Foxes and Chickens: Do Borrowers Have a Private Cause of Action Against Farm Credit System Institutions?

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Don and Mary Redd are Farm Credit System (FCS) borrowers. This Missouri farm family obtained a loan, secured by their farm, from the Federal Land Bank of St. Louis (FLB) in 1972. Due to conditions beyond their control—several years of extremely low farm commodity prices, high interest rates, high production costs, and severe weather—the Redds were unable to make all scheduled loan payments.

Although the farmers developed a plan which they asserted could bring them up to date in their payments,[1] the FLB refused to consider forbearance, debt restructuring, or any of the borrowers' rights given under the Farm Credit Amendments Act of 1985.[2] When the Redds attempted to enforce their rights in federal district court,[3] the case was dismissed, in part because the statute did not explicitly provide a private cause of action and the court refused to imply a private right to sue the FCS.[4]

The Redds typify the problems of the many other farmers like them who are unable to repay their original FCS loans due to circumstances beyond their control.

I. Introduction

The government has long played a vital role in assisting the agricultural sector of the United States. Although the spirit of

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1. The Redds proposed to sell off a portion of their land, thereby reducing their debt, and to obtain Farmers Home Administration financing or loan guarantees. Brief for Plaintiff at 4, Redd v. Federal Land Bank, 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988).

2. Pub. L. No. 99-205, 99 Stat. 1678 (codified as amended in scattered sections of 12 U.S.C.).

3. Redd v. Federal Land Bank, 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988).

4. *Id.* at 862.

helping farmers remain self-sufficient continues, program implementation often changes with various administrations and economic climates.

The Farm Credit Administration (FCA) is a government creation designed to help farmers obtain credit for operations and land purchases. The original purpose of the FCA was the establishment of an institution owned and operated by the borrowers, through which they could help themselves rather than relying on direct government assistance.[5] In the past few years, however, the FCA has been moving away from this structure towards a policy of less available money and less member control. The free spending, easy credit seventies have given way to a decade of tight money and high interest rates. Such tight money policies, combined with a dramatic drop in the value of farm land, have created a situation where farmers are deeply indebted and loans are severely undersecured.

While Congress has made several attempts to assist the farmer/borrower, agency interpretation of the statutes often thwarts these attempts. Because the Farm Credit System, which implements FCA policies, is not a system of government agencies but only government-affiliated entities,[6] it is difficult to determine whether their actions are reviewable by the federal courts.

The courts have also had difficulty determining congressional intent regarding borrowers' rights. The Farm Credit Amendments Act of 1985 (1985 Amendments)[7] recently renewed the controversy over borrowers' rights. The basic argument continues to be whether a borrower is allowed to sue an FCS entity in federal court for enforcement of protections provided by Congress, particularly for equitable relief.

The Agricultural Credit Act of 1987 (1987 Act),[8] passed in early January of 1988,[9] not only restructures the FCS and gives

5. Farmer participation and control was expanded at the district level by the Farm Credit Act of 1953; it gave borrowers the authority to elect six of the seven members of each of the twelve district farm credit boards. Farm Credit Act of 1953, ch. 335, § 14, 67 Stat. 390, 396 (codified as amended in scattered sections of 12 U.S.C.). Decentralization continued with the Farm Credit Act of 1971. 12 U.S.C. § 2001(b) (1982) stated "It is the objective of this Act 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. . . ."

6. *See* Farm Credit Act of 1971, 12 U.S.C. §§ 2001, 2241 (1982 & Supp. IV 1986).

7. Pub. L. No. 99-205.

8. Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 12 U.S.C.).

9. Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 12 U.S.C.).

assistance to the System, it also includes additional borrowers' rights. But, rather than clarifying the question whether a borrower can sue and FCS entity in federal court, the 1987 Act has only added fuel to the fire started by the 1985 Amendments by not mentioning the borrowers' right to a private cause of action.

The potential for continued problems for farmers is great if the FCS is to police itself in enforcing borrowers' rights and borrowers have no neutral court in which to have grievances heard.[10] This article traces the development of the Farm Credit System. It focuses especially on borrowers' rights: where they exist, how they can be enforced, and what the effect might be of the 1985 Amendments and the 1987 Act.

II. History of the Farm Credit System

The history of government assistance to farmers can be traced to the early 1900s, when both President Woodrow Wilson and the Southern Commercial Congress, a non-governmental organization, created commissions to study European cooperative credit systems.[11] After studying the proposals offered by the two commissions, Congress adopted a system based on a combination of methods used by European countries.[12]

The FCS, which implements FCA programs, is comprised of several entities, all performing various credit functions.[13] Originally, there were federal land bank associations (FLBAs) at the local level,[14] from which farmers would borrow money. To do so farmers were required to buy stock in the FLBA's supervising federal land bank (FLB) district.[15] There were also Federal Interme-

10. *See infra* pp. 66-68 for examples of the FCS' noncompliance with both the 1985 and 1987 laws.

11. John R. Brake, *A Perspective on Federal Involvement in Agricultural Credit Programs*, 19 S.D.L. Rev. 567, 568 (1974).

12. The two methods used were from the Landschaften banks of Germany and the organization of Raiffeisen banks in Europe. The Landschaften banks obtained loan funds through the sale of mortgage bonds to investors, the method employed by FLBs and Federal Intermediate Credit Banks. The Raiffeisen banks, using an approach similar to modern day credit unions, loaned money deposited by members to other members at favorable rates. The Raiffeisen method was adopted by the local FLBAs and Production Credit Associations. *Id.* at 568.

13. 12 U.S.C. §§ 2001-2260 (1982 & Supp. IV 1986).

14. Most FLBAs served several counties.

15. There were 12 FLB districts covering the United States and Puerto Rico, each with several FLBAs. Although the FLBs were originally capitalized with nine million dollars in government stock, Congress' intent was that the farmer/borrowers should own and control the institutions. This prompted the requirement of borrowers buying stock. Caitlin F. Collier-Wise & Patrick Duffy, *The Congressional Response to a Crisis in Agricultural Credit: The 1985 Farm Credit Amendments*, 31 S.D.L. Rev. 471 (1986).

diate Credit Banks (FICBs),[16] which, along with Production Credit Associations (PCAs),[17] offered discounted loans with the interest deducted in advance to commercial lenders, making agricultural loans more appealing. The 1987 Act called for major changes in the structure of the FCS, however.[18] The FLBs and FICBs were merged into new Farm Credit Banks.[19] PCAs and FLBAs were also merged.[20] Finally, the number of FCS districts was cut in half.[21] At this time one Federal Land Bank has already been closed and several others are having serious difficulties due to financial problems.[22]

III. Recent Legislation

A. The Farm Credit Amendments Act of 1985

In 1985, major revisions were made to the 1971 Farm Credit Act, in an attempt to bolster a weakened FCS and to increase borrower protection.[23] The Farm Credit Amendments Act of 1985 consists of four titles.[24]

Title III of the Amendments Act is captioned "Protection for Farmers and Other Farm Credit Borrowers."[25] Section 301(b)[26]

16. There were also 12 district FICBs.

17. The main function of PCAs was to provide operating loans to farmers for expenses generated during crop production. These loans were scheduled to be repaid at the end of the crop season, although some intermediate term credit was available for up to seven to ten years. C.W.S. Horne, *Sources of Agricultural Financing With an Emphasis on the Farm Credit System*, 1981-1982 Agric. L.J. 15, 21.

18. Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 12 U.S.C.).

19. *Id.* § 410.

20. *Id.* § 411.

21. *Id.* § 412.

22. The Federal Land Bank of Jackson closed May 20, 1988. The Federal Land Banks of St. Paul, Minnesota and Louisville, Kentucky are also reportedly in trouble. *Farm Credit Agency Shuts a Land Bank*, Wall Street J., May 23, 1988 at 4, col. 1.

23. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (codified as amended in scattered sections of 12 U.S.C.).

24. The first provision gives the system greater authority to build itself back up using its own resources. A new institution, the Farm Credit System Capital Corporation, was created to provide a central source of financial assistance to the various system institutions, and serve as a "warehouse" to which they could sell the property and delinquent loans. The Capital Corporation could then restructure or guarantee the loans and adjust borrowers' debts. Along the same lines, the second provision makes the FCA a "stronger, arms' length regulator of the system." Title III provides greater protection for borrowers under the system, and the final section gives the Secretary of the Treasury discretionary power to shore up the system's finances through purchasing obligations of the Capital Corporation. *Id.*

25. *Id.*

26. 12 U.S.C. § 2199 (Supp. IV 1986).

requires disclosure of loan information, such as the current rate, the amount and frequency by which a variable interest rate can increase, and "any [other] change in the interest rate applicable to the borrower's loan."[27] Borrowers are to receive a copy of the forbearance policy, which would give the FCS the option of waiting for past due payments in certain circumstances. Borrowers are also entitled to copies of all documents they signed at the time of execution of the loan.[28] Title III goes on to establish credit review committees, which include farmers, to review loan applications.[29] Finally, the provision calls for a review of each loan that has been placed in non-accrual status to determine if the loan could be restructured under the Act and its amendments.[30]

Regulations implementing these new borrower rights were published for comment by the FCA in May of 1986,[31] and following a comment period,[32] regulations were finalized on October 28, 1986.[33] The Governor of the FCA had previously stated that no regulations were necessary for several sections of the statute, including the provision describing the information to which borrowers are entitled and that dealing with actions on loan applications. These provisions became effective immediately.[34] The October regulations were given a November 28, 1986 effective date, eleven months after the passage of the Act.

The major problem arising out of this legislation and the regulations implementing it is whether borrowers under the FCS have a private cause of action to enforce the rights given them. FCA claims that the only relief afforded borrowers is through the agency's own appeals system, as provided in section 303 of the 1985 Act.[35] This view is supported by several pre-Amendments cases.[36] However, the legislative history and other post-Amendments cases

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27. *Id.*

28. 12 U.S.C. § 2200 (Supp. IV 1986).

29. 12 U.S.C. § 2202 (Supp. IV 1985).

30. Loans designated as having a non-accrual status are those which are due, but have not yet been paid.

31. 51 Fed. Reg. 17,034 (1986) (to be codified at 7 C.F.R. § 1747).

32. Proposed regulations are published by the agency, then interested parties are given an opportunity to comment on the regulations for a certain period of time before the final regulations are published. 5 U.S.C. § 553 (1982). Included among the comments to these particular regulations was a letter from the Attorneys General of several midwestern states: Hubert H. Humphrey (Minnesota), Neil F. Hartigan (Illinois), Thomas L. Miller (Iowa), Robert T. Stephan (Kansas), Nicholas Spaeth (North Dakota), and Bronson C. LaFollette (Wisconsin).

33. 51 Fed. Reg. 39,486 (1986) (to be codified at 12 C.F.R. 614, 615, 618).

34. Farm Credit Admin., News Release, *Farm Credit Administration Takes Action to Implement Farm Credit Act Amendments* (Feb. 14, 1986).

35. "The board of directors of each Farm Credit System institution shall establish one or more credit review committee(s). . . .Any loan applicant who has re-

point to a private cause of action.[37]

B. The Agricultural Credit Act of 1987

The 1987 Act[38] continued the major overhaul of the FCS begun by the 1985 Amendments,[39] and also strengthened the rights available to borrowers.[40]

Title I of the Act, "Assistance to Farm Credit System Borrowers," includes protection of borrower stock,[41] restructuring of distressed loans,[42] access to documents and information,[43] and a right of first refusal on property acquired by the FCS in a foreclosure.[44]

Of particular assistance to farmers are the sections on restructuring and the right of first refusal. Under the Act, the FCS must allow borrowers to submit an application for restructuring which modifies the loan obligation in such a way that makes it "probable that the operations of the borrower will become financially viable."[45] The Act specifically mentions rescheduling, reamortization, renewal, and deferral of payments.[46] In general, if the cost of restructuring is less for the FCS than the cost of foreclosure, the loan must be restructured.[47] It is possible restructuring may be cheaper for the FCS because a huge drop in the value of land, which is the usual security for loans, makes it impossible to collect the entire debt by the traditional method of foreclosure

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ceived written notice. . .of a decision to deny or reduce the loan applied for . . .may obtain a review of such decision...before the. . .committee."

36. Smith v. Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985); Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank, 625 F. Supp. 713 (D. Minn. 1986); Apple v. Miami Valley Prod. Credit Ass'n, 614 F. Supp. 119 (S.D. Ohio 1985); Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), *aff'd*, 785 F.2d 556 (6th Cir.), *cert. denied sub nom.* Bower v. Lyng, 479 U.S. 829 (1986); Hartman v. Farmers Prod. Credit Ass'n, 628 F. Supp. 218 (S.D. Ind. 1983).

37. 131 Cong. Rec. H11,518-19 (daily ed. Dec. 10, 1985) (Comments by Rep. de la Garza) Mendel v. Production Credit Ass'n, 656 F. Supp. 1212 (D.S.D. 1987); Aberdeen Prod. Credit Ass'n v. Jarrett Ranches, Inc., 638 F. Supp. 534 (D.S.D. 1986); Federal Land Bank v. Overboe, 404 N.W.2d 445 (N.D. 1987); Federal Land Bank v. Halverson, 392 N.W.2d 77 (N.D. 1986).

38. Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 12 U.S.C.).

39. Pub. L. No. 99-205, 99 Stat. 1678 (codified as amended in scattered sections of 12 U.S.C.).

40. Pub. L. No. 100-233, §§ 101-110, 101 Stat. 1568 (1988).

41. Pub. L. No. 100-233, § 101, 101 Stat. 1568, 1572 (1988).

42. Pub. L. No. 100-233, § 102, 101 Stat. 1568, 1574 (1988).

43. Pub. L. No. 100-233, § 104, 101 Stat. 1568, 1579 (1988).

44. Pub. L. No. 100-233, § 108, 101 Stat. 1568, 1582 (1988).

45. 12 U.S.C.S. § 2202a(a)(7) (Law. Co-op. Supp 1988).

46. *Id.*

47. *Id.* § 2202a(e)(1).

and sale. The restructuring provision also requires that borrowers be given forty-five days notice and that their restructuring application be considered *before* the lender may begin or continue foreclosure.[48]

With a right of first refusal, previous owners may buy back their property for the appraised market value or offer to purchase it for a lesser amount before the lender sells the property to a third party.[49] The Act extends the right of first refusal to borrowers whose land is acquired by the lender through foreclosure or voluntary conveyance. It includes borrowers who did not have sufficient financial resources to avoid foreclosure, as determined by the lender.[50]

Although an explicit private cause of action was not included in the 1987 Act, some courts have already taken a more enlightened view on that subject under the 1987 Act than those interpreting the 1985 Amendments. In both *Leckband v. Federal Land Bank*,[51] and *Harper v. Federal Land Bank*,[52] the courts found borrowers did have a right to sue if proper borrower protections were not afforded them.[53] This view is also substantiated by the legislative history of the 1987 Act.[54]

Final regulations for the Farm Credit portion of the 1987 Act were published on September 14, 1988.[55] Their publication could either help alleviate confusion or create the need for further litigation.

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48. *Id.* § 2202a(b)(2-3).

49. *Id.* § 2219a(a).

50. *Id.*

51. Civ. No. 3-88-167 (D. Minn. May 17, 1988), *appeal docketed*, No. 88-5301 MN (8th Cir. July 18, 1988). This Minnesota class action law suit deals with the right of first refusal.

52. 692 F. Supp. 1244 (D. Ore. 1988), *appeal docketed*, No. 88-4033 (9th Cir. July 26, 1988). This case, currently under consideration for class certification which would include certain borrowers in the 12th Federal Land Bank district (Spokane), deals with the right to apply and be considered for restructuring.

53. *See also* Transcript of Court's Order, Martinson v. Federal Land Bank, No. A2 88-31 (D.N.D. April 21, 1988) (court held the right of first refusal provisions apply to all property an FCS lender chooses to sell), *appeal docketed*, No. 88-5202 ND (8th Cir. May 20, 1988) Stainback v. Federal Land Bank, Civ. No. GC 88-25-NB0 (N.D. Miss. Feb. 8, 1988) (set for trial) (court held that despite the discharge in bankruptcy, the Stainbacks were entitled to loan restructuring consideration); *In re* Dilsaver, 17 Bankr. Ct. Dec. (CRR) 785 (Bankr. D. Neb. 1988) (appeal pending) (FLB must offer restructuring consideration to borrowers prior to obtaining the requested relief from a stay of collecting rents and profits on mortgaged land).

54. 133 Cong. Rec. S16,995 (daily ed. Dec. 2, 1987) (comments by Sen. Burdick); 133 Cong. Rec. H7,693 (daily ed. Sept. 21, 1987) (comments by Rep. de la Garza). See the discussion of the *Cort v. Ash* test, *infra* pp. 70-81.

55. 53 Fed. Reg. 35427-458 (1988).

C. The Problem

As noted above, the Redd family provides a good example of the problems which often befall FCS borrowers. After receiving notice that their farm would be sold at public auction, the Redds attempted to enjoin the foreclosure until they could be considered for Title III rights.[56] The district court held that the Redds had no private cause of action.[57] The court relied on legislative history and mistakenly concluded that Congress had debated and dropped such a remedy before the statute passed.[58] The debate upon which the court relied, however, concerned enforcement powers given the FCA to reprimand its own employees, not remedies for borrowers wronged by the System. The court also held that the administrative remedies available through the agency appeals process were adequate.[59] The Redds had argued vigorously against this point claiming that Congress had recognized the crises and the conflict of interest which had resulted in tension between the System and its borrowers.[60] As stated in their brief, "[i]t is highly unlikely that Congress, under such circumstances, would appoint the fox as the sole guardian of the chicken coop."[61]

The Redds then filed for reorganization under Chapter 11 of the Bankruptcy Code to prevent foreclosure while they appealed to the United States Court of Appeals for the Eighth Circuit.[62] The court of appeals limited its decision to the issue of whether the 1985 Amendments contain an implied private cause of action for damages.[63] The FLB acknowledged that if the Redds' bankruptcy plan was confirmed, there would be no need for foreclo-

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56. Redd v. Federal Land Bank, 851 F.2d 219, 220 (8th Cir. 1988).

57. Redd v. Federal Land Bank, 661 F. Supp. 861, 862 (E.D. Mo. 1987), *aff'd* 851 F.2d 219 (8th Cir. 1988).

58. *Id.* at 863.

> Mr. Glickman offered an amendment that would hold directors and officers of the System personally and individually liable for damages suffered when they knowingly violate this Act, or any rate regulation or order issued thereunder. It was pointed out that such severe penalties would discourage persons from serving as directors or officers. In addition, the bonding costs would add a considerable burden and cost to these institutions, if such bonds were to equal those or [sic] commercial-for-profit institutions. It was also pointed out that various other legal remedies already exist to address this matter.

Id. (Quoting H.R. Rep. No. 425, 99th Cong., 1st Sess. 44, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587, 2631).

59. *Id.*

60. H.R. Rep. No. 425, 99th Cong., 1st Sess. 44, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2587, 2598 [hereinafter House Report 425].

61. Appellants' Reply Brief at 3, Redd v. Federal Land Bank, 851 F.2d 219 (8th Cir. 1988).

62. *Redd*, 851 F.2d at 220.

63. *Id.* at 219.

sure.[64] It also conceded that if the bankruptcy proceeding was dismissed, the foreclosure would be governed by the 1987 Act.[65] The court decided, however, that the Redds could not recover damages. Dismissing comments made during floor debate of the Amendments as not controlling, the three-judge panel held that money damages were "inconsistent with the underlying purpose of the 1985 amendments."[66] Therefore, the question of whether injunctive relief is available under the 1985 Amendments was left explicitly unanswered by the *Redd* court.[67]

Many other farmers have found themselves in situations similar to that of the Redds. The Halversons had a good repayment record until March of 1984 and had continued to make partial payments through December of that year. Five straight years of bad weather—rain, hail, frost, and drought—and low prices prevented them from staying current on their payments. Despite their previously good record, their FLB refused any type of forbearance.[68]

Another farm family, the Overboes, met similar resistance when, after falling behind on their loan payments, they asked that their payment date be changed from July to December. This would have better accommodated their cash flow needs because, like most farmers, their money was tied up in crops during the summer growing season. The local FLB refused.[69]

The 1987 Act has not changed the attitude of the FCS. The System still seems determined to keep the farmers off the land, even if allowing them to stay costs the FCS the same or even less than selling to a third party.

One example is the Leckbands' situation.[70] There, the FLB interpreted 12 U.S.C. § 1229a to say there was no right of first refusal if the land was sold at public auction. The Leckbands argued that the statute gave them such rights whether the land was sold by public sale or otherwise.[71] The court found that the right of first refusal created by section 1229a (b) "comes into being when the seller first elects to sell the property."[72] Therefore, the FLB

64. *Id.* at 220.
65. *Id.*
66. *Id.* at 223.
67. *But see* Zajac v. Federal Land Bank, Civ. No. A3-88-115 (D.N.D. July 19, 1988) (decided under the 1987 Act, held there was no implied cause of action for damages, and, by inference no injunctive relief based on *Redd*, a case decided under the 1985 Amendments), *appeal docketed*, No. 88-5353 ND (8th Cir. Aug. 15, 1988); *See also infra* pp. 82-83.
68. Federal Land Bank v. Halverson, 392 N.W.2d 77 (N.D. 1986).
69. Federal Land Bank v. Overboe, 404 N.W.2d 445 (N.D. 1987).
70. Civ. No. 3-88-167 (D. Minn. May 17, 1988).
71. *Id.*
72. *Id.* at 3.

must offer the right at that time, the type of sale being irrelevant.[73]

An Oregon farm family, the Harpers, met similar resistance when they attempted to apply for restructuring of their FLB loans. In this case,[74] the FLB had obtained a default judgment of foreclosure in state court, before the January 6, 1988 passage of the 1987 Act. A sheriff's sale was held in March of 1988, but the Harpers retained redemption rights. The FLB contended that because the foreclosure judgment occurred before the Act, the Harpers did not qualify for borrower protection.[75] The court held, however, that since the statute said "no qualified lender may foreclose or *continue* any foreclosure proceeding. . . ,"[76] the Harpers must be considered for restructuring.[77]

These cases, and many others, illustrate a common practice of the FCS. The System often uses immediate foreclosure to collect a small percentage of the amount owed rather than working with a borrower, using some form of debt adjustment, to receive a greater amount on a revised schedule.[78]

IV. Pre-Amendment Interpretation

Relevant case law, involving situations occurring before the 1985 Amendments, is nearly unanimous in holding that there is no private cause of action as a remedy under the Farm Credit Act of 1971.[79] Most cases use language such as that found in *Brekke v. Volcker*.[80] The court held that because the Act did not "contain an express provision granting such a right"[81] and because several other courts had denied an implied cause of action, they would do the same.[82]

A recent case, *Production Credit Association v. VanIperen*,[83]

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73. *Id.* at 4.

74. Harper v. Federal Land Bank, 692 F. Supp. 1244 (D. Ore. 1988), *appeal docketed*, No. 88-4033 (9th Cir. July 26, 1988)

75. *Id.* at 1246.

76. 12 U.S.C.S. § 2202a(b)(3) (Law. Co-op. Supp. 1988) (emphasis supplied).

77. *Harper*, 692 F. Supp. at 1249.

78. *See also* Federal Land Bank v. Hopman, 658 F. Supp. 92 (E.D. Ark. 1987), Mendel v. Production Credit Ass'n, 656 F. Supp. 1212 (D.S.D. 1987), Brekke v. Volker, 652 F. Supp. 651 (D. Mont. 1987); Production Credit Ass'n v. VanIperen, 396 N.W.2d 35 (Minn. Ct. App. 1986).

79. *See, e.g.*, Bowling v. Block, 785 F.2d 556 (6th Cir. 1986), *cert. denied sub nom.*, Bower v. Lyng, 479 U.S. 829 (1986); Smith v. Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985) *VanIperen*, 396 N.W.2d 35.

80. 652 F. Supp. 651 (D. Mont. 1987).

81. *Id.* at 654.

82. *Id.*

83. 396 N.W.2d 35 (Minn. Ct. App. 1986).

held that the Farm Credit Act did not create a private cause of action for those injured by a System institution.[84] This case asserts that the plaintiff has a cause of action in state court, however, under the common law.[85] A right to be heard in state court does provide some chance for relief—when the agency had regulations but failed to follow them. Thus, under *VanIperen* a borrower possesses a common law defense against foreclosure.

A problem with this remedy can occur, however, in a case such as *Redd*. The Redds filed suit in state court just days before foreclosure proceedings on their property were to commence. The FCS removed the case to federal court, where a motion for a temporary restraining order (TRO) to stop foreclosure was denied.[86] As the Redds could not address their state law claims until their federal claims were dismissed much later, they were forced to file for bankruptcy to avoid foreclosure.[87] This jurisdictional problem makes state relief ineffective.

In another case, although the court decided against the farmer, it did note two things "significant to the analysis of the 1985 Act. . ., and which make the earlier [pre-Amendments] line of cases distinguishable."[88] The farmer in *Aberdeen Production Credit Association v. Jarrett Ranches, Inc.*[89] had alleged no facts or claims which arose after the passage of the 1985 Act. But, the court noted, "[w]ith the exception of any rights purportedly established under the 1985 Farm Credit Amendments Act, the statute creates no entitlement for farmer borrowers other than the right to reasons for denial and an informal hearing for unsuccessful loan applicants."[90]

The type of relief sought is another distinguishing factor in the cases finding there is no private cause of action. Monetary damages seem to require explicit language affording such protection. Equitable rights, however, can be implied. Although *Mendel v. Production Credit Association*,[91] one of the few cases brought under the 1985 Amendments, held that a private cause of action for damages was inconsistent with the purposes of the Amend-

84. *Id.* at 36.

85. *Id.*

86. Brief for Plaintiff at 5, Redd v. Federal Land Bank, 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988).

87. *Id.*

88. James T. Massey, *Farm Credit System Borrowers' Rights—Are They Enforceable?*, 2 Farmers' Legal Action Rep. 1 (Jan./Feb. 1987).

89. 638 F. Supp. 534 (D.S.D. 1986).

90. *Id.* at 537 (citing 12 U.S.C. §§ 2201, 2202).

91. 656 F. Supp. 1212 (D.S.D. 1987).

ments,[92] the court did not consider equitable relief. The court instead denied damages, finding that Congress was attempting to stabilize a financially unstable System.[93] The court's discussion did not apply to a plea for equitable relief. In another case, based on pre-Amendments actions, the court found that although there was no implied right of action for damages, "courts have recognized that federal regulations which have been held not to imply a private cause of action may nevertheless afford a basis for an equitable defense to a foreclosure action."[94] The courts have thus left the door open to equitable relief.

In *Federal Land Bank v. Halverson*,[95] the Supreme Court of North Dakota held that, under facts occurring before the 1985 Amendments, the failure of a federal land bank to comply with the administrative forbearance regulation and policies gives rise to a valid equitable defense to a foreclosure action under state law.[96] The court went on to say that the "close correspondence" between the Amendments' language and comments by Representative de la Garza on the House floor suggests that the Representative's remarks should be considered in interpreting the language.[97]

V. *Cort v. Ash*[98] Analysis

Further support for the proposition that farmers have a private cause of action against the FCA/FCS is found in *Cort v. Ash*, a 1975 United States Supreme Court case which sets the standard for deciding generally "whether a private remedy is implicit in a statute not providing one."[99] The case sets out four factors for making such a determination:

> 1. [I]s the plaintiff one of the class for whose especial benefit the statute was enacted?;
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> 2. [I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?;
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> 3. [I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?;
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> 4. [I]s the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?[100]

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92. *Id.* at 1216.
93. *Id.*
94. Federal Land Bank v. Overboe, 404 N.W.2d 445, 448 (N.D. 1987).
95. 392 N.W.2d 77 (N.D. 1986).
96. *Id.* at 81.
97. *Id.* at 86.
98. 422 U.S. 66 (1975).
99. *Id.* at 78.
100. *Id.* (citations omitted).

A. *Farmer/Borrowers Are Members of the Protected Class*

In going through the test step by step, using Title III of the 1985 Amendments, the first discussion is whether farmers who have been denied notice or other rights set out under the Act are of the class Congress intended to benefit. *Mendel v. Production Credit Association*,[101] speaks directly to that question, holding, "[b]y its terms, therefore, the 1985 Amendments were designed to benefit the special class of farmer/borrowers having difficulty paying their debts and receiving additional financing, and the Mendels are a member of that class."[102]

Additional support for *Mendel*'s proposition is found in earlier cases. By the 1930s, most courts held that if a statute favored a certain class, members of that class had the right to go to court to remedy a breach of that statute.[103] That view has changed dramatically as a result of increased litigation and overcrowded court dockets. The courts, therefore, are increasingly reluctant to find an implied right of action without *very* clear congressional support for such a decision.[104] For example, in 1979, *Touche Ross & Co. v. Redington*[105] held that section 17(a) of the Securities Exchange Act of 1934 gives no private cause of action, because the intent was to provide the Securities Exchange Commission with an early warning to protect investors, not to provide investors a vehicle with which to sue for damages. This made it obvious that investors were not the group Congress intended to benefit from the legislation. In the same year, however, the Supreme Court decided *Transamerica Mortgage Advisors, Inc. v. Lewis* in which a statute prohibited certain conduct and declared void any contracts made through such conduct, but did not expressly mention enforcement.[106] Without reference to legislative history, the Supreme Court found an implied right of action for rescission, injunctive relief, and restitution. The Court went on to hold that, "[t]he very least Congress must have assumed [is] that [the void contracts] could be raised defensively in private litigation. . ."[107] and concluded that the statutory language itself implied a right to judicial relief. This was despite the fact that no civil liabilities allowing

101. 656 F. Supp. 1212 (D.S.D. 1987).

102. 656 F. Supp. at 1216.

103. Comment, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Cumb. L. Rev. 569 (1983).

104. Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 Fordham L. Rev. 611, 613 (1982).

105. 442 U.S. 560 (1979).

106. 444 U.S. 11 (1979).

107. *Id.* at 18.

damages were created by the Act. The difference seems to be that the plaintiffs in *Transamerica* were intended beneficiaries of the statutory protections.

In the case of the 1985 Amendments, the FCS argues that Title III was intended for the benefit of the Farm Credit System, and that forbearance and the internal appeals process were meant to strengthen the institutions, not to help the individual borrowers.[108] This argument is based mainly on the enforcement powers given the FCA, under other sections of the Amendments, which allow them to issue cease and desist orders and suspend or remove recalcitrant directors or officers.[109] Although the House Committee on Agriculture rejected an amendment which would have authorized damage actions against System officers and directors, these provisions dealt with the FCA's disciplinary powers over its own employees, and had nothing to do with the borrowers.[110] There are no published regulations giving instructions for seeking a cease and desist order. This makes it impossible for a borrower to enforce his rights by that method, if it was meant to be the proper avenue.

As Congress was creating new "protection" for the special class of FCS borrowers, allegedly to ensure fairness, it seems unlikely that the only enforcement power and source of relief would be left to the FCA. A footnote in *Cannon v. University of Chicago*[111] addresses this issue, saying that although the Court had "sometimes refuse[d] to imply private rights of action where administrative or like remedies are expressly available," if the "statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process" it would not withhold such a remedy.[112] Leaving protection only to the FCS is especially unrealistic as Congress noted the "tensions" created between the System and its borrowers by financial difficulties.[113] The fact that so many borrowers must resort to court action to receive rights guaranteed by law demonstrates the folly of thinking the FCS can police itself. Therefore, farmer/borrowers must be the intended class.

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108. Brief for Appellees at i, Redd v. Federal Land Bank, 851 F.2d 219 (8th Cir. 1988).

109. House Report 425, *supra* note 60, at 2598.

110. *Id.*

111. 441 U.S. 677 (1979).

112. *Id.* at 707 n.41.

113. House Report 425, *supra* note 60, at 2598.

B. *Congress Intended an Implied Cause of Action for Farmer/Borrowers*

The second factor in the *Cort v. Ash* test concerns the legislative intent behind a statute. Some recent decisions have been based almost entirely on this criterion, with the other elements enunciated in *Cort* virtually ignored.[114] The original interpretation of the legislative intent factor in *Cort* was that a positive showing of congressional intent would be required for a private cause of action to be implied. This completely overruled an earlier notion that Congress had to expressly disallow a private action within the wording of a statute for that remedy to be unavailable.[115] *Touche Ross & Co.* bases its decision in large part on the fact that the relevant provision was flanked by other sections which explicitly provide a private right of action. This led to the conclusion that, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[116] Justice Rehnquist, writing for the majority, "expressly subordinated" the third and fourth factors, and found that if the first two factors were not satisfied, that was enough to deny an implied private right of action.[117]

In the same year that *Touche Ross & Co.* was decided, however, the Supreme Court also decided *Cannon v. University of Chicago*,[118] which stated, "The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section."[119] The Court determined that courts have tried to avoid reaching so far to discover legislative intent, and will not do so without "other, more convincing evidence that Congress meant to exclude the remedy."[120] More recently, in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,[121] the high Court reiterated its use of legislative intent as the most important factor, but used quite different methods in discovering that intent. They noted that lower courts had upheld a private cause of action under the pertinent law, and subsequent

114. *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982).

115. Comment, *supra* note 103, at 579.

116. *Touche Ross & Co.*, 442 U.S. at 572.

117. Note, *supra* note 104, at 619.

118. 441 U.S. 677 (1979).

119. *Id.* at 711; *see also* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

120. *Cannon*, 441 U.S. at 711.

121. 456 U.S. 353 (1982).

amendments by Congress did not expressly prohibit such a right; the Court decided the lower courts must have been correctly interpreting congressional intent.[122]

The legislative intent factor was construed much more broadly under *Curran*, and that construction was carried over to a 1987 case, where *Cort* was not even mentioned in the majority opinion.[123] In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court found that there were only two circumstances where there was no right to sue under 42 U.S.C. § 1983:[124] "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983."[125] The Court went on to say "the remedial devices provided in [the Housing Act] are [not] sufficiently comprehensive. . .to demonstrate congressional intent to preclude the remedy of suits under section 1983,[126] [and] [t]hey do not show that 'Congress specifically foreclosed a remedy under section 1983.' "[127] The *Wright* court also stated that the availability of administrative review did not preclude use of section 1983.[128]

More specific questions concerning intent behind statutory law are, what is legislative history and how much weight should be accorded various sources. An early case, *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*,[129] held that the court would be "wholly unjustified" in ignoring the legislative interpretation given the statute during debate and at its passage.[130] The Court relied heavily on the House and Senate committee reports, as well as statements by the bill's sponsors on the floor.

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122. *Id.* at 379-83; *see also* Comment, *supra* note 103, at 591.

123. Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987).

124. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

125. 479 U.S. at 424; *see also* Fuentes v. Shevin, 407 U.S. 67 (1972).

126. 479 U.S. at 424 (citing Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 20 (1981)). *Sea Clammers* held that because the statutes at issue provided "comprehensive enforcement mechanisms," including specific statutory remedies such as citizen-suit provisions, the § 1983 right of action was not preserved. 453 U.S. at 20.

127. 479 U.S. at 424 (citing Smith v. Robinson, 468 U.S. 992, 1004-05 n.9 (1984)).

128. 479 U.S. at 427-28.

129. 336 U.S. 301 (1949).

130. *Id.* at 312.

More recently the Supreme Court reaffirmed that reasoning, holding that although the comments of one legislator are not the final word in statutory interpretation, "remarks. . .of the sponsor of the language ultimately enacted are an authoritative guide to the statute's construction."[131] The Court expressed similar sentiments in *Brock v. Pierce County*,[132] where it held that if comments by individual legislators are consistent with other legislative history, as well as the language of the statute itself, "they provide evidence of Congress' intent."[133]

As discussed above, the legislative history of the Farm Credit Amendments points toward an intent to allow private action in federal court, beginning with the title of the relevant section. Discussion in the House of Representatives centered on providing relief to FCS borrowers and institutions. The House Report found that

> [a]dditionally, the bill provides legal protection for borrowers that is needed to ensure that they receive fair treatment and due process, and that they are given every realistic opportunity to avoid liquidation and stay in business. . .The bill is designed to reduce those tensions by bolstering confidence in the System's financial stability and mandating fair and equitable treatment of the borrowers.[134]

The report's further statement that the Amendments would "[p]rovide new protection for System borrowers"[135] also creates an inference that additional relief was intended.

Individual legislators also made statements indicating new borrowers' rights were being created, including legal relief. Senator Paula Hawkins stated:

> Another positive step in this legislation are a number of provisions that protect farmer-borrowers of the System . . . [including] this section of the legislation [which] provides for the reconsideration of farm credit institution's action with regard to loans that may be restructured based on changes in the circumstances of the institution as a result of the enactment of this bill.[136]

Senator Jesse Helms of North Carolina also urged passage of the bill because of the urgent need of both the FCS and the nation's

131. North Haven Bd. Educ. v. Bell, 456 U.S. 512, 526-27 (1982); Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 66 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

132. 476 U.S. 253 (1986).

133. *Id.* at 263.

134. House Report 425, *supra* note 60, at 2597-98.

135. *Id.* at 2588.

136. 131 Cong. Rec. S16,739 (daily ed. Dec. 3, 1985).

farmers.[137] These comments show that congressional leaders intended to provide assistance to farmers, not just to an ailing System.

The evidence most directly related to the question of whether borrowers have the right to go to court against the FCS came in a discussion between Representatives Tim Penny of Minnesota and Kika de la Garza, chairman of the House Committee on Agriculture and sponsor of the bill.

> Rep. PENNY: . . .I know you share with me the belief that applicants and member-borrowers need assurances throughout the process that they are being treated fairly. In addition to such guidelines and regulations, will this legislation provide [them] the option of utilizing the court system to ensure they are properly enforced?
>
> Rep. DE LA GARZA: Yes, Mr. Penny, as you indicate, a major section of this bill does establish a set of borrowers' rights, and it would be my understanding that the rights of applicants and member-borrowers as set forth in this Act and in the regulations of the Farm Credit Administration shall be enforceable in courts of law.[138]

Further evidence is found in testimony presented before a House subcommittee, where former FCA Governor Donald Wilkinson stated, "system institutions are borrower-owned businesses, not government agencies. FCA believes that adequate protection of debtor's rights are provided by the judicial process."[139]

The legislative history for the 1987 Act also refers to the cause of action available under the 1985 Amendments. While discussing differences between the House and Senate versions of a "right to sue" section of the bill, Senator Quentin Burdick stated: "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."[140] Earlier in the year Representative de la Garza had made a similar comment in the House: "I have no problem with the gentleman's intention in allowing borrowers [the right] to sue, although I think basically they have that right now."[141] Despite this history and the caption, "Protection for Farmers and Other Farm Credit System Borrowers," indicating in-

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137. 131 Cong. Rec. S17,759-60 (daily ed. Dec. 17, 1985).

138. 131 Cong. Rec. H11,518-19 (daily ed. Dec. 10, 1985).

139. *Hearings Before the Subcomm. on Government Information Justice and Agriculture of the House Comm. on Government Operations*, 99th Cong., 1st Sess. (Nov. 15, 1985) (testimony of Donald E. Wilkinson) (on file with *Law & Inequality*).

140. 133 Cong. Rec. S16,995 (daily ed. Dec. 2, 1987).

141. 133 Cong. Rec. H7,693 (daily ed. Sept. 21, 1987).

creased borrowers' rights, the FCA/FCS insists in its court cases against farmers that the Amendments are only for the benefit of the System itself. As indicated in a brief from a recent FCS case, the FCS argues, "[t]he primary purpose of the 1985 Amendments was to reduce the financial stress on the farmer-owned Farm Credit System. The forbearance policy was intended to provide additional protection to the lender, not to delinquent borrowers. Thus, Congress vested exclusive power to enforce the forbearance policy in the [FCA]."[142] The FCS interprets the entire 1985 Act as relating only to the strengthening and restructuring of the System, and feels Title III was designed to protect the lender. They point to the fact that from a lender's perspective, foreclosure should usually be the last alternative, and therefore the policy of forbearance would strengthen the System, and is not necessarily for borrower protection.[143]

Finally, the FCS argues that Congress did not intend that farmers should be able to enforce the forbearance policy, but instead gave limited procedural rights to the borrowers through agency appeals.[144] Asserting that Congress knew how to create a private cause of action and did not specifically do so, the System interprets the Amendments as it does the original Act—providing no private cause of action. *Mendel v. Production Credit Association* found, however, that legislative history proved that "Congress explicitly intended that the borrowers' rights portion of the amendments be enforceable through a court action," and that this, along with the language of the amendments, made it apparent that enforceable, substantive rights were created.[145] *Aberdeen Production Credit Association v. Jarrett Ranches, Inc.*[146] also notes the comments in the Congressional Record, but the events in that case occurred prior to the enactment of the Amendments, so the newer law was not applicable.

If legislative history is to be given the most weight in deciding whether a statute provides private remedies, there is certainly strong support for arguing that Congress intended Title III of the 1985 Amendments to include a private cause of action. Even if the discussions among individual legislators are not found to be dispositive, the language in the House and Senate reports favorable to

142. Brief for Appellees at i, Redd v. Federal Land Bank, 851 F.2d 219 (8th Cir. 1988).

143. *Id.* at 11.

144. *Id.*

145. 656 F. Supp. 1212, 1216 (D.S.D. 1987).

146. 638 F. Supp. 534, 537 (D.S.D. 1986).

the allowance of a private cause of action meets the legislative intent requirement of the *Cort* test.

C. An Implied Cause of Action Is Consistent with the Legislative Purpose

The third *Cort v. Ash* factor concerns whether it would be consistent with the underlying purposes of the legislation to allow an implied cause of action. The history of the Amendments indicates four primary provisions would be amended, including one which would "[p]rovide new protection for System borrowers."[147] The FCS argues that the enforcement powers created in section 204 of the Act are carried over into Title III.[148] This part of the statute authorizes the FCA to take enforcement actions against System institutions and employees to ensure safe and sound operation and conformance with applicable laws.[149] Only the FCA can initiate cease and desist orders[150] or proceedings for suspension and removal[151] if individual employees or the institution for which they work engage in unauthorized activities. The FCS interprets these as the exclusive remedies under the statute, precluding judicial review.

The claim continues by naming assistance to the financially troubled FCS as the main objective behind the 1985 Amendments, making foreclosure inconsistent with the statutory purpose.[152] The Amendments also restructured the FCA, making it an "arms' length regulator."[153] The FCS argues that because the primary purpose of the Amendments was to strengthen the System, it makes sense for such a regulator to have exclusive responsibility for enforcement.[154]

There is no doubt that the statute refers in large part to strengthening the System internally. The *Mendel v. Production Credit Association* court stated, "the 1985 Amendments major goal was to shore up a financially unstable [FCS]. . . .Allowing farmer/borrowers who were not given their Title III rights to recover substantial monetary damages is completely inconsistent with the underlying purpose of the 1985 Amendments."[155] However, these

147. House Report 425, *supra* note 60, at 2588.
148. *See supra* pp. 76-77.
149. House Report 425, *supra* note 60, at 2611.
150. *Id.* at 2612.
151. *Id.* at 2612-2613.
152. Brief for Appellees at 25, Redd v. Federal Land Bank, 851 F.2d 219 (8th Cir. 1988).
153. *Id.*
154. *See supra* note 148 and accompanying text.
155. Mendel v. Production Credit Ass'n, 656 F. Supp. 1212, 1216 (D.S.D. 1987).

arguments seem to run counter to much of the legislative history behind the Amendments. This language does not preclude the availability of injunctive relief, and there are many comments on an intended right of enforcement, all of which point to a borrower's right to judicial review. A counter argument set forth by borrowers is that Congress knew that the courts were unanimous in holding that there was no implied private right of action under farm credit legislation prior to the 1985 Amendments.[156] Knowing that the farmer/borrower had no right of action, Congress proceeded to enact the Amendments with a significant section devoted to creating borrowers' rights. Arguing that the Amendments are substantially different from the Act itself, the borrowers state that the judicial construction of the Act should not automatically transfer to the Amendments.[157] In support, it is pointed out that Congress specifically recognized the stress and conflict of interest which resulted in tension between the System and its borrowers.[158]

As noted in *Cannon*, the Supreme Court will not make a negative inference that there is Congressional intent to deny relief simply because a complex statutory scheme creates express remedies. Rather the Court has demanded "other, more convincing, evidence that Congress meant to exclude the remedy."[159] In *Cannon*, the Supreme Court found there was a private cause of action. In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[160] an implied right of action for certain limited non-monetary relief was found even though the statute specifically set out other procedures for compliance and relief.[161] *Cannon* reiterated that point, saying that when a remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court should be receptive to its implication.[162] As there is evidence that the chairman of the House Committee on Agriculture, the sponsor, and several others spoke of judicial relief and other borrowers' rights, the Amendments pass the *Cannon* test. "[E]quitable relief can be tailored to

156. Brief for Appellants at 8, *Redd*, 851 F.2d 219.

157. Johnson v. First Nat'l Bank holds that "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). The court goes on to say, however, "This presumption is especially valid where, as in the present case, the language of the statutes under consideration is substantially identical to that of the previous statutes." 719 F.2d at 277.

158. House Report 425, *supra* note 60, at 2598.

159. Cannon v. University of Chicago, 441 U.S. 677, 711 (1979).

160. 444 U.S. 11 (1979).

161. *Id.* at 24.

162. 441 U.S. at 703.

be consistent with the underlying purposes of the legislative scheme."[163]

D. An Implied Cause of Action Does Not Interfere with Traditional State Remedies

The final test under *Cort v. Ash* is whether the cause of action is "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."[164] The rights here were created by the Farm Credit Amendments Act of 1985, making it appropriate for them to be enforced as a matter of federal law. An additional argument is that in states where nonjudicial foreclosures are allowed, borrowers have no remedy if they are precluded from raising their claims in federal court.[165]

On the other hand, it has been argued that state law governs because of the statutory language. Each System institution is a citizen of the state in which its principal office is located,[166] and several cases have applied state law on issues of foreclosure and fiduciary relationships between PCAs and their officers.[167] While foreclosure proceedings may be an issue under state law, the rights in question were specific ones created by the Amendments and put into effect by federal regulations, not general acts to be performed under state law. *Aberdeen Production Credit Association v. Jarrett Ranches, Inc.*, does state that although the defendants did not have a federal cause of action, they were not left without a remedy because they could still protect their rights under state law.[168] The court dismissed without prejudice the defendant's claims of breach of contract and negligence, rights traditionally enforced under state law. The dismissal of claims brought under the newly created Title III rights left the borrowers no recourse for those claims.[169]

Each of the elements enumerated by *Cort* have been satisfied by the 1985 Amendments. Farmer/borrowers are of the class for whose benefit the law was enacted and there is clearly legislative intent supporting a private cause of action for that class. Such a

163. Chase v. Theodore Mayer Bros., 592 F. Supp. 90, 100 (S.D. Ohio 1983).

164. 422 U.S. 66, 78 (1975).

165. Brief for Plaintiff at 13, Redd v. Federal Land Bank, 661 F. Supp. 861 (E.D. Mo. 1987), *aff'd*, 851 F.2d 219 (8th Cir. 1988).

166. 12 U.S.C. § 2258 (1982).

167. Federal Land Bank v. Warner, 292 U.S. 53, 55-57 (1934); Wilson v. Mason State Bank, 738 F.2d 343, 345 (8th Cir. 1984); Boyster v. Roden, 628 F.2d 1121, 1125 (8th Cir. 1980).

168. 638 F. Supp. 534, 538 (D.S.D. 1986).

169. *Id.*

remedy is also consistent with the statutory purpose of assisting borrowers. Finally, a cause of action for borrowers is not one traditionally relegated to state law. Because each of the *Cort* factors is met, a private cause of action exists under the 1985 Amendments and the farmer/borrower should be allowed that right.

VI. The Effect of the 1987 Act

Although a case should be decided under the laws in effect at the time the particular incidents occurred, the 1985 and 1987 legislation is too closely intertwined to consider one without reference to the other. As noted previously, much of the legislative history surrounding the 1987 Act indicates a belief on the part of Congress that FCS borrowers already enjoyed a private cause of action against Farm Credit institutions.

In May of 1987, the 1987 Act was proposed and included an express private cause of action.[170] The section by section analysis states, "[S]ection 302 adds a new section 5.38 to the Farm Credit Act of 1971 to affirm that borrowers have a right to sue, in federal court. . ."[171] One of the bill's sponsors then stated:

> I am particularly proud to be the sponsor of legislation that spells out a borrowers bill of rights. The borrowers in this system have been abused, mislead, coerced by Farm Credit Administration banks and officials who have sought to remake this system along new lines, but to the detriment of local control and cooperative principles. To protect against such abuses in the future, the bill provides borrowers with specific rights, including the following:. . .Borrowers have the right to sue in Federal court any institution of the Farm Credit System for violating duties owed to the borrower. . . .[172]

The bill which the Senate considered in August also contained an express provision for a borrowers' private right of action.[173] Senator David Boren explained that the bill would provide a right to sue both the FCS and FCA and give original jurisdiction to federal district courts.[174]

After the House included an amendment granting an express cause of action in their version of the bill,[175] the Senate reconsidered the Act. Senator Burdick, feeling the House version actually restricted borrowers' rights, proposed his own amendment.[176] By

170. 133 Cong. Rec. S6,105 (daily ed. May 6, 1987).
171. *Id.* at S6,107.
172. *Id.* at S6,109 (comments by Sen. Fowler).
173. 133 Cong. Rec. S11,724 (daily ed. Aug. 7, 1987).
174. *Id.* at S11,755.
175. 133 Cong. Rec. H7,638, 7,692 (daily ed. Sept. 21, 1987).
176. 133 Cong. Rec. S16,993, S16,995 (daily ed. Dec. 2, 1987); *see also supra* p. 76.

using the word "borrower" to describe those with a cause of action, Senator Burdick felt "[t]his restricts rights of persons who are not yet borrowers, or who are former borrowers, to sue."[177] Senator Boren stated:

> I am told that the House has unduly restricted the right of the borrower to bring suit and that that is the proposal that is in the House bill. It would be my thought...that we would oppose that House provision in the conference committee. 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.[178]

Senator Richard Lugar stated, "I would confirm the understanding that. . .[w]e 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."[179] Consistent with their expressed intent, the Senate opposed the House provision, and it was deleted from the final Act.[180]

Both the House and the Senate intended that a borrower have the right to bring a private action in federal court to enforce the Act. However, members of Congress, particularly Representative de la Garza, Chairman of the House Agricultural Committee, and Senators Boren and Lugar, all members of the conference committee, were under the misperception that courts were already accepting the farmers' right to sue.[181]

There have already been several cases brought by borrowers under the 1987 Act.[182] In all but one case the court ruled that there was a private cause of action for the plaintiffs for equitable relief.[183] The courts relied mainly on legislative intent, which they gleaned from various statements by legislators.[184]

In *Zajac v. Federal Land Bank*,[185] the Federal District Court

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177. 133 Cong. Rec. S16,995 (daily ed. Dec. 2, 1987).

178. *Id.*

179. *Id.*

180. 133 Cong. Rec. H11,820 (daily ed. Dec. 18, 1987).

181. 133 Cong. Rec. H7,692-93 (daily ed. Sept. 21, 1987).

182. *See* notes 52-53, *supra* and accompanying text.

183. *See* Zajac v. Federal Land Bank, Civ. No. A3-88-115 (D.N.D. July 19, 1988), *appeal docketed*, No. 88-5353 ND (8th Cir. Aug. 15, 1988).

184. Harper v. Federal Land Bank, 642 F. Supp. 1244,12 (D. Ore. 1988), *appeal docketed*, No. 88-4033 (9th Cir. July 26, 1988); Leckband v. Federal Land Bank, Civ. No. 3-88-167 at 7-9 (D. Minn. May 17, 1988), *appeal docketed*, No. 88-5301 MN (8th Cir. July 18,1988); Transcript of Court's Order, Martinson v. Federal Land Bank, No. A288-31 at 2 (D.N.D. April 21, 1988), *appeal docketed*, No. 88-5202 ND (8th Cir. May 20, 1988).

185. *Martinson*, No. A288-31 at 2.

for the District of North Dakota found no private cause of action under the 1987 Act, but gave little explanation. Relying on *Redd*, a case under the 1985 Amendments, the court held the borrowers, who sued under the 1987 Act, had no judicial review.[186] The *Zajac* opinion, decided after the 1987 Act cases discussed earlier, did not distinguish those cases or even mention them, and contained very little analysis.

The main argument of System institutions against a private cause of action for borrowers has been the availability of cease and desist orders against FCS institutions and employees.[187] This triggers the question of whether borrowers can force the FCA to issue cease and desist orders to employees who fail to follow the statute and regulations. This proposition is not supported by any of the cases brought under the 1987 Act.

Authority for the proposition that private remedies are available can be found in cases against other government agencies. In *Dunlop v. Bachowski*,[188] the Secretary of Labor was asked to bring a civil suit to set aside a union election. When the Secretary declined to do so, a defeated candidate filed suit. The Supreme Court held that "in the absence of an express prohibition in the [statute] the Secretary. . .bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of this decision."[189] The Court went on to say the Secretary failed to make a showing of "clear and convincing evidence"[190] that Congress meant to prohibit *all* judicial review, but found a congressional purpose to limit the scope. Finally, the Court said the Secretary must give reasons supporting his determination, and a court's review should be "confined to examination of the 'reasons' statement."[191]

More recently, in *Heckler v. Chaney*,[192] the Court provided a more explicit review scheme. The Court found that, under sections 701-706 of the Administrative Procedures Act, any person "adversely affected or aggrieved"[193] by an agency action, or failure to act, as long as the action is a "final agency action for which there is no other remedy," is entitled to judicial review.[194]

Although the Court in *Chaney* declined to provide the plain-

186. *Id.* at 7.
187. *Leckband*, Civ. No. 3-88-167 at 8.
188. 421 U.S. 560 (1971).
189. *Id.* at 567.
190. *Id.* at 568.
191. *Id.*
192. Heckler v. Chaney, 470 U.S. 821 (1985).
193. 5 U.S.C. § 702 (1982 & Supp. IV 1986).
194. *Id.* § 704.

tiff judicial review, there are factors which distinguish the case of the FCS borrower. The Court noted that when an agency refuses to act, it "generally does not exercise its *coercive* power over an individuals liberty or property rights and thus does not infringe upon areas that courts often are called upon to protect."[195] Most FCS borrowers, however, stand to lose their farms, homes, and ways of life as a result of agency action.

Although none of the courts involved in actions under the 1987 Act have accepted it to this point, there is also the argument that both Houses of Congress had express causes of action included in their bills but subsequently deleted those provisions. These deletions could be interpreted as meaning Congress consciously removed that remedy for FCS borrowers. In *Cannon v. University of Chicago*,[196] the Supreme Court addressed a similar situation. In *Cannon*, the Court analyzed whether there is a private right of action under Title IX of the Education Amendments which Congress modelled after Title VI of the Civil Rights Act of 1964. When Congress passed Title IX in 1972, it was "under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable."[197] The Supreme Court stated that " 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.' "[198] Therefore, a private right of action was found under Title IX.

Here, as in *Cannon*, an implied right of action is consistent with the intent expressed by both the House and the Senate. As articulated in *Harper v. Federal Land Bank*,[199] Congress did not, by eliminating the express language creating a private cause of action, intend to eliminate the right, but rather to maintain a right it thought already existed.[200]

If Judge Panner's reasoning under *Cannon* is rejected, Hart and Sacks[201] offer another option: "consider the variety of reasons which legislators may have either for opposing a bill or simply withholding the votes necessary." These reasons include the belief that a bill is sound in principle but politically inexpedient, that the bill is sound in principle but defective in material particulars, or

195. *Chaney*, 470 U.S. at 832.
196. 441 U.S. 677 (1979).
197. *Id.* at 710-11.
198. *Id.* (quoting Brown v. General Serv. Admin., 425 U.S. 820, 828 (1976)).
199. 692 F. Supp. 1244 (D. Ore. 1988), *appeal docketed*, No. 88-4033 (9th Cir. July 26, 1988).
200. *Id.* at 1247-48.
201. Henry H. Hart & Albert M. Sacks, The Legal Process, 1395-96 (tent. ed. 1958).

action should be withheld until the problem can be attacked on a broader front.[202] The authors question how a court could ever ascertain that a bill's failure to pass was due to one of these reasons.[203] Any such holding by a court would have to be supported by the unreasonable conclusion that Congress' failure to pass a bill can be translated into approval of a judicial decision.

Any of the above reasons could apply in the case of the FCS borrower. Congress needed to pass a farm bill to address the many problems plaguing American agriculture. To pass any bill there must be "give and take," and to get any farm legislation through, explicit language may have been removed by necessity. It is also very possible that because of concern for the financial stability of the System, legislators were afraid an express right of action would give a damage remedy but had no intention of denying an equitable remedy. Several courts have given relief as a matter of equity under the 1985 Amendments, or suggested its availability where an FCS lender had failed to carry out a mandatory provision of the Act.[204] Legislative history indicates that Congress maintained great concern for individual farmers and their rights. In highlighting a letter of concerns from several key farm state senators, Senator Charles Grassley of Iowa stated, "Any assistance package for the Farm Credit System must directly help the struggling farmer/borrower as opposed to having what some suppose might be a legitimate end of just saving the System or helping the System."[205] These concerns voiced by the courts, Congress, and other holders of public office only serve to accent the obvious needs of farmers.

VII. Conclusion

The question of who may exercise a private cause of action after the violation of a statutory right remains open and controversial. The Supreme Court itself has not followed the *Cort* test strictly, allowing lower courts to create their own formulas. The 1985 Amendments mandated major changes in the Farm Credit System structure and in how it treated its borrowers. When the System interpreted the Amendments as narrowly as possible, Congress was again forced to pass substantial farm legislation in 1987. Even this not so gentle nudge has failed to affect FCS policy—

202. *Id.*

203. *Id.* at 1396.

204. *See, e.g.*, Federal Land Bank v. Overboe, 404 N.W.2d 445 (N.D. 1987); Federal Land Bank v. Halverson, 392 N.W.2d 77 (N.D. 1986); Aberdeen Prod. Credit Ass'n v. Jarrett Ranches, Inc. 638 F. Supp. 534 (S.D. 1986) (dictum).

205. 133 Cong. Rec. 16,926 (daily ed. Dec. 2, 1987).

farmers continue to be pushed off the land, even if it would be cheaper for the System to allow them to remain. There will be no end to this vindictiveness until Congress explicitly grants a private cause of action to FCS borrowers, for both equitable and monetary relief. Unfortunately, the 1987 Act, without such explicit language, leaves the question open to further litigation.

The concept that a statutory right without a remedy for its violation is an empty right has been around many years. "[I]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law."[206]

It remains in the hands of the judiciary to decide whether the cases of FCS borrowers will be heard by an impartial court, or left to the fox.

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206. Couch v. Steel, 3 E. & B. 402, 411, 118 Eng. Rep. 1193, 1196 (Q.B. 1854).