THE LAW OF HARD TIMES

What Lawyers and Policy Makers in 2019 Can Learn from the Farm Crisis of the 1980s

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> These folks is our folks—is our folks. An' that manager, he come an' set an' drank coffee, an' he says, 'Mrs. Joad' this, an' 'Mrs. Joad' that—an 'How you gettin' on, Mrs. Joad?'" She stopped and sighed. "Why, I feel like people again."
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> — Ma Joad speaking after she's just met Jim Rawley, administrator of the Weedpatch Camp. John Steinbeck based the character of Rawley on Tom Collins, the administrator of the Arvin Sanitary Camp for migrant workers in California, a Farm Security Administration project. *Grapes of Wrath* is dedicated to "Tom, who lived it."

I. The Big Picture of the Law of Hard Times

We are in—or going into—another farm depression that will be similar to the Great Depression of the 1930s and the Farm Crisis of the 1980s.

While every era is different, I believe that knowledge of the case law developed during the farm struggles of the 1930s and 1980s, and knowledge of statutory and regulatory reforms

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that arose from advocacy during those difficult times, will be helpful to today's agriculture lawyers and policy makers.

As farmers and ranchers again find themselves, due to circumstances beyond their control, in financial distress, they will contact AALA members and state and federal policy makers.

I hope that the information below will help attorneys and policy makers more rapidly respond to their needs. Obviously, more will need to be done, but the developments of the 1980s may serve as a base from which to start.

II. Four Significant Reforms from Hard Times in the 1980s (You think *you* have it bad?)

A. The First Big Reform of the 1980s: Vastly Improved Appeals Procedures for Disputes with the Farm Service Agency[2] of USDA

1. In the early 1980s, USDA used an appeal procedure for farm borrowers that "starved" farmers out by seizing all of their income, long in advance of an appeal hearing before a biased hearing officer who oftentimes had been involved in the decision being appealed. The constitutionality of these procedures was challenged in Coleman v. Block. See, Coleman v. Block, 562 F.Supp. 1353 (D. N.D. 1983) (preliminary injunction for class of 8200 North Dakota farmers, saying at p. 1366 that the FmHA appeals process was "woefully inadequate if not non-existent"); 100 F.R.D. 705 (D.N.D. 1983 (expanding North Dakota class into national class); 580 F. Supp. 192 (D.N.D. 1983) (preliminary injunction for national class) and 580 F.Supp. 194 (D.N.D. 1984) (final permanent injunction).[3] While other courts had ordered FmHA to provide notice of the right to a deferral[4], no court had previously addressed the constitutionality of the appeals process or the pre-hearing seizure of funds intended for family living or farm operating expenses.

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[2] Farm Service Agency (FSA) is the name for the agency known as FmHA in the 1980s. Nationwide, FSA had 38,628 borrowers with $5.5 billion in loans outstanding as of FY 2018. Founded in 1935 as the Resettlement Administration, it tends to have riskier loans than Farm Credit System lenders or private lenders, and includes loans to beginning farmers, farmers who have suffered disasters, and other higher risk borrowers in its portfolio. FSA's direct loan portfolio was running at a 19.6% delinquency rate in January, 2019. See Associated Press, March 1, 2019, Farm Loan Delinquencies Highest in 9 years as prices slump (https:///.drovers.com/article/farm-loan-delinquencies-highest-9-years-prices-slump).

[3] A second phase of the Coleman v. Block litigation, which for convenience might be called "Coleman II," began on November 29, 1985 with a supplemental complaint. Coleman II challenged forms and procedures announced by FmHA in November 1983 and October of 1984. Coleman II litigation continued for several years. See, Coleman v. Block, 632 F. Supp. 997 (D.N.D. 1986) and 663 F. Supp. 1315 (D.N.D. 1987) and Coleman v. Lyng, 864 F. 2d 604 (8th Cir. 1989) (summarizing the litigation since 1985 and dismissing remaining claims as moot) (*cert. denied*, 493 U.S. 953 (1989). James T. Massey and Lynn Hayes were lead counsel on the Coleman II litigation, with various states participating as amici.

[4] See, e.g., Curry v. Block, 541 F.Supp. 506 (S.D. Ga.1982), aff'd 738 F.2d 1556 (11th Cir. 1984) (requiring deferral regulations) and Allison v. Block, 556 F.Supp. 400 (W.D. Mo. 1982, aff'd 723 F.2d 631 (8th Cir. 1983) (requiring actual notice of deferral rights but not requiring regulations).

For context of the times in which the Coleman case arose, it is worth spending two hours watching the Academy Award-winning movie Country, starring Jessica Lange and Sam Shepard. Country deals with Iowa farmers who dramatize the real challenges the lead plaintiffs in the Coleman case suffered. Released in the fall of 1984, the film contains an excerpt from Judge Van Sickle's final permanent injunction in its closing scene.

2. The "Coleman" fair hearing reforms—requiring a neutral hearing officer, fair appeals procedures, and proper advance notice of the right to apply for a deferral—were eventually put into law in Title VI of the 1987 Agriculture Credit Act (ACA), Pub. L. No. 95-334, 92 Stat. 4210, 7 U.S.C. §1934 (1988). As stated by the Senate Conferees, "[t]hese provisions are intended to carry out the intent of the Coleman decisions in the context of this reform of FmHA practices." S. Rep. No. 100-230, 100th Cong., 1st Sess. 6 (1987). The Senate Report also said Title VI "is based on a careful analysis of the Coleman opinions and is designed to address, for the future, the notice issues raised in that case." S.Rep. No. 100-230, 100th Cong., 1st Sess. 38 (1987). Shortly after the Coleman reforms became law, USDA applied to the Eighth Circuit to dissolve the various Coleman injunctions as moot (a motion that would also remove Judge Van Sickle from being able to hear contempt cases). On December 28, 1988, the Eighth Circuit Court of Appeals in the case of Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988) held that because the ACA "provides more relief to the plaintiffs than the remedy ordered by the District Court … we hold that the passage of the Agriculture Credit Act moots both the government's appeal and the farmers' cross appeal." Further statutory reforms of USDA's appeal process were made in the FACT Act of 1990 (the 1990 Farm Bill).

3. The present form of the National Appeals Division (NAD) was established by Congress in the Department of Agriculture Reorganization Act of 1994, Subtitle H, 7 USC §§ 6991-7002. Compared to the pre-Coleman appeal procedures, the NAD appeals system is a dream come true. Practitioners who have FSA clients should familiarize themselves with NAD deadlines and processes. Excellent information about NAD is on USDA's website. For example, the NAD website contains the procedures, federal regulations and laws which govern NAD, its annual reports to Congress, and a searchable data base of NAD opinions. In addition to appeals of FSA adverse actions, NAD also handles appeals for the Natural Resources Conservation Service (NRCS), the Risk Management Agency, and the constituent sub-agencies of Rural Development, viz. the Rural Housing Service, the Rural Utilities Service, and the Rural Business Cooperative Service.

4. Practitioners working with FSA borrowers for the first time, or who are working on unfamiliar issues, may need to quickly gain basic information on FSA's practices and requirements. As a result of the 2010 Keepseagle settlement, a plain language guide to FSA loans entitled Your Guide to FSA Loans is available on USDA's website. Another plain language guide, entitled Your FSA Farm Loan Compass, spells out responsibilities of FSA loan borrowers and the loan servicing options available to them. While intended for applicants and borrowers, both pamphlets will be helpful to attorneys learning about FSA programs and requirements. A more technical resource is FSA's handbook on Program Appeals, Mediation, and Litigation 1-APP (available at fsa.usda.gov).

5. NAD does not cover discrimination complaints. USDA has an internal (often ineffective and slow) process for handling discrimination complaints by the USDA Office of Civil Rights. 7 CFR 11.1. Such complaints must be submitted within 180 days of the date that the complainant knew or should have known of the alleged discrimination. However, if your client's dispute involves discrimination in credit because of a prohibited basis (sex, race, marital status, etc.), a cause of action with the potential for an award of attorneys' fees exists under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §1691 et seq.

6. It is now possible to get attorneys' fees under the Equal Access for Justice Act (EAJA) for a successful NAD appeal. EAJA was adopted by Congress in 1980. It authorizes the payment of attorneys' fees to a prevailing party in a lawsuit and in an adversary adjudication against the United States, unless the position of the United States is "substantially justified." See, 5 U.S.C. §504 (administrative hearings) and 28 U.S.C. §2412 (judicial actions). Starting in the 1980s, farmers' lawyers were sometimes successful in obtaining EAJA fees for successful court litigation. (For example, attorneys in Coleman v. Block were awarded almost $180,000 for the first two years of litigation. See, Coleman v. Block, 589 F. Supp. 1411 (1984). However, USDA's position for almost three decades after passage of EAJA was that EAJA did not apply to FmHA administrative hearings. Only after USDA lost four decisions from four circuits[5] did USDA finally concede that the Equal Access to Justice Act applied to all NAD hearings. See, November 6, 2009 Federal Register, 74 FR 57401-01 (final administrative rule amending NAD rules of procedure to concede that NAD hearings were subject to EAJA). The rule that provides that EAJA and the Administrative Procedure Act applies to FSA appeals is at 7 CFR § 11.4.

7. Requirements for filing a NAD appeal Careful review of the NAD rules are necessary. There are many requirements that will apply, and failure to follow those requirements can prevent having a successful appeal. For example, there are rules for FSA farm credit programs that impose a mandatory informal review prior to filing a NAD appeal (7 CFR §11.5(a)), a 30 day deadline for filing NAD appeals (7 CFR §11.6(b)(1), "tolling" of that 30 day period by a request for mediation with only the balance of days remaining after mediation is concluded (7 CFR §11.6(c)), deadlines for requests for a Director review (7 CFR §11.6(a)), requirements that the appellant personally sign appeals and requests for review (7 CFR §11.6(b)(1)), and many others.

8. No judicial review is available of any agency adverse decision appealable under NAD rules, without first completing a NAD appeal. 7 CFR §11.13.

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[5] When USDA lost an EAJA decision in a particular circuit, it would award EAJA fees only within that circuit. Thus, attorneys' fees could be sought on NAD appeals within the Eighth Circuit after Lane v. USDA, 120 F.2d 106 (8th Cir. 1997), but not elsewhere. See, 64 FR 33367-01 ("USDA will apply the holding of Lane to NAD appeals that arise in the 8th Circuit. For adverse decisions arising outside of the 8th Circuit, USDA will continue to assert the inapplicability of NAD and EAJA and NAD will not process EAJA applications filed in such appeals.") After another decade, there were decisions similar to Lane in the Ninth Circuit in Aageson Grain and Cattle v. USDA, 500 F.3d 1038 (9th Cir. 2007); and in the Seventh Circuit in Five Points Rd. Joint Venture v. Johanns, 542 F. 3d 1121 (7th Cir. 2008). USDA finally decided to amend NAD rules to comply with EAJA six months after the decision in Rosenbaum v. USDA, No. 07-02808 (S.D. Tex May 1, 2009) (final judgment).

B. The Second Big Reform of the 1980s: "Borrowers Rights" at the Farm Credit System Institutions

1. As a condition of the bailout for Farm Credit System (Farm Credit or FCS)[6] lenders in the Farm Credit Amendments Act of 1985, P.L. 99-205 (Dec. 23, 1985), Congress required in Title III that FCS lenders begin to provide a series of "Borrowers' Rights." See also Title I of ACA, "Assistance to Farm Credit Borrowers." The FCA's Borrowers Rights are codified at 12 U.S.C. § 2199 – §2202e. They are implemented at 12 C.F.R. Part 617 of the FCA regulations. Perhaps the most important of these rights are rights pertinent to restructuring: the borrower's right to an independent appraisal of secured assets; the right to have his or her loan restructured if, in the judgement of FCS, the cost of restructuring the loan is less than the cost of foreclosure; the right to seek review by an FCS credit review committee; and the limited right of first refusal to repurchase or lease foreclosed or deeded back property. Those rights have been mostly quiescent after the crush of troubled loans from the 1980s were resolved by about the mid-90s, but with a worsening economy they may yet become as critically important as they were in 1985.

2. 12 CFR 617.7000 defines key terms such as "adverse credit decision," "distressed loan," and others. For the purposes of borrower's rights, a "foreclosure proceeding" is deemed to include seizing and realizing on non-real property collateral as well as real property. "Restructure" and "restructuring a loan" means "a reamortization, renewal, deferral of principal or interest, monetary concessions, or the taking of any other action to modify the terms of, or forbear on, a loan."

3. 12 CFR 617.7005 broadly allows use of electronic communications, if the borrower agrees, but forbids electronic communication and requires paper communication for "a notice of default, acceleration, repossession, foreclosure, eviction or the right to cure when a borrower's primary residence secures the loan."

4. 12 CFR 617.7010 generally forbids waiver of borrower's rights, with specified exceptions (e.g., when a loan is guaranteed by the SBA, certain loan sales, loan syndications). When a waiver is made in connection with a loan syndication, the borrower's written waiver must say that the borrower was represented by counsel.

5. 12 CFR 617.7015 sets out complex rules on restricting and limiting waivers of borrower's rights when a loan is sold.

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[6] The FCS is a nationwide network of federally chartered farm lenders active in all fifty states. It includes Federal Land Banks, which make real estate loans, and Production Credit Associations (PCAs) that make operating and chattel loans. FCS institutions are regulated by the Farm Credit Administration (FCA). According to the Farm Credit website, in 2018, FCS lent $15.5 billion to farmers and ranchers and, as of December 31, 2018, FCS had 500,000 customers, 910,000 loans and a total loan volume of $272 billion. Farm Credit institutions generally deal with less financially risky loans than does USDA and provide 40.7% of all farm lending in the United States.

6. 12 CFR 617.7100 and 12 CFR 617.7200 set out rules on effective interest disclosure.

7. 12 CFR 617.7300 requires system lenders to give notice of adverse actions on a loan request, to provide notice of a right of review, notice of the timeline such a request must be made (30 days!) and an explanation of how an applicant may seek an independent collateral review, and information on the borrower's right to appear before a credit review committee (CRC).

8. 12 CFR 617.7305 specifies the membership of a credit review committee, which must include a farmer-elected board member, and cannot include the loan officer who made the adverse decision.

9. 12 CFR 617.7310 specifies the procedure for consideration of a distressed farmer's request for review by a credit review committee. The farmer has a right to appear in person, be accompanied by counsel, submit evidence and request a new collateral evaluation. The deadlines for this process are tight (the farmer must have at least 15 days of prior notice of a meeting; the CRC must decide within 30 days of a meeting).

10. 12 CFR 617.7315 provides that qualified lenders must maintain certain records of CRC meetings (presumably so that regulators can ensure compliance).

11. 12 CFR Subpart E (Sections 617.7400 – 7430) includes several very important protections for distressed farm borrowers.

> a) 12 CFR 617.7425 says that the institution MUST send a written "45-day notice" (it is a minimum of 45 days) to a borrower before instituting a foreclosure (as noted above, "foreclosure" is defined as applying to real and personal property). The notice must include the restructuring policy and state that the borrower has a right to apply. If a restructuring application is pending, 12 CFR 617.7425 provides a mini-moratorium on collection until the CRC process is completed: "No qualified lender may foreclose or continue any foreclosure proceeding with respect to a distressed loan before the lender has completed consideration of any pending application for restructuring and CRC [credit review committee] consideration, if applicable." It is important to note, however, that an exception arises if the lender has "reasonable grounds" to believe that diversion, dissipation or deterioration of security may occur. However, if the borrower fails to respond appropriately within the 45 days, the right to seek restructuring is no longer guaranteed.

12. One of the most significant borrower's rights provided by the ACA was that FmHA (now FSA) and Farm Credit Administration regulated lenders (Federal Land Banks and PCAs) are <u>required</u> to participate in mediation in a state mediation program certified pursuant to the ACA, and to consider restructuring, if requested to do so by a borrower. See, 7 U.S.C. §5103(a) (USDA lenders) and 7 U.S.C.§ 5103(b) (institutions under the Farm Credit Administration). See also 12 CFR §617.7430: "*If initiated by a borrower, System institutions <u>must</u> participate in state mediation programs certified under section 501 of the Agriculture Credit Act of 1987 and present and explore debt*

restructuring proposals advance in the course of such mediation." (Emphasis supplied.) This section also provides that no system lender can escape the requirements of the ACA by requiring a borrower to waive mediation rights under a state mediation program. Section (d) provides that a state mediation and an FCS restructuring process may proceed at the same time.

To illustrate how important that right was is shown by the experience of North Dakota between 1989 and 1994. During those years, FmHA was involved in 1730 mediations and FCS institutions were involved in 2940 meditations. See Addendum A, Johnson, The North Dakota Agriculture Mediation Service, 70 N.D.L.R. 295 at 304 (1994).

13. Borrower's rights do not lapse after loss of farm property. 12 CFR 617, Subpart G spells out procedures for notifying and the limited rights of a previous owner to purchase property at a public auction, or to lease the property.

14. Enforcement of the Borrower's Rights with respect to a Federal Land Bank or PCA:

a) 12 CFR Subpart F (Sections 617.7500 -7525) provides various enforcement mechanisms—such as cease and desist orders—that may be used by the Farm Credit Administration, the regulator of the FCS system, should a regulated institution violate Borrower's Rights.

b) During the late 1980s and early 1990s, courts had generally concluded that the Farm Credit Amendments of 1985 and Title I of the ACA did not create a private right of action. See, e.g., Wagner v. Penn West Farm Credit, 109 F.3d 909, 913 (3rd Cir. 1997), Jajac v. Federal Land Bank, 909 F.2d 1181, 1183 (8th Cir. 1990) (en banc); Griffin v. Federal Land Bank, 902 22, 24 (10th Cir. 1990), Harper v. Federal Land Bank, 878 F.2d 1172, 1173 (9th Cir. 1989), cert. denied 493 U.S. 1057, 110 S.Ct. 867, 107 L.Ed.2d 951 (1990).

c) Even though there is no private right of action, some courts have held that violation of borrower's rights can be used as an equitable defense. Therefore, practitioners should carefully review whether or not the Farm Credit institution that is taking foreclosure or other collection actions has followed the Borrower's Rights provisions. See, e.g., Federal Land Bank of Spokane v. L.R. Ranch Co., 926 F. 2d 859, 863-64 (9th Cir. 1991) (borrowers can assert the bank's failure to comply with any procedural or substantive provision of the Act as an equitable defense to foreclosure); Burgmeier v. Farm Credit Bank of St. Paul, 499 N.W.2d 43 (Mn. Ct. App., 1993) (a borrower may assert a lender's noncompliance with substantive provisions of the Act as an equitable defense); and Federal Land Bank v. Overboe, 404 N.W. 2d 445, 449 (N.D. 1987) (a borrower may assert a lender's noncompliance with substantive provisions of the act as an equitable defense).

C. The Third Big Reform of the 1980s: Certified State Mediation Programs

1. Title V, Section 502, of the ACA authorized the Secretary of Agriculture to help states develop USDA Certified State Agricultural Loan Mediation Programs, and committed USDA to participating in such programs. It is presently codified at 7 U.S.C.

Chapter 82, "State Agriculture Loan Mediation Programs," 7 U.S.C §§5101-5106. A Fact Sheet published by USDA in January 2018 provides a list of contacts for the 41 presently certified state mediation programs: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming.

2. Attached as Addendum A is a law review article by L. Roger Johnson: The North Dakota Mediation Service, published at 70 N.D.L.Rev. 295 (1994). Johnson was then the Administrator of the North Dakota mediation program and this article sheds light on how the mediation process worked in North Dakota from its inception as a small state-run program, to a very large program with scores of employees helping thousands of farmers.

D. The Fourth Big Reform of the 1980s: Chapter 12 Bankruptcy

1. Chapter 12 has its origins in both the 1930s and the 1980s.

The concept of a specialized farm bankruptcy procedure is based on the Frazier-Lemke Farm Bankruptcy Act, passed on June 28, 1933. (Its common name is derived from two North Dakotans: Senator Lynn Frazier and Representative William Lemke. Both were members of the Nonpartisan League, a unique North Dakota political party.) It was declared unconstitutional in 1935 in the case of Louisville Joint Stock Land Bank v. Radford, 295 U.S. 55 (1935). The law was quickly revised under the name "Farm Mortgage Moratorium Act" to meet the objections of the Supreme Court (although it was still known as the Frazier-Lemke Farm Bankruptcy Act). Again, its constitutionality was challenged, but in 1937, the Supreme Court declared that the modified version was constitutional. Wright v. Vinson Branch of Mountain Trust Bank of Roanoke, 300 U.S. 440 (1935). The law was renewed by Congress for successive two-year periods, but eventually, when times were better, Congress allowed it to expire in 1949.

During the 1980s, Congress again saw the need for a specialized farm bankruptcy law and on November 26, 1986, Congress adopted Chapter 12. Like the Frazier-Lemke Farm Bankruptcy Act, it was adopted for successive two-year periods but was finally made into permanent law in April, 2005.

Chapter 12 will be discussed by other speakers on this panel.

III. Approaches that Might be Useful Today

A. Dealing with a Farmer in Crisis: Tips for Attorneys

1. Working with Family Farmers[7] as Clients. It is likely that any family farmer who comes to your office will be distraught, even if the farmer shows little emotion on the surface. His/her career, home, life savings, future, and family heritage may be at stake. If the farmer loses his/her farm, children will need to change school districts, links to churches and civic groups will be lost; the adults will need to find new jobs in new communities, despite a lifetime of being self-employed. And, painfully, close relatives who moved away from the farm years ago will blame your client for the loss of "our" home place. *Be patient and listen*. The first meeting may be longer than subsequent meetings because of complex facts and emotions. It is also likely that this will be the very first time these clients have ever dealt with a lawyer. If you decide to work together, clarify any upcoming deadlines and make a "to do" list before they leave.

2. Who should come to the appointment? If the farming has been done as a husband and wife team, it is best if both members of the team work to extricate themselves from the problem. (Married women who are farmers are often ignored, but lenders invariably ask them to sign the promissory notes.) Sometimes, one member of a couple might be a talker, and the other is the notetaker and "doer." It may be awkward on an intake call, but if it appears that the potential clients are very distraught, see if there is a trusted friend or relative who could also come to the appointment to provide support and take notes.

3. You will likely need to provide positive reinforcement to your client.

a) Be aware that the farmer will probably blame him/herself. But if you even do minimal research into the causes of their distress, you will likely find that their troubles arise from years of a cost/price squeeze (for several years, it has cost wheat farmers more to plant and harvest a crop than they receive from the marketplace). In summary, you may find that the underlying reasons for these farmer's distress is not because they were bad farmers, but rather due to misguided federal policy, international trade developments, the value of the dollar, weather and other factors over which they had no control at all. It is important that the farmer adrift in an ocean of debt can see the shore above the waves of troubles. In the 1980s, I found that a totally demoralized farmer (thankfully there were few of them) had difficulty acting in a constructive manner to make the best of a bad situation. S/he might not even open the mail or call you when a summons and complaint is received (yes, that happened to me). You may need to say that you believe forces bigger than the farmer's own decisions and work ethic played a huge role in their current situation.

b) I think it will be a good idea to have information on hand on how to reach a Farm Crisis Center, such as the one at FarmAid, 1-800-FARM-AID (1-

[7] This presentation is limited to dealing with family farmers—*people*. In North Dakota, a 1932 initiated measure banned corporate farming. Over the years, limited exceptions to that ban have been added by the legislature. See, N.D.C.C. Chapter 10-06.1. It has been challenged, but is still the law today. See, e.g., Asbury Hospital v. Cass County (two cases), 72 N.D. 359, 7 N.W.2d 438 (1943) and 73 N.D. 469, 16 N.W.2d 523 (1944) (both affirmed by the United States Supreme Court in 326 U.S. 207 (1945); Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 844 N.W. 892 (N.D. 2004); and, most recently, N. Dakota Farm Bureau, Inc. v. Stenehjem, 333 F. Supp.3d 900 (D.N.D. 2018).

800-327-6243, weekdays, 9 to 5 EST) or a trained professional such as a clergy member. If your clients deny they would use that resource, ask them to still take the information because they may come across someone else who does need it.

4. Legal Fees

a) If it is consistent with your law firm's economics, try to have the first appointment with a new client be very low cost or even gratis. If you can't help that potential client, you will probably recognize that fact fairly quickly during the appointment and, by foregoing billing for the first meeting, you haven't made their situation worse. *If* you *do* decide to work with the client going forward, the billing process should be clearly explained so that future work and future meetings are efficient.

b) Explore whether there are ways your clients can make your representation more cost effective (e.g., being prompt and thorough in answering interrogatories).

c) Explore blended billing: the farmer pay*s* for costs and a reduced hourly rate, pending the results of a lawsuit that might have a payout or an award of attorney's fees if the case is successful.

d) See if there is a statute, such as the Equal Access to Justice Act, or a consumer protection law, that might provide for an award of legal fees if you are successful.

e) In certain types of farm credit matters, it is a good idea to explore whether there is a qualified private or public credit financial counsellor who can work with you, as part of the team. Is there help from a certified agriculture mediation program? Perhaps there is a retired banker or farm management professional who might be helpful for certain tasks.

5. Legal Research

a) In doing legal research, you might find it fruitful to do research on cases and laws from the 1980s, or even from the 1930s. Many times in the 1980s, I was able to apply state laws adopted in the 1930s and rely on precedents from the same era when representing farmers. And, even if the lender is a federal agency (FSA) or is federally chartered, in many respects they are nonetheless subject to many state commercial laws that are applicable to other lenders. See, e.g., <u>U.S. v. Kimball Foods, Inc.</u>, 440 U.S. 715 (1979).

Practitioners should check state laws, especially the laws adopted in 1933 and in the early 1980s, for creative solutions to farm crisis problems. Many states still use "foreclosure by publication," but in 1933, Minnesota adopted a law that required all foreclosures to proceed in the courts ("foreclosure by action"). This law also provided an extended right of redemption if the debtor paid the property's income value or rental value to the creditor. This emergency law was upheld in the Minnesota Supreme Court, <u>Blaisdell v. Home Bldg. & Loan Ass'n</u>, 189 Minn. 422, 249 N.W. 334 (1933) and the U.S. Supreme Court, <u>Blaisdell v. Home Bldg. & Loan Ass'n</u>, 290 U.S. 398 (1934). In Arkansas, the legislature

created a de facto three-month moratorium by providing that defendants had three months within which to file answers to foreclosure complaints. Act of February 9, 1933, No. 21, Sec. 1, 1933 Ark. Acts 47. This law was held constitutional in Rieman v. Rawls, 188 Ark. 983, 68 S.W.2d 470 (1934). In 1933, North Dakota passed a law declaring that courts could defer foreclosure sales if prices were such that a sale would amount to confiscation of equity in the borrower's home, or when prices for agriculture products were confiscatory. This law lay quiescent until the 1980s, when it was used repeatedly to prevent foreclosures by advertisement by the Bank of North Dakota and to defeat summary judgment motions by other creditors (thus influencing creditors to mediate). See, e.g., Folmer v. State, 346 N.W. 2d 731 (N.D. 1984); Heidt v. State, 372 N.W. 2d 857 (N.D. 1985). (Unfortunately, the confiscatory price law has since been repealed.) In 1933, North Dakota passed a law—still in effect—that says contract provisions requiring debtors to pay creditors' attorneys' fees incurred to collect a debt or to foreclose are against public policy and void. See, N.D.C.C. 28-26-04. North Dakota also declared "all contracts in restraint of the right of redemption from a lien are void." See, N.D.C.C. 35-01-10. In 1986, Minnesota adopted a state-of-the art mediation statute that has been in place ever since and is seeing much use today. See Minn. Stat. §§ 583.20 - 583.32. Minnesota's meditation program remains the gold standard for mediation programs nationwide and is worth replicating in other states. See also AALA webinar, Farm Financing and Counseling Clients, May 14, 2019, by Jeffrey Peterson and Susan Stokes.

Perhaps the most artful foreclosure moratorium from the 1930s (unfortunately I cannot locate the citation) was a state law that said that foreclosure actions would be the lowest priority category on a court's calendar. Additional examples are listed in The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session, 60 N.D.L.R. 489 (1984).

6. Find out the underlying cause of what led to the farmer's financial distress. Is there a legal remedy for all, or part, of the farmer's underlying problem?

a) Over decades, I've seen many farmers who have suffered significant economic losses due to commercial chicanery (e.g., defective seed, a faulty application of pesticide) or from breaches of contract (e.g., at harvest the contracted buyer refuses to take the product at the higher agreed price) do nothing to get redress from the party at fault. By asking questions, you might find the contours of a potential legal remedy (breach of contract, tort, consumer fraud) that might help the farmer recover lost income. In one of my cases, two farmers came to visit me with concerns about stunted and deformed sunflowers. Both would have blamed themselves, but happened to mention it to each other at a coffee shop. As it turned out, there were at least 90 farmers with the same problem and suit was filed alleging violation of the ND consumer fraud statute. After the ND Supreme Court ruled in Jorgenson, et al., v. Agway, 2001 ND 104, 627 N.W.2d 391 that farmers are "consumers" under the North Dakota consumer

protection law and thus were eligible for treble damages and an award of reasonable attorney's fees for false advertisement of the quality of sunflower seed, the case settled.

Peterson v. BASF Corp, 675 N.W.2d 57 (Minn. 2004) is a case in which misleading advertising and sales practices induced farmers to pay $4 more an acre for a particular pesticide made by BASF. This false advertising was challenged under New Jersey's consumer fraud law in Minnesota courts. After years of hard-fought litigation, the class of farmers won a $15 million jury verdict, which was trebled. The total judgment in favor of the farmers was $52,048,931.51, which included $45 million in trebled damages, prejudgment interest and attorneys' fees. Peterson v. BASF, 675 N.W.2d at 64.

b) Because farmers tend to deal with the same lenders, sell to the same buyers, buy from the same pesticide and seed dealers, and participate in standardized federal programs, it is likely that for every farmer in your office there will be tens, hundreds or hundreds of thousands of similarly affected farmers. Since 1997, I have worked in small firms with slim resources, and yet sometimes have had the resources to do "big firm" litigation. Farmers can explore with their lawyers whether it is possible for similarly situated farmers affected by the same problem to share resources to pay expenses (your legal bills, deposition expenses, etc.) amongst each other. Such similarly situated clients have assessed themselves pennies on a bushel, dollars on an acre, or a flat sum per farmer. If the farmers can do this, it is possible to litigate against formidable, well-funded opponents. In one of my cases, the first call came from a farmer who left a message saying, "Sarah, Call me back right away! The FDIC took away my 71 cents!" The case ended up with a judgment worth $43,000,000 for 8000 durum farmers in three states.[8]

7. Be Creative. In the 1980s, the best advocates for farmers were lawyers who had previously done work in criminal law, consumer protection or legal services. Unlike lawyers who specialized in commercial law or were experts in finance, these lawyers didn't expect their clients to be "perfect." My background in consumer protection on the East Coast in New York City and in Washington, DC at the Federal Trade Commission was helpful to dealing with North Dakota farmers' problems: they were as much victims of sharp business practices as were the poor people who were cheated in the slums of New York.

8. Legal Resources

Farmers Legal Action Group (FLAG) (www.flaginc.org). FLAG is a thirty-three-year-old national nonprofit law center headquartered in St. Paul, Minnesota. Its sole mission is to provide legal services and support to family farmers and their communities to keep farmers on the land. Since its founding during the farm crisis of the 1980s, FLAG has trained scores of lawyers, trainers, and farm advocates who work in communities across

[8] See, Wiley v. Glickman, 1999 W.L.33283312 (1999), A3-99-32 (D. N.D. Sep. 3, 1999). In Wiley, we had 8000 durum farmers as clients, who sued to recover $0.71 per bushel of durum wheat covered by the policy. Funds to carry the litigation forward were raised on a per acre basis by a network of farmers and all of the farmers who provided on-going legal fees during the course of litigation were fully reimbursed at the end of the case from interest on the earnings of the $43,000,000.

the country. During its 33 years, it has conducted at least 900 training events in 42 states, attended by approximately 38,000 farmers, farm advocates, trainers and lawyers. FLAG has prepared many detailed guides to complex agriculture law issues, all of which are available on its website at low or no cost. Because of the current distress in farm country, FLAG is now working with other partners to create regional legal provider networks composed of civil legal aid services, state bar associations, task forces, and governmental organizations.

Farm Aid. Farm Aid is a nonprofit started by Willie Nelson and other musicians in 1985. Its mission is to build a vibrant, family farm-centered system of agriculture in America. Since 1985, Farm Aid has raised more than $48 million to support programs for family farmers. Farm Aid operates a hot-line (1-800-FARM-AID, 1-800-327-6243) and email service (farmhelp@farmaid.org). It has prepared Farmer Resource Guides, and its website links to 750 organizations that provide services and information to farmers throughout the country.

The National Agriculture Law Center. It is located in Fayetteville, Arkansas and provides legal research publications nationally.
See, http://nationalaglawcenter.org/center-publications.

National Farmers Union. It has set up a Farm Crisis Center with links to the National Suicide Lifeline (800-273-TALK, 800-273-8255) as well as the Farm Aid hotline, a directory of 750 resources, the fact sheet on USDA's Ag Mediation program, links to resources for disaster aid, and more. See farmcrisis.nfu.org.

And, of course, resources and programs by the **American Agriculture Law Association**.

Surprisingly, it appears to be the case that many agricultural agencies and entities appear to be unconcerned about the farm crisis. In particular, the National Association of State Departments of Agriculture (NASDA) comes to mind.

B. Tips for Attorneys General

1. Be on the alert for scams and frauds. In the 1980s, numerous con artists took advantage of desperate farmers. Bogus legal "foreclosure kits" were offered for sale by scam artists who junketed from state to state, misleading farmers by making false promises. The Attorneys General of a number of Midwestern states banded together to combat these frauds. Several Attorneys General set up special farm fraud units, and Attorneys General cooperated and met frequently to share information on frauds and scams so that farmers could be forewarned to be skeptical of these false solutions.

2. In the 1980s, a working group of Attorneys General from ten states, led by Minnesota Attorney General Skip Humphrey, Iowa Attorney General Tom Miller, and North Dakota Attorney General Nick Spaeth, geared up to provide legal support to struggling farmers in their respective states and across the country. They filed lawsuits, filed comments on regulations, filed Amicus briefs, submitted testimony, fought scammers who sought to deceive farmers, and actively participated in preparation of legislative "fixes" to farm troubles, including writing the Borrower's Rights provisions of the Farm Credit Act Amendments of 1985.

An excellent article that describes how Minnesota's Attorney General operated during the farm crisis and how that office coordinated with other state attorneys general is Humphrey and Haukedahl, An Attorney General's Role in the Farm Crisis: The Minnesota Experience. 15 New York Univ. Rev. Law & Social Change 295-312 (1987).

3. Convene continuing legal education seminars so that practitioners can develop up-to-date knowledge on representation of farmers.

C. Tips for Commissioners and Secretaries of Agriculture

1. Gather information. Starting yesterday, your staff can do research, develop data, conduct surveys, and convene policy makers to develop solutions and strategies to ameliorate consequences of the current economic distress. As one example, in April 1982, my predecessor as ND Agriculture Commissioner, Republican Kent Jones, sent a multipage Survey of Agriculture Lenders to hundreds of North Dakota-based businesses, bankers, and farm organizations. When the responses came back, his staff compiled the findings. An exhaustive report was published on May 3, 1982. This report gave state policy makers critical information on the breadth of the problems—long before federal reports from the Federal Reserve Bank of Minneapolis or USDA's Economic Research Service confirmed the data. The cost: postage, paper, and staff time. The value: priceless. Knowing this information aided state office holders, the legislature, and farm organizations in developing tools to ameliorate the hardships of the ensuing and worsening farm credit downturn. Since the 1980s, North Dakota has continuously had an independent Credit Review Board which periodically meets with creditors to get a sense of the current situation and serves as an early warning "weather station" for farm distress. It recently met and lenders reported increased delinquencies (e.g., the Farm Credit Service said that their delinquent debts had risen from 60 to 180 loans, and the Bank of North Dakota reported that foreclosures had risen from one last year to nine in 2019). This will provide impetus for getting prepared for future demand for services. (Interview, ND Agriculture Mediation Service).

Other North Dakota programs that were useful in the 1930s and 1980s were laws that said borrowers could specify the sequence in which their land was auctioned at a sheriff's sale (leaving the home quarter for last), a program to help farmers buy their home quarter, funds to provide tax and legal advice, and laws requiring notice before a foreclosure and opportunity to cure defaults before any foreclosure action could be filed.

2. Closely monitor solvency of licensed buyers. Farmers are not the only ones affected by an economic downturn. State officials need to monitor grain, dairy, and livestock buyers to ensure that all buyers are licensed, examined and adequately bonded, so that farmers and ranchers do not suffer losses from unscrupulous or insolvent traders.

3. Ensure that your state has a certified Agriculture Mediation Program. And provide it with adequate state and federal funding and suitable training for employees and contractors!

To give an idea of the scale of the agriculture mediation programs from the mid-1980s to mid-1990s, consider these facts from North Dakota: 7,400 farmers (about one third of the state's farmers) participated in the state's mediation program and the federal government supported most of that activity with generous grants. However, in the FY 2019, federal support for mediation programs in 41 participating states is only $3.2 million. This tiny amount was perhaps fine for when farmers enjoyed a strong economy, but it is plainly insufficient for bad times. States will have to step up to the plate with their own money, and lobby cooperatively for a higher level of matching federal funds.

4. Be on the Watch for Recruitment of Farmers by Extremist Hate Groups. The opening of "the age of terror" as it applied to the farm crisis of the 1980s in the United States occurred on Sunday, February 13, 1983 outside Medina, North Dakota. On this day, Gordon Kahl, a farmer, war veteran, member of the Posse Comitatus, and federal tax protester, and his supporters, engaged in a shootout with federal marshals who tried to arrest Kahl for violation of parole after a previous conviction for federal income tax evasion. Two Marshals were killed (one in cold blood) and three other law enforcement officers were injured before Kahl escaped into the right-wing underground.

The event shocked placid, low-crime North Dakota. A week later, in an editorial in the Grand Forks Herald, Mike Jacobs wrote: "What is rare is the terrible realization of the hate and ugliness among us that burst out at Medina. I doubt that many of us appreciate the estrangement some of our neighbors feel from the political process that we take for granted. I doubt that many of us realize that some among us are capable of such an act of violence. And I doubt that many of us understand the desperation of some of our fellows or the philosophy that sustains them. It is shocking, but all of it is here, among us, nurtured in our quiet streets and open places. The announcement of it in Sunday's gunfire shattered the image that we had held of ourselves."[9]

On February 13, 1983, in fact, "something terrible, and terribly important, was taking place. Not only in North Dakota, but throughout the agrarian midsection of the country known as the American Heartland. Seeds of desperation, mistrust, anger, and hatred had been nurtured by low crop prices, high interest rates, foreclosures, and bankruptcies and were beginning to sprout like weeds throughout the region, threatening to choke off and kill a way of life."[10]

[9] This editorial is reprinted in the forward to the reprint of the 1990 book, Bitter Harvest: Gordon Kahl and the Posse Comitatus; Murder in the Heartland by James Corcoran (N.D. Inst. of Reg'l Studies, 2005).
[10] Bitter Harvest, p. 7.

While some farmers committed suicide, some quit farming, and some retrenched, some participated in the Coleman v. Block case which was filed later in February, 1983—but Gordon Kahl turned to hate. He believed and preached that farmers were "victims of a Jewish-led, Communist-supported conspiracy that had infiltrated the U.S. government, the judicial system and law enforcement, and was bent on destroying the Christian Republic that had been established by the Founding Fathers."[11] He believed, implausibly, that there was no legitimate form of government beyond the county sheriff level. His racist and anti-Semitic views were similar to the Ku Klux Klan, the Aryan Nations, and the Order. And he wasn't alone: there were many groups like the Posse. Some used "hate" as an opening, and others offered false hope, often with bogus "foreclosure kits," or use of a variant of the "funny money" defense (foreclosure couldn't occur because the Federal Reserve System was unconstitutional). When the farmers lost their cases, or lost their land, they were told: "See, we told you that your constitutional rights as a sovereign citizen would be trampled."

In the 1980s, Attorneys General of many Midwestern states worked hard to prevent farmers from being suckered in on those "remedies." They also worked to create programs that would remove the perceived necessity of turning to "crazies" for help by helping to develop sound state and federal programs (credit counselling, legal services at low or no cost, tax advice) that would constructively help farmers survive.

It is to be expected that the same type of hateful extremists will become active—or already are active—in today's climate. Echoes of many of the themes that were being promoted by racist, misogynist, anti-Semitic organizations can be sensed today. In the 1980s, these organizations communicated by holding meetings, doing military training at remote places, and newsletters. Today, these organizations can communicate online.

As in the 1980s, society's response to these extremists must occur on two tracks: 1) struggling farmers and others (farm workers, small town workers) must be offered sound, sensible, helpful answers to their financial concerns (e.g., farm crisis counselling, mediation, fair hearings, access to legal services, restructuring, opportunities for employment) by mainstream organizations, governments and politicians, and 2) "regular people"—who might otherwise be recruited by extremists—must be educated about the errors, futility and dangers of those views. In fact, if a farmer wants to lose his or her farm for sure, the best way to do that is to follow the advice of groups like the Freeman, the Posse, or organizations that hide under titles like "Americans for the Restoration of the Christian Faith." It cannot be overstated: the so-called solutions to the ills of the agricultural economy being peddled by these groups must be exposed as fraudulent and useless.

Attorneys General and farm organization leaders can obtain in-depth knowledge about how white supremacists recruit adherents to their causes by reading these three books, each of which is written by an author who was deeply involved in the 1980s farm crisis:

1) Bitter Harvest: Gordon Kahl and the Posse Comitatus; Murder in the Heartland by James Corcoran (N.D. Inst. of Reg'l Studies, 2005).
2) The Terrorist Next Door: The Militia Movement and the Radical Right by Daniel Levitas (St. Martins/Griffin, 2005).

[11] Bitter Harvest, p. 22.

3) Blood and Politics: The History of the White Nationalist Movement from the Margins to the Mainstream by Leonard Zeskind (Farrar, Straus and Giroux, 2009).

IV. Conclusion

Rexford Tugwell, an original member of FDR's brain trust and leader of the Resettlement Administration (which became the Farm Security Administration), delivered these words in 1958, to inspire and motivate the next generation of public servants:[12]

> My final advice to those who are thus moved by injustices and human needs, and who think they perceive better possibilities through social organization, is to go ahead. Fail as gloriously as some of your predecessors have. If you do not succeed in bringing about a permanent change, you may at least have stirred some slow consciences so that in time they will give support to action. And you will have the satisfaction, which is not to be discounted, of having annoyed a good many miscreants who had it coming to them.

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[12] As quoted in Sidney Baldwin, Poverty and Politics: The Rise and Decline of the Farm Security Administration (University of North Carolina Press, 1968) at 418–419.