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An Agricultural Law Research Article

Bankruptcy Law and the Farmer: Are Farmers Really Exempt from Forced Liquidation Under Chapter 11

by

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- I. Introduction
- II. The Farmer and the Bankruptcy Code
 - A. Defining Farmer
 - B. Burden of Establishing Farmer Status
 - C. Farmers' Exemption from Involuntary Bankruptcy Proceedings
- III. Issue
 - A. Courts Allowing Forced Liquidation
 - B. Courts Denying Forced Liquidation
- IV. Summary and Conclusion

I. INTRODUCTION

Financial stress in the agricultural sector has caused farm debt to reach its highest level ever.¹ Estimated at \$220 billion, farm debt has farmers² earning their lowest income since the Depression.³ For example, the average 1984 net farm income in Kansas was \$6,334.⁴ Surprisingly, half of the 2.4 million farmers⁵ in the United States are thought to be self-financing.⁶ However, the problem lies with the other half of the farm population that must borrow money. A recent study on farm debt found that over fifty-six percent of all farm debt was owed by farmers carrying debt-to-asset ratios of over forty percent.⁷ The study

1. See *Consecutive—Disaster Emergency Loan Act of 1984 and General Issues Relating to Agricultural Credit, 1984: Hearing on H.R. 4610 Before Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture, 98th Cong., 2d Sess. 1, 7 (1984)* (statement of Rep. Robert Lindsay Thomas) [hereinafter cited as *Hearing on H.R. 4610*].

2. Reference made here is to the general interpretation of the word farmer. As used in this Note, a farmer is an individual or entity involved in the production of agricultural products. Future references to the term farmer may be as indicated to the Bankruptcy Act or Code definition of farmer. See, e.g., *infra* note 21 and accompanying text.

3. *Hearing on H.R. 4610, supra* note 1, at 7. Farm debt has "doubled and tripled in the past 3 to 4 years." *Id.* Net farm income, which measures the income generated from a given calendar year's production, is forecast at \$20 to \$25 billion for 1985, following the \$33 to \$36 billion estimated for 1984. *Farm Income Update*, AGRICULTURAL OUTLOOK, July 1985, at 13.

4. See *Rural Papers*, Sept. 1985, at 8 (Kansas Rural Center). "According to analysis of the 1984 Kansas Farm Management Association records by Kansas State University extension economists, average net farm income in Kansas dropped to \$6,334 in 1984. This is down 86 percent from 1979." *Id.*

5. See *Farm and Home Foreclosures, 1983: Hearing on Farm and Home Foreclosures Before the Subcomm. on Courts of the United States Senate Judiciary Comm., 98th Cong., 1st Sess. 1, 87 (1983)* (statement of Frank W. Naylor, Jr., Undersecretary of Agriculture for Small Community and Rural Development) [hereinafter cited as *Hearing on Farm and Home Foreclosures*]. This 2.4 million figure includes the "so-called weekend farmers for whom agriculture is primarily a hobby." It is estimated that "fewer than 700,000 Americans are effectively full-time, serious farmers." *Bitter Harvest*, NEWSWEEK, Feb. 18, 1985, at 52, 55. The number of farmers has fallen from 6.8 million in 1935 to 2.4 million today. *The U.S. Farm Debt Bomb*, WORLD PRESS REVIEW, Feb. 1985, at 30.

6. *Hearing on Farm and Home Foreclosures, supra* note 5, at 87.

7. This analysis was based on family-size commercial farms defined as farms with sales between \$50,000 to \$500,000 annually. See *Financial Conditions of Farmers*, AGRICULTURAL OUTLOOK, April 1985, at 2, 4. "Inflation, high interest rates, bumper crops, unstable foreign markets, expansion predicated on rising land values and inconsistent governmental policies have all combined to put the American farmer in a financial vise. Record numbers of farmers are seeking protection under the Bankruptcy Code." Kunkel, *Farmers' Relief Under the Bankruptcy Code: Preserving the Farmers' Property*, 29 S.D.L. REV. 303 (1984). Financial stress among farmers has reached a crisis. It is estimated that between 130 and 150 farmers are forced out of farming each week for financial reasons. *Long-Term Farm Policy to Succeed the Agriculture and Food Act of 1981 (Conservation and Credit Programs): Hearings Before Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture, 98th Cong., 2d Sess. 249, 251 (1984)* (testimony of Daniel Levitas on behalf of the Rural America Organization).

also showed that as of January 1, 1985, 43,000 farms were insolvent,⁸ 50,000 faced extreme financial problems,⁹ and 136,000 were confronted with serious financial problems.¹⁰ Many farmers unable to weather the current farm crisis will turn to the Bankruptcy Code¹¹ for help.¹²

Although the Code provides a number of possible alternatives for financially troubled farmers,¹³ the emphasis of this Note is limited to a particular issue arising under Chapter 11: can a creditor's liquidation plan filed in accordance with Chapter 11 be confirmed over a farmer-debtor's objection? Several courts recently addressing this issue have disagreed on an answer.¹⁴ Consequently, the intent of this Note is to examine the specialized treatment afforded farmers in bankruptcy,¹⁵ and to analyze the rationale and policy of the case law to reach a sound conclusion on this issue for both creditors and farmer-debtors.¹⁶

II. THE FARMER AND THE BANKRUPTCY CODE

A. Defining Farmer

Being a farmer for Bankruptcy Code purposes confers substantial immunity upon a debtor.¹⁷ Such special treatment has been afforded farmer-debtors since the original enactment of bankruptcy law.¹⁸ Thus, a critical issue is whether a debtor is a farmer for bankruptcy purposes. The Bankruptcy Code defines

8. *Financial Conditions of Farmers*, *supra* note 7, at 4. "Insolvent" in this context refers to farms with debts exceeding assets. *Id.* at 28 (results of study compiled into bar chart).

9. *Financial Conditions of Farmers*, *supra* note 7, at 4. Farms faced with extreme financial problems are farms with debt equaling 70% to 100% of assets. *Id.* at 28 (results of study compiled into bar chart).

10. *Financial Conditions of Farmers*, *supra* note 7, at 4. Farms faced with serious financial problems are farms with debt equaling 40% to 70% of assets. *Id.* at 28 (results of study compiled into bar chart).

11. All references to the "Bankruptcy Code" or "Code" contained herein are to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified beginning at 11 U.S.C. § 101 and amendments thereto).

12. See Kunkel, *supra* note 7, at 303 indicating that a record number of farmers are seeking protection under the Bankruptcy Code.

13. See Anderson & Rainach, *Farmer Reorganizations Under the New Bankruptcy Code*, 28 LOY. L. REV. 439, 440 (1982) (surveying sections of the Bankruptcy Code applicable to financially troubled farmers); Dole, *The Availability and Utility of Chapter 13 of the Bankruptcy Code to Farmers Under the 1984 Bankruptcy Amendments*, 16 TEX. TECH L. REV. 433, 434 (1985) (discussing the utility of a Chapter 13 proceeding for debt-burdened farmers facing economic crisis); Looney, *The Bankruptcy Reform Act of 1978 and the Farmer: A Survey of Applicable Provisions*, 25 S.D.L. REV. 509 (1980) (analyzing bankruptcy provisions directly applicable to a farmer facing bankruptcy).

14. See *infra* notes 65-109 and accompanying text.

15. See *infra* notes 54-63 and accompanying text for a discussion of the Bankruptcy Code sections providing special treatment for farmers and bankruptcy proceedings.

16. See *infra* notes 65-112 and accompanying text.

17. The debate relating to farmer exemption from involuntary bankruptcy and other specialized treatment centers around whether the particular debtor falls within the Code definition of farmer. See *infra* note 21 and accompanying text; see also Pearson, *Is a Man Out Standing in His Field a Farmer for Bankruptcy Purposes?*, 5 J. AGRIC. TAX'N & L. 305 (1984) (analysis of Bankruptcy Code definition of "farmer").

18. See Anderson & Rainach, *supra* note 13, at 444-67 for a comprehensive analysis of the treatment of farmers in bankruptcy; see also Hanna, *Agriculture and the Bankruptcy Act*, 19 MINN. L. REV. 1, 5 (1934). The author, in reference to section 75 of the 1933 Act, said "[farmers] were the only individuals having enough friends in Congress to press successfully for special and additional bankruptcy relief." *Id.* For case law discussing the definition of farmer, see *infra* notes 22 & 32.

farmer as a person¹⁹ who received more than eighty percent of their gross income during the previous taxable year from a farming operation²⁰ either owned or operated by them.²¹

This definition of farmer clarifies the Bankruptcy Act of 1898.²² The Bankruptcy Act as originally enacted neither defined nor used the term farmer.²³ However, section 4(b), which listed the individuals exempt from involuntary petitions, included "a person engaged chiefly in farming or tillage of the soil."²⁴ After various amendments,²⁵ the 1938 revision of the Act provided a new definition of farmer.²⁶ Under the Bankruptcy Act, a farmer was defined as an individual who was personally engaged in farming or tillage of the soil and who derived the principal part of his income from farming.²⁷

19. See *infra* note 29 and accompanying text for the Bankruptcy Code definition of "person."

20. 11 U.S.C.A. § 101(18) (West 1979) states: "[F]arming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock and production of poultry or livestock products in an unmanufactured state." Although § 101(18) specifies certain modes of farming to be a "farming operation," one authority has stated it is not limited to the precise terms used. See 2 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 101.18 (15th ed. 1985) [hereinafter cited as W. COLLIER 15th ed.].

21. 11 U.S.C.A. § 101(17) (West 1979) states:

"[F]armer" means person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

Id.

The present definition of farmer is the result of last-minute legislative maneuvering. Originally, the commission on bankruptcy laws recommended that relief from involuntary proceedings be limited to individual farmers who derived at least one-half of their gross income from farming. The House Committee then extended the definition of farmer to include not only individuals, but corporations and partnerships as well. It contained a 75% gross income test with a ceiling of \$275,000. The Senate version eliminated the ceiling on gross income. Thus, in the final version, the ceiling on income was deleted and the gross income percentage raised to 80%. For an in-depth analysis of the legislative history of the definition, see *In re Blanton Smith Corp.*, 7 Bankr. 410 (M.D. Tenn. 1980) (legislative history exhaustively set out); Looney, *supra* note 13, at 514-15 (comprehensive analysis of the definition); Pearson, *supra* note 17, at 306 (House version tended to "exclude hobby farmers and large farming operations").

22. The Bankruptcy Act definition required a two-step analysis for determining whether a debtor was a farmer for purposes of the Act. See *infra* note 27 and accompanying text (Bankruptcy Act definition of "farmer"). See, e.g., *In re Beery*, 680 F.2d 705, 713-17 (10th Cir. 1982); *Jenkins v. Petitioning Creditor—Ray E. Friedman & Co.*, 664 F.2d 184, 186-87 (8th Cir. 1981) (both interpreting the 11 U.S.C. § 1(17) (1976) definition of farmer); see also *infra* notes 23-37 and accompanying text discussing the Code and Act definition of farmer.

For a general discussion of the definitional problem under the Act, see 8 C.J.S. *Bankruptcy* § 95 (1962) and cases cited therein.

23. See Act of July 1, 1898, ch. 541, 30 Stat. 544 (known as the Bankruptcy Act of 1898); see also 1 W. COLLIER, COLLIER ON BANKRUPTCY ¶ 4.15[1] (14th ed. 1974) (comprehensive analysis of the statutory development of the term farmer) [hereinafter cited as W. COLLIER 14th ed.].

24. See § 4(b) of the Bankruptcy Act of July 1, 1898. Section 4 was titled "[w]ho may become bankrupts," and subsection (b) described who could become the subject of an involuntary proceeding. *Id.*

25. See, e.g., Act of May 15, 1935, ch. 114, 49 Stat. 246 (substituting "farmer" for "a person engaged chiefly in farming or the tillage of the soil" in section 4(b) of the Act); Act of June 28, 1934, ch. 869, 48 Stat. 1289 (Frazier-Lemke Act provided that farmers could not be forced to liquidate against their will); Act of March 3, 1933, ch. 204, 47 Stat. 1467 (enactment of § 75 providing rehabilitation relief to farmer-debtors).

26. See Act of June 22, 1938, ch. 575, 52 Stat. 840 (codified at 11 U.S.C. § 1(17) (1938)); see also *infra* note 27 and accompanying text for the Act definition of farmer.

27. 11 U.S.C. § 1(17) (Supp. IV 1939) defined farmer as:

[A]n individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations.

The Bankruptcy Code has expanded and clarified the definition of farmer. Specifically, the Code definition uses the term person in contrast to the use of "individual."²⁸ Since the Code defines person to include an individual, partnership or corporation, it is now clear that a partnership or corporation may be considered a farmer for bankruptcy purposes.²⁹ The Code further clarifies the definition by giving farmer status only to those persons who receive more than eighty percent of their gross income³⁰ from a farming operation.³¹ The former Bankruptcy Act's income prerequisite was confusing to calculate and administer;³² it merely required that the principal part of the individual's income be derived from farm-related activities.³³

The Code's income-percentage test will be easier for courts to calculate and should provide for uniformity in the decision of who qualifies as a farmer.³⁴ It nonetheless will exclude an increasing number of part-time farmers who have turned to outside employment to supplement their farm income.³⁵ Conversely,

Id.

28. See *supra* notes 20-21 & 27 and accompanying text for the contrasting definitions provided by the Act and Code.

29. See 11 U.S.C.A. § 101(33) (West Supp. 1985) (" 'person' includes individual, partnership and corporation, but does not include governmental unit"); see also *In re Blanton Smith Corp.*, 7 Bankr. 410, 414 (M.D. Tenn. 1980), where the court found implicit in the legislative history of 11 U.S.C. § 101(17), an intention to expand the definition of farmer to the extent contemplated by the term "person" so as to include a farming corporation or agribusiness. See generally *In re Pommerer*, 10 Bankr. 935 (D. Minn. 1981), where the court gave a broad construction to the Code definition and found debtors were farmers even though they were not engaged in farming when they filed their Chapter 7 petition.

30. 11 U.S.C.A. § 101(17) (West 1979). Unfortunately, the Bankruptcy Code does not define gross income. *But see* 26 U.S.C.A. § 61 (West Supp. 1985) (Internal Revenue Code defines gross income as "income from whatever source derived").

31. 11 U.S.C.A. § 101(18) (West 1979). The prior act contained no parallel definition of "farming operation," so the courts were faced with determining whether the debtor fell within the category of "farming or tillage of the soil" as provided for in the definition of farmer. 11 U.S.C. § 1(17) (1938). "Under the prior law, the courts formulated varying tests which required a judgment as to how individuals divided their time between a farming and nonfarm operation and the extent of the physical effort devoted to the enterprise." Marsh, *Farmers' Exemption From Involuntary Bankruptcy*, 15 U.C.C. L.J. 162, 164 (1982). See W. COLLIER 14th ed., *supra* note 23, at ¶¶ 4.15[2]-[3] (analyzing cases construing the definition of farmer under the Act). Although the Code specifies certain modes of farming to be a "farming operation," it is not limited to the precise terms used. See W. COLLIER 15th ed., *supra* note 20, at ¶ 101.18.

32. See, e.g., *Jenkins v. Petitioning Creditor—Ray E. Friedman & Co.*, 664 F.2d 184, 186 (8th Cir. 1981) (argument that borrowed funds should be included as income for definitional purposes of "farmer" rejected); *In re Hinrichs*, 314 F.2d 384, 386 (7th Cir. 1963) (found debtor's principal part of income was from farm implement business); *In re White*, 233 F. Supp. 454, 456 (D. Colo. 1965) ("failure over a period of years to receive any income from farming may indicate that the putative farmer is not really relying on farming as his primary source of income"); *In re Beechwood*, 42 F. Supp. 401 (D. N.J. 1942) (lawyer who lived on family farm and was in charge of hired help but only received \$2,500 of income from the farm versus approximately \$10,000 from his law business was not a farmer). See generally BANKRUPTCY SERVICE LAWYERS EDITION, 1898 ACT ANNOTATED 146 (E. Barbie, managing ed. 1979 Supp.) (discussion of case law interpreting principal part of income test of the Act definition).

33. 11 U.S.C. § 1(17) (1938). See *supra* note 27 and accompanying text.

34. Essentially, all a court will have to do is look at the debtor's tax return for the taxable year immediately preceding the year of filing. See generally Looney, *supra* note 13, at 515 (indicating that the 80% gross taxable income test should be easily calculated, thus eliminating definitional problems); Pearson, *supra* note 17, at 305 ("[y]ou can't tell if a person is a farmer until you see last year's tax return").

35. See *Bitter Harvest*, *supra* note 5, at 55, indicating that out of the 2.4 million American farmers, fewer than 700,000 are actually "full-time, serious farmers." *Id.* In today's farm economy, off-farm income is very important to debt-ridden farmers. See W. LEE, A. NELSON & W. MURRAY, *AGRICULTURE FINANCE* 10 (7th ed. 1980); J. PENSON & D. LINS, *AGRICULTURE FINANCE: AN*

by including the phrase "owned or operated by such person," the Code definition should encompass additional farmers not qualifying under the former Act, which required personal involvement.³⁶ In addition, the Code definition of farmer retains the Act's introductory phrase "farmer means," "thereby suggesting a more precise, rather than inclusive interpretation. That is, such 'person' must meet the requisites specified in the definition."³⁷

B. Burden of Establishing Farmer Status

An issue has arisen as to who has the burden of proof in establishing whether the debtor is a farmer for special treatment under the Bankruptcy Code and its provisions. Neither the former Bankruptcy Act nor the Code specifically states who has this burden. Many courts have unequivocally held that "the burden is on the petitioning creditors to allege and, where controverted, prove" that the debtor is not a farmer.³⁸ The cases imposing this burden on creditors have all done so while interpreting the former Bankruptcy Act's definition of farmer.³⁹ However, two recent cases analyzing the Code definition of farmer have shifted the burden of proof to the debtor.⁴⁰ The bankruptcy court in *In re Johnson*⁴¹ required the debtor to plead and prove his status as a farmer.⁴² Likewise, in *Potmesil v. Alexandria Production Credit Association*,⁴³ a Louisiana district court faced with an involuntary proceeding cited *Johnson* and required the debtor to carry the burden of proving that he was a farmer and thus entitled to special protection under the Bankruptcy Code.⁴⁴ Although it is not clear why

INTRODUCTION TO MICRO AND MACRO CONCEPTS 26 (6th ed. 1973). Therefore, the 80% gross income formula may not be a consistent way to approach farmers' problems. As more and more farmers and their spouses seek off-farm employment to supplement their farm income and help ward off financial disaster, this income percentage formula may become too limited. Recent data show that many farmer-debtors would be unable to meet the 80% gross income test. See Marsh, *supra* note 31, at 165-66 (analyzing off-farm income and indicating many of today's farmers could not meet the 80% limitation on gross income).

36. 11 U.S.C.A. § 101(17) (West 1979). The Act definition required the alleged farmer to be "personally engaged in farming or tillage of the soil." 11 U.S.C. § 1(17) (1938). See *In re Blanton Smith Corp.*, 7 Bankr. 410, 412 (M.D. Tenn. 1980). A "debtor cannot be denied the status of a farmer under § 101(17) merely because it owns rather than operates the farming operation from which its income is derived." *Id.* See generally Looney, *supra* note 13, at 515 ("wide range of persons who could not have qualified as farmers under the old definition should now qualify").

37. W. COLLIER 15th ed., *supra* note 20, at ¶ 101.17.

38. W. COLLIER 14th ed., *supra* note 23, at ¶ 4.15[3]. See *infra* note 39 and accompanying text for a discussion of the cases which have imposed the burden of proof on creditors.

39. See, e.g., *In re Beery*, 680 F.2d 705, 714 (10th Cir. 1982) (trustee met burden of proof requirement to show debtor was not a farmer under the Act); *Jenkins v. Petitioning Creditor—Ray E. Friedman & Co.*, 664 F.2d 184, 186 (8th Cir. 1981) (petitioning creditor bears burden of proving alleged bankrupt is not a farmer); *In re Hinrichs*, 314 F.2d 384, 385 n.2 (7th Cir. 1963) (creditor had burden of proving debtor was not a farmer); *In re White*, 238 F. Supp. 454, 455 (D. Colo. 1965) (burden of disproving debtor's status as a farmer is on the creditor).

40. See *infra* notes 41-44 and accompanying text analyzing the conclusions of these cases.

41. 13 Bankr. 342 (D. Minn. 1981).

42. *Id.* at 346-47.

In an involuntary case whether debtor is a farmer is a factual question to be pled and proven under 11 U.S.C. § 101(17) that more than 80% of his prior year's gross income was so derived. If he fails to plead and prove that he is a farmer, he has in effect consented to the entry of the order for relief. Being a farmer is not a jurisdictional fact, it is a defense to be pled and proven.

Id. But see 11 U.S.C. § 109(b) (1982). Railroads, banks, savings and loan associations and other such institutions are barred as a jurisdictional fact from being debtors under Chapter 7. *Id.*

43. 42 Bankr. 731 (W.D. La. 1984).

44. *Id.* at 732.

these two courts have shifted the burden of proof to the debtor, or whether other courts will follow, it can be the subject of speculation. The Bankruptcy Code definition of farmer provides a more precise and ascertainable definition by utilizing a specific income determinative test,⁴⁵ requiring that more than eighty percent of the debtor's gross income during the preceding year come from a farming operation.⁴⁶ The debtor is the only one with access to his tax return for the previous year; therefore, the argument can be made that it only makes sense to place the burden upon him. However, the earlier Bankruptcy Act definition of a farmer also utilized an income determinative test.⁴⁷ The Act defined farmer as an individual "personally engaged in farming" operations, if the principal part of his income is derived from these operations.⁴⁸ Thus, even under the Act's definition of farmer, access to the debtor's tax return would have been beneficial in determining whether the principal part of the debtor's income was from farming operations. The authors are unable to find a definitive reason for the change. However, it might be noted that the two cases shifting the burden of proof to the debtor were not federal court of appeal decisions, as were many of the cases placing the burden upon the petitioning creditor.⁴⁹ Therefore, a court faced with an involuntary proceeding would not be required to follow the burden of proof requirements found in *In re Johnson*⁵⁰ or *Potmesil*.⁵¹

C. Farmers' Exemption from Involuntary Bankruptcy Proceedings

A farmer, like any other debtor, may voluntarily file a petition and seek the protection of the Bankruptcy Code. Therefore, subject only to the prerequisites of the Code,⁵² farmers can utilize voluntary proceedings in Chapters 7, 11 and 13.⁵³ However, several sections of the Code provide farmers with special protection not afforded other debtors.⁵⁴ Under section 303 of the Bankruptcy Code, farmers are specifically exempted from being the subject of an involuntary petition.⁵⁵ This special immunity has consistently been provided by Congress,⁵⁶ and as such, is evidence of the special nature of the farming business. Although the

45. See *supra* notes 21 & 27-31 and accompanying text discussing the definition of a farmer for purposes of the Code.

46. See *supra* note 20 and accompanying text discussing the definition of a farming operation under the Bankruptcy Code.

47. See 11 U.S.C. § 1(17) (1938) amended by 11 U.S.C. § 1(17) (1978).

48. *Id.*

49. See *supra* notes 41-44 and accompanying text.

50. 13 Bankr. 342 (D. Minn. 1981).

51. 42 Bankr. 731 (W.D. La. 1984).

52. See 11 U.S.C.A. § 109 (West 1979 & Supp. 1985) (outlining the prerequisites to become a debtor for the voluntary provisions of Chapters 7, 11 and 13).

53. For a general discussion of the various chapters of the Code which may be utilized by farmers, see Dole, *supra* note 13; Kunkel, *supra* note 7; and Looney, *supra* note 13.

54. See generally Anderson & Rainach, *supra* note 13, at 467-81; Dole, *supra* note 13, at 440-74; Looney, *supra* note 13, at 513-14 and Marsh, *supra* note 31, at 163-64, discussing the special protection afforded farmers by the Bankruptcy Code.

55. 11 U.S.C.A. § 303(a) (West 1979) provides in relevant part that "[a]n involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer . . . that may be a debtor under the chapter which such case is commenced." *Id.*

56. See *In re Doroski*, 271 F. 8, 9 (E.D. N.Y. 1921). The "intent of Congress to protect men engaged in agriculture, who might fall behind from the failure of crops for one or two seasons, has always been recognized as the basis for this provision in the statute." *Id.*; see also H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1 at 224 (1973) ("the existing [former] exception is an effective exception and has deep roots in history").

validity of the exemption has been challenged by creditors and commentators,⁵⁷ the rationale for its existence is clearly stated in legislative history, where Congress has enunciated its concern for the cyclical nature of the farming business.⁵⁸ The immunity from involuntary proceedings afforded farmers is mirrored in sections 1112(c) and 1307(e) of the Bankruptcy Code.⁵⁹ In essence, these sections prohibit a court from doing indirectly what Code section 303 prohibits from being done directly.⁶⁰ Specifically, the Code prohibits a farmer's voluntary Chapter 11 or 13 petition from being converted into a Chapter 7 liquidation proceeding over his objection.⁶¹ Chapter 11 does allow a creditor to file a plan requesting liquidation of the farmer's bankruptcy estate,⁶² but it also requires

57. See Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill*, 1979 UTAH L. REV. 405, 411. The exception "appears to combine ancient myths of the yeoman farmer with a contemporary lobby of political clout to achieve an exclusionary policy that is, at once, both too broad and too narrow. It hardly makes sense." *Id.*

58. H.R. REP. NO. 595, 95th Cong., 1st Sess. 116, 322 (1977). "Farmers are excepted because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy." The purpose of such special treatment afforded farmers has also been stated by commentary as:

This exception is maintained for several reasons: first, the existing exception is an effective exception and has deep roots in history; and second, the irregular nature and the potential ups and downs of a farmer's income would require a different test for an involuntary petition against a farmer, the complexity of which does not appear warranted in light of the lack of any request for any change in the law and the absence of any abuses having come to the attention of the Commission.

H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 224 (1973) (in reference to a proposed statute of 1973 exempting from involuntary petitions those individuals who earn more than half of their gross income from farming).

59. See 11 U.S.C.A. §§ 1112(c), 1307(e) (West 1979). Section 1112(c) provides: "The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer . . . unless the debtor requests such conversion." Similarly, section 1307(e) provides: "The court may not convert a case under this chapter to a case under chapter 7 or 11 of this title if the debtor is a farmer, unless the debtor requests such conversion."

60. Section 303 prohibits the filing of an involuntary petition under Chapter 7 or 11 against a farmer-debtor. See *supra* note 55 for the text of § 303.

61. See *supra* note 59 and accompanying text; see also *In re Besler*, 19 Bankr. 879, 884 (D. S.D. 1982) (farmer-debtor cannot be converted from a Chapter 11 to an involuntary Chapter 7 pursuant to 11 U.S.C.A. §§ 303(a) and 1112(c)).

Involuntary proceedings are not permitted in Chapter 13 cases, regardless of who the debtor is. The policy reasons for prohibiting involuntary Chapter 13 proceedings are expressed in the legislative history. A mandatory Chapter 13 case would force an individual to work for his creditors and could possibly violate the thirteenth amendment prohibition against involuntary servitude. Further, on policy grounds it would be unwise to allow creditors to force a debtor into a repayment plan, because an unwilling debtor is less likely to retain his job or cooperate in the repayment, causing it to fail. H.R. REP. NO. 595, *supra* note 58. See generally Dole, *supra* note 13, discussing the availability and utility of Chapter 13 for farmers.

62. See 11 U.S.C.A. § 1123(b)(4) (West 1979) (subsection allowing a creditor to file a plan to liquidate the debtor); see also 11 U.S.C.A. § 1121 (West 1979 & Supp. 1985), which establishes who may file a plan in a Chapter 11 proceeding. Subsection (b) provides for an exclusive 120-day filing period for the debtor. Subsection (c) allows a creditor and others to file a plan only if:

- (1) a trustee has been appointed under this chapter;
- (2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or
- (3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

Id. The time periods of subsection (c) are qualified by subsection (d), which allows a party in interest, upon request, the chance to reduce or increase said periods.

There presently is a report before Congress to accompany H.R. 2211, which would amend title 11 of the United States Code with respect to bankruptcy proceedings involving debtors who are farmers and family members. See H.R. REP. NO. 178, 99th Cong., 1st Sess. 1 (1985) (discussing the

that any plan proposed be confirmed by the bankruptcy judge.⁶³ A question then arises as to whether a creditor's liquidation plan can be confirmed over a farmer's objection.⁶⁴

III. ISSUE

The question of whether a farmer who has filed a voluntary Chapter 11 bankruptcy petition can be forced to liquidate under a creditor's liquidation plan has been answered both affirmatively and negatively by the various courts which have considered the question. The divergent rationales and conclusions of these courts are discussed separately below.

A. Courts Allowing Forced Liquidation

In *In re Jasik*,⁶⁵ the Fifth Circuit Court of Appeals upheld the decision of the lower court allowing the liquidation of the debtor's property under Chapter 11.⁶⁶ In *Jasik*, the debtors filed a voluntary petition to reorganize their farm and ranch under Chapter 11 of the Bankruptcy Code.⁶⁷ However, they failed to file a plan for reorganization, and ten months later, a liquidation plan was filed jointly by the trustee and creditors.⁶⁸ In approving the joint plan, the court held that once the debtor's exclusive period for filing a reorganization plan had ended,⁶⁹ a creditor's plan for liquidation could be filed and confirmed.⁷⁰ The court concluded that Congress enacted section 1121(c)⁷¹ to protect creditors from the use of a Chapter 11 action by debtors in an "offensive" manner,⁷² with

Family Farmer Bankruptcy Act of 1985). The significant features of H.R. 2211 are that it (1) allows a farmer a 240-day exclusive period to file a Chapter 11 plan; (2) extends the time in which a creditor can file a plan from 120 days to 240 days if the debtor is a farmer; and (3) extends the time for the debtor's plan to be accepted to 300 days if the debtor is a farmer.

63. 11 U.S.C.A. § 1129 (West 1979 & Supp. 1985). Section 1129 contains a number of requirements that must be met before a court can confirm a plan or reorganization under Chapter 11. See generally 5 W. COLLIER 15th ed., *supra* note 20, at §§ 1129.01-05 (comprehensive analysis of section 1129); Blum, *The "Fair and Equitable" Standard For Confirming Reorganizations Under the New Bankruptcy Code*, 54 AM. BANKR. L.J. 165 (1980); Hopper, *Confirmation of a Plan Under Chapter 11 of the Bankruptcy Code and the Effect of Confirmation on Creditors' Rights*, 15 IND. L. REV. 501 (1982).

64. See *infra* notes 65-112 and accompanying text discussing this issue.

65. 727 F.2d 1379 (5th Cir. 1984).

66. *Jasik*, 727 F.2d at 1381-82; see also Brister, *Bankruptcy*, 16 TEX. TECH L. REV. 95, 107-09 (1985) (thorough discussion favoring *Jasik* opinion).

67. 727 F.2d at 1380.

68. *Id.* at 1380-81.

69. 11 U.S.C. § 1121(b) (1978) provides that in most cases, "only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter." *Id.* But see *supra* note 62 and accompanying text (Congress has proposed extending the exclusive filing period for farmer-debtors to 240 days).

70. *Jasik*, 727 F.2d at 1382. The court stated that "[o]nce the statutory period elapses, or upon the appointment of a trustee . . . the debtor's exclusive right to file a plan ceases. At that time, 'any party in interest' may file a plan." *Id.*

71. See *supra* note 62 and accompanying text for a discussion of this provision; see also Pearson, *supra* note 17, at 307 (discussing § 1121 of the Code).

72. 727 F.2d at 1381.

"[N]owhere in the statutory language or in legislative history is there evidence of any congressional intent to confer on a farmer the offensive capability to initiate a Chapter 11 proceeding which both stays collection by his creditors and allows him, by refusing to file, to block the submission of a plan of liquidation."

Id.

no specific statutory exception for farmers.⁷³

The Eighth Circuit Court of Appeals came to a similar conclusion in *In re Button Hook Cattle Co.*⁷⁴ In *Button Hook*, a family farm corporation filed a voluntary Chapter 11 reorganization petition.⁷⁵ Like the debtors in *Jasik*, the corporation failed to file a reorganization plan within the statutory exclusive 120-day filing period.⁷⁶ Consequently, the court confirmed the creditor's liquidation plan over the objection of the debtor.⁷⁷ The court, agreeing with the lower court's reasoning,⁷⁸ decided that Congress had not specifically excepted farmers from creditors' Chapter 11 liquidation plans under the Code.⁷⁹ Consequently, the court approved the sale of the debtor's assets.⁸⁰ In a subsequent case with analogous facts, the court reaffirmed this decision.⁸¹

A creditor's farm liquidation plan was also confirmed by a Kentucky bankruptcy court in *In re Tinsley*.⁸² In *Tinsley*, the court held that the lack of a specific statutory exemption from liquidation for farmers "[could not] be construed as a Congressional oversight or be entitled to imputed applicability."⁸³ The court decided that all debtors who place themselves in a bankruptcy court's jurisdiction⁸⁴ by voluntarily filing under Chapter 11 must take the risks as well as the benefits provided therein.⁸⁵

In *In re J.F. Toner & Sons, Inc.*,⁸⁶ a Virginia bankruptcy court allowed the forced liquidation of a dairy farm debtor who had filed a voluntary Chapter 11 petition.⁸⁷ As in *Jasik*, the debtor failed to file a plan within the exclusive 120-day period.⁸⁸ Consequently, over a year later, the creditors filed a plan which

73. *Id.* at 1382. "This provision curbs the unfair disadvantage to creditors of giving the debtor perpetual exclusive rights to initiate a plan. Farmer-debtors get neither more nor less." *Id.*

74. 747 F.2d 483 (8th Cir. 1984).

75. *Button Hook*, 747 F.2d at 484.

76. *Id.* One hundred fifty-four days after the debtor's exclusive filing period had ended, the creditor bank filed its liquidation plan. *Id.* at 485.

77. *Id.* at 486. The debtor's motion to dismiss was denied. *Id.*

78. The court, in confirming the lower court's opinion, noted that "a farmer who files a voluntary chapter 11 petition is subject to the same benefits and risks that other chapter 11 debtors face, including the risk that if he fails to file a plan within the exclusive 120-day period, a creditor may thereafter propose a liquidation plan." *Id.* at 485.

79. *Id.* at 486. "We do not believe that this failure to except farmers was a mere oversight [by Congress]."

80. *Id.*

81. See *In re Cassidy Land & Cattle Co.*, 747 F.2d 487 (8th Cir. 1984).

82. 36 Bankr. 807 (W.D. Ky. 1984) (debtors included a farm partnership and individual debtors).

83. *Id.* at 809.

84. The court stated a debtor, "[b]y voluntarily placing himself before the Court and its jurisdiction . . . [becomes] subjected to all the provisions of the applicable law." *Id.*

85. *Id.*

Where a farmer-debtor voluntarily files a Chapter 11 petition, substantial substantive benefits are sought and received. The institution of a Chapter 11 proceeding affords immediate benefits to the petitioner including, without limitation, automatic stay protection; retention of control of assets; an exclusive period for filing of a plan; and the right to assume or reject executory contracts. By so acting it must be assumed that the farmer, in evaluating a proper course of action at a time of financial stress, weighs not only the potential advantages but also the risks attendant thereto.

Id.

86. 40 Bankr. 461 (W.D. Va. 1984).

87. *Id.* at 462.

88. *Id.* at 461. For a discussion of the *Jasik* opinion, see *supra* notes 65-73 and accompanying text.

the court confirmed under a rationale similar to that used by the court in *Jasik*.⁸⁹ In denying the debtor's motion for dismissal,⁹⁰ the court held that dismissal was within the discretion of the court,⁹¹ and under the facts at issue dismissal was inappropriate.⁹²

B. Courts Denying Forced Liquidation

In *In re Lange*,⁹³ a Kansas bankruptcy court held that a creditor's Chapter 11 liquidation plan could not be confirmed over the farmer's objection.⁹⁴ The court initially noted the established congressional policy prohibiting the filing of involuntary petitions against farmer-debtors.⁹⁵ The court also noted that the United States Supreme Court has held that ambiguities in the Bankruptcy Code should be resolved in the debtor's favor.⁹⁶ The bankruptcy court found further support for its conclusion in section 1129, which requires a plan to be filed in good faith and in accordance with the provisions of the Code.⁹⁷ It was the court's opinion that if a debtor objected to the creditor's liquidation plan, the plan would fail to meet the requirements of section 1129.⁹⁸ Additionally, the court disagreed with the previous court decisions confirming creditors' farm liquidation plans,⁹⁹ stating that they failed "to construe the provisions of the Code liberally and resolve ambiguities in favor of the farmer/debtor," as required by the United States Supreme Court.¹⁰⁰ Consequently, the court concluded that farm creditors could ask for dismissal of the bankruptcy action under section 1112,¹⁰¹ but could not have a liquidation plan approved.¹⁰²

89. 40 Bankr. at 462; see also Pearson, *supra* note 17, at 308. "Given the fact that debtors generally and farmer-debtors specifically are prone to unrealistic optimism which is only increased in Chapter 11, it seems only fair to permit creditors to terminate the farming Chapter 11 through a liquidation plan." *Id.*

90. 40 Bankr. at 462 (debtors argued that even if a creditor's liquidating plan could be confirmed, they were entitled to dismissal under 11 U.S.C. 1129(b)).

91. 40 Bankr. at 463. The court stated that "[u]nder Chapter 11, the debtor does not have an absolute right to dismissal. Dismissal under . . . section [1112] is appropriate only (1) for cause, and (2) if in the best interest of creditors and the estate." *Id.*

92. *Id.*; see also *infra* note 112 for cases analyzing the dismissal issue.

93. 39 Bankr. 483 (D. Kan. 1984).

94. *Id.* at 484.

95. *Id.* at 483-84. For a discussion of the historical congressional bankruptcy policy favoring farmers, see *supra* note 18 & 53-61 and accompanying text.

96. *Lange*, 39 Bankr. at 485 (citing both *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 278-79 (1940) and *In re Mahaffey*, 129 F.2d 292 (2d Cir. 1942)).

97. 39 Bankr. at 486. 11 U.S.C.A. § 1129 (West Supp. 1985) provides in relevant part:

- (a) [t]he court shall confirm a plan only if all of the following requirements are met:
- (1) The plan complies with the applicable provisions of this title;
 - (2) The proponent of the plan complies with the applicable provisions of this title;
 - (3) The plan has been proposed in good faith and not by any means forbidden by law.

Id.

98. *Lange*, 39 Bankr. at 486. The court held that: [U]pon objection by the farmer, a liquidating plan does not comply with chapter 11 and those provisions of chapter 3 incorporated in chapter 11 because the liquidating plan purports to do that which the creditor could not otherwise do pursuant to § 303(a) and § 1112(c) The Court does not believe § 1129(a)(1) is satisfied by elevating form over substance.

Id.

99. See *supra* notes 65-92 and accompanying text.

100. *Lange*, 39 Bankr. at 487; see *supra* note 96.

101. *Id.* 11 U.S.C.A. § 1112 (West 1979 & Supp. 1985) provides in relevant part:

The *Lange* rationale was followed in *In re Kehn Ranch*.¹⁰³ In *Kehn Ranch*, a South Dakota bankruptcy court held that sections 1112 and 1129 precluded a creditor liquidation plan under Chapter 11 "from ever being confirmed."¹⁰⁴ *In re Blanton Smith Corp.*¹⁰⁵ represents an additional case in which a creditor's Chapter 11 liquidation plan was rejected. In *Blanton Smith*, a Tennessee bankruptcy court held that the debtor corporation's egg farming operation could not be compelled to liquidate without its consent.¹⁰⁶ In *In re Smeltzer*,¹⁰⁷ a Wisconsin bankruptcy court also held that a creditor's Chapter 11 liquidation plan against a farmer could not be confirmed.¹⁰⁸ The court concluded that such "involuntary liquidation" plans are prohibited under the Code.¹⁰⁹

IV. SUMMARY AND CONCLUSION

Farmers currently are in a financial crisis which is expected to worsen. Congress expressly provided qualifying farmer-debtors¹¹⁰ immunity from involuntary conversion of reorganization petitions into Chapter 7 proceedings. Arguably, these declarative provisions indicate that Congress did not intend that a farmer who filed a voluntary Chapter 11 petition could nonetheless be liquidated under a creditor's "reorganization" plan. Although there are court opinions on both sides of the issue, without further clarification we believe that the *Lange* decision is the correct view from a policy standpoint.

However, debtors must not be allowed to perpetuate a Chapter 11 action with the sole intent of delaying the sale of their assets. Once the debtor's exclusive statutory period for filing a plan has expired¹¹¹ and it is evident that a legiti-

[O]n request of a party in interest, and after notice and a hearing, the court . . . may dismiss a case under this chapter . . . for cause, including—

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;
- (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
- (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
- (7) inability to effectuate substantial consummation of a confirmed plan;
- (8) material default by the debtor with respect to a confirmed plan; or
- (9) termination of a plan by reason of the occurrence of a condition specified in the plan.

Id. For cases discussing the dismissal issue, see *infra* note 112.

102. 39 Bankr. at 487. Upon the dismissal of a bankruptcy action, the creditors are able to pursue their state law foreclosure remedies.

103. 41 Bankr. 832, 833 (D. S.D. 1984).

104. *Id.* at 833.

105. 7 Bankr. 410 (M.D. Tenn. 1980).

106. *Id.* at 414.

107. 47 Bankr. 77 (W.D. Wis. 1985).

108. *Id.* at 79; see also *In re Zarovy*, No. EF 11-83-00417 (Bankr. W.D. Wis., Feb. 9, 1984).

109. 47 Bankr. at 79; see also *In re Clemmons*, 37 Bankr. 712, 717 (W.D. Mo. 1984). "Because debtors are farmers the Court cannot order conversion . . . but will order dismissal if debtors do not convert." *Id.*

110. For a discussion of the qualifications necessary to be a farmer under the Bankruptcy Code, see *supra* notes 20-21 & 29-34.

111. See *supra* note 62 and accompanying text, indicating that while the current statutory filing period is 120 days, Congress has proposed to extend it to 240 days for farmers.

mate reorganization is unlikely, a creditor's motion for dismissal of the bankruptcy action should be readily sustained.¹¹²

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112. See *In re* 2218 Bluebird Ltd. Partnership, 41 Bankr. 540, 542-43 (S.D. Cal. 1984) ("resorting to the Chapter 11 device, merely for the purpose of invoking the automatic stay without an intent or ability to reorganize financial activities, is an abuse of the reorganization process. Such conduct is sufficient "cause" upon which a case may be dismissed, and where appropriate, subject to sanctions"); *In re* Powell Bros. Ice Co., 37 Bankr. 104, 106 (D. Kan. 1984) ("where a case has been on file and there is no movement toward confirmation, or there is no prospect of reorganization, grounds for . . . dismissal may exist"); *In re* Weathersfield Farms, Inc., 14 Bankr. 574, 576 (D. Vt. 1981) (dismissal warranted when debtor's plan was filed in bad faith, had no chance for success and caused unreasonable delay); *In re* Coram Graphic Arts, 11 Bankr. 641, 643 (E.D. N.Y. 1981) ("Court has the authority to *sua sponte* dismiss a Chapter 11 petition for cause shown").