. § 2 (banning attempted monopolization); Clayton Act, 15 U.S.C. § 18 (criminalizing mergers consummated to create a monopoly); Federal Trade Commission Act, 15 U.S.C. § 57b–1(a)(8) (incorporating monopolization of commerce into the statutory definition of "antitrust violation").

through horizontal agreements between competitors or the vertical integration of manufacturing, distribution, and retail apparatuses.[46] Some monopolies arise naturally as a result of market conditions and superior products or services, while others are intentionally constructed and maintained through unfair exercises of market power.[47] Generally, if a company possesses monopoly power, "the power to control prices or exclude competition,"[48] the company does not face scrutiny unless it exercises its power to maintain its apex position.[49] Accordingly, antitrust's tripartite statutory framework particularly probes activities that increase companies' market power and precipitate the formation of a monopoly.[50]

Prohibitions against anticompetitive conduct, however, are futile without effective enforcement. Typically, most headline-grabbing antitrust cases are brought by the DOJ's Antitrust Division or the FTC.[51] As executive branch agencies, the DOJ and FTC are empowered to seek injunctions, civil damages, and possibly, jail sentences.[52] Although some enforcement actions inevitably initiate litigation, the DOJ and FTC usually pursue settlement agreements enjoining the defendants' conduct and imposing fines without the

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[46] *See supra* notes 35–43 and accompanying text.

[47] *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (theorizing that "monopoly may have been thrust upon" companies); L.G. Telser, *Cutthroat Competition and the Long Purse,* 9 J.L. & ECON. 259, 263–64 (1966) (identifying the varying methods through which monopolists can maintain their superior position).

[48] United States v. E.I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377, 391 (1956).

[49] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the 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.").

[50] *See, e.g.*, 15 U.S.C. § 18a (requiring companies to file premerger notifications with the FTC and the Department of Justice (DOJ) for particular acquisitions to determine the merger's impact on competition).

[51] *See Mission*, DEP'T. OF JUST. ANTITRUST DIV., https://www.justice.gov/atr/mission (last visited Mar. 1, 2023) (describing the DOJ's enforcement actions); *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Nov. 16, 2021) (explaining the scope of the FTC's enforcement powers).

[52] *See Mission*, *supra* note 51 (noting the DOJ's power to seek fines and jail sentences); *The Enforcers*, *supra* note 51 (noting the FTC's authority to seek civil penalties or an injunctions).

defendant admitting liability.[53] The settlement is then memorialized via a consent decree subject to judicial approval.[54] Private parties may also seek to enjoin anticompetitive behavior through private enforcement actions.[55] Private enforcement actions are "a significant supplement to the limited resources available" to the DOJ and FTC because these lawsuits call attention to anticompetitive behavior in overlooked markets.[56] Furthermore, the Clayton Act incentivizes private parties to report anticompetitive conduct through the possibility of treble damages, thus creating "a set of 'on the street' enforcers."[57] As such, private enforcement actions can constitute the bulk of antitrust regulation in neglected industries such as agriculture.[58]

B. ANTITRUST COMMON LAW

Liability does not automatically result just because the DOJ, FTC, or private plaintiffs have identified anticompetitive conduct that fits within the tripartite antitrust statutory framework. Because almost all contracts can be construed as restraints on trade,[59] courts have recognized that certain anticompetitive behavior can possess potentially beneficial effects on a given market.[60] Accordingly, for over a century, federal courts have constructed a common-law spectrum of judicial oversight to analyze potentially anticompetitive conduct across diverse markets

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[53] *See* FED. TRADE COMM'N, COMPETITION ENFORCEMENT DATABASE, https://www.ftc.gov/competition-enforcement-database (last visited Mar. 1, 2023) (reporting that the FTC has settled around sixty-three percent of its competition cases via consent decree since 1996); U.S. DEP'T OF JUST., ANTITRUST DIVISION, CONG. SUBMISSION FY 2021 PERFORMANCE BUDGET 28, https://www.justice.gov/doj/page/file/1246281/download (last visited Mar. 22, 2023) (communicating that the DOJ's Antitrust Division has resolved nearly its entire case docket since 2016).

[54] See *infra* section III.A for more on antitrust consent decrees.

[55] *See* 15 U.S.C. § 15(a) (permitting private parties injured by anticompetitive conduct to recover triple damages and enjoin anticompetitive behavior).

[56] Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

[57] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 677 (2010).

[58] *See id.* at 675–76 (estimating that roughly ten private enforcement actions are commenced for every case brought by the DOJ and FTC).

[59] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911) (arguing that all contracts are technically restraints on trade).

[60] *See id.* at 66 (recognizing that reasonable restraints on trade can benefit markets).

composed of three standards: per se illegality, the rule of reason, and quick look analysis.[61]

1. Per se Illegality. Per se illegality was the original standard of review for cases under the Sherman Act.[62] At the most basic level, courts have determined that certain conduct is so inherently anticompetitive that it should be considered per se unlawful.[63] Courts more readily declare behavior illegal per se after extensive judicial experience with this conduct.[64] Consequently, only a handful of restraints—namely, horizontal price-fixing and market allocation—have been declared presumptively unlawful.[65]

2. Rule of Reason. Almost immediately after its promulgation, courts reassessed per se illegality. Restraints on trade greatly benefit consumers by lowering production costs, increasing output, and creating new markets.[66] Recognizing these procompetitive benefits, the U.S. Supreme Court, beginning in *Standard Oil Company of New Jersey v. United States*,[67] developed the rule of reason.[68] Under the rule of reason, courts examine whether the contested conduct was reasonable given the relevant product and geographic markets, the defendant's market power, and the

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[61] *See* Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 98 n.42 (1981) ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute.").

[62] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 ("[T]he Anti-Trust Act [Sherman Act] . . . renders illegal all agreements which are in restraint of trade . . . .").

[63] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

[64] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984) ("*Per se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of [anticompetitive consequences are] probable.").

[65] *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (explaining that market allocation agreements and horizontal price-fixing agreements are inherently unlawful).

[66] *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21–22 (1979) (upholding blanket licensing practices because blanket licenses created a market for composers and decreased costs).

[67] 221 U.S. 1 (1911).

[68] *See id*. at 66 ("If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide . . . .").

existence of anticompetitive effects.[69] After a plaintiff has shown actual adverse effects on competition, the burden of proof shifts to the defendant to provide procompetitive justifications for the harmful behavior.[70] Common procompetitive justifications include market creation[71] and the enhancement of interbrand competition.[72] After both parties make sufficient showings, courts weigh the competing evidence to determine if the conduct promotes competition and thus, is reasonable.[73] Typically, a complete rule of reason analysis results in the defendant's exoneration, given the parties' dueling experts and market analyses.[74]

3. Quick Look Analysis. First articulated in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[75] quick look analysis is an abbreviated inquiry into anticompetitive behavior.[76] Instead of conducting a full-blown rigorous market analysis customary under the rule of reason, a plaintiff only needs to show direct evidence of actual detrimental effects (i.e., increased prices or decreased output).[77] After the plaintiff's initial showing, the court then must ask whether "an observer with even a rudimentary understanding of economics could

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[69] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–86 (2018) (identifying the defendant's market power and the existence of anticompetitive effects as crucial for a rule of reason analysis).

[70] *See id.* at 2284–85 (describing the rule of reason's burden shifting framework).

[71] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984) ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner . . . seek[s] . . . is to be preserved.").

[72] *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies . . . .").

[73] *See Am. Express Co.*, 138 S. Ct. at 2284–85 (explaining the court's role after the parties have satisfied their burden).

[74] *See, e.g.*, *id.* at 2287 (ruling that the U.S. failed to identify anticompetitive effects under the rule of reason); *see also* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829–30 (2009) (statistically demonstrating that plaintiffs almost never win under the rule of reason). *But see* Realcomp II, Ltd. v. FTC, 635 F.3d 815, 831–34 (6th Cir. 2011) (finding that the defendant failed to meet its burden of proof under the rule of reason due to the FTC's comprehensive market analyses).

[75] 468 U.S. 85 (1984).

[76] *See id.* at 109 n.39 (stating that the rule of reason via quick look "can sometimes be applied in the twinkling of an eye").

[77] *See Realcomp II*, 635 F.3d at 828 (explaining that a full rule of reason inquiry is unnecessary if direct evidence of actual anticompetitive effects is present).

conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[78] Should the defendant fail to provide a procompetitive justification,[79] the plaintiff prevails and the anticompetitive conduct is enjoined.[80]

Initially, scholars praised quick look analysis for reducing litigation costs.[81] Moreover, quick look analysis emboldened putative antitrust plaintiffs to bring cases that concerned anticompetitive conduct outside per se illegality that a well-funded defendant could quash via a detailed market analysis suggesting a procompetitive impact.[82] But some scholars have attacked quick look analysis as unfairly restraining beneficial conduct ordinarily exonerated under the rule of reason.[83] Nevertheless, quick look analysis persists.[84]

These common-law standards provide frameworks for courts' approach to novel allegations of anticompetitive conduct and blueprints for antitrust reforms, including judicial oversight of private enforcement actions in the agricultural industry.[85] While courts generally encourage settlements, courts should still inquire into settlements of private enforcement actions against agricultural cooperatives.[86] Courts should not, however, engage in intrusive

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[78] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[79] *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005) (stating that after the plaintiff's initial showing, the defendant must "come[] forward with some plausible . . . competitive justification for the restraint").

[80] *See id.* (articulating the court's ultimate disposition if the defendant fails to provide a procompetitive justification).

[81] *See* Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 55 (2017) (explaining quick look's support among academia).

[82] *See id.* (identifying quick look's appeal for antitrust plaintiffs).

[83] *See, e.g.*, Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 464 (2000) (attacking quick look as "an artifact of a bygone Populist era").

[84] Though the U.S. Supreme Court continues to support quick look analysis, the Court has deferred to lower courts to elaborate quick look analysis. *See Polygram Holding, Inc.*, at 35–37 (applying quick look analysis to an agreement among record companies). *But see* Cavanagh, *supra* note 81, at 58 ("[T]he quick look doctrine appears to be in limbo.").

[85] *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 158–59 (2013) (subjecting reverse payment agreements to the rule of reason rather than quick look).

[86] *See* FED. R. CIV. P. 41(a) (permitting parties to settle pending litigation without the court's approval); *see generally* Leandra Lederman, *Which Cases Go to Trial: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 335–38 (1999) (discussing how judges frequently encouraging parties to settle).

scrutiny, which is usually reserved for trial.[87] Judicial oversight of private enforcement settlements in the agricultural industry instead should approximate quick look analysis by conducting an elementary review of a settlement to determine its ability to protect competition in a given agricultural market without engaging in a full analysis more appropriate for trial.[88] Doing so would both comport with antitrust's common-law levels of review and fulfill the objectives of each dueling school of antitrust philosophy.[89]

C. THE CURRENT STATE OF THE ANTITRUST DEBATE

Antitrust laws protect consumers through the promotion of healthy competition among market players with the paramount goal of optimally priced goods and services.[90] Despite this deceptively simple objective, scholars have long debated how to best protect competition through antitrust enforcement.[91]

The Harvard School of antitrust law, the first dominant school of antitrust thought, arose in the 1940s.[92] The Harvard School emphasized rigid categorical rules on prohibited conduct to promote certainty within the legal system, regardless of whether the conduct benefited consumers through decreased prices or increased

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[87] *See, e.g.*, Apple v. United States, 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013) (explaining the parties' preference for trial to resolve claims).

[88] *See* Plummer v. Chem. Bank, 668 F.2d 654, 659 (2d Cir. 1982) ("Although we do not expect district judges to convert settlement hearings into trials on the merits, we do expect them to explore the facts sufficiently to make intelligent determinations concerning adequacy and fairness.").

[89] *See infra* notes 92–112 and accompanying text for a discussion of the three dueling schools of antitrust philosophy: the Harvard School, the Chicago School, and the Neo-Brandeisians.

[90] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

[91] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 3 (1978) ("Antitrust is a subcategory of ideology . . . .").

[92] *See* Laura Phillips Sawyer, *U.S. Antitrust Law and Policy in Historical Perspective*, 14–18 (Harv. Bus. Sch., Working Paper 19-110, 2019) (discussing the influence of Harvard economists on antitrust law after the Great Depression).

output.[93] Unsurprisingly, the Harvard School's influence on antitrust law corresponded with the height of per se illegality.[94]

In response to the perceived ill effects of the Harvard School's rigid categorical approach,[95] the Chicago School proposed that antitrust law should singularly adhere to the consumer welfare model.[96] The consumer welfare model presumes firms are rational profit-maximizing actors.[97] To maximize profit, firms seek greater efficiency in the production and distribution of goods and services.[98] In turn, greater productive efficiency in a market benefits consumers in the form of increased output, decreasing marginal costs and prices in the overall market.[99] Decreased prices free up consumer capital that can be employed to spur innovation and productive efficiencies within other markets.[100] Therefore, the Chicago School's consumer welfare model prioritizes behavior that increases output and decreases prices over any potential anticompetitive violations.[101] As such, the Chicago School excuses anticompetitive conduct if firms can demonstrate that their conduct

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[93] *See, e.g.*, Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 671 (1962) (arguing for the dissolution of large firms because of inevitable high price-cost margins in highly concentrated industries); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 732–33 (1975) (proposing a rigid categorical test for predatory pricing regardless of market conditions).

[94] *See* Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 353 (2007) (discussing the Harvard School's affiliation with per se illegality); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* . . . .").

[95] *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 929 (1979) (criticizing the Harvard School's approach to antitrust as a "[c]asual observation of business behavior" mixed with "eclectic forays into sociology and psychology" without any basis in economic theory).

[96] *See* BORK, *supra* note 91, at 51 ("The only legitimate goal of American antitrust law is the maximization of consumer welfare . . . .").

[97] *See id.* at 119 ("Profit motivation is patently ubiquitous and overwhelming, and it matters little whether we view it as entirely a conscious motivation . . . .").

[98] *See id.* at 111 (discussing firms' profit motivations).

[99] *See id.* at 110 (arguing that mergers lead to greater productive efficiencies in the form of decreased prices).

[100] *See id.* at 111 (discussing how mergers redistribute income to efficient producers).

[101] *See id.* at 122 ("The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental.").

is ancillary to a legitimate agreement that either increases output or decreases prices.[102]

Although initially marginalized by legal academia, the consumer welfare model gained prominence when key proponents such as Robert Bork were appointed to the federal bench in the late 1970s.[103] Similarly, federal courts shifted towards the rule of reason, reasoning that firms could acquire and exercise market power with sufficient economic justification.[104] At the start of the twenty-first century, the majority of courts and scholars viewed antitrust law as "a consumer welfare prescription."[105]

However, due to the economic disruption associated with deregulation, the advent of digital platform economies,[106] and the 2008 Great Recession,[107] a new generation of Neo-Brandeisian scholars sharply criticized the consumer welfare model as an outdated concept that failed to promote competition and protect

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[102] *See id.* at 90–91 (arguing that reductions in productive and allocative efficiency are the only acceptable reasons for objecting to a firm's practices under antitrust law).

[103] *See* Piraino, *supra* note 94, at 351 (recounting the Chicago School's ascendency).

[104] *See* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) ("[A] business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not.").

[105] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 91, at 66). *But see* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 14 (arguing that "the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix" that combines both the Chicago School's concern for consumer welfare and the Harvard School's concern for the administrability of legal rules).

[106] Platform economies are online networks facilitating digital interactions for the delivery of goods and services. An example of a digital platform economy is Amazon's cloud network that facilitates global commerce. For more on platform economies, see generally Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017). *See also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 20–21 (2018) (arguing that the digital age has led to concentrated economies and the reemergence of income inequality in America).

[107] *See* Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1100 (2019) ("In the wake of the 2008 financial crisis, a new awakening to the power and danger of big technology platforms, and an ongoing consolidation wave across sectors, a new body of scholarship . . . has challenged consumer welfare on grounds of history, statutory interpretation, and the usefulness of the antitrust laws to help address current crises.").

consumers from anticompetitive behavior.[108] Neo-Brandeisian theory postulates that the Chicago School's definition of consumer welfare equates economic harm with firms exercising market power through price-based controls, with Neo-Brandeisian theory ultimately disregarding the actual formation of market power.[109] Neo-Brandeisians believe that overemphasis on price-based measures of consumer welfare effectively sanctions firms' exclusionary conduct as long as this conduct results in firms delivering lower prices and greater output to consumers.[110] Neo-Brandeisians argue that courts should preserve a competitive process by preventing behavior that leads to overconcentrated markets.[111] These proposals have yet again reinvigorated debate over courts' proper role in enforcing antitrust laws after the Chicago School's prolonged dominance.[112]

This Note does not intend to resolve the ongoing debate in antitrust scholarship, nor does it take a side of the debate. Rather, this Note seeks to construct an overarching standard of judicial review for antitrust lawsuit settlements against agricultural cooperatives that fulfills each school's goals. Ultimately, this Note aims to promote certainty by enacting bright-line legal rules favored by the Harvard School, enhance consumer welfare by encouraging low prices and high output in the vein of the Chicago School, and protect market structure and the overarching competitive process like the Neo-Brandeisians. To accomplish each of these objectives, this proposed regime of judicial review must account for agricultural antitrust's unique statutory framework.

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[108] *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 (2017) (arguing that the consumer welfare model fails to protect consumer interests and the overall competitive process in the modern economy).

[109] *See id.* (criticizing consumer welfare as antitrust's guidepost).

[110] *See, e.g.*, *id.* at 774 (discussing Amazon's willingness to sustain losses to maintain below-cost retail pricing, which, though beneficial for consumers, erects higher barriers to market entry for smaller competitors).

[111] *See, e.g.*, *id.* at 745 ("[T]he best guardian of competition is a competitive process, and whether a market is competitive is inextricably linked to . . . how that market is structured."); WU, *supra* note 106, at 127–34 (presenting a Neo-Brandeisian agenda focused on enjoining mergers).

[112] *See* William E. Kovacic, Comment, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46, 47 (2021) (summarizing the points of contention between Neo-Brandeisians and Chicago theorists).

III. AGRICULTURAL ANTITRUST

Agricultural cooperatives represent a several billion-dollar industry that lies outside the scope of the antitrust laws.[113] While the previous Part discussed the general architecture of antitrust law, this Part displaces these laws to focus on the agricultural industry's statutory exemptions from the antitrust laws. Agricultural cooperatives are subject to a separate, perplexing regime that both permits and forbids anticompetitive conduct. In this paradoxical space, cooperatives have thrived, accumulating market power in ways that in any other industry would be considered anticompetitive.[114] The executive, judicial, and legislative branches and private parties are powerless to stop these cooperatives' growth, necessitating the implementation of a new procedure—judicial review—that operates effectively within this paradoxical framework.

A. AGRICULTURE'S COMPLEX STATUTORY SCHEME

Although many other industries enjoy statutory exemptions from antitrust law, the complexity of the agricultural statutory scheme far surpasses other industry exemptions.[115] Under Section 6 of the Clayton Act, Congress specified that "[n]othing contained in the antitrust laws shall be construed to forbid . . . agricultural . . . organizations[] instituted for the purposes of mutual help . . . nor shall such organizations . . . be construed to be illegal combinations or conspiracies in restraint of trade."[116] Through this language, Congress legitimized cooperatives: voluntary associations of

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[113] *See generally* U.S. DEP'T. OF AGRIC., TOP 100 AGRICULTURAL COOPERATIVES, 2016 AND 2015, BY TOTAL GROSS BUSINESS REVENUE (BILLION $) (2016) [hereinafter TOP 100 AGRICULTURAL COOPERATIVES], https://www.rd.usda.gov/files/USDA2016NewTop100AgCoop.pdf (breaking down the largest cooperatives' market share).

[114] *See, e.g.*, Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 32–33 (2d Cir. 1983) (permitting a market-dominating dairy cooperative to engage in predatory pricing).

[115] *See, e.g.*, 15 U.S.C. § 17 (exempting labor unions from antitrust laws); § 1012(b) (exempting insurance companies from federal antitrust laws only "to the extent that such business is not regulated by State Law"); § 62 (exempting export trade associations); 12 U.S.C. § 1828(c) (limiting the antitrust statutes' role in bank mergers).

[116] 14 U.S.C. § 17.

farmers created to collectively buy, process, market, and limit the supply of agricultural products.[117]

However, even with a specific exemption in the Clayton Act, the agricultural industry remained unsatisfied and lobbied for their own statutory scheme.[118] These staunch lobbying efforts led to the enactment of the Capper-Volstead Act.[119] Under the Capper-Volstead Act, farmers can join cooperatives that collectively process and market agricultural products.[120] Although the Act granted the Secretary of Agriculture the power to enjoin cooperative price-fixing schemes,[121] the statute essentially legitimized price-fixing and joint marketing between competitors in agricultural industries as long as the agreements satisfied the rule of reason.[122]

Despite the risk of anticompetitive conduct posed by the Capper-Volstead Act exemption,[123] Congress and regulators supported the exemption because of the particularly harsh economic conditions that farmers faced.[124] Justice Harry Blackmun aptly summarized

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[117] *See* Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 472 (2013) (defining cooperatives as "pure cartel[s]" that regulate members' competition).

[118] *See* David P. Clairborne, Comment, *The Perils of the Capper-Volstead Act and Its Judicial Treatment: Agricultural Cooperation and Integrated Farming Operations*, 38 WILLAMETTE L. REV. 263, 273 (2002) (discussing the National Grange's aggressive campaign for the Capper-Volstead Act); David L. Baumer, Robert T. Masson & Robin Abrahamson Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 190–91 (1986) (identifying cooperatives' inability to issue capital stock and ambiguity over the "legitimate objects" of cooperatives as the core motivations for an additional statutory exemption).

[119] 7 U.S.C. §§ 291–92.

[120] *See* § 291 (permitting collective processing and marketing enterprises by cooperatives).

[121] *See* § 292 ("If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced . . . he shall serve upon such association a complaint . . . .").

[122] *See* Baumer et al., *supra* note 118, at 194 ("In essence, the Capper-Volstead Act removes such activities as price fixing from the per se category of antitrust violations and subjects them to scrutiny under a 'rule of reason.'").

[123] *See* 7 U.S.C. § 291 (allowing "persons engaged in the production of agricultural products . . . [to] act together in associations . . . in collectively processing, preparing for market, handling, and marketing . . . such [agricultural] products . . . [and] make the necessary contracts and agreements").

[124] *See* James L. Guth, *Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act*, 56 AGRIC. HIST. 67, 67 (1982) (hypothesizing that Congress passed the Capper-Volstead Act to help small farmers achieve marketing efficiency).

Congress' rationale for the Capper-Volstead Act in *National Broiler Marketing Association v. United States*:

> Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he would sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers . . . had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.[125]

Similarly, Justice William Brennan determined that Congress passed the Capper-Volstead Act out of concern "that the farmer, at the mercy of natural forces on one hand, and the economically dominant processors on the other, was being driven from the land."[126] As a result, the Capper-Volstead Act intended to counteract commercial buyers' monopsony[127] power by providing farmers the same unified competitive advantage that corporations possessed.[128]

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[125] 436 U.S. 816, 825–26 (1978) (footnote omitted).

[126] *Id.* at 831 (Brennan, J., concurring) (citing 62 Cong. Rec. 2257 (1922)).

[127] A monopsony arises where only one buyer exists in a market. *See In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 722 (E.D. Tenn. 2011) (characterizing monopsony as a "buyer-side conspiracy").

[128] *See* Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960) (explaining Congress's intent to combat corporate buyers' monopsony power via the Capper-Volstead Act); Carstensen, *supra* note 117, at 466 ("Congress adopted the Capper-Volstead

Congress enlarged the antitrust carve-out for agriculture with the Agricultural Marketing Agreement Act of 1937 (AMAA).[129] As crop failures ravaged the U.S. during the Great Depression,[130] Congress intended to restore American agriculture by allowing farmers to form cooperatives to ensure an adequate supply of critical foodstuffs and raise farmers' income.[131] Again, the statute explicitly disclaimed any antitrust liability for facilitating marketing agreements.[132] Additionally, the AMAA granted the Secretary of Agriculture "the power . . . to enter into marketing agreements with processors, producers," and their associated cooperatives.[133] Curiously, the AMAA purported to protect consumer interests by allowing the Secretary of Agriculture to set prices "in the public interest."[134] Despite these requirements, little else exists to help courts construct a cohesive common law regime.

B. THE COMMON-LAW COOPERATIVE CONUNDRUM

Since the enactment of the Capper-Volstead Act and the AMAA, federal courts have struggled to develop a cohesive common law doctrine and have placed some clearly defined limits on cooperatives' behavior. In *United States v. Borden Co.*, the Supreme Court condemned a price-fixing conspiracy between a dairy cooperative and milk processors as outside the scope of the Capper-Volstead Act.[135] Federal courts have since extended *Borden* to prohibit non-agricultural firms from claiming antitrust immunity

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Act with a stated goal of enhancing the bargaining power of farmers in their dealings with buyers." (footnote omitted)).

[129] 7 U.S.C. §§ 671–74.

[130] *See The Dust Bowl*, NAT'L DROUGHT MITIGATION CTR., https://drought.unl.edu/dustbowl/Home.aspx (last visited Feb. 7, 2023) (discussing the Dust Bowl drought of the 1930s).

[131] *See* Baumer et al., *supra* note 118, at 206 (stating that the AMAA's purpose was to ensure an adequate supply of milk and increase farmers' income.)

[132] *See* 7 U.S.C. § 608b(a) ("The making of any such agreement shall not be held to be *in violation of any of the antitrust laws* . . . ." (emphasis added)).

[133] *Id.*

[134] § 602(2)(a).

[135] *See* United States v. Borden Co., 308 U.S. 188, 205 (1939) ("Such 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.").

by executing agreements with agricultural cooperatives.[136] These clear limits are the exception rather than the rule because of federal courts' strict construction of the Capper-Volstead Act.[137]

Because the Capper-Volstead Act explicitly permits cooperatives' price-fixing and marketing agreements,[138] federal courts have allowed cooperatives to achieve monopoly positions via voluntary agreements with other cooperatives.[139] By contrast, courts impose liability on cooperatives under section two of the Sherman Act if they engage in predatory practices or implement anticompetitive prices with the intent to stifle competition.[140] Though proof of a specific intent to quash competition appears to balance the antitrust laws' prohibition against anticompetitive behavior with the Capper-Volstead Act's prescriptions, this strict interpretation paradoxically both authorizes and prohibits cooperatives' anticompetitive behavior.[141] In light of this confusing conundrum, federal courts have struggled to proscribe the contours of anticompetitive conduct

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[136] *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978) ("We, therefore, conclude that any member of [the broiler cooperative] that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act."); Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1186 (8th Cir. 1982) (proclaiming "that vertical integration in agricultural industries cannot extend to a point where non-farmer middlemen can claim" immunity under the Capper-Volstead Act).

[137] *See In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1154 (D. Idaho 2011) ("The Court must construe [the Capper-Volstead Act's] terms in accordance with their ordinary meaning.").

[138] *See* 7 U.S.C. § 291 (allowing cooperatives "to make the necessary contracts and agreements" to collectively market agricultural products); *see also Nat'l Broiler*, 436 U.S. at 842 (White, J., dissenting) ("The assistance offered farmers by the Capper-Volstead Act was to allow combination in a way that would otherwise violate the antitrust laws.").

[139] *See* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1040 (2d Cir. 1980) (stating that the Capper-Volstead Act does not limit cooperatives' size).

[140] *See Alexander*, 687 F.2d at 1182 (ruling that anticompetitive activity committed with the intent to stifle competition is per se illegal even in the agricultural industry); *see also* United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 52 (W.D. Mo. 1975) (eliminating a cooperative's ability to coerce non-members to join the cooperative via threats or undue influence), *aff'd*, 534 F.2d 113 (8th Cir. 1976).

[141] *See* United States v. Dairymen, Inc., 660 F.2d 192, 195 (6th Cir. 1981) (permitting cooperatives' monopoly so long as the monopoly does not pursue anticompetitive practices with the intent to stifle competition).

in agriculture,[142] leading some courts to legitimize anticompetitive practices in the agricultural industry.[143]

The Secretary of Agriculture's lax enforcement of the Capper-Volstead Act and the AMAA has only further complicated federal courts' cooperative conundrum. The Secretary of Agriculture has consistently demonstrated a lack of interest in agricultural competition policy.[144] The Secretary of Agriculture's lax enforcement is a direct consequence of the Secretary's statutory duty to encourage cooperatives' expansion.[145] Instead of policing cooperatives, the Secretary of Agriculture has willingly facilitated marketing orders at cooperatives' request, even when these orders clearly increase a cooperative's market power.[146] However, this willful ignorance would not be so concerning if the Secretary, the FTC, and the DOJ shared concurrent jurisdiction, but the DOJ and FTC can only act after unfair trade practices have been clearly identified.[147]

Cooperatives have thrived in this uncertain environment. With fluctuating supply and inelastic demand for foodstuffs such as milk, cooperatives face little long-run competition from putative entrants.[148] Additionally, since average agricultural production costs decrease as output increases, farmers are reluctant to splinter from cooperatives because disassociating would almost certainly

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[142] *Compare* April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958) (holding that cooperatives cannot "use unfair methods to put competitors out of business"), *with* Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 32–34 (2d Cir. 1983) (permitting market-dominating dairy cooperative to charge different premiums and refuse to sell milk to buyers unless buyer paid similar prices to other producers).

[143] *See, e.g.*, Ewald Bros., Inc. v. Mid-Am. Dairymen, Inc., 877 F.2d 1384, 1394 (8th Cir. 1989) (permitting price stabilization and pooling arrangements in the milk industry under the Capper-Volstead Act because, "while the options may have enhanced the cooperatives' ability to set prices[,] . . . the pool served the legitimate purpose of providing an adequate reserve supply to meet fluctuations in consumer demand for fluid milk").

[144] *See* Carstensen, *supra* note 117, at 462–63 (describing the Secretary of Agriculture's disinterest in policing anticompetitive cooperatives).

[145] *See, e.g.*, Cooperative Marketing Act, 7 U.S.C. § 453(b)(6) (authorizing the Secretary of Agriculture to "promote the knowledge of cooperative principles").

[146] *See* Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1637 (1980) (detailing factors behind the Secretary of Agriculture's lax enforcement).

[147] *See* Baumer et al., *supra* note 118, at 194–95 (describing circumstances where the DOJ and FTC can intervene in agricultural competition policy enforcement).

[148] *See id.* at 222–23 (attributing dairy cooperatives' success to milk's relatively inelastic supply and constant demand).

severely limit their individual profits.[149] Furthermore, with marketing orders approved by the Secretary of Agriculture, cooperatives can engage in activities far removed from selling products.[150] Once a cooperative executes enough exclusive contracts with farmers in a given geographic and product market, it can achieve temporary market dominance as farmers remain with cooperatives for decreased operating costs and a consistent purchaser.[151] Accordingly, to acquire and maintain monopoly power, cooperatives engage in anticompetitive conduct including boycotts, exclusive distribution agreements, interference with non-members' products, tying arrangements, and even implementing price-fixing conspiracies with non-members.[152] Alarmingly, cooperatives regularly restrict their members' output through complex growing allocation schemes, even going so far as to purchase land to prevent production.[153] Despite federal court warnings that liability attaches for any anticompetitive practices that stifle competition, cooperatives do not appear to take these warnings seriously.[154]

Scholars have proposed numerous reforms to combat cooperatives' untamed anticompetitive tendencies, including amending and re-interpreting agricultural antitrust statutes.[155]

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[149] *See id.* at 224 & n.142 (characterizing the dairy industry as an economy of scale, where initial production costs decrease with cooperation).

[150] *See* Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 215 (9th Cir. 1974) (interpreting "marketing" broadly to encompass, among other things, supplying market information, storing, transporting, and financing).

[151] *See, e.g.*, Carstensen, *supra* note 117, at 479–80 (detailing the Dairy Farmers of America's market dominance with over thirteen billion dollars reported in revenue in 2011, joint ventures with several large food manufacturers, and expansive membership across the United States in the tens of thousands).

[152] *See* Baumer et al., *supra* note 118, at 225 (recounting dairy cooperatives' anticompetitive practices).

[153] In one egregious case, a mushroom cooperative allegedly purchased mushroom caves in Dublin, Georgia, with an annual production capacity of eight million pounds per year and subsequently sold the caves subject to a covenant prohibiting any future mushroom production. *See* Revised Consolidated Amended Class Action Complaint at 25, *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382 (E.D. Pa. 2014) (No. 06-0620), 2007 WL 4763602, at *11 (describing a scheme to buy and resell land, even at steep losses, in order toto stunt potential mushroom supply across the U.S.).

[154] *See, e.g.*, *In re* Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1148 (D. Idaho 2011) (describing an alleged acreage allocation scheme to pay farmers to refrain from growing potatoes or to destroy their existing stock to increase potato prices).

[155] *See* Carstensen, *supra* note 117, at 493–94, 496 (proposing either a comprehensive repeal of the Capper-Volstead Act or judicial reinterpretation that excludes vertically-

However, these reforms are politically unpopular due to the farming industry's deep adherence to the Capper-Volstead Act.[156] Furthermore, private enforcement actions against cooperatives, the last bastion against anticompetitive conduct, almost always end in massive settlements with little to no progress on novel antitrust issues.[157] Consequently, to develop a body of antitrust law enjoining anticompetitive practices committed "to stifle or smother competition,"[158] a new enforcement procedure is necessary—one which requires little executive or legislative discretion and already has a basis in the common law. As the next Section argues, judicial review of settlements, an area where the judiciary has unfettered discretion, has an established basis in American law and is thus a prime vehicle for developing antitrust law in the agricultural industry.

IV. THE ROLE OF JUDICIAL REVIEW IN SETTLEMENTS

Despite courts' general encouragement for parties to settle pending litigation without the court's approval,[159] judicial oversight of settlements exists in many aspects of American law.[160] Typically, judicial review mechanisms have been enacted to ensure fairness in contexts where parties negotiate in the interests of other unrepresented parties.[161] Additionally, judicial review of a settlement can create a quasi-precedent within a district court concerning acceptable terms, penalties, and concessions for similar

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integrated producers from the Capper-Volstead Act); Folsom, *supra* note 146, at 1639 (arguing for an amendment to the FTCA to give the FTC concurrent or full jurisdiction over agricultural competition policy).

[156] *See* Carstensen, *supra* note 117, at 496 (explaining why statutory reforms to the Capper-Volstead Act are "politically implausible").

[157] *See, e.g.*, *In re Processed Egg Products Antitrust Litigation Website*, GARDEN CITY GRP., LLC, http://www.eggproductssettlement.com/index (last visited Oct. 25, 2022) (listing settlement sums for direct egg purchaser plaintiffs).

[158] Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 463 (1960).

[159] *See supra* note 86 and accompanying text.

[160] *See* Weisburst, *supra* note 26, at 56 (discussing judicial review of settlements in class actions, antitrust consent decrees, and criminal plea agreements).

[161] *Compare* FED. R. CIV. P. 23(e) (prescribing settlement procedures for a class of plaintiffs to ensure fairly negotiated settlements that treat class members equitably), *with* 15 U.S.C. § 16(e) (delineating that DOJ consent decree approval procedures require consideration of the public interest).

lawsuits.[162] However, some courts view judicial oversight of settlements as an overreach of judicial authority that infringes on litigants' rights, the executive branch's administrative duties, and the legislature's policymaking responsibilities.[163] Furthermore, some scholars worry that judges lack the capability to assess a settlement better than sophisticated parties well acquainted with their underlying claims' impact on the general public.[164]

Accordingly, a proposed model for judicial review of agricultural settlements must resolve the frustrations farmers and agricultural purchasers face in enjoining anticompetitive conduct while addressing larger concerns posed by criticisms of judicial review of settlements. This Part intends to resolve these theoretical issues by assessing two examples of judicial review of settlements: antitrust consent decrees and disclosure-only settlements. Judicial oversight over DOJ consent decrees demonstrates how settlements can work in the public interest, a vague concept that often leads courts to varying results.[165] Disclosure-only settlements in merger litigation after the landmark holding in In re *Trulia, Inc. Stockholders Litigation*[166] allow future models of judicial review to articulate clear standards to assess settlement adequacy.[167] By incorporating aspects from each model into a model of judicial review for agricultural antitrust, settlements will provide some guidance to other courts and perhaps even establish precedent.

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[162] *See* Weisburst, *supra* note 26, at 66 (discussing how settlement review creates quasi-precedents "that not only deter but also provide guidance to parties seeking to conform to the law").

[163] *See* Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001) (arguing that rate setting is "a task [courts] are inherently unsuited to perform competently"); *In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445 (9th Cir. 1990) ("The federal courts generally are unsuited as rate-setting commissions."); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (rejecting "judicial oversight of pricing policies [that] would place the courts in a role akin to that of a public regulatory commission").

[164] *See* Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549, 585 (2008) ("Federal judges are generalists, and their experience with economics and competition issues typically will be limited.").

[165] *See infra* section IV.B for a discussion of public interest determinations.

[166] 129 A.3d 884 (Del. Ch. 2016).

[167] *See id.* at 895–96 (discussing the court's role in assessing corporate disclosure settlements).

A. ANTITRUST CONSENT DECREES

Judicial review exists in consent decrees in civil antitrust actions brought by the DOJ. Antitrust consent decrees are a specialized type of settlement agreement entered into between the DOJ and a private party which hybridizes contracts with judicial orders.[168] Consent decrees have significant policy implications outside a given lawsuit because the DOJ employs them to establish the boundaries of procompetitive behavior.[169] Recognizing consent decrees' pervasive influence, Congress passed the Antitrust Procedures and Penalties Act (APPA) to ensure that the DOJ diligently sought favorable antitrust consent decrees against wrongdoers.[170] After the DOJ submits a consent decree to the court, the DOJ must publish the consent decree in the Federal Register for at least sixty days before the judgment's effective date so that the general public may comment on the proposed settlement.[171] During this sixty-day period, the DOJ may respond to these comments with the court's approval.[172] The DOJ must also file a competitive impact statement that must describe, amongst other things, the alleged anticompetitive practices, explains the proposal and its remedies, and lists alternatives that the DOJ considered.[173]

The APPA's paramount requirement is that federal courts determine whether the DOJ's settlement is "in the public interest."[174] Given the broad nature of the "public interest," the APPA prescribes certain factors for judges to consider when

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[168] *See* RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND IN PRACTICE: WHY LESS IS MORE 5 (2007) (explaining consent decrees' dual nature).

[169] *See* Wright & Ginsburg, *supra* note 24, at 257 ("Even though they do not lead to the development of legal precedents, consent decrees signal an agency's enforcement goals. These signals can help an industry quickly understand the prevailing logic and inner workings of the agency.").

[170] *See* Weisburst, *supra* note 26, at 94 (stating that Congress passed the APPA out of concern that the DOJ could not effectively negotiate settlements with politically powerful defendants in the public interest).

[171] *See* 15 U.S.C. § 16(b) (describing the consent decree notice-and-comment process); *see also* Frankel, *supra* note 164, at 551 (illustrating that the notice-and-comment procedure enhances government transparency by requiring the DOJ to explain its rationale underlying a given consent decree).

[172] *See* 15 U.S.C. § 16(d) (permitting the DOJ to respond to comments in the Federal Register).

[173] *See* § 16(b) (delineating six requirements for the DOJ's competitive impact statement).

[174] § 16(e).

reviewing consent decrees, including the judgment's "competitive impact" on the relevant market(s), the judgment's impact upon the public and individuals alleging specific injury from violations, "whether [the judgement's] terms are ambiguous," and the "anticipated effects of alternative remedies."[175] Additionally, the court still has the discretion to examine "any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary."[176] While the court does not have to conduct an evidentiary hearing or allow any third-party objectors to testify, the APPA grants judges expansive investigative powers akin to a jury's fact-finding role.[177] The court may take testimony from government officials and experts, appoint a special master,[178] authorize amicus curiae to appear, allow a party to intervene, review any comment, and "take such other action in the public interest as the court may deem appropriate" to determine whether a consent decree is in the public interest.[179]

Despite its detailed expansion of judicial power, the APPA provides little guidance on balancing these public interest factors.[180] Without clear guidance from Congress or federal appellate courts, district courts have taken varying approaches.[181] While some courts engage in limited fact-finding, others treat the public interest determination as a mini-trial wherein courts review hundreds of public comments, invite extensive additional briefing, and even conduct days-long hearings where multiple experts, amicus curiae, and third-party intervenors appear before the court.[182] The

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[175] § 16(e)(1).

[176] § 16(e)(1)(A).

[177] *Compare* § 16(e)(2) (disavowing any requirement for an evidentiary hearing or third-party objectors' participation), *with* FED. R. CIV. P. 23(e)(5)(A) (requiring courts to allow third parties to object to a proposed class action settlement).

[178] A special master is a subordinate official who has the power to conduct fact-finding and address pretrial and post-trial matters that a judge otherwise could not effectively or timely conduct. *See* FED. R. CIV. P. 53 (explaining special master selection and appointment in civil matters).

[179] 15 U.S.C. § 16(f).

[180] *See* United States v. Am. Tel. & Tel. Co. (*AT&T*), 552 F. Supp. 131, 149 (D.D.C. 1982) ("[The APPA] provides relatively little guidance regarding the meaning of 'public interest' . . . .").

[181] *See* Frankel, *supra* note 164, at 549 (remarking that the APPA "appears to yield almost unlimited discretion to district judges").

[182] *Compare* United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975) (arguing that Congress intended district courts to adopt the least time-consuming means possible in a

complexity of a public interest determination depends on the presiding judge, which undermines these determinations' certainty and administrability.[183] The judge may be a generalist who possesses little knowledge about the relevant market or even antitrust law, yet has the authority to discard deftly-negotiated settlements in favor of their own conceptions of the public benefit,[184] an inequitable outcome that deters consent decrees.[185] Despite these concerns, judges still require some investigative power to protect the court's reputation and the public at large.[186] As a result, courts face a Catch-22 where too much investigation amounts to judicial overreach while too little inquiry risks implicitly approving anticompetitive conduct.

While the APPA's public interest determination provides an embryonic foundation for fact-finding procedures, it lacks clarity and certainty.[187] Any proposed model of judicial review should further define what is in the plaintiffs' and the public's best interests. Furthermore, this model should allow courts sufficient

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public interest determination), *with AT&T*, 552 F. Supp. at 147 n.65 (allowing twenty attorneys from eighteen organizations to argue at a two-day hearing).

[183] *See supra* note 182 and accompanying text; *see also* Maryland v. United States, 460 U.S. 1001, 1003 (1983) (Rehnquist, J., dissenting) (lamenting the "paucity of guidance" for judges for public interest determinations under the Tunney Act), *aff'g* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982); James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication,* 46 EMORY L.J. 363, 374 (1997) ("Because the Tunney Act did not provide guidance on the proper level of judicial inquiry, or even a definition of 'public interest,' courts were left to formulate their own standards for evaluating decrees that fit their own definition of 'public interest.'")

[184] *See* Richard A. Posner, *The Law and Economics of the Economic Expert Witness,* 13 J. ECON. PERSP. 91, 96 (1999) ("Econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all of the criticisms of an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience."); *see also* Frankel, *supra* note 164, at 587 ("[I]t is the litigants'—not judges'—proper role to negotiate, strike the appropriate compromises, and settle cases.").

[185] *See* James C. Noonan, Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 HASTINGS L.J. 133, 156 (1983) ("Without assurance that its good faith determination of the required balance between the competing economic, social, and administrative interests will receive court approval, the Antitrust Division lacks the negotiating muscle to force a defendant to the bargaining table.").

[186] *See* Frankel, *supra* note 164, at 551, 595 (arguing that the public interest determination allows courts to protect themselves against ambiguous provisions and ensure that judicial power is wielded for the public benefit).

[187] *See* Noonan, *supra* note 185, at 156 ("[T]he *AT&T* standard [interpreting the APPA] injects a substantial degree of uncertainty into the consent decree negotiating process.").

investigative power to make informed determinations on the public interest while respecting parties' freedom of settlement. Fortunately, corporate disclosure settlements in merger litigation have articulated clear standards on shareholders' interest that can be easily imported into antitrust law.[188]

B. JUDICIAL REVIEW IN MERGER LITIGATION

Mergers and acquisition law in Delaware has largely developed via derivative lawsuits.[189] Since derivative actions are a special species of class action lawsuits,[190] Delaware courts have formulated differing standards of review to assess board members' conduct in facilitating or resisting mergers.[191] Due to judicial willingness to review board action during mergers, shareholder plaintiffs and their attorneys regularly leveraged the threat of an injunction against the merger, potentially endangering billion-dollar deals.[192] Thus, to prevent the merger from collapsing, companies often quickly sign "disclosure-only" settlements that promise to disclose additional "material" information about the merger, add amendments to the merger agreement, or offer to pay monetary

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[188] *See infra* note 192.

[189] *See* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1748–49 (2004) (demonstrating that derivative actions play an important role in developing Delaware's corporate law).

[190] In a derivative action, a corporation's shareholders unite as plaintiffs to sue the corporation and its board of directors for alleged injuries to the corporation arising from the directors' violations of their corporate duties. For more information on derivative actions, see John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 330–32 (2016).

[191] *See* Klang v. Smith's Food & Drug Ctrs., Inc., 702 A.2d 150, 156 (Del. 1997) ("In the absence of bad faith or fraud on the part of the board, courts will not 'substitute [our] concepts of wisdom for that of the directors.'" (quoting Morris v. Standard Gas & Elec. Co., 63 A.2d 577, 583 (Del. Ch. 1949))); Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 953–57 (Del. 1985) (establishing a standard to evaluate boards' decisions to adopt anti-takeover mechanisms and deal-protection devices); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (requiring boards of directors to maximize the corporation's valuation in an inevitable sale of control); Weinberger v. UOP, Inc., 457 A.2d 701, 710–11 (Del. 1983) (articulating the entire fairness standard).

[192] *See* Jason Klig, *Disclosure-Only Settlements and the Case for In re* Trulia, 31 GEO. J. LEGAL ETHICS 689, 689 (2018) (discussing how shareholder plaintiffs leverage derivative lawsuits against mergers).

awards and resulting attorneys' fees.[193] In exchange for such corporate concessions, plaintiffs agree to release all merger-related claims on behalf of the company's shareholders.[194] These disclosure-only settlements became the bane of every corporate attorney: from 2013 to 2015, disclosure-only lawsuits delayed over eighty percent of corporate acquisitions valued over $100 million.[195] Shareholders rarely received any substantial disclosures from these lawsuits while plaintiffs' attorneys raked in large sums for little work.[196]

Delaware courts were initially slow to respond to disclosure-only settlements, as courts previously only reviewed merger litigation settlements when shareholders alleged that the board of directors failed to fulfill its duties to shareholders in negotiating a settlement on behalf of the corporation.[197] However, in 2016, the Delaware Chancery Court reevaluated its role in approving disclosure-only settlements in In re *Trulia, Inc. Stockholders Litigation*.[198]

In re *Trulia, Inc. Stockholders Litigation* concerned a proposed settlement of a shareholder derivative action challenging a proposed merger between Zillow, Inc. and Trulia, Inc., two Internet real estate listing sites.[199] Trulia's stockholders filed complaints alleging that Trulia's directors breached their fiduciary duties by approving the proposed merger's unfair stock-for-stock exchange ratio and sought to enjoin the merger.[200] After limited discovery, the parties agreed to a "disclosure settlement."[201] In exchange for the

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[193] *See id.* (discussing the various resolutions to corporate disclosure settlements); *see also* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game, The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 477 (2015) (finding that 71.6% of merger litigation results in a settlement).

[194] *See* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-only Settlements*, 15 U. PA. J. BUS. L. 669, 678 (2013) (identifying plaintiffs' remedies in corporate disclosure settlements).

[195] Klig, *supra* note 192, at 689.

[196] *See In re* Trulia, Inc. Stockholders Litig., 129 A.3d 884, 891–92 (Del. Ch. 2016) ("But far too often such litigation serves . . . only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders . . . .").

[197] *See, e.g.*, *In re* Caremark Internat'l, Inc. Derivative Litig., 698 A.2d 959, 972 (Del. Ch. 1996) (determining that the board of directors fulfilled their duty of care in negotiating a settlement on behalf of the corporation).

[198] 129 A.3d at 893–99.

[199] *Id.* at 888.

[200] *Id.* at 886–88.

[201] *Id.* at 887.

plaintiffs' release of all of Trulia stockholder future claims against the merger, Trulia agreed to supplement their merger materials with disclosures of certain material information in a proxy statement disseminated to shareholders prior to the shareholder vote to approve the merger.[202] The parties then submitted the proposed settlement to the Delaware Chancery Court.[203]

To the parties' surprise, the Chancery Court rejected the settlement.[204] Although the Chancery Court usually encouraged voluntary settlement,[205] the Chancery Court believed that it had a heightened duty "to exercise independent judgment to determine whether a proposed settlement [wa]s fair and reasonable to" all of Trulia's unrepresented stockholders.[206] The Chancery Court also criticized corporate disclosure settlements as "little more than deal 'rents' or 'taxes'" that surrendered potentially valuable stockholder claims for paltry disclosures.[207] Furthermore, the Chancery Court felt powerless to assess the plaintiffs' claims because settlement precluded an adversarial discovery process.[208]

In rejecting its past laissez-faire practices, the Chancery Court mandated that disclosure-only settlements should be rejected unless the disclosures addressed "a *plainly material misrepresentation or omission*, and the subject matter of the proposed release [wa]s *narrowly circumscribed* to encompass nothing more than" the plaintiffs' claims.[209] Drawing upon federal securities law, the Chancery Court defined a plainly material misrepresentation as a misrepresentation that would have

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[202] *See id.* at 889–90 (detailing the terms of the proposed settlement). Majority shareholder approval is not always necessary to execute a merger but usually occurs given modern merger complexity and the threat of activist shareholders. *See* DEL. CODE ANN. tit. 8, § 251(c) (discussing when shareholder approval of a merger may be required under Delaware law).

[203] *See In re Trulia*, 129 A.3d at 890 (providing the case's procedural history); *see also* DEL. CH. CT. R. 23(e) (requiring the Chancery Court to review the settlement).

[204] *See In re Trulia*, 129 A.3d at 907 ("[N]one of plaintiffs' Supplemental Disclosures were material or even helpful to Trulia's stockholders. . . . Accordingly, I find that the proposed settlement is not fair or reasonable to Trulia's stockholders.").

[205] *See id.* at 890 ("Although Delaware has long favored the voluntary settlement of litigation . . . .").

[206] *Id.* at 887.

[207] *Id.* at 895.

[208] *See id.* at 896 ("[T]he optimal means by which disclosure claims in deal litigation should be adjudicated is outside the context of a proposed settlement so that the Court's consideration of the merits of the disclosure claims can occur in an adversarial process . . . .").

[209] *Id.* at 898 (emphasis added).

substantially impacted shareholders' understanding of the merger.[210] Utilizing these standards, the Chancery Court ultimately rejected Trulia's disclosure settlement as immaterial to its stockholders.[211]

The *Trulia* decision has been widely praised for its simplicity, clarity, and predictability,[212] and many other state courts have adopted the *Trulia* decision.[213] Critically, the Delaware Supreme Court has not overruled the *Trulia* court and has instead only cited *Trulia* favorably.[214] Thus, the *Trulia* decision appears to be an emerging model of settlement review that provides a blueprint for future settlement review regimes.

Settlements in antitrust agricultural lawsuits parallel disclosure-only settlements. Cooperatives quickly settle to escape substantive review of the farmer-plaintiffs' complaints just as shareholder plaintiffs' attorneys in disclosure-only settlements quickly negotiated settlements to receive attorneys' fees without any searching legal analysis.[215] Furthermore, comparable to shareholder threats to enjoin a nascent billion-dollar deal, cooperatives exploit farmers' precarious economic position[216] using price-fixing to fund settlements that, while large to a small group of

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[210] *See id.* at 899 ("[I]nformation is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the "total mix" of information made available.'" (quoting Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1277 (Del. 1994))); *see also* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

[211] *See In re Trulia*, 129 A.3d at 907 (rejecting the proposed settlement).

[212] *See, e.g.*, Klig, *supra* note 192, at 702 ("[T]he *Trulia* standard is both clear and simple." (footnote omitted)).

[213] *See, e.g.*, Griffith v. Quality Distrib., Inc., 307 So.3d 791, 796–800 (Fla. Dist. Ct. App. 2018) (adopting the *Trulia* court's reasoning); *In re* Krispy Kreme Doughnuts, Inc. Shareholder Litig., No. 16-CVS-3669, 2018 WL 264537, at *7 (N.C. Super. Jan. 2, 2018) ("The Court must still engage in its fairness inquiry and satisfy itself that the supplemental disclosures are 'material' . . . .").

[214] *See* KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 759 n.97 (Del. 2019) (citing the *Trulia* decision as a solution to disclosure-only settlements).

[215] *Compare* Kaufman, *supra* note 14 (recounting cooperatives' settlement strategies), *with In re Trulia*, 129 A.3d at 892 (describing plaintiff attorneys' strategies in corporate disclosure settlements).

[216] *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 825 (1978) ("Few farmers . . . had sufficient economic power to wait out an unfavorable situation.").

farmers, are small in the eyes of a multi-billion-dollar industry.[217] Although most people would not commonly group corporate defendants and farmer plaintiffs together due to their often combative relationship with one another, both corporate defendants and farmer plaintiffs have been abused by quick yet insignificant settlements.[218] Therefore, to protect farmers from cooperatives' substantively vacuous settlements, courts should examine judicial review of settlements and incorporate portions of the *Trulia* decision. Adopting the rhetoric from the *Trulia* decision would at least allow courts to reinvigorate the adversarial process and adequately examine the materiality of proposed settlements.[219]

V. A QUICK LOOK IN THE PUBLIC INTEREST: A MODEL OF JUDICIAL REVIEW

As a hybrid between trial and settlement, judicial oversight occupies a unique yet awkward position.[220] Judicial review cannot engage in fact-finding, an action exclusively reserved for trial.[221] However, antitrust suits against agricultural cooperatives cannot be nominal or expedited because the risk that farmers—an already vulnerable occupation—may be taken advantage of during settlement negotiations is too high.[222] Additionally, cooperatives' flagrant anticompetitive conduct urgently requires reform to prevent further harm to the farmers and direct purchasers of agricultural products.[223] Alternative avenues of reform have either

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[217] *See* TOP 100 AGRICULTURAL COOPERATIVES, *supra* note 113 (detailing cooperatives' billion-dollar market share); *see also* Kaufman, *supra* note 14 (discussing agricultural cooperative settlements ranging from $50 to $140 million).

[218] *See supra* note 215.

[219] *See In re Trulia*, 129 A.3d at 894 (lamenting the lack of an adversarial process with quick settlements).

[220] *See* Weisburst, *supra* note 26 (discussing settlement review's hybrid nature).

[221] *See* FED. R. CIV. P. 52(a)(1) ("In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.").

[222] *See supra* note 13 and accompanying text; *see also* Knisley v. Network Assocs., Inc., 312 F.3d 1123, 1125 (9th Cir. 2002) ("One risk of class action settlements is that class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorney's fee.").

[223] *See, e.g.*, Kaufman, *supra* note 14 (detailing complex dairy price-fixing conspiracies).

failed to help farmers or failed to function properly.[224] Consequently, judicial review of antitrust actions is the last hope for private antitrust plaintiffs in suing agricultural cooperatives and companies. Judicial review of antitrust actions against cooperatives and other agricultural industry players should be a middle-of-the road standard that is accessible to generalist judges untrained in the nuances of agricultural competition policy, yet knowledgeable about the foundations of antitrust law.[225]

Fortunately, antitrust law already possesses an accessible moderate standard: quick look analysis.[226] Lying between per se illegality, a standard that categorizes certain behaviors as presumptively illegal,[227] and the rule of reason, an intrusive inquiry that balances procompetitive benefits with anticompetitive detriments,[228] quick look is an abbreviated analysis that simply asks whether conduct is anticompetitive to an individual with a rudimentary conception of economic principles.[229] When applying quick look analysis, judges examine the firm's conduct from the available record (with no sophisticated statistical model evidence required) and then determine whether the conduct is fundamentally anticompetitive.[230] Moreover, given the unique statutory exemptions for agriculture, judicial review of agricultural settlements must import other conceptions of judicial review.[231]

With the quick look, a judge should assess whether a person with a "rudimentary understanding" of agricultural economics would believe that the cooperative's settlement is fair and adequately addresses the plaintiffs' alleged harm.[232] An individual with a basic

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[224] *See* Carstensen, *supra* note 117, at 496 (recounting farmers' "almost religious" commitment to the Capper-Volstead Act); Folsom, *supra* note 146, at 1637 (discussing the Secretary of Agriculture's failure to enforce the antitrust laws). *But see* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021) (ordering the Secretary of Agriculture "to . . . improve conditions of competition").

[225] *See supra* note 164.

[226] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (delineating quick look analysis).

[227] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897) (introducing per se illegality).

[228] *See, e.g.*, Realcomp II, Ltd. v. F.T.C, 635 F.3d 815, 831–34 (6th Cir. 2011) (assessing the FTC's competing statistical analyses under the rule of reason).

[229] *See supra* note 78 and accompanying text.

[230] *See supra* note 77 and accompanying text.

[231] *See* 7 U.S.C. §§ 291–92 (exempting agricultural cooperatives from antitrust laws). *See, e.g.*, Hayes, *supra* note 16 (discussing price-fixing conspiracies in the poultry market).

[232] *See supra* note 78 and accompanying text.

understanding of agricultural economics should be defined as an individual who understands the necessity of cooperatives' market facilitation function, yet recognizes the underlying harm that monopolist cooperatives' anticompetitive practices inflict on agricultural markets; namely, an artificial reduction in output and unfair price-fixing.[233]

To determine whether a settlement is fair and adequate in addressing the plaintiffs' concerns, courts should draw from models of judicial oversight in consent decrees and corporate disclosure settlements. First, courts should determine a settlement's adequacy by examining its impact on the plaintiffs specifically and then the public interest more broadly. The settlement's impact on the plaintiffs' injuries should be assessed via the *Trulia* standard.[234] Because agricultural antitrust lawsuits often quickly settle for large sums,[235] courts should scrutinize the "give" and the "get" of the settlement to preclude the defendants from "buying out" the plaintiffs.[236] In doing so, courts should determine whether the settlement contains provisions that materially benefit the plaintiffs and whether these terms are narrowly circumscribed to encompass nothing more than the plaintiff's specific injuries arising from anticompetitive conduct.[237] A proposed settlement "materially benefits" the plaintiffs when the settlement terms "substantially alter" the total balance of market power and structure within a given agricultural market in the plaintiffs' favor.[238] If the settlement contains a substantive provision that compels the defendants to refrain from anticompetitive conduct or provides a workable solution balancing cooperatives', farmers', and consumers' interests, this settlement alters the "total mix" of market power within the

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[233] *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 826 (1978) (theorizing that cooperatives initially to bolstered farmers' economic strength against corporations).

[234] *See supra* notes 209–210 and accompanying text.

[235] *See* Kaufman, *supra* note 14 (discussing large agricultural settlements).

[236] *See In re* Trulia, Inc. Stockholders Litig., 129 A.3d 884, 895 (Del. Ch. 2016) (discussing the Delaware Chancery Court's role in assessing the "get" for stockholders in a proposed disclosure settlement).

[237] *See id.* at 898 (stating that the proposed settlement should address material misrepresentations or omissions and be "narrowly circumscribed to encompass nothing more than disclosure claims").

[238] *See id.* at 899 (defining materiality as "a substantial likelihood that it 'significantly alter[s] the "total mix" of information made available'" (quoting Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1277 (Del. 1994))).

agricultural industry.[239] Furthermore, settlements that solely provide financial relief must be viewed with suspicion due to the high risk a defendant may settle to avoid a definite pronouncement of the law.[240]

Second, courts should separately determine how the settlement impacts the public at large via the APPA's public interest factors.[241] Crucially, courts should understand how the settlement will impact the relevant geographic and agricultural product markets.[242] To determine the settlement's impact on the relevant market, courts should combine both the Chicago and Neo-Brandeisian perspectives on antitrust law by assessing whether the settlement is economically efficient and protective of the competitive process.[243] The judge should disapprove the settlement only if it (1) is economically inefficient, which is demonstrated through a preliminary finding of increased prices absent a procompetitive justification; or (2) is detrimental to the competitive process, which is defined as a risk of overconcentration in the relevant market.[244] This assessment under both Chicago and Neo-Brandeisian theories of competitive harm can be conducted via a fairness hearing. Like the APPA's public interest determination, this hearing should empower the court to independently solicit testimony and evidence.[245] Furthermore, the court should allow interested third-party objectors to appear to ensure an adversarial process.[246]

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[239] *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("[T]here must be a substantial likelihood that the disclosure . . . significantly altered the 'total mix' of information . . . .").

[240] *See* Kaufman, *supra* note 14 (implying that agricultural cooperatives silenced plaintiffs' antitrust claims with large settlements).

[241] *See* 15 U.S.C. § 16(e)(1)(A) (mandating that courts assess the competitive impact of any consent decree); *see also* Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930) (noting that "the interest of the public in the preservation of competition is the primary consideration" in antitrust).

[242] *See* 15 U.S.C. § 16(e)(1)(B) (requiring courts to assess "the impact of entry of such judgment upon competition in the relevant market or markets").

[243] *Compare* BORK, *supra* note 91, at 51 (defending the consumer welfare model), *with* Khan, *supra* note 108, at 745 (arguing that market structure analyses should be the primary way to assess competition).

[244] *See* BORK, *supra* note 91, at 123 (stating that antitrust's chief evil is output restrictions); WU, *supra* note 107, at 136 (emphasizing the protection of the competitive process).

[245] *See supra* note 179 and accompanying text.

[246] *See* Weisburst, *supra* note 26, at 64 (demonstrating courts' reliance on third-party objectors to preserve the adversarial process in class action settlements).

Examples of interested third-party objectors include but are not limited to farmers in a similar product or geographic market, the product's direct purchasers, and the DOJ and FTC.[247] Should no third party objectors appear, a judge should nonetheless continue their independent quick look investigation and assume a contrarian role.[248] Finally, after a quick look at the evidence presented, the parties' arguments supporting the agreement, and any interested third-party objector testimony, the court should promulgate an opinion that establishes precedent that better promotes a competitive agricultural market.[249]

Again, this proposed quick look must be conducted as a preliminary analysis rather than a full-blown trial. Quick look review balances the judicial desire to provide clarity on the confines of agriculture competition with party autonomy. No extensive fact-finding should be conducted during a fairness hearing, nor should the court require the parties to conduct extensive discovery prior to settlement. To allow courts to conduct a more searching review akin to the rule of reason would defeat the point of settlement—avoiding the costly nature of trial.[250]

Quick look review also avoids criticisms of judicial activism commonly faced by models of judicial review. Although some scholars will inevitably characterize quick look judicial review as an overreach of judicial power that improperly intrudes on the legislative and executive branches' policymaking powers,[251] this standard acts within the confines of already existing settlement review mechanisms.[252] Additionally, the political branches of

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[247] *See* 15 U.S.C. § 16(f)(3) (permitting amicus curiae submissions prior to fairness hearings for antitrust settlements).

[248] *See In re* Trulia Stockholders Litig., 129 A.3d 884, 894 (Del. Ch. 2016) ("The lack of an adversarial process often requires that the Court . . . play devil's advocate . . . .").

[249] *See* Weisburst, *supra* note 26, at 66 (arguing that judicial review of settlements "precedents" that guide settlement negotiations).

[250] *See* D. Theodore Rave, *When Peace is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 477 (2016) (identifying resolution as the overarching goal of settlement).

[251] *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (rejecting "judicial oversight of pricing policies [that] would place the courts in a role akin to that of a public regulatory commission").

[252] *See In re Trulia*, 129 A.3d at 896 (requiring judicial review of disclosure settlements to protect stockholders from relinquishing potentially valuable claims); Plummer v. Chem. Bank, 668 F.2d 654, 659 (2d Cir. 1982) ("Although we do not expect district judges to convert settlement hearings into trials on the merits, we do expect them to explore the facts

American government appear largely disinterested in change.[253] Current policy proposals do not directly address courts' inability to develop the common law on agricultural competition. Only a review of settlements could initiate action needed to clarify statutory ambiguity.[254] Through approval or disapproval of settlements, courts could signal to plaintiffs which cases should be brought and warn defendants against certain conduct. Moreover, even if a district court judge feels compelled to accept a settlement based on the quick look standard, the district court judge could issue an opinion to signal to Congress, the president, and higher courts that action must be taken to prevent the underlying anticompetitive behavior.[255] As such, the benefits of a body of settlement precedent far outweigh the risks of alleged judicial overreach.

Courts may need congressional authorization to impose this standard. Passing a statute to codify a quick look regime of judicial review would be difficult due to heightened levels of congressional polarization.[256] Furthermore, with the farming community's deep commitment to the Capper-Volstead Act and the agricultural industry's coordinated lobbying campaigns,[257] any attempt at statutory reform of antitrust enforcement in agriculture will flounder.[258] However, courts can and have enacted settlement review.[259] In the vein of the *Trulia* court, which unilaterally

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sufficiently to make intelligent determinations concerning adequacy and fairness."); 15 U.S.C. § 16(e) (requiring judicial approval of consent decrees).

[253] An ambiguous executive order represents the only inkling of change proposed by the Biden Administration related to agricultural competition. *See* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021) (asking the Secretary of Agriculture to continue to enforce already existing antitrust laws).

[254] See *supra* section III.A for a more robust discussion of the complex and vague language in the agricultural antitrust statutory scheme.

[255] *See* VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 75–78 (2006) (discussing how federal circuit court judges strategically employ dissents and concurrences to signal to the circuit en banc and the U.S. Supreme Court to reverse the majority's decision).

[256] *See* KEITH T. POOLE & HOWARD ROSENTHAL, IDEOLOGY & CONGRESS 106 (2d ed. 2007) (demonstrating increasing congressional polarization since the 1970s).

[257] *See* Carstensen, *supra* note 117, at 496 (describing farmers' backlash to an Assistant Attorney General's questioning of the Capper-Volstead Act's current language).

[258] *See* Kaufman, *supra* note 14 (describing the meat industry's lobbying campaign against regulatory reforms).

[259] *See, e.g.*, *In re* Trulia, Inc., Stockholders Litig., 129 A.3d 884, 896 (Del. Ch. 2016) (unilaterally imposing judicial review on corporate disclosure settlements).

reassessed its role in the settlement process,[260] courts can unilaterally decide that they have a quasi-fiduciary duty to look out for smaller farmers in these agricultural antitrust suits.[261] Courts could even state that the overarching goals of antitrust law, the promotion of consumer welfare through diminished prices and increased output, and the prevention of overconcentration in agricultural markets mandate the adoption of a judicial review mechanism in antitrust settlements against agricultural cooperatives. Fittingly, courts may have to enact this judicial regime just as unilaterally as they employ the quick look standard.

VI. CONCLUSION

This Note proposes a quick look model of judicial review of settlements in private enforcement actions against agricultural cooperatives. The model aims to craft settlements that provide narrowly tailored yet material benefits to address plaintiff injuries and serve the public interest by increasing aggregate output, decreasing aggregate prices, and diminishing market concentration. Ultimately, through this quick look, the cooperatives' chickens will finally come home to roost via increased competition in the verdant green hills of Gainesville, Georgia, where lily-white chicken feathers float as freely as competition should be.

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[260] *See id.* ("[T]he Court's historical predisposition toward approving disclosure settlements needs to be reexamined.").

[261] *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (classifying judges as fiduciaries of classes in class action lawsuits).