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An Agricultural Law Research Article

**Farmers Home Administration and
Farm Credit System Update**

by

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I. INTRODUCTION

Two federally created lending institutions—the Farmers Home Administration (FmHA) and the Farm Credit System (FCS)—together hold over forty percent of all agricultural loans in the United States, a percentage that has declined in recent years from a level which substantially exceeded half of all such loans in the early 1980s.¹ Even at this reduced level, however, the FmHA and the Farm Credit Services lenders exert a great deal of influence and control over agricultural credit in general, and affect the availability and cost of credit, as well as the flexibility of other lenders.

FmHA and FCS lenders have more in common than their derivation from federal law. They are both specifically directed and limited in the scope of their lending by the federal legislation under which

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1. HAROLD G. HALCROW ET AL., *FOOD AND AGRICULTURAL POLICY: ECONOMICS AND POLITICS*, 256-63 (1994).

they are created and maintained, they are closely regulated by an executive agency of the United States government, and they are both subject to an intense level of political scrutiny and influence which affects how, and how well, they serve their producer customers and constituents.

At the same time, the programs differ a great deal as well. The Farmers Home Administration is an agency within the United States Department of Agriculture (USDA). It is funded with appropriations of federal tax dollars—for both administrative costs and for its “direct” lending programs—and is administered by political appointees and career government employees within the USDA.² The Farm Credit System, on the other hand, is a network of federally-chartered and regulated borrower-owned cooperative lending institutions.³ These institutions are intended to raise their own operating and lending capital, although they were created with and have recently received infusions of federal funds. They are managed and administered by producer-elected directors and private employees, and they are clearly not agencies of the United States government.

Effective representation of agricultural producers or lenders involved with the FmHA or FCS requires an understanding of the history, purpose, structure, funding, and regulation of these lenders, as well as case law that has evolved under federal legislation enacted during the past decade. A brief discussion of these issues follows.

II. FARMERS HOME ADMINISTRATION

The Farmers Home Administration is an agency within the United States Department of Agriculture. The FmHA is authorized, among other things, to make loans to farmers and ranchers for acquisition and improvement of real estate, equipment and livestock used in agricultural production, and for annual operating purposes. The FmHA's purpose, as expressed by the Congress, is as follows:

Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of non-family owned large-scale corporate farming enterprises will be detrimental to the national welfare. It is neither the policy nor the intent of Congress that agricultural and agriculture-related programs be administered exclusively for family farm operations, but it is the policy and

2. 7 U.S.C. §§ 1921-2006 (1988). See James T. Massey, *Farmers In Crisis: A Challenge to Legal Services*, 18 CLEARINGHOUSE REV. 704 (1984).

3. 12 U.S.C. §§ 2001 to 2279aa-14 (1988). See James T. Massey & Susan A. Schneider, *Title I of the Agricultural Credit Act of 1987: A Law in Search of Enforcement*, 23 U.C. DAVIS L. REV. 589 (1990).

the express intent of Congress that no such program be administered in a manner that will place the family farm at an unfair economic disadvantage.⁴

Although the underlying purpose of the FmHA loan programs has remained the same over several decades, those programs have been substantially modified, redirected, and changed by acts of Congress, by policies of several administrators, and by the federal courts. A brief overview of the contemporary history of the agency helps to put its current statutory and regulatory scheme in perspective.

A. The Pre-Coleman FmHA

During the 1970s, Congress appropriated a great deal of money for the FmHA's farm loan programs.⁵ This was prompted by several years of very serious drought—particularly in the South—and by an executive and congressional policy attitude that supported substantial involvement in agriculture. In the late 1970s, the Congress was also spurred on by visions of enormous world markets, and an inflationary spiral that was expected to carry commodity prices and land values to levels commensurate with the huge wave of credit being advanced by all agricultural lenders.⁶

The decade of the 1980s brought with it a sudden and radical shift in the federal government's agricultural credit policies as well as in the agricultural credit climate in general. First, the Reagan Administration immediately sought in 1981 to restrict and cut back on FmHA farm lending programs, as well as other governmental program designed to assist farmers.⁷ When the Administration was unsuccessful in convincing Congress to substantially dismantle the FmHA—a goal of the administration from the outset—the USDA instead began a conscious and deliberate effort to restrict, undermine, or simply refuse to implement the programs that had been enacted by the Congress to assist financially distressed farmers and ranchers. At the same time, the inflationary spiral of the late 1970s and early 1980s continued unabated, but failed to lift up with it the price farmers received for their agricultural commodities or, ultimately, the value of their agricultural assets. Thus, the stage was set in the agricultural economy for the "cost/price squeeze," a situation in which the cost of producing agricultural commodities exceeded the price farmers received in the market.

There emerged from these two phenomena—the financial and economic crisis brought on by the cost/price squeeze in general, coupled

4. Congressional Reaffirmation of Policy to Foster and Encourage Family Farms; Annual Report to Congress. 7 U.S.C. § 2266(a) (1988).

5. See, eg., Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657; Agricultural Credit Act of 1978, Pub. L. No. 95-334, 92 Stat. 420.

6. HALCROW ET AL., *supra* note 1, at 256-57.

7. See Massey, *supra* note 2, at 712-13.

with the administration's policy of withdrawing federal assistance from farmers and ranchers—a true credit crisis for FmHA borrowers. By the early 1980s, forty percent of FmHA's 250,000 borrowers had become seriously delinquent on their loans.⁸ At the same time, the value of their assets—particularly land and equipment—began a free-fall descent which saw appraised and true market value of farm real estate drop in some areas of the country to twenty to thirty percent of its valuation just five years before.⁹ Although farmers and ranchers could have expected the federal government to play a cushioning or protective role in decades past, a role specifically directed in both policy and program language contained in FmHA's legislation, this was not to be with the new Administration. Rather, the Administration adopted aggressive and historically blind "delinquency reduction goals" in 1981.¹⁰ These delinquency reductions were to be accomplished, according to the then Administrator of the Farmers Home Administration, through "loan servicing," a euphemism for liquidations and foreclosures, not through any form of loan forbearance, consolidation, reamortization or restructuring of unsecured debt.¹¹

Although there were many incidents and examples of the Administration's policy during this period, two stand out as exemplary of the Administration's conduct and as harbingers of the coming decade. In 1978, with a friendlier administration in the White House, Congress had taken two very substantial steps toward assisting financially troubled FmHA borrowers. First, Congress created the Limited Resource (LR) program under which the Secretary of Agriculture could make FmHA real estate and operating loans at low, subsidized interest rates to small and family size farmers.¹² This legislation was particularly significant in the late 1970s as market interest rates began to creep upward to the double digit level. In the same year, and in the same act, Congress enacted the "deferral statute." This statute

8. Massey, *supra* note 2, at 714.

9. KENNETH L. PEOPLES ET AL., ANATOMY OF AN AMERICAN AGRICULTURAL CREDIT CRISIS: FARM DEBT IN THE 1980s, at 25 (1992).

10. See *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *FmHA Sets Delinquency Reduction Goals*, SMALL FARM ADVOCATE, Winter 1981/1982, at 6. According to the article in the *Small Farm Advocate*, the delinquency reduction plan was rumored to include both incentives and disincentives for state directors. Those who achieved the goals, it was reported, might expect more favorable job performance reports and promotion recommendations; one source claimed that a salary bonus incentive was also part of the program. The disincentives were said to include decreases of state FmHA allocations for states not reaching the delinquency reduction goals. New delinquency reduction goals were set by FmHA for 1982. Farmers Home Administration, Administrative Notice No. 742, Aug. 20, 1982.

11. Farmers Home Administration, Administrative Notice No. 742, Aug. 20, 1982.

12. Agricultural Credit Act of 1978, Pub. L. No. 95-334, 92 Stat. 420; 7 U.S.C. § 1934 (1988).

granted the Secretary the authority to defer payments on FmHA loans, and created a moratorium on particular foreclosure actions, in cases in which an FmHA borrower was delinquent due to circumstances beyond his or her control.¹³ The Reagan Administration opposed implementation of both of these provisions.

With respect to the Limited Resource program, the Administration's initial strategy was to ask Congress to eliminate the entire program in 1981 and 1982. This, Congress refused to do. When it failed in the Congress, the Department of Agriculture accomplished administratively most of what it was unable to do legislatively, at least until 1984. Beginning in 1982, FmHA simply declined to spend a substantial portion of the Limited Resource loan authority appropriated by the Congress each year, notwithstanding quotas set in the legislation. In 1982 alone, \$120 million, or forty-six percent of the Limited Resource authority, went unspent and was lost at the end of the fiscal year. In 1983, the results were similar. During 1982 and 1983, the Administration declined to utilize subsidized loan assistance that could have served over 10,000 average FmHA borrowers. During the same period of time, the FmHA's rate of farm acquisition—through "voluntary liquidation," foreclosure and bankruptcy—first doubled, then tripled.¹⁴ In fiscal year 1982, 8,227 FmHA borrowers went out of business.¹⁵ In 1983, that number was 7,529.¹⁶ Thus, while the farmers whom Congress intended to assist with these programs were going out of business, the Administration was refusing to act. Congress finally mandated in 1984 that the Administration utilize all of the funds appropriated for the Limited Resource program.¹⁷

The Administration's refusal to implement the deferral statute led initially to the federal courts, and not to Congress. Beginning in 1982, a string of federal courts declared that the Secretary of Agriculture had violated the 1978 Act by refusing to implement the deferral statute, and enjoined any agency farm loan liquidation or foreclosure of FmHA loans until the statute was implemented.¹⁸ In one of these cases, *Coleman v. Block*, filed initially as a North Dakota class action and later enlarged to become a national class action encompassing vir-

13. 7 U.S.C. § 1981a (1988).

14. Massey, *supra* note 2, at 714 n.71.

15. Massey, *supra* note 2, at 716 n.85.

16. Massey, *supra* note 2, at 716 n.86.

17. Food & Agriculture Act of 1984, § 102, 7 U.S.C. § 2266 (1988).

18. *Matzke v. Block*, 732 F.2d 799 (10th Cir. 1984); *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983), 580 F. Supp. 192 (D.N.D. 1983), 580 F. Supp. 194 (D.N.D. 1984), 632 F. Supp. 997 (D.N.D. 1986), 663 F. Supp. 1315 (D.N.D. 1987), *dismissed as moot*, 864 F.2d 604 (8th Cir. 1989), *cert. denied*, 493 U.S. 953 (1989); *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *Allison v. Block*, 556 F. Supp. 400 (W.D. Mo. 1982), *aff'd*, 723 F.2d 631 (8th Cir. 1983).

tually every state, the United States District Court issued several injunctions from 1983 through 1987 which virtually precluded any FmHA liquidations or foreclosures of its borrowers during that period of time.¹⁹ The *Coleman* decisions also mandated notice and due process procedures that were required to be implemented by the USDA before it could foreclose on any FmHA borrowers, and before it could refuse to release farm proceeds from the sale of crops or livestock in which the United States held a security interest through the Farmers Home Administration.²⁰ Both the pre-*Coleman* and *Coleman* decisions laid the groundwork for the next decade of FmHA activity, in the administration, the Congress, and the federal courts. A closer look at the *Coleman* decisions identifies the context in which the legislation evolved.

Following the landmark decision in *Curry v. Block*,²¹ the United States District Court for North Dakota issued decisions in 1983 and 1984 which created a national class of FmHA borrowers, and issued an injunction halting FmHA liquidations and foreclosures.²² In the *Curry* and *Coleman* decisions, the courts determined that FmHA borrowers had a constitutionally protected property interest in their FmHA loans and loan collateral, and that that property interest was protected by the Due Process Clause of the Fifth Amendment.²³ In reaching that decision, the courts analogized the FmHA borrower's status to that of a welfare or social security recipient, drawing on due process cases that had established as early as 1970 that welfare recipients have the right to the due process protections of notice, hearing, and written decision, before the government terminates the welfare benefits.

In the *Curry/Coleman* litigation, the courts determined that the FmHA's procedure for accelerating, liquidating, and foreclosing its loans offended fundamental notions of due process. First, a decision was made by FmHA personnel to liquidate a loan.²⁴ Second, a notice was sent to the borrower indicating that that decision was made and, effective immediately, the government had unilaterally terminated the farmer's right to utilize any of his or her proceeds that served as government collateral to pay family living or operating expenses.²⁵

19. *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983), 580 F. Supp. 192 (D.N.D. 1983), 580 F. Supp. 194 (D.N.D. 1984), 632 F. Supp. 997 (D.N.D. 1986), 663 F. Supp. 1315 (D.N.D. 1987), *dismissed as moot*, 864 F.2d 604 (8th Cir. 1989), *cert. denied*, 493 U.S. 953 (1989).

20. See 7 U.S.C. § 1985(f) (1988).

21. 541 F. Supp. 506 (S.D. Ga. 1982).

22. *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983); *Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984).

23. *Coleman v. Block*, 632 F. Supp. 997, 1003 (D.N.D. 1986).

24. 7 C.F.R. § 1962 (1993).

25. *Id.*

Thus, based upon an ex parte decision and seldom any statement of reasons other than a loan delinquency, the federal government put itself in the business of "starving out" delinquent FmHA borrowers. As was repeatedly pointed to the federal courts during this period of time, FmHA did not have to foreclose on these loans, it merely needed to wait until the borrower was prepared to "voluntarily convey" or file bankruptcy.²⁶

Following the first round of the *Curry/Coleman* cases in 1982 to 1984, the USDA initially agreed only to recognize the impact of those cases on a district by district basis and refused to publish regulations implementing the 1978 statute.²⁷ Eventually, there was a split amongst the United States Circuit Courts of Appeal over the question of whether the FmHA was required to implement the program through regulations.²⁸ Ultimately, in a Federal Register notice published October 19, 1984, the FmHA agreed to publish nationwide regulations implementing the 1978 statute.²⁹ At the same time, the FmHA entered into a self-imposed period of foreclosure moratorium while it developed its new regulations, lasting through November of 1985. During that period, virtually no liquidation or foreclosure activity was initiated by the FmHA.

When the FmHA published its new regulations in November of 1985,³⁰ it was immediately apparent to counsel for the *Coleman* class that the regulations were inadequate to protect their clients' interests.³¹ A supplemental complaint was filed in *Coleman* in December of 1985 challenging the new regulations on both statutory and constitutional grounds. The plaintiff class in *Coleman* sought a preliminary injunction in early 1986 enjoining FmHA from proceeding with any loan collection activity based on its new regulations; at this stage of the litigation, the court declined to issue a wholesale injunction of FmHA collection activities, setting the stage for several years of chaos.³² The FmHA issued somewhere between 75,000 and 80,000 foreclosure notices under these new regulations in early 1986, then began a process of "loan servicing" under the new regulations which

26. *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983); *Coleman v. Block*, 580 F. Supp. 192, (D.N.D. 1984); *Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984); *Coleman v. Block*, 632 F. Supp. 997 (D.N.D. 1986); *Gamrad v. Block*, 581 F. Supp. 122 (D. Minn. 1983).

27. *Massey*, *supra* note 2, at 707 n.11.

28. *Massey*, *supra* note 2, at 707 n.11. In *Curry v. Block*, 738 F.2d 1556 (11th Cir. 1984), the Eleventh Circuit decided regulations were required. The Eighth Circuit decided they were not in *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983).

29. 49 Fed. Reg. 41,220 (1984).

30. 50 Fed. Reg. 45740 (1985).

31. *See Coleman v. Block*, 632 F. Supp. 1005 (D.N.D. 1986).

32. *Id.* at 1019.

ultimately led to 14,000 loan accelerations prior to the issuance of the court's next injunction.

Following the government's defeat of the plaintiff's preliminary injunction motion in 1986, the government filed a motion for summary judgment asking the North Dakota court to dismiss the continuing *Coleman* litigation altogether. In an order issued on the government's motion for summary judgment in 1987, however, the court again declared the new agency regulations to be unconstitutional as applied, and, in June of 1987, issued a sweeping injunction again halting all FmHA loan liquidations and foreclosures throughout the country.³³ At this point, the court's injunction stopped the 75,000 to 80,000 loan liquidation proceedings, including foreclosures, and halted the government's refusal to release security proceeds to the tens of thousands of FmHA borrowers whose loans the government sought to accelerate. It was estimated by the USDA that the 1987 *Coleman* injunction resulted in approximately \$1.5 billion in farm proceeds being left in the hands of borrowers each year the injunction was in place. Eventually, the injunction and its statutory sequel—the Agricultural Credit Act of 1987³⁴—provided procedural protections and opportunities for loan restructuring to these tens of thousands of borrowers through the late 1980s and into the early 1990s.

However, during these years of intense litigation and FmHA gridlock, Congress became extremely concerned with the FmHA's aggressive pursuit of foreclosure on the one hand, and its refusal and inability to service loans on the other. The stage was set in 1987 for dramatic legislative overhaul.

B. The Agricultural Credit Act of 1987

Faced with both the administration's aggressive foreclosure policy, and FmHA's inertia and gridlock in the face of litigation, Congress enacted sweeping credit reforms in the Agricultural Credit Act of 1987.³⁵ In that Act, Congress codified numerous elements of the *Coleman* decision—particularly the notice and appeal provisions—and required FmHA to notify each delinquent borrower of the agency that he or she could apply for loan restructuring under the terms of the new Act.³⁶ The Act in turn required the FmHA to conduct what amounts to a liquidation analysis of each delinquent loan situation in which the borrower applies for loan restructuring.³⁷ If that analysis determines that the government's net recovery under a restructured loan, that is,

33. *Coleman v. Block*, 663 F. Supp. 1315, 1342 (D.N.D. 1987).

34. See Pub. L. No. 100-233, 101 Stat. 1568 (codified at scattered sections of 7 U.S.C. (1988)).

35. *Id.*

36. 7 U.S.C. § 1981d and § 2001 (1988).

37. *Id.* § 2001(a).

the "net present value" of a restructured loan, would exceed the government's recovery through foreclosure, that is, the "net recovery value" of the loan collateral, the statute requires the government to restructure the loan.³⁸ The FmHA's restructuring regulations in turn contain a sequenced approach to loan restructuring, beginning with an analysis of whether a deferral, rescheduling, reamortization, consolidation, or change of interest rates will allow a farmer to service the debt, and ending with a program under which the government will write off or write down unsecured debt to the point of the greater of net recovery value of the collateral or net present value of a restructured loan.³⁹

Although the FmHA restructuring regulations are extraordinarily detailed and complex, and incorporate the use of a computer program called "DALR\$" ⁴⁰—the software code for which takes up several volumes of paper—the concept is quite simple and is familiar to anyone who practices bankruptcy. However, several elements of the FmHA analysis are different from, and better than, what is available in bankruptcy. First, in an FmHA loan restructuring analysis under the 1987 Act, the borrower is required only to service the debt at the greater of the two values—net recovery value or net present value of the restructured loan.⁴¹ Thus, the fair market value of the collateral in this analysis is reduced, as is FmHA's ultimate "claim," to the liquidation value of the collateral. This generally results in a twenty-five to thirty-five percent discount below the fair market value of the collateral. Second, FmHA borrowers are entitled to the lower of the existing contract interest rate or the present rate on the type of loan to be restructured.⁴² The FmHA's interest rates have been, and continue to be, as low as five percent, substantially below market rates that would be applied in the bankruptcy court.⁴³ Finally, there is no cost in an FmHA restructuring of a trustee or, in many cases, of an attorney, resulting in the borrower's cash flow being totally dedicated to servicing the FmHA debt. With these three fundamental differences, many FmHA borrowers can demonstrate a positive cash flow under the FmHA program when they would be unable to service a debt in a bankruptcy proceeding.

38. *Id.* § 2001(b)(4).

39. 7 C.F.R. § 1951.901-950 (1993).

40. *Id.* § 1951, Subpt. S. Exh. J.

41. *Id.* § 1951.902(a)(2).

42. *Id.* § 1951.860.

43. See, e.g., *USDA v. Fisher (In re Fisher)*, 930 F.2d 1361 (8th Cir. 1991). See also Susan A. Schneider, *The Interaction of Agricultural Law and Bankruptcy Law: A Survey of Recent Cases*, 68 N.D. L. REV. 309, 355 n.211 (1992).

C. The 1990 FACT Act

The FmHA and Congress were faced with substantial criticism when the 1987 Act was implemented. Whether by conscious ploy to generate such criticism, or by happenstance, FmHA offices throughout the country wrote off a substantial number of fairly large loans early in 1989 under the 1987 Act.⁴⁴ Some of these large write-downs, which exceeded \$1 million, made very large headlines throughout the country. This, in turn, generated press criticism of the program and of Congress and resulted in a backlash which expressed itself in the 1990 Farm Bill.⁴⁵

Under the 1990 Farm Bill, Congress limited FmHA write-downs to a lifetime amount of \$300,000. Thus, for many FmHA borrowers who had large loans with enormous interest accumulations since the 1970s or early 1980s, the program became limited or irrelevant. In addition, various elements of eligibility for loan programs were changed and Congress mandated the agency to incorporate in its restructuring analysis a consideration of all "available" assets of the borrower and any co-signer. Under the 1987 Act, Congress limited the restructuring analysis and calculation of net recovery value to looking only to the value of the agency's collateral, and not to other unsecured assets of the borrower.

The many changes which were incorporated in the Food, Agriculture, Conservation and Trade Act of 1990 (FACT Act) are limited to prospective applications only. Thus, these provisions apply only to applications for FmHA loan restructuring received by the agency after November 28, 1990, the effective date of the Act. For any applications received prior to that date, the 1987 Act—without amendments—and FmHA's regulations under the 1987 Act control.⁴⁶ Thus, it is essential in analyzing an FmHA borrower's situation to determine whether the application for restructuring will be considered under the 1987 Act or the 1990 Act.

D. FmHA Appeals

The FmHA has a statutory obligation to provide its borrowers with detailed notices and appeals related to any "adverse action" of the

44. See James Bovard, *Don't Give Bad Farmers More Loans*, NEWSDAY Oct. 2, 1989, at 49; Judith Havermann, *OMB's "High Risk List" Details Vulnerable Programs; Management, Accounting and Procurement Weaknesses are Widespread; Billions at Stake*, WASH. POST, Dec. 6, 1989, at A4.

45. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359. See Roth, *Regulations Finalize It—What the ACA Giveth the FACT Act Taketh Away*, Appendix 1, (republished with permission from *Farmers' Legal Action Report*, Vol. 7, No. 2, Spring 1992, ©Farmers' Legal Action Group).

46. Pub. L. No. 101-624, Title XVIII § 1861(c), 104 Stat. 3837 (1990).

agency.⁴⁷ The FmHA appeal process was initially mandated by statute in 1985 and was substantially modified in the 1987 Act. All appeals are conducted by the National Appeals Staff of the FmHA, a program within, but separate from, the main administrative structure of the FmHA. Over the past several years, there has been a great deal of debate over the ultimate authority of FmHA decisions, and several congressional hearings have been directed at strengthening the independence of the FmHA appeals branch. This debate led to a provision contained in the 1990 Farm Bill which was intended by the Congress to reinforce that independence.⁴⁸ However, there remains substantial administrative control over the agency by the Administrator of the FmHA, who appoints the Director of the National Appeals Staff. Congress continues to discuss new legislation which would remove the appeals function from the FmHA and bring it under an entirely new agency within the USDA which would hear appeals of FmHA, ASCS and, perhaps, FCIC determinations.⁴⁹

Under the appeal statutes and regulations, a borrower is entitled to notice of any adverse action of the agency, the opportunity for an informal meeting with the decision maker, and a face-to-face appeal before a hearings officer of the National Appeals Staff. Following the initial decision by this hearings officer, there are two levels of further review. The borrower may elect, as an option, to have the hearings officer's decision reviewed by the FmHA State Director. These reviews virtually never result in a reversal of an adverse decision of the appeal officer. As an option, or as a final stage of review after the State Director review, the borrower can request the review of an appeal decision by the Director of the National Appeals Staff. This is a review on the record, although there does exist the possibility of supplementing the appeals hearing record at this stage. It is absolutely critical that FmHA borrowers be advised to exhaust all of their opportunities for hearings and appeals within the agency if they or their counsel contemplate bringing an action in federal district court for judicial review of the agency's final conduct. If the borrower does not exhaust all of these remedies, a case in federal court in virtually *every* situation will be dismissed by the court for failure to exhaust.

The conduct of FmHA appeals is informal, and will be frustrating to any trial lawyer. On the other hand, the informality of the hearing does allow a substantial amount of latitude and flexibility in how issues are approached, and provides a less expensive forum for the borrower and his or her counsel than a bankruptcy proceeding or a case in federal court. The appeals hearing also provides the opportunity to

47. 7 U.S.C. § 1983b (1988); 7 C.F.R. § 1900.51-100 (1993).

48. Pub. L. No. 101-624, Title XVIII § 1812, 104 Stat. 3821 (1990).

49. S. 3119, 102d Cong., 2d Sess. (1992)(sponsored by Senator Kent Conrad of North Dakota).

supplement the borrower's application for services and to argue that changed circumstances have better enabled the farmer to service a new loan or a restructured loan.

A large problem in the past several years, particularly during the debate over whether the National Appeals Staff Director or the Administrator of the FmHA has ultimate decision making authority concerning appeals, has been that the FmHA has refused to implement many appeal decisions. Such refusals have taken three forms. First, the agency has simply "sandbagged" many decisions, ignoring the hearing officer's determination. Second, the FmHA has initiated a "revolving door" approach to post-appeal decision cases, requiring the borrower to reapply, and then rejecting the borrower's application for new reasons not previously decided by the agency. Finally, in many cases, the Administrator simply overrode the decision of the national appeal branch in one of two ways: secretly, by directing an outcome through the Director of the National Appeals Staff, or overtly, through issuance of letters. Although the issue has not been litigated in federal court, borrowers' attorneys feel very strongly that there exist several sound legal arguments as to why FmHA is not authorized to interfere with National Appeals Staff decisions in any of these three ways.

This problem with the implementation of appeal decisions has led to several congressional hearings and the introduction of Senate Bill 3119, which is currently being reshaped by Senator Conrad in the Senate Agriculture Committee. Any borrower or borrower's attorney faced with an FmHA refusal to implement a favorable appeal decision should consult with knowledgeable FmHA borrowers' counsel to discuss options which will best serve the client's needs.

E. FmHA Restructuring and Bankruptcy

An interesting question which has arisen both in the FmHA regulations and in the bankruptcy court is the relationship between the FmHA restructuring provisions and the bankruptcy court. There are several questions. First, are borrowers who have received a discharge in Chapter 7 or confirmation in a Chapter 11 or 12 eligible for further restructuring under the Act? Second, are borrowers who file bankruptcy under Chapter 11 or 12 entitled to statutory benefits, such as lower interest rates and longer amortization periods, provided by the FmHA statutes and regulations? And, finally, what is the procedural interrelationship between a bankruptcy proceeding and the FmHA's complex loan restructuring procedure? That is, when a borrower files a bankruptcy petition, may that same borrower seek restructuring within the agency as part of the plan; and will the ensuing time frame—often taking up to two years—be tolerated by the bankruptcy court and somehow incorporated into the plan?

Some of these questions have been answered; some have not. First, in respect to the borrower who has received a discharge in a Chapter 7, the United States Court of Appeals for the Eighth Circuit has decided that those borrowers have no further rights to seek restructuring under the 1987 Act.⁵⁰ The court reasoned that, once the borrower received a personal discharge in the Chapter 7, there was no "debt" within the meaning of the 1987 Act to restructure, and the farmer was no longer a "borrower" under the Act.⁵¹ That decision was challenged in the Ninth Circuit in a foreclosure case litigated in the United States District Court for the Eastern District of Washington in 1991.⁵² The borrower there argued that (1) the Eighth Circuit was wrong, (2) the Ninth Circuit had adopted different judicial review standards which would lead to a different result in this Circuit, and (3) the United States Supreme Court had reached a contrary result in a very similar case involving a post-Chapter 7 reorganization under Chapter 13 (the so-called Chapter 20 case).⁵³ The Eastern District of Washington court decided to follow the *Lee* decision.⁵⁴ One could expect, therefore, that in the State of Washington any borrower who received a Chapter 7 discharge and who seeks judicial assistance in obtaining further loan restructuring from FmHA would not receive any assistance.

A different result was reached, albeit by settlement, in a recent Oregon case.⁵⁵ In that case, the borrower's plan had been confirmed in a Chapter 11, and his property had reverted before the FmHA implemented the Agricultural Credit Act of 1987.⁵⁶ Under regulations implementing the Act, the FmHA sent a notice in 1989 to the borrower's former bankruptcy counsel, indicating that to apply for any loan restructuring, the borrower would need to seek a modification of the stay in the bankruptcy court, and was required to reaffirm its FmHA debt. The borrower's former bankruptcy counsel advised the FmHA that he was no longer representing the borrower, that the plan had been confirmed, and that the agency should deal directly with the borrower without regard to the bankruptcy. The FmHA refused, taking the position that once a borrower had been in the bankruptcy court and had received a confirmed plan, the borrower's entitlement to apply for loan restructuring was altered for all time.

50. *Lee v. Yeutter*, 917 F.2d 1104 (8th Cir. 1990).

51. *Id.* at 1107-08.

52. *United States v. Kline*, Case No. CS-90-0464-WFN (E.D. Wash. 1991).

53. *Johnson v. Home State Bank*, 501 U.S. 178 (1991).

54. *United States v. Kline*, CS-90-0464-WFN (E.D. Wash. 1991) (Order Granting Plaintiff's Motion to Dismiss Counterclaims and Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment).

55. *United States v. March Farms*, Case No. 91-1101-MA (D. Or. 1991).

56. *In re March Farms*, No. 683-07715 (Bankr. D. Or. 1983).

In this particular case, the FmHA had nonetheless conducted a computer analysis of the debtor's FmHA's loans and concluded internally that a positive restructuring plan was possible. However, because the borrower did not formally seek to lift the stay or otherwise follow the agency's procedures through counsel, the FmHA concluded that the borrower was ineligible for any relief and initiated foreclosure. In the ensuing litigation, the borrower challenged the FmHA's regulations restricting the confirmed Chapter 11 borrower's rights to apply for loan restructuring, as well as the FmHA's conduct in refusing to extend a restructured loan program when the FmHA's own analysis showed that the government would realize more through restructuring than it would through foreclosure. The case settled.

Finally, in regard to the question of procedural and substantive interplay between the FmHA's restructuring program and bankruptcy law, some things do appear fairly clear. First, as a practical matter, the writer is unaware of any case in which a bankruptcy court has delayed confirmation proceedings to allow the FmHA to go through its lengthy administrative restructuring process. Although that is what is contemplated by the FmHA's regulations, those regulations are so convoluted and so inconsistent with the procedural movement of the bankruptcy court, that it is unlikely that a bankruptcy court would tolerate such a procedure.⁵⁷ It is also questionable as to whether the procedure would be fair to other creditors and thus consistent with the Bankruptcy Act. Second, numerous cases have addressed the question of whether the borrower is entitled to the restructuring provisions available under the Act—including subsidized interest rates, long amortization periods, and "recovery value" as opposed to "market value"—and have essentially taken the position that, once a borrower has filed bankruptcy, general bankruptcy law will apply to the federal government as it does to private creditors.⁵⁸ Although this is an unfortunate outcome for FmHA borrowers and, arguably, one not consistent with congressional intent in implementing Chapter 12 and the Agricultural Credit Act of 1987, it does appear to be the law of the land.

F. Judicial Review

FmHA borrowers may seek judicial review of final agency action under provisions of the Administrative Procedures Act.⁵⁹ That Act, which generally creates a cause of action for judicial review of final agency action, limits such review, however, to conduct of the agency

57. 7 C.F.R. § 1962.47 (1993). *See also* U.S. v. March Farms, Case No. 91-1101-MA (D. Or. 1991) (Memorandum in Support of Defendant's Motion for Summary Judgment, Appendix B).

58. *See Schneider, supra* note 43.

59. 5 U.S.C. §§ 701-706 (1988).

that is "arbitrary, capricious, an abuse of discretion or not in accordance with law."⁶⁰

Although case law under the Administrative Procedures Act is legion, with a fair amount relating to the FmHA, the impact of that case law can be summed up in several rules of thumb. First, federal district courts *will not* conduct a *de novo* review of the agency's determination. Rather, the court will generally look to the agency conduct only *on the record*, except in cases where the borrower can demonstrate that the administrative record is inadequate to present the facts or the administrative process was unfair to the farmer. Although there are numerous means by which the administrative record can be explained or expanded upon, one should approach any judicial review litigation with a notion that the court will be willing to look solely to the administrative record.

Second, federal courts will not second guess the agency where Congress has delegated substantial discretion to the agency and there is thus no "law" to apply. For example, federal courts will be very reluctant to review an agency determination that the borrower "lacks management ability," is "not credit-worthy," or is not a "family size farm." Each of these elements of loan eligibility set out in the FmHA's legislation and regulations relies to a certain extent upon judgment and expertise which federal courts feel Congress has delegated to the agency and which is not possessed by the court. On the other hand, the court *will* review the agency's compliance with clear procedural mandates and determinations. Thus, if the agency has failed to issue a notice as required by statute and regulations, has declined to extend the right to a hearing to a farmer, or has not calculated the value of a restructured loan or property in accordance with the detailed regulations of the agency, the court is much more likely to review the agency's conduct against the standard set by the statute and regulations.⁶¹

For example, in a recent case filed in the federal district court in Washington, a dispute arose over the value of the FmHA collateral, and ultimately the net recovery value of that collateral for purposes of restructuring or the recovery value buyout.⁶² While the ultimate dispute between the borrower and the agency was the value of the collateral, the complaint addresses the failures by the agency to comply with its own regulations in the valuation process.⁶³ Thus, the bor-

60. *Id.* § 706.

61. RANDI ROTH, JUDICIAL REVIEW OF FMHA DECISIONS, (Farmers' Legal Action Group, ed.); Thomas P. Guarino, *Reviewability of Administrative Determinations Under 7 U.S.C. § 2001: Debt Restructuring and Loan Servicing*, 1 SAN JOAQUIN AGRIC. L. REV. 57 (1991).

62. *Shane Farms v. Madigan*, No. CS-92-510-WFN (E.D. Wash. Dec. 16, 1992).

63. *Id.*

rower's complaint stresses that the FmHA did not properly extend to the borrower the right to obtain an independent appraisal, and that the agency's contract appraiser violated clear FmHA regulations and appraisal standards in numerous respects.⁶⁴ Although the borrower in that case does ask the federal court to conduct a valuation determination in federal court, the case in the alternative requests a remand to the agency for proceedings consistent with agency regulations. Thus, while a substantive issue that does involve expertise—the valuation of agricultural collateral—is at the heart of the case, the primary focus of the litigation is on procedural compliance by the agency with statutory and regulatory provisions, not on whether the agency's ultimate appraisal figure was correct or not.

It is absolutely imperative in seeking judicial review of FmHA determinations that each case be evaluated primarily in respect to agency compliance with clear statutory and regulatory provisions, not in respect to whether or not the borrower or his/her attorney believes that the agency was ultimately right or wrong in a determination that rests equally as heavily upon discretionary or judgmental factors.

G. Statute of Limitations Issues

Several recent cases have raised questions under the federal statute of limitations in connection with the government's effort to foreclose upon or seek deficiency judgments in the case of FmHA loans. The questions which are often raised by farmers and attorneys with respect to statute of limitations issues, and which have arisen in these cases, are (1) which statute of limitations applies, (2) does the statute of limitations apply to foreclosures, and (3) what of the government's argument that the *Coleman* litigation and related federal legislation tolled the statute of limitations during the 1980s.

First, the general federal statute of limitations applies to FmHA actions in federal court. That statute provides in pertinent part:

(a) Subject to the provisions of Section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

...

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.⁶⁵

64. *Id.*

65. 28 U.S.C. § 2415(a) and (c) (1988).

State statutes of limitations do not apply to actions brought by the United States.⁶⁶

The federal statute of limitations contains several sections which can result in tolling of the statute. Section 2416 provides:

For the purpose of computing the limitations periods established in Section 2415, there shall be excluded all periods during which—

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pursuant to Article I, Section 8, of the Constitution of the United States.⁶⁷

It has been generally recognized by the courts that the existence of an injunction which prevents maintenance or prosecution of a legal action tolls the running of the statute of limitations under section 2416(b).⁶⁸ Two recent cases have addressed this issue in connection with FmHA collection efforts and the *Coleman* injunctions.

First, in *United States v. Mitchell*,⁶⁹ the court held that the *Coleman* injunctions tolled the running of the statute of limitations on the government's action to recover a money judgment against the borrower.⁷⁰ In *Mitchell*, the court held that the total tolling period resulting from the *Coleman* injunctions was 35.5 months.⁷¹ This period was based upon testimony provided to the court by agents of the United States Department of Agriculture.⁷²

Arguably, the calculation adopted by the United States Court of Appeals for the Ninth Circuit in *United States v. Dos Cabezas Corp.*,⁷³ is much closer to the correct count of the tolling period under *Coleman* than is the court's calculation in *Mitchell*. In *Dos Cabezas*, the appeals court adopted the decision of the district court in the case of the same name in which the court found that the *Coleman I* injunction was in effect for a maximum period of one month, and the *Coleman II* injunction was in effect for a maximum period of 20.5 months.⁷⁴ The United States District Court for the District of South Dakota also recently

66. *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 (1960); *United States v. Summerlin*, 310 U.S. 414, 416-417 (1940). See also, *Westnau Land Corp. v. United States*, 785 F. Supp. 41, 43 (E.D.N.Y. 1992); *United States v. Kurtz*, 525 F. Supp. 734 (E.D. Pa. 1981).

67. 28 U.S.C. § 2416 (1988).

68. *Hines v. United States*, 760 F. Supp. 549 (D.S.C. 1991).

69. Case No. S-92-995 (E.D. Cal. March 2, 1993).

70. *Id.*

71. *Id.*

72. *Id.*

73. 995 F.2d 1486 (9th Cir. 1993).

74. *United States v. Dos Cabezas Corp.*, CIV 89-574 TUC-RMB (D. Ariz. 1991).

held, in a yet unpublished Memorandum Opinion and Order, that the statute of limitations had run against the FmHA in its action to collect on an FmHA note there.⁷⁵ The court appears to have adopted the *Dos Cabezas* tolling period without alteration.⁷⁶

In connection with the statute of limitations issue, three other issues should finally be noted. First, the statute will not start running until the borrower has completed all loan servicing and restructuring applications and appeals available within the agency, or has waived the opportunity to do so during applicable time periods.⁷⁷ Second, the statute, by its own terms, does not apply to actions brought by the government "to establish the title to, or right of possession of, real or personal property."⁷⁸ The federal courts have been unanimous in declaring that this provision applies specifically to foreclosure actions and that such actions, to the extent they seek only foreclosure of real property serving as collateral for FmHA loans, are not subject to the six year limitation.⁷⁹ Third, both the *Mitchell* and *Dos Cabezas* cases recognize that any period of time during which a bankruptcy stay was in effect would also be counted as a tolling period for purposes of calculating the statute of limitations.⁸⁰

Any practitioner looking at the statute of limitations issue in connection with an FmHA action to recover on a promissory note should look very carefully at the cases cited above.

H. Summary Regarding FmHA

Farmers Home Administration procedures have evolved over several decades. They are procedurally intricate, complex, and voluminous. Any borrower or borrower's attorney *must* become educated concerning the FmHA procedures if the full benefit of available FmHA programs and resources is to be obtained. The agency itself cannot be relied upon to fairly, completely, or properly implement its procedures. This inadequacy results from numerous factors, including understaffing, executive branch policy and bias over the past twelve years, complexity and rapidity of change, and simple agency inertia. In many instances, it has also resulted from hostile relationships which have developed between borrowers and FmHA personnel at the local level. In the end, attorneys for FmHA borrowers faced with a loan delinquency and credit restructuring problem must either plow

75. *United States v. Feeney*, CIV 92-3012 (S.D. Aug. 25, 1993) (Memorandum Opinion and Order).

76. *Id.*

77. 28 U.S.C. § 2415(a) (1988).

78. *Id.* § 2415(c).

79. *See, e.g., United States v. Ward*, 985 F.2d 500 (10th Cir. 1993).

80. *United States v. Dos Cabezas*, 995 F.2d 1486 (9th Cir. 1993); *United States v. Mitchell*, No. S-92-995 DFL/JFM (E.D. Cal. March 2, 1993).

through voluminous materials to learn the FmHA programs, or must be prepared to engage consulting counsel or loan restructuring expertise to assure that the FmHA borrower's situation is adequately handled.

III. FARM CREDIT SYSTEM

As noted at the outset, the Farm Credit System today derives from the same historical federal involvement in agriculture as does Farmers Home Administration. That derivation, and the fact that both lenders focus their attention on farmers and ranchers, exhausts the similarity between the programs. The Farm Credit System today, with the exception of the "bailout" granted by the Congress in the 1987 Act, functions with funds raised privately and lent to members through agricultural lending cooperatives—the "Farm Credit Services" offices as they are known today.⁸¹ The Farm Credit System previously consisted of Production Credit Associations, Federal Land Banks, Federal Intermediate Credit Banks, District Federal Land Banks and Banks for Cooperatives.⁸² For decades, these lending institutions—all borrower owned cooperatives—operated on a regional basis under the auspices of twelve districts.⁸³ The districts and local lenders, in turn, were regulated by the Farm Credit Administration, an executive agency of the United States government.⁸⁴ For reasons similar to those affecting the FmHA in the 1980s, however, Congress dramatically overhauled the Farm Credit System in several stages, culminating in the Agricultural Credit Act of 1987.⁸⁵ While the scope of the overhaul and the mechanism of the "bailout" which accompanied that overhaul are far beyond the scope of this Article and discussion, it is important that FCS borrowers and their attorneys are aware of some of this history as they approach Farm Credit System cases. As with the FmHA, this history shapes a great deal of the conduct of the FCS lenders today.

In the early 1980s, the Farm Credit Administration began a very intrusive and aggressive regulatory role within district Farm Credit Banks around the country. For example, regulators from the Farm Credit System took over and overrode functions of Spokane district

81. See Christopher R. Kelly & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 N.D. L. REV. 127 (1990); James T. Massey, *Farm Credit System: Structure and Financing Under the New Act*, Vol. 3, No. 1, *Farmers' Legal Action Report*, January/February 1988; James T. Massey & Susan A. Schneider, *Title I of the Agricultural Credit Act of 1987: A Law in Search of Enforcement*, 23 U.C. DAVIS L. REV. 589 (1990).

82. HALCROW ET AL., *supra* note 1, at 260.

83. HALCROW ET AL., *supra* note 1, at 258-59.

84. HALCROW ET AL. *supra* note 1, at 258-59.

85. HALCROW ET AL., *supra* note 1, at 259-60; P.L. 100-233, 101 Stat. 1568 (1987).

bank examiners in the early 1980s and liquidated several Production Credit Associations within the Spokane district.⁸⁶ These liquidations, in turn, led to litigation concerning the scope of the Farm Credit Administration's (FCA) role, and particularly the means by which it carried out its function.⁸⁷ This intrusive conduct by the FCA also led to a reaction among local FCS lenders and their borrowers concerning the proper role of the federal government in the system.

At the same time, the Farm Credit System began experiencing a great deal of financial difficulty which paralleled the financial difficulties of its borrowers. At one time, it was estimated that the system was carrying tens of billions of dollars of unsecured and unserviceable debt,⁸⁸ although there was great debate during the 1980s as to what that amount actually was. As a result of that debt and, again, of executive branch policy, the Farm Credit System began in the 1980s to liquidate and foreclose on tens of thousands of its loans. These liquidations, in turn, led to a political backlash similar to that accompanying the FmHA's conduct. Thus, Congress enacted in both 1985 and 1987 new provisions that were intended to protect borrowers' rights within the system.⁸⁹

Although these borrowers' rights seemed to parallel the FmHA provisions, they have met with a sorry fate in implementation. When Congress enacted them in 1985 and 1987, it failed to specifically address the question of whether FCS borrowers had a private right of action through which these new borrowers' rights could be enforced in court. As a result, Farm Credit System lenders throughout the country took the position that these so-called borrowers' rights were merely advisory, not enforceable, and did not take them very seriously. This position led to a series of lawsuits which have ultimately determined that the borrowers' rights provisions contained in the federal legislation and the Farm Credit System regulations are virtually unenforceable by system borrowers.⁹⁰

A. The Borrowers' Rights Provisions

The Agricultural Credit Act of 1987 consolidated and added to a list of so-called "borrowers' rights," some of which had been initially enacted by Congress in 1985. These borrower protections under the Act are:

86. KENNETH L. PEOPLES ET AL., ANATOMY OF AN AMERICAN AGRICULTURAL CRISIS, 129-40 (1992).

87. *VanLeeuwen v. Farm Credit Administration*, 577 F. Supp. 264 (D. Or. 1983).

88. HALCROW ET AL., *supra* note 1, at 257-58.

89. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (codified in scattered sections of 12 U.S.C.); Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (codified in scattered sections of 12 U.S.C.).

90. *See infra* section III.B.

1. If the borrower applies, FCS lenders must consider restructuring distressed loans. Until restructuring is considered, lenders are restricted from continuing or initiating certain foreclosures.⁹¹

2. All nonaccrual loans held by FCS lenders receiving federal financial assistance must be considered for restructuring.⁹²

3. FCS lenders must provide borrowers with extensive loan information prior to loan closing and with copies of appraisals.⁹³

4. Lenders must give written notice to borrowers of any action taken on a loan application or loan restructuring.⁹⁴

5. Borrowers are entitled to have a Credit Review Committee review an adverse action taken on a loan application or a request for restructuring.⁹⁵

6. Borrowers may request additional appraisals to support reviews of loan denials or reductions.⁹⁶

7. Lenders may not foreclose on loans that are current. Lenders may demand additional collateral in only very narrow circumstances.⁹⁷

8. Once a loan is current, lenders may not accelerate a borrower's loans for past delinquency.⁹⁸

9. Lenders must notify borrowers if their loans are placed in nonaccrual status.⁹⁹

10. Borrowers have the right of first refusal to lease or repurchase any real estate acquired from them by a lender.¹⁰⁰

11. In general, FCS must retire borrowers' stock at par value.¹⁰¹

12. Upon request of the borrower, lenders must review interest rates being paid to determine if they are proper.¹⁰²

13. FCS lenders must release any documents signed by the borrower.¹⁰³ Today, these borrower protections are contained in the Farm Credit System regulations¹⁰⁴ and are the law of the land of Farm Credit System lenders. However, the litigation referred to above has reduced these borrower protections to virtual nonsense.

91. 12 U.S.C. §§ 2202a(b)(3), 2202a(d)(1) (1988).

92. *Id.* § 2202c(a).

93. *See id.* §§ 2199, 2202(d)(3).

94. *Id.* § 2201.

95. *Id.* § 2202(b).

96. *Id.* § 2202(d).

97. *Id.* § 2202d(a). *See, e.g., id.* § 2202a(j)(protecting lenders against loss of collateral).

98. *Id.* § 2202d(c).

99. *Id.* § 2202d(d)(1).

100. *Id.* § 2219a(a).

101. *Id.* § 2162(a).

102. *Id.* § 2199(b).

103. *Id.* § 2200.

104. 12 C.F.R. 614.4336 (1993).

B. *Harper* and Subsequent Cases

In early 1988, when the Agricultural Credit Act of 1987 became the law, the Federal Land Bank of Spokane decided that borrowers whose loans had already been foreclosed, but who still remained in possession of and occupying the property, were not eligible for restructuring under the provisions of the new Act. This decision led to litigation in the United States District for Oregon. There, in *Harper v. Federal Land Bank of Spokane*,¹⁰⁵ Chief Judge Owen Panner determined that, although Congress did not include an express private right of action for FCS borrowers which would enable them to enforce provisions of the Act, Congress nonetheless implied a private right of action since it was concerned with correcting abuses of borrowers' rights which had been reported throughout the country.¹⁰⁶ The Land Bank appealed this decision, however, and the United States Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit panel held that Congress did not intend to allow borrowers to enforce the borrower protections through an implied private right of action, and that the sole remedy, if there was one, was contained in the very vague and unimplemented provisions of the Act concerning review and enforcement by the Farm Credit Administration.¹⁰⁷ The *Harper* case has been followed by decisions in the Sixth, Eighth and Tenth Circuits, as well as state courts throughout the country.¹⁰⁸ Thus, as this is written, the borrower pro-

105. 692 F. Supp. 1244, (D. Or. 1988), *rev'd*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990).

106. *Id.* at 1247.

107. *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990).

108. *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990)(en banc)(no implied cause of action); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990)(no implied cause of action); *Walker v. Federal Land Bank of St. Louis*, 726 F. Supp. 211 (C.D. Ill. 1989)(no implied cause of action); *Renick Bros., Inc. v. Federal Land Bank Ass'n of Dodge City*, 721 F. Supp. 1198 (D. Kan. 1989)(no implied cause of action); *Stoppel v. Farm Credit Bank of Wichita*, No. 89-1221-C 1989 U.S. Dist. LEXIS 11642, (D. Kan. Sept. 26, 1989)(no implied cause of action, relying on *Renick*); *Federal Land Bank of Wichita v. Ochs*, No. 87-4113-R 1989 U.S. Dist. LEXIS 9079 (D. Kan. July 12, 1989)(no implied cause of action); *Wilson v. Federal Land Bank of Wichita*, No. 88-4058-R (1989 U.S. Dist. LEXIS 1558)(D. Kan. Jan. 30, 1989)(no implied cause of action); *In re Reilly*, 105 Bankr. 59 (Bankr. D. Mont. 1989)(no implied cause of action); *Neth v. Federal Bank of Jackson*, 717 F. Supp. 1478 (S.D. Ala. 1988)(no implied cause of action). *But see In re Jarrett Ranches, Inc.*, 107 Bankr. 963 (Bankr. D.S.D. 1989)(finding an implied cause of action); *Martinson v. Federal Land Bank of St. Paul*, 725 F. Supp. 469 (D.N.D. 1988), *appeal dismissed*, No. 88-5202 (8th Cir. May 5, 1989)(finding an implied cause of action); *Leckband v. Naylor*, 715 F. Supp. 1451 (D. Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989)(finding an implied cause of action). *See also Payne v. Federal Land Bank of Columbia*, 711 F. Supp. 851 (W.D. N.C. 1989)(implicitly finding an implied cause of action); *In re Hilton Land & Cattle Co.*, 101 Bankr. 604 (D. Neb. 1989)(implicitly finding an implied cause of action); *Meredith v. Federal Land Bank of St. Louis*, 690 F.

tections provided to Farm Credit System borrowers do not play much of a role in FCS restructuring determinations.

C. The Restructuring Process

Despite the ineffectiveness of these borrower protections, however, FCS lenders do provide their borrowers with notice and the opportunity to apply for restructuring in the case of delinquent loans. For example, in some cases, the Federal Land Bank of Spokane has turned from an aggressive foreclosure policy toward a more reasonable approach, seeking to balance the interest of the bank and its shareholders with those of individual members facing financial difficulty. The bank has indicated more willingness to discuss restructuring—whether in the context of the formal notice or informal negotiations—and to avoid litigation and bankruptcy proceedings where possible. Although this willingness may not generally be the rule throughout the district, and may depend upon individual cases and representation, it does represent a change of attitude from that of the early 1980s.

Although the formal restructuring mechanism under the Act is essentially unenforceable through direct litigation by an FCS borrower in most circuits, it is important that the borrower pursue all administrative remedies provided under the Act and FCS regulations. It is not yet certain in many states, including Oregon and Washington, whether, in spite of *Harper*, a borrower can raise a failure by an FCS lender to comply with its own regulations as an affirmative, equitable defense to foreclosure.¹⁰⁹ Surely, if the borrower has failed to seek all available administrative remedies from the bank during the pre-foreclosure proceedings, a court would be reluctant to find that the borrower had acted in good faith sufficient to invoke the court's equity to stop the foreclosure. Any attorney representing a borrower in an FCS foreclosure should evaluate whether the bank has complied with the

Supp. 786 (E.D. Ark. 1988)(implicitly finding an implied cause of action), *aff'd*, 873 F.2d 1447 (8th Cir. 1989).

For a brief period, the Eighth Circuit recognized an implied cause of action. *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989), *vacated on grant of reh'g en banc*, 1989 U.S. App. LEXIS 18809 (8th Cir. 1989)(finding an implied cause of action). Before that decision was vacated, it was followed by at least one district court in the Eighth Circuit. *Hill v. Farm Credit Bank of St. Louis*, 726 F. Supp. 1201 (E.D. Mo. 1989).

At least two courts have recently considered whether there is an implied cause of action to remedy violations of regulations promulgated under the Farm Credit Act, as amended. *Williams v. Federal Land Bank of Jackson*, 729 F. Supp. 1387 (D.D.C. 1990)(finding no implied cause of action); *Winkel v. Production Credit Ass'n of East Central Wisconsin*, 451 N.W.2d 440 (Wis. Ct. App. 1989)(finding no implied cause of action and apparently considering the 1987 Act).

109. See, e.g., *Federal Land Bank of St. Paul v. Bosch*, 432 N.W.2d 855, 858-59 (N.D. 1988); *Federal Land Bank v. Overboe*, 404 N.W.2d 445, 446 (N.D. 1987).

regulations, with its own restructuring procedures, and with the Act, and should look at several cases which lay out the framework for assertion of an equitable defense to foreclosure.¹¹⁰ Although these cases seem conceptually indistinguishable from those in which the borrower initiates an action to enforce a restructuring regulation or requirement, the courts have recognized a distinction and have acknowledged that the affirmative, equitable use of FCS violations of restructuring provisions and regulations may be actionable even where a private right of action does not exist.

IV. CONCLUSION

Representation of financially distressed agricultural producers within the Farmers Home Administration or Farm Credit System can be challenging, difficult, and frustrating. However, such representation, particularly of FmHA borrowers, can also be productive and rewarding to the borrower, and may avoid the cost and stigma of a bankruptcy. Many farms and ranches have literally been saved through use of the FmHA procedures and negotiation with FCS lenders within their regulatory context. To be successful in either arena, however, the farm credit attorney must be fully educated about his or her client's options and must understand the regulations, how they fit into the overall scheme of the lender, and particularly, the remedies that are available if the negotiations or administrative procedures fail.

110. See, e.g., *Federal Land Bank of St. Paul v. Bosch*, 432 N.W.2d 855, 858-59 (N.D. 1988); *Federal Land Bank v. Overboe*, 404 N.W.2d 445, 446 (N.D. 1987).