

Title I of the Agricultural Credit Act of 1987: "A Law in Search of Enforcement"

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INTRODUCTION

A. *The Agricultural Credit Act of 1987*

The Agricultural Credit Act of 1987, signed by the President on January 6, 1988,¹ contained a comprehensive overhaul of the Farm Credit System (FCS).² The Act included a \$4 billion so-called "bailout" of the FCS.³ It required and authorized extensive internal restructuring of the FCS⁴ and contained numerous "borrower protections."⁵ These "borrower protections," set out in Title I of the Act,⁶ regulate and substantially modify the credit relationship between FCS borrowers and lenders. Although the loan restructuring provisions in Title I have drawn the most attention, the Act provides numerous significant borrower protections.

B. *Borrower Protections*

Title I of the Agricultural Credit Act of 1987 contains the following borrower provisions:

- 1) If the borrower applies, FCS lenders must consider restructuring dis-

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¹ Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 568 (1988) (codified at scattered sections of 7, 12 & 16 U.S.C.).

² *Id.* at tits. I-IV, 101 Stat. 1568-1662 (codified as amended at scattered sections of 7, 12 & 16 U.S.C.).

³ *See id.* at sec. 201, § 6.26(a), 101 Stat. 1597 (codified at 12 U.S.C. § 2278b-6(a) (1988)).

⁴ *Id.* at tit. IV, 101 Stat. 1622-62 (codified at scattered sections of 12 U.S.C.).

⁵ *See id.* §§ 101-110, 101 Stat. 1572-85 (codified at scattered sections of 12 U.S.C.).

⁶ *Id.*

tressed loans.⁷ Until restructuring is considered, lenders are restricted from continuing or initiating certain foreclosures.⁸

2) All nonaccrual loans held by FCS lenders receiving federal financial assistance must be considered for restructuring.⁹

3) FCS lenders must provide borrowers with extensive loan information prior to loan closing¹⁰ and with copies of appraisals.¹¹

4) Lenders must give written notice to borrowers of any action taken on a loan application or loan restructuring.¹²

5) Borrowers are entitled to have a Credit Review Committee review an adverse action taken on a loan application or a request for restructuring.¹³

6) Borrowers may request additional appraisals to support reviews of loan denials or reductions.¹⁴

7) Lenders may not foreclose on loans that are current.¹⁵ Lenders may demand additional collateral in only very narrow circumstances.¹⁶

8) Once a loan is current, lenders may not accelerate a borrower's loans for past delinquency.¹⁷

9) Lenders must notify borrowers if their loans are placed in nonaccrual status.¹⁸

10) Borrowers have the right of first refusal to lease or repurchase any real estate acquired from them by a lender.¹⁹

11) In general, FCS must retire borrowers' stock at par value.²⁰

12) Upon request of the borrower, lenders must review interest rates being paid to determine if they are proper.²¹

13) FCS lenders must release any documents signed by the borrower.²²

C. General Problem and Issue Areas Under the Act

In several key provisions, the Act lacks clarity, is confusing or internally inconsistent, or simply lacks standards for interpretation, application and enforcement. At the same time, the Farm Credit Administra-

⁷ 12 U.S.C. § 2202(a)(d)(1) (1988).

⁸ *Id.* § 2202a(b)(3).

⁹ *Id.* § 2202c(a).

¹⁰ *See id.* § 2199.

¹¹ *Id.* § 2202(d)(3).

¹² *Id.* § 2201.

¹³ *Id.* § 2202(b).

¹⁴ *Id.* § 2202(d).

¹⁵ *Id.* § 2202d(a).

¹⁶ *See, e.g., id.* § 2202a(j) (protecting lenders against loss of collateral).

¹⁷ *Id.* § 2202d(c).

¹⁸ *Id.* § 2202d(d)(1).

¹⁹ *Id.* § 2219a(a).

²⁰ *Id.* § 2162(a).

²¹ *Id.* § 2199(b).

²² *Id.* § 2200.

tion (FCA),²³ through its regulations and conduct, has essentially abdicated any responsibility for enforcement of the borrower protection provisions of the Act. The Farm Credit Administration has refused to take a more aggressive regulatory role, maintaining that it is merely an "arm's-length" regulator of the FCS.

The most significant issue under the Act, whether borrowers have a private right of action to enforce the Act in court, raises the greatest problem of uncertainty. Two federal cases decided in 1989, *Harper v. Federal Land Bank of Spokane*²⁴ and *Zajac v. Federal Land Bank of St. Paul*,²⁵ created a split on this issue between the United States Courts of Appeals for the Eighth and Ninth Circuits.²⁶

This Article addresses in detail the areas of the Act which are of greatest significance to borrowers and lenders and which have raised the most difficult questions of interpretation, application, and enforcement. This Article identifies each key issue or problem, discusses the source of or reason for the problem, and recommends legislative change to address the problems.

I. RESTRUCTURING APPLICATION PROCEDURES AND PROBLEMS

The Act provides procedures and standards for restructuring distressed loans.²⁷ To obtain consideration for loan restructuring, an FCS borrower must submit an application.²⁸ Under the Act, an application for restructuring means a written request:

- (a) from a borrower for the restructuring of a distressed loan in accordance with a preliminary restructuring plan proposed by the borrower as a part of the application;
- (b) submitted on the appropriate forms prescribed by the qualified lender; and
- (c) accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.²⁹

²³ The Farm Credit Administration is the federal agency charged with regulating and overseeing the Farm Credit System.

²⁴ *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989).

²⁵ *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989), *vacated* No. 88-5353ND (8th Cir. Dec. 7, 1989) (LEXIS 18809). The Eighth Circuit currently is hearing *Zajac* en banc.

²⁶ For a discussion of this disagreement, see *infra* notes 127-32 and accompanying text.

²⁷ See 12 U.S.C. § 2202a (1988). For a definition of "distressed loan" and discussion of eligibility for loan restructuring, see *infra* notes 71-80 and accompanying text.

²⁸ See 12 U.S.C. § 2202a(a)(1) (defining application).

²⁹ *Id.*

This definition is identical to the final regulations issued by the FCA.³⁰

Three general and recurring problems regarding the application for restructuring and the definition of "application" have been observed in implementing these provisions. First, district policies that articulate what constitutes an application for restructuring, and how it is to be handled, are unclear and inconsistent throughout the system. Second, lenders deny borrowers the information necessary for preparation of realistic plans for restructuring. Third, FCS lenders are rigid in their policies on amendment of restructuring plans.

A. *Inconsistency Among the District Policies*

The FCA received comments on its proposed regulations implementing the Act.³¹ These comments request the FCA to expand and clarify the definition of "application for restructuring" to create uniform and consistent procedures among the FCS districts.³² Each FCS district has not only developed its own set of application forms, but also has developed its own general expectations for the information required with the application for restructuring. Moreover, each district appears to have developed its own methodology for evaluating the applications.

In response to this situation and to the comments submitted to the FCA, the prefatory comments to the final regulations provide the following explanation:

[S]pecific items other than these requirements cannot be identified and accordingly the regulation cannot prescribe such items. Each restructuring application will be different, depending on the type of loan, borrower, lender, and other factors. The information that constitutes a "good faith application" may very well be different in each case and FCA cannot provide an exhaustive list of specifics. For these reasons, FCA should not and cannot create uniform, consistent procedures.³³

Thus, what constitutes a complete application for loan restructuring and what is expected of borrowers in the restructuring process is unclear. The lack of consistent, articulated standards for the system as a whole is exacerbated by the failure of FCS lenders to disclose significant policy information to borrowers and by limitations placed on a borrower's ability to submit modified restructuring plans during the application process.

³⁰ See 12 C.F.R. § 614.4440 (1989).

³¹ See 53 Fed. Reg. 35,427, 35,427-51 (1988).

³² *Id.* at 35,433.

³³ *Id.*

B. *Lack of Disclosure to the Borrower*

The Act requires that the notice of restructuring provided to borrowers include: "(1) a copy of the policy of the lender established under subsection (g) of this section that governs the treatment of distressed loans; and (2) all materials necessary to enable the borrower to submit an application for restructuring on the loan."³⁴ Again, the final regulations are identical to the statutory language.³⁵

The Act further requires that the restructuring policy referenced in the notice requirements include "an explanation of . . . the procedure for submitting an application for restructuring."³⁶ The final regulations reflect this requirement.³⁷

Each FCS district submitted a policy to the Farm Credit Administration pursuant to this provision in the Act. Unfortunately, however, each of the policies submitted simply restates the language of the Act.³⁸ No policy provided borrowers with any additional information regarding the restructuring process. Moreover, reports from borrowers, attorneys, and financial planners indicate that in all districts it is difficult for borrowers to obtain any additional information regarding the lender's restructuring analysis.

This lack of disclosure presents the borrower with several practical problems. First, she may be uncertain as to what information should be submitted in connection with the application. This issue is discussed below with regard to the "preliminary plan" definition. Second, the borrower is at a serious disadvantage in formulating a restructuring proposal. This disadvantage exists because the borrower is not given the criteria and/or formulas used by the lender in evaluating her restructuring proposal. The acceptance of the proposal is based upon the computation of cost of foreclosure as opposed to cost of restructuring. Without knowledge of what costs the lender will include in each category and without knowledge of the formulas used in calculating these costs, it is extremely difficult for a borrower to propose a plan that complies with these undisclosed requirements.

The problems created by the lack of disclosure are emphasized by the fact that an individual plan may involve a complex combination of various restructuring tools. These tools may include reamortization, write-

³⁴ 12 U.S.C. § 2202a(b)(1) (1988).

³⁵ See 12 C.F.R. § 614.4516(a) (1988).

³⁶ 12 U.S.C. § 2202a(g)(2) (1988).

³⁷ See 12 C.F.R. § 614.4515.

³⁸ The policies were obtained from the Farm Credit Administration by the author's law firm pursuant to the Freedom of Information Act.

off of principal and/or interest, debt set-aside, and/or partial deed-back. In this context, it is not a matter of simply how much the borrower can afford to pay, but rather what creative restructuring plan can be developed that meets both the needs of the borrower and those of the lender. If the needs of the lender are not articulated to the borrower, it may be impossible for the borrower to develop an acceptable plan.

These concerns were raised in comments submitted to the Farm Credit Administration in connection with its proposed regulations.³⁹ The FCA response contained in the prefatory comments was as follows:

FCA disagrees with the comments that requested that the lender provide the costs of foreclosure and restructuring. In most cases this will be impossible for a lender to do until and after the borrower has submitted an application for restructuring. To the extent that this comment meant that a specific list of what the lender is including in these costs should be provided, as stated immediately above each case may involve different costs. Thus there is no one list of items that objectively will be part of each and every application.⁴⁰

Thus, the regulations approve the lender's refusal to disclose this type of information to borrowers, either as part of the application process or as part of the subsequent negotiation process.

This lack of information makes it virtually impossible for a farmer to adequately assess her own situation in a restructured operation. Essentially, the farmer must "guess" at how the FCS lender will determine its cost of restructure and cost of foreclosure. This makes a "good faith" negotiation process extremely difficult, and in many cases, impossible. The practice of lenders to accept only one application and restructuring plan exacerbates the problem.

C. "Plan" Definition Problem

Both the Act and the regulations use the phrase "preliminary restructuring plan" in the listing of requirements for an application for restructuring.⁴¹ Because of this phrase, borrowers have submitted initial restructuring plans on the assumption that they will be able to modify these plans through a process of negotiation with the lender. It has been widely reported, however, that FCS lenders treat the initial proposal as final and deny restructuring based solely upon that proposal.

Because borrowers are forced to prepare their applications or re-

³⁹ See 53 Fed. Reg. 35,427, 35,433 (1988).

⁴⁰ *Id.* at 35,434.

⁴¹ 12 U.S.C. § 2202a(a) (1988); 12 C.F.R. § 614.4512(a) (1989).

structuring plans without full FCS disclosures, the borrower may be denied restructuring solely for lack of adequate information — or exploration of alternatives — and not necessarily because it is less costly to foreclose. On this issue, the FCA regulations again only mimic the express language of the Act.⁴² FCA specifically declined in the regulatory language to set out an open, flexible application process as suggested by many who commented on the proposed rules.

In prefatory language to the regulations, FCA indicated that the borrower's initial application should be treated only as a preliminary plan. The borrower may modify the application through a "good faith" discussion between the parties.⁴³ However, in the same prefatory comment, FCA indicates that borrowers should not be allowed repeated amendments of their proposed restructure plans.⁴⁴ This conflicting prefatory language has left FCS borrowers and lenders unclear about FCA's interpretation of the Act's requirements.

In the end, many FCS borrowers report that they are allowed only "one shot" in submitting a plan and that no subsequent discussions or negotiations occur between the parties. This results in a great deal of unnecessary resentment and conflict and may prevent restructuring of many borrower's loans even though restructuring would be the less costly route.

D. Recommendations for Legislative Amendment and Change

This Article proposes that Congress should amend the Act. The proposed amendment should contain the following provisions:

- i) Clear, uniform standards and procedures for the FCS restructuring process. Although individual facts and needs of different borrowers and lenders may require, and result in, some different approaches to loan restructuring, uniform standards and procedures are essential to assure fairness and accountability throughout the system.
- ii) The requirement of full and timely disclosure by FCS lenders of (a) the lender's formulas and calculations for determining the relative cost of restructuring and cost of foreclosure, (b) all necessary documents and information required of the borrower to complete a restructuring application, (c) all standards by which the lender will evaluate the application for restructuring.
- iii) A clear indication that a preliminary plan is just that and a statement of an over-arching legislative goal of finding a workable loan structuring approach whenever possible. This language should discourage farm displacement and place a burden on FCS lenders to

⁴² Compare 12 U.S.C. § 2202a(d) (1988) with 12 C.F.R. § 614.4517 (1989).

⁴³ See 53 Fed. Reg. 35,427, 35,433-34 (1988).

⁴⁴ *Id.*

explore and exhaust all restructuring options before foreclosure, not just those on the borrower's initial application.

II. PROBLEMS IN THE CREDIT REVIEW PROCESS

If the borrower's restructuring proposal is denied, the borrower is entitled under the Act to have that denial reviewed by a Credit Review Committee.⁴⁵ The review process has been troubled in three particular areas. First, FCS lenders refuse to make key disclosures necessary to the review process. Second, the scope of review is too narrow. Third, independent appraisals have been denied to many borrowers.

A. *Disclosure of Information Supporting the Denial*

For a borrower to adequately prepare for a Credit Review Committee hearing, it is essential that she understand the reasons why the restructuring proposal was rejected. However, borrowers report that these reasons are often not disclosed to them until they are actually present at the Credit Review Committee hearing. Disclosure at that time does not allow them sufficient opportunity to prepare a defense of their proposal or to identify and suggest modifications.

The Act requires that the borrower receive "prompt written notice" of the lender's decision on the application for restructuring and, if the application is denied, an explanation of the reasons for the denial.⁴⁶ The regulations set forth FCA's interpretation of this requirement:

Where an application for restructuring is denied, the notice shall include:
(a) the reason(s) for the denial, and any critical assumptions and relevant information upon which the reasons are based, except that any confidential information shall not be disclosed.⁴⁷

The regulations do not define or explain either the phrase "critical assumptions" or "relevant information."

In many situations, the borrower and lender disagree substantially on what information is critical and/or relevant for purposes of disclosure. The borrower is at a disadvantage in challenging the lender's disclosure at this stage because she may not be aware of information that is being withheld.

Some explanation of the FCA position on this issue is set forth in the prefatory comments.⁴⁸ In these comments, the FCA confirms that suffi-

⁴⁵ 12 U.S.C. § 2202(b)(1) (1988).

⁴⁶ *Id.* § 2201.

⁴⁷ 12 C.F.R. § 614.4518 (1989).

⁴⁸ See 53 Fed. Reg. 35,427, 35,443-45 (1988).

cient information must be provided to the borrower to ensure the borrower's right to a meaningful credit review.⁴⁹ The FCA emphasizes, however, that this does not indicate that all information must be provided to the borrower.⁵⁰ Under the FCA interpretation, the borrower is only entitled to an explanation of the reasons for the lender's decision and sufficient information supporting those reasons to enable the borrower to decide whether to appeal the decision.⁵¹ In many cases, the denial is based solely upon the lender's calculations. In this situation the calculations should be disclosed, but they are not.

Thus, although the FCA comments confirm that the borrower is entitled to an explanation for the denial of her restructuring proposal, the FCA regulations and the operating policy observed in the field deny borrowers the precise information they need to decide whether to seek review and if so, on which issues. Indeed, the borrower does not even have the ability at this point in the process to verify the completeness or fairness of the lender's disclosure.

The FCA's prefatory comments suggest its rationale for limited disclosure at this stage of the restructuring process. In these comments, the FCA states that it "does not believe that a lender must disclose every piece of information and all of its calculations so that a lender will be unable to effectively negotiate with borrowers or compete with other financial institutions."⁵² Similarly, the comments indicate that a lender "bound by confidentiality restraints" cannot disclose information.⁵³ The FCA does not explain what type of information may be confidential.

In summary, under both the statute and the regulations, a borrower is entitled to an explanation of a denial of loan restructuring, along with notice of that denial.⁵⁴ This is imperative for a realistic and fair review. While it would be best for full disclosure during the negotiation process to allow the borrower and lender to work together toward a mutually beneficial resolution, the borrower should at a very minimum receive this information in time to utilize it in the credit review process.

B. Scope of the Review

In the prefatory comments to the final regulations, the FCA clearly indicates that the Credit Review Committee's function is limited to a

⁴⁹ *Id.* at 35,444.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See supra* notes 46-53 and accompanying text.

review of the loan officer's decision.⁵⁵ Under this interpretation of the Committee's statutory duty, it is not appropriate for the Committee to undertake any consideration of counterproposals. The comments specifically state:

Any counterproposals should have occurred at the lender's prior decision-making stage or before, and *not* during the committee review process that is reviewing the decision that was already made by the lender.⁵⁶

This position underscores the importance of the initial negotiation process between the borrower and the lender and of the concept of a preliminary plan. It also emphasizes the importance of the disclosure to the borrower of specific reasons for denial of the plan. According to the FCA interpretation, the borrower's only opportunity for overturning the denial is to refute these reasons.⁵⁷

The regulations specifically provide that a borrower may "submit any documents or other evidence to support the information contained in the unsuccessful loan or restructuring application" at the borrower's presentation to the Credit Review Committee.⁵⁸ The prefatory comments to the final regulations, however, confirm that this documentation does not include the submission of any type of counterproposal.⁵⁹ Rather, the documentation must relate to the restructuring proposal being reviewed.⁶⁰

Thus, the borrower is caught in a dilemma. On the one hand, FCS lenders refuse as a policy matter to provide critical information concerning the restructure application at a time when the borrower needs it most. At the same time, according to the FCA, the lender may not accept a new proposal during the review process.⁶¹ A new proposal could include modifications or additions suggested by information that should have been disclosed at an earlier stage.

C. Independent Appraisals

The Act as originally passed contained provisions that granted borrowers the right to an "independent appraisal" as part of the credit review process in certain restructuring situations.⁶² Initially, the Act ap-

⁵⁵ See 53 Fed. Reg. 35,427, 35,439 (1988).

⁵⁶ *Id.* (emphasis in original).

⁵⁷ See *id.*

⁵⁸ 12 C.F.R. § 614.4443(b) (1989).

⁵⁹ See 53 Fed. Reg. 35,439 (1988).

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² Agricultural Credit Act of 1987, Pub. L. No. 100-233, sec. 106, § 4.14(d), 101

peared to limit this right in the restructuring review context to situations in which the qualified lender demanded additional collateral.⁶³ The Agricultural Credit Technical Corrections Act of 1988⁶⁴ expanded the right to an independent appraisal to all restructuring application denials before the Credit Review Committee.⁶⁵ The amended statute and the final FCA regulations reflect this right.⁶⁶

Thus, it is now clear that any borrower seeking review by a Credit Review Committee of the denial of a restructuring application can request an independent appraisal. It is not clear, however, what effect this change will have on borrowers who have already gone through the review process, particularly those who requested and were denied an independent appraisal prior to passage of the Technical Corrections Act. Section 1001 of the Technical Corrections Act provided that this change was to become effective "as if enacted immediately after the enactment of the 1987 Act."⁶⁷

FCS lenders have refused to reconsider cases when the issue has been raised. This refusal has led to one significant federal court decision.⁶⁸ This is particularly noteworthy, since the primary complaint reported by borrowers and their counsel regarding the independent appraisal provision is that FCS appraisals lack objectivity and independence. Even under the statutory "independent appraisal" process, the Credit Review Committee presents the applicant with a list of three accredited appraisers approved by the qualified lender.⁶⁹ The borrower must select from this list.⁷⁰ In practice, many borrowers report that appraisers

Stat. 1568, 1580-81 (1988).

⁶³ See *id.* § 4.14(d)(4), 101 Stat. 1581.

⁶⁴ Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, 102 Stat. 989 (codified at scattered sections of U.S.C.).

⁶⁵ *Id.* § 103, 102 Stat. 990.

⁶⁶ See 12 U.S.C. § 2202(d) (1988); 12 C.F.R. § 614.4443(c) (1989).

⁶⁷ Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 1001, 102 Stat. 989, 1008.

⁶⁸ In *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989), the court held that the Agricultural Technical Corrections Act of 1988 was clearly retroactive by its own terms, *see id.* at 846 n.2, and enjoined foreclosure of the Zajacs' property until the bank provided an independent appraisal as part of the restructuring consideration. *See id.* at 857. The Zajacs had applied for but had been denied restructuring prior to passage of the Technical Corrections Act without benefit of an independent appraisal of the value of their property, a matter of substantial dispute between the parties. *See id.* at 846 & n.1. On December 7, 1989, the *Zajac* panel decision was vacated and the case set for rehearing *en banc* on January 19, 1990.

⁶⁹ 12 U.S.C. § 2202(d)(2) (1988).

⁷⁰ *Id.*

listed include FCS contractors, FCS employees, and/or other appraisers with affiliation to the FCS lender. In this situation, the borrowers contend that the appraisal is clearly not “independent.”

D. Recommendations for Legislative Amendment and Change

To address these problems, Congress should amend the Act as follows:

- i) To require disclosure by FCS lenders of all reasons for restructuring denials and the basis for those reasons, in a written denial letter or notice in advance of the credit review.
- ii) To authorize the Credit Review Committee to propose and/or accept restructuring counterproposals if the initial application/plan process is not changed, to require full disclosure by the lender, and an ongoing negotiating process.
- iii) To require appointment of independent (not FCS employees) hearing officers for credit reviews if they are to review decisions made by loan officers.
- iv) To require FCS lenders to reconsider every case denied for restructuring where an independent appraisal was not allowed.

III. RESTRICTIONS ON ELIGIBILITY FOR RESTRUCTURING

Loan restructuring under the Act is available to certain borrowers with “distressed loans” when restructuring of the loan is no more costly to the lender than foreclosure.⁷¹ A distressed loan is defined as:

[A] loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

- (A) The borrower is demonstrating adverse financial and repayment trends.
- (B) The loan is delinquent or past due under the terms of the loan contract.
- (C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.⁷²

Numerous FCS policies and practices have substantially reduced the number of borrowers who may be eligible for loan restructuring. Lenders are given unfettered discretion to identify “distressed loans” and may sue directly on notes without foreclosure to avoid restructuring. Borrowers in foreclosure prior to January 6, 1988, have been excluded from restructuring eligibility. FCS lenders use arbitrary and unrealistic

⁷¹ *Id.* § 2202a(e)(1).

⁷² *Id.* § 2202a(a)(3).

“cost of restructure” computations. Cost computations do not allow for short-term “catch-up” of income with land values. Some FCS lenders are extending only “shotgun” restructuring — short-term, high-risk agreements entered under duress. Finally, borrowers discharged in bankruptcy are denied restructuring rights.

A. Determination of “Distressed Loan”

The most problematic aspect of the distressed loan definition is the phrase “a loan that the borrower does not have the financial capacity to pay according to its terms.”⁷³ In some circumstances, there may not be an existing monetary default, but the farmer believes that she cannot continue to make payments on the loan as scheduled without jeopardizing the farm operation. That farmer may believe that her loan is distressed and attempt to apply for debt restructuring. The FCS lender, on the other hand, may take the position that the loan is not distressed. The FCA regulations grant sole discretion to the lender to make the “distressed loan” finding.⁷⁴ The regulations recite the statutory definition verbatim, adding only the clause “as determined by the lender.”⁷⁵

The prefatory comments to the final regulations address this language as follows:

The lender must determine whether the borrower has the financial capacity to repay his loan. In order to make such a determination, a lender may have to consider repayment trends on other loans or accounts, where such information is available. . . . Nothing in the statute or the regulations prevents a borrower from voluntarily contacting a lender if a borrower wishes to discuss restructuring.⁷⁶

This grant of discretion, coupled with FCS lenders’ refusal to disclose information, works substantial unfairness on borrowers whose loans are current, but who nonetheless are in dire straits. Observations and reports indicate that this situation is most likely to occur when the borrower has made some type of assignment of income to the lender. For example, when the farmer gives her FCS lender a dairy assignment covering milk proceeds, and this assignment is backed up by a valid security interest in these proceeds, the lender may choose to continue receiving its assignment rather than consider the borrower’s loan for restructuring.

The borrower in this situation is faced with a complex dilemma. If

⁷³ *Id.*

⁷⁴ See 12 C.F.R. § 614.4516(a) (1989).

⁷⁵ Compare *id.* § 614.4440(e) with 12 U.S.C. § 2202a(a)(3) (1988).

⁷⁶ 53 Fed. Reg. 35,427, 35,434-35 (1988).

the borrower declines to pay the FCS lender in an effort to "create" a distressed loan, she may be guilty of converting assigned or encumbered proceeds. Moreover, the failure to make a payment will not assure that the loan is classified as "distressed." The FCS lender may take the position that the borrower has the financial capacity to pay. Moreover, by creating a default, the borrower may lose her right of first refusal under the Act.⁷⁷ The Act limits this right to a borrower "who, *as determined by the institution*, does not have the financial resources to avoid foreclosure."⁷⁸ In the end, the borrower may simply lose the farm for taking action designed only to get the attention of the FCS lender in an effort to be considered for restructuring.

The exclusive authority of the FCS lender to determine when a loan is distressed, coupled with the disclosure and review problems noted above,⁷⁹ further limits the opportunity of many FCS borrowers to be considered for loan restructuring. Because courts are not likely to grant judicial review of FCS lenders' restructuring decisions unless clear procedural violations of the Act are apparent, these borrowers are left without any remedy.⁸⁰

B. *Lenders' Suits on Debt Instrument*

As discussed above, the lender must give notice of debt restructuring to the borrower when her loan is determined to be distressed or not later than forty-five days before the lender begins foreclosure proceedings against the borrower. It has been reported, however, that lenders have circumvented the restructuring process by suing the borrower on the debt instrument. The lender's position apparently is that (1) the loan is not distressed because the borrower has the financial means to pay it; and (2) taking legal action on the debt instrument does not fall within the definition of a "foreclosure proceeding." This kind of circumvention of the Act in cases of truly distressed loans further limits borrowers' access to the restructuring provisions. The spirit and intent of the law clearly prohibit this conduct by FCS lenders. However, there are no reported cases on this issue at this time.

⁷⁷ See 12 U.S.C. § 2219a (1988).

⁷⁸ *Id.* § 2219a(a) (emphasis added). For a discussion of the right of first refusal, see *infra* notes 104-15 and accompanying text.

⁷⁹ See *supra* notes 45-61 and accompanying text.

⁸⁰ See *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989); *Troutman v. Federal Land Bank of Spokane*, Civ. No. CV88-726-PA (D. Or. Sept. 15, 1988).

C. Foreclosure Proceedings Initiated Prior to the Act's Effective Date

The Act became effective on January 6, 1988, when many FCS foreclosure actions were in process throughout the country. The issue arose whether the borrowers in these foreclosure proceedings were eligible for debt restructuring consideration. Some Farm Credit System Districts took the position that they were not eligible and attempted to complete the foreclosure. In response, numerous borrowers brought suit against their lenders for failure to comply with the restructuring provisions of the Act.

This conflict between borrower and lender, in part, arose because of two distinct and somewhat inconsistent provisions of the Act. Supporting the lender's position, one subsection of section 102 of the Act provides that the notice provisions do not apply to a loan that became distressed before January 6, 1988, "if the borrower and lender of the loan are in the process of negotiating loan restructuring with respect to the loan."⁸¹ In contrast, another subsection provides that, "No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."⁸²

The Farm Credit Administration addressed this issue in the prefatory comments to the final regulations. In these comments, the FCA states:

While the issue is not free from doubt, upon a review of the statutory language, the FCA Board has concluded that as long as the foreclosure proceeding as defined in Section 4.14A(a)(4) of the Act was not complete as of January 6, 1988, restructuring rights are applicable if otherwise appropriate.⁸³

These comments state that loans subject to pending foreclosure proceedings that were not complete as of January 6, 1988, are considered "distressed loans" for the purposes of restructuring consideration. Finally, the comments declare that the issue of when a foreclosure proceeding is complete is a matter of state law and, as such, subject to state-by-state variation. Notwithstanding the FCA's clear statement of purposes on this point, FCS lenders continue to fight applicability of the restructuring provision to cases in process as of January 6, 1988.

For example, prior to the publication of the FCA regulations on

⁸¹ 12 U.S.C. § 2202a(k) (1988).

⁸² *Id.* § 2202a(b)(3).

⁸³ 53 Fed. Reg. 35,427, 35,428 (1988).

September 14, 1988,⁸⁴ the Land Bank argued, in *Harper v. Federal Land Bank of Spokane*,⁸⁵ that the Harpers were ineligible to apply for loan restructuring. The Land Bank had obtained a state court foreclosure judgment against the Harpers prior to January 6, 1988.⁸⁶ Chief Judge Owen Panner held that the Land Bank had illegally "continued" the foreclosure proceeding by seeking a sheriff's foreclosure sale after enactment.⁸⁷

The Ninth Circuit subsequently reversed *Harper*. The court held that FCS borrowers do not have an implied private right of action to sue for enforcement of the Act.⁸⁸ The court did not reach the question of whether the Land Bank's conduct violated the Act through "continuance" of a prohibited foreclosure. The *Harper* case has been followed by courts in several districts, while in others it has not. The policy leaves hundreds of farmers without access to restructuring consideration. The Harpers petitioned the United States Supreme Court to grant certiorari in their case. The Supreme Court denied the petition on January 22, 1990. Thus, the issue may remain unresolved unless Congress acts.

D. "Least Cost" Problems

Under the Act, FCS lenders are to determine their cost of restructuring a loan and their cost of foreclosing the loan.⁸⁹ The Act then directs the lender to take the least cost approach.⁹⁰ Two significant cost-analysis problems have arisen which exclude large numbers of borrowers from qualifying for restructuring. These are (1) calculations by lenders which include unrealistic costs of restructuring; and (2) upswing in property values, making foreclosure more financially viable to FCS lenders than restructuring.

1. Unrealistic Cost of Restructuring Figures

The Act requires FCS lenders to consider, as a cost of restructuring, the present value of interest income and principal foregone in any re-

⁸⁴ See 53 Fed. Reg. 35,427 (1988).

⁸⁵ *Harper v. Federal Land Bank of Spokane*, 692 F. Supp. 1244 (D. Or. 1988), *rev'd*, 878 F.2d 1172 (9th Cir. 1989).

⁸⁶ *Id.* at 1249.

⁸⁷ *Id.*

⁸⁸ *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989).

⁸⁹ 12 U.S.C. § 2202a(d), (e) (1988).

⁹⁰ *Id.* § 2202a(f).

structuring agreement.⁹¹ The interpretation of this language, and its application by FCS lenders, presents perhaps the most serious concern with implementation of the restructuring provisions of the Act.

A review of FCS district policies and restructuring computations reveals that FCS lenders, in applying this requirement of the Act, assume that all interest income and principal initially anticipated under the loan must be the baseline for that which is calculated as foregone. Thus, the "cost" computation for restructuring is based upon the assumption that it would be possible, absent restructuring, for the FCS lender to collect in full on the loan.

If this were actually the case, the borrower's loan would not be categorized as distressed, and the borrower would not be eligible for the restructuring process at all. In effect, this calculation charges to the borrower's side of the equation (cost of restructuring) the difference between full payment under the existing loan and the payments to be made under the restructured loan. This does not reflect the true cost of foreclosure versus cost of restructuring comparison, especially in a situation where the loan is substantially under-collateralized and the borrower has no available assets or ability to pay a deficiency judgment.

This language of the statute only makes sense if it is interpreted in the context of the "real" net present value of the loan. That figure can only be the amount that the loan is actually worth — that is, the amount the borrower can pay or the amount that would be realized upon liquidation of the loan and collection of other available assets. A denial of restructuring based upon the higher, presumed but uncollectible value of the loan denies to these borrowers the fundamental remedy of the Act and, in the end, may cost more to the lender as well.

2. Property Value Increases

The restructuring provision of Act was written in the context of severely depressed real estate values. In the mid-1980s both agricultural income and real estate values had reached a low point. In some parts of the country farm and ranch real estate values have made a fairly rapid recovery from the low point of the mid-1980s. At the same time, however, the income of many farmers and ranchers has been slow to catch up. As a result, foreclosure may be the least cost *short-run* alternative in many cases. However, the long-term purposes of the Act are frustrated in these situations where a viable *long-term* restructuring plan could salvage the operation and save the lender money.

⁹¹ *Id.* § 2202a(e)(2)(A).

The incomes of many farmers and ranchers have dramatically decreased over the past decade because of low prices, high interest rates, decreased government payments, drought and/or steady inflation of input costs. For some, this has led to partial or complete liquidation of income-producing assets such as equipment and livestock.

For these farmers, rebuilding their income-producing operation will take time and will often be slower than the recovery of real estate values in general. The FCS restructuring scheme, at least as it is currently interpreted and applied by FCS lenders, makes it impossible for these borrowers to restructure because their income has not kept up or "caught up" with their real estate value.

The FCS provisions of the Act⁹² and their implementation do not expressly provide any restructuring or rebuilding opportunity for these borrowers. Rebuilding could be accomplished with partial or complete principal and interest deferrals combined with amortization of deferred payments. This would free up available income for capital investment in the operation and for initial operating expenses. Without such an approach, however, the restructuring provisions of the Act offer no relief to these farmers and ranchers.

E. "Shotgun" Restructuring

In some FCS districts, "shotgun" restructuring is offered to some borrowers after they are denied long-term restructuring "under the Act." This "shotgun" restructuring is typified by two things. First, it is offered when the borrower is under extreme pressure, and having being denied restructuring "under the Act," is faced with few options to avoid immediate foreclosure. Second, it is typically a very short-term alternative, involving two to three year financing with a "balloon" payment of all principal and interest at the end of the term. It is frequently accomplished with the farmer executing a "deed in lieu of foreclosure," then repurchasing the farm on a contract for deed with the balloon.

This "shotgun" approach is unacceptable under the Act. The FCS policies, practices and interpretations that have arbitrarily excluded many FCS borrowers from restructuring "under the Act" have created a second tier or class of borrowers to whom only "shotgun" restructuring is available. This is not consistent with the Act nor with sound credit practice. In the 1987 Act, Congress sought to stabilize the FCS credit situation and to re-instill credibility in the system. The "shot-

⁹² Agricultural Credit Act of 1987, Pub. L. No. 100-233, tits. I-IV, 101 Stat. 1568, 1568-1662 (codified as amended in scattered sections of 12 U.S.C.).

gun" approach defeats both goals.

The short-term, highly at-risk real estate loans offered in "shotgun" restructuring essentially convert these loans to demand notes normally associated with operating credit. The Farm Credit Act, on the other hand, recognizes that real estate loans should generally be amortized and serviced with a long-term perspective. Agriculture has ups and downs, good years and bad. Sound credit policies should recognize and anticipate this.

Credibility and confidence in the system have deteriorated dramatically among FCS borrowers, even those who receive "shotgun" restructuring. These borrowers enter agreements because they have no choice. With FCS interest rates remaining relatively high and government payments declining, borrowers fear a repeat, on an accelerated schedule, of the credit crisis that spawned passage of the Act.

F. Farmers Involved in Bankruptcy

The Act does not specifically address the question of whether a farmer-borrower in bankruptcy may qualify for statutory restructuring. There are generally two ways in which the restructuring issue will arise for such a farmer. The first situation concerns a farmer who has received a discharge in bankruptcy. This usually occurs as the result of a chapter 7 bankruptcy. The second situation arises in the context of a bankruptcy reorganization under either chapter 11, 12 or 13 of the bankruptcy code. Whether the borrowers' rights provisions⁹³ apply in reorganization bankruptcy becomes an issue if and when the FCS lender requests relief from the automatic stay. It also arises with regard to the confirmation of the debtor's plan if the debtor attempts to use provisions of the Act as support for the confirmation of that plan.

The final regulations adopted by the Farm Credit Administration do not address the issue of whether a farmer's restructuring rights under the Act apply in any of the bankruptcy situations described above. Moreover, the comments to these regulations indicate that the FCA intends to leave the resolution of this issue to the bankruptcy courts:

Comments were received that requested that the regulations ensure that the borrower rights provisions are applicable to borrowers who are in the process of bankruptcy proceedings and some commenters requested that the regulations apply to situations where an individual's debts have already been discharged in bankruptcy. FCA believes that the issue of whether these provisions are applicable in a bankruptcy proceeding is a determination for the courts to make and therefore has not included such a

⁹³ See *supra* notes 7-22.

provision in the regulations.⁹⁴

Thus, the FCA is unwilling to set out a consistent policy regarding the interaction of restructuring rights and bankruptcy.

Presumably, most of the districts have developed at least a general internal policy regarding the bankruptcy restructuring issues. However, this policy is not set forth in any of the distressed loan restructuring policies that are distributed to farm borrowers. Moreover, the districts appear to be unwilling to articulate a specific policy. In response to a formal request for information by Farmers' Legal Action Group, Inc., the general counsel of the Farm Credit Corporation of America (FCCA), in Denver, Colorado replied that:

As long as a System borrower is subject to the jurisdiction of the Bankruptcy Court, any proposed loan restructuring must satisfy the additional confirmation standards of the Bankruptcy Code, which includes taking into consideration the interests of all creditors. Accordingly, the restructuring of the loan of a System borrower who is in bankruptcy will vary depending upon the facts of each case, taking into account the position of all creditors under the Bankruptcy Code. Stated another way, once the borrower is under the jurisdiction of the Bankruptcy Court, a System lender no longer has the same flexibility to agree unilaterally to a restructuring plan that it had outside of bankruptcy.

Treatment of the loan of a distressed borrower in bankruptcy upon lifting of the stay prior to confirmation or upon dismissal of the case may depend on the specific terms of the Bankruptcy Court's order. Generally, the borrower will have the right to consideration for restructuring under Section 102 of the 1987 Act by dealing directly with the System lender.⁹⁵

In response to the same information request, the Farm Credit Bank of Omaha stated:

The filing of a Chapter 11, 12 or 13 bankruptcy does not preclude consideration for restructuring. A borrower who has been discharged in a Chapter 7 bankruptcy is eligible for restructuring provided he meets all other criteria, and is willing to execute a new note, mortgage or security agreement so that there is a valid contractual obligation between FCBO and the borrower.⁹⁶

There has already been substantial litigation on these issues. Most of these cases resulted in unreported decisions. For this reason, it is diffi-

⁹⁴ 53 Fed. Reg. 35,427, 35,429 (1988).

⁹⁵ Letter from Stephen T. Phelps, General Counsel, Farm Credit Corporation of America to Susan A. Schneider, Staff Attorney, Farmers' Legal Action Group, Inc. (Sept. 15, 1988).

⁹⁶ Letter from Tom Lehan, Senior Attorney, Farm Credit Services of Omaha, Nebraska, to Susan A. Schneider, Staff Attorney, Farmers' Legal Action Group, Inc. (Sept. 20, 1988).

cult to monitor the prevailing judicial trend. Several bankruptcy court decisions highlight the problems in this area.

In *Stainback v. Federal Land Bank of Jackson*,⁹⁷ the court held that the debtors were entitled to consideration for loan restructuring even after a discharge in a chapter 7 bankruptcy. In *In re Pennington*,⁹⁸ the court agreed, but held that property valuation would be decided under bankruptcy law. Similarly, in *In re Dilsaver*,⁹⁹ the court held that borrowers in chapter 11 proceedings were entitled to the restructuring protections of the Act. In *In re Burton*,¹⁰⁰ the court held that the FCS creditor's secured claim must be determined under the restructuring provisions of the Act. On the other hand, two courts have held that debtors with confirmed chapter 11 plans or in bankruptcy are not entitled to the protections and procedures of the Act.¹⁰¹

Although several of these decisions have recognized statutory restructuring rights for borrowers who are in or were discharged in bankruptcy, several others have not. For the borrower in these cases the Act is a nullity. This inconsistency in the bankruptcy decisions has created both the perception and reality of unfairness in the system. Borrowers under the same Act, same regulations, and same federally chartered system receive totally inconsistent treatments.

Finally, both the inconsistency and uncertainty cause increased bankruptcy filings and related litigation. This result contradicts the Act's objectives. Congress sought to create alternatives to bankruptcy when it adopted the 1987 Act, rather than to provide an additional revenue source for bankruptcy lawyers. Because so many FCS borrowers are arbitrarily excluded from loan restructuring, the current uncertainty in bankruptcy court makes it both highly risky and highly attractive as a next step alternative for these borrowers. In either case, it is expensive both to the borrowers and to the system.

This uncertainty, and the cases in which the courts have held that these farmers are not entitled to consideration for restructuring, further limit the efficacy of the 1987 Act. The litigation alone is extraordinarily expensive and is being repeated in dozens of bankruptcy courts throughout the country. Farmers paying attorneys and court costs in

⁹⁷ *Stainback v. Federal Land Bank of Jackson*, No. GC880 (N.D. Miss. Feb. 8, 1988).

⁹⁸ *In re Pennington*, No. 87-01485-BKC-DTW (Bankr. N.D. Miss. Mar. 22, 1988).

⁹⁹ *In re Dilsaver*, 86 Bankr. 1010 (Bankr. D. Neb. 1988).

¹⁰⁰ *In re Burton*, No. 87-01099-K52 (Bankr. E.D. Wash. Aug. 12, 1988).

¹⁰¹ See *In re Bellman Farms*, 86 Bankr. 1016 (Bankr. D.S.D. June 24, 1988); *In re Kraus*, No. BK-86-2677 (Bankr. D. Neb. May 20, 1988).

these cases are using scarce dollars which they could commit to operating the farm if the farmers were granted debt restructuring under the Act. At the same time, the FCS lenders are resisting a process that by definition can save the lender money if the loan is restructured.

G. Recommendations for Legislative Amendment and Change

To address these problems, Congress should amend the Act as follows:

- i) Require the lender to consider loan restructuring upon application by any farmer. A notice of the restructuring policies and procedures of the lender should be sent to each borrower. This process allows a farmer the opportunity to communicate her financial problems directly to the lender in a restructuring application without the risk of “creating” a default and without categorical exclusion by the lender.
- ii) Require forty-five day notice and consideration of debt restructuring prior to any suit by an FCS on a debt instrument. This is the same requirement that precedes foreclosure.¹⁰²
- iii) Clearly state that FCS borrowers are entitled to consideration for loan restructuring as long as they retain any rights to their property, including redemption under state law. Even at this stage, a restructured loan used to redeem from foreclosure can help the farmer keep the farm.
- iv) Specifically indicate that the restructuring provisions are available to borrowers in bankruptcy or with a debt discharged in bankruptcy.
 - (a) Clarify that foregone principal and interest are costs of restructuring only to the extent they are secured or collectible under the pre-restructured loan situation.¹⁰³
 - (b) Require FCS lenders to seek every option to avoid foreclosure, including the use of partial or complete deferrals, staggered interest rates or other mechanisms to allow farmers’ income to “catch up” with recovering real estate values.
- v) Add specific means of loan restructuring that provide long-term, fully amortized real estate loans to qualified borrowers. FCS lenders should be prohibited from substituting “shotgun” restructuring for amortized restructuring that gives some security to rebuild to borrowers.

IV. PROBLEMS WITH REPURCHASE OF INVENTORY PROPERTY

The Act requires FCS lenders to make “acquired” real estate available for repurchase by previous borrower/owners.¹⁰⁴ Acquired real estate is defined as real estate obtained from borrowers. This typically occurs through foreclosure, bankruptcy or voluntary conveyance. FCA

¹⁰² 12 U.S.C. § 2202a(b)(2) (1988).

¹⁰³ This entire section of the Act would benefit from a rewrite.

¹⁰⁴ 12 U.S.C. § 2219a (1988).

and FCS lenders have distorted and interfered with this provision in two ways. First, FCS lenders deny repurchase rights to borrowers by selling acquired real estate at auctions. Second, FCS lenders conduct unreliable appraisals and frequently do not disclose them.

A. *Conflicts Regarding Manner of Sale*

Section 108 of the Act contains two provisions which have spawned a great deal of conflict and litigation. In section 108(b), FCS lenders are required, within fifteen days after making the initial decision to sell acquired real estate, to notify the former owner or borrower that she may purchase the property at its appraised fair market value.¹⁰⁵ If the former owner offers to do so, the lender must agree to the sale, although the Act makes clear that the lender is not obliged to finance the sale.¹⁰⁶ If the former owner offers less than the appraised fair market value, the lender may not sell for less than the appraised value to any third party without providing the former owner the opportunity to match or exceed the third party bid.¹⁰⁷

Under section 108(d) of the Act, FCS lenders who elect to sell acquired real estate through public bid or auction are required to disclose to the former owner the minimum bid and terms and conditions of the sale.¹⁰⁸ If the former owner is one of two high bidders in the sale process, the property must be sold to her.¹⁰⁹

The conflict in these sections is that some FCS districts have read these sections as alternative rather than cumulative obligations. They argue that if they proceed initially with a bid or auction sale they need not, at any time, offer for sale or sell to the former owner at the appraised fair market value. Borrowers, on the other hand, have read these sections to be cumulative and to require the FCS lender to offer the fair market sale in every case to the former owner.

In those districts which read the provisions as alternatives, public auctions are used to avoid the repurchase provision of the Act. Massive blocks of FCS inventory have gone on the auction block without any opportunity for the former owner to reacquire her farm. In some districts parcels are "batched" for sale, enhancing their development potential and raising the price above appraised fair market as individual farms. As a result, few previous owners have had the opportunity to

¹⁰⁵ *Id.* § 2219a(b)(1).

¹⁰⁶ *Id.* § 2219a(f).

¹⁰⁷ *Id.* § 2219a(b)(5).

¹⁰⁸ *Id.* § 2219a(d)(1).

¹⁰⁹ *Id.* § 2219a(d)(2).

reacquire their farms.

This dispute has led to litigation in Minnesota and North Dakota. In two cases, *Leckband v. Naylor*¹¹⁰ and *Martinson v. Federal Land Bank of St. Paul*,¹¹¹ the district courts have held against the “alternative” interpretation. At the same time, and in spite of the court decisions, the “alternative” application of the Act has been codified in Farm Credit Administration regulations.¹¹²

The problems with the “alternative” interpretation of section 108 were communicated directly to the Farm Credit Administration both in formal comments on its proposed regulations¹¹³ and in a letter from counsel associated with *Leckband* requesting FCA intervention and correction of this problem.¹¹⁴ The comments and substance of the letter were ignored, and FCA subsequently approved the disputed application of the Act in its final regulations.¹¹⁵

B. Appraised Fair Market Value

Disputes between FCS borrowers and lenders also have concerned the “appraised fair market value” in connection with FCS sales of acquired real estate. FCS lenders frequently use their own staff or contractors to conduct appraisals and then refuse to release the appraisal to the former owner. The lender merely cites a dollar figure. Thus, the former owner is unable to examine or evaluate the appraisal process or to determine whether to hire her own appraiser for another opinion. If the former owner hires her own appraiser, the problem becomes more complex. FCS lenders are not required in the Act or FCA regulations to consider other appraisals, nor does any process exist for obtaining truly independent opinions. As a result, litigation has commenced in several states challenging FCS refusals to sell at a figure believed by former owners to be a fair market price.

¹¹⁰ *Leckband v. Naylor*, 715 F. Supp. 1451 (D. Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989).

¹¹¹ *Martinson v. Federal Land Bank of St. Paul*, 725 F. Supp. 469 (D.N.D. Apr. 21, 1988), *appeal dismissed*, No. 88-5202 (8th Cir. June 8, 1989).

¹¹² 12 C.F.R. § 614.4522(c) (1989).

¹¹³ Comments submitted to FCA by Farmers' Legal Action Group (June 10, 1989).

¹¹⁴ Letter from James T. Massey, counsel to National Family Farm Coalition, to Frank W. Naylor, Jr., Chairman, Farm Credit Administration (July 25, 1988).

¹¹⁵ See 12 C.F.R. § 614.4522(c) (1989).

C. *Recommendations for Legislative Amendment and Change*

To resolve these conflicts, Congress should amend the Act:

- i) To clearly indicate that section 108(d) and (b) are cumulative, not alternative requirements.
- ii) To require release of all appraisals to former owners of FCS-acquired real estate and to set out a process for obtaining a truly independent, credible appraisal to determine the repurchase price.
- iii) To allow review of a denial of offers to purchase acquired real estate when the denial involves an appraisal dispute.

V. FCA PASSIVITY ON BORROWER RIGHTS

A. *The Farm Credit Act*

The Farm Credit Act requires the FCA to adopt regulations necessary to effective oversight and regulation of the Farm Credit System.¹¹⁶ It also grants extensive "cease and desist" powers to the FCA to address violations of federal statutes and regulations by lenders.¹¹⁷ The FCA has ignored the requirements and authority of these sections by promulgating empty regulations which, in virtually every respect, merely restate verbatim the language of the Act. The FCA also declines to use cease and desist procedures or powers to enforce borrower protections under the Act. Finally, the FCA refuses to release to borrowers any documents, findings or evidence of action taken on any investigation or cease and desist proceeding.

The FCA has taken no visible enforcement role whatsoever on the borrower protection provisions of the Act. For the most part, FCA regulations merely restate verbatim the provisions of the Act. Indeed, the FCA has only spoken on the question of "cumulative" or "alternative" requirements concerning sale of acquired real estate under section 108. On this question, it has spoken against former owner/borrowers' interests and in favor of strangers.

The FCA's passivity is demonstrated in the vacuity of its regulations, in its stated justifications for rejecting virtually every comment directed at improving them, and in its refusal to acknowledge the seriousness of complaints lodged with it. This passivity has been justified by the FCA through repeated references to its role as merely an "arms-length" regulator of the Farm Credit System. This is a concept found nowhere in the federal legislation. Nonetheless, the FCA clearly will "not intervene in disputes between the institutions under its jurisdiction and their bor-

¹¹⁶ 12 U.S.C. § 2252(a)(9) (1988).

¹¹⁷ *Id.* §§ 2261-2263.

rowers.”¹¹⁸ This FCA policy position effectively nullifies the cease and desist power and other FCA enforcement powers that could be brought to bear upon FCS lenders who are not faithful to the Act or FCA regulations.

Finally, the FCA has refused Freedom of Information Act requests to disclose to borrowers any documents, findings or orders issued pursuant to its cease and desist power.¹¹⁹ This refusal renders the procedure absolutely unavailable for enforcement of borrowers’ protections.

B. Recommendations for Legislative Amendment and Change

To provide effective enforcement of the Act, Congress should amend the Act:

- i) To require the FCA to publish detailed, implementing regulations and to establish a complaint/enforcement procedure for allegations of borrower protection violations.
- ii) To clearly state that this is an alternative and not an exclusive remedy and that FCS borrowers may proceed directly to court if they so choose.

VI. JUDICIAL ENFORCEMENT

A. Is There a Private Right of Action? — The Background

After nearly two years of litigation under the Act, it is still unclear whether FCS borrowers and former borrowers have the right to sue to enforce the “borrower protections” contained in Title I. Congress did not include an express right to sue provision in the Act, leaving courts to undertake the traditional “implied right of action” analysis adopted by the Supreme Court in *Cort v. Ash*¹²⁰ and recently reiterated in *Thompson v. Thompson*.¹²¹ Under that analysis, the federal district courts and panels of two circuit courts of appeals have reached dramatically different results.

The *Cort v. Ash* analysis looks to four elements to determine

¹¹⁸ Letter from Francis J. Boyd, Director of Congressional and Public Affairs, Farm Credit Administration, to FCS borrowers Donald and Patricia Jackson (Aug. 2, 1989), filed as an Exhibit in *Jackson v. Farm Credit Administration*, No. CV-F-88-636-REC (E.D. Cal. 1989).

¹¹⁹ Letter from Ronald H. Erickson, FOIA officer, Farm Credit Administration, to Susan Schneider, Farmers’ Legal Action Group (Sept. 15, 1988). Mr. Erickson states: “Your request for copies of all cease and desist orders issued by this agency since December of 1985 is denied under Exemption (b)(8) of the FOIA.” *Id.*

¹²⁰ *Cort v. Ash*, 422 U.S. 66 (1975).

¹²¹ *Thompson v. Thompson*, 484 U.S. 174 (1988).

whether Congress implied that a party should be able to privately enforce the statute. Those four elements are:

First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted — that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be appropriate to infer a cause of action based solely on federal law?¹²²

In the early federal district court cases that applied this four-part test to the Act, several courts found that Congress implied a private right of action for FCS borrowers and former borrowers to enforce the Act.¹²³ Other lower courts, faced with the identical issue and using the same analysis, held that borrowers did *not* enjoy an implied private right of action under the Act.¹²⁴

Zajac and *Harper* were reversed, respectively, by the Eighth and Ninth Circuits. The reversal of *Zajac* and *Harper* continues the uncertainty and lack of enforceability of the Act, and the intrigue continues. The Supreme Court denied the Harper's petition for certiorari without comment.¹²⁵ In *Zajac*, the Eighth Circuit vacated the panel decision on

¹²² 422 U.S. at 78 (citations omitted) (emphasis in original).

¹²³ *Griffin v. Federal Land Bank of Wichita*, 708 F. Supp. 313 (D. Kan. 1989) (implicitly allowing private right of action but finding no violation); *In re Hilton Land and Cattle*, 101 Bankr. 604 (Bankr. D. Neb. 1989), *cert. denied*, 110 S. Ct. 867 (1990) (allowing private right of action in bankruptcy proceeding); *Meredith v. Federal Land Bank of St. Louis*, 690 F. Supp. 786 (E.D. Ark. 1988) (implicitly allowing private right of action but dismissing for failure to state a claim); *Harper v. Federal Land Bank of Spokane*, 692 F. Supp. 1244 (D. Or. 1988), *rev'd*, 878 F.2d 1172 (9th Cir. 1989) (allowing private right of action to enforce restructuring procedures); *Leckband v. Naylor*, 715 F. Supp. 1451 (D. Minn. 1988), *appeal dismissed*, No. 88-5301 (8th Cir. June 8, 1989) (allowing private right of action to enforce right of first refusal); *Martinson v. Federal Land Bank of St. Paul*, 725 F. Supp. 469 (D.N.D. 1988), *appeal dismissed*, No. 88-5202 (8th Cir. June 8, 1989) (same); *see also* *Federal Land Bank of St. Louis v. McGinnis*, 711 F. Supp. 952, 958 (E.D. Ark. 1989) (granting borrowers affirmative defense on basis that creditor failed to comply with Act but denying relief because parties were not borrowers under the Act); *Federal Land Bank of St. Paul v. Bosch*, 432 N.W.2d 855 (N.D. 1988); *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D. 1987) (allowing affirmative defense based on Act).

¹²⁴ *Zajac v. Federal Land Bank of St. Paul*, No. Civ. A3-88-115, slip op. at 4-5 (D.N.D. July 19, 1988), *rev'd*, 887 F.2d 844 (8th Cir. 1989); *Wilson v. Federal Land Bank of Wichita*, No. 88-4058-R (D. Kan. Jan. 30, 1989); *Neth v. Federal Land Bank of Jackson*, 717 F. Supp. 1478 (S.D. Ala. 1988).

¹²⁵ *Harper v. Federal Land Bank of Spokane*, *cert. denied*, 110 S. Ct. 867 (U.S.,

December 7, 1989, and reheard the case *en banc* on January 19, 1990, in St. Louis.¹²⁶ A discussion of the two panel opinions, and the extraordinarily stark conflict between them, underscores the polarity that has existed in federal courts on this issue.

B. *The Harper-Zajac Conflict*

The appellate decisions in *Harper* and *Zajac* are in direct conflict. In both cases, the fundamental question was whether Farm Credit System borrower/shareholders may enforce the mandatory procedural requirements of the Act through injunctive relief in federal court. In *Harper*, the sections of the Act at issue were those mandating a restructuring notice and prohibiting continuation of foreclosures during consideration of restructuring.¹²⁷

In *Zajac*, the farmers requested an independent appraisal in connection with their application for loan restructuring, as mandated under the Act. The St. Paul Bank refused to allow such an appraisal, and the Zajacs filed an action in the district court seeking to enjoin sale of their farm property pursuant to a foreclosure judgment entered in state court.¹²⁸ The district court dismissed the Zajacs' complaint, holding *inter alia*, that there was no implied private right of action to enforce the mandatory procedures of the Act.¹²⁹ The Eighth Circuit reversed.¹³⁰

In comparing the Eighth and Ninth Circuit decisions, it is important to note that the issue raised in both cases is extremely narrow and virtually identical. Narrowly stated, that issue is whether the mandatory, procedural requirements of section 102 of the Act may be enforced in federal district court through declaratory and injunctive relief. This was the only relief sought by the Harpers and the Zajacs and the only relief issued or considered by the district courts and courts of appeals. Neither case involved damages. *Harper* did not discuss relief broader than enforcement of mandatory procedural requirements of the Act. In *Zajac*, the Eighth Circuit painstakingly circumscribed its holding to include only enforcement of mandatory requirements.

The starkness of the conflict between *Harper* and *Zajac* is under-

Jan. 22, 1990) (No. 89-863).

¹²⁶ *Zajac v. Federal Land Bank of St. Paul*, No. 88-5353 (8th Cir. Dec. 7, 1989).

¹²⁷ See *Harper v. Federal Land Bank of Spokane*, 692 F. Supp. 1244, 1247 (D. Or. 1988).

¹²⁸ *Zajac v. Federal Land Bank of St. Paul*, Civil No. A3-88-115 (D.N.D. July 19, 1988).

¹²⁹ *Id.*

¹³⁰ *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844 (8th Cir. 1989).

scored by a point by point comparison of the appellate courts' analyses and conclusions under the *Cort v. Ash* standard. On each of the four *Cort* factors,¹³¹ and on the overarching congressional intent requirement of *Thompson v. Thompson*,¹³² the courts reach diametrically opposed conclusions.

1. The Especial Benefit Question

— *Harper*

On the first *Cort* factor, whether the plaintiff was one for whose "especial benefit" the statute was enacted, the Ninth Circuit concluded that "the major impetus for the legislation was the financial crisis of the Farm Credit System."¹³³ Thus, the court further concluded that the legislation was passed to benefit the system, not its borrowers.¹³⁴ In reaching this conclusion, the court did not address the fact that the system is owned cooperatively by its shareholders.

— *Zajac*

In *Zajac*, the Eighth Circuit commented directly on the *Harper* court's conclusions concerning the "especial benefit" test:

We disagree. There can be no doubt that farmer-borrowers are a protected class under the Act because its language and structure established broad rights for borrowers and mandatory duties for lenders. A private cause of action will be readily found "where the language of the statute explicitly confer(s) a right directly on a class of persons that include(s) the plaintiff. *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771-72 . . . (1981), quoting *Cannon v. University of Chicago*, 441 U.S. 667, 690 n.13 . . . (1979), *Miener v. State of Mo.*, 673 F.2d 969, 974 n.4 (8th Cir. 1982).¹³⁵

The court also found that, "The 1987 Act was enacted, first and foremost, 'to provide credit assistance to farmers.'"¹³⁶

2. Intent of Congress

The paramount consideration under *Cort* and *Thompson* is the intent of Congress. The Court has stated that: "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication

¹³¹ See *supra* note 122 and accompanying text.

¹³² See *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

¹³³ *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1174 (9th Cir. 1989).

¹³⁴ See *id.* at 1175.

¹³⁵ *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844, 856 n. 15 (8th Cir. 1989) (emphasis added).

¹³⁶ *Id.* at 851.

of a remedy simply does not exist."¹³⁷ Under the second *Cort* factor, the Eighth and Ninth Circuits reached opposite conclusions.

— *Harper*

In *Harper*, the court reasoned that, because case law under predecessor statutes to the Act determined that those statutes did not include an implied private right of action, Congress' failure to include an *express* private right of action in the Act signaled its intent to leave intact what the court concluded was the status quo.¹³⁸

In its discussion of legislative intent, however, the *Harper* court completely ignored several essential factors including: (1) the substantial and mandatory "borrower protections" Congress included in the Act, including those at issue in *Harper*; (2) the fact that not one statement by any congressional member or witness in the legislative history opposes a private right of action for FCS borrowers; (3) the fact that all statements and activity chronicled in the legislative history evidence only a positive congressional attitude toward the right of FCS borrowers to privately enforce the mandatory, procedural requirements of the Act; and (4) the fact that virtually all of the earlier FCS cases noted by the court had sought damages, not the limited declaratory and injunctive relief sought by both the Zajacs and the Harpers.

Ignoring these factors, the court simply concluded that the introduction during the legislative process of express private right of action language which was ultimately not included in the final text of the Act could only mean that Congress intended that there be no right of action at all.¹³⁹ The court dismissed, as "inadvertent" or even "planned" efforts to sabotage the bill, the plethora of congressional statements in the history which indicated that various members of Congress believed either that (1) borrowers already had the right to sue to enforce the Act and Congress should not restrict it, (2) borrowers had the right to sue so no provision was necessary, (3) a provision was needed to codify the right to sue that borrowers already enjoyed.¹⁴⁰ The court failed to recognize that these statements from the legislative history, although perhaps inaccurate or inconsistent with one another, represented a positive statement on the question of a private right of action for FCS borrowers.

¹³⁷ *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (quoting *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 94 (1981)).

¹³⁸ See *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1176 (9th Cir. 1989).

¹³⁹ See *id.*

¹⁴⁰ See *id.*

Finally, the *Harper* court held that Congress created administrative remedies which it intended to be the sole vehicle for enforcement of the mandatory procedural requirements of the Act.¹⁴¹ The court held that these consisted of the Credit Committee review process required in 12 U.S.C. Section 2202(a) and (c) and the “extensive” enforcement powers of the Farm Credit Administration set out in 12 U.S.C. Sections 2261-2274.¹⁴² While it acknowledged that the Harpers had identified numerous glaring inadequacies in these administrative procedures, the court stated: “We do not dispute that an implied private right of action would enhance the administrative remedies provided under the 1987 Act. We have previously rejected, however, enhancement as a factor in the analysis of implied remedies.”¹⁴³

— *Zajac*

Again, the *Zajac* panel, looking to the same language, structure, and history of the Act, came to the opposite conclusion. From an exhaustive review and analysis of the text of the Act, the House, Senate and Conference Reports, and the reported floor discussion from the Senate, the *Zajac* panel concluded:

In the light of the above, there certainly can be no quarrel that Congress viewed the Act as responsive to the needs of farmer-borrowers in ways that earlier Farm Credit Acts were not. Moreover, the Act clearly manifests Congress’ intent to provide borrowers with the ability to enforce procedures granted to protect them from unjustified foreclosure. *This can only be done by implying a private right of action for borrowers.*¹⁴⁴

In reaching this conclusion, the *Zajac* court did several things that the *Harper* court did not. First, the *Zajac* panel looked closely to both the structure and language of the relevant provisions of the Act,¹⁴⁵ the essential requirement set out by the Supreme Court in *Thompson*.¹⁴⁶ Structurally, the court noted that Title I of the Act, entitled “Assistance to Farm Credit System Borrowers,” was codified as “Rights of Borrowers; Loan Restructuring.”¹⁴⁷

¹⁴¹ *See id.*

¹⁴² *See id.* The court declined to note, however, that both of these procedures were created in the Food Security Act of 1985, not in the Agricultural Credit Act of 1987. Nowhere in the lengthy and detailed legislative history of the 1987 Act did the court discuss either of these procedures as an alternative to judicial enforcement.

¹⁴³ *Id.* at 1176-77.

¹⁴⁴ *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844, 851 (8th Cir. 1989) (emphasis added).

¹⁴⁵ *See id.* at 849-51.

¹⁴⁶ *See supra* note 121 and accompanying text.

¹⁴⁷ *Zajac*, 887 F.2d at 848.

The court noted that the language of the Act was clearly mandatory and exceedingly detailed, unlike its predecessor Acts. Thus, the Act requires that:

- Independent appraisers *shall* be appointed;
- Written notice *shall* be provided;
- Foreclosures *may not* be continued or begun;
- FCS lenders *shall* meet with borrowers;
- Loans *shall* be restructured if it is less costly than foreclosure.¹⁴⁸

From this the court found that both the structure and language evidenced congressional intent to confer enforceable rights.¹⁴⁹

Second, the *Zajac* panel distinguished prior decisions of the Eighth Circuit under the predecessor 1985 statute, noting that they were cases in which the plaintiffs had sought damages under that Act, not the narrow declaratory and injunctive relief sought by the Zajacs (and the Harpers) under the 1987 Act.¹⁵⁰

Third, the *Zajac* panel undertook an exhaustive and enormously detailed analysis of exactly what happened in the various congressional committee, conference, and floor proceedings, and what the members were seeking to achieve through passage of the Act.¹⁵¹ With respect to the failure to include an express private right of action in the Act, the court concluded that the author of a Senate amendment to the bill believed that inclusion of the express House amendment would limit, not create or expand, farmers' rights to bring an action to enforce the Act since the language included only "borrowers," not former borrowers as well.¹⁵² The *Zajac* panel also noted that these were not inadvertent or isolated comments in the record. Rather, the court said that "they were the comments by those in Congress responsible for managing the Act through the legislative process, making their statements more indicative of legislative intent than typical statements made during congressional proceedings."¹⁵³ Indeed, as the *Zajac* opinion pointed out, there is not one single comment or document cited from the legislative history indicating congressional intent not to allow borrowers a vehicle of private enforcement of the Act.¹⁵⁴

Finally, while the Ninth Circuit ignored the inadequacies cited by the Harpers in the supposed FCS administrative remedies, and appar-

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 848-49.

¹⁵⁰ *See id.* at 853-54.

¹⁵¹ *See id.* at 849-53.

¹⁵² *See id.* at 852.

¹⁵³ *Id.* at 853.

¹⁵⁴ *See id.* at 852 n.7.

ently ignored the Supreme Court's holding in *Cannon v. University of Chicago*,¹⁵⁵ the *Zajac* court looked closely at those procedures. The court concluded, "In sum, borrowers are unable to enforce their rights through administrative avenues."¹⁵⁶ The Supreme Court's admonition in *Cannon*, ignored entirely by the Ninth Circuit, compelled the Eighth Circuit to conclude that Congress "has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute."¹⁵⁷

Clearly, the Eighth Circuit and the Ninth Circuit could not have reached decisions more at odds on the second and most important *Cort* element of Congressional intent.

3. Consistency with Legislative Purpose

The Eighth and Ninth Circuits also disagreed on the third *Cort* factor — whether implying a private right of action would be consistent with the overall legislative purpose of the law at issue.

— *Harper*

The Ninth Circuit concluded in *Harper* that Congress' principal objective in passing the Act was to restore financial integrity to the Farm Credit System.¹⁵⁸ While it agreed with the district court that a private right of action would strengthen the Farm Credit System "because it forces the lenders to make cost-effective decisions concerning the possibility of restructuring loans,"¹⁵⁹ the court ultimately contradicts itself. The court stated that, "Allowing a private right of action undermines that objective by involving the Farm Credit System in costly litigation."¹⁶⁰

— *Zajac*

Again, the conflict with the *Zajac* panel decision is absolute. In *Zajac* the Eighth Circuit held that:

Implying a private right of action for borrowers to enforce carefully defined procedures mandated by the language of the Act is also consistent with a further goal of the 1987 Act to strengthen and stabilize the farm credit system . . . Injunctive relief strengthens, rather than weakens, the

¹⁵⁵ *Cannon v. University of Chicago*, 441 U.S. 667 (1979).

¹⁵⁶ *Zajac*, 887 F.2d 844 at 855.

¹⁵⁷ *Cannon*, 441 U.S. at 706 n.41.

¹⁵⁸ *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1177 (9th Cir. 1989).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Farm Credit System by requiring lenders to make a decision based on a thorough review of all factors and procedures deemed important by Congress.¹⁶¹

4. Cause of Action Relegated to State Law

The disagreement between the Eighth and Ninth Circuits becomes complete under the fourth *Cort* element — whether the cause of action is one traditionally relegated to state law.

— *Harper*

The Ninth Circuit essentially undertook a tautological approach to this question. The court declared, without any analysis of the history, purpose or legislative underpinnings of the Farm Credit System, that “mortgage foreclosures are traditionally a matter of state law.”¹⁶²

— *Zajac*

In *Zajac*, the court concluded otherwise, acknowledging the uniquely federal nature of the Farm Credit System:

First, the Federal Land Banks were created by Congress in 1916 as “instrumentalities of the United States.” Indeed, the entire Farm Credit System itself is uniquely federal because it is created by and exists at the pleasure of the Congress. Also, systemwide requirements of the Agricultural Credit Act of 1987, such as restructuring, are not only uniquely federal; such provisions are absolutely federal.¹⁶³

With this statement the Eighth Circuit completed its disagreement with the Ninth Circuit on all four factors. As noted above, the Eighth Circuit vacated the panel decision December 7, 1989, and reheard the case *en banc* on January 19, 1990.¹⁶⁴

C. *The Harper-Zajac Implication*

The split among federal courts highlighted by the *Zajac* and *Harper* decisions presents a host of immediate problems for FCS borrowers and lenders. As a practical matter, until Congress speaks further or the Supreme Court addresses the issue, the Farm Credit System will remain in a dangerous state of uncertainty on this issue.

For borrowers, the implications of this uncertainty and of *Harper* go far beyond the restructuring sections of the Act. The “borrower protection” sections become nullities. FCS lenders are now literally free,

¹⁶¹ *Zajac v. Federal Land Bank of St. Paul*, 887 F.2d 844, 851-52 (8th Cir. 1989).

¹⁶² *Harper*, 878 F.2d at 1177 (citing *Rank v. Nimmo*, 677 F.2d 692, 697 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982)).

¹⁶³ *Zajac*, 887 F.2d at 856 (citation omitted).

¹⁶⁴ See *supra* note 126 and accompanying text.

without concern for consequences or liability of any kind, to ignore the borrower protection sections with complete impunity.

The enforcement issue reaches to the system-restructuring provisions of the Act as well. In those sections, Congress required or authorized various consolidations and mergers of FCS associations, banks and districts.¹⁶⁵ For the most part, the specific acts of system restructuring must be approved by shareholders, following issuance of written notices, descriptions, and plans. Under *Harper*, system mergers, consolidations, or liquidations carried out in direct violation of the Act will be unreachable through borrower-initiated enforcement of any kind, including court action.

Similarly, if lenders required under the Act to request certification to issue preferred stock and receive federal financial assistance¹⁶⁶ fail to do so, borrowers will be precluded from filing suit under the Act to challenge that failure. The Act's provisions requiring FCS lenders to have affirmative action programs¹⁶⁷ and prohibiting signed ballots for FCS shareholder votes¹⁶⁸ also will be unenforceable in court. These are but a few examples of *Harper* implications.

D. *Recommendations for Legislative Amendment and Change*

The Act should be amended to include an express private right of action for any borrower or former borrower who is denied the protections set out in the Act and to require an award of attorney fees if the borrower/former borrower prevails in the litigation. Language has been submitted to the Senate Agriculture Subcommittee on Agricultural Credit that would address these issues. It is supported by forty-five farm groups and organizations throughout the country and opposed by the Farm Credit System.

CONCLUSION

The Agricultural Credit Act of 1987 provided new rights, protections, and procedures available to FCS borrowers. Many problems exist, however, in interpretation, application, and enforcement of the Act. It is the responsibility of Congress and the Farm Credit Administration to take the steps necessary to clarify the legislation and to achieve uni-

¹⁶⁵ See Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. IV, 101 Stat. 1568, 1622-62 (1988) (codified as amended in scattered sections of 12 U.S.C.).

¹⁶⁶ See 12 U.S.C. § 2278a-4 (1988).

¹⁶⁷ *Id.* § 2219c.

¹⁶⁸ *Id.* § 2208.

form implementation of the Act. Unless this is done, FCS borrowers and lenders will continue to be mired in extraordinarily expensive litigation for years to come.