

The Courts' Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FmHA Loans

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Over a twelve year period, Kenneth and Lanae Fisher incurred three Farmers Home Administration (FmHA) loans¹ for their family farm. On July 26, 1988, the Fishers filed a petition under Chapter 12 of the bankruptcy code.² In the reorganization plan, the Fishers calculated the FmHA loans' repayment rate as a weighted average of the three different interest rates at which they had borrowed. The FmHA objected, claiming this weighted average was too low. Yet the bankruptcy court³ affirmed the Fishers' plan, and the district court affirmed the bankruptcy court's decision.⁴ The Court of Appeals for the Eighth Circuit, however, reversed these decisions,⁵ interpreting Chapter 12's cramdown provision⁶ as requiring the Fishers to pay back their loans at a higher interest rate after bankruptcy than previously.⁷

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1. Low-income family farmers qualify for special low interest loans offered by the Farmers Home Administration (FmHA). This government agency was established to specifically aid low income farmers. *See infra* notes 42-44 and accompanying text.

2. The United States Congress enacted Chapter 12 bankruptcy to help family farmers through the present farm crisis. *See also infra* notes 101-17 and accompanying text. *See* H.R. CONF. REP. No. 958, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5249.

3. *In re Fisher*, 930 F.2d 1361, 1361 (8th Cir. 1991) (citing *In re Fisher*, No. 88-05611 (Bankr. D.N.D. Jan. 25, 1989)).

4. *Id.* (citing *In re Fisher*, No. A1-89-053 (D.N.D. June 6, 1989)).

5. *Id.* at 1364.

6. The cramdown provision provides that if a creditor receives the present value of the loan's secured collateral, a debtor's repayment plan may be crammed onto the creditor. 11 U.S.C. § 1225(a)(5)(b) (1988). *See infra* notes 87-88 and accompanying text.

7. The original rates for the three FmHA loans were 7.25%, 4.5%, and 4.5%. 930 F.2d at 1363. The court rejected these rates as too low and held that the loans should be repaid at the market rate. *Id.* at 1363, 1364.

Fisher illustrates the power courts possess to influence the fate of the imperiled American family farm.⁸ Chapter 12 bankruptcy was enacted to help family farmers survive the present farm crisis.⁹ During Chapter 12 proceedings, courts, like the *Fisher* court, interpret the code, thereby determining the extent of Chapter 12's protection for family farms.

This article argues that interpreting the statute to place the farmer in greater debt after filing for bankruptcy contradicts Chapter 12's purpose by hurting those farmers most in need of help. Part I discusses the evolution of the American family farm and the factors contributing to its demise. Part II examines statutory responses intended to relieve the plight of the family farm, including Chapter 12 bankruptcy proceedings. Part III describes various courts' interpretations of present "value" under the bankruptcy code. Part IV presents a more reasonable resolution for cases like *Fisher*, one which comports with Chapter 12 and satisfies underlying policy considerations.

I. The Changing Face of Agriculture: Demise of an Institution

The United States began as an agricultural nation, with the family farm feeding and raising this country. The family farm retained its central position in the American socioeconomic structure for most of our country's history. However, the twentieth century, hosted a dramatic decline to family farming; government programs seeking to hinder this trend, actually accelerated the descent. In the present agricultural economy, family farms have been displaced by large nonfamily corporate or industrial farms. Family farmers presently struggle to survive the worst farm crisis in the history of the United States. The survival of the family farm in America ap-

8. As used in this article, "family farmers" consist of those people owning and running noncorporate farms alone or with a family member or corporate farms in which over 50% of the outstanding stock or equity is held by one family or one family and relatives, and this family or these relatives run the farm.

9. The current farm crisis grips the entire farm economy. Land values dropped approximately in half since 1981, resulting in undersecured loans. Neil E. Harl, *The Financial Crisis in the United States, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?* 112, 113 (Gary Comstock ed., 1987). More farm foreclosures, land contract forfeitures, and note defaults occurred than at any time since the Great Depression. *Id.* The crisis affects entire rural communities. Lenders in rural communities fight to overcome the effects of loan defaults and farm foreclosures. *See id.* Sellers of farm supplies suffer from undersecured and unpaid debts. *See id.* The depressed farm economy similarly hurts "main-street" retailers due to the reduced cash flow. *See id.* Although the Midwest has been most severely affected by the farm problems, when a significant segment of the population has been affected, the effects touch the entire country.

pears doubtful. This section details this rise and fall of the American family farm.

In 1790, ninety-five percent of the United States' population lived in a rural, agricultural setting.¹⁰ Hence, the agrarian tradition prevailed,¹¹ and agrarian-based ideas appealed to many, as exemplified by Jefferson's successful political ideology.¹² Family farmers contributed to the expansion of the United States by pioneering the settlement of the West.¹³ Although the "farmer's frontier" pushed steadily westward in the years preceding the Civil War, the post-Civil War decades hosted an unprecedented surge in agriculture.¹⁴ The 1862 Homestead Act¹⁵ hastened settlement of the West and stimulated massive growth in agriculture. The number of farms grew more between 1860 and 1910 than during any other period in American history.¹⁶ This flourishing, however, sharply curbed in the twentieth century when America transformed itself into an urban culture. The farm population continues to plummet.¹⁷ Today, little more than one percent of Americans live

10. Richard S. Kirkendall, *A History of the Family Farm*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?*, *id.*, at 80.

11. This agrarian tradition embraces neighborly behavior; concern for future generations; deriving dignity from hard work; and acting frugally, modestly, honestly, and responsibly toward the community. MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 35 (1988).

12. The family farmer played an important role in Thomas Jefferson's democratic ideology. Kirkendall, *supra* note 10, at 80. Agriculture's economic importance and the plentiful land available in America helped Jefferson's democratic ideas succeed. *Id.* Jeffersonian agrarianism borrowed traditional agrarian ideas from Europe. *Id.* Such ideas promoted the superiority of farming, for example, claiming that working on the land benefitted the human personality. *Id.* Jefferson fashioned these ideas to fit his democratic philosophy. *Id.* He believed that work performed on family farms cultivated the personality type essential to a democratic political system. *Id.* at 81. "Jefferson felt deep attachment to the land and had an unquestioning trust in the common people who tilled it"; he considered farmers "the eternal guardians of public virtue." WINTHROP D. JORDAN ET AL., *THE UNITED STATES* 162 (5th ed. 1982).

13. JORDAN, *supra* note 12, at 416-17.

14. *Id.* at 416. Between 1870 to 1900 the number of American farm acres doubled, from 407 million to 841 million. *Id.*

15. Homestead Act, ch. 75, 12 Stat. 392 (1862) (repealed 1976). The Homestead Act offered 160 acres to anyone who would settle the land and work it for five years. *Id.* The act offered free public land in the West to any United States citizen or any individual declaring an intention of becoming a citizen. *Id.* During the 1860s Minnesota set the record for the most homestead filings in a single year: 26,000. JOHN OPIE, *THE LAW OF THE LAND: TWO HUNDRED YEARS OF AMERICAN FARMLAND POLICY* 65 (1987).

16. The number of farms increased from 2 million to 6.4 million between 1860 and 1910. Kirkendall, *supra* note 10, at 82.

17. A farm goes out of business in America every six minutes. Paul Hendrickson, *Those Who Are No Longer with Us*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?*, *supra* note 9, at 47, 48.

and work on family farms.¹⁸ The number of farms declined from 6.4 million in 1920 to 2.1 million in 1987.¹⁹ While the number of farms decreases, the number of acres per farm increases.²⁰ Family farms fail, and their lands are incorporated into larger corporate farms.²¹ The average size of these corporate farms is six times that of the average family farm.²²

Corporations have grown to dominate and control the farm economy in a number of ways. Increasingly, formerly independent farmers work under contract arrangements for agribusiness corporations.²³ These arrangements, such as "forward contracting,"²⁴ create a type of price-fixing for farmers' crops.²⁵ Moreover, the profits farmers receive are reduced by corporate middlepeople who

18. Kirkendall, *supra* note 10, at 79.

19. Bob Sector & Tracy Shryer, *Farmer's Exodus of the Young; The 80's Crisis is Over, But the Turmoil Took a Toll on Youth. Many Are Seeking Other Careers in a Trend That Could Hasten the Ongoing Decline of Family Enterprises*, L.A. TIMES, July 23, 1991, at A1. These figures were extracted from the 1987 U.S. Census of Agriculture. Moreover, a 1986 study by the Office of Technology Assessment predicted that the number of farms would further plummet to 1.2 million by the year 2000 if current trends continue. *Id.*

20. F. Larry Leistritz & Steve H. Murdock, *Financial Characteristics of Farms and of Farm Financial Markets and Policies in the United States*, in THE FARM FINANCIAL CRISIS: SOCIOECONOMIC DIMENSIONS AND IMPLICATIONS FOR PRODUCERS AND RURAL AREAS, 13, 30 (Steve H. Murdock & F. Larry Leistritz eds., 1988).

21. Current low prices encourage large farms to swallow small farms. STRANGE, *supra* note 11, at 122 ("corporate farms . . . can buy land at will in a weakened market"), 105-06 (analogizing this acquisition of failing small farms by large farms to "barricudas . . . feeding on tuna.").

22. The 1982 Census of Agriculture determined that the average size of a family farm was 330 acres. In contrast, corporate farms possessed six times this much acreage. Don E. Albrecht & Steve H. Murdock, *The Structural Characteristics of U.S. Agriculture: Historical Patterns and Precursors of Producers' Adaptations to the Crisis*, in THE FARM FINANCIAL CRISIS: SOCIOECONOMIC DIMENSIONS AND IMPLICATIONS FOR PRODUCERS AND RURAL AREAS, *supra* note 20, at 13, 30.

23. Catherine Lerza & Michael Jacobson, *Food for People, Not for Profit*, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 9, at 238, 241.

24. "Forward contracting" describes the agreement between farmers and corporations, whereby the "conditions and volume of production as well as the price after harvest are set in advance by food manufacturing and processing firms with growers." *The Embattled Independent Farmer*, N.Y. TIMES, Nov. 29, 1981, § 6, at 138. In such an arrangement, "the corporation does not become a farmer, it rents one." *Id.*

Agribusiness corporations have effectively subordinated formerly independent farmers into tenant roles. Chicken processors, like Holly Farms and Safeway Foods, acquire "cheap human labor in the form of farmers who do the growing for them." Lerza & Jacobson, *supra* note 23, at 241. Decision-making authority moves off the farm and into the hands of corporations. Kirkendall, *supra* note 10, at 93. Hogfarming seems to be following the route of chicken-farming. Sharon Schmickle, *A Barnyard Dispute; Plan for Big, Businesslike Hog Operation is Criticized as Death of Family Farming*, STAR TRIB., Feb. 10, 1992, at A1.

25. This price-fixing results in both lower prices paid to farmers and higher prices paid by consumers due to the elimination of competition. "[S]ince processors use their contract prices with higher-volume farmers as the base price for all their crop purchases, forward contracting tends to dictate commodity prices received by all

buy farmers' products and distribute them to the consumer; middlepeople withhold two-thirds of every dollar consumers pay for farmers' food products.²⁶ Profits are further reduced by the growing disparity between the prices farmers receive for their products and the prices farmers pay corporate suppliers.²⁷

The pressures placed upon family farmers by corporations are further intensified by the farm crisis which continues to destroy family farming. From the late 1970s until 1981, land prices rose while interest rates dropped.²⁸ Banks willingly lent money to farmers because rising land prices provided excellent security for the loans. In fact, banks pressured farmers to borrow more than the

farmers, even those who do not grow under contract." *Embattled Independent Farmer*, *supra* note 24.

When corporate domination eliminates competition, consumers end up paying more, not less. Jim Hightower, *The Case for the Family Farm*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?*, *supra* note 9, at 205, 210. In 1981 the *New York Times* reported that "former Federal Trade Commission economist Russell Parker has estimated that consumer overcharges because of diminished competition in the food industry already approach 14 billion annually, or about \$200 per family. *Embattled Independent Farmer*, *supra* note 24. The article described an example, using the peanut industry:

A recent example of how diminished competition can raise food prices occurred during [the 1980] peanut shortage. Processors and manufacturers more than doubled the price of peanut butter to the consumer even though upwards of 90 percent of peanut farmers sold their crops under contract to the processors at the same price as the year before.

Id. To eliminate competition and acquire a monopoly, corporate farmers often sell products at a loss to undercut independent farmers and force them out of business. Catherine Lerza & Michael Jacobson, *Food for People, Not for Profit*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?*, *supra* note 9, at 238, 242. Agribusiness corporations can afford to operate a division of its business at a loss for an extended period of time. But small farmers who specialize in producing cannot overcome such competition, resulting in their being forced out completely or into a contractual peonage operation. *Id.*

26. Hightower, *supra* note 25, at 207; CAROL GORMAN, *AMERICA'S FARM CRISIS* 45 (1987). Dairy prices illustrate this principle. Dairy prices reached record highs in 1989 after the "dairy buy-out." Sharon Schmickle, *Dairy Farmers Soured on Declining Prices*, *STAR TRIB.*, Sept. 22, 1991, at 1A, 10A. But the same year, prices plummeted to the lowest price paid to dairy farmers in over a decade. *Id.* However, the price charged to consumers did not fall with the farmers' prices. Corporate middlepeople absorbed the excess profits. *Id.* In January of 1985, \$.77 of the \$2.00 retail milk price per gallon went to middlepeople, which translates to 38.5% of the retail price. *Id.* In May of 1991, \$1.38 of the \$2.40 retail milk price per gallon went to middlepeople, which translates to 57.5% of the retail price being swallowed by middlepeople. *Id.* In fact, during this period, although the retail price per gallon rose \$.40, the price paid to farmers fell \$.21. *Id.*

27. Since 1952, the price farmers receive for their food products increased only six percent, while prices charged to farmers for supplies rose 122% during the same period. Hightower, *supra* note 25, at 207.

28. Land prices more than tripled their early 1970s values, and interest rates fell below 10 percent. Nancy Blodgett, *A Day in America's Courts: Saving the Family Farm*, A.B.A. J., Jan. 1, 1988, at 86, 89.

farmer originally intended.²⁹ Farmers were encouraged to expand in the midst of "a world food shortage and an export boom."³⁰ Farmers took advantage of banks' eagerness to lend, often using the loans to buy more efficient machinery.³¹ This compounded their future problems by causing overproduction. The bubble of prosperity finally burst in the early 1980s. Land prices plummeted, sometimes to less than sixty percent of their peak value reached in 1981; crop prices also fell because production outpaced demand,³² and the export growth collapsed.³³

The current farm crisis remains particularly dangerous to family farms' survival because the farmers most likely to leave farming are young farmers who run grain-producing, mid-sized farms.³⁴ Most family farmers are concentrated in these mid-sized farms.³⁵ The average age of a farmer has climbed to fifty-two, while the number of farmers under age twenty-five has plunged.³⁶ As farmers retire, the number of replacements dwindles.³⁷

As Part II demonstrates, the government passes many statutes aimed at preserving the family farm, thereby evidencing its firm support of this institution. Valid reasons underlie this sup-

29. See STRANGE, *supra* note 11, at 24 (describing lenders' refusals to loan money for modest improvements, instead, encouraging farmers to make drastic, "progressive" changes).

30. *Id.* at 18. United States farmers welcomed increasing exports to China, the Soviet Union, Japan, Mexico, Venezuela, Indonesia, and most of the Middle East among others. *Id.* at 18-19.

31. GORMAN, *supra* note 26, at 33.

32. Blodgett, *supra* note 28, at 89.

33. STRANGE, *supra* note 11, at 25. President Carter's grain embargo became a popular source of blame, but even the Reagan administration concluded this event was not a prime reason for the export collapse. *Id.* at 25-26.

34. Steve H. Murdock et al., *The Implications of the Current Farm Crisis for Rural America*, in THE FARM FINANCIAL CRISIS: SOCIOECONOMIC DIMENSIONS AND IMPLICATIONS FOR PRODUCERS AND RURAL AREAS, *supra* note 20, at 141, 157.

35. *Id.* at 158.

36. Sector & Shryer, *supra* note 19, at A1. "In short, the next generation of would-be farmers . . . are abandoning the land in droves." *Id.* The 1987 U.S. Census of Agriculture showed

the average age of active farmers rose to 52, while the number of farmers under the age of 25 declined 43% in just five years and the number between the ages of 25 and 34 fell 34% during the same time frame. Only about 1% were under 25 while nearly 30% were over 55 years of age. What's more, there were nearly as many active farmers 70 or older as there were those 34 or younger.

Id.

37. During Senate Agriculture Committee hearings on Mike Espy's confirmation as Secretary of Agriculture, Senator Grassley of Iowa stated, "[T]he farming population is aging. In my state, one-fourth of the farmers will be retiring in four years. . . . We have 103,000 farming units in my state. Only 3,000 are led by farmers that are under 30 years of age." *Hearing of the Senate Agriculture Committee*, FNS, Jan. 14, 1993, available in LEXIS, Nexis Library, FNS File.

port. Family farmers practice better soil conservation methods than nonfamily industrial farms.³⁸ Moreover, with the growth of industrial farming comes heavier reliance on chemical pesticides and fertilizers, endangering people's health, in addition to eroding the soil.³⁹ Water resources are also irreparably harmed by industrial farming practices.⁴⁰ Industrial farms lack the personal link to the land that inspires both valuable stewardship and better food.⁴¹ Part II examines strengths and shortfalls of some of the most significant measures passed to alleviate the family farm's plight.

38. A farm passed down in the family for many generations is cared for by the farmer as if the land was another member of the family. Carol Hodne, *We Whose Future Has Been Stolen*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?*, *supra* note 9, at 54, 54-55. Because farmers devote themselves to caring for the land and preserving it to pass on to future generations, they practice extensive conservation practices, such as crop rotation and terracing. *Id.* Nonfamily industrial farms, on the other hand, view land as a means to short-term profits, and thus, do not value conservation practices. *Id.* at 55.

39. Marty Strange, director of the Nebraska-based Center for Rural Affairs, explained that as the number of farmers declines, causing farming to become less labor intensive, the more farming must rely on chemical pesticides and fertilizers. Seter & Shryer, *supra* note 19, at A1. He stated, "In the short-term there's mountains of corn but in the long term there's polluted ground water, increased soil erosion and a lot of environmental problems that are the product of trying to have a technology substitute for human management and labor." *Id.*

"[L]arge-scale farms typically use herbicides and other chemicals poisons on more than 30 percent of their acreage, compared with four percent used on smaller farms." *Embattled Independent Farmer*, *supra* note 24. Some fear this damages the soil's fertility. *Id.*

40. Industrial farms' heavy reliance on chemicals destroys precious water resources:

According to the Nebraska Department of Health, eighty-one municipal wells in Nebraska — about one in five — are near or above tolerable levels of contamination from nitrate-nitrogen. The principal sources of nitrate pollution in groundwater in that state are agricultural chemicals and livestock wastes. In Iowa, environmental officials reckon that up to half of that state's municipal water supplies are contaminated with pesticides or other synthetic organic chemicals. Perhaps most alarming, the heavy increase in the use of fertilizer and pesticides in the past thirty-five years has also been epidemiologically implicated in the high rate of certain cancers among farmers.

STRANGE, *supra* note 11, at 42 (citations omitted).

41. Family farmers share a unique relationship with their land.

It should not come as a surprise that the trend toward industrial agribusiness is accompanied by degradation of land and water resources. It is, after all, the stewardship of those natural resources that has made agriculture different from industrial businesses, and it is that difference that is eroding. If agriculture is to be made over in the image of industry, the way land and water are used will be changed. At the heart of the process of industrializing agriculture lie the changes in the relationship between people and land.

Id. This unique relationship between farmers and their land also leads to a higher quality of food. "The price, taste, and nutritional value of our own food supply depends on the farm family's willingness to plow a bit of itself into the land." Hodne, *supra* note 38, at 55.

II. Congress' Farm Policies

The United States government has attempted to help the farm economy recover in a variety of ways. Although many of these programs were promoted as saving the family farm, they actually strengthened the huge nonfamily corporate farms at the family farm's expense. Favorable government treatment contributes to industrial farms' power, giving them a competitive advantage over family farms. This part explores how significant Congressional measures affect family farms.

In 1946, the government passed the Farmers' Home Administration Act⁴² to meet the needs of "limited-resource farmers." The 1946 act created the Farmers Home Administration (FmHA)⁴³ to make loans, grants, and advice available to farmers with the lowest farming incomes.⁴⁴ However, recently the agency has been criticized for straying from this purpose.⁴⁵

During the twentieth century the government sought to revitalize the farm economy by reducing overproduction and insuring adequate commodity prices.⁴⁶ Target price supports⁴⁷ and com-

42. Farmers' Home Administration Act of 1946, ch. 964, 60 Stat. 1062 (1946) (current version in 7 U.S.C. §§ 1001 note, 431-36 notes, 1010 note, 1030-1031, 1032a, 12 U.S.C. §§ 84, 371 (1988)).

43. *Id.* § 3.

44. CATHERINE LERZA, *SAVING THE FAMILY FARM* 29 (1980).

45. Congress called for an investigation into the lending policies of the FmHA, led by North Dakota Senator Kent Conrad. Untitled, States News Service, Sept. 21, 1989, available in LEXIS, Nexis Library, SNS File. A report from the General Accounting Office explained that "[a]s policies shifted, FmHA became a government-subsidized free-for-all for large, corporate farms and private banks Small and mid-sized farms, often the hardest hit in an agricultural downswing, have practically been left out" *Id.*

Statistics from the 1982 U.S. Bureau of the Census showed that in 1979 comparatively wealthy farmers, with over \$200,000 in gross sales, accounted for more of the FmHA's lending than the poorest farmers, with gross sales under \$40,000. Luther Tweeten, *Has the Family Farm Been Treated Unjustly?*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?* *supra* note 9, at 212, 220. In 1979 farms with gross sales under \$40,000 comprised sixty percent of all farms but only twenty-two percent of FmHA lending. *Id.* In contrast, farms with gross sales of over \$200,000 comprised only seven percent of all farms but twenty-three percent of all FmHA lending. *Id.* Therefore, the FmHA extended more loans to wealthy farmers than limited-resource farmers. The midsize farms between these two extremes comprised thirty-three percent of all farms, fifty-five percent of all FmHA lending. *Id.*

46. Some of these programs grew out of programs developed in the New Deal era. LERZA, *supra* note 44, at 2. The Agricultural Adjustment Act, ch. 25, title I, §§ 1-22, 48 Stat. 31 (1933) (codified as amended at 7 U.S.C. §§ 601-620, 623-624 (1988)), sought to reduce food production. Farmers were paid to decrease acreage used to plant crops and reduce their livestock. The government also provided price supports for the farmers. Farmers received loans for storing their crops as surplus with the government. If market prices stayed below the loan price, farmers gave the government the crop as a loan repayment. GORMAN, *supra* note 26, at 19-21.

modity loan programs⁴⁸ were created for this purpose. However, these programs created a surplus of grain. In response, Congress devised new programs to curb production by paying farmers to refrain from farming some of their land.⁴⁹

During the 1980s, Congress instituted a variety of measures to help the farm economy, some specifically aimed at helping the family farmer. The effect of these measures varied. In 1986, the government instituted the "dairy buy-out,"⁵⁰ attempting to reduce milk production by encouraging dairy farmers to sell their herd and stop milking in exchange for payments.⁵¹ While the program initially created higher prices, dairy prices have since crashed to a shocking low.⁵²

Many of these efforts, promoted as helping the family farmer, actually do more to strengthen large, nonfamily industrial farms.⁵³ However, the family farmer continues to be "used" to pass these

47. Target price support programs attempted to reduce over-production, thereby increasing prices. The USDA administered the program. If farmers refrained from planting a required percentage of their acreage, they became eligible for target payments. Target prices were predetermined prices set by the government. If the market price remained lower than the target price, the government paid the farmer the difference between the two prices. *LERZA, supra* note 44, at 2.

48. Commodity loans involved the government offering a loan to farmers for specified commodities. The farmer exchanged the crops for the loan. If the farmer could receive a higher price in the open market, the farmer sold the crop and repaid the loan with interest. Otherwise the farmer kept the loan and gave the crops to the government as repayment. The government retained the crops as surplus crops. *Id.*

49. This legislation included "set aside" and "idling" programs. *GORMAN, supra* note 26, at 51. Under the "set aside" program, farmers had to set aside ten percent of their land used for corn and fifteen percent of their land used for wheat. However, because few farmers signed up for the program, surpluses continued to increase and prices fell further. *Id.* A similar program, called the Payment in Kind (PIK) program, involved "idling" acres by not planting crops on them and giving some surplus grain to farmers. *Id.* at 52. If farmers set aside ten to thirty percent of their crop acreage, in addition to land already idled for price supports, the government would give them some of its surplus crops. The farmers could then dispose of the crops as they wished. *Id.*

50. LUTHER TWEETEN, *FARM POLICY ANALYSIS* 343 (1989).

51. To participate in the program, milk producers submitted bids for milk prices that they would be willing to accept in exchange for agreeing to quit milking for five years. If their bid was accepted, farmers were paid by the dairy industry and the government not to milk, based on the volume of their past milk production. Susan Skorupa, *Cast-off Cows Create Problems for Dairies and Ranches*, *ROCKY MTN. BUS. J.*, Apr. 28, 1986, at 3.

52. Schmickle, *supra* note 26.

53. Family farmers acquire only a small portion of the billions of dollars the government claims it spends on their behalf. The government awards income and price-support payments based on volume and acreage, essentially favoring large size and therefore, giving the most money to farmers least in need of the financial help. Hightower, *supra* note 25, at 208.

programs through Congress.⁵⁴ Congress' programs encourage farmers to increase their farms' size. Such expansion is "artificial" in that true market forces do not otherwise warrant such growth. In fact, smaller farms have repeatedly been proven more efficient than large farms.⁵⁵ "[F]arm programs, tax rules, credit services, and other instruments of public policy are weighted to seduce individual farmers to expand."⁵⁶ The target price supports, commodity loan programs, and set aside programs reward the largest farms with the biggest sales, thereby giving farmers "artificial" incentives to expand. Although Congress instituted limits on payments, these limitations failed to achieve their objectives.⁵⁷

In addition to the programs previously discussed, Congress proposed two significant farm acts during the 1980s, but only one became law. The Save the Family Farm Act,⁵⁸ sponsored by Sena-

54. When debating the worth of government programs aimed at farmers, the small family farmer is used to justify such aid. However, as Diane Sawyer appropriately queried, "[W]ho are we kidding? Three-quarters of the subsidies, and most of the regulations, help the biggest farmers and big business . . ." *Prime Time, Live: Ballooning Bureaucracy* (ABC television broadcast, January 21, 1993), available in LEXIS, Nexis Library, ABCNEW File.

55. A study of Iowa farms from 1976-83 concluded that small farms of 100 to 179 acres get more output per dollar invested than do the large farms in Iowa. STRANGE, *supra* note 11, at 98. "In fact, the larger the farm the lower the output per dollar invested." *Id.* When examining output per dollar at direct cash expenses, medium-sized farms of 260-359 acres are the most efficient, not large farms. *Id.* These results were confirmed by a 1985 Congressional Budget office study, *id.* at 99, and by two USDA studies. A 1967 USDA report, entitled *The Economics of Scale in Farming*, declares farms run by one or two persons to be at least equally, and often more, efficient than large industrial farms. Lerza & Jacobson, *supra* note 23, at 242. Another USDA report submitted to a U.S. Senate subcommittee drew similar conclusions. The report concluded the optimum size for a vegetable farm in California was 440 acres, but corporate farms dominating vegetable farming in California possess an average of 3,206 acres. Hightower, *supra* note 26, at 207.

56. STRANGE, *supra* note 11, at 127.

57. Congress instituted the limitation in 1970. *Id.* at 128. In the 1960s the biggest 20% of farms received over half the benefits of most commodity programs, while the smallest 40% received less than 10% of the benefits. *Id.* But the limitations did not rectify this problem. The initial limit of \$50,000 limited virtually no one, lower limits were avoided by artificially splitting farms into smaller farms, and when big farmers became eligible in 1983 for enormous cash payments in addition to surplus commodities, "the Reagan administration arbitrarily suspended the payment limitation in crops paid in kind." *Id.* at 129.

58. S. 2069, 99th Cong., 2d Sess. (1986). The Save the Family Farm Act sought to reduce overproduction and increase the influence of family farmers' voices in creating farm programs. A nationwide farm referendum, including producers of all the major commodities, would be held to allow farmers to choose the type of farm program they want. When a referendum would pass, farmers would set aside 15% of their tillable acres (to reduce overproduction). If greater set aside was required, producers with gross incomes exceeding \$200,000 would set aside a greater percentage of their land. This was intended to create a disincentive to conglomerate and tax-loss ventures. Tom Harkin, *The Save the Family Farm Act*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM*, *supra* note 9, at 388, 394.

tor Tom Harkin of Iowa, failed to pass. In contrast to other governmental efforts, the Save the Family Farm Act sought to help only family farmers. Its purpose was to move control of farm policy from agribusiness-dominated Washington⁵⁹ to a national farmer referendum, giving one farmer one vote, thereby permitting farmers to create their own farm programs.⁶⁰

The other legislative effort, the 1985 Farm Bill, passed and became the Food Security Act of 1985.⁶¹ The Senate Report for the act states that the purpose of successful farm policy is to introduce predictability into the otherwise unpredictable farming business.⁶² The act sought to accomplish its goals by reducing loan rates and freezing target commodity rates for two years.⁶³ Significantly, the act forged a new trail in emphasizing environmentalism by conditioning subsidies on better land stewardship.⁶⁴

59. The federal agencies designed to regulate farming, the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA), have been run by officials closely tied to agribusiness interests, as evidenced by the number of agency officials that serve as corporate officials before and after their agency tenure. Lerza & Jacobson, *supra* note 23, at 243-44.

A 1969 congressional report revealed that thirty-seven of forty-nine top FDA officials who departed from the agency went to work for major food and drug corporations. *Id.* at 244.

In 1974, Virgil Wodicka, director of the Bureau of Foods, quit to become a private consultant to industry; prior to his five-year sojourn with FDA, Wodicka worked for Ralston Purina; Libby, McNeill and Libby; and Hunt-Wesson (where he was vice president). The nutrition director of the FDA also left his post in 1974 and joined the Hershey Corporation. In prior years, the same pattern was repeated. The FDA's general counsel previously represented ITT-Continental Baking, dairy interests, and the chewing gum industry. The man he replaced as general counsel, William Goodrich, left the FDA to become the president of the Institute of Shortening and Edible Oils, an industry lobby. The man Goodrich replaced was a former assistant commissioner of the FDA.

Id.

As the following situation illustrates, the situation at USDA has been similar to that of the FDA:

The secretary of agriculture from 1971 to 1976, Earl Butz, was formerly a director of several agribusiness corporations including Ralston Purina and Stokely Van Camp. Several of the top officials in USDA jumped ship in the early seventies for the lush environs of Continental Grain, Miles Laboratories, and other corporations. In 1985 Ronald Reagan appointed Richard Lyng as secretary of agriculture. Lyng was formerly a member of the National Livestock and Meat Board.

Id.

60. Harkin, *supra* note 58, at 392.

61. Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended mostly in scattered sections of 7 U.S.C., 21 U.S.C. and 46 U.S.C.).

62. S. REP. NO. 145, 99th Cong., 1st Sess. 1 (1985), reprinted in 1985 U.S.C.C.A.N. 1676, 1676.

63. GORMAN, *supra* note 26, at 62.

64. The 1985 act required farmers who received crop subsidies from the USDA to develop and use a conservation plan for land designated as erodible. *Who's in control?*, BILLINGS GAZETTE, Apr. 26, 1992, at F12. This marked the first time farmers

Although many proponents of the 1985 act thought it would reduce government involvement in commodity markets, critics believe this did not happen.⁶⁵ However, some in Washington declared the 1985 act a success, including President Bush.⁶⁶ The 1985 act expired in 1990, but Congress passed a successor.⁶⁷ The 1990 act preserved the environmental commitment of the 1985 act by continuing conservation techniques.⁶⁸

could not receive subsidies without taking better care of their land. John Lancaster, *Study Says Soil Service Lags on Conservation; Enforcement of 1985 Measures Lacking*, WASH. POST, Apr. 22, 1991, at A7. "The idea was to use benefits as an incentive for the control of erosion and other ecological change." *Id.* However, there have been significant problems with enforcement of these measures. *Id.* Under the act, farmers were given ten years to implement these plans to control soil erosion on land considered highly erodible, which encompasses one-third of the Midwest's farmland. George Gunset, *Farmers' Annual Ritual: Spring Gamble Tillers of Soil Ponder Ways to Reap Greatest Returns*, CHI. TRIB., Apr. 12, 1992, at 3C.

65. Darrel Good, University of Illinois Cooperative Extension Service marketing specialist, stated that this hope failed to materialize: "The government is no longer in the grain storage business, but is a major determinant of export demand." *Weekly Outlook - Soviet Grain Demand*, UPI, Sept. 11, 1991, available in LEXIS, Nexis Library, UPI File. Texas Agricultural Commissioner Jim Hightower echoed this cynicism by proclaiming that despite Washington's proclaimed success of the 1985 act, the bottom line revealed that the bill failed to help farmers since their share of the consumer's food dollar shrank.

"Despite all the hubbub coming out of Washington proclaiming that the 1985 Farm Bill is a success, the truth is farming is still a losing proposition," said Hightower. The commissioner said food industry profits continue to rise while the farmers' share of the consumer food dollar continues to fall. Texas farmers will earn only 2.8 cents for producing a single serving of a 1989 Thanksgiving dinner that includes that includes turkey and all the trimmings, a government study said Tuesday.

Single Thanksgiving Meal Earns Texas Farmer 2.8 Cents, UPI, Nov. 14, 1988, available in LEXIS, Nexis Library, UPI File. Iowa Senator Tom Harkin echoed this sentiment: "If you talk about just putting some money in the farmers' pockets, I guess you could say the '85 farm bill worked, but we borrowed a lot of money to do it. If you look at it from the standpoint of what's happening in rural America, it hasn't worked." Untitled, UPI, Aug. 17, 1989, available in LEXIS, Nexis Library, UPI File.

66. President Bush declared the 1985 act a success when he signed its successor. "Bush boasted that the new agriculture policy law 'builds on the success of the 1985 farm bill . . .'" *President Bush signs New Five-year Farm Policy Bill*, [1990] Daily Rep. for Executives (BNA) No. 230, at A-8 (Nov. 29, 1990). While a member of the Senate Agriculture, Nutrition, and Forestry Committee, Rudy Boschwitz of Minnesota stated that a General Accounting Office report underscored the 1985 act's success. *GAO Cites 1985 Farm Bill as Contributor to Improved U.S. Farm Economy*, [1989] 6 INT'L TRADE REP. (BNA) No. 15, at 448 (Apr. 12, 1989). Boschwitz cited the bill's assistance in recapturing export markets for U.S. farmers. *Id.*

67. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (codified as amended in scattered sections of 7 U.S.C., 12 U.S.C., and 16 U.S.C.).

68. *Wetlands Focus of Farm Conservation Effort*, UPI, Jan. 18, 1991, available in LEXIS, Nexis Library, UPI File. However, the 1990 act actually improves the environmental provisions by introducing a "sense of permanence" ensuring that the conservation techniques outlast the act itself. *Purdue Experts Look at New Farm Bill*, UPI, Nov. 28, 1990, available in LEXIS, Nexis Library, UPI File.

Despite Congress' efforts to bolster and stabilize the farm economy, many family farmers face bankruptcy and the loss of their livelihoods. Recognizing this, Congress passed perhaps the most significant legislation for the family farm: the Chapter 12 bankruptcy act.⁶⁹

Bankruptcy Law and the Family Farm

Before Chapter 12, farmers in need of bankruptcy protection had to choose from Chapter 7: Liquidation,⁷⁰ Chapter 11: Reorganization,⁷¹ and Chapter 13: Adjustment of Debts of an Individual With Regular Income.⁷² For various reasons, these chapters failed to meet farmers' bankruptcy needs. The shortcomings of Chapters 7, 11, and 13 will be addressed in order.

Chapter 7 requires liquidation of the debtor estate's property by a bankruptcy trustee.⁷³ Creditors can initiate an involuntary Chapter 7 bankruptcy against a debtor, which posed a severe disadvantage for farmers before 1986.⁷⁴ Due to the forced liquidation, Chapter 7 works well for debtors with much unsecured or undersecured debt and few valuable assets. However, farmers dislike liquidation of their assets. Most farmers wish to continue farming by reorganizing their debts. If they lose their land, they lose their livelihood. Moreover, many farmers hate to lose land passed down in the family for generations. Hence, many farmers find Chapter 7 inadequate.

If the farmer must liquidate, a liquidating reorganization under Chapters 11 or 13 works better for farmers than a Chapter 7 liquidation.⁷⁵ While a Chapter 7 liquidation occurs rapidly under

69. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 11 U.S.C. §§ 1201-1231 (1988)).

70. 11 U.S.C. §§ 701-766 (1988).

71. *Id.* §§ 1101-1174.

72. *Id.* §§ 1301-1330.

73. *Id.* § 704(1). After the trustee reduces the property to money, the trustee distributes the money to satisfy unsecured creditors' claims in a prioritized fashion. *Id.* § 726.

74. *Id.* § 303. Currently, the bankruptcy code exempts "farmers" and "family farmers" from involuntary bankruptcies. *Id.* § 303(a). However, before the enactment of Chapter 12 in 1986, the bankruptcy code exempted only "farmers" from involuntary bankruptcies. Since the statutory definition of "farmer" eliminates many family farmers, many farm debtors were susceptible to involuntary bankruptcies before 1986. To be a "farmer," over 80% of such person's gross income must come from a farm owned or operated by the person. *Id.* § 101(19). On the other hand, to be a "family farmer," only over 50% of such person's gross income must come from the farming operation. *Id.* § 101(17).

75. JOHN C. ANDERSON & JEFFREY W. MORRIS, CHAPTER 12 FARM REORGANIZATIONS § 1.01, at 1-4 (1987).

trustee supervision, a reorganization liquidation progresses in an orderly manner supervised by the debtor-farmer.⁷⁶ Debtor supervision can work better for farmers with a financial stake in the farm because they tend to know more about the property and have more incentive than trustees to try to satisfy the creditor's claim.⁷⁷

Unlike Chapter 7, Chapter 11 allows the debtor to remain in possession of the property.⁷⁸ Chapter 11 is rehabilitative, allowing debtors to submit a plan of reorganization to work out their debt problems.⁷⁹ The debtor in possession is permitted to assume the role of trustee.⁸⁰ Courts appoint a trustee under Chapter 11 only under limited circumstances.⁸¹

Like Chapter 7, Chapter 11 is available to all forms of business organizations, as well as individuals.⁸² An involuntary Chapter 11 bankruptcy is possible, as with Chapter 7, which seriously affected some farmers before 1986.⁸³ However, the Chapter 11 debtor possesses the exclusive right to file the reorganization plan.⁸⁴ After the debtor files the plan, the creditors must decide

76. *Id.*

77. *Id.* Because farmers work with farm equipment and have bought it themselves, they know more about its worth and how to receive the highest price. Some farmers with a financial stake in the farm have greater incentive to receive a higher price since they hope to pay off the debts and have money left for themselves. Some wish to pay the debts off as a matter of pride.

78. Originally, Congress devised Chapter 11 to provide a remedy for businesspeople, allowing them to continue their businesses. DANIEL R. COWANS, *COWANS BANKRUPTCY LAW AND PRACTICE* § 20.1 (1987).

79. *Id.* After bankruptcy is filed, the debtor proposes a plan of repayment for the debts. The plan allows the debtor to continue the business, using the business' income to make payments under the plan.

80. 11 U.S.C. § 1107 (1988). The bankruptcy code gives the debtor in possession all the rights available for trustees to administer an estate, except for the right to compensation. These rights include the right to continue operating the debtor's business; to sell, use, or lease the debtor's property in the ordinary course of business; to sell the estate's property free and clear of any liens outside the ordinary course of business; to obtain credit; to reject, affirm, and assign executory contracts; and to bring actions. JOHN C. ANDERSON, *CHAPTER 11 REORGANIZATIONS* § 8.03, at 8-5 (1992) (footnotes omitted).

81. The "court shall order the appointment of a trustee — (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement . . . or (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . ." *Id.* § 1104(a).

82. 11 U.S.C. § 109(b) (1988). Only stockbrokers or commodity brokers are excluded. *Id.*

83. *See supra* note 74 and accompanying text.

84. This occurs within 120 days of commencement of the action, unless the court has appointed a trustee. 11 U.S.C. § 1121 (1988).

whether to accept it.⁸⁵ After the creditors' decisions, the court decides whether to confirm the plan.⁸⁶

Even if some creditors reject the reorganization plan, the court can still confirm it if at least one class of impaired claims confirms the plan.⁸⁷ This confirmation over creditors' objections is called "cramdown." Before the court will confirm a reorganization plan over creditors' objections, the plan must be "fair and equitable," requiring that creditors receive the present value of their claim.⁸⁸ Because creditors need only receive the present value of their secured interest under the cramdown provision, creditors' claims can, in effect, be written down to the value of the collateral. The creditor has an unsecured claim for the balance, but this, as a practical matter, is written off.

Unsecured creditors must receive the "value, as of the effective date of the plan, equal to the allowed amount of such claim."⁸⁹ Unsecured creditors must receive payment in full before junior claimants receive anything, which is known as the absolute priority rule.⁹⁰ This rule makes it hard for farm debtors to retain their farms because the farmer is an equity holder whose claim remains junior to the unsecured creditors' interests.⁹¹ Consequently, if the creditors reject the farmer's plan, Chapter 11 does not provide

85. *Id.* § 1126. Under Chapter 11, the debtor must submit a disclosure statement providing sufficient information for the creditor to make a knowledgeable decision. *Id.* § 1125. A class of claims accepts a plan if creditors holding "at least two-thirds in amount and more than one-half in number of the allowed claims" accept the plan. *Id.* § 1126(c). Unimpaired creditors are presumed to accept the plan. *Id.* § 1126(f). § 1124 describes when claims or interests are considered "impaired."

86. *Id.* § 1129.

87. *Id.*

88. A plan accepted by less than every class can only be confirmed if the following two requirements are met: (1) the plan cannot discriminate unfairly between classes and (2) the plan must be fair and equitable. *Id.* § 1129(b)(1). § 1129(b)(2) describes the requirements for a plan to be fair and equitable with respect to the various classes of creditors. To be "fair and equitable" to undersecured secured creditors, the creditors must receive the "value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." *Id.* § 1129(b)(2)(A)(i)(II).

89. *Id.* § 1129(b)(1)(B).

90. *Id.* § 1129(b)(2)(B)(ii). Junior claimants are those creditors paid after a particular class of creditors. For example, because unsecured creditors are paid after secured creditors, unsecured claimants are considered junior claimants with respect to secured claimants.

91. An equity holder includes anyone owning a portion of the business: shareholders of a corporation, partners in a partnership, and any owner of a business. Hence, farmers are equity holders. The only way for equity holders to retain their interest is to pay everyone ahead in full (to meet the rule of absolute priority) or get everyone ahead of them to vote yes to a plan that allows them to be paid without everyone ahead being paid in full (because § 1129(b)(1) requirements do not have to be met with respect to classes accepting the plan). *Id.* § 1129(b)(1).

enough help to farmers. Thus, besides its complexity, Chapter 11 does not always result in a plan that helps farmers survive bankruptcy while keeping their farms intact.

Like Chapter 11, Chapter 13 is rehabilitative in nature and requires a reorganization plan.⁹² Chapter 13 also has a cramdown provision similar to Chapter 11's.⁹³ Hence, the reorganization plan need not be accepted by unsecured creditors to be confirmed. After an unsecured creditor objects, the court may approve the debtor's plan if the creditor receives the present value of the claim, or the debtor pays all of his or her disposable income into the plan for three years.⁹⁴ Hence, Chapter 13 eliminates Chapter 11's absolute priority rule.⁹⁵

Unlike Chapters 7 and 11, Chapter 13 may not be used by partnerships or corporations, only by individuals with regular income.⁹⁶ Chapter 13 does not permit involuntary bankruptcies since only the debtor can file.⁹⁷

Besides the fact that only the debtor can file a Chapter 13 plan, the main advantages of Chapter 13 for farmers are its simplicity, low cost, and easier confirmation.⁹⁸ Farmers can also obtain a co-debtor stay under Chapter 13 to protect family and friends who co-signed for consumer debts.⁹⁹ Unfortunately, Chapter 13's debt limits and exclusion of partnerships and corporations prevent many family farmers from utilizing Chapter 13's benefits.¹⁰⁰

Chapter 12 bankruptcy was created specifically for family farmers due to the other chapters' failure to adequately protect

92. *Id.* § 1322.

93. *Id.* § 1325(b).

94. *Id.* § 1325(b)(1).

95. See *supra* notes 90-91 and accompanying text.

96. The bankruptcy code states that "[o]nly an individual with regular income that owes . . . unsecured debts of less than \$100,000 and . . . secured debts of less than \$350,000" may use Chapter 13. *Id.* § 109(e). The code defines an individual with regular income as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of this title, other than a stockholder or commodity broker." *Id.* § 101(29).

97. *Id.* § 1321. This benefitted many farmers before 1986 who were subject to involuntary bankruptcies because they did not fit the statutory definition of "farmer." See *supra* note 74.

98. Jeffrey L. Dull, Comment, *Bankruptcy Chapter 12: How Many Family Farms Can It Salvage?*, 55 UMKC L. Rev. 639, 653 (1987).

99. Chapter 13 provides a stay of action against co-debtors for "consumer debts." 11 U.S.C. § 1301 (1988).

100. A Chapter 13 debtor must be an individual. See *supra* note 96. However, many family farms are organized as family partnerships or family corporations. Moreover, Chapter 13 debtors must have less than \$100,000 in unsecured debts and less than \$350,000 of secured debt, amounts easily exceeded by current costs of farmland and farm equipment. *Id.*

family farmers' interests.¹⁰¹ Before Congress enacted this chapter, no provisions in the bankruptcy code specifically helped farmers even though they encounter unique financial difficulties.¹⁰² Congress enacted Chapter 12 on a trial basis, as evidenced by its sunset, or self-destructive, provision which states that Chapter 12 will expire on October 1, 1993 if Congress fails to reenact it.¹⁰³ Congress limited the chapter to family farmers;¹⁰⁴ hence, agribusiness corporations cannot take advantage of its leniency.

One of the significant changes incorporated into Chapter 12 is the new definition of "adequate protection." As with the other chapters, under Chapter 12 a creditor can lift the automatic stay¹⁰⁵ imposed by bankruptcy if the creditor's interest in the property is not adequately protected.¹⁰⁶

Under the other chapters, courts' interpretation of "adequate protection" caused a major problem for farmers. Chapter 12 sought to change the definition by eliminating the other chapters' requirement that a debtor compensate the creditor for "lost opportunity

101. Chapter 12 became effective on November 26, 1986. The conference committee report states that most family farmers acquired too much debt to qualify for Chapter 13 and thus, were forced to use Chapter 11, which many farmers found too complex and expensive. H.R. CONF. REP. No. 958, 99th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5246, 5249. Because of the farm crisis, Congress drafted the new chapter to protect farm debtors.

[Chapter 12] is designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land. It offers family farmers the important protection from farm creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive a fair repayment.

Id. Congress enacted the new chapter specifically to help family farmers deal with bankruptcy. *Id.*

102. Some of these risks result from the weather, inflation, and the economy. Dull, *supra* note 98, at 642. Another unique risk farmers experience concerns harm to animals. Paul C. Rosenblatt, FARMING IS IN OUR BLOOD: FARM FAMILIES IN ECONOMIC CRISIS 37 (1990). Furthermore, the farmer's illness poses a particularly great threat to farming since the farmer's labor is essential to the business and cannot be easily replaced for financial reasons and otherwise. *Id.* at 36. This health risk is aggravated by the fact that farming remains one of the most dangerous occupations in America. Sharon Schmickle, *Bucolic Image Belies Farm Accident Rate: Each Year, 1 in 7 Farms is Scene of Serious Injury*, STAR TRIB., Jan. 18, 1992 at 1A.

103. Act of Oct. 27, 1986, Pub. L. No. 99-554, § 302(f), 100 Stat. 3088, 3124 (1986). The drafters stated that the sunset provision was included because "Congress will want to evaluate both whether the chapter is serving its purpose and whether there is a continuing need for a special chapter for the family farmer." H.R. CONF. REP. No. 958, 99th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5246, 5249.

104. 11 U.S.C. § 101(19) (1988).

105. As soon as a petition for bankruptcy is filed under §§ 301, 302, or 303, of the bankruptcy code, an automatic stay is imposed on actions of the creditor. *Id.* § 362(a). This stay prevents creditors from pursuing action against the debtor, the debtor's property, or the debtor estate's property to satisfy creditors' claims or enforce their liens.

106. *Id.* § 362(d)(1).

costs."¹⁰⁷ Chapter 12 protects the value of the collateral, not the creditor's interest in the collateral.¹⁰⁸ Eliminating "lost opportunity costs" illustrates Congress' Chapter 12 policy of favoring the farm debtor because it places the burden of "lost opportunity costs" on the lender. This reduces litigation costs, allowing family farm debtors to concentrate on preparing a reorganization plan.¹⁰⁹

Another aspect of Chapter 12 benefitting farmers allows the trustee to sell property without the creditor's consent.¹¹⁰ Chapter 12 also continued Chapter 13's elimination of the absolute priority rule in cramdown.¹¹¹ As in Chapter 13,¹¹² an unsecured creditor cannot prevent confirmation of a reorganization plan if the debtor uses his disposable income to satisfy the plan for a specified

107. The legislative history states the following:

The Fourth and Ninth circuits have held that adequate protection requires the debtor to compensate the secured creditor for so-called "lost opportunity costs" in those cases where the value of the collateral is less than the amount of debt secured by the collateral. *In re American Mariner Industries, Inc.*, 734 F.2d 426 (9th Cir. 1984); *Grundy National Bank v. Tandem Mining Corp.*, 754 F.2d 1436 (4th Cir. 1985). The payment of lost opportunity costs requires the periodic payment of a sum of cash equal to the interest that the undercollateralized secured creditor might earn on an amount of money equal to the value of the collateral securing the debt.

Lost opportunity costs payments present serious barriers to farm reorganizations . . . Family farmers are usually unable to pay lost opportunity costs.

H.R. CONF. REP. NO. 958, 99th Cong., 2d Sess. 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5250. Lost opportunity costs compensate creditors for investment opportunities creditors could have taken using the foreclosure proceeds, but which are lost due to the delayed foreclosure.

108. See 11 U.S.C. § 1205(a) (1988). § 1205(a) states that § 361 "does not apply in a case under this chapter." (§ 361 defines "adequate protection" for the other bankruptcy chapters.) § 1205(b) defines "adequate protection" under Chapter 12. Most significantly, § 1205(b)(1) inserts the phrase "value of property securing a claim or of an entity's ownership interest in property" in place of § 361(1)'s phrase "value of such entity's interest in such property." In § 1205(b)(4), the aforementioned "value of property phrase" is inserted in place of § 361(3)'s "indubitable equivalent of such entity's interest in such property." These phrase replacements illustrate that Chapter 12's drafters sought to change the focus from adequately protecting the creditor's interest in the property, to instead, protect the collateral's value.

109. H.R. CONF. REP. NO. 958, 99th Cong., 2d Sess. 50 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5251.

110. 11 U.S.C. § 1206 (1988). The legislative history states that the provision's purpose is to allow farm debtors to "scale down the size of their farming operations by selling unnecessary property." H.R. CONF. REP. NO. 958, 99th Cong., 2d Sess. 50 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5251. This provision avoids the deadlock that had been occurring under Chapters 11 and 13 between creditors seeking to dispose of land and equipment and creditors who thought they could get higher prices by disposing of it themselves. David K. McPhail, *Bankruptcy: Determination of an Appropriate Cram-down Interest Rate for the Family Farmer*, 41 OKLA. L. REV. 489, 491 (1988).

111. See *supra* notes 90-91, 95 and accompanying text.

112. See *supra* note 94 and accompanying text.

number of years.¹¹³ However, under Chapter 12 the debtor may have to contribute his income for a longer period of time: anywhere from three to five years.¹¹⁴

The possibility of paying a debtor for longer than three years is one aspect of Chapter 12 favoring creditors. Certain provisions were added to balance Chapter 12 with respect to creditors' concerns.¹¹⁵ For example, untimely filing results in a dismissal and prevents refiling.¹¹⁶ Fraud can also result in a dismissal or conversion to Chapter 7.¹¹⁷

Changes in the bankruptcy code and continuing government involvement in farm-oriented legislation illustrate our government's intent to preserve the family farm.¹¹⁸ The government has established many programs and statutes to help the family farmer through the farm crisis. However, since these programs sometimes stray from their goals, courts must accept responsibility in implementing Congress' express policy of helping family farmers. When interpreting these statutes, courts must remember the purpose of the statute. Interpreting present "value" in Chapter 12's cramdown provision presents an opportunity for courts to read the statute's plain language in light of the statute's purpose, as Part IV explains. But first, Part III illustrates the ambiguity of present "value" by examining the variety of ways courts have interpreted the phrase.

III. The Courts' Interpretation of the Cramdown Interest Rate

Courts have used a number of methods for determining what represents the present "value" of a secured claim under the cramdown provisions of the bankruptcy code. The *Fisher* court used the market rate of the loans to compute the claims' present "value".¹¹⁹ Because the Fishers qualified for special FmHA loans

113. 11 U.S.C. § 1225(b)(1) (1988).

114. Under Chapter 12 the judge has discretion to approve payments for more than three years but less than five years. *Id.* § 1222(c).

115. McPhail, *supra* note 110, at 491.

116. 11 U.S.C. § 1208(c)(3) (1988). *E.g.*, *In re Braxton*, 121 B.R. 632 (Bankr. N.D. Fla. 1990).

117. 11 U.S.C. § 1208(d) (1988). *E.g.*, *Reinbold v. Dewey County Bank*, 942 F.2d 1304 (8th Cir. 1991).

118. In fact, during the Senate Agriculture Committee hearings on the confirmation of Secretary of Agriculture Michael Espy, the chair of the committee, Senator Patrick Leahy, reiterated Congress' commitment to the small, family farm. "[W]e have to be committed to rural America. It can wait no longer. If we lose our small family farms, we lose not only our rural heritage but the economic strength of our rural communities." *Hearing of the Senate Agriculture Committee, supra* note 37.

119. The court of appeals remanded to the lower court the determination of this "market rate." *In re Fisher*, 930 F.2d 1361, 1364 (8th Cir. 1991).

with low interest rates for limited-resource farmers, the Fishers actually owed more after filing for bankruptcy than before. Therefore, the court's determination of present value penalized the Fishers for using a special Congressional enactment, Chapter 12, designed expressly to help family farmers manage their debts. Such a result contradicts Chapter 12's purpose.

Courts can choose from a variety of interest rates when determining the present value of claims under the bankruptcy code's cramdown provisions. One option is to take a preexisting rate, created for another situation, and apply it to the bankruptcy case. For example, some courts have applied the federal tax rate used by the Internal Revenue Service to charge taxpayers for unpaid tax liabilities.¹²⁰ Another possibility is a statutory interest rate designed for civil judgments.¹²¹ Other courts use a judgment rate as a starting point, adding a premium to compensate for risk.¹²²

Courts have also borrowed other lenders' interest rates, applying them to the bankruptcy context. Some courts apply the consumer loan contract rate prevailing in the market when the bankruptcy plan took effect.¹²³ Other courts use the prime rate commercial lenders quote to business borrowers,¹²⁴ sometimes adding a risk factor to compensate for added risk.¹²⁵ Another popular rate is the treasury rate at which the government competes in the money market with other borrowers.¹²⁶ Courts have also held that the rate should be determined uniquely in each case, based on the

120. *In re Ziegler*, 6 B.R. 3, 6 (Bankr. S.D. Ohio 1980). The court used the rate established by the Internal Revenue Code, 26 U.S.C. § 6621. The court considered the rate "reasonably responsive to current economic conditions" since it was "subject to periodic revision," and the court thought using the rate did not impose "an unfair burden on Chapter 13 debtors." *Id.*

121. *In re Crockett*, 3 B.R. 365, 368 (Bankr. N.D. Ill. 1980). The court considered the current legal rate of interest to be the proper rate to compensate the creditor for delayed payments. *Id.*

122. *In re Lum*, 1 B.R. 186, 188 (Bankr. E.D. Tenn. 1979). The court examined the judgment rate of 8% and arbitrarily added 2% to accommodate the creditor's interests. *Id.*

123. *In re Benford*, 14 B.R. 157, 160 (Bankr. W.D. Ky. 1981). The court chose the prevailing market rate for consumer loans on the date the plan takes effect since it is "responsive to changing economic conditions, yet provides . . . a reasonably certain and uniform method for calculating the long-term equivalent of a claim's present value." *Id.*

124. *In re Hudock*, 124 B.R. 532, 534 (Bankr. N.D. Ill. 1991). The court chose the prime rate since it represented the borrower's cost of money, permitting "the market to make the necessary risk assessment." *Id.*

125. *In re Patterson*, 86 B.R. 226, 228-29 (Bankr. 9th Cir. 1988). The court favored adjusting the prime interest rate for bankruptcy loans to reflect the added risk. Moreover, the court held that because prime rate is generally lower than market, a higher risk factor can be used. *Id.*

126. *U.S. v. Doud*, 869 F.2d 1144, 1146 (8th Cir. 1989). The court upheld using the treasury bond rate, adding a 2% risk factor. *Id.*

interest rate the debtor would have to pay in the open market, considering the risks.¹²⁷

Courts can also use compensatory rates or rates alleviating hardships. Courts have used interest rates equalling the creditor's cost of funds.¹²⁸ Courts have also averaged several rates to eliminate the hardship of applying one interest rate.¹²⁹ Other courts rely on experts who testify to the appropriate interest rate in a particular context.¹³⁰

A final, and seemingly most reasonable, rate for family farm debtors is some form of the contract rate itself. Some courts keep the contract rate unchanged.¹³¹ Other courts use the "prevailing market rate . . . with a maximum limitation on such rate to be the underlying contract rate of interest."¹³² A further possibility is to use the contract rate as a presumption¹³³ and go from there.

None of these possible rates is perfect. The rates created for other situations and borrowed by bankruptcy courts invariably disfavor one party by incorporating other context's external factors.¹³⁴ Rates compensating the lender for the cost of funds or reinvestment rate are difficult to calculate.¹³⁵ The averaging rate is somewhat

127. *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503, 1508 (9th Cir. 1987). After examining various possible rates, the court concluded that the rate should be determined on a case-by-case basis according to open market standards. *Id.*

128. *In re Hardzog*, 74 B.R. 701, 703 (Bankr. W.D. Okla. 1987). The court used the cost of funds as the appropriate interest rate because it thought the rate properly balanced creditor and debtor interests. The court left the determination of the cost of funds to a case-by-case determination and instead, simply stated that the cost of funds "should reflect the actual rate the creditor must pay to obtain the replacement funds." *Id.*

129. *See In re Hyden*, 10 B.R. 21, 27 (Bankr. S.D. Ohio 1980). Because the case involved an installment sales contract, the court concluded it was appropriate to average the state's statutory interest rate for installment sales contracts, the contract interest rate, and an arbitrary "leveling factor" of 6%. *Id.*

130. *In re Moore*, 25 B.R. 131, 134 (Bankr. N.D. Tex. 1982). The court relies on the "uncontradicted testimony of the debtor's expert at the trial" in establishing the interest rate. *Id.* at 28.

131. *In re Thorne*, 34 B.R. 428, 431 (Bankr. E.D. Tenn. 1983).

132. *In re Colgrove*, 771 F.2d 119, 123 (6th Cir. 1985).

133. *In re Smith*, 4 B.R. 12, 13 (Bankr. E.D. N.Y. 1980).

134. Because the rates were established for completely different contexts, the interest rates reflect different risks. For example, rates designed for judicial proceedings take different factors into account than prime rates commercial lenders quote to business borrowers. Choosing between these rates poses a significant challenge for a court since none exactly reflects the rate agreed to between the debtor and creditor.

135. For example, because interest rates fluctuate in the market, an interest rate designed to equal the creditor's cost of funds would have to be continuously readjusted to exactly compensate the creditor. McPhail, *supra* note 110, at 500.

Furthermore, the name "compensatory" is somewhat of a misnomer. Using market rates (as courts do when attempting to compensate the lender) does not adequately compensate a commercial lender because a bankruptcy loan poses great risk

arbitrary,¹³⁶ and the expert rate often leads to a battle of experts creating uncertainty, introducing delay, and increasing cost.¹³⁷ Either party may be disadvantaged by the contract rate because of fluctuations in current rates.

Selecting any of these rates forces a court to make difficult decisions in characterizing the loan.¹³⁸ When characterizing the loan, courts should take the nature of the loan into account and treat commercial loans differently from loans under special government programs. Special government loans are isolated from market forces, and this isolation should not be sacrificed by filing for bankruptcy.¹³⁹

Hence, regardless of the rates courts apply in other contexts, FmHA loans should be treated uniquely. Such treatment has legal precedent. *In re Doud*¹⁴⁰ stated that "[t]reatment of the FmHA loans must be viewed in light of the agency's mission to provide

and does not represent a voluntary agreement between debtor and creditor. Hence, using rates designed for voluntary loans does not "compensate" the lender for a bankruptcy loan.

136. Averaging several rates may result in a rate that bears no relation to the original loan or to protecting either the lender's or the creditor's interests. It simply side-steps the problem of having to decide on one rate.

137. *Matter of Wichmann*, 77 B.R. 718, 720 (Bankr. D. Neb. 1987) (in light of such problems, the court expressly rejected rate determination methods requiring expert testimony in every case). Another court rejected methods requiring expert testimony for similar reasons: delay, cost, and differential abilities of the parties to hire experts. *In re Shannon*, 100 B.R. 913, 933 n.47 (S.D. Ohio 1989). Expert testimony can also potentially create wide variation "in rates for similarly situated debtors," which, in turn, encourages litigation. *In re Neff*, 89 B.R. 672, 679 (Bankr. S.D. Ohio 1988). When the experts disagree, courts can choose one expert's testimony over another, see *In re Stratford Assoc. Ltd. Partnership*, 145 B.R. 689, 703 (Bankr. D. Kan. 1992), or courts can choose their own rate, using expert testimony as a guide, see *In re Oaks Partners, Ltd.*, 135 B.R. 440, 447 (Bankr. N.D. Ga. 1991).

138. Selecting among these rates inevitably forces courts to characterize the "new loan," i.e. the repayment schedule as set out in the reorganization plan. Courts must decide whether to view the loan as first, voluntary or forced, and second, as being made at the time of the original loan or the bankruptcy plan confirmation. Some courts select the rate by characterizing the loan as a voluntary loan between the creditor and a solvent similar debtor. Then these courts decide whether to use rates prevailing at the time the loan was made (e.g. the contract rate) or when the bankruptcy plan is confirmed (e.g. the market rate). Other courts take the bankruptcy context into account and view the loan as a forced loan to an insolvent debtor. These courts often add risk factors to other contexts' interest rates to compensate for the loan's involuntariness due to the debtor's poor financial condition. In a sense, this rationale is artificial in that if a lender actually took the bankruptcy context into account, the lender would not make the loan at all. By adding these risk factors, courts are really trying to give the creditors a little extra for the extended time and the written-off portion of unsecured debt, essentially balancing the pro-debtor provisions of bankruptcy against the creditors' interests.

139. Since the market rate never applied to special low interest government loans when they were incurred, courts should not use market rates to set the interest rates for these loans in a bankruptcy plan.

140. 74 B.R. 865 (Bankr. S.D. Iowa 1987).

credit to family farmers who are unable to obtain credit from conventional sources."¹⁴¹

Doud relies on another decision, *Curry v. Block*,¹⁴² which held that a Congressional enactment should be interpreted in light of the "evident legislative purpose in enacting the law in question."¹⁴³ After examining the history of the FmHA, the *Curry* court concluded that the FmHA's purpose is "predominantly a form of social welfare legislation."¹⁴⁴ The court determined that "Congress . . . refutes the notion that the [FmHA] is strictly a business venture."¹⁴⁵ Therefore, when interpreting the section at issue¹⁴⁶ the court said it must "attempt to implement the social welfare goals of Congress as well as its directive to keep 'existing farm operations operating'"¹⁴⁷

Doud and *Curry* rely on the Supreme Court's characterization in *United States v. Kimbell Foods*¹⁴⁸ of the FmHA's lending programs as "forms of social welfare . . . [whose purpose] . . . is to assist the underprivileged farmer."¹⁴⁹ In *Kimbell Foods*, the Court contrasted the collection of taxes with repayment of FmHA loans.¹⁵⁰ The Court emphasized that collecting taxes was much more important than collecting outstanding FmHA loans. "The overriding purpose of the tax lien statute obviously is to ensure prompt revenue collection," but the same cannot be said of FmHA loans.¹⁵¹ "[FmHA loans] are a form of social welfare legislation, primarily designed to assist farmers . . . that cannot obtain funds from private lenders on reasonable terms."¹⁵²

Reasoning from the analyses in *Curry* and *Kimbell Foods*, the *Doud* court held that the contract rate should be applied to the low interest rate FmHA loans at issue, rather than the market rate.¹⁵³ The court stated, "It would be incongruous indeed if a farmer who on one hand qualified for FmHA protections because of high risk

141. *Id.* at 870 (citing *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd* 738 F.2d 1556 (11th Cir. 1984)).

142. 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd* 738 F.2d 1556 (11th Cir. 1984).

143. *Id.* at 509 (quoting *United States v. Bornstein*, 423 U.S. 303 (1976)).

144. *Id.* at 514.

145. *Id.* at 513.

146. 7 U.S.C. § 1981(a) (1982 Supp.). This was a 1978 amendment to the Consolidated Farm and Rural Development Act entitled "Loan moratorium and policy on foreclosures." *Id.* at 508.

147. *Id.* at 514.

148. 440 U.S. 715 (1978).

149. *Id.* at 735.

150. *Id.* at 734.

151. *Id.* at 734-35.

152. *Id.* at 735.

153. *In re Doud*, 74 B.R. 865, 871 (Bankr. S.D. Iowa 1987).

characteristics would on the other hand be required to forgo these protections to proceed under Chapter 12."¹⁵⁴

Doud's result comports with *Curry v. Block*'s conclusion that the FmHA is not a "business venture."¹⁵⁵ The market rate should be saved for loans to business ventures. Due to their nonprofitable purpose, social welfare loans' interest rates should remain below market rates after bankruptcy, just as before bankruptcy.

Other cases have adhered to *Doud*'s reasoning. *In re Schaal*¹⁵⁶ concluded that "determination of the interest rate to be applied must be viewed in light of FmHA's purpose of providing credit to farmers."¹⁵⁷ The court also stated that "FmHA lending programs have been characterized as forms of social welfare and the purpose of the programs is to assist the underprivileged farmer."¹⁵⁸ The court held that the interest rates of the FmHA's limited resource loan program should apply if the debtors remain qualified for the program.¹⁵⁹

The same court deciding *Doud* reaffirmed its holding in *Matter of Simmons*.¹⁶⁰

This court acknowledged that the FmHA's mission is to provide credit to family farmers who are unable to obtain conventional credit and found that application of the conventional loan calculation would thwart this mission. Implicit in this holding is a recognition that commercial banks are indeed different from the FmHA. The most obvious difference is that the FmHA lends money to those that commercial banks refuse at interest rates generally below market rates. . . . There is no reason to ignore the FmHA's mission and place all risk on the debtor just because the FmHA borrower filed bankruptcy.¹⁶¹

Hence, the court emphasized the difference between commercial banks and the FmHA when rejecting the FmHA's argument for the commercial loan rate.¹⁶²

Some courts, however, have rejected treating FmHA loans uniquely. *Arnold v. Porter*¹⁶³ held that a different rule should not apply to special FmHA loans,¹⁶⁴ and other courts have adhered to

154. *Id.* (citation omitted).

155. See *supra* note 145 and accompanying text.

156. 93 B.R. 644 (Bankr. W.D. Ark. 1988).

157. *Id.* at 647 (citing *Curry v. Block*, 541 F. Supp. 506, 511 (S.D. Ga. 1982)).

158. *Id.* (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 735 (1979)).

159. *Id.*

160. 86 B.R. 160 (S.D. Bankr. Iowa 1988).

161. *Id.* at 162.

162. *Id.*

163. 878 F.2d 925 (6th Cir. 1989).

164. The FmHA loan in that case was described as an "interest credit" whereby the original contract rate of 9% was waived, and an interest rate of only 1% applied when bankruptcy was filed. *Id.* at 926.

Arnold's holding.¹⁶⁵ In *Arnold* the debtors' plan proposed that they continue paying the special interest rate on one note until periodic review by the FmHA revealed the debtors no longer qualified, at which time the rate would revert to a higher rate.¹⁶⁶ This solution was created to alleviate the concern expressed in an earlier case, *In re Kesterson*.¹⁶⁷ The *Kesterson* court worried that debtors would use the FmHA's limited resource operating loans' low interest rates without complying with applicable rules and regulations, such as the annual review.¹⁶⁸

The *Arnold* court rejected the debtors' plan, stating, "we note that the FmHA is generally treated as other creditors, . . . and in any event had Congress intended a different rule, it could have so provided in Chapter 12."¹⁶⁹ This assertion is incorrect on two grounds. First, as *Kimbell Foods* demonstrates, the Supreme Court does not treat the FmHA as other creditors. In *Kimbell Foods* the Court explicitly called the FmHA lending program "social welfare legislation" available for farmers unable to borrow from "private lenders."¹⁷⁰ Second, as discussed later, relying on Congress' silence remains very tenuous.¹⁷¹ Silence is ambiguous and just as easily can support the proposition that treating FmHA loans uniquely is permissible since the statute does not forbid such treatment.

As described earlier, courts, such as in *Doud*, *Curry*, and *Kimbell Foods*, have permitted pro-family farm legislation to treat family farmers uniquely both in the bankruptcy context¹⁷² and in other contexts.¹⁷³ The reasoning underlying these cases supports unique treatment of FmHA loans. In any event, a special exception should

165. Courts have followed *Arnold's* lead in applying the market rate to FmHA loans. *In re Case*, 115 B.R. 666, 671 (Bankr. 9th Cir. 1990); *In re Branch*, 127 B.R. 891 (Bankr. N.D. Fla. 1991). Another court cited *Fisher* and *Arnold* as establishing the prevailing market rate as the appropriate interest rate. *In re Mason*, No. 90-21413, 1991 WL 145844, at *2 (Bankr. W.D. N.Y. Aug. 2, 1991). *Mason* rejected the debtor's proposed interest rate of 5% for an FmHA loan, concluding that the debtor failed to prove this was an "appropriate rate." *Id.* Another creditor's expert testified that the current rate for "such loans [as FmHA loan] was between 10.25% to 13.75%." *Id.*

166. 878 F.2d at 926.

167. 94 B.R. 561, 562 (Bankr. W.D. Ark. 1987).

168. The court did not want debtors using only the best features of the program, i.e., the low interest rates, while failing to adhere to the program's rules and regulations. *Id.* Such rules and regulations include "annual review and possible conversion to standard Farmers Home Administration loan terms." *Id.*

169. *Id.* at 930 (citation omitted).

170. 440 F.2d at 735.

171. See *infra* notes 188-89 and accompanying text.

172. See *supra* notes 141-62 and accompanying text.

173. *MSM Farms v. Spire*, 927 F.2d 330 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 65 (1991) (upholding the constitutionality of statutes limiting the ownership of farm and ranch land to family farmers).

certainly be created for FmHA's limited-resource operating loans. Based on this analysis, *Fisher* was wrongly decided, as the following section explains in greater detail.

IV. *Fisher's* Flawed Reasoning

The loans at issue in *Fisher* were limited-resource operating loans that the FmHA offers at below market interest rates to farmers starting out, undercapitalized farmers, and farmers unable to qualify for conventional loans.¹⁷⁴ To obtain one of these loans, the Fishers had to satisfy the FmHA's special program requirements. The FmHA required that they own or run a small or family farm, satisfy a low income requirement, fail to qualify for conventional loans, demonstrate poor managerial skills, possess only a limited education, and remain unable to maintain a reasonable standard of living without the reduced loan rate.¹⁷⁵

The Fishers filed for Chapter 12 bankruptcy on July 26, 1988, and on September 9, 1988, the FmHA filed a proof of claim for the loans to the Fishers.¹⁷⁶ Because the Fishers lacked adequate collateral to satisfy the claims, the claims were written down under Chapter 12's cramdown provision.¹⁷⁷ The reorganization plan includes proposed interest rates, and if any secured creditors object to these rates, the court can "cram" the proposed discount rate "down" on the creditors. Before a court can confirm the plan over a creditor's objection, the creditor must receive the present "value" of the creditor's secured claim.¹⁷⁸

In *Fisher*, the debtors proposed to repay their FmHA limited-resource operating loans, taken out at below market interest rates of 7.25%, 4.5%, and 4.5%, at a weighted average of 5.41%. The FmHA objected, claiming that this rate failed to provide the present value of the loans. The bankruptcy court¹⁷⁹ and the district

174. 930 F.2d at 1362.

175. *Id.* (citing 7 C.F.R. §§ 1941.4(h), 1943.4(h)).

176. *Id.*

177. 11 U.S.C. § 1225(a)(5)(B)(ii) (1988). This provision states the following:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

...
(5) with respect to each allowed secured claim provided for by the plan—

...
(B)(ii) the value, as of the effective date of the plan, of the property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the amount of such claim.

178. *Id.*

179. *In re Fisher*, 930 F.2d 1361, 1361 (8th Cir. 1991).

court¹⁸⁰ approved the contract rate proposed by the debtors, instead of the market rate proposed by the creditors, because the contract rate promoted the FmHA's policy of assisting disadvantaged farmers.¹⁸¹ The Court of Appeals for the Eighth Circuit reversed, following the Sixth Circuit case, *U.S. v. Arnold*,¹⁸² by relying on Chapter 12's plain language.

The *Fisher* court decided to use the market rate, although it did not decide how to compute the market rate; instead, it remanded this issue to the lower court.¹⁸³ Because the market rate exceeds the original FmHA rate, the *Fisher* decision effectively makes very poor farmers pay more for their loans after declaring bankruptcy. The rate at which loans are paid back can mean the difference between recovering from bankruptcy and losing the farm.

Requiring limited-resource farmers to pay interest rates higher than the original contract rate does not make sense logically or as a matter of policy. The purpose of bankruptcy is to protect debtors while they reorganize their loans.¹⁸⁴ Making these farmers pay more nullifies this protection premise. Congress' overriding purpose behind enacting Chapter 12 was to preserve the family farm.¹⁸⁵ This purpose supports using the contract rate as the proper interest rate since a poor family farmer declaring bankruptcy would be more likely to be able to meet the lower contract rate payments than higher market rate payments. A closer examination of *Fisher* reveals the court's flawed reasoning.

The Eighth Circuit focuses on the plain language of the cramdown provision.¹⁸⁶ When interpreting the statute, the court relies on the fact that the cramdown provision makes no distinction between the present value of claims resulting from special programs, like the FmHA's limited-resource operating loans, and loans from other lenders.¹⁸⁷ This resembles the Conan Doyle approach to statutory interpretation, in which courts hold that silence relates something about the statute.¹⁸⁸ However, the Supreme Court has

180. *Id.*

181. 930 F.2d at 1363.

182. 878 F.2d 925 (6th Cir. 1989). See also *supra* notes 164-69 and accompanying text.

183. 930 F.2d at 1364.

184. ANDERSON & MORRIS, *supra* note 75, § 1.03, at 1-12.

185. See *supra* note 101.

186. For the text of the cramdown provision, see *supra* note 177.

187. 930 F.2d at 1363.

188. This derives from Doyle's Sherlock Holmes mystery "Silver Blaze," in which a dog's silence told Sherlock information to help solve a mystery:

[A] dog was kept in the stables, and yet, though someone had been in and fetched out a horse, he had not barked enough to arouse the two

rejected this dubious canon of statutory interpretation.¹⁸⁹ Moreover, silence can be interpreted to "say" different things. The *Arnold* court states that silence means FmHA loans cannot be treated uniquely since this is not expressly mentioned. However, conversely, since special treatment is not expressly prohibited, the silence could also be interpreted to mean that FmHA loans can be treated uniquely. Silence is very ambiguous, and hence, serves as a poor foundation for statutory interpretation.

The Eighth Circuit asserts that the district court ignored the cramdown provision's language and wrote into the statute a requirement that the FmHA must continue to subsidize the debtors under the favorable terms of the original loan, even though the original loan ceased to exist after the debtors filed bankruptcy.¹⁹⁰ This reasoning ignores the relationship between the original loan and the post-bankruptcy loan. The two are inextricably linked: Chapter 12 is designed to allow creation of a new loan that the debtor can pay, based on the original loan's terms.

Furthermore, the *Fisher* court's heavy reliance on the provision's "plain language" appears precarious in light of the ambiguity of the cramdown provision and the continued litigation concerning "value."¹⁹¹ Because the language is not determinative, the legislative history and policy behind the statute should be examined.¹⁹² Chapter 12's legislative history fails to define "value." Thus, the general policy behind Chapter 12 sheds the most light on this provision's language.

The *Fisher* court describes the policy behind the enactment of Chapter 12. The court states, "Chapter 12 was created to 'give farm families facing bankruptcy a fighting chance to reorganize their

lads in the loft. Obviously the midnight visitor was someone whom the dog knew well.

Sir Arthur Conan Doyle, *Silver Blaze*, in 1 THE COMPLETE SHERLOCK HOLMES 335, 339 (Doubleday & Company 1930) (1893). Although this canon usually applies to the legislative history's silence, the underlying reasoning equally applies to silence of the statutory language.

189. The Supreme Court states,

In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980).

190. *Id.*

191. See *supra* part III.

192. The Supreme Court has held that when a statute is deemed ambiguous, the legislative history and overall structure should be examined. *Green v. Bock Laundry Machine Co.* 490 U.S. 504, 508-09 (1989). In fact, the Supreme Court effectively held that legislative history and purpose can trump the plain meaning of a statute, i.e. that ambiguity in the plain meaning is not required before examining the legislative history. In *Green v. Bock Laundry* the Supreme Court concluded that the plain language of the statute at issue "can't mean what it says." *Id.* at 511.

debts and to keep their land.”¹⁹³ However, the court’s decision contradicts this purpose. The *Fisher* court ignored the *In re Doud*¹⁹⁴ case, also from the Eighth Circuit. *Doud*’s policy-based analysis held that the contract rate should apply to FmHA loans.¹⁹⁵

Chapter 12’s legislative history states that the purpose of Chapter 12 is to protect farm debtors while securing fair repayment for the creditor.¹⁹⁶ This purpose supports using the contract rate. The contract rate would undoubtedly protect the debtors since the rate remains below the market rate. The contract rate should be considered fair for creditors since they originally agreed on this rate. Furthermore, in this context the creditor is a federal agency, the FmHA, established to serve limited-resource farmers; fair repayment should be based on rates at which the agency usually lends money, which are below the market rate.

If courts fail to maintain the contract rate in FmHA farm bankruptcy cases, an absurd result occurs: when the debtors need the most protection, they receive the least protection. The contract rate would not only further the general purpose of Chapter 12 but also would further the purpose of the FmHA loans. FmHA loans differ from conventional loans, and as a result, courts should treat these loans differently.

Arnold interpreted the cramdown provision to be a compromise between the debtor and creditor,¹⁹⁷ and the *Fisher* court relied on this to use the higher market rate for these risky loans.¹⁹⁸ However, when the creditor is a federal agency set up to provide low-interest loans to low income people, the agency deals with high risk loans on a regular basis. It makes no sense to compensate the government as a lender for risks it is obligated to assume.

Since the agency was created for the express purpose of aiding disadvantaged farmers, agreeing to accept the loan’s contract rate appears reasonable. *Fisher* underscores the issue of whom the FmHA serves.¹⁹⁹ The FmHA’s lending practices have been criti-

193. 930 F.2d at 1362 (citing H.R. REP. No. 958, 99th Cong., 2d Sess. 48-49 (1986), reprinted in 1986 U.S.C.C.A.N. 5249-50).

194. 74 B.R. 865 (Bankr. S.D. Iowa 1987).

195. See *supra* notes 141-55 and accompanying text.

196. It offers family farmers the important protection from farm creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive a fair repayment.

H.R. REP. No. 958, 99th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5246, 5249.

197. 878 F.2d at 928.

198. 930 F.2d at 1364.

199. See *supra* note 45 and accompanying text.

cized frequently in recent years.²⁰⁰ Resulting legislative reform and case law have made the FmHA's actions more borrower-friendly.²⁰¹ Finding the contract rate to be appropriate would follow the trend of restoring the FmHA to its original purpose of aiding poor farmers.

Even if the Eighth Circuit does not embrace the contract rate in all FmHA farm bankruptcy cases, a special exception should be made for FmHA limited-resource operating loans. The loans at issue in *Fisher* were limited-resource operating loans. *Doud* and *In re Simmons*²⁰² held that all FmHA loans should be treated uniquely. But other cases, such as *In re Schaal*,²⁰³ created an exception only for limited-resource operating loans. Even under this more restricted holding, since the Fishers qualify for the program, they should get the limited-resource operating loan rates.

The Eighth Circuit's *Fisher* decision undermines the policy of preserving family farms by inserting its own interpretation of "fairness." *Fisher*'s heavy emphasis on creditors' rights in a Chapter 12 bankruptcy should be saved for a more appropriate case involving private lenders, not a case involving a government agency established specifically to help underprivileged family farmers.

Conclusion

"The family farm has become a rare species, nearly extinct."²⁰⁴ Traditionally, the family farm assumed an essential role in the settling and building of America. Congress' efforts to preserve family farms evidences its support of them, but the efforts often fail to achieve their goals. Existing programs often stray from Congress' intentions. The courts remain the last refuge in many cases to guide these programs back onto course.

Fisher was wrongly decided in light of Congress' purpose in passing Chapter 12. Because the loans at issue were limited-resource operating loans, the Eighth Circuit should have used the contract rate for the cramdown interest rate. *Fisher* provided an opportunity for the court to help one of Congress' programs return

200. Neil D. Hamilton, *The Role of the Law in American Agriculture*, 38 *DRAKE L. REV.* 573, 577-78 n.8 (1989).

201. *Id.* One of the most significant cases influencing FmHA reform was *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982). For a general discussion of how this case affected the FmHA's lending practices, see Guy R. Montag, *FmHA Loan Servicing: Alternatives to Foreclosure*, 35 *DRAKE L. REV.* 561 (1986).

202. 86 B.R. 160 (Bankr. S.D. Iowa 1988).

203. 93 B.R. 644 (Bankr. W.D. Ark. 1988). *Schaal* held that FmHA's limited resource loan interest rates would apply if the debtors qualify for the program. *Id.* at 647.

204. Kirkendall, *supra* note 10, at 96.

to its intended path, but the court failed to seize the chance. Future opportunities will undoubtedly present themselves, and the courts must recognize and utilize their power to help family farm legislation achieve its goals. Family farmers have played an important role in our nation. The courts can help Congress ensure that they continue to do so.

