MANDATORY OR PERMISSIVE: BORROWERS' STATUTORY RIGHT TO NOTICE OF DEFERRAL RELIEF FOR FARMERS HOME ADMINISTRATION LOANS

I. INTRODUCTION

The United States agriculture industry has traditionally been very dependent on the availability of credit.[1] Modern agriculture operations require large initial outlays of capital.[2] To meet this capital requirement many farmers must rely on one or more sources of credit.[3]

Credit available to farmers generally comes from either private or governmental sources.[4] Due to this dependence on credit, governmental sources have been playing an increasingly active role in making agricultural loans.[5] Today agricultural loans attributable to governmental sources account for fifty-five percent of such loans in this country.[6] The remaining forty-five percent of these loans are provided by commercial banks, insurance companies, and other private sources.[7] Federal lenders fall into two categories; those subject to direct federal control as an agency of the government and those which are essentially private in nature, subject to federal control only indirectly.[8] This Note deals with the relationships that develop in the former category. These relationships have characteristics of a different nature than those of contractually-based relationships in a commercial setting.[9] The rights involved in the relationship between farmer-borrowers and federal agency lenders are currently the subject of much litigation.

The purpose of this Note is to discuss the various arguments that have

---

1. Hamilton, *Farm Credit System and Farmer's Home Administration Borrower's Rights to Obtain Loan Servicing in Times of Economic Stress*, ARK. L. NOTES 21 (1983) [hereinafter cited as Hamilton]. It is estimated that over $215 billion are currently outstanding to agricultural borrowers. *Id.*

2. Increased cost of farm land and modern equipment are but two factors contributed to farmers' needs for large capital expenditures.

3. The federal government is the largest source of agricultural credit in the United States. Hamilton, *supra* note 1, at 21.

4. Hamilton, *supra* note 1, at 21.

5. Curry v. Block, 541 F. Supp. 506, 509 (S.D. Ga. 1982).

6. Hamilton, *supra* note 1, at 21.

7. *See id.*

8. *Id.* Organizations which operate as quasi-independent agricultural lenders include, the Production Credit Association and the Federal Land Banks. *Id.* These two federally connected organizations provide approximately 78% of all federally related agriculture loans. *Id.*

9. This is because borrowers under these programs have protections available which are created by law. *See, e.g.*, 7 U.S.C. §§ 1981(d) (1976 & Supp. 1978-81); 7 U.S.C. § 1981a (Supp. 1978).

been successful in resolving the issues that arise in determining the rights of the farmer-borrowers, as a guide for those engaged in similar litigation. Additionally, because these issues are currently undergoing extensive judicial scrutiny, this Note will provide a framework for further analysis by attempting to summarize and analyze the judicial interpretations which have thus far been rendered. Finally, this Note will compare the rights and duties as they are developing in these cases to the rights and duties attendant other government entitlements.

II. BACKGROUND

A. *Farmers Home Administration*

One of the most active federal agencies is the Farmers Home Administration (FmHA).[10] The FmHA, an agency of the United States Department of Agriculture (USDA), involves the federal government directly in the making of loans to farmers.[11] The FmHA is designed to bestow upon the Secretary of Agriculture the authority to make available to eligible farmers who cannot secure credit from other sources direct and insured loans necessary to finance the acquisition, improvement, and operation of their farms.[12] The federal government is also involved, through the FmHA, in providing credit to farm owners to assist them in construction, improvement, alteration, or repair of their farm dwellings.[13]

In recent years farmers dependent on credit sources, such as the FmHA, have been faced with serious financial difficulties due to a combination of persistently high interest rates and low grain prices.[14] Consequently, greater numbers of farmers have become unable to meet the debt service on their outstanding loans.[15] When this situation arises, the farmer is exposed to the possibility of a foreclosure action.[16] When faced with potential foreclosure, farmers are primarily concerned with their legal right to loan servicing, such as deferral or rescheduling, that will permit them to continue operations and avoid foreclosure.[17]

---

10. *See* 7 U.S.C. §§ 1981-1996 (1976 & Supp. 1978-81) setting out the consolidated farm and rural aid, amending the Farmers Home Administration Act of 1946 and the Bankhead-Jones Farm Tenant Act of 1937.

11. Hamilton, *supra* note 1, at 21. FmHA provides for approximately 12% of all agricultural loans in the United States. *Id.*

12. Curry v. Block, 541 F. Supp. at 510. In determining the purpose of FmHA loans the court relied on U.S. CODE CONG. & AD. NEWS 2243, 2304 (1961). *Id.*

13. *See* 42 U.S.C. § 1471 (1976 & Supp. 1977-80). This program was intended, as part of a national housing policy, to assist in the "elimination of substandard and other inadequate housing". Housing Act of 1949, ch. 338, 63 STAT. 413, 413 (1949) (codified as amended at 42 U.S.C. § 1441 (1976 & Supp. 1978 & 1980)).

14. Hamilton, *supra* note 1, at 21.

15. *Id.*

16. *Id.*

17. *Id.* Borrowers' rights generally come from two sources: from the lending agreement

B. *Farmer-Borrower Rights*

The potential rights of a farmer-borrower depend, to a great extent, upon the identity of the lender and the nature of the loan relationship.[18] In the commercial setting the loan relationship is largely contractual; therefore, the borrowers' rights are set out in the loan agreement itself.[19] FmHA loans, however, because of their "entitlement" nature, appear to be governed by a somewhat different standard. The distinction between the commercial lender and a government lending company such as the FmHA is that the protections available to borrowers from government lenders like the FmHA are created by statute.[20]

Recent economic hardships have resulted in a drastic increase in the number of farmers who are delinquent in the repayment of their FmHA loans.[21] Due to this increased delinquency rate, the FmHA has adopted a more aggressive policy with regard to delinquent borrowers, including the institution of foreclosure actions.[22] The FmHA itself argues that it is primarily in "the business of making loans" and must therefore take such measures as necessary to protect the government's interest in such loans.[23]

The nature of the government's interest in these loans is a predominant issue in need of resolution. The FmHA is envisioned in two bipolar roles; as an agency which is primarily carrying out a social welfare function and, second, as mentioned above, as a lending institution where social welfare objectives are only collateral.[24] Determination of the nature of FmHA loans is fundamental to the resolution of the rights to be afforded its borrowers. In other words, a construction of FmHA's purpose as being primarily social welfare in nature would require a more liberal implementation of the various relief alternatives available to borrowers who have met with financial hardships. On the other hand, a construction placing less emphasis on social welfare would justify the FmHA in seeking more vigorous enforcement of its rights as a creditor.

Upon default, the FmHA might choose to accelerate repayment of a loan.[25] Depending upon the rights that are assigned these borrowers, the mere right to an administrative appeal after acceleration is of questionable value because the next step would be for the FmHA to take foreclosure ac-

---

itself and from the policies and regulations controlling the FmHA loans. *Id.* at 22.

18. *Id.*

19. *See supra* note 9 and accompanying text.

20. *See supra* note 10.

21. FmHA Farm Loan Handbook at 57 (1982).

22. *Id.* In 1981 the agency set a "delinquency reduction goal of 23% for each state's farm loan portfolio." *Id.*

23. Curry v. Block, 541 F. Supp. at 513.

24. *Id.* FmHA "loans are made with the expectation that they will be repaid and must be adequately secured to assure such repayment." *Id.*

25. FmHA Farm Loan Handbook at 52, 53, and 54-57.

tion.[26] This is because by the time loan acceleration occurs, loan servicing is no longer a viable alternative.[27] Thus, the prime concern of FmHA borrowers is the availability of some kind of formal review prior to acceleration of a loan in default.[28] Central to any pre-acceleration remedy is the availability of loan servicing or some other form of assistance (examples: new loan, release of security, deferral, or rescheduling), which would allow the borrower to avoid acceleration and ultimately foreclosure.[29]

These issues have recently come to a head in a series of cases brought by farmer-borrowers facing FmHA loan foreclosures.[30] This rash of litigation revolves around the judicial interpretation of a 1978 amendment to the Consolidated Farm and Rural Development Act.[31] This amendment, 7 U.S.C. §1981a, states:

> In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payment of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferral under this section to bear no interest during or after such period. Provided, that if the security instrument securing such loan is foreclosed, such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.[32]

The questions raised by these cases involving interpretations of this amendment depend on whether or not the courts find this section to impose upon the Secretary a mandatory duty to implement a deferral program.[33] It has

---

26. *Id.* at 57.

27. Loan servicing available from the FmHA will not remedy a loan which has been accelerated. *See infra* note 28 and accompanying text.

28. Without this kind of review FmHA borrowers will not receive an opportunity to request the loan servicing available to them, which if granted will forestall the possibility of acceleration. *See* 7 U.S.C. § 1981a (Supp. 1978).

29. If a default is not cured it eventually will lead to liquidation. FMHA FARM LOAN HANDBOOK at 57-58. Although many FmHA borrowers can be in default for years without facing liquidation, this is a risk not wisely taken. *Id.* at 54.

30. *See, e.g.*, Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982).

31. 7 U.S.C. § 1981a (Supp. 1978).

32. *Id.*

33. *See* Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (holding that section 1981a created a mandatory duty upon the Secretary of Agriculture). *But see* Neighbors v. Block, 564

been successfully argued that, if section 1981a creates an affirmative duty, FmHA borrowers have a right (1) to personal notice of their right to apply for this deferral relief, (2) to an opportunity to be heard, and (3) to have the standard concerning eligibility criteria for such relief reduced to regulations.[34] On the other hand, several courts have held that section 1981a is permissive in nature, and that implementation of any deferral program rests in the sole discretion of the Secretary.[35]

III. FmHA Loan Servicing

The FmHA provides a source of credit for those parties unable to obtain credit elsewhere.[36] Thus, it is considered an objective of the FmHA to provide not only credit but also to structure such financing so as to keep farmers in operation.[37] Additionally, FmHA borrowers have more formalized rights to obtain loan servicing because Congress has created certain legal remedies that are available to FmHA borrowers.[38] Finally, the agency itself has adopted extensive procedures to which it must adhere before it is able to liquidate or foreclose upon a borrower.[39]

The FmHA has an obligation to provide servicing on its loans.[40] The FmHA provides two major types of loan servicing.[41] The first type of loan servicing involves furnishing management advice and supervision to the borrower so that his farm operation can be managed to maximize economic return and thereby enhance repayment ability.[42] The second type of loan servicing involves the procedures developed by the FmHA to deal with borrowers who are unable to repay their loans.[43] At the heart of these procedures is federal law permitting the Secretary to "[c]ompromise, adjust or reduce claims and adjust and modify the terms of mortgage, leases, contracts and agreements entered into or administered by Farmers Home Administration under any of its programs, as circumstances may require."[44] Additionally, authority is provided by section 1981a of Title 7, which is the

---

F. Supp. 1075 (E.D. Ark. 1983) (Section 1981a is wholly permissive in nature).

34. *See e.g.*, Curry v. Block, 541 F. Supp. at 522.

35. *See e.g.*, Neighbors v. Block, 564 F. Supp. at 1077.

36. *See* Hamilton, *supra* note 1, at 21.

37. Curry v. Block, 541 F. Supp. at 513.

38. *See supra* note 9 and accompanying text.

39. *See* 7 C.F.R. § 1955.15 (1983).

40. *See* 7 C.F.R. § 1951.2 (1983). Part 1951 establishes the agency's servicing policy. 7 C.F.R. § 1951 (1983) *See also* FmHA Form 1924-14, "Farmers Program Borrowers Responsibilities," which each borrower signs upon obtaining a FmHA loan. *See also* 7 U.S.C. § 1946 (Supp. 1981).

41. *See infra* notes 42 & 43 and accompanying text.

42. FmHA Farm Loan Handbook at 48-49.

43. *Id.* at 54-57. Loan servicing remedies available include: consolidation, rescheduling reamortization, deferral, etc. *See* 7 C.F.R. §§ 1951.33 and 1951.40 (1983).

44. 7 U.S.C. § 1981(d) (1976 & Supp. 1978-81).

subject of this controversy.[45] FmHA borrowers have persuasively argued that section 1981a imposes an affirmative duty upon the Secretary to implement a formal loan servicing program.[46]

Before engaging in a discussion of the current litigation with regard to section 1981a, a brief review of the previously existing loan servicing procedure is necessary. When a borrower is unable to pay a loan obligation on time, the loan becomes delinquent, which is a type of default.[47] Generally, default occurs when the borrower either fails to make timely payments (delinquency) or disposes of secured property without prior written consent of the FmHA.[48] Many times FmHA will allow a late payment without taking any action.[49] Most annual payments on FmHA loans come due on January 1 of each year.[50] If the loan is secured by chattel and the county supervisor knows that last year's crop will be sold by March 1, he may be willing to wait for payment without a formal agreement.[51] On the other hand, if payment is late and the source of such payment is uncertain, the supervisor may not be willing to wait.[52] Default on a FmHA loan has serious implications; consequently, it is always in the borrower's, as well as the government's, best interest to attempt to avoid its consequences.[53] At this stage, if the borrower's history and circumstances meet certain criteria, the FmHA will normally consider loan servicing relief.[54]

In addition to the agency *sua sponte* considering the borrower for servicing relief, the borrower may request the agency to make such considera-

---

45. *See supra* notes 31-33 and accompanying text.

46. Brief for Plaintiff at 7-13, Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982).

47. FmHA Farm Loan Handbook at 53.

48. *Id.* Secured property disposed of without written consent is referred to as "conversion". *Id.* at 54.

49. FmHA Farm Loan Handbook at 53. FmHA allowing borrowers to remain delinquent without taking action is commonly known as *de facto* deferral. *Id.* at 56.

50. FmHA Farm Loan Handbook at 53.

51. *Id.*

52. *Id.*

53. *Id.* at 54

54. *Id.* at 55. FmHA regulation lists requirements which the borrower must satisfy before servicing will be provided. These requirements include:

(1) The servicing relief will assist in the orderly collection of the loan.

(2) The relief is not just to remove a delinquency or to delay liquidation.

(3) The relief is not used to avoid graduation requirements.

(4) The farmer is making satisfactory progress or will make satisfactory progress with revised payment terms.

(5) The borrower is cooperating in servicing the account and is maintaining the security.

(6) In the case of an FO loan, it will not be reamortized if it appears the borrower can bring the account within two years.

(7) The borrower's loan case has not been turned over to government counsel for action.

Id. See also 7 C.F.R. §§ 1951.2; .33(b)(1)-(6); .4(b)(1)-(2) (1983).

tions.[55] This right to request the agency to make loan servicing considerations is vigorously contended to be guaranteed in the language and intent of section 1981a.[56]

FmHA regulations set forth a list of requirements that must be satisfied before a FmHA borrower will be provided with loan servicing.[57] These requirements are somewhat restrictive and, rather than being applied in response to a borrower's requests, have been used unilaterally by FmHA officials.[58] If the FmHA decides in favor of providing loan servicing, the agency has a wide choice of alternatives to pick from.[59] The remedies available include: (a) consolidation; (b) rescheduling (operating loans); (c) reamortization (farm ownership loans); (d) deferral; (e) limited resource loan date availability; (f) no action (*de facto* deferral).[60] If, however, the agency decides that the borrower is not eligible to receive loan servicing, the agency has the power to act on the borrower's default.[61]

The course of action taken generally consists of two parts.[62] First, the agency sends the borrower notice of the acceleration of his loan.[63] Second, upon acceleration of the loan, the agency can move for liquidation.[64] Liquidation can be either voluntary or involuntary.[65] If, after acceleration, the borrower refuses a voluntary liquidation and has exhausted all appeals available, the agency can proceed with foreclosure of any secured property.[66]

In 1982, approximately six thousand FmHA borrowers voluntarily liquidated their loans, while FmHA foreclosed on another eight hundred forty-four borrowers.[67] In addition to providing formal loan servicing in one form or another to more than forty-two thousand borrowers, it is estimated that over one quarter of all FmHA borrowers were being carried as delinquent.[68] Because the agency has increased efforts to reduce the number of loan delinquencies, numerous lawsuits have been instituted by farmer-borrowers at-

---

55. FmHA Farm Loan Handbook at 54.

56. *See supra* note 46.

57. *See supra* note 54 and accompanying text.

58. FmHA Farm Loan Handbook at 55.

59. *See infra* note 60 and accompanying text.

60. FmHA Farm Loan Handbook at 54-57.

61. *See* 7 C.F.R. part 1955 (1983), Subpart A "Liquidation of Loans and Acquisition of Property". This provision sets out the rules and procedures for liquidation and foreclosures of FmHA loans. *See id.*

62. *See infra* notes 63-64 and accompanying text.

63. *See* Exhibit B-5 of 7 C.F.R. §1900.51 (1983), which sets forth the language that is required in a letter notifying the borrower of his right to appeal and outlines the appeal procedure. *Id.*

64. *See supra* note 59 and accompanying text.

65. FmHA Farm Loan Handbook at 57.

66. *Id.*

67. Hamilton, *supra* note 1, at 25.

68. *Id.*

tempting to ameliorate the potential adverse impact.[69]

IV. Current Litigation

A. *Remedies Sought and Threshold Issues*

Due to the present situation with respect to FmHA borrowers, a growing number of lawsuits have been filed in the federal district courts nationwide.[70] Plaintiffs[71] are generally seeking to enjoin the FmHA for failure to carry out the congressional intent manifest in section 1981a of Title 7.[72] This failure to implement section 1981a has been ground on several recurring claims.[73] Predominant among these claims are: (1) that the FmHA has failed to promulgate regulations implementing section 1981a;[74] (2) that the FmHA has failed to give its borrowers meaningful notice of the availability of loan servicing relief;[75] and (3) that the FmHA has not provided borrowers with an opportunity to be heard requesting consideration for loan servicing relief.[76]

Plaintiffs are generally seeking to enjoin the FmHA from taking any adverse action against them or other similarly situated.[77] In many loan servicing lawsuits the plaintiffs petition the federal court to grant a preliminary injunction to prevent FmHA from proceeding with adverse action on the loan before there can be a decision on the merits.[78] Meeting the requirements of a valid preliminary injunction has been a major stumbling block in several recent loan servicing cases.[79] In establishing whether or not the plaintiffs are entitled to the injunctive relief requested, the courts have relied on traditional tests such as the four-part tests enunciated in *Dataphase Systems, Inc. v. C.L. Systems, Inc.*[80] This test requires the following factors

---

69. *See, e.g.*, Coleman v. Block, 562 F. Supp. 1353 (D. N.D. 1983); Neighbors v. Block, 564 F. Supp. 1075 (E.D. Ark. 1983); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Allison v. Block, 556 F. Supp. 400 (W.D. Mo. 1982).

70. *See id.*

71. *See, e.g., id.* The plaintiffs in all of these cases are farmers who hold or, in the case of class actions, will hold FmHA farmer program loans. *Id.* Named defendants generally include the Secretary of Agriculture, the Administrator of the Farmers Home Administration, as well as various state and local FmHA officials. *Id.*

72. *See, e.g.*, Curry v. Block, 541 F. Supp. 509, 509 (S.D. Ga. 1982).

73. *See, e.g., supra* note 69.

74. *See, e.g.*, Brief for plaintiffs at 5-19, Curry v. Block, 541 F. Supp. 509 (S.D. Ga. 1982); Curry v. Block, 541 F. Supp. at 509.

75. *See* Curry v. Block, 541 F. Supp. at 522-24.

76. *See* Coleman v. Block, 562 F. Supp. 1353, 1361-62 (D. N.D. 1983).

77. *See, e.g.*, Curry v. Block, 562 F. Supp. at 509.

78. *See, e.g.* Coleman v. Block, 362 F. Supp. 1353 (D. N.D. 1983).

79. FmHA Farm Loan Handbook at 67 (citing Holmes v. Block, No. CV82-L-606, slip op. (D. Neb. Dec. 19, 1982) (Plaintiff's request for injunctive relief was denied for failing to meet criteria for the granting of preliminary injunctions. *Id.*)).

80. 640 F.2d 109, 113 (8th Cir. 1981).

be considered:

1) The threat of irreparable harm to the movant;
2) The balance between this harm and the harm that would result to the defendants from granting the injunction;
3) The probability that the movant will succeed on the merits; and
4) The public interest.[81]

Of the four factors listed above, failure to adequately show the first and third has proven to be fatal.[82] In the case of *Holmes v. Block*,[83] the plaintiff's request for injunctive relief was denied because of a failure to exhaust administrative remedies and thereby avert the potential irreparable harm the plaintiffs later sought to enjoin.[84]

Defendants have also successfully argued that there is an adequate remedy at law for the borrowers in the form of judicial foreclosure proceedings.[85] The court, in the case *Moskiewicz v. Block*,[86] concluded that the plaintiffs were afforded adequate due process protection at the formal judicial foreclosure proceedings.[87] In a judicial foreclosure action the plaintiffs would have a full opportunity to contest all issues relevant to their circumstances, the court reasoned, therefore, the plaintiff's injury was not irreparable by definition.[88] Although this argument has been addressed in several opinions, it fails to consider the timing factors crucial to an adequate remedy under these circumstances.[89] The court in *Coleman v. Block*[90] addressed this issue in granting the plaintiffs a preliminary injunction.[91] In *Coleman* the court held that "[t]he rights that plaintiffs are seeking would apply not just to foreclosure but to other adverse actions that the FmHA may take against the plaintiffs, such as voluntary liquidation or loan servicing without allowance for living and operating expenses or notice of availability of payment deferral."[92]

The defendants in *Coleman* argued that the plaintiffs' injury was not

---

81. *Id.*
82. *See supra* notes 78-79 and accompanying text.
83. No. CV82-L-606, slip op. (D. Neb. Dec. 19, 1982) (judicial order).
84. FmHA Farm Loan Handbook at 67 (citing Holmes v. Block, No. CV82-L-606, slip op. (D. Neb. Dec. 19, 1982)).
85. FmHA Farm Loan Handbook at 67 (citing Moskiewicz v. Block, No. 82-C-231, slip op. (W.D. Wis. Sept. 7, 1982)). *See also* Neighbors v. Block, 564 F. Supp. 1075, 1083 (E.D. Ark. 1983).
86. No. 82-C-231, slip op. (W.D. Wis. Sept. 7, 1982).
87. FmHA Farm Loan Handbook at 67 (citing Moskiewicz v. Block, No. 82-C-231, slip op. (W.D. Wis. Sept. 7, 1982)).
88. *See* Neighbors v. Block, 564 F. Supp. 1075, 1084 (E.D. Ark. 1983) (citing Moskiewicz v. Block, No. 82-C-231, slip op. (W.D. Wis. Sept. 7, 1982)).
89. *See supra* notes 25-29 and accompanying text.
90. 562 F. Supp. 1353 (D.N.D. 1983).
91. *Id.* at 1359.
92. *Id.*

irreparable because the plaintiffs' financial position made it inevitable that they would lose their farm even if the injunction was issued.[93] Defendants relied on *Tuepker v. FmHA*,[94] which denied injunctive relief on essentially the same grounds.[95] In that case it was held that section 1981a relief is available only to those who are "temporarily unable to continue making payments."[96] Because section 1981a grants the Secretary broad discretion to deny unreasonable requests for deferral, any request by a financially defunct borrower would be properly rejected.[97] Although this argument has been accepted in several cases, it appears to be limited to the facts of those cases.[98] The court in *Coleman* rejected this argument on the grounds that it would deny the plaintiff the opportunity to "delay his demise".[99] This would have improperly imposed an additional standard to be met by a party seeking injunctive relief. The *Coleman* court went on to grant the preliminary injunction as have other courts.[100]

Coleman v. Block represents judicial recognition that farmers participating in FmHA loan programs are fundamentally beneficiaries of a federal social welfare program.[101] Implicit within these relationships are certain rights bestowed upon the borrower which are in the nature of entitlements.[102] Such entitlements necessarily invoke due process rights of notice and of a prior hearing.[103] Noting the existence of these rights, the court also

---

93. *Id.*

94. 525 F. Supp. 237 (W.D. Mo. 1981).

95. *Id.* at 239.

96. *Id.*

97. *Id.*

98. In *Tuepker*, for example, the borrower had six defaulted FmHA loans. *Id.* at 240. The court held that the FmHA loans outstanding in addition to thousands of dollars of "private debt" resulted in circumstances which made the potential relief from an injunction too speculative. *Id.*

99. Coleman v. Block, 562 F. Supp. at 1360.

100. *Id.*

101. *Id.* at 1364.

102. *Id.* at 1364-67. Citing cases such as *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), the *Coleman* court concluded that FmHA borrowers held a significant property interest in the continuation of their loan. *Id.* at 1365.

103. Coleman v. Block, 362 F. Supp. at 1365. The court in *Coleman* relied on the standards for due process set out in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at 1365-66. The standard articulated in these cases:

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. at 334-35.

recognizes the appropriateness of injunctive relief.[104] Contiguous with the existence of these due process rights is the notion that the remedy provided be meaningful.[105] In order for a remedy to be meaningful in these circumstances, its timing is of utmost importance.[106] In this respect, *Coleman v. Block* held the administrative procedures and remedies available to be "inadequate if not non-existent."[107]

Another major preliminary issue,[108] which is also essential to maintaining a class action suit against the FmHA, is certification of the class.[109] Class certification is noteworthy because thus far class plaintiffs have received more favorable treatment.[110] This is significant because the courts have generally adopted a broadly defined view of the class.[111] The trend developing is that the class includes "all persons who have obtained a farmer program loan from the Farmers Home Administration (FmHA) and who are or may be eligible to obtain a farmer program loan from the FmHA and whose loans are or will be administered through the FmHA offices located within the state. . . ."[112]

The defendants in several cases have argued that the proposed class is so broad that it embraces individuals who have little or no connection with the claim being litigated.[113] The defendants generally contend that the appropriate class should be more narrowly defined.[114] The defendants in *Coleman* suggested that a more realistic class would include only "those persons who have or will acquire FmHA farmer program loans and *who are or will be subject to FmHA foreclosure.*"[115] The court in *Coleman* rejected this suggestion holding that "a class so restricted would be improper because the newly defined class would not adequately cover the relief which the plaintiffs are seeking."[116] The relief sought in these class actions is not solely for improper foreclosure procedures, but includes a broad range of actions taken by FmHA.[117] Therefore, it is appropriate for the class to include all parties

---

104. Coleman v. Block, 562 F. Supp. at 1366-67.

105. *See supra* notes 102 and 103 and accompanying text.

106. *See supra* notes 25-29 and accompanying text.

107. Coleman v. Block, 562 F. Supp. at 1366.

108. An additional preliminary issue not discussed but worth noting is that of jurisdiction, which has been based on 28 U.S.C. §§ 1331 & 1337.

109. The majority of FmHA loan servicing suits have been class actions and with one exception, *Matzke v. Block*, 542 F. Supp. 1107 (D. Kan. 1982), have been certified in every case. FmHA Farm Loan Handbook at 59.

110. FmHA Farm Loan Handbook at 59.

111. *Id.; see, e.g.*, Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983).

112. Coleman v. Block, 562 F. Supp. at 1356.

113. *See* Brief for Defendants at 5-7; Gamradt v. Block, No. 5-83 Civ. 158, slip op. (Minn. June 29, 1983).

114. *Id.*

115. Coleman v. Block, 562 F. Supp. at 1356 (emphasis in original).

116. *Id.*

117. *Id.*

that are significantly affected by the proposed remedy.[118]

It is relatively settled that the class in these actions is broadly defined.[119] However, class certification appears to be about the only preliminary issue that is clear. Although cases such as *Coleman v. Block* have held that exhaustion of administrative remedies will not prevent a plaintiff from obtaining relief, the issue of exhaustion of administrative remedies is far from resolved.[120] *Neighbors v. Block*,[121] *Turnbull v. Block*[122] and *Holmes v. Block*[123] continue to remind us that litigation involving FmHA loans and procedures is not uniformly decided.

B. *Analysis of Substantive Issues*

One of the most widely discussed issues dealing with FmHA farm loans is the nature and purpose of the FmHA itself. Determining the nature of the role of the FmHA is essential to the task of assigning rights to FmHA borrowers.[124] The courts have recognized this and have expended considerable effort in developing this issue.[125] FmHA loans have a dual function; on one hand they appear much the same as loans in the commercial sector, while on the other hand FmHA loans fulfill a social welfare function.[126] Although this issue has not been settled, it is clear that the view most generally accepted tends to favor the position that FmHA loans have significant social welfare characteristics.[127] This view is supported by the growing number of decisions in favor of farm-borrowers who have brought these actions.[128]

In reaching the conclusion as to the proper role or function to be assigned the FmHA, a great deal of emphasis has been placed on the history and nature of the agency's programs.[129] From this history the courts have

---

118. *Id.*

119. *Id.*

120. *Id.*

121. 564 F. Supp. 1075 (E.D. Ark. 1983) (court held exhaustion of administrative remedies resulted in failure to meet requirements of preliminary injunction).

122. FmHA Farm Loan Handbook at 67 (citing No. 82-6053-CU-SJ, slip op. (W.D. Mo. 1982) (order denying injunction where failure to exhaust administrative remedies prohibited injunctive relief)).

123. FmHA Farm Loan Handbook at 67 (citing No. CU. 82-L-606, slip op. (D. Neb. Dec. 29, 1982) (order denying injunction where plaintiffs are unlikely to succeed on the merits because of failure to exhaust administrative remedies)).

124. *See supra* notes 23-24 and accompanying text.

125. *See, e.g.*, Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Neighbors v. Block, 564 F. Supp. 1075 (E.D. Ark. 1983).

126. *See supra* notes 23-24 and accompanying text.

127. Included in this trend in favor of the plaintiffs are cases such as: Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983); and Allison v. Block, 556 F. Supp. 400 (W.D. Mo. 1982).

128. *See supra* note 127.

129. *See supra* note 125.

attempted to glean the congressional intent behind the FmHA.[130] In the leading case of *Curry v. Block*,[131] the Federal Court for the Southern District of Georgia made an indepth analysis of the history of the FmHA.[132] The court held that the Farmers Home Administration Act is predominantly a form of social welfare legislation.[133] In *Curry*, the court noted that "[t]he federal government has been involved in extending agricultural credit for some 120 years."[134] The earliest predecessor to the FmHA was created in 1935.[135] With the Bankhead-Jones Farm Tenant Act of 1937 Congress again entered the agricultural credit market.[136] In 1946 the Bankhead-Jones Farm Tenant Act of 1937 was re-enacted as part of the Farmers Home Administration Act of 1946.[137] The underlying purpose of this legislation, which was to provide farm ownership loans to farmers without alternative credit sources, remained substantially the same.[138] The court in *Curry* noted that "the concepts of the present farm loan programs are rooted in that mass of social legislation arising out of the depression years."[139]

In 1961 Congress updated and modernized the Farmers Administration Act of 1946.[140] These changes were in response to the increased development in farming technology and the wide differences in credit needs among farmers.[141] Thus, the 1961 Act consolidated the secretary's "authority to make available to eligible farmers who cannot obtain credit elsewhere direct and insured loans necessary to finance their acquisition, improvement and operation of farms."[142] Finally, in 1972 the farmer loan program and the rural housing loan programs were merged by amendment to the Farmers Home Administration Act of 1961.[143] The *Curry* court found it clear that "the object of the legislation is to aid 'underprivileged' farmer[s]."[144]

The *Curry* analysis of the role of the FmHA has been approved by several other courts.[145] In fact, this analysis of the legislative history surrounding the FmHA was adopted *in toto* by the court in *Jacoby v. Schuman*.[146] Understanding the function of FmHA programs sets the stage for further

---

130. *Id.*
131. 541 F. Supp. 506 (S.D. Ga. 1982).
132. *See id.*
133. *Id.* at 509-22.
134. *Id.* at 509.
135. *Id.* at 510.
136. *Id.*
137. *Id.*
138. *Id.* at 510-11.
139. *Id.* at 510.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 511.
145. *See, e.g.*, Jacoby v. Schuman, No. N83-0024-C, slip op. (E.D. Mo. June 14, 1983).
146. *Id.*

interpretation of the section that lies at the heart of this controversy; section 1981a of Title 7 U.S.C.[147]

In each of these cases the plaintiffs have alleged that the language within this section coupled with the social welfare nature of FmHA loans requires an affirmative duty to be imposed upon the Secretary of Agriculture.[148] Upon finding a mandatory command within section 1981a, the courts have also been asked to impose a duty on the Secretary to provide FmHA borrowers with: (1) personal notice of the availability of deferral relief, (2) an opportunity to be heard to request such relief, and (3) regulations implementing a loan deferral scheme consistent with the congressionally mandated program contained within section 1981a.[149]

Section 1981a was added to the Consolidated Farm and Rural Development Act as an amendment in 1978.[150] This section as set out in full states:

> In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferral under this section to bear no interest during or after such period: Provided, that if the security instrument securing such loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.[151]

The outcome of each of these cases has turned on the construction adopted with respect to this section.[152] The two interpretations which have each been adopted in one or more courts are, that section 1981a imposes a mandatory obligation upon the Secretary,[153] or that section 1981a is wholely permissive in nature and therefore any implementation of its provisions is solely within the discretion of the Secretary.[154] To fully understand these

147. *See supra* notes 31 and 32 and accompanying text.

148. *See, e.g.*, complaint for the plaintiffs, ¶ 32-33, Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Curry v. Block, 541 F. Supp. at 509.

149. *See supra* notes 74-76 and accompanying text.

150. 7 U.S.C. § 1981a (Supp. 1978).

151. *Id.*

152. *See supra* notes 33-35 and accompanying text.

153. *See e.g.* Curry v. Block, 541 F. Supp. at 522.

154. *See e.g.* Neighbors v. Block, 564 F. Supp. at 1077.

conflicting positions it is useful to put them in juxtaposition for further analysis of the merits of each.

The defendants have consistently argued that section 1981a is permissive in nature and therefore the plaintiffs have no legal basis on which to demand relief.[155] This interpretation of section 1981 was first accepted, as dicta, by *Moskiewicz v. Block*.[156] In that case the plaintiffs' complaint was dismissed on the grounds that the plaintiffs failed to exhaust administrative remedies and that adequate due process protection was available at the formal judicial foreclosure proceedings.[157] The court went on to conclude that the language of 7 U.S.C. section 1981a was "clearly permissive" and therefore does not require the Secretary to either permit loan payment deferral or to promulgate regulations permitting such deferral.[158]

This position was amplified in *Neighbors v. Block*.[159] The *Neighbors* decision is particularly significant because the Federal Court for the Eastern District of Arkansas supported their conclusion that section 1981a was permissive with an extensive analysis of that section's legislative history.[160] The *Neighbors* court found the language of the 1978 amendment to be unambiguous and permissive.[161] The court held that the "plain language" of section 1981a confers no substantive rights.[162] The court reasoned that because no property or liberty rights existed, it followed that the plaintiffs were not entitled to procedural due process.[163] *Neighbors* rejected several arguments raised by *Curry v. Block* and distinguished them from the positions finally adopted in that decision.[164]

The *Neighbors* position with respect to the permissive nature of section 1981a appears to be losing ground as decisions are rendered in favor of the plaintiffs in other districts.[165] *Neighbors* relied to a great extent on the defendants' argument that FmHA borrowers are automatically afforded the benefits of section 1981a.[166] This argument is based on the FmHA's claim that consideration of alternatives to foreclosure, such as deferrals, are made in every case before the decision to accelerate a loan is made.[167] Therefore, the Secretary, in effect, waives the right to require the individual borrowers

---

155. FmHA Farm Loan Handbook at 67 (citing Moskiewicz v. Block, No. 1-82-C-231, slip op. (W.D. Wis. Sept. 7, 1982)).
156. *Id.*
157. *Id.*
158. *Id.*
159. 564 F. Supp. 1075, 1077 (E.D. Ark. 1983).
160. *Id.* at 1077-80.
161. *Id.* at 1077.
162. *Id.* at 1078.
163. *Id.*
164. *Id.* at 1078-79.
165. *See supra* note 127 and accompanying text.
166. Neighbors v. Block, 564 F. Supp. at 1081.
167. *Id.*

to request deferral relief and nothing further would be gained by granting the borrowers an opportunity to make a showing.[168]

Another case worth noting, which has held that section 1981a is permissive in nature, is *United States v. Hamrick*.[169] In this case U.S. District Judge, G. Ross Anderson, Jr., determined that section 1981a was "clearly discretionary."[170] The opinion further held that the plaintiff had no property interest to which due process might attach, therefore, constructive notice would adequately satisfy any constitutional requirement.[171]

This line of cases, represented primarily by *Neighbors v. Block*,[172] illustrates the notion that section 1981a imparts no substantive or procedural rights upon FmHA borrowers.[173] According to this view, section 1981a deferral relief rests solely within the discretion of the Secretary of Agriculture.[174] Closer analysis of this position reveals that such a construction results in a unilateral implementation of these provisions.[175] This scenario would operate without any input from the borrower; first, the FmHA would *sua sponte* make a determination of whether or not the borrower was eligible for section 1981a relief, and, second, decide whether or not to deny such relief and accelerate the indebtedness.[176] Thus, it would follow that the plaintiffs' demands for notice of 1981a relief and an opportunity to be heard are superfluous because the agency is already acting on the borrowers behalf.[177] Additionally, promulgation of regulations would be equally unnecessary because the deferral program is already in *de facto* operation.[178]

In conflict with this view is the position adopted by the majority of the courts reaching a decision on the merits.[179] This line of cases has adopted the view that section 1981a imposes a mandatory duty upon the Secretary, in that it creates recognizable property rights to which due process protection applies.[180] These cases reject a unilateral application of 1981a benefits while embracing the adoption of procedures that will afford FmHA borrowers more input.[181]

---

168. *Id.*

169. FmHA Farm Loan Handbook at 67 (citing United States v. Hamrick, No. 82-608-3, slip op. (S.C. Nov. 15, 1982)).

170. *Id.*

171. *Id.*

172. 564 F. Supp. 1075 (E.D. Ark. 1983).

173. *Id.* at 1077.

174. *Id.* at 1083.

175. FmHA Farm Loan Handbook at 55 (without imposing a duty to provide notice the borrower would be unaware of the loan servicing available. It is thus presumed that no borrower participation would occur.).

176. *Id.*

177. Neighbors v. Block, 564 F. Supp. at 1081.

178. *Id.*

179. *See e.g.* Curry v. Block, 541 F. Supp. at 522.

180. *Id.*

181. *See supra* notes 27-28 and accompanying text.

Curry v. Block leads this line of cases with a voluminous discussion of the legislative history and statutory framework of section 1981a.[182] The court in *Curry* rejected the defendants' contention that section 1981a should be interpreted with the notion that the FmHA is "in the business of making loans," rather, they recognized FmHA's social welfare nature, as mentioned above.[183] Accordingly, the court felt compelled "to implement the social welfare goals of Congress as well as its directive to keep 'existing farm operations operating' by placing a liberal, but not a strained, gloss on that section."[184]

The plaintiffs vigorously argue that section 1981a of Title 7 should be dealt with in the same manner as the Rural Housing Loan Moratorium Statute, which uses similar language.[185] The use of comparable language is indicative of congressional intent that the FmHA loan programs be implemented in the same manner.[186] The court recognized that normally it will give deference towards statutory construction developed by administrative bodies with expertise in the area of law.[187] The gist of this case, however, was that "the agency had previously promulgated regulations pursuant to 42 U.S.C. § 1475 — an act containing comparable language to that in § 1981a — inconsistent with its present position on § 1981a."[188]

In examining the language of the section itself the court concluded that the Secretary has the discretion only to grant either a deferral or to forego foreclosure once the eligibility requirements established by the statute have been met.[189] However, the court acknowledged that words alone do not al-

---

182. Curry v. Block, 541 F. Supp. at 509-22.

183. *Id.* at 513.

184. *Id.* at 514.

185. *Id.* (citing the Rural Housing Loan Moratorium Statute, 42 U.S.C. § 1475 which provides:

> During any time that such loan is outstanding, the Secretary is authorized under regulations to be prescribed by him to grant a moratorium upon the payment of interest and principal on such loan for so long a period as he deems necessary, upon a showing by the borrower that due to circumstances beyond his control, he is unable to continue making payments of such principal and interest when due without unduly impairing his standard of living. In cases of extreme hardship under the foregoing circumstances, the Secretary is further authorized to cancel interest due and payable on such loans during the moratorium. Should any foreclosure of such a mortgage securing such a loan upon which a moratorium has been granted occur, no deficiency judgment shall be taken against the mortgagor if he shall have faithfully tried to meet his obligation.

42 U.S.C. § 1475 (1976).

186. Curry v. Block, 541 F. Supp. at 514. *See also* Williams v. Butz, No. 176-153, slip op. (S.D. Ga. Oct. 7, 1977) (FmHA agreed to provide certain rural housing program borrowers with personal notice of the availability of moratorium relief under the Rural Housing Act, 42 U.S.C. § 1475 (1976)).

187. Curry v. Block, 541 F. Supp. at 514-21.

188. *Id* at 521.

189. *Id.* at 516.

ways show intent and proceeded to look to the legislative history of the statutes and the policies behind their enactment.[190] An examination of legislative history revealed that the intent of Congress was to impose a mandatory duty upon the Secretary to implement section 1981a.[191]

Thus, without ruling on the constitutional issues raised by the plaintiff,[192] the court held that section 1981a did impose a mandatory duty upon the Secretary and that the Secretary failed to adequately comply with the duty.[193] The court specifically held that measures already implemented to provide a deferral program were insufficient to meet the statutory requirements of section 1981a.[194] The *Curry* decision required that the FmHA be enjoined from taking any further action until the Secretary promulgates regulations implementing section 1981a.[195] Additionally, the FmHA must provide borrowers with personal notice of the availability of deferral relief and an opportunity to be heard upon application.[196]

The court based its requirement of personal notice on the fact that the "language of the statute expressly provides that the deferral mechanism is triggered 'at the request of the borrower'."[197] In addition, the statute contemplates an opportunity to be heard by the fact that no deferral relief could be expected without "a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principle and interest when due without unduly impairing the standard of living of the borrower".[198] Intuitively, a borrower is incapable of requesting deferral relief he neither has, had notice of, nor had an opportunity to be heard.[199]

Another significant case in support of the position that section 1981a imposes a mandatory duty on the Secretary is *Coleman v. Block*.[200] In this case the Federal District Court of North Dakota held that the language of the statute did imply that certain rights be afforded the plaintiffs.[201] The court in *Coleman* noted the extensive discussion of legislative history in both *Curry* and *Neighbors*, but instead took a more direct approach in its resolution of whether or not section 1981a was mandatory.[202] The court

---

190. *Id.*
191. *Id.* at 521.
192. Brief for the plaintiffs at 20-22, Curry v. Block, 541 F. Supp. 506, 522 n.15 (S.D. Ga. 1982) (Plaintiffs argued that the Fifth Amendment provides due process protection to FmHA borrowers).
193. Curry v. Block, 541 F. Supp. at 522.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 522-24.
198. *Id.* at 522.
199. *Id.*
200. 562 F. Supp. 1353 (D.N.D. 1983).
201. *Id.* at 1361.
202. *Id.*

found that the language in section 1981a clearly contemplated knowledge on part of the borrower.[203] The statute expressly states that the Secretary may permit deferral, at the "request of the borrower".[204] The question is thus reduced to "whether it is the borrower's responsibility to find out about the deferral or the Secretary's to tell him".[205] Relying on "notions of basic fairness" the *Coleman* court held that the responsibility to inform the borrower about loan deferrals belongs to the Secretary.[206]

Again, relying on basic standards of fairness, it is clear that the Secretary is required to consider the borrower's request.[207] In order to be properly informed it is imperative that the farmer be given an opportunity to present his side of the case.[208] Although the Secretary has broad authority to either grant or deny loan deferral, this authority must be exercised in an intelligent and informed manner.[209] Therefore, the court held that an opportunity to present evidence must be provided borrowers.[210] Additionally, to be effective, this opportunity must occur prior to any FmHA decision to terminate the borrower's allowance for living and operating expenses.[211]

Coleman v. Block departed somewhat from the majority of cases granting relief to the plaintiffs in that *Coleman* did not require the Secretary to promulgate regulations.[212] The court felt that, although such regulation might be beneficial, there is no express requirement that they be adopted.[213] "[B]y requiring only that FmHA observe these rights, rather than requiring them to issue regulations, the court allows the agency to carry on with foreclosures so long as the above rights are observed."[214]

Coleman is also significant because of the fact that the court discusses the rights assigned the farmer-borrower in terms of constitutionally protected property rights.[215] The court compared the benefits received by FmHA borrowers to those received by the plaintiffs in *Goldberg v. Kelly*.[216] Because FmHA loans have an entitlement nature, FmHA borrowers have a legitimate expectation that their benefits will continue.[217]

---

203. *Id.*
204. *Id.*; 7 U.S.C. § 1981a (Supp. 1978).
205. Coleman v. Block, 562 F. Supp. at 1361.
206. *Id.*
207. *Id.* at 1361-62.
208. *Id.*
209. *Id.* at 1361.
210. *Id.* at 1361-62.
211. *Id. See supra* notes 25-29 and accompanying text.
212. Coleman v. Block, 562 F. Supp. at 1362.
213. *Id.*
214. *Id.* at 1363.
215. *Id.* at 1363-67.
216. *Id.* at 1365; 397 U.S. 254 (1970) (Court held that plaintiffs were wrongfully terminated from welfare benefits without providing a prior hearing).
217. Coleman v. Block, 562 F. Supp. at 1365.

The case of *Allison v. Block*[218] closely follows the holding in *Curry*.[219] The court in *Allison* noted that "[r]efusal to exercise discretion is itself an abuse of discretion."[220] Consequently, the court in *Allison* held that section 1981a imposes a mandatory duty upon the Secretary to provide notice and an opportunity to be heard and that "[t]he Secretary must clearly articulate the grounds for his exercise of discretion."[221]

V. Present Status of FmHA Loans

As can be seen from the previous discussion, the holdings discussing the impact of 7 U.S.C. § 1981a are far from uniform. Even the cases within a single jurisdiction have not been entirely consistent.[222] The cases are divided in their interpretation of section 1981a and about FmHA practice in providing loan servicing. In districts following the line of cases represented by *Neighbors v. Block*, FmHA borrowers are subject to the agency's previous policy of providing loan servicing on an *ad hoc* basis.[223] In these districts FmHA's implementation of the provisions of section 1981a was, until very recently, purely *ad hoc*.[224]

In other jurisdictions, where the courts have adopted a position consistent with the findings in cases such as *Curry* or *Coleman*, the FmHA is enjoined from taking any further adverse action, such as foreclosure, until the various procedures found to be mandated by section 1981a are met.[225] As could be expected, the FmHA has filed appeals from the decisions in several of these cases.[226] While the final outcome of the fate of section 1981a cannot

---

218. 556 F. Supp. 400 (W.D. Mo. 1982).

219. *Id.* at 404. The court held that FmHA is primarily a form of social welfare legislation based on the analysis of FmHA's function in *Curry*. *Id.*

220. *Id.*

221. *Id.* at 405. Two additional cases referred to as *Matzke I* and *Matzke II* require brief mention. In *Matzke v. Block*, 542 F. Supp. 1107 (D. Kan. 1982) (Matzke I) the court granted injunctive relief to the plaintiffs, as individuals, after failure of class certification. This injunction was expanded in *Matzke v. Block*, 564 F. Supp. 1157 (D. Kan. 1983) (Matzke II), which was successfully brought as a class action. *Id* at 1160. The court in *Matzke II* did not require the promulgation of regulations as long as the standard within section 1981a was carried out. *Id.* at 1167-68. The court in Matzke II further held that because the "language of the statute does not provide for notice or for a hearing on the record . . . constructive notice and an informed hearing would suffice". *Id.* at 1166.

222. *Compare* Allison v. Block, 556 F. Supp. 400 (W.D. Mo. 1982); Allison v. Cavanaugh, No. 80-4226-CU-C-H, slip op. (W.D. Mo. Jan. 1, 1983) (order granting injunction) *with* Turnbull v. Block, No. 82-6053-CU-SJ, slip op. (W.D. Mo. 1982) (claim for injunctive relief denied).

223. *See, e.g.*, Neighbors v. Block, 564 F. Supp. at 1075.

224. *See supra* notes 57-59 and accompanying text.

225. *See, e.g.*, Curry v. Block, 541 F. Supp. at 506; Coleman v. Block, 562 F. Supp. at 1353.

226. An appeal from the decision in *Curry* has been filed by the FmHA and is currently pending in the 11th Circuit.

yet be predicted with any guarantee of accuracy, there is a marked trend toward a resolution in line with the position embraced in *Curry* and *Coleman*.[227]

The underlying principal of the position adopted in *Curry* and *Coleman* is that the benefits received by FmHA borrowers are tantamount to the receipt of a property right.[228] Therefore, these borrowers have a legitimate expectation to the continuation of these benefits. Whether these rights are created merely ancillary to the statute[229] or as constitutional rights inherent in the nature of the relationship between the FmHA and the borrower,[230] they are protected by due process considerations. Included in these considerations are notice, an opportunity to be heard, and an enunciation of the standard to be used in making the determination of whether servicing relief will be granted or not.[231]

Recently, Judge Van Sickle, Federal District Judge for the District of North Dakota, issued a temporary injunction enjoining the FmHA from foreclosing on approximately 1,800 farmers in 44 states.[232] This nationwide injunction is an expansion of the relief granted by Judge Van Sickle in the case of *Coleman v. Block*.[233] Judge Van Sickle's order requires the FmHA to:

> A. Give borrowers notice of FmHA's intention to terminate planned releases of normal income for family living or operating expenses.
> B. Give borrowers notice of the standards which must be met in order to get a deferral under 7 U.S.C. § 1981a (§ 331A of the Consolidated Farm and Rural Development Act).
> C. Provide the opportunity for an appeal hearing before FmHA terminates planned releases of normal income for family living or operating expenses.
> D. Provide the opportunity for an appeal hearing before FmHA finally decides not to grant a deferral under § 1981a.
> E. Give borrowers a written explanation of the decision FmHA makes as a result of any hearing.[234]

Due to the retroactive nature of this order, it affects not only borrowers currently facing acceleration and foreclosure but also those borrowers whose loans have already been accelerated.[235] In these cases the FmHA has the option to; (1) reverse the acceleration, (2) reinstate planned releases of nor-

---

227. *See infra* notes 232-34 and accompanying text.
228. *See supra* notes 215-17 and accompanying text.
229. *See supra* notes 192-96 and accompanying text.
230. *See infra* note 233.
231. Coleman v. Block, 562 F. Supp. at 1367-68.
232. N. Y. Times, January 4, 1984, at A 14, col. 4 & 5.
233. 562 F. Supp. 1353, 1367 (D.N.D. 1983).
234. Temporary Directives for Pretermination Notice, December 20, 1983 (adopted by memorandum from Charles W. Shuman, FmHA Administrator to State Directors *et. al.*) [Hereinafter referred to as Temporary Directives].
235. *Id.* at 1-2.

mal income to help cover essential family living or farm operating expenses, or (3) to discontinue foreclosure procedures (i.e. not record any deed(s) given up by the borrower).[236] The option exercised by the FmHA will, of course, depend on factors such as the financial status of the borrower and the progress of the foreclosure proceedings.[237]

Pursuant to this Order, the FmHA discontinued all foreclosure activity on FmHA loans.[238] On January 4, 1984 the FmHA officially adopted temporary directives to implement Judge Van Sickle's Order.[239] These directives have been issued to FmHA field staff pending resolution of the litigation.[240]

The temporary regulations adopted by the FmHA create a complex procedure which must be complied with before any action adverse to a borrower may be taken.[241] The dominant features of these regulations are their provisions for requiring notice to be provided to borrowers advising them of their rights under 7 U.S.C. § 1981a.[242]

The primary function of this notice is to inform the borrower in three ways.[243] First, the notice will indicate to the borrower that the FmHA intends to take one or more of the following actions: (1) terminate the release of income; (2) cancel a previous deferral; (3) accelerate the debt; and/or (4) demand real property or chattel in which the FmHA has security interest be turned over to the FmHA.[244] Second, the notice will list the loan servicing alternatives for which the borrower may apply.[245] Among the options available are consolidation, rescheduling, re-amortization, and deferral.[246] Third, the criteria for approval of loan deferral will be spelled out rather explicitly.[247]

The standard to be set out in this part of the notice is somewhat rigorous and places the burden of meeting the stated requirements upon the borrower.[248] To fulfill these requirements the borrower must show that "[t]he reasons for needing the deferral are due to circumstances which are beyond

---

236. *Id.* at Exhibit A. These procedures have the effect of returning previously accelerated loans to a pre-acceleration status. *Id.*

237. *Id.*

238. *See supra* note 234 and accompanying text.

239. Notice of Temporary Directives, 49 FED. REG. 2 (1984).

240. Temporary Directives, *supra* note 234, at 1.

241. *Id.*

242. *Id.*

243. *Id.* Another function of this notice is to advise borrowers of their right to administrative appeal of certain FmHA decisions. *Id.* at 3-4.

244. *Id.* at Attachment 1.

245. *Id.* at Attachment 1, p. 2. *See supra* note 60 and accompanying text. Note that these loan servicing options are essentially the same options considered by FmHA previous to these directives.

246. Temporary Directives, *supra* note 234, at Attachment 1, p.2.

247. *Id.* at Attachment 2.

248. *Id.*

the borrower's control."[249] Circumstances beyond a borrower's control include illness, injury, natural disaster, and unplanned, but essential farm expenses.[250] Additionally, the borrower must be found to have been acting in good faith, maintaining recommended and recognized successful production and financial management practices, and complying with the conditions of the loan.[251] There are numerous other factors listed, which the FmHA official will consider before granting deferral.[252]

No acceleration of FmHA loans can occur for thirty days from the borrower's receipt of the pre-acceleration notice.[253] Furthermore, if a loan is accelerated and deferral is denied, the borrower has the right to appeal.[254] Finally, a written explanation of any denial of deferral, as well as any other hearing or appeal, must be provided to the borrower.[255]

While these regulations or directives are only temporary, they represent a somewhat stricter approach to loan servicing than the FmHA implemented prior to the imposition of this injunction.[256] It is reasonable to assume that if the injunction becomes permanent the FmHA will not back away from this more hard-nosed approach. FmHA officials will feel hampered in administering their loan programs because of these complicated procedures.[257] Although the FmHA is expected to make loans, they are prevented from acting like commercial lenders.[258] They are likely to have less control over the use of income derived from loan funds and have less ability to respond to defaulted borrowers in the government's best interest.[259] The FmHA, as a result, is likely to impose tougher standards for the initial loan applications of farmer-borrowers as well as requiring strict compliance with deferral criteria.[260]

VI. Conclusion

There is no doubt that the implementation of loan servicing procedures, such as those adopted by the FmHA in its temporary directives, will adequately protect the expectancy of FmHA borrowers. If the underlying purpose of the FmHA is truly social welfare, due process must be afforded the

---

249. *Id.* at Attachment 2, p. 1-4.
250. *Id.*
251. *Id.*
252. *Id.* Factors considered include borrower's good faith, loan repayment record, and potential for repayment after deferral. *Id.*
253. Temporary Directives, *supra* note 234, at 2.
254. *Id.* at 4.
255. *Id.* at 1.
256. *See supra* notes 246-48 and accompanying text.
257. Interview with Robert Muenchrath, Program Loan Specialist, United States Department of Agricultural, Farmers Home Administration, Des Moines, Iowa (January 16, 1984).
258. *Id.*
259. *Id.*
260. *Id.*

recipient of the entitlement created. However, FmHA borrowers may find that after these procedural protections are adopted they are in no better position than they were under FmHA implementation of section 1981a on an *ad hoc* basis.[261] In fact, they may find that both the loans and the loan servicing are more difficult to obtain under a stricter regulatory regime.

It must be remembered that while the Secretary may be under a statutory duty to provide notice and opportunity to be heard, and must abide by the standards set out in the regulation, his authority to grant deferral relief to borrowers remains discretionary.[262] The Secretary may deny any request for deferral so long as such denial is not arbitrary or capricious.[263] Thus, the end result of this litigation may actually frustrate the underlying social welfare function of the FmHA.

It is possible that the courts have misconceived the role of the FmHA as a social welfare agency. Arguably, if Congress had intended the Farmers Home Administration Act to be primarily social welfare legislation, it would have created an agency which could provide farmers with grants and subsidies, rather than an agency equipped to make loans. The FmHA is, at least in form, a lending institution.[264] Yet, the outcome of these cases indicates that operational objectives other than seeking repayment of loans should prevail.

FmHA borrowers are predominantly borrowers who are unable to obtain credit elsewhere.[265] However, a borrower from the FmHA will find he has a much better deal from the government than he would have had, were he fortunate enough to be able to borrow from the private sector. What FmHA loans appear to be doing is creating a separate class of borrowers which have rights and privileges far superior to borrowers from commercial lenders. It is possible that the FmHA is not the correct vehicle for the accomplishment of all of these social welfare objectives.

It would not be illogical to expect a reasonable number of FmHA loans to be repaid. However, with current delinquency and default rates, repayment of FmHA loans may be an unrealistic goal under present procedures.[266] Although a great number of FmHA loans are repaid, perhaps loans are not the best way to provide aid to farmers in serious financial distress.

A more workable solution might be the bifurcation of these social welfare objectives into two distinct programs. On one hand, FmHA loans should be continued. They could provide credit to borrowers unable to borrow from

---

261. *See supra* notes 40 & 42 and accompanying text.

262. *See* 7 U.S.C. § 1981a (Supp. 1978).

263. Administrative Procedure Act, 5 U.S.C. § 706 (1976).

264. *See supra* notes 54-61 and accompanying text.

265. *See supra* note 12 and accompanying text.

266. Hamilton, *Farm Credit System and Farmer's Home Administration Borrower's Rights to Obtain Loan Servicing in Times of Economic Stress*, ARK. LAW NOTES 21, 23 (1983). In 1982 the national delinquency rate was 24%. *Id.* The estimates for 1983, however, indicate that the national delinquency rate exceeds 50%. *Id.*

commercial lenders, and still permit the FmHA to function more as if it were a commercial lender itself. On the other hand, the FmHA could provide direct financial aid or subsidies in cases where loans would be inappropriate. With this type of system the creation of a separate class of borrowers might be avoided.

While the final outcome of the litigation in this area is yet unknown, it is likely that FmHA will be compelled to adopt at least some additional procedural protections implementing section 1981a. The standards for these procedures are outlined only in a cursory fashion in the statute itself. Consequently, whatever permanent standard is adopted, be it the present temporary directives or some other standard, it will undoubtedly be deemed reasonable because of the deference normally afforded agency regulations. This means that a borrower who fails to meet the standard and therefore is denied deferral, will have little hope of successful appeal.

The final question that should be raised with regard to these cases is what application the policies adopted by the courts will have in the future against private lenders? Many of the principles evolved in these cases would receive a warm welcome from borrowers in the commercial sector. Although commercial loans have no entitlement characteristic, federal intervention in the relationships between private lenders and borrowers has been increasing.[267] Since the lender-borrower relationship is continually changing, it is highly probable that the rights established in these cases will be asserted elsewhere.

Jeffrey B. Klaus

267. One example is the federal truth in lending laws, which are designed to protect private borrowers from undisclosed or misleading interest charges. 15 U.S.C. § 1 601-1693(r) (1976).