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A Guide to Borrower Litigation against the Farm Credit System and the Rights of Farm Credit System Borrowers

Part 1

by

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A GUIDE TO BORROWER LITIGATION AGAINST THE FARM CREDIT SYSTEM AND THE RIGHTS OF FARM CREDIT SYSTEM BORROWERS†

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I. INTRODUCTION

The farm financial crisis of the 1980's has produced and continues to produce an unprecedented amount of litigation against the lending institutions of the Farm Credit System by the owners of those institutions, their borrowers. Although no single characterization of the substance of the claims made by those borrowers can be all-encompassing, the gist of most claims has been that the Farm Credit System lender behaved imprudently or unfairly in the servicing, including foreclosure, of the borrower's loans. Coinciding with that litigation have been entreaties to Congress to mandate changes in the ways in which Farm Credit System lenders deal with their borrowers. As a result, the 1980's produced dramatic revisions in the organic law governing the Farm Credit System.

This article will survey both the recent litigation against Farm Credit System lenders and the statutory and judicially created rights of the borrowers of those institutions. In doing so, this article's intent is to provide the reader with a succinct, but reasonably complete, primer on its subject. The article is structured topically to facilitate the reader's access to issues of particular interest. Although exhaustive treatment of the myriad issues that have arisen in borrower litigation against the Farm Credit System is beyond the scope of this article, greater attention is devoted to the

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more significant or problematic issues. For those issues in particular, this article references additional sources of guidance or information.[1]

If for no other reason, the legal aspects of the relationship between Farm Credit System lenders and their borrowers are important because, until 1987, the Farm Credit System was the nation's "largest single provider of credit to farmers, ranchers, and their cooperatives."[2] For most of the last decade, Farm Credit System lenders have shared roughly one-third of the farm loan market.[3] Accordingly, the behavior of Farm Credit System lenders has a significant impact on the financial well being of agricultural producers who are permanently or periodically reliant on credit.[4]

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1. At various points in this article, note is made of the unsettled nature of the issue discussed. Because the jurisprudence governing the Farm Credit System continues to develop, the reader is urged to be attentive to developments post-dating this article.

In addition to the usual sources for recent developments, there are at least three periodicals that provide coverage of Farm Credit System litigation. The AGRICULTURAL LAW UPDATE, a monthly publication of the American Agricultural Law Association, is available through membership in the AALA, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701. The IOWA AGRICULTURAL LAW REPORTER is available from the Agricultural Law Center, The Law School, Drake University, Des Moines, IA 50311. The FARMERS' LEGAL ACTION REPORT is available from the Farmers' Legal Action Group, Inc., 1301 Minnesota Building, 46 East Fourth Street, St. Paul, MN 55101. A fourth publication, THE AGRICULTURAL CREDIT LETTER, published by Webster Communications Corporation, P.O. Box 9153, Arlington, VA 22209, offers twice monthly coverage of various matters affecting the System. Unlike the first three publications, THE AGRICULTURAL CREDIT LETTER primarily covers institutional developments within the System, and its coverage of litigation is generally limited to cases that affect the System as a whole.

2. H.R. 295 (I), 100th Cong., 1st Sess. 54, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2723, 2726. "In 1987, commercial banks surpassed the Farm Credit System as the principal holder of combined real estate and non-real estate farm debt." ECON. RESEARCH SERV., USDA, PUB. NO. AFO-33, AGRICULTURAL INCOME AND FINANCE: SITUATION AND OUTLOOK REPORT 13 (May 1989)[hereinafter AGRICULTURAL INCOME AND FINANCE].

3. Boehlje & Pederson, *Farm Finance: The New Issues*, CHOICES, Third Quarter 1988, at 16,17 [hereinafter Boehlje & Pederson]. Since 1980, the Farm Credit System has shared close to or over one-third of the farm loan market, although that share is declining. In 1980, the System held a thirty-two percent share of the farm loan market. That share increased to thirty-four percent in 1983. However, in 1986, the System's share declined to twenty-nine percent. By way of comparison, in 1986, commercial banks held a twenty-six percent market share, life insurance companies held six percent, the Farmers Home Administration held fifteen percent, and individuals and others shared twenty-three percent of the farm loan market. *Id. See also* Jensen, *Agricultural Lending in the 1980's: An Insurance Company's Perspective*, 18 MEM. ST. U.L. REV. 353, 354 (1988) (discussing agricultural lending by insurance companies in the 1980s). By 1989, the System's market share had declined to less than twenty-seven percent while the share of commercial banks had increased to thirty-two percent. AGRICULTURAL INCOME AND FINANCE, *supra* note 2, at 13-14. For an account of the recent competition for borrowers between Farm Credit System institutions and commercial banks, see Webster, *Interest Rate Turf Battles: Farm Credit Versus the Commercial Banks*, AGRIFINANCE, Dec. 1989, at 18. *See also* S. 2830, 100th Cong., 2d Sess., 136 CONG. REC. S11,232, S11,314 (1990) (a directive in the Senate version of Food, Agricultural, Conservation, and Trade Act of 1990 (informally referred to as the 1990 farm bill) for a General Accounting Office study of rural credit cost and availability including a review of the interest rates of System lenders).

4. For discussions of the reliance of farmers on debt financing, see *e.g.*, T. FREY & R. BEHRENS, LENDING TO AGRICULTURAL ENTERPRISES (1981); M. STRANGE, FAMILY

In a general sense, the legal aspects of the relationship between Farm Credit System lenders and their borrowers are colored and occasionally complicated or confused by four fundamental attributes of Farm Credit System lenders. First, Farm Credit System lenders are federally chartered.[5] Second, as federally chartered institutions, Farm Credit System lenders are subject to regulation by the Farm Credit Administration [hereinafter FCA], an agency of the federal government with authority and power generally equivalent to other federal financial regulators.[6] Third, Farm Credit System lenders must operate within the confines of the statutory authority underlying their federal charters, the Farm Credit Act of 1971, as amended.[7] Finally, although they are federally chartered entities, regulated by a federal agency, and

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FARMING: A NEW ECONOMIC VISION 104-26 (1988); N. Harl, *The Financial Crisis in the United States*, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? 115-16 (G. Comstock ed. 1987) (a similar discussion can be found at Harl, *The Architecture of Public Policy: The Crisis in Agriculture*, 34 KANSAS L. REV. 425, 426-32 (1986)); Baker, *Structural Issues in U.S. Agriculture and Farm Debt Perspectives*, 34 U. KAN. L. REV. 457 (1986); Boehlje & Pederson, *supra* note 3, at 16-17; Roberts, *Deregulating the Agricultural Industry: A Wise Policy Choice?*, 12 J. CONTEMP. L. 49, 59-61 (1986); Kelley, *Imposing the Duties of Fairness, Good Faith, and Honesty On the Agricultural Lender*, ARK. L. NOTES 18, 18-19 (1987) [hereinafter Kelley].

5. 12 U.S.C.A. §§ 2002(a), 2011(a), 2071(a), 2091(a) (West 1989).

6. 12 U.S.C.A. §§ 2241-74 (West 1989). The FCA is "an independent agency in the executive branch. . . ." 12 U.S.C.A. § 2241 (West 1989). *See also* 12 C.F.R. pt. 600 (1990) (setting forth the organizational structure and the functions of the FCA). For summaries of the current responsibilities of the FCA, see Kayl, *Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation (And the Effect of Subsequent Legislation on the 1985 Act)*, 37 DRAKE L. REV. 271, 285-300 (1987-88) [hereinafter Kayl]; Dewey, *The Farm Credit System*, 36 FED. B. NEWS & J. 287 (1987) [hereinafter Dewey]. *See also* Massey & Schneider, *Title I of the Agricultural Credit Act of 1987: "A Law in Search of Enforcement"*, 23 U.C. DAVIS L. REV. 589, 613-14 (1990)(criticizing the FCA's lack of enforcement of the rights of System borrowers) [hereinafter Massey & Schneider]; *infra* notes 78-80, 100 and the accompanying text (discussing in greater detail the responsibilities of the FCA).

7. As amended to date, the statutory authority for the Farm Credit System is found at 12 U.S.C.A. §§ 2001-2279 (West 1989 & Supp. 1990). As is discussed in greater detail in various portions of this article, the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, has been substantially amended four times, specifically by the Farm Credit Act Amendments of 1980, Pub. L. No. 96-592, 94 Stat. 3437; the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678; the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874; and the Agricultural Credit Act of 1987, Pub.L. No. 100-233, 101 Stat. 1568-1717 (1988). Technical corrections were made to the Agricultural Credit Act of 1987 by the Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, 102 Stat. 989. *See also* Rural Development, Agriculture, and Related Agencies Appropriation Act of 1989, Pub. L. No. 100-460, 102 Stat. 2229, 2266 (1988) (amending section 6.29 of the Farm Credit Act of 1971); Act of Dec. 12, 1989, Pub. L. No. 101-220, 103 Stat. 1876, 1879-81 (amending sections 5.55 and 6.29 of the Farm Credit Act of 1971 and section 646 of the Rural Development, Agriculture, and Related Agencies Appropriations Act of 1989).

This article was prepared prior to the enactment of the 1990 farm bill. The Senate version of that legislation, the Food, Agriculture, Conservation, and Trade Act of 1990, proposes several amendments to the Farm Credit Act of 1971. S. 2830, 101st Cong., 2d Sess., 136 CONG. REC. S11,232, S11,314-316 (1990). Only one of those amendments, a provision for production credit association first liens on borrower stock and participation certificates in the association, directly affects the rights of System borrowers. *Id.* at S11,314.

subject to Congressionally imposed limits of authority and other requirements, Farm Credit System lenders are neither owned nor managed by the federal government. Rather, they are owned on a cooperative basis by their member-borrowers.[8] Those four fundamental attributes must be understood and appreciated for it is their presence and the interplay among them that gives the law governing the relationship between Farm Credit System lenders and their borrowers its uniqueness.

Because the four attributes essentially arise from the statutory purposes, history, and structure of the Farm Credit System, this article begins with a discussion of those purposes and that history and structure. The article next focuses on the unique issues that have arisen in litigation by borrowers against System lenders and the various statutory "borrowers' rights" available to System borrowers. Finally, the article concludes with some thoughts and comments on the future of Farm Credit System lenders and their relationships with their borrowers.

II. THE PURPOSE OF THE FARM CREDIT SYSTEM

The objective of the Farm Credit System has been defined as the satisfaction of ". . . the peculiar credit needs of American farmers and ranchers while encouraging those farmers and ranchers to participate through management, control, and ownership of the

8. Borrower ownership was achieved by conditioning borrowing on the purchase of stock in the local association either making or servicing the loan. In turn, the associations purchased stock in the "upstream," supervisory bank, a federal land bank or federal intermediate credit bank (now merged as district farm credit banks). When the initial capitalization by the federal government was repaid, the System became wholly owned and controlled by its borrowers. *See infra* notes 15-36 and the accompanying text. *See generally* FREY & BEHRENS, *supra* note 4, at 385-97 (describing how the System's borrowers became the owners of the System through the purchase of stock in federal land bank and production credit associations); W. LEE, M. BOEHLJE, A. NELSON, & W. MURRAY, AGRICULTURAL FINANCE 354-69 (7th ed. 1980) (same).

Occasionally, the stock purchase requirement is incorrectly or loosely stated when a federal land bank loan is at issue. For example, in *In re* Massengill, 100 Bankr. 276 (E.D. N.C. 1988), the court referred to the borrower's stock as "Land Bank stock". 100 Bankr. at 278. However, the court also expressly noted that the stock had been purchased in the federal land bank association, not in the federal land bank. 100 Bankr. at 278 & n.1. Other courts have simply stated incorrectly that the borrower had purchased stock in the federal land bank. *E.g.*, *In re* Cansler, 99 Bankr. 758, 759 (W.D. Ky. 1989). At least one court has admitted uncertainty about the stock purchase requirement. *In re* Shannon, 100 Bankr. 913, 916 n.9 (S.D. Bankr. Ohio 1989).

Prior to the effective date of the Agricultural Credit Act of 1987, borrowers who obtained federal land bank funds had to apply for a loan through a federal land bank association and purchase stock in the association. *See* 12 U.S.C.A. § 2016 (West 1980). Currently, borrowers who reside in an area not served by a federal land bank association may borrow directly from the successor to the federal land bank in each district, the farm credit bank, after purchasing stock in the respective farm credit bank. 12 U.S.C.A. §§ 2017, 2021(b) (West 1989). *See also infra* notes 119-34 and the accompanying text (discussing the restructuring of the System resulting from the Agricultural Credit Act of 1987).

system."[9] The Congressional expression of the policy and objectives of the Farm Credit System is as follows:

> (a) It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.
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> (b) It is the objective of this chapter to continue to encourage farmer- and rancher-borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit and credit for housing in rural areas made available through the institutions constituting the Farm Credit System as herein provided.
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> (c) It is declared to be the policy of Congress that the credit needs of farmers, ranchers, and their cooperatives are best served if the institutions of the Farm Credit System provide equitable and competitive interest rates to eligible borrowers, taking into consideration the creditworthiness and access to alternative sources of credit for borrowers, the cost of funds, including any costs of defeasance under section 4.8(b), the operating costs of the institution, including the costs of any loan loss amortization under section 5.19(b), the cost of servicing loans, the need to retain earnings to protect borrowers' stock, and the volume of net new borrowing. Further, it is declared to be the policy of Congress that Farm Credit System institutions take action in accordance with the Farm Credit Act Amendments of 1986 in such manner that borrowers from the institutions derive the greatest

9. Daley v. Farm Credit Admin., 454 F. Supp. 953, 954 (D. Minn. 1978).

> benefit practicable from that Act: *Provided*, That in no case is any borrower to be charged a rate of interest that is below competitive market rates for similar loans made by private lenders to borrowers of equivalent creditworthiness and access to alternative credit.[10]

The policy and objectives assigned to the Farm Credit System reflect that the System was created as a result of a need by farmers for "dependable sources of adequate credit, on terms suited to the particular needs of agriculture, from lenders who understood their problems."[11]

III. THE HISTORY AND STRUCTURE OF THE FARM CREDIT SYSTEM

A. THE EUROPEAN COOPERATIVE MODEL

In response to difficulties faced by farmers in obtaining credit in the early 1900's, two commissions, one appointed by President Taft and the other created by a private organization, undertook studies of the European rural credit systems.[12] Three different proposals for responding to the credit needs of American farmers were generated from the combined work of the commissions:

1. obtaining loan funds through the sale of bonds to investors;
2. organizing cooperatives; and
3. making direct government loans to farmers.[13]

The first proposal, the realization of funds through the sale of bonds to investors, was based on the method used by the German

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10. 12 U.S.C.A. § 2001 (West 1989).

11. W. HOAG, THE FARM CREDIT SYSTEM: A HISTORY OF FINANCIAL SELF-HELP 1 (1976) [herinafter HOAG]. *See also* McGowan & Noles, *The Cooperative Farm Credit System*, 4 MERCER L. REV. 263, 263 (1953) [hereinafter McGowan & Noles] ("[The System] is a complete, dependable and permanent system for the furnishing to farmers on a cooperative basis of various types of sound agricultural credits at reasonable rates of interest and costs."). *See generally* 11 N. HARL, AGRICULTURAL LAW, ch. 100 (1986) (describing the purposes of the System); 2 J. DAVIDSON, AGRICULTURAL LAW, ch. 10 (1981) (same); K. MEYER, D. PEDERSON, N. THORSON & J. DAVIDSON, AGRICULTURAL LAW: CASES AND MATERIALS, 269-74 (1985) (same); J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW § 14.3 (1982)(same).

12. HOAG, *supra* note 11, at 211-12. The commissions especially focused on the successful *Landshaft* system that had been functioning for 100 years in Germany. *Id. See also* FEDERAL LAND BANK OF ST. PAUL, DOWN THE ROAD TOGETHER 6 (1967) (describing the commissions' studies and asserting that "there is some reason to believe that the German Landshafts were patterned on early agricultural credit programs which originated in the American colonies").

13. HOAG, *supra* note 11, at 212.

Landschaften banks.[14] It ultimately became the method adopted by the federal land banks, the banks for cooperatives, and the federal intermediate credit banks.[15] Those Farm Credit System institutions currently obtain loan funds by selling bonds and debentures on the money markets.[16]

The cooperative approach was based on the organization of the European *Raiffeisen* banks. This form was adopted by the local federal land bank associations and production credit associations.[17] The third approach, direct governmental loans to farmers, was incorporated into the Farmers Home Administration programs.[18]

B. THE FEDERAL LAND BANKS (FLB)

Acting on the recommendations contained in the commission reports, Congress, in 1916, enacted the Federal Farm Loan Act of 1916[19] authorizing the establishment of federal land banks for the purpose of making long-term loans secured by real estate.[20] Each federal land bank was initially capitalized by federal government subscription of the institution's stock, and supervision of the banks was placed in a five-member Federal Farm Loan Board serving under the Treasury Department.[21] However, the Act provided that the government owned stock was to be eventually retired

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14. *Id.* at 213.

15. *Id.*

16. *See* 12 U.S.C.A. §§ 2153, 2160 (West 1989) (authorizing System banks to borrow and to issue notes, bonds, and other obligations and creating the Federal Farm Credit Banks Funding Corporation to serve as the marketing agent for those obligations, replacing the System's Fiscal Agency which had previously served that function). *See also* 12 C.F.R. pt. 615, subpts. A, C, D, O (1990) (relating to the funding of the System and the issuance of notes, bonds, and other obligations); 55 Fed. Reg. 24,861, 24,887 (1990) (revising the authority for 7 C.F.R. pt. 615).

17. HOAG, *supra* note 11, at 213.

18. Brake, *A Perspective On Federal Involvement In Agricultural Credit Programs*, 19 S.D.L. REV. 567, 568-69 (1974) [hereinafter Brake]. *See also* HOAG, *supra* note 11, at 209-17; 11 N. HARL, AGRICULTURAL LAW 100.01[2] (1986) (discussing the historical development of the System); J. KNAPP, THE ADVANCE OF AMERICAN COOPERATIVE ENTERPRISE: 1920-1945 246-87 (1973) (same, with an emphasis on the cooperative nature of the System); M. ABRAHAMSEN, COOPERATIVE BUSINESS ENTERPRISE 323-37 (1976) (same, also with an emphasis on the cooperative nature of the System); McGowan & Noles, *supra* note 11, at 263-65 (same); Horne, *Sources of Agriculture Financing With an Emphasis on the Farm Credit System*, AGRIC. L.J. 15 (1980-81) (same). Although a discussion of the lending programs administered by the Farmers Home Administration (FmHA) is beyond the scope of this article, excellent explanatory materials on those programs are available from the Farmers' Legal Action Group, Inc., 1301 Minnesota Building, 46 East Fourth Street, St. Paul, MN 55101. *See also* Lancaster, *Current Issues in FmHA Loan Servicing*, 23 U.C. DAVIS L. REV. 713 (1990) (discussing the application of the Agricultural Credit Act of 1987 to FmHA borrowers).

19. Pub. L. No. 64-158, ch. 245, 39 Stat. 360 (1916) (repealed 1923).

20. *Id.* at 362-63.

21. *Id.* at 360-63.

through farmer-borrower purchases so that the federal loan banks would eventually be solely owned by farmers.[22] Since 1947, the federal land banks have been completely farmer owned.[23]

Pursuant to the Farm Loan Act of 1916, the Federal Farm Loan Board created twelve federal land bank districts.[24] In addition, national farm loan associations, later renamed federal land bank associations, were established to act as agents for the regional federal land bank associations.[25] Farmer-borrower purchases of stock in local federal land bank associations which, in turn, purchased stock in the federal land banks, ultimately achieved farmer ownership of both entities.[26]

C. THE FEDERAL INTERMEDIATE CREDIT BANKS (FICB)

In 1923, pursuant to the Agricultural Credit Acts,[27] the federal intermediate credit banks were created to discount the notes of other lenders made for short or intermediate term farm loans.[28] Although initially capitalized by the federal government in a manner similar to the capitalization of the federal land banks, the federal intermediate credit banks did not make direct loans to farmers as did the federal land banks.[29] Rather, the initial function of the federal intermediate credit banks was to purchase notes made by other lenders.[30]

D. THE PRODUCTION CREDIT ASSOCIATIONS (PCA)

Because existing lenders did not make substantial use of the federal intermediate credit banks, regional production credit corporations were authorized in 1933.[31] The Farm Credit Act of 1933[32] created twelve regional production credit corporations, twelve regional banks for cooperatives, and the Central Bank for Cooperatives.[33] The banks for cooperatives were established to

22. *Id.* at 364-65.
23. HOAG, *supra* note 11, at 254.
24. *Id.* at 214. For a map of the federal land bank districts, now the farm credit bank districts, see Appendix C to this article. *See also* 12 U.S.C.A. §§ 2002(b), 2252(a) (West 1989) (providing that there shall not be more than twelve farm credit districts and authorizing the merger of districts).
25. *Id.* at 216.
26. Brake, *supra* note 18, at 570-72; HOAG, *supra* note 11, at 213-17.
27. Pub. L. No. 67-503, ch. 252, 42 Stat. 1454 (1923) (repealed 1933).
28. *Id.* at 1455-56.
29. HOAG, *supra* note 11, at 25. The Federal Intermediate Credit Banks stopped using government capital in 1956. *Id.*
30. Brake, *supra* note 18, at 572; HOAG, *supra* note 11, at 231-43.
31. HOAG, *supra* note 11, at 237.
32. Pub. L. No. 73-75, 48 Stat. 257 (1933) (repealed 1953).
33. *Id.* at 257-64.

make loans to farmer cooperatives.[34]

The Farm Credit Act of 1933 also authorized the establishment of local production credit associations modeled after the federal land bank associations.[35] However, unlike federal land bank associations, the production credit associations were not merely agents of the regional production credit corporations.[36] Rather, they made direct loans that were discounted by the regional corporations.[37] Later, in 1956, the federal intermediate credit banks assumed the discounting function for production credit associations, and the assets of the twelve regional production credit corporations were transferred to the federal intermediate credit banks.[38]

E. THE FARM CREDIT ADMINISTRATION AND THE DEPARTMENT OF AGRICULTURE

The Farm Credit Act of 1933 created the Farm Credit Administration to coordinate all federal lending activities.[39] For the first six years of its existence, the Farm Credit Administration operated as an independent agency of the executive branch.[40] However, in 1939, an executive order placed the agency in the Department of Agriculture.[41] The Farm Credit Administration remained within the Department of Agriculture until the Farm Credit Act of 1953[42] re-established its independent status.[43]

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34. *See* Brake, *supra* note 18, at 572-73; HOAG, *supra* note 11, at 231-43.

35. Farm Credit Act of 1933, Pub. L. No. 73-76, 48 Stat. 257, 259 (1933) (repealed 1953).

36. HOAG, *supra* note 11, at 46-48.

37. *Id.* at 50-53.

38. Brake, *supra* note 18, at 569. For a detailed account of the early history of the Farm Credit System, see McGowan & Noles, *supra* note 11.

39. Farm Credit Act of 1933, Pub. L. No. 73-76, 48 Stat. 257, 262-64 (1933) (repealed 1953). *See also* HOAG, *supra* note 11, at 233, 234 (discussing the Farm Credit Act of 1933). The functions and powers transferred to the Farm Credit Administration included the following: the Federal Land Bank, National Farm Association and Federal Intermediate Credit Bank supervision from the Federal Farm Loan Board in the Treasury Department; loans to cooperatives from Agricultural Marketing Revolving Fund from the Federal Farm Board; Regional Agricultural Credit Corporations supervision from the Reconstruction Finance Corporation; Crop Production and Seed Loan Offices supervision from the Secretary of Agriculture; and the Fund for Investments in Stock of Agricultural Credit Corporations from the Secretary of Agriculture. *Id.* at 234.

40. HOAG, *supra* note 11, at 233.

41. Reorganization Plan No. 1 of 1939, 53 Stat. 1423, 1429 (April 25, 1939) (repealed 1953).

42. Pub. L. No. 83-202, 67 Stat. 390 (1953) (repealed 1971).

43. *Id.* at 390-94.

F. DECENTRALIZATION OF THE SYSTEM — THE FARM CREDIT ACT OF 1953

Not only did the Farm Credit Act of 1953 re-establish the independent status of the Farm Credit Administration, it redefined and redirected the Farm Credit System, moving it toward decentralization, farmer ownership and control, and cooperative development.[44] The 1953 Act created the Federal Farm Credit Board as the policy making body of the Farm Credit Administration.[45] In addition, the Farm Credit Administration, with its Governor responsible to the Board rather than the President, was accorded supervisory authority over the regional banks, the federal land banks [hereinafter FLBs] and federal intermediate credit banks [hereinafter FICBs], and their local associations, the federal land bank associations [hereinafter FLBAs], and production credit associations [hereinafter PCAs] respectively.[46] Farmer participation and control was increased by giving farmer members the authority to elect six of the seven members on each of the twelve district farm credit boards.[47] Also, recommendations were sought for retiring all of the remaining government capital in the system.[48] Further, the impetus of the Farm Credit Act of 1953 contributed to the repayment of all government capital in the Farm Credit System by the end of 1968.[49]

G. THE MODERN SYSTEM — THE FARM CREDIT ACT OF 1971

The Farm Credit Act of 1971[50] continued the trend toward decentralization by authorizing that more decisions be made at local district levels.[51] To implement decentralization, lending authority was expanded in three areas by the authorization of the following: long term mortgage loans for rural housing;[52] loans to

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44. *See generally* HOAG, *supra* note 11, at 231-43 (identifying and describing the broad themes of the Farm Credit Act of 1953).

45. Farm Credit Act of 1953, Pub. L. No. 83-202, 67 Stat. 390 (1953) (repealed 1971).

46. HOAG, *supra* note 11, at 257-58. The restoration of the Farm Credit Administration to the status of an independent agency after fourteen years as an agency within the United States Department of Agriculture was primarily motivated by a desire to insulate it from political influence. *Id.*

47. *Id.* at 121.

48. *Id.* at 259.

49. Brake, *supra* note 18, at 574-76; HOAG, *supra* note 11, at 257-61.

50. Pub. L. No. 92-181, 85 Stat. 583 (1971) (codified as amended at 12 U.S.C.A. §§ 2001—2279aa-14 (West 1989 & Supp. 1990).

51. *Id.* at 584-86 (FLBs), 590-97 (FICBs). *See generally* Kayl, *supra* note 6, at 275-77 (discussing the major features of the Farm Credit Act of 1971).

52. 12 U.S.C.A. §§ 2014, 2018 (West 1980). In amending the Farm Credit Act of 1971, the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, 1572-1662 (1988),

persons furnishing custom services to farmers;[53] and financial services to farmers including financial management, record keeping, and estate planning.[54]

1. *FLBs and FLBAs*

After the Farm Credit Act of 1971, the Farm Credit System was entirely farmer owned for the last government subscription had been retired in 1968.[55] Long-term mortgage credit was provided through the FLBs and the FLBAs.[56] Although each FLB and each FLBA were separate corporations, each FLBA owned a portion of the stock of the regional FLB.[57] Farmers who sought FLB funds made application through their local FLBA.[58]

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restructured the system. The previously separate FLBs and FICBs were required to merge into district farm credit banks. Although FLBAs and PCAs were permitted, with limited exceptions, to remain separate, the 1987 Act also allowed FLBAs and PCAs to merge as agricultural credit associations. *See infra* notes 125-27 and the accompanying text. However, the authority of the farm credit banks and the PCAs to make loans for rural housing was retained. 12 U.S.C.A. §§ 2019(b), 2075(b) (West 1989). *See also* 12 C.F.R. § 613.3040 (1990) (rural resident loan program); 55 Fed. Reg. 24,861, 24,878 (1990) (to be codified at 12 C.F.R. § 613.3040) (same). A FLBA can also make direct loans for rural housing if that authority has been delegated to it by the district farm credit bank. *See* 12 U.S.C.A. § 2013(18) (West 1989); 55 Fed. Reg. 24,861, 24,881 (1990) (to be codified at 12 C.F.R. 614.4030(a)(3)).

53. 12 U.S.C.A. § 2016 (West 1980). As with the authority to make housing loans to rural residents, the authority to make loans for persons furnishing custom services to farmers has been retained under the current amended version of the Farm Credit Act of 1971. 12 U.S.C.A. §§ 2019(c), 2075(a)(3) (West 1989). *See also* 12 C.F.R. § 613.3050 (1990) (farm-related businesses); 55 Fed. Reg. 24,861, 24,878 (1990) (to be codified at 12 C.F.R. § 613.3050) (same).

54. 12 U.S.C.A. §§ 2019, 2076 (West 1980). Under the current version of the Farm Credit Act of 1971, "technical assistance" may be provided by System lenders to their borrowers. 12 U.S.C.A. §§ 2020(a), 2076 (West 1989). *See also* 12 C.F.R. § 618.8000 (1990) (technical assistance); 55 Fed. Reg. 24,861, 24,888 (1990) (revising the authority for 12 C.F.R. § 618).

55. *See supra* note 49 and the accompanying text.

56. 12 U.S.C.A. § 2093 (West 1980). Currently, as a result of the Agricultural Credit Act of 1987, the authority formerly possessed by FLBs is held by the district farm credit banks (FCBs). 12 U.S.C.A. § 2015(a) (West 1989). *See also* 55 Fed. Reg. 24,861, 24,800 (1990) (to be codified at 12 C.F.R. § 614.4000) (long-term real estate lending authority of farm credit banks). Lending for long-term real estate purposes is still provided through a FLBA unless there is not an active association in the lending area. 12 U.S.C.A. § 2021(a)-(b) (West 1989). *See also* 55 Fed. Reg. 24,861, 24,881 (1990) (to be codified at 12 C.F.R. § 614.4030) (long-term real estate lending authority of federal land credit associations). However, a farm credit bank may delegate its direct lending authority to an association. 12 U.S.C.A. § 2013(18) (West 1989). When direct lending authority for long-term real estate loans is transferred to a FLBA, the association is referred to as a "federal land credit association." 55 Fed. Reg. 24,861, 24,889 (1990) (to be codified at 12 C.F.R. § 519.9155). *See also infra* notes 119-27 and the accompanying text (discussing the changes in lending authority occasioned by the 1987 Act).

57. 12 U.S.C.A. § 2093 (West 1980). Under the current version of the Farm Credit Act of 1971, FLBAs still subscribe to the stock of their respective farm credit bank. 12 U.S.C.A. § 2093(10) (West 1989).

58. 12 U.S.C.A. § 2020 (West 1980). Currently, borrowers seeking long-term loans for real estate purposes still apply for those funds through a FLBA if there is an association serving the prospective borrower's area. To obtain the funds, the prospective borrower must purchase stock in the association. 12 U.S.C.A. § 2017 (West 1989). If there is not an

The farmer borrower of FLB funds was required to purchase capital stock in the FLBA in an amount at least equal to five percent of the face value of his loan.[59] With the purchase of stock, the borrower became a voting member of the FLBA, and the FLBA purchased a like amount of stock in the regional FLB.[60] Each stockholder was entitled to only one vote.[61] Further, the FLB and FLBA held a first lien on the borrower's stock.[62]

The primary source of FLB funds was derived from the sale of consolidated federal land bank bonds which were joint obligations of the twelve district FLBs.[63] However, the United States bears no liability on the bonds.[64]

2. *FICBs and PCAs*

PCAs under the Farm Credit Act of 1971 made short and intermediate term loans that were, in turn, discounted by the regional FICBs.[65] The capital stock of the FICBs was owned by

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association serving the prospective borrower's area, the loan may be obtained directly from the district farm credit bank, and stock must be purchased in the district farm credit bank. 12 U.S.C.A. § 2021(b), (c) (West 1989).

59. 12 U.S.C.A. § 2034(a) (West 1980). For a discussion of current requirements regarding the amount of stock that must be purchased, *see infra* notes 131 and 132 and the accompanying text. *See also In re* Massengill, 100 Bankr. 276, 278 & n. 1 (E.D. N.C. 1988) (describing in detail the stock purchase requirements under the Farm Credit Act of 1971 prior to its amendment by the Agricultural Credit Act of 1987).

60. 12 U.S.C.A. § 2034 (West 1980). The voting shareholders of each FLBA continue to elect the association's board of directors. 12 U.S.C.A. § 2092 (West 1989). *See also supra* note 58 (discussing the current requirements for the purchase of stock). Under current law, when a FLBA has merged with a PCA, the stock purchased would be that of the agricultural credit association formed as a result of that merger. *See infra* notes 125-27 and the accompanying text.

61. *Id.* The one vote principle still applies. Thus, irrespective of the number of shares owned, a shareholder in a System institution has only one vote. *See* 12 C.F.R. § 615.5230(a)(1)(i) (1990).

62. 12 U.S.C.A. § 2054 (West 1980). Under the current law, FLBAs continue to be entitled to a first lien on borrower's stock and participation certificates issued by the association. 12 U.S.C.A. § 2097 (West 1989).

63. 12 U.S.C.A. § 2155 (West 1980). *See also* 12 U.S.C.A. §§ 2153, 2155 (West 1989) (the System continues to issue notes, bonds, debentures, and other obligations for which each bank in the System is jointly liable).

64. 12 U.S.C.A. § 2155(c) (West 1989). For an extensive and highly critical study of the Farm Credit System's funding of loans with long-term, non-callable, fixed rate bonds during the early 1980's, see GENERAL ACCOUNTING OFFICE, PUB. NO. GGD-86-150 BR, FARM CREDIT SYSTEM: ANALYSIS OF FINANCIAL CONDITION (1986). *See also* Barry, *Financial Stress For the Farm Credit Banks: Impacts On Future Loan Rates For Borrowers*, 46 AGRIC. FINANCE REV. 27 (1986) (discussing the effect on loan rates resulting from the financial distress experienced by the System in the mid-1980s).

65. 12 U.S.C.A. §§ 2096, 2072(6) (West 1980). Under the Farm Credit Act of 1971, as currently amended, PCAs largely retain the same status and function that they assumed under the 1971 Act. PCAs continue to extend short- and intermediate-term credit. 12 U.S.C.A. § 2075(a) (West 1989). However, the functions formerly performed by FICBs are now the responsibility of the district farm credit banks. Those functions include the discounting of PCA loans. 12 U.S.C.A. § 2015(b)(A) (West 1989). *See also infra* notes 119-27 and the accompanying text (discussing the lending authority of System lenders under the Agricultural Credit Act of 1987).

PCAs.[66] The FICBs obtained funds through the sale of consolidated debentures.[67] As was required of FLBA and FLB borrowers, PCA borrowers also were required to purchase stock in an amount equal to at least five percent of the face value of the loan.[68]

3. *Board of Directors*

Each PCA and FLBA had a board of directors elected by its members.[69] Similarly, each of the twelve farm credit districts had a board of directors consisting of seven members.[70] Prior to the enactment of the Farm Credit Amendments Act of 1985,[71] one director was appointed by the Governor of the Farm Credit Administration and the remaining six were elected by the district's FLBAs, PCAs, and borrowers from the bank of cooperatives, with each of the three System institutions electing two directors.[72] Under the 1985 Act, the seventh member of the district board was elected by the "borrowers at large in a district," a phrase defined as follows:

> (i) a voting shareholder of a Federal land bank association and a direct borrower, and a borrower through an agency, from a Federal land bank;
> (ii) a voting shareholder of a production credit association; and
> (iii) a voting shareholder or subscriber to the guaranty fund of a bank for cooperatives.[73]

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66. 12 U.S.C.A. § 2073 (West 1980). Currently, PCAs continue to subscribe to stock in the "upstream" bank. However, that bank is now the district farm credit bank rather than the district FICB. 12 U.S.C.A. § 2073(7) (West 1989).

67. 12 U.S.C.A. § 2094 (West 1980). As a result of the Agricultural Credit Act of 1987, the successors to the district FICBs, the farm credit banks, are responsible for obtaining funds through the sale of obligations for which all of the System banks are liable. 12 U.S.C.A. §§ 2013(10), 2153, 2155(a) (West 1989).

68. 12 U.S.C.A. § 2094 (West 1980). Currently, prospective borrowers still must purchase stock in the PCA making the loan. 12 U.S.C.A. § 2017 (West 1989). For a discussion of the current requirements regarding the amount of stock that must be purchased, see *infra* notes 131-32 and the accompanying text.

69. 12 U.S.C.A. §§ 2092, 2032 (West 1980). Under the current law, each PCA's shareholders continue to elect the PCA's board of directors. 12 U.S.C.A. § 2072 (West 1989).

70. 12 U.S.C.A. § 2222 (1980). Currently, the number of directors serving on the board of directors of the district farm credit banks is dictated by the respective bank's bylaws. *See* 12 U.S.C.A. § 2012 (West 1989). *See also* 12 C.F.R. §§ 611.310-611.340 (1990) (relating to the election of bank and association directors).

71. *See infra* notes 74-92 and the accompanying text.

72. 12 U.S.C.A. § 2223 (West 1980) (repealed 1988).

73. 12 U.S.C.A. § 2223(a) (West Supp. 1986) (repealed 1988). Currently, the only statutory requirement concerning the qualification of a director is that "at least one member shall be elected by the other directors, which member shall not be a director, officer, employee, or stockholder of a System institution." 12 U.S.C.A. § 2012 (West 1989). A

H. THE FARM CREDIT AMENDMENTS OF 1985

The Farm Credit Amendments Act of 1985[74] also made structural changes in levels above the district board of directors. Prior to the 1985 Act, the Federal Farm Credit Board was a part-time board consisting of thirteen members, one nominated by each of the twelve districts and appointed by the President and one appointed by the Secretary of Agriculture as his representative.[75] The 1985 Act renamed the board the Farm Credit Administration Board and reduced its membership to three full-time members.[76] The three members are appointed by the President with the advice and consent of the Senate.[77]

The shift in the responsibilities of the Farm Credit Administration was a second major structural change caused by the 1985 Act.[78] Under prior law, the Farm Credit Administration directly participated in the supervision and management of the System.[79] Under the 1985 Act, the Farm Credit Administration assumed the function of an independent regulatory agency.[80] The enumerated powers of the Farm Credit Administration included the power to modify the boundaries of farm credit districts, approve the merger of districts, and promulgate regulations.[81] In addition, the Farm Credit Administration was directed to examine System institutions in the same manner as followed by examiners under the National Bank Act, the Federal Reserve Act, and the Federal Deposit Insur-

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concise description of the System as it existed under the 1971 Act is found in Rosantrater, *Farm Credit: An Overview*, 15 COLO. LAW. 1594 (1981).

74. Pub. L. No. 99-205, 99 Stat. 1678 (1985) (codified as amended in scattered sections of 12 U.S.C.A. (West 1989 & Supp. 1990)).

75. 12 U.S.C.A. § 2242 (West 1980).

76. 12 U.S.C.A. § 2242 (West 1989).

77. *Id.*

78. The significance of this change and its consequences are analyzed in Kayl, *supra* note 6, at 279-94, and Dewey, *supra* note 6, at 287-89.

79. *See* Dewey, *supra* note 6, at 287 (describing the selection process for the former, part-time, Federal Farm Credit Board, a process in which twelve of the thirteen members were nominated by the twelve farm credit districts, as a "process in which directors could place allegiances to their individual district's interests above their responsibilities to the federal regulatory body"). *See also* Kayl, *supra* note 6, at 288 ("the situation was the classic 'tail wagging the dog' wherein the FCA was intimidated by the FCS members").

80. *See* 12 U.S.C.A. §§ 2243, 2252 (West 1989) (setting forth the authority of the FCA board and the powers and duties of the FCA). *See also* Dewey, *supra* note 6, at 287-88 ("The 1985 Amendments recognized the wisdom in establishing the FCA as a non-captive agency which could carry out its governmental functions free of institutions' influence."); Kayl, *supra* note 6, at 286 ("Stronger independent regulation is an euphemism for greater control of the FCS by the FCA."); Bailey v. Federal Intermediate Credit Bank, 788 F.2d 498, 499 n. 3 (8th Cir. 1986) ("the concern of Congress was with decreasing the FCA's day-to-day involvement and increasing its role as an 'arm's length' regulator of the farm credit system" (citations omitted)), *cert. denied*, 479 U.S. 915 (1986); *In re* Hoag Ranches, 846 F.2d 1225, 1229 (9th Cir. 1988) ("The role of the Farm Credit Administration has been changed from supervisor to arms-length regulator").

81. 12 U.S.C.A. § 2252(a)(1), (2), (9) (West 1989).

ance Act.[82] Further, the Farm Credit Administration was given broad enforcement powers under the 1985 amendments including the authority to issue cease and desist orders[83] and to suspend or remove System institution directors and officers.[84] Finally, the chairman of the Farm Credit Administration Board also serves as the chief executive officer of the Farm Credit Administration under the 1985 Act.[85]

The Farm Credit Amendments Act of 1985 also centralized the power to raise and distribute funds within the System.[86] The Act created the Farm Credit System Capital Corporation which, in turn, was granted the authority to require all of the System institutions to purchase its stock, to pay assessments to it, and to contribute to its capital.[87] The purposes of the Capital Corporation included the following functions:

1. provide financial assistance to System institutions;
2. acquire from and participate with other System institutions the nonperforming assets of those institutions;
3. "hold, restructure, collect, and otherwise administer nonperforming assets required from or participated in with other Farm Credit System institutions, and guarantee performing and nonperforming assets held by other Farm Credit institutions"; and
4. provide technical and other services to other System institutions relating to their loan portfolios.[88]

Probably the most controversial of the powers accorded to the Capital Corporation was the authority to draw funds from stronger districts to buttress weaker ones.[89] The Corporation's attempts to exercise that authority spawned numerous lawsuits initiated by district banks and local associations.[90]

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82. 12 U.S.C.A. § 2254(a) (West 1989).
83. 12 U.S.C.A. §§ 2261-63 (West 1989).
84. 12 U.S.C.A. §§ 2264-74 (West 1989).
85. 12 U.S.C.A. § 2244 (West 1989).
86. One of the goals of the 1985 amendments was to "[g]ive the Farm Credit System broader authority to use its own resources to shore up weak system units". Kayl, *supra* note 6, at 285 (citing H.R. REP. NO. 425, 99th Cong., 1st Sess. *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2587).
87. 12 U.S.C.A. §§ 2216-16k, 2152 (West Supp. 1986) (repealed 1988).
88. 12 U.S.C.A. § 2216 (West Supp. 1986) (repealed 1988).
89. 12 U.S.C.A. § 2216(f)(a)(14) (West Supp. 1986) (repealed 1988).
90. *E.g.*, Federal Land Bank of Springfield v. Farm Credit Admin., 676 F. Supp. 1239 (D. Mass. 1987); Sikeston Production Credit Ass'n v. Farm Credit Admin., 647 F. Supp. 1155 (E.D. Mo. 1986). For general discussions of the issues presented in the litigation, see Webster, *Joined in Battle: Who Will Control the Farm Credit System?* AGRIFINANCE, March 1987, at 6; Taylor, *Big Trouble at Farm Credit*, FARM J., Nov. 1986, at 20; Kayl, *supra* note 6, at 289-305 (citing additional cases).

The Farm Credit Amendments Act of 1985 also gave the Secretary of the Treasury the authority to provide financial assistance to the system on a "certification . . . [of] need" by the Farm Credit System.[91] Finally, as will be discussed in greater detail later in this article, the 1985 Act granted to System borrowers certain rights not previously afforded to them.[92]

I. THE FARM CREDIT ACT AMENDMENTS OF 1986

The mid-1980's saw continuing deterioration in the financial condition of the Farm Credit System.[93] The Congressional response, contained in the Farm Credit Act Amendments of

91. 12 U.S.C.A. § 2216 (West Supp. 1986). A good, but brief, discussion on the structural changes mandated by the 1985 Act is contained in Note, *The Congressional Response To A Crisis In Agricultural Credit: The 1985 Farm Credit Amendments*, 31 S.D.L. REV. 471 (1986). *See also* Duncan, *Farm Credit System — Current Matters*, 38 ALA. L. REV. 537, 539 (1987) (discussing the 1985 Act); Kayl, *supra* note 6, at 279-305 (same). *See generally* GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-86-126BR, FARM FINANCE: FARM DEBT, GOVERNMENT PAYMENTS, AND OPTIONS TO RELIEVE FINANCIAL STRESS (1986) (discussing the agricultural economy at the time of the 1985 Act and the options available to improve that economy).

92. 12 U.S.C.A. § 2199(a) (disclosure of interest rates), 2199(b) (forbearance), 2200 (access to loan documents and other information), 2201 (prompt action on loan applications), 2202 (reconsideration of action on loan applications) (West Supp. 1986) (some of the borrower rights currently found in sections 2199-2202 were added by the Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. I, 101 Stat. 1568, 1572-85 (1988)). *See infra* notes 340-434 and the accompanying text.

In addition to the codified protections for System borrowers, the 1985 Act also contained an uncodified provision mandating that System lenders review all loans that had been placed in "non-accrual" status "based on changes in the circumstances of such institutions as the result of this Act and the amendments made by this Act. . . ." Borrowers were to be notified in writing of the results of that review. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 307, 99 Stat. 1678, 1709 (1985).

Perhaps the most significant of the borrower protections contained in the 1985 Act was the requirment that System lenders develop forbearance policies. 12 U.S.C.A. § 2199(b) (West Supp. 1986). Previously, there had been no statutory requirement for such policies. Rather, the only directive for such policies was contained in the regulations at 12 C.F.R. § 614.4510 (1985). Section 614.4510 merely required that the banks and associations have policies providing a "means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden."

The imposition of a statutory mandate for the development of forbearance policies, though itself not specific regarding the availability and means of forbearance, reflected Congressional displeasure with the System's prior procedures and attitudes toward forbearance. *See* H.R. REP. NO. 99-425, 99 CONG., 1ST SESS., *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2587, 2598. *See also* Kayl, *supra* note 6, at 287 ("Testimony before House and Senate committees [considering the 1985 legislation] dealt with borrowers' perceptions that they had been treated high-handedly by FCS member institutions" (citations omitted)). Later, with the passage of the Agricultural Credit Act of 1987, Congress became more specific in its directives to the System regarding its treatment of its member-borrowers. *See infra* notes 340-434 and the accompanying text.

93. GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-89-33BR, FARM FINANCE: FINANCIAL CONDITION OF AMERICAN AGRICULTURE AS OF DECEMBER 31, 1987, 66-73 (1988); GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-88-26BR, FARM FINANCE: FINANCIAL CONDITION OF AMERICAN AGRICULTURE AS OF DECEMBER 31, 1986, 64-71 (1987). *See also* Guebert, *Confessions of a Farm Credit Regulator*, TOP PRODUCER, June-July 1987, at 15 (discussing the deteriorating financial condition of the System); Taylor, *Day of Reckoning for Farm Credit*, FARM J., March 1987, at 26 (same).

1986,[94] was to partially decentralize authority by giving district banks the power to set interest rates and to implement new "regulatory accounting practices" (RAP) that, among other things, allowed System institutions to amortize for up to twenty years the additions to their loss reserves.[95]

J. THE AGRICULTURAL CREDIT ACT OF 1987

The Agricultural Credit Act of 1987[96] was signed by the President on January 6, 1988.[97] The 1987 Act operates in two ways that have resulted or will result in structural changes to the System. First, it makes available up to four billion dollars of federal funds to improve the financial condition of System institutions.[98] Second, it mandates the merger of certain System institutions and provides for the voluntary consolidation of others.[99]

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94. Pub. L. No. 99-509, 1031-1037, 100 Stat. 1874, 1877-79 (1986) (codified as amended in scattered sections of 12 U.S.C.A. (West 1989 & Supp. 1990)).

95. *Id.*, 1035-1037, 100 Stat. at 1878-79. *See generally* Banner & Barry, *RAPPING The Farm Credit System: Spreading Costs to the Future*, CHOICES, First Quarter 1988, at 31 (discussing the economics of the new regulatory accounting practices); *How the Farm Credit System Could Harvest a Big Profit*, WASH. POST NAT. WEEKLY ED., Oct. 27, 1986, at 20, col. 1 (same); Kayl, *supra* note 6, at 309-10 (discussing the 1986 Act in general). The "regulatory accounting practices" regulations are currently found at 12 C.F.R. § 624 (1990).

96. Pub.L. No. 100-233, 101 Stat. 1568-1718 (1988) (codified in scattered sections of Titles 7, 12, & 14 of 12 U.S.C.A. (West 1988, 1989 & Supp. 1990)).

97. The 1987 Act substantially changed the loan servicing procedures for the loan programs administered by the Farmers Home Administration (FmHA) and made minor changes to other agricultural programs, including the Conservation Reserve Program. *See generally* Hayes, *Farmers Home Administration: What the New Law Provides*, 3 FARMERS' LEGAL ACTION REP. 6 (1988) (discussing, in detail, the changes made by the 1987 Act to FmHA loan servicing procedures); Hertzler, Jr., *The Agricultural Credit Act of 1987—A View from the Farmers Home Administration*, 2 J. AGRIC. LENDING 17 (1988) (briefly describing how the 1987 Act affected the FmHA); McEowen & Harl, *A Look at the Conservation Reserve Program (CRP) and How It Affects Owners and Tenants of Marginal Land*, 12 J. AGRIC. TAX'N & L. 121 (1990) (discussing the Conservation Reserve Program).

98. 12 U.S.C.A. § 2278b-6 (West 1989).

99. An uncodified provision of the 1987 Act required the merger of the FLB and FICB in each district within six months of the Act's enactment. Pub. L. No. 100-203, 410, 101 Stat. 1568, 1637 (1988). *See also* 12 U.S.C.A. § 2011 (West 1989) (setting forth in the annotations the terms of section 410). *See generally* 12 U.S.C.A. §§ 2279a-2279a-3 (West 1989) (authorizing the merger of banks within a district).

In addition, another uncodified provision of the 1987 Act required each FLBA and PCA sharing substantially the same geographic territory to submit to their respective shareholders a plan for merging the associations within six months after the merger of the district FLB and FICB. Pub. L. No. 100-203, 411, 101 Stat. 1568, 1638 (1988). *See also* 12 U.S.C.A. § 2071 (West 1989) (setting forth in the annotations the terms of section 411). *See generally* 12 U.S.C.A. § 2279c-1 (West 1989) (authorizing the merger of associations).

Finally, the 1987 Act also required the development of a proposal for the consolidation of farm credit districts, Pub. L. No. 100-203, 412, 101 Stat. 1568, 1638-39 (1988), and the voluntary merger of the banks for cooperatives, Pub. L. No. 100-203, 413, 101 Stat. 1568, 1639-42 (1988). *See also* 12 U.S.C.A. §§ 2221, 2121 (West 1989) (setting forth in the annotations the terms of sections 412 and 413, respectively).

1. *Financial Assistance to System Institutions*

Under the 1987 Act, the Farm Credit Administration remains the regulatory authority over System institutions.[100] However, a new threefold approach to financial assistance is undertaken. First, the Capital Corporation, a creation of the 1985 Act, has been abolished.[101] In its place, an entity known as the Farm Credit System Assistance Board has been created to certify financially distressed institutions.[102] Once certified, an institution can issue preferred stock and receive financial assistance.[103] If the book value of the stock of a System institution is less than seventy-five percent of the par value of the stock, that is, if its value is less than $3.75 per share, the institution is required to seek certification.[104]

Second, the 1987 Act also created an entity known as the Financial Assistance Corporation.[105] That entity is authorized to issue federally guaranteed bonds and to purchase the preferred stock of System institutions that have been certified as eligible to issue preferred stock, thereby funnelling the federal "bail-out" funds to those institutions.[106] The Financial Assistance Corporation will terminate on the maturity and full payment of its

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100. *See generally* Dewey, *supra* note 6, at 289 (discussing the role of the FCA under the 1987 Act).

101. Pub. L. No. 100-233, 207(a)(3), 101 Stat. 1568, 1607 (1988). The assets and liabilities of the Capital Corporation were assumed by the Farm Credit System Assistance Board. 12 U.S.C.A. § 2278a-9 (West 1989).

102. 12 U.S.C.A. § 2278a (West 1989). The mission of the Assistance Board is to protect borrower's stock and "to assist in restoring System institutions to economic viability. . . ." 12 U.S.C.A. § 2278a-1 (West 1989). The Board has three directors, one appointed by the Secretary of the Treasury, one by the Secretary of Agriculture, and the third member, who is to be an agricultural producer "experienced in financial matters", is appointed by the President with the advice and consent of the Senate. 12 U.S.C.A. § 2278a-2 (West 1989).

The Assistance Board is granted broad powers with which to fulfill its mission. *See* 12 U.S.C.A. § 2278a-3 (West 1989). Those powers include the authority to issue regulations without complying with the Administrative Procedure Act, and the Board is not subject to regulation by the FCA. 12 U.S.C.A. § 2278a-10(a), (b) (West 1989).

103. 12 U.S.C.A. § 2278a-4, 2278a-5 (West 1989). The preferred stock issued by certified institutions is purchased by the Financial Assistance Corporation using funds the Corporation obtained by issuing federally guaranteed bonds. *See infra* note 106 and the accompanying text.

104. 12 U.S.C.A. § 2278a-4(b) (West 1989). The $3.75 per share figure assumes that the stock had a par value of $5.00, which it usually did prior to the 1987 Act. *See* 12 U.S.C.A. §§ 2034(a), 2094(f) (West 1980). *See also In re* Massengill, 100 Bankr. 276, 278 & n. 1 (E.D. N.C. 1988) (discussing the stock purchase requirements in effect prior to the 1987 Act).

105. 12 U.S.C.A. § 2278(b) (West 1989). The purpose of the Financial Assistance Corporation is the provision of capital to financially distressed System institutions. 12 U.S.C.A. § 2278b-1 (West 1989). The board of directors of the Financial Assistance Corporation consists of the Board of Directors of the Federal Farm Credit Banks Funding Corporation. 12 U.S.C.A. § 2278b-2(a) (West 1989).

106. 12 U.S.C.A. §§ 2278b-6(a), 2278b-7(b) (West 1989). Interest must be paid on the federally guaranteed bonds. *See* 12 U.S.C.A. §§ 2278b-6(c), 2278b-8 (West 1989). Although the Secretary of the Treasury bears some initial responsibility for interest payments, the System is ultimately obligated to repay the Secretary up to the sum of $2,000,000,000 for interest payments. 12 U.S.C.A. §§ 2278b-6(c), 2278b-8(b) (West 1989).

bonds.[107] The bonds will have a fifteen year maturity period.[108]

In addition to creating an "assistance fund" through the issuance of federally guaranteed bonds, the 1987 Act created a "trust fund" funded solely from the proceeds from a one-time required purchase of Financial Assistance Corporation stock by the PCAs and Farm Credit Banks.[109] The creation of the "trust fund" already has been challenged as an unconstitutional taking under the fifth amendment.[110]

Third, the 1987 Act also creates the Farm Credit System Insurance Corporation.[111] The Corporation's function is to create an insurance fund by assessing and collecting premiums from System institutions.[112] The fund is intended to protect System institutions, investors, and stockholders beginning in 1993 by satisfying defaults on payments of bonds, preferred stock, and borrower stock.[113]

The 1987 Act also created, as part of the Farm Credit System, the Federal Agricultural Mortgage Corporation to oversee a new agricultural mortgage secondary market.[114] Lenders other than System lenders will be eligible to participate in the secondary

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107. 12 U.S.C.A. § 2278b-11 (West 1989). The System is required to pay the bond obligations. 12 U.S.C.A. § 2278b-6(c) (West 1989).

108. 12 U.S.C.A. § 2278b-6(a) (West 1989). For an excellent discussion of the federal "bailout" provisions of the 1987 Act, see Massey, *Farm Credit System: Structure and Financing Under the New Act*, 3 FARMERS' LEGAL ACTION REP. 52, 58-64 (1988) [hereinafter Massey] (includes flow chart diagrams of the "bailout" mechanisms).

109. 12 U.S.C.A. §§ 2278b-5(b), 2278b-9 (West 1989 & Supp. 1990). The purpose of the "trust fund" is to provide intermediate security for each System institution's share of interest and principal repayment on the "assistance fund" bonds. *See* Massey, *supra* note 108, at 63-64.

110. Colorado Springs Production Credit Ass'n v. Farm Credit Admin., 695 F. Supp. 15 (D.D.C. 1988) (order denying in part and granting in part motion to dismiss).

111. 12 U.S.C.A. § 2277a-1 (West 1989).

112. *Id. See also* Massey, *supra* note 108, at 65-68 (discussing purposes and functions of the Farm Credit System Insurance Corporation); Federal Farm Credit Banks Funding Corp. v. Farm Credit Admin., 731 F. Supp. 217, 219-20 (E.D. Va. 1990) (briefly describing the Insurance Corportation and the Insurance Fund).

113. *See* 12 U.S.C.A. § 2277a-9(a), (c) (West 1989).

114. 12 U.S.C.A. §§ 2279aa - 2279aa-14 (West 1989). *See generally* Pariser, *Agricultural Real Estate Loans and Secondary Markets*, IV AGRIC. & HUMAN VALUES 29 (1987) (discussing the possible effects of the secondary market on the Farm Credit System); GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-90-118, FEDERAL AGRICULTURAL MORTGAGE CORPORATION: SECONDARY MARKET DEVELOPMENT AND RISK IMPLICATIONS (1990) (discussing a variety of issues presented by the secondary market); GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-88-55FS, FARM FINANCE: PROVISIONS FOR SECONDARY MARKETS FOR FARM REAL ESTATE LOANS IN H.R. 3030 (1987) (same); AMERICAN BANKERS ASSOC., FINANCING FARM REAL ESTATE: A COMPREHENSIVE TRAINING MANUAL FOR THE SECONDARY MARKET FOR AGRICULTURE (1988) (a lender's guide to the secondary market created by the 1987 Act); D. FRESHWATER & D. TRECHTER, NEW APPROACHES TO FINANCING LONG-TERM FARM DEBT (Econ. Res. Serv., USDA, Agric. Info. Bull. No. 511, March 1987) (discussing secondary agricultural mortgage markets in general); Killebrew, *The Case for the Secondary Market*, 1 J. AGRIC. LENDING 6 (1987) (a commercial lender's argument for a secondary agricultural mortgage market).

market.[115]

In addition, the Federal Farm Credit Banks Funding Corporation was created as the System's fiscal agent for the marketing of System bonds. In addition to marketing System bonds, the Funding Corporation will determine the terms and other conditions of those bonds.[116]

Questions have already been raised about the efficacy of the federal "bail-out."[117] Moreover, on Friday, May 20, 1988, the Federal Land Bank of Jackson was closed and placed in a receivership by the Farm Credit Administration after examiners determined that an additional infusion of federal funds would be "futile."[118]

2. *Merger of System Institutions*

The 1987 Act mandated the merger of the federal land bank and the federal intermediate credit bank in each district within six months after January 6, 1988.[119] The merged FLB and FICB within each district are now known as the Farm Credit Banks.[120]

The Farm Credit Banks, acting through FLBAs, will continue to provide real estate loans.[121] However, the Farm Credit Banks can transfer direct loan making authority to an FLBA.[122]

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115. 12 U.S.C.A. § 2279aa-5(2) (West 1989).

116. 12 U.S.C.A. § 2160 (West 1989).

117. Bullock & Dodson, *The Farm Credit System: It Was A New Lease On Life, But . . .*, CHOICES, First Quarter 1988, at 32.

118. 53 Fed. Reg. 18,812 (1988) (order appointing receiver) (the order has been amended at least twice, 53 Fed. Reg. 47,762 (1988), 55 Fed. Reg. 3,644 (1990)). *See also* Wall St. J., May 23, 1988, at 4, col. 1 (reporting on the receivership order); GENERAL ACCOUNTING OFFICE, PUB. NO. GGD-90-16, FARM CREDIT: BASIS FOR DECISION NOT TO ASSIST JACKSON FEDERAL LAND BANK (1989) (critical study of the decision to place the Jackson FLB in receivership); *Behind The Takeover of Jackson Farm Credit*, AGRIFINANCE NEWS, July 1988, at 1 (discussing the Jackson FLB receivership); Hughes, *Jackson FLB In Receivership*, AGRIC. OUTLOOK, July 1988, at 20 (same). Subsequently, the loans of the Jackson FLB were sold to the Farm Credit Bank of Texas, and the three states formerly served by the Jackson FLB, Alabama, Mississippi, and Louisiana, are now served by the Farm Credit Bank of Texas. FARM CREDIT ADMIN., 4 FCA BULL. 2-3 (1989). Some of the events leading up to the placing of the Jackson FLB in receivership are discussed in Federal Land Bank of Jackson in Receivership v. Federal Intermediate Credit Bank (of Jackson), 727 F. Supp. 1055, 1056-57 (S.D. Miss. 1989). *See also* Grant v. Federal Land Bank of Jackson, 559 So.2d 148, 150-55 (La. Ct. App. 1990) (discussing the Jackson FLB's receiver's liability under the *"D'Oench* doctrine" [D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 676 (1942)] in a lender liability action), *cert. denied*, 563 So.2d 886, 887 (La. 1990); Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. CAL. L. REV. 253 (1988) (discussing the *"D'Oench* doctrine").

119. Pub. L. No. 100-233, 401, 101 Stat. 1568, 1622 (1988). *See also supra* note 99 (discussing the mandatory merger of district FLBs and FICBs into district farm credit banks).

120. 12 U.S.C.A. § 2011 (West 1989).

121. 12 U.S.C.A. §§ 2015, 2013(18), 2021(a), 2091, 2093(9) (West 1989). Where there is no active association, the Farm Credit Bank may make the loan directly. 12 U.S.C.A. § 2021(b) (West 1989).

122. 12 U.S.C.A. § 2013(18) (West Supp. 1989). When the direct lending authority has been delegated to a FLBA, the association is referred to as a "Federal land credit

PCAs will continue to provide short and intermediate term loans.[123] Those loans may be discounted by the Farm Credit Banks, and associations, including both federal land bank and production credit associations, will continue to be supervised by the Farm Credit Banks.[124]

Under the 1987 Act, a PCA and an FLBA may merge.[125] If a merger occurs, the Farm Credit Banks must transfer the direct lending authority for long-term real estate mortgage loans to the FLBA.[126] Further, merged associations are referred to as "agricultural credit associations" (ACAs).[127]

The Act also required the twelve banks for cooperatives and the Central Bank for Cooperatives to consider consolidation into one national bank for cooperatives.[128] The St. Paul, Springfield, Jackson, and Spokane Banks recently voted not to consolidate; the remaining eight banks will consolidate into one national bank.[129]

The 1987 Act removed the requirement that a borrower must purchase stock in the amount of five percent of the face value of the loan.[130] A borrower now must purchase stock in an amount as set by the lender, subject to FCA regulation.[131] The FCA has

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association". 55 Fed. Reg. 24,861, 24,889 (1990) (to be codified at 12 C.F.R. § 619.9155). *See also* 55 Fed. Reg. 24,861, 24,881 (1990) (to be codified at 12 C.F.R. § 614.4030) (lending authority for federal land credit associations).

123. 12 U.S.C.A. §§ 2073(13), 2075 (West 1989).

124. 12 U.S.C.A. §§ 2013(6), (13), (17)-(21) (West Supp. 1989). *See also* 55 Fed. Reg. 24,861, 24,882-83 (to be codified at 12 C.F.R. subpt. C) (final rules relating to the farm credit bank/association relationship) (The FCA still has not adopted in final form other rules relating to loan policies and operations proposed on November 3, 1988, at 53 Fed. Reg. 44,438-44,456 (1990)). *See* 55 Fed. Reg. 24,861, 24862 (1990)).

125. 12 U.S.C.A. § 2279c-1 (West 1989). The 1987 Act directed that, not later than six months after the merger of the FLBs and FICBs into district farm credit banks, the board of directors of the FLBAs and PCAs were to submit to their respective association's shareholders a proposal to merge the FLBAs and PCAs serving the same geographical area. Pub. L. No. 10-233, 411, 101 Stat. 1568, 1368 (1988). *See also* 12 U.S.C.A. § 2071 (West 1989) (setting for section 411 in the annotations). The 1987 Act also permits "like" associations to merge, i.e., a PCA may merge with another PCA. 12 U.S.C.A. § 2279f-1 (West 1989).

126. 12 U.S.C.A. § 2279b(b) (West 1989). *See also* 55 Fed. Reg. 24,861, 24,882 (1990) (loan authority for the "agricultural credit associations" formed by the merger of "unlike" associations).

127. 55 Fed. Reg. 24,861, 24,888 (1990) (to be codified at 12 C.F.R. § 619.9015).

128. Pub. L. No. 100-233, 413, 101 Stat. 1568, 1639-42 (1988). *See also* 12 U.S.C.A. § 2121 (West 1989) (setting forth the terms of section 413 in the annotations).

129. *National Bank for Cooperatives Formed by Merger Vote*, AGRIFINANCE NEWS, August 1988, at 4. A bank for cooperatives may merge with district farm credit bank. 12 U.S.C.A. § 2279f(a) (West 1989). When such a merger occurs, the resulting bank is known as an "agricultural credit bank". 55 Fed. Reg. 24,861, 24,888 (1990) (to be codified at 12 C.F.R. § 619.9020). *See generally* Hopkin, Sporleder, Padberg & Knutson, *Evaluation of Restructuring Alternatives for the Banks for Cooperatives*, 3 J. AGRIC. COOPERATION 71 (1988) (discussing the consolidation alternatives for the banks of cooperatives).

130. 12 U.S.C.A. §§ 2034, 2294 (West 1980). *See supra* notes 59 & 68 and the accompanying text.

131. 12 U.S.C.A. §§ 2074, 2094 (West Supp. 1989).

issued regulations providing that the amount of stock required to be purchased must be not less than two percent of the loan amounts or $1,000, whichever is less.[132]

Finally, the 1987 Act also requires the Farm Credit Administration to propose a plan for the merger of the twelve districts into no less than six districts.[133] The various Farm Credit Banks are to submit the proposed merger affecting it to its members for their approval.[134]

K. "FARM CREDIT SERVICES" AS A TRADE NAME, THE FEDERAL FARM CREDIT CORPORATION OF AMERICA, AND THE FARM CREDIT COUNCIL

As has been briefly described above and is discussed elsewhere in this article, the Farm Credit System consists of various "System institutions," most notably the district Farm Credit Banks, Banks For Cooperatives, and various federal land bank associations and production credit associations within each district. Each System institution is a federally-chartered instrumentality and, as such, is a separate legal entity.[135] However, the various institutions often hold themselves out as being, or being a part of, "Farm Credit Services." "Farm Credit Services" is a trade name;

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132. 12 C.F.R. § 614.5220(d) (1990).

133. Pub. L. No. 100-203, 412, 101 Stat. 1568, 1638-39 (1988). *See also* 12 U.S.C.A. § 2002 (West 1989) (setting forth the terms of section 412 in the annotations).

134. *Id.* A more detailed explanation of the structural changes occasioned by the 1987 Act can be found in a FARMERS' LEGAL ACTION GROUP, INC., SPECIAL REPORT ON THE AGRICULTURAL CREDIT ACT OF 1987 (1988), available from the Farmers' Legal Action Group, Inc., 1301 Minnesota Building, 46 East Fourth Street, St. Paul, Minnesota, 55101. *See also* Davidson, *Agricultural Credit Act of 1987*, AGRIC. L. UPDATE, Feb. 1988, at 7 (surveying the provisions of the 1987 Act); M. HUGHES, RECENT DEVELOPMENTS AT THE FARM CREDIT SYSTEM (Econ. Res. Serv., USDA, Agric. Inf. Bulletin No. 572, 1989) (summarizing the structural changes in the System resulting from the 1987 Act); Koenig & Hiemtra, *More Than A Facelift for FCS*, AGRIC. OUTLOOK, March 1988, at 22 (same); Kayl, *supra* note 6, at 311-18 (same); Duncan, *The Agricultural Credit Act of 1987—A View from the Farm Credit Administration*, 2 J. AGRIC. LENDING 7 (1988) (same); Lugar, *The Agricultural Credit Act of 1987 — A View from the Hill*, 2 J. AGRIC. LENDING 12 (1988) (same); Harl, *Policy Considerations Related to Further Intervention in the Farm Credit System*, 2 J. AGRIC. COOPERATION 57 (1987) (written before the passage of the 1987 Act, this article highlights many of the policy considerations underlying the provisions that were enacted). Appended to this article as Appendix B is a flow chart of the Farm Credit System current as of July 1989.

The 1987 Act also contained significant new "borrowers' rights" provisions. Those provisions are discussed later in this article. *See infra* notes 340-434 and the accompanying text. *See also* Massey & Schneider, *supra* note 6, at 589-624 (focusing exclusively on the "borrowers' rights" provisions of the 1987 Act); Hambright, *The Agricultural Credit Act of 1987*, 17 COLO. LAW. 611 (1988) (same); Saxowsky, *Government Response to Financial Stress: The Farm Experience*, 3 NAT. RESOURCES & ENV'T 28 (1989) (surveying the governmental response to the farm credit crisis of the 1980s, including the changes legislatively imposed on the System).

135. *See infra* note 150 and the accompanying text.

it is not a legal entity. Accordingly, "Farm Credit Services," as such, is not capable of suing or being sued.

The various Farm Credit System banks are authorized to create organizations to perform certain functions or services for the banks.[136] Two such organizations have been organized under charters issued by the FCA. The first, initially established in July, 1985, by the district banks, is the Farm Credit Corporation of America (FCCA) located in Denver, Colorado.[137] Among other things, the FCCA provides centralized financial and management guidance to the district banks.[138] The second, the Farm Credit Council, is the trade association of the System banks and associations.[139] Essentially a lobbying organization, its offices are in Washington, D.C.[140]

III. LITIGATION INVOLVING THE FARM CREDIT SYSTEM

A. FEDERAL JURISDICTION

Federal jurisdiction over FLBAs and PCAs is limited. Unless diversity of citizenship exists to satisfy the requirement of 28 U.S.C. § 1332,[141] the only other currently possible bases for federal jurisdiction over FLBAs and PCAs are federal question jurisdiction under 28 U.S.C. § 1331,[142] premised on the theory that the Farm Credit Act, as amended, implies a private cause of action;[143] the Racketeer Influenced and Corrupt Organizations Act;[144] and the Equal Credit Opportunity Act.[145] As will be discussed later in this article, the prevailing view is that the Farm Credit Act of 1971 does not create an implied private cause of action.[146] Further, it also appears that claims based on the Farm Credit Amendments Act of 1985 may not satisfy 28 U.S.C. § 1331. The Eighth Circuit and the Minnesota Court of Appeals have recently held that the

136. 12 U.S.C.A. § 2211 (West 1989). *See also* 12 C.F.R. § 611.1135 (1990) (providing for the incorporation of service organizations).

137. *See generally The Farm Credit System: New Players, New Goals* (Interview with Brent Beesley, President and Chief Executive Office of the FCCA), LANDOWNER, Aug. 25, 1986, at 3 (discussing the history of the FCCA).

138. *Id.*

139. *Id.*

140. *Id.* In late 1989, plans were underway to disband the Farm Credit Corporation of America (FCCA) and to divide its functions between the Farm Credit Council (FCC) and the Federal Farm Credit Banks Funding Corporation. *See Farm Credit System Aims for New Year Start of New Farm Credit Council*, AGRIC CREDIT LETTER, Dec. 15, 1989, at 1.

141. 28 U.S.C.A. § 1332 (West 1966 & Supp. 1990).

142. 28 U.S.C.A. § 1331 (West 1966 & Supp. 1990).

143. *See infra* notes 184-267 and the accompanying text.

144. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1990).

145. 15 U.S.C.A. §§ 1691-1691f (West 1982 & Supp. 1990).

146. *See infra* notes 184-94 and the accompanying text.

1985 Act did not create an implied private right of action for damages.[147] Whether the Agricultural Credit Act of 1987 implies a private right of action also appears to be headed for a negative resolution. The Ninth, Tenth, and Eighth Circuits have held that there is no implied private cause of action for injunctive relief under the 1987 Act.[148] The Eighth Circuit's decision, one reached by the court sitting *en banc*, vacated an earlier panel decision finding an implied cause of action for injunctive relief to remedy the failure of System lenders to follow a procedural directive in the 1987 Act.[149]

1. *Status as Federally Chartered Instrumentalities*

The mere status of the FCBs, FLBAs, and PCAs as federally chartered instrumentalities of the United States does not create federal court jurisdiction. FLBAs and PCAs are federally chartered instrumentalities of the United States.[150] In that regard, 29 U.S.C. § 1349[151] provides as follows:

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.[152]

Further, 28 U.S.C. § 1349 has been held to preclude federal court jurisdiction over a claim against a FLB premised on an allegation

147. The following cases have found that there is no implied right of action for damages in the 1985 Act: Redd v. Federal Land Bank of St. Louis, 851 F.2d 219 (8th Cir. 1988); Mendel v. Production Credit Ass'n of the Midlands, 862 F.2d 180 (8th Cir. 1988); Ebenhoh v. Production Credit Ass'n of Southeast Minnesota, 426 N.W.2d 490 (Minn. Ct. App. 1988). *See also* Hillesland v. Federal Land Bank Ass'n of Grand Forks, 407 N.W.2d 206, 208-10 (N.D. 1987) (finding no implied action in a wrongful discharge action and holding that a member of Congress's statements made during the debate on the 1985 Act were irrelevant to determining whether Congress intended to create an implied cause of action under the 1971 Act).

148. Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990); Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990); Zajac v. Federal Land Bank of St. Paul, No. 88-5353ND (8th Cir. July 31, 1990) (*en banc*) (1990 U.S. App. LEXIS 12932).

149. Zajac v. Federal Land Bank of St. Paul, 887 F.2d 844 (8th Cir. 1989), *vacated on grant of reh'g en banc*, Dec. 7, 1989 (1989 U.S. App. LEXIS 18809).

150. 12 U.S.C.A. §§ 2011(a) (FCBs), 2091(a) (FLBAs), 2071(a) (PCAs) (West 1989).

151. 28 U.S.C.A. § 1349 (West 1976).

152. *Id.* The United States does not own stock in the Farm Credit System, the last federal government stock having been retired in 1968. Brake, *supra* note 18, at 576; *In re* Hoag Ranches, Inc., 846 F.2d 1225, 1228 (9th Cir. 1988). The "bail out" provisions of the Agricultural Credit Act of 1987 did not involve the acquisition of System institution stock by the United States. *See generally supra* notes 105-08 and the accompanying text (discussing the "bail out" provisions of the 1987 Act).

that the FLB was a federally chartered instrumentality.[153]

Also, System institutions are generally not considered foreign corporations under state certificate of authority statutes. This is because

> [i]t is well settled that "[c]orporations created by the authority of the United States are not foreign corporations but have legal existence in every state in which they may transact business pursuant to the authority conferred upon them by Congress."[154]

Thus, the status as federally chartered instrumentalities does not create federal court jurisdiction.

2. *Citizenship*

For purpose of diversity and other jurisdictional bases, a System institution is "deemed to be a citizen of the State, commonwealth, or District of Columbia in which its principal office is located."[155]

3. *Fifth Amendment*

There is no federal question jurisdiction under 28 U.S.C. § 1331 against an FLBA or PCA based on a claim arising under the fifth amendment to the United States Constitution because those

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153. Federal Land Bank of Columbia v. Cotton, 410 F. Supp. 169, 170 (N.D. Ga. 1975) (also holding that the FLB was not an agency within the meaning of 28 U.S.C.A. §§ 451 & 1349 (West 1976) *Id.* at 171) (In subsequent litigation involving the same parties, 28 U.S.C. § 1349 was cited for the proposition that "[t]he mere fact that defendant is federally chartered does not support federal jurisdiction". Cotton v. Federal Land Bank of Columbia, 647 F. Supp. 37, 38 n. 1 (M.D. Ga. 1986), *aff'd*, 887 F.2d 1091 (11th Cir. 1989)). *Accord* Federal Land Bank of St. Louis v. Keiser, 628 F. Supp. 769, 771 (C.D. Ill. 1986). *See also* Franklin v. Federal Land Bank of St. Louis, 96 Bankr. 929, 931-34 (W.D. Mo. 1989) (holding that a FLB's status as a federally chartered instrumentality is not sufficient to support procedural due process claim or federal question jurisdiction); LPR Land Holdings v. Federal Land Bank of St. Paul, 651 F. Supp. 287, 289-92 (E.D. Mich. 1987) (same, rejecting the argument that Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941), and Greene County Nat'l Farm Loan Ass'n v. Federal Land Bank of Louisville, 152 F.2d 215 (6th Cir. 1945), stand for the contrary proposition); Hill v. Farm Credit Bank of St. Louis, 726 F. Supp. 1201, 1208 (E.D. Mo. 1989) (same, citing additional cases); *In re* Hoag Ranches, 846 F.2d 1225, 1227-28 (9th Cir. 1988) (PCA not an "agency" within the meaning of Fed. R. App. P. 4(a)(1)).

154. Federal Land Bank of St. Paul v. Gefroh, 390 N.W.2d 46, 47 (N.D. 1986) (quoting Federal Land Bank of Omaha v. Felt, 368 N.W.2d 592, 595 (S.D. 1985)). *See also* Federal Land Bank of St. Paul v. Anderson, 410 N.W.2d 709, 713 (N.D. 1987) (holding that a FLB is not subject to state registration requirements); Kolb v. Naylor, 658 F. Supp. 520, 526 (N.D. Iowa 1987) (same); Federal Land Bank of St. Paul v. Bagge, 394 N.W.2d 694, 696 (N.D. 1986) (same, relying on *Gefroh*).

155. 12 U.S.C.A. § 2258 (West 1989). *See also* Engelmeyer v. Production Credit Ass'n of the Midlands, 652 F. Supp. 1235, 1237 (D.S.D. 1987) (citing section 2258; Cotton v. Federal Land Bank of Columbia, 647 F. Supp. 37, 38-39 (D. Ga. 1986)); and Apple v. Miami Valley Production Credit Ass'n, 614 F. Supp. 119, 122 (D. Ohio 1985)).

entities are private rather than governmental.[156] However, the Eighth Circuit has found a "colorable basis" for jurisdiction for a fifth amendment claim against a PCA based on the "pervasive involvement of the federal government in the creation and operation of the production credit associations."[157]

4. *Federal Common Law*

There is no 28 U.S.C. § 1331 jurisdiction under the federal common law based on a claim of breach of fiduciary duty.[158] The fiduciary obligations of FLBAs and PCAs will be discussed in greater detail later in this article.[159]

5. *Section 1983*

Federal instrumentalities are not "persons" subject to section 1983 liability.[160] Thus, there is no 28 U.S.C. § 1343 jurisdiction based on a claim arising under 42 U.S.C. § 1983.

6. *Tucker Act*

Unless there is at issue a claim based on a substantive right, there is no jurisdiction under the Tucker Act.[161] In addition, the

156. *E.g.*, Birbeck v. Southern New England Production Credit Ass'n, 606 F. Supp. 1030, 1034-35 (D. Conn. 1985) (citing DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432, 1439 (S.D. Ga. 1983), *overruled on other grounds sub nom.* Smith v. Production Credit Ass'n, 777 F.2d 1544, 1548 n. 1 (11th Cir. 1985)); Federal Land Bank of Wichita v. Jost, 761 P.2d 270, 271 (Colo. Ct. App. 1988) (relying on *DeLaigle* and Federal Land Bank v. Read, 703 P.2d 777, 78-81 (Kan. 1985)). *See also supra* note 153 (citing other cases).

157. Schlake v. Beatrice Production Credit Ass'n, 596 F.2d 278, 281 (8th Cir. 1979) (citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)). *But see* Hill v. Farm Credit Bank of St. Louis, 726 F. Supp. 1201, 1208 (E.D. Mo. 1989) (declining to follow *Schlake*); Franklin v. Federal Land Bank of St. Louis, 96 Bankr. 929, 934 (W.D. Mo. 1989) (declining to follow *Schlake* and citing Boyster v. Roden, 628 F.2d 1121 (8th Cir. 1980), in support of the assertion that "[e]ven the Eighth Circuit Court of Appeals has treated *Schlake* as an aberration"); LPR Land Holdings v. Federal Land Bank of St. Louis, 651 F. Supp. 287, 291 (E.D. Mich. 1987) (declining to follow *Schlake*); Birbeck v. Southern New England Production Credit Ass'n, 606 F. Supp. 1030, 1034 n. 1 (D. Conn. 1985) (criticizing *Schlake*); United States v. Haynes, 620 F. Supp. 474, 477 (M.D. Tenn. 1985) (declining to follow *Schlake*); *In re* Hoag Ranches, 846 F.2d 1225, 1228-29 (9th Cir. 1988) (same).

158. *Birbeck*, 606 F. Supp. at 1039-44. *See also* Boyster v. Roden, 628 F.2d 1121, 1125 (8th Cir. 1980) (holding that the fiduciary obligations of System institutions are governed by state law, not federal law).

159. *See infra* notes 300-39 and the accompanying text.

160. *Birbeck*, 606 F. Supp. at 1044-45. *See also* Harper v. Federal Land Bank of Spokane, 878 F.2d 1172, 1178 (9th Cir. 1989) (holding that section 1983 is not available because of the absence of state action), *cert. denied*, 110 S. Ct. 867 (1990); Walker v. Federal Land Bank of St. Louis, 726 F. Supp. 211, 214 (C.D. Ill. 1989) ("the FCB is, itself, not a state actor, and thus is not a 'person' for purposes of 1983"); Kolb v. Naylor, 658 F. Supp. 520, 524 (N.D. Iowa 1987) (the "use of state law to foreclose is not sufficient to allege a claim under section 1983").

161. 28 U.S.C.A. §§ 1346(a)(2), 1491(a)(1) (West Supp. 1990). The Tucker Act gives the federal district courts and the United States Claims Court jurisdiction over claims against the United States founded on the United States Constitution, an Act of Congress, a

Tucker Act does not create substantive rights.[162] Also, the Tucker Act does not extend to entities in which the United States has no proprietary interest, and, thus, it does not apply to System lenders.[163]

7. *Truth In Lending*

Credit transactions primarily for agricultural purposes are exempt from the disclosure requirements of the Truth-In-Lending Act.[164] Thus, in virtually all instances, FLB and PCA loans will be exempt from disclosure requirements of the Truth-In-Lending Act.[165]

8. *Federal Tort Claims Act*

The correct rule is that FLBAs and PCAs are not agencies for purposes of the Federal Tort Claims Act (FTCA).[166] However, the Montana Supreme Court recently took the opposite position on this issue, although it later reversed its position in the same case and withdrew its earlier decision. In its initial decision in *Tooke v. Miles City Production Credit Association*,[167] the Montana Supreme Court held that PCAs were subject to the FTCA.[168] In *Tooke*, the Tookes brought suit against the PCA in state court alleging that the PCA had breached its fiduciary duties to them and committed fraud in considering the Tookes' loan application.[169] The court found that the case should have been brought under the FTCA for two reasons.[170] First, the PCA was a federal instrumentality under the test set out in *Lewis v. United States*,[171]

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regulation of an executive department, an express or implied contract with the United States, or an other basis for liquidated or unliquidated damages not sounding in tort. The district court's jurisdiction is limited to claims up to $10,000 and does not include certain claims under the Contract Disputes Act. 28 U.S.C.A. § 1346(a)(2) (West Supp. 1990).

162. *Birbeck*, 606 F. Supp. at 1045.

163. *Id.*

164. 15 U.S.C.A. § 1603(1) (West 1982).

165. *See* Gregory v. Federal Land Bank of Jackson, 515 So. 2d 1200, 1203 (Miss. 1987). *See also* Felt v. Federal Land Bank Ass'n of Belle Fourche, 760 F.2d 209, 210-11 (8th Cir. 1985) (affirming dismissal of claim under the Truth in Lending Act on grounds that the action was time-barred and because of the agricultural purpose exemption).

166. 28 U.S.C.A. §§ 2671-2680 (West 1965 & Supp. 1990); South Central Iowa Production Credit Ass'n v. Scanlon, 380 N.W.2d 699, 700-03 (Iowa 1986); Kolb v. Naylor, 658 F. Supp. 520, 525-26 (N.D. Iowa 1987).

167. Tooke v. Miles City Production Credit Ass'n, No. 87-409 (Mont. March 3, 1988) (Westlaw, MT-CS database, 1988 WL 27167) [hereinafter *Tooke I*], *withdrawn*, 763 P.2d 1111 (Mont. 1988).

168. That holding was reversed when the initial opinion was withdrawn by Tooke v. Miles City Production Credit Ass'n, 763 P.2d 1111 (Mont. 1988).

169. *Tooke I*, slip op. at 3.

170. *Id.*

171. 680 F.2d 1239 (9th Cir. 1982). *Lewis* described the test to determine whether an entity was a federal agency within the meaning of the FTCA as follows: the entity must

and, as a federal instrumentality, it was subject to the FTCA unless the FTCA specifically exempted it from coverage.[172] Second, while the FLB and the FICB were specifically exempted from the FTCA,[173] PCAs were not; thus, they were subject to the FTCA.[174]

The decision was unsound. In essence, it was premised on the notion that the federal government exercises "control over the . . . [PCA's] detailed physical performance and day to day operation."[175] Although recent federal legislation governing the Farm Credit System has been increasingly prescriptive, and the FCA has acquired the status of an independent regulator, PCAs continue to be farmer-owned cooperatives with considerable autonomy.[176] Fortunately, although it claimed to base its change of opinion on "new authority" and not its initial faulty reasoning, the Montana Supreme Court subsequently withdrew its initial opinion in *Tooke* and substituted it with one holding that the PCA was not a federal agency for purposes of the FTCA.[177]

9. *Securities Act*

FLBA and PCA Class B stock is not subject to the Securities Act of 1933[178] or the Securities Exchange Act of 1934.[179] Thus,

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have federal government control over detailed physical performance and daily operation of the entity. *Id.* at 1240. Other factors considered include whether the entity is an independent corporation, whether the government is involved in the entity's finances, and whether the mission of the entity furthers the policy of the United States. *Id.* at 1240-41.

172. *Tooke I*, slip op. at 7.

173. 28 U.S.C.A. § 2680(n) (West 1965).

174. *Tooke I*, slip op. at 7.

175. *Id.*

176. *See generally* HOUSE COMM. ON GOVERNMENT OPERATIONS, FARM CREDIT ADMINISTRATION'S ROLE IN THE SYSTEM'S CRISIS, H. REP. NO. 99-561, 99th Cong., 2nd Sess. 3 (recommending that the FCA implement its new functions under the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985), so as to "zealously guard the cooperative principles of FCS so that as much authority as possible can be exercised at the lowest possible level of the system"); Federal Land Bank of Springfield v. Farm Credit Admin., 676 F. Supp. 1239, 1241 (D. Mass. 1987) (characterizing Farm Credit System banks and associations as "autonomous and locally-oriented," while also being "interdependent and financially interrelated"); Central Kentucky Production Credit Ass'n v. United States, 846 F.2d 1460, 1461 (D.C. Cir. 1988) ("The FCA is an independent regulatory agency that does not itself make, subsidize, or guarantee agricultural loans. Instead, borrowers obtain credit from a national network of privately owned banks and associations"). The autonomy of some PCAs allowed them to prosper while other System institutions were floundering in the 1980s. *See* Sikeston Production Credit Ass'n v. Farm Credit Admin., 647 F. Supp. 1155 (E.D. Mo. 1986); Colorado Springs Production Credit Ass'n v. Farm Credit Admin., 695 F. Supp. 15 (D.D.C. 1988).

177. Tooke v. Miles City Production Credit Association, 763 P.2d 1111, 1114-16 (Mont. 1988) (The court relied heavily on the analysis followed in *In re* Hoag Ranches, 846 F.2d 1225 (9th Cir. 1988), which concluded that a PCA was not a government agency under Fed. R. App. P. 4(a)(1)).

178. 15 U.S.C.A. §§ 77a-77bbbb (West 1981 & Supp. 1990).

179. 15 U.S.C.A. § 771 (West 1981); Dau v. Federal Land Bank of Omaha, 627 F. Supp. 346, 348-49 (N.D. Iowa 1985); Seger v. Federal Intermediate Credit Bank of Omaha, 850 F.2d 468, 469 (8th Cir. 1988); Wiley v. Federal Land Bank of Louisville, 657 F. Supp. 964,

farm borrowers are denied any remedies under the Securities Act.

10. *Federal Indenture Act*

FLBA and PCA stock is exempt under the Federal Indenture Act,[180] thus preventing farm borrowers from seeking any remedies under the Act.

11. *Equal Credit Opportunity Act*

Farm Credit System institutions are subject to the Equal Credit Opportunity Act.[181] Therefore, Farm Credit Institutions must not violate the Equal Credit Opportunity Act regulations.

12. *Fair Debt Collection Practices Act*

In virtually all instances, FLBAs and PCAs will be exempt from the Fair Debt Collection Practices Act[182] because the debt was not incurred for "personal, family, or household purposes."[183] Thus, farm borrowers cannot look to the Fair Debt Collection Practices Act for relief.

13. *Implied Cause of Action Under the Farm Credit Act of 1971 and the Farm Credit Amendments Act of 1985*

Claims of an implied private right of action under the Farm Credit Act of 1971 as the Act existed prior to the effective date of the 1985 amendments have been unsuccessful.[184] In virtually all of those cases, the borrowers were seeking the benefit of the loan

966 (S.D. Ind. 1987) (also holding that System institutions are not subject to the National Bank Act, 12 U.S.C. §§ 85, 86).

180. 15 U.S.C.A. §§ 78a-78kk (West 1981 & Supp. 1990); *Dau*, 627 F. Supp. at 349 (also rejecting a claim under the federal Real Estate Settlement Procedures Act, 12 U.S.C.A. §§ 2601-17 (West 1980 & Supp. 1990), because of the exemptions for parcels in excess of 25 acres).

181. 15 U.S.C.A. §§ 1691-1691f (West 1982 & Supp. 1990).

182. 15 U.S.C.A. §§ 1692-1693r (West 1982 & Supp. 1990).

183. 15 U.S.C.A. §§ 1692a(5) (West 1982 & Supp. 1990); Munk v. Federal Land Bank of Wichita, 791 F.2d 130, 132 (10th Cir. 1986).

184. The following cases have rejected a private cause of action under the Farm Credit Act of 1971: Bowling v. Block, 785 F.2d 556 (6th Cir. 1985), *cert. denied*, 479 U.S. 829 (1986); Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985); Aberdeen Production Credit Ass'n v. Jarrett Ranches Inc., 638 F. Supp. 534 (D.S.D. 1986); Corum v. Farm Credit Services, 628 F. Supp. 707 (D.Minn. 1986); Spring Water Dairy Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F. Supp. 713 (D. Minn. 1986); Apple v. Miami Valley Production Credit Ass'n, 614 F. Supp. 119 (S.D. Ohio 1985), *aff'd*, 804 F.2d 917 (6th Cir. 1986); Hartman v. Farmers Production Credit Ass'n of Scottsburg, 628 F. Supp. 218 (S.D. Ind. 1983); Yankton Production Credit Ass'n v. Jensen, 416 N.W.2d 860 (S.D. 1987); Production Credit Ass'n of Worthington v. Van Iperen, 396 N.W.2d 35 (Minn. Ct. App. 1986); and Johansen v. Production Credit Ass'n of Marshall-Ivanhoe, 378 N.W.2d 59 (Minn. Ct. App. 1985).

servicing regulations[185] promulgated pursuant to the Act.

As it existed prior to the regulations promulgated under the 1985 amendment, those loan servicing regulations provided, in relevant part, that System banks and associations that were originating lenders were to "adopt loan servicing policies and procedures to assure that loans will be serviced fairly and equitably for the borrower while minimizing the risk for the bank and associations."[186] Also, the regulations provided that the "policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract and is capable of working out of the debt burden."[187]

At the risk of oversimplifying the issue, the courts that have rejected the argument that the Farm Credit Act of 1971 implies a private cause of action have done so on two basic grounds. First, with the exception of one federal district court, courts have refused to find that the forbearance policies contemplated by the former loan servicing regulations are substantive rules having the force and effect of law.[188] Rather, the forbearance rules have been found to be merely general statements of agency policy and therefore did not provide a basis for an implied cause of action.[189]

The second ground for rejecting assertions of an implied cause of action under the Farm Credit Act of 1971 has been the absence of any legislative history reflecting a Congressional intent to imply a federal remedy.[190] In applying the fourfold test for ascertaining the existence of an implied cause of action in a federal statute enunciated in *Cort v. Ash*,[191] the courts have tended to focus on the legislative intent prong of the test. The conclusion of the court in *Bowling v. Block*[192] is representative:

> It is readily apparent that the Farm Credit Act

185. 12 C.F.R. § 614.4510 - .4512 (1986) (removed 51 Fed. Reg. 39,486, 39,502 (1986)).

186. 12 C.F.R. § 614.4510 (1986) (removed 51 Fed. Reg. 39, 486, 39,502 (1986).

187. 12 C.F.R. § 614.4510(d)(1), (2) (1986) (removed 51 Fed. Reg. 39,486, 39,502 (1986).

188. *Compare* DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432, 1436-38 (S.D. Ga. 1983) (concluding that section 614.4510 has the "force and effect of law") *with* Smith v. Russellville Production Credit Ass'n, 777 F.2d at 1457-58 ("we disapprove of DeLaigle v. Federal Land Bank of Columbia, *supra*, to the extent that it may be inconsistent with this opinion").

189. Smith v. Russellville Production Credit Ass'n, 777 F.2d at 1548; Federal Land Bank of Springfield v. Saunders, 108 A.D.2d 838, 485 N.Y.Supp. 2d 342 (N.Y. App. Div. 1985), *appeal denied*, 479 N.E.2d 827.

190. *See, e.g.*, Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), *aff'd*, 785 F.2d 556 (6th Cir.), *cert. denied*, 479 U.S. 829 (1986).

191. 422 U.S. 66, 78 (1975).

192. 602 F. Supp. 667, 670-71 (S.D. Ohio 1985), *aff'd*, 785 F.2d 556 (6th Cir.), *cert. denied*, 479 U.S. 829 (1986).

> merely established the machinery by which its purpose, to augment the amount of credit available to the farming community, would be effected. It does not create specific enforceable rights which would necessitate the existence of a private right of action. Further, the Act intimates that the specific entities it creates for the purpose or providing the needed credit — the production credit associations, the federal land bank associations and the banks for cooperatives — are to be operated much like any other private lending institution. Therefore, whatever disputes arise between plaintiffs and the nonfederal defendants must be resolved in the same manner that such a dispute would be resolved if the defendants were common banks or savings and loans.[193]

Thus, the issue of whether the Farm Credit Act of 1971, prior to its 1985 amendment, creates an implied cause of action appears to be firmly resolved in the negative. In light of recent decisions, the same also may be said for the issue of whether the Act, as amended in 1985, created an implied cause of action.

The enactment of the 1985 amendments arguably strengthened arguments for an implied cause of action in at least two respects. First, the availability of forbearance became no longer solely a matter of institutional policy. It was a congressional mandate.[194] Second, the legislative history of the 1985 amendments appeared to support the argument in favor of an implied cause of action.[195] In particular, during the floor debate in the House, Representative De La Garza, the Chairman of the House Committee on Agriculture and sponsor of the House bill[196] that formed the basis for the Act stated that ". . . it would be my understanding that the rights . . . [in the Act] shall be enforceable in courts of law."[197]

The test for determining whether one has an implied cause of action for relief under a federal statute was articulated by the United States Supreme Court in *Cort v. Ash*.[198] Those factors are as follows:

> First, is the plaintiff "one of the class for whose *espe-*

193. *Id.*
194. 12 U.S.C.A. § 2199(b) (West Supp. 1986) (amended 1988).
195. 131 CONG. REC. H11518-19 (daily ed. Dec. 10, 1985).
196. H.R. 3792, 99th Cong., 1st Sess. (1985).
197. 131 CONG. REC. H11518-19 (daily ed. Dec. 10, 1985).
198. 422 U.S. 66 (1975).

> *cial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the 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 inappropriate to infer a cause of action based solely on federal law?[199]

Shortly after the enactment of the 1985 amendments, two courts offered, in dicta, observations as to whether the 1985 amendments to the Farm Credit Act would support a private cause of action.[200] However, in both cases, the court did not need to resolve the issue because the plaintiff was asserting claims based on the Farm Credit Act arising prior to its amendment in 1985.[201]

In the first case to be reported, *Aberdeen Production Credit v. Jarrett Ranches, Inc.*,[202] the court noted the remarks on the House floor by Representative De La Garza.[203] However, because the acts challenged by the plaintiff occurred prior to the enactment of 1985 amendments, the court's remarks were limited to the following:

> This Court does not read this statement to indicate that all regulations of the Farm Credit System were intended to be enforceable in courts of law. The statement was expressly made in reference to "borrowers' rights" established in Title III, 301 et seq. of the 1985 Farm Credit Amendments Act — the "rights" of disclosure and access to documents. The defendants are not claiming any violation of rights allegedly established under the 1985 amendments. Therefore, this Court is not required to consider the significance of the 1985 Farm Credit Amendments Act in determining the existence of a private cause of action.[204]

In the second case, *Production Credit Association of Worth-*

199. Cort v. Ash, 422 U.S. at 78 (emphasis in original) (citations omitted).
200. *See infra* notes 204-10 and the accompanying text.
201. *Id.*
202. 638 F. Supp. 534 (D.S.D. 1986).
203. Aberdeen Production Credit Union v. Jarrett Ranches, 638 F. Supp. 534, 536-37 (D.S.D. 1986).
204. *Jarrett Ranches*, 638 F. Supp. at 537.

ington v. Van Iperen,[205] the court also found it unnecessary to resolve the issue of whether the 1985 amendments created a private cause of action.[206] A decision was unnecessary because "the amendments referred to by the [appellants] were not effective until after the contract date between the parties herein."[207] In passing over the question, however, the court correctly noted that the "substance of the Act" must also be examined and that exclusive reliance could not be made on the statements of Representative De La Garza.[208] The same court later held that no implied private cause of action exists under the 1985 Act.[209]

In subsequent actions where the issue was squarely presented, two federal district courts rejected contentions that the borrowers's rights provisions of the Farm Credit Amendments Act of 1985 created an implied cause of action in favor of Farm Credit System borrowers.[210] In the first of the two cases to be subsequently decided an appeal, *Redd v. Federal Land Bank of St.*

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205. 396 N.W.2d 35 (Minn. Ct. App. 1986).

206. Production Credit Ass'n of Worthington v. Van Iperen, 396 N.W.2d 35, 37 (Minn. Ct. App. 1986).

207. *Id.* at 38.

208. *Id.*

209. Ebenhoh v. Production Credit Ass'n of Southeast Minnesota, 426 N.W.2d 490 (Minn. Ct. App. 1988).

210. Redd v. Federal Land Bank of St. Louis, 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988); Mendel v. Production Credit Ass'n of the Midlands, 656 F. Supp. 1212 (D.S.D. 1987), *aff'd*, 862 F.2d 180 (8th Cir. 1988). However, addressing a related issue, the North Dakota Supreme Court held that an FLB's failure to comply with the System's forbearance regulations may afford a basis for an equitable defense to a foreclosure action notwithstanding the absence of an implied cause of action. Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445, 447-50 (N.D. 1987). *See also* Federal Land Bank of St. Paul v. Bosch, 432 N.W.2d 855, 858 (N.D. 1988) (following *Overboe* in the application of the "equitable defense"); Federal Land Bank of St. Paul v. Asbridge, 414 N.W.2d 596, 597 (N.D. 1987) (same); Federal Land Bank of St. Paul v. Huether, 454 N.W.2d 710, 715 (N.D. 1990) (same).

Unlike the issues in *Redd* and *Mendel*, the issue presented to the North Dakota Supreme Court in *Overboe* assumed that the Farm Credit Act did not afford borrowers a right of action. In *Overboe*, the question was whether, in the absence of a private right of action, a borrower could assert a federal land bank's failure to follow the System's forbearance regulations as a defense to a foreclosure action. 404 N.W.2d at 447. Relying on a line of cases that have allowed a mortgagee's failure to follow HUD mortgage servicing regulations promulgated under the National Housing Act to be asserted as an affirmative defense notwithstanding the absence of a private cause of action under that Act, the court resolved the issue in favor of the borrower. *Id.* at 450.

The administrative forbearance defense permitted by the *Overboe* court permits judicial consideration of both the procedural and substantive aspects of the System institution's action. In that regard, the initial inquiry is whether the institution "has established a general policy of forbearance and whether it applied that policy in arriving at its decision to seek foreclosure. *Id.* at 450. If the trial court finds that the borrower's qualifications were considered by the institution in accordance with its procedures, the court's review of the merits of that consideration must be confined to whether the institution abused its discretion. *Id.* In other words, to prevail, the borrower must show that the institution acted in an "arbitrary, capricious, unreasonable or unconscionable manner." *Id.* The *Overboe* court indicated that the appellate review of a trial court's determination of the substantive issue will be guided by the standard of whether the abuse

Louis,[211] the district court relied on the House Report's discussion of the rejection of an amendment to the 1985 legislation that would have held "directors and officers of the System personally and individually liable for damages suffered when they knowingly violate . . . [the] Act, or any rate regulation or order issued thereunder" as indicating an absence of any intention to create a private cause of action.[212] It bolstered its reliance on the House Report by concluding that the Act's granting of cease and desist powers to the Farm Credit Administration reflected a Congressional intention to so limit the remedy available for violations of the Act.[213] The court discounted Representative De La Garza's statement that the Act created a private cause of action[214] by finding that understanding to be inconsistent with the Act's creation of a remedy in favor of the Farm Credit Administration.[215]

The Eighth Circuit affirmed the district court's decision in *Redd* by finding that the second and third tests under *Cort v. Ash* were not met.[216] The Eighth Circuit agreed with the district court that the remarks of Representative De La Garza were not binding on the court in determining whether an implied cause of action exists.[217] The court looked at the "substance of the amendment to determine whether a cause of action should be implied, rather than the comments of committee persons as they field questions about the bill."[218] The Eighth Circuit reasoned that Congress was aware of the enforcement problems in the Act, but the court found that Congress had answered the problem by granting the FCA broad cease and desist powers.[219] The granting of such broad regulatory powers suggested to the court that Congress did not intend to grant borrowers a private right of action.[220]

The third test under *Cort v. Ash* also provided grounds for the

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of discretion standard of review "appears to have been misapprehended or grossly misapplied." *Id.*

The *Overboe* decision is discussed in greater detail later in this article. See *infra* notes 454-74 and accompanying text.

211. 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988).

212. H.R. REP. NO. 425, 99th Cong., 1st Sess. 44, *reprinted in* 1985 U.S. CONG. & ADMIN. NEWS 2587, 2631.

213. Redd v. Federal Land Bank of St. Louis, 661 F. Supp. at 863 (citing 12 U.S.C.A. §§ 2261, 2264, 2267(b), 2268(a) and (g), and 2269 (West Supp. 1986)).

214. See *supra* note 197 and the accompanying text.

215. *Redd*, 661 F. Supp. at 863-64 (citing 131 CONG. REC. H11518-19 (daily ed. Dec. 10, 1985)).

216. *Redd*, 851 F.2d at 221-22. *See supra* notes 198-99 and the accompanying text for a discussion of the *Cort v. Ash* test.

217. *Id.* at 222.

218. *Id.*

219. *Id.*

220. *Id.*

Eighth Circuit to determine no implied cause of action exists.[221] The court found that the purpose of the 1985 Act was to strengthen the financial condition of the System.[222] Thus, the court reasoned that granting money damages to the Redds would deplete the already diminishing resources of the System and defeat the legislation's purpose.[223]

In the second case to be decided on appeal, also by the Eighth Circuit, *Mendel v. Production Credit Association of the Midlands*,[224] the district court disagreed with the *Redd* court's dismissal of Representative De La Garza's remark.[225] The *Mendel* court found that Representative De La Garza's statement was sufficient to demonstrate intention to create a private remedy.[226] Nevertheless, the district court in *Mendel* also found that the underlying purpose of the 1985 amendments was to "shore up" the finances of the System, and that allowing recovery of monetary damages against a System institution would be inconsistent with that purpose.[227] On that basis, the court in *Mendel* invoked the third element of the *Cort v. Ash* test to deny a private right of action.[228] Relying on its earlier decision in *Redd*, the Eighth Circuit affirmed the result reached by the district court.[229]

14. *Implied Cause of Action Under the Agricultural Credit Act of 1987*

The 1987 Act also does not expressly provide a private cause of action against institutions of the Farm Credit System. However, shortly after System lenders began to implement the 1987 Act, borrowers began asserting that the 1987 Act created an implied private cause of action.[230]

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221. *Id.* *See supra* notes 198-99 and the accompanying text for a discussion of the *Cort v. Ash* test.

222. *Id.* at 222.

223. *Id.* at 222-23.

224. 656 F. Supp. 1212 (D.S.D. 1987), *aff'd*, 682 F.2d 180 (8th Cir. 1988).

225. *Mendel*, 656 F. Supp. at 1216.

226. *Id.*

227. *Id.*

228. *Id.*

229. Mendel v. Production Credit Ass'n of the Midlands, 862 F.2d 180 (8th Cir. 1989). The *Mendel* court repeated the court's earlier holding in *Redd* that the 1985 Amendments to the Farm Credit Act did not create an implied right of damages. *Id.* at 182.

230. Zajac v. Federal Land Bank of St. Paul, No. 88-5353ND (8th Cir. July 31, 1990) (*en banc*) (1990 U.S. App. LEXIS 12932) (no implied cause of action); Griffin v. Federal Land Bank of Wichita, 902 F.2d 22 (10th Cir. 1990) (no implied cause of action); Harper v. Federal Land Bank of Spokane, 692 F. Supp. 1244 (D. Or. 1988), *rev'd*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (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 (D. Kan.

The early reception by the federal district courts to those assertions was mixed. In *Martinson v. Federal Land Bank of St. Paul*,[231] *Harper v. Federal Land Bank of Spokane*,[232] and *Leckband v. Naylor*,[233] the Agricultural Credit Act of 1987 was found to have implied a private cause of action. However, in *Zajac v. Federal Land Bank of St. Paul*,[234] *Wilson v. Federal Land Bank of Wichita*,[235] and *Neth v. Federal Land Bank of Jackson*[236] no implied cause of action was found.

When the issue reached the courts of appeals, the reception ceased to be mixed. Of the three courts of appeals to have reached the issue to date, all have found against an implied cause of action. In those cases, *Harper v. Federal Land Bank of Spo-*

Sept. 26, 1989)(1989 U.S. Dist. LEXIS 11642) (no implied cause of action relying on *Renick*); Ochs v. Federal Land Bank of Wichita, NO. 87-4113-R (D. Kan. July 12, 1989) (1989 U.S. Dist. LEXIS 9079) (no implied cause of action); Wilson v. Federal Land Bank of Wichita, No. 88-4058-R (D. Kan. Jan. 30, 1989) (1989 U.S. Dist. LEXIS 1558) (no implied cause of action); In re Reilly, 105 Bankr. 59 (Bankr. D. Mont. 1989) (no implied cause of action); Neth v. Federal Land Bank of Jackson, 717 F. Supp. 1478 (S.D. Ala. 1988) (no 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. May 5, 1989) (finding an implied cause of action); *In re* Jarrett Ranches, Inc., 107 Bankr. 963 (Bankr. D.S.D. 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. 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*, Dec. 7, 1989 (1989 U.S. App. LEXIS 18809) (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. 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); Williams v. Federal Land Bank of Jackson, 729 F. Supp. 1389 (D.D.C. 1990) (same).

231. 725 F. Supp. 469 (D.N.D. 1988), *appeal dismissed*, No. 88-5202 (8th Cir. May 5, 1989).

232. 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990).

233. 715 F. Supp. 1451 (D. Minn. 1988), *appeal dismissed*, No. 88-5301 MN (8th Cir. May 5, 1989). *Accord In re* Jarrett Ranches, Inc., 107 Bankr. 963, 965 (Bankr. D.S.D. 1989) (relying on Leckband and Martinson, and noting that "the Eighth Circuit has yet to provide guidance on . . . [the] issue"). Subsequently, the Eighth Circuit held against an implied cause of action. Zajac v. Federal Land Bank of St. Paul, No. 88-5353ND (8th Cir. July 31, 1990) (1990 U.S. App. LEXIS 12932).

234. No. A3-88-115 (D.N.D. July 19, 1988) (1989 U.S. Dist. LEXIS 16698), *aff'd*, No. 88-5353ND (8th Cir. July 31, 1990) (1990 U.S. App. LEXIS 12932).

235. No. 88-4058-R (D. Kan. Jan. 30, 1989) (1989 U.S. Dist. LEXIS 1558). *Accord* Renick Bros., Inc. v. Federal Land Bank Ass'n of Dodge City, 721 F. Supp. 1198 (D. Kan. 1989); Stoppel v. Farm Credit Bank of Wichita, No. 89-1221-C (D. Kan. Sept. 26, 1989) (1989 U.S. Dist. LEXIS 11642); Ochs v. Federal Land Bank of Wichita, No. 87-4113-R (D. Kan. July 12, 1989) (1989 U.S. Dist. LEXIS 9079).

236. 717 F. Supp. 1478 (S.D. Ala. 1988).

kane,[237] *Griffin v. Federal Land Bank of Wichita*,[238] and *Zajac v. Federal Land Bank of St. Paul*,[239] the Ninth, Tenth, and Eighth Circuits each rejected the claim that the 1987 Act created an implied private cause of action.

The differences between the courts can best be illustrated by a comparison of the majority and dissenting opinions in *Zajac*. Each opinion addressed each element of the *Cort* test, and each made reference to the prior decision of the Ninth Circuit in *Harper*.

As noted earlier,[240] the first inquiry under *Cort* is whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."[241] In *Zajac*, the plaintiffs were seeking to secure through injunctive relief an independent appraisal of the collateral securing their FLB loan at the credit review committee stage of the loan restructuring process, a right granted by the 1987 Act[242] which they alleged had been improperly denied them.[243] The Zajacs argued that the provisions of the 1987 Act at issue were enacted for their benefit as System borrowers.[244]

The majority in *Zajac* declined to decide whether the Zajacs were within the class for whose benefit the Act was enacted on the grounds that the "Zajacs cannot make the other showings required by *Cort*."[245] However, the majority noted that, in the earlier *Harper* decision, the Ninth Circuit had found that the primary purpose of the 1987 Act was to respond to the financial crisis facing the System. Specifically, although the Ninth Circuit conceded that one of the purposes of the loan restructuring provisions of the 1987 Act was to benefit borrowers seeking loan restructuring, the court chose to "look at the overall purpose of the 1987 Act . . . and

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237. 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990).

238. 902 F.2d 22 (10th Cir. 1990).

239. Zajac v. Federal Land Bank of St. Paul, No. 88-5353 ND (8th Cir. July 31, 1990)(enbanc)(1990 U.S. App. LEXIS 12932).

240. See *infra* notes 198-199 and the accompanying text.

241. Cort v. Ash, 422 U.S. 66, 78 (1978).

242. 12 U.S.C.A. § 2220(d) (West 1989). The right to an independent appraisal where a loan restructuring application denial is under review by a credit review committee is specifically afforded to borrowers by the Technical Corrections Act of 1988, Pub. L. No. 100-399, sec. 103, 102 Stat. 989, 990 (1988)(codified at 12 U.S.C.A. § 2202(d)(1), (2), (3) (West 1989). *See infra* notes 407-09 and the accompanying text.

243. *Zajac*, slip op. at 7 (Heaney, J., dissenting). At the time that the Zajacs brought their action for injunctive relief before the federal district court, a foreclosure action brought by the FLB was pending against them. In a concurring opinion joined by Judge McMillian, Judge Arnold concluded that the Zajac's request for injunctive relief was barred by the Anti-Injunction Act, 28 U.S.C. § 2283. *Id.* at 4-5.

244. *Id.*, slip op. at 2.

245. *Id.* The loan restructuring provisions are found in Title I of the 1987 Act entitled "Assistance to Farm Credit System Borrowers." Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, 1572 (1988).

conclude that the major impetus for the legislature was the financial crisis of the Farm Credit System."[246] In doing so, the Ninth Circuit in *Harper* implicitly rejected the claim that the loan restructuring provisions of the 1987 Act were enacted for the special benefit of borrowers.[247]

The dissent in *Zajac* addressed the first test of *Cort* and concluded that it had been satisfied. It found that borrowers were a "protected class under the Act because its language and structure established broad rights for borrowers and mandatory duties for lenders."[248]

With respect to the second and most significant aspect of the *Cort* test, legislative intent, the majority in *Zajac* focused on the rejection of an amendment to the House bill[249] that formed the basis of the 1987 Act that would have expressly granted borrowers a right of action to enforce the Act. Although the dissent in *Zajac* relied heavily on other aspects of the legislative history of the legislation, it also referenced the rejection of the amendment. However, the two opinions put a different gloss on that rejection.

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246. *Harper*, 878 F.2d at 1176 (citing Midlantic Nat'l Bank v. New Jersey Dept. of Envt'l Protection, 474 U.S. 494, 501 (1986).

247. The distinction that the Ninth Circuit implicitly made between the financial interests of the Farm Credit System and those of its borrowers reflects a misunderstanding of the loan restructuring provisions of the 1987 Act. As is discussed later in this article, the 1987 Act requires a System lender to restructure a loan only when the restructured loan would result in a greater financial return to the institution than would be achieved through a foreclosure. In other words, loan restructuring under the Act is intended to force System institutions to act in their best financial interests by requiring them to consider alternatives to foreclosure. Accordingly, the distinction implicitly made by the Ninth Circuit is artificial and at odds with the goals of the Act. *See infra* notes 365-411 and the accompanying text. *See also Zajac*, slip op. at 21 (Heaney, J., dissenting) ("Granting borrowers a private right for injunctive relief requires lenders to weigh the costs of restructuring against the costs of foreclosure before resorting to the latter. Injunctive relief strenghtens, rather than weakens, the Farm Credit System by requiring lenders to make a decision based on a thorough review of all factors and procedures deemed important by Congress"); H. Rep. 100-295 (I), 100th Cong., 1st Sess. 62, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2723, 2733 ("Complaints about the rights of System borrowers being abused at both the association and district levels have been like a constant drumbeat in the offices of some Members of Congress for several years. The package of borrower rights adopted in H.R. 3030 reflect a common sense approach which should have been standard operating procedures in a cooperative, borrower-owned lending system."). *But see* Walker v. Federal Land Bank of St. Louis, 726 F. Supp. 211, 217 (C.D. Ill. 1989). In reflecting on why Congress may have decided not to include an express cause of action in the 1987 Act, the court surmised that, "Congress may well have decided that a private right of action under the 1987 Act would generate too many meritless lawsuits filed simply to postpone the inevitable, and that these lawsuits, in addition to those with merit, would pose too heavy a financial burden upon the already strapped Farm Credit System." *Id.*

248. *Zajac*, slip op. at 33 n. 15 (Heaney, J., dissenting) ("The detail and precision with which Congress set forth borrowers' rights under . . . [the restructuring section of the 1987 Act] are powerful indicators [of] Congress' intent to confer specific enforceable rights on borrowers." *Id.* at 13).

249. H.R. 3030, 100th Cong., 1st Sess. (1987).

The dissent in *Zajac*, relying on colloquies[250] on the House

250. In introducing legislation that would have expressly created a cause of action, Representative Watkins of Oklahoma stated:

> My amendment would allow the borrower the right to sue. I really believe in my heart that the right to sue is implied within the bill itself, but I think it is our responsibility and our obligation to make sure that there is no question that the borrower has that right. If a person has a loan and has worked with the Farm Credit System and has suffered some legal wrong or been aggrieved or adversely affected by certain violations of the Farm Credit System, they should have a right to be able to sue.
>
> Every one of us in this Chamber today has heard of dictatorial actions, and we have heard of rigid abuses from individuals against the farmer and against the landowner, and they really have had no recourse to try to remedy their problems. I think my amendment assures them that they have that right if they can prove the wrong.

131 CONG. REC. H7692 (daily ed. Sept. 21, 1987).

Further discussion of the amendment brought about the following exchanges with Representatives Glickman and De La Garza:

> Mr. GLICKMAN: Mr. Chairman, I thank you gentleman for yielding to me.
>
> What factually right now is the state of the law as it relates to a borrower's right to sue? He is allowed to sue under State law, but not Federal law?
>
> It would be useful to know what right a borrower would have to enforce a decision by the Farm Credit System right now in court.
>
> Mr. WATKINS: I think, if the gentleman from Kansas might recall, some States do allow it, and some States do not.
>
> What we are saying is, so there will not be any mistake under this particular Federal legislation, that it be established that they do have the right to be able to sue if they feel like they have been legally wronged or adversely affected by some actions from the Farm Credit System.
>
> Mr. DE LA GARZA: Mr. Chairman, I thank the gentleman for yielding to me.
>
> I have no problem with the gentleman's intention in allowing borrowers to sue, although I think basically they have that right now.

131 CONG. REC. H7693 (daily ed. Sept. 21, 1987).

The Senate also debated the right of individuals to sue System institutions. Senator Burdick of North Dakota offered an amendment which gave any person, not just borrowers, the right to sue:

> This amendment is made necessary only because the House, in their Farm Credit bill, included a right to sue provision that actually restricts the right to sue.
>
> Currently, any person has the right to sue these two entities. However, the House provision arguably limits this right to borrowers of the System. This restricts rights of persons who are not yet borrowers, or who are former borrowers, to sue.
>
> My amendment simply clears up these problems and restores the rights to all persons, whether borrowers or not.
>
> My amendment also gives persons the right to sue in Federal Court. This does not create additional litigation, as some will argue, but only gives the option of suing in Federal court.

131 CONG. REC. S16995 (daily ed. Dec. 2, 1987).

Following Senator Burdick's statement, the following exchange occurred:

> Mr. BOREN: Mr. President, I have listened with interest as my good friend and colleague from North Dakota has explained the purpose of his amendment. I have certainly a high degree of sympathy with the principles that he has set forth.
>
> It has been our hope since we have carefully crafted this legislation in the committee that we not reopen this matter at this time. However, I am told that the house has unduly restricted the right of the borrower to bring suit and that this is the proposal that is in the House bill. It would be my thought, and I have also discussed this with Senator LEAHY, and Senator LUGAR will speak for himself, that we would oppose that House provision in the conference committee.

floor addressing proposals for an express cause of action that reflected, among other things, the misapprehension that a cause of action already existed, concluded that Congress contemplated that the borrowers' rights provisions of the Act would be enforceable without an express provision to that effect.[251] On the other hand, the majority in *Zajac* declined to give any weight to the remarks of individual members of Congress.[252] Instead, the majority based its conclusions on legislative intent solely on the conference committee report. That report noted that the committee had deleted the private right of action provision.[253]

In drawing its conclusions concerning legislative intent from the conference committee report, the majority in *Zajac* expressly adopted the analysis followed by the Ninth Circuit in *Harper*. Accordingly, the majority in *Zajac* reasoned that the conference committee report " 'represents the final statement of the terms agreed to by both houses' "[254] and that " '[n]ext to the statute itself it [the report] is the most persuasive evidence on congressional intent'."[255]

The *Harper* court had noted that an implied cause of action to enforce Farm Credit legislation had been consistently denied by courts as of the time of the debate on the 1987 Act. It then invoked the "normal rule of statutory construction . . . that if Congress intends for legislation to change the interpretation of a judi-

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That would have much the same effect as the adoption of the Burdick amendment would have without our attempting to write the actual language of the amendment here on the floor at this time.

I wonder if the Senator might consider withholding the actual offering of this amendment with the understanding that the Senate conferees would oppose the House amendment in the conference.

Mr. BURDICK: The proposal of the Senator is very acceptable.

Mr. BORDEN: I thank my colleague, and I believe the Senator from Indiana also has the same view.

Mr. LUGAR: Mr. President, I would confirm the understanding that the distinguished Senator from this amendment. We will in fact oppose the House amendment in conference. We understand the problem, and we would appreciate the Senator's not pursuing this amendment on this occasion with that assurance.

131 CONG. REC. S16995 (daily ed. Dec. 2, 1987).

The Senate was concerned that the House amendment would limit the existing right of individuals to sue System institutions and opposed the House amendment in Conference Committee. The House amendment was thus deleted. H.R. REP. NO. 100-490, 100th Cong., 1st Sess. 178, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2723, 2973. *See also Zajac*, slip op. at 21-24 (Heaney, J., dissenting) (discussing the foregoing and other remarks made on the floor).

251. *Zajac*, slip op. at 22 n. 5 (Heaney, J., dissenting).

252. *Id.*, slip op. at 2-3.

253. *Id.*

254. *Id.* (citing *Harper*, 878 F.2d at 1176).

255. *Id.*

cially created concept, it makes that intent specific."[256] Applying that rule, the Ninth Circuit found that the deletion from the final version of the 1987 Act of a provision for an express cause of action reflected a Congressional intention that a cause of action also should not be implied.[257] The *Zajac* majority concurred.[258]

The *Zajac* majority and dissent were also at odds in their application of the third aspect of the *Cort* test; whether an implied cause of action would be consistent with the legislation's purpose.[259] The majority agreed with the Ninth Circuit's conclusion in *Harper* that the enforcement powers granted to the Farm Credit Administration revealed a legislative intention to exclude any other remedy.[260] The Ninth Circuit reached this conclusion even after acknowledging that those remedies might be inappropriate or ineffective because

> . . . there is no procedure for filing charges or for compelling FCA to commence an investigation. . . . [The] FCA's enforcement apparatus is inadequate to enforce the borrower's rights. . . . [The] FCA's authority to issue temporary cease and desist orders is limited to violations likely to cause insolvency and that FCA's issuance of permanent cease and desist orders is extremely time consuming. . . . [And] [t]here is no provision in the statute guaranteeing any remedy for the individual borrower."[261]

However, the dissent in *Zajac* vigorously took issue with the assertion that an implied cause of action would not be consistent with the scheme of the 1987 Act. The dissent seized on the inade-

256. *Harper*, 878 F.2d at 1176 (citing Midlantic Nat'l Bank v. New Jersey Dept. of Envt'l Protection, 474 U.S. 494, 501 (1986)).

257. *Id.*

258. *Zajac*, slip op. at 3-4. The dissent in *Zajac* argued that the *Harper* court's approach, specifically, its heavy reliance on the conference committee report, "relegates the language and structure of the statute to insignificant status under its *Cort v. Ash* analysis." *Id.* at 14 (citation omitted). The dissent maintained that "[a]s long as the implied cause of action doctrine exists, the dominant focus must be the language and structure of the Act in question." *Id.* at 15 (citing Thompson v. Thompson, 484 U.S. 174, 520 (1988)).

259. *Cort*, 422 U.S. at 66.

260. *Zajac*, slip op. at 3 (citing *Harper*, 878 F.2d at 1176).

261. *Harper*, 878 F.2d at 1176. *But see* Leckband v. Naylor, 715 F. Supp. 1451, 1455 (D. Minn. 1988) (finding an implied cause of action for reasons including that "[t]he cease and desist powers granted FCA by 12 U.S.C. § 2262 are inappropriate, both in scope and timimg, to effectively protect . . . [the right of first refusal granted to borrowers under the 1987 Act]"), *appeal dismissed* No. 88-5301 MN (8th Cir. May 5, 1989); *In re* Jarrett Ranches, Inc., 107 Bankr. 963, 967-68 (Bankr. D.S.D. 1989) (discussing the inadequacy of the FCA's powers as a means of protecting the right of first refusal granted to borrowers under the 1987 Act and finding an implied cause of action based, in part, on those inadequacies). *See also* Massey & Schneider, *supra* note 6, at 613-14 (discussing the inadequacy of the FCA as a protector of the borrowers rights provisions of the 1987 Act).

quacies of the FCA's powers noted in *Harper* as evidencing "[t]he plain fact . . . that the FCA is in no position to effectively enforce the borrowers rights provisions of the 1987 Act."[262] Moreover, it noted that the record before it did not support the view that the FCA has "either the ability or the willingness to enforce the borrowers' rights provisions."[263]

Finally, in addressing the fourth element of the *Cort* test,[264] the *Zajac* majority held that protecting rights created by federal law such as the right at issue would be "inappropriate" "because foreclosure is an area 'traditionally controlled by state law'."[265] That holding is consistent with *Harper*. There, the Ninth Circuit held that because the loan restructuring provisions of the 1987 Act were tied to the commencement of state law-governed foreclosure proceedings, the cause of action sought to be implied was one traditionally relegated to state law.[266]

On the other hand, the dissent in *Zajac* concluded that the protection of the federally created rights was appropriate, particularly when the right being protected, such as the right to an independent appraisal, was procedural. For that reason, the dissent would have limited the cause of action to injunctive relief tailored to secure lender compliance with the procedures prescribed by one or more of the specific borrowers' rights provisions. The dissent expressly disavowed any desire to imply a cause of action in favor of borrowers to secure judicial review of the merits of lender decisions, such as the decision to foreclose rather than to restructure.[267]

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262. *Zajac*, slip op. at 29 (Heaney, J., dissenting).

263. *Id.* at 30 (Heaney, J., dissenting). *But see* Walker v. Federal Land Bank of St. Louis, 726 F. Supp. 211, 216 (C.D. Ill. 1989) (in finding no implied private right of action, the court stated, "[b]ut clearly the *Zajac* court missed the point. . . . That the Farm Credit Administration has been lax in complying with Congressional intent is of no moment. . . ."). One of the borrowers' rights provisions relating to loan restructuring provides that "[t]he Farm Credit Administration may issue a directive requiring compliance with any provision of this section [Restructuring distressed loans] to any qualified lender that fails to comply with such provision." 12 U.S.C.A. § 2202a(i) (West Supp. 1989). Although that broad grant of authority would appear not to encompass the enforcement of borrowers' rights in areas other than loan restructuring, it does afford the basis for a more zealous oversight of the protection of borrowers in the process of seeking loan restructuring than the FCA has chosen to exercise. *See generally* Massey & Schneider, *supra* note 6, at 613-14 (discussing the "passivity" of the FCA in enforcing the borrowers' rights provisions of the 1987 Act).

264. *Cort*, 422 U.S. at 78.

265. *Zajac*, slip op. at 4 (citing *Harper*, 878 F.2d at 24).

266. *Harper*, 878 F.2d at 1177.

267. *Zajac*, slip op. at 33 n. 15 (Heaney, J., dissenting). Specifically, the dissent stated that it "would not be appropriate for a federal court to intrude into credit decisions of a System lender if the lender complies with the statutorily mandated procedures." *Id.*, slip op. at 33. Such an approach, had it been adopted by the majority, would have been consistent with earlier analogous decisions of the Eighth Circuit concerning the scope of review of the denial of Farmers Home Administration (FmHA) loan applications. Tuepker

The three courts of appeals that have ruled against an implied cause of action encompass within their respective circuits large areas of the major agricultural regions of this country. Accordingly, their respective decisions have a significant impact on large numbers of System borrowers. Moreover, their decisions will most certainly influence other circuits that may confront the issue. It appears that if borrowers are to be given the right to enforce the borrowers' rights provisions of the Farm Credit Act, as amended, the grant will have to be expressly made by Congress.

15. *RICO*

The federal RICO statute[268] appears to offer a basis for federal jurisdiction over PCAs and FLBs. However, there are no reported successful RICO actions against a PCA or FLB.[269] At least one federal district court, in an action brought *pro se*, has held, without elaboration, that because Farm Credit System institutions are federal instrumentalities, they are immune from liability under RICO.[270]

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v. Farmers Home Admin., 708 F.2d 1329, 1332 (8th Cir. 1983) (declining to review the denial of an FmHA loan in the absence of a claim "alleging a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error, going to the heart of the administrative determination"); Woodsmall v. Lyng, 816 F.2d 1241, 1245 (8th Cir. 1987) (declining to review the denial of an FmHA loan because the applicant was not creditworthy on the grounds that the federal courts "are not equipped to undertake such a task, for in these matters we have neither the training nor the experience of an FmHA loan officer").

268. 18 U.S.C.A. §§ 1961-68 (West 1984 & Supp. 1990). The federal RICO statute (racketeer influenced and corrupt organizations) claims are usually brought under § 1962(c) which provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C.A. § 1962(c) (West 1984 & Supp. 1990).

269. *See* Federal Land Bank of Omaha v. Gibbs, 809 F.2d 493, 496 (8th Cir. 1987) (stating that plaintiff's RICO claim fails to state a claim upon which relief can be given); Brekke v. Volcker, 652 F. Supp. 651, 655 (D. Mont. 1987) (holding plaintiff's RICO claim inadequate); Creech v. Federal Land Bank of Wichita, 647 F. Supp. 1097, 1100-11 (D. Colo. 1986) (stating that plaintiff's RICO claim failed to state underlying facts with enough specificity); Schroder v. Volcker, 646 F. Supp. 132, 135 (D. Colo. 1986) (holding that plaintiff failed to state a claim), *aff'd*, 864 F.2d 97 (10th Cir. 1988); Jacobson v. Western Montana Production Credit Ass'n, 643 F. Supp. 391, 395-96 (D. Mont. 1986) (stating that RICO action failed due to lapsed statute of limitations); Criswell v. Production Credit Ass'n, 660 F. Supp. 14, 16 (S.D. Ohio 1985) (stating that RICO claim failed to distinguish between enterprise and culpable person).

270. Wiley v. Federal Land Bank of Louisville, 657 F. Supp. 964, 967 (S.D. Ind. 1987) (also holding that the National Bank Act, 12 U.S.C. §§ 85, 86, does not apply to System institutions).

16. *Other Theories*

The following are other theories or claims which have been unsuccessfully asserted against System institutions:

a. Purchase of Stock
A Mississippi court has held that FLBA and PCA required purchases of stock are valid requirement in order to obtain financing, and those purchases do not create an " 'unlawful debt' " for " 'seeming nonexistent capital stock'."[271]

b. Renouncing Citizenship
The appellate court of Colorado rejected a farmer's attempt to stop foreclosure by renouncing his United States citizenship.[272]

c. Land Patent
At least two courts have held that arguing that possession of an original land patent precludes foreclosure constituted a frivolous claim under Rule 11 of the Federal Rules of Civil Procedure warranting sanctions.[273]

B. STATE COURT JURISDICTION

The amenability of Farm Credit System institutions to suits in state court on common law causes of action is beyond dispute.[274]

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271. Gregory v. Federal Land Bank of Jackson, 515 So. 2d 1200, 1204 (Miss. 1987).

272. Federal Land Bank of Wichita v. Deatherage, 739 P.2d 905, 906 (Colo. Ct. App. 1987) (holding that no basis in law exists to support plaintiff's claim).

273. Federal Land Bank of Spokane v. Redwine, 755 P.2d 822, 825 (Wash. Ct. App. 1988) (stating that use of the land patent was an obvious attempt to improve title by personal fiat); Britt v. Federal Land Bank Ass'n of St. Louis, 505 N.E.2d 387 (Ill. Ct. App. 1987) (holding that filing of alleged "land patent" by former mortgagors after judgment of foreclosure did not vest mortgagors with superior title), *appeal denied*, 515 N.E.2d 102 (Ill. 1987).

274. *E.g.*, Bowling v. Block, 602 F. Supp. 667, 670 (S.D. Ohio 1985), *aff'd*, 785 F.2d 556 (6th Cir.), *cert. denied*, 479 U.S. 829 (1986); Boyster v. Roden, 628 F.2d 1121, 1125 (8th Cir. 1980); Johansen v. Production Credit Ass'n of Marshall-Ivanhoe, 378 N.W.2d 59, 62 (Minn. Ct. App. 1985). In recent years, many of the state court actions against System lenders premised on common law causes of action have been lender liability claims. The literature on lender liability is becoming voluminous. For a sampling, see Flick & Replansky, *Liability of Banks to the Borrowers: Pitfalls and Protections*, 1986 BANKING L.J. 220; Bahls, *Termination of Credit for the Farm or Ranch: Theories of Lender Liability*, 48 MONT. L. REV. 213 (1987); Kelley, *Some Observation on Lender Liability and Representing the Farmer/Borrower*, AGRIC. L. UPDATE, Dec. 1986, at 4; Kelley, *supra* note 4; Special Project, *Lender Liability: A Survey of Common Law Theories*, 42 VAND. L. REV. 855 (1989); Lawrence & Wilson, *Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing*, 63 IND. L.J. 825 (1988); Ebke & Griffin, *Good Faith and Fair Dealing in Commercial Lending Transactions: From Covenant to Duty and Beyond*, 49 OHIO ST. L.J. 1397 (1989); Kunkel, *The Fox Takes Over the Chicken House: Creditor Interference with Farm Management*, 60 N.D.L. REV. 435 (1984); Tyler, *Emerging Theories of Lender Liability in Texas*, 24 HOUSTON L. REV. 411 (1987); Note, *The Fiduciary Controversy:*

However, courts have been vigilant in frustrating attempts to convert violations of the Farm Credit Act or the regulations promulgated under into state law causes of action. For example, it has been held that the Farm Credit Act and the regulations promulgated under it neither create enforceable duties upon which to base a negligence claim[275] nor does their violation support a claim based on the tort of bad faith.[276] Similarly, alleged violations of the Act have been held not to support a claim based on the breach of the contractual duties of good faith and fair dealing.[277] In essence, the rejection of such claims has been based on the absence of an expressed or implied cause of action under the Farm Credit Act and the reasoning that " 'the law does not permit by indirection what cannot be accomplished directly'."[278]

V. MISCELLANEOUS MATTERS

A. PUNITIVE DAMAGES

The prevailing view is that punitive damages are not awarda-

Injection of Fiduciary Principles into the Bank-Depositor and Bank Borrower Relationships, 20 LOY. L.A.L. REV. 795 (1987); Hagedorn, *The Impact of Fiduciary Principles on the Bank-Customer Relationship in Washington*, 16 WILLAMETTE L. REV. 803 (1980); Ellis & Gray, *Lender Liability for Negligently Processing Loan Applications*, 92 DICK. L. REV. 363 (1988); Fischel, *The Economics of Lender Liability*, 99 YALE L.J. 131 (1989); Nickles, *The Objectification of Debtor-Creditor Relations*, 74 MINN. L. REV. 371 (1989); Weissman, *Lender Liability: The Obligation to Act in Good Faith and Deal Fairly*, 8 COM. DAMAGES REP. 239 (1986); Douglas-Hamilton, *Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor*, 31 BUS. LAW. 343 (1975); Comment, *Lenders' Liability — The Shift from Contract to Tort Doctrine Deters Banks from Enforcing Unjustified and Detrimental Contract Provisions*, 21 J. MARSHALL L. REV. 369 (1988); Note, *Trust and Confidence and the Fiduciary Duty of Banks in Iowa*, 35 DRAKE L. REV. 611 (1985-86); Annotation, *Existence of Fiduciary Relationship Between Bank and Depositor or Customer So As To Impose Special Duty of Disclosure upon Bank*, 70 A.L.R. 3D 1344 (1976); Annotation, *Measure and Elements of Damages for Breach of Contract to Lend Money*, 4 A.L.R. 4TH 682 (1981); Annotation, *Recoverability of Compensatory Damages for Mental Anguish of Emotional Distress for Breach of Contract to Lend Money*, 52 A.L.R. 4TH 371 (1987); Annotation, *Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing*, 55 A.L.R. 4TH 1026 (1987).

Lender liability litigation on behalf of borrowers against System institutions can be frustrating. For examples, see Zwemer v. Production Credit Ass'n of the Midlands, 792 P.2d 245 (Wyo. 1990); Nelson v. Production Credit Ass'n of the Midlands, 729 F. Supp. 677 (D. Neb. 1989); *In re* Louden, 106 Bankr. 109 (Bankr. E.D. Ky. 1989) (adversary proceeding against FLB); Lawrence v. Farm Credit System Capital Corp., 761 P.2d 640 (Wyo. 1988). *But see, e.g.*, Federal Land Bank Ass'n of Tyler v. Sloane, No. 12-88-00231-CV (Texas Ct. App. May 31, 1990) (1990 Tex. App. LEXIS 1345) (partially successful lender liability action against FLBA).

275. Yankton Production Credit Ass'n v. Jensen, 416 N.W.2d 860, 864 (S.D. 1987). *See also infra* note 299 and the accompanying text (discussing the related, but distinct, issue of negligence claims based on lender violations of their internal loan policies).

276. Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 121-25 (N.D. 1990).

277. Mendel v. Production Credit Ass'n of the Midlands, 656 F. Supp. 1212, 1217 (D.S.D. 1987), *aff'd*, 862 F.2d 180, 183-84 (8th Cir. 1988).

278. Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 124-25 (N.D. 1990) (citation omitted). For a discussion of the implied cause of action issue under the Farm Credit Act, as amended, see *infra* notes 184-267 and the accompanying text.

ble against a Farm Credit System institution. Generally, a federal instrumentality enjoys immunity from suit unless it waives that immunity. Congress has waived immunity from suit for Farm Credit System institutions by giving them the authority "to sue and be sued."[279]

Nevertheless, a federal instrumentality "retains its immunity from punitive damages unless Congress *explicitly* authorizes liability for such damages."[280] Several courts have held that the "sue and be sued" clause for PCAs does not waive immunity from punitive damages.[281] However, a federal district court recently denied a motion to dismiss a claim for punitive damages against an FLB on the grounds that the FLB's tort liability was the same as a private lender.[282]

By analogizing the Farm Credit System to the law governing federal and other public officers and employees, Farm Credit System directors, officers, or employees may not enjoy immunity from punitive damage awards for unlawful acts or conduct outside the scope of their authority when they are sued in their individual capacities.[283] Attorneys representing borrowers should be aware that the bylaws of many FLBA's and PCA's forbid indemnification of directors, officers, and employees for liabilities arising out of the person's gross negligence or willful misconduct in the performance of official duties.[284] Therefore, a suit against an individual based on gross negligence or willful misconduct is not, in effect, a suit against the institution. However, at least two courts have held that Farm Credit System employees are not subject to punitive damages for acts undertaken in their employment.[285]

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279. 12 U.S.C.A. § 2013(4) (FCBs), 2073(4) (PCAs), 2093(4) (FLBAs) (West 1989). *See In re* Sparkman, 703 F.2d 1097, 1101 (9th Cir. 1983) (citing Federal Housing Admin. v. Burr, 309 U.S. 242 (1940)).

280. *In re* Sparkman, 703 F.2d at 1101 (emphasis in original).

281. *Id. See also* Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544, 1549-50 (11th Cir. 1985). *In re* Sparkman, 703 F.2d at 1101; Rohweder v. Aberdeen Production Credit Ass'n, 765 F.2d 109, 113 (8th Cir. 1985). *Accord* Smith v. Russellville Production Credit Ass'n, 777 F.2d at 1549-50. *See generally PCAs and Other Chameleons*, 3 AGRIC. L. UPDATE 1 (March 1986) (discussing the scope of the "sue and be sued" provision).

282. Jackson v. Farm Credit Admin. of America, No. CV-F-88-636 REC, slip op. at 30-31 (E.D. Cal. May 9, 1989) (citing Sterrett v. Milk River Production Credit Ass'n, 647 F. Supp. 299, 303 (D. Mont. 1986)).

283. *E.g.*, Davis v. Passman, 442 U.S. 228 (1979) (stating that congressmen may be sued for sexual discrimination); Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (FBI agent held subject to punitive damages under 42 U.S.C.A. § 1985(3)).

284. The bylaws of System institutions are available to member-borrowers on request. 12 U.S.C.A. § 2200 (West 1989).

285. Reilly v. Production Credit Ass'n of the Midlands, No. 11243 (Osceloe Co., Iowa, Dist. Ct. Sept. 4, 1986) (holding that punitive damages were not awardable against a PCA employee sued in his capacity as an employee); Wilson v. Federal Land Bank of Wichita, No. 88-4058R (D. Kansas Jan. 30, 1989) (1989 U.S. Dist. LEXIS 1558) (FLB agents and

B. DISCOVERY

Rather than operating as a shield from discovery, the Farm Credit System regulations have been held "to disclose an intent to provide information in a court proceeding. . . ."[286] In that case, Agrivest Partnership v. Central Iowa Production Credit Association,[287] a PCA declined to produce certain board minutes as requested by the plaintiff.[288] The PCA asserted a privilege based on 12 C.F.R. §§ 618.8300 and 618.8320 (1985) which imposed both specific and general confidentiality requirements.[289]

In resolving the issue under an evidentiary rule similar to Rule 501 of the Federal Rules of Evidence, the Iowa Supreme Court noted that "privileges should not be called into play merely because an agency, acting on only general authority, issues regulations declaring certain information privileged."[290] From that point, the court reviewed other Farm Credit System regulations relating to the dissemination of information.[291] It found that 12 C.F.R. § 618.8330 (1985), which authorized employee testimony of production of documents "to the extent as under the conditions directed by the court," as counseling "greater liberality" than that shown by the PCA in the action before it.[292] Moreover, the court held that the regulations invoked by the PCA were not intended to apply to discovery requests, and that the PCA had no statutory or regulatory privilege.[293] The court also declined to find a common law governmental privilege.[294]

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attorneys not liable for punitive damages for actions taken in the course of the agency relationship).

286. AgriVest Partnership v. Central Iowa Production Credit Ass'n, 373 N.W.2d 479, 485 (Iowa 1985).

287. *Id.*

288. *Id.* at 481.

289. *Id.*

290. *Id.* at 483 (citations omitted). *See also* Matter of Nelson, 131 F.R.D. 161, 163 (D. Neb. 1989) (FCA regulations "cannot supplant the authority of the judicial branch to control discovery proceedings" (citations omitted)). However, courts have held that "[i]n order to secure information within the scope of regulations such as 12 C.F.R. § 602.289 [relating to responses to demands for FCA documents served on non-FCA employees and entities], a litigant must comply with agency regulations regarding discovery requests." Interstate Production Credit Ass'n v. Fireman's Fund Ins. Co., 128 F.R.D. 273, 276 (D. Ore. 1989) (citation omitted).

291. *AgriVest*, 272 N.W.2d at 483.

292. *Id.* at 485.

293. *Id. See also* Matter of Nelson, 131 F.R.D. 161, 162-65 (D. Neb. 1989) (discussing the deliberative process privilege as applied to the minutes of FICB board of director and other FICB meetings and finding that the privilege did apply).

294. *AgriVest*, 373 N.W.2d at 485-86. In Minnesota, borrowers were successful in obtaining orders directing a PCA to turn over Farm Credit Administration examination reports by relying on *AgriVest*. *See* Rieks v. Production Credit Ass'n of River Falls, No. 95566 (Dakota Co., Minn., Dist. Ct. December 11, 1986, & August 14, 1987) (orders compelling production of documents). *But see* Interstate Production Credit Ass'n v. Firemans Fund Ins. Co., 128 F.R.D. 273, 276 (D. Ore. 1989) ("The federal courts have

C. NO AGENCY RELATIONSHIP BETWEEN FLBS AND FLBAS

Generally, there is no agency relationship implied by law between a FLB and a FLBA within the FLB's district, for the two are distinct and separate entities. Although FLBAs accept applications to the district FLB for loans, the United States Supreme Court has held that an association could not be deemed the agent of the FLB in disbursing the proceeds of a loan.[295] Nevertheless, the Farm Credit Banks (FLBs and FICBs prior to the Agricultural Credit Act of 1987) have the authority to supervise the associations within their respective districts and to "delegate to Federal land bank associations such functions as the bank determines appropriate."[296] Thus, an agency in fact may exist.

D. INCORPORATION OF FARM CREDIT SYSTEM REGULATIONS IN CONTRACT DOCUMENTS

Members of some PCAs will have signed a "Membership Agreement" in connection with their loan application. Paragraph 10 of one such agreement provides as follows:

> 10. One Agreement/Interpretation: The Agreement includes and incorporates all amendments and supplements hereto, and all notes, security instruments, documents, and other writings submitted by Debtor to PCA in connection with this Agreement. Neither debtor nor the PCA shall be bound by the agreement or undertaking, nor shall this Agreement be amended or supplemented except as expressed in writing and signed by the party against whom

consistently ruled that a court may not order an institution such as IPCA [a PCA] to produce information in violation of regulations such as 12 C.F.R. § 602.289 [relating to demands for FCA documents served on non-FCA employees or entities]" (citations omitted)).

295. Federal Land Bank of Columbia v. Gaines, 290 U.S. 247, 254 (1933). *See also* Federal Deposit Ins. Corp. v. Langley, 792 F.2d 541, 548-49 (5th Cir. 1986) (FLB not bound by the misrepresentations and omissions of the president of an FLBA), *aff'd*, 484 U.S. 86 (1987); Federal Land Bank of New Orleans v. Jones, 456 So. 2d 1, 5-10 (Ala. 1984) (detailed discussion of the relationship between an FLB and FLBA, concluding that "[i]n the present case, the controlling statutes clearly provide for the creation of two autonomous entities, and the courts interpreting those statutes have recognized that statutorily there is no agency relationship between the Bank and the Association" (citing Gantt v. Gunter, 225 Ala. 679, 145 So. 146 (1932)); Hinds v. Federal Land Bank of New Orleans, 235 Ala. 360, 179 So. 194 (1938)); Sterrett v. Milk River Production Credit Ass'n, 764 P.2d 467, 68-70 (Mont. 1988) (holding that FICB's supervisory duties over PCA did not establish agency relationship to impose on the FICB liability for alleged misrepresentations of PCA employee).

296. 12 U.S.C.A. § 2013(13), (18) (West 1989).

> enforcement is sought. The invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the remaining terms and provisions hereof.
>
> This Agreement and the transactions between the Debtor and PCA shall be governed by the Farm Credit Act of 1971 as amended, the Regulations adopted thereunder, the PCA bylaws and, where not inconsistent, applicable state law.[297]

This agreement provision appears to contemplate that all existing and future provisions of the Farm Credit Act of 1971 and the regulations promulgated under it are incorporated into the terms of the contractual relationship between borrower-members and the PCA. If so, then any failure by the PCA to abide by the Act or the regulations would be a breach of contract. This appeared to be one way for the borrower to avoid the obstacles inherent in attempting to assert claims based on violations of the Act or regulations under an implied cause of action theory. However, such an attempt was rebuffed in *Production Credit Association of Worthington v. Van Iperen*.[298]

E. NEGLIGENT FAILURE TO FOLLOW LOAN POLICIES

An assertion that is notable for its persistent appearance despite repeated rebuffs by the courts is the claim that the loan policies of System lenders create enforceable standards of care in favor of borrowers. The Eighth Circuit, the Minnesota Court of Appeals, and the Wisconsin Court of Appeals have rejected the argument that a PCA's internal policies set a standard of conduct that creates a cause of action based on common-law negligence if the policies are not followed.[299]

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297. PRODUCTION CREDIT ASSOCIATION OF NORTHEAST ARKANSAS MEMBERSHIP AGREEMENT (1986).

298. 396 N.W.2d 35, 38 (Minn. Ct. App. 1986). On the subject of the incorporation of regulations into contract documents, see Smithson v. United States, 847 F.2d 791 (Fed. Cir. 1988) (declining to broadly incorporate the Farmers Home Administration (FmHA) regulations into agreements between FmHA borrowers and the FmHA), *cert. denied*, 488 U.S. 1004 (1989).

299. Overvaag v. Production Credit Ass'n of the Midlands, No. 87-5332 (8th Cir. Mar. 7, 1988) (*See* 845 F.2d 1028 (D.S.D. 1988) (Table of Decisions Without Published Opinions)); Ebenhoh v. Production Credit Ass'n of Southeast Minnesota, 426 N.W.2d 490, 493 (Minn. Ct. App. 1988); Bevier v. Production Credit Ass'n of Southeast Minnesota, 429 N.W.2d 287, 289 (Minn. Ct. App. 1988); Winkel v. Production Credit Ass'n of East Central Wisconsin, 451 N.W.2d 440, 442-43 (Wis. Ct. App. 1989). *See also supra* notes 275-78 and the accompanying text (discussing related, but distinct claims); Williams v. Federal Land Bank of Jackson, 729 F. Supp. 1387, 1390 (D.D.C. 1990) (construing the provisions of the FLB's Credit and Operations Manual as not supporting borrower's claim). The argument