An Analysis of the Family Farmer Bankruptcy Act of 1986

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AN ANALYSIS OF THE FAMILY FARMER BANKRUPTCY ACT OF 1986*

On October 27, 1986 Public Law No. 99-554 was enacted amending the Bankruptcy Code. Known as "The Bankruptcy Judges, United States Trustees, And Family Farmer Bankruptcy Act of 1986," Congress, inter alia, added Chapter 12 to the Code which specifically attempts to redress the unique economic problems facing the American family farmer by providing a bankruptcy option that is contoured to this limited constituency. This Note will analyze the historical and legislative antecedents of Chapter 12, its provisions, its chances for success, and the impact, Chapter 12 may have in the non-farm bankruptcy context.

I. HISTORICAL ANTECEDENTS OF CHAPTER 12

A. Section 75

Providing a separate bankruptcy avenue for farmers has historical precedent. As part of Congress' legislative response to the De-

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A key factor that needs to be considered is the precedent set by establishing another limited constituency with special rights in bankruptcy. There are already other special groups that have special rights in bankruptcy . . . . Each of these groups is fairly small, has unique characteristics, and longstanding public policy reasons behind its special status. We wonder whether these same characteristics apply to family farmers. If special exceptions are made this year in the Bankruptcy Code for family farmers, will we be back next year attempting to amend the Code to protect automobile dealers or home builders or some other special group which may be experiencing economic difficulties? This is a rhetorical question, but the potential for the Balkanization of the Bankruptcy Code is quite real.

Id.
pression, section 75 was added to the Bankruptcy Code in 1933. Its purpose was to permit farmers to rehabilitate via composition or extension agreements with their creditors. This initial attempt to provide farmers with a bankruptcy solution beyond mere liquidation did not work as intended since creditors still maintained the power to approve the farmers' proposed plans. If approval was not obtained, the farmers' options were dismissal of the bankruptcy case or liquidation. As a result, one year later subsection (s) was added to section 75 revolutionizing the relationship between farm debtors and creditors. This amendment to section 75 had "the express purpose of impinging upon the rights of secured creditors since its main premise was to provide a moratorium for farmers to relieve them from overburdening mortgage indebtedness and the harshness resulting from a loss of their farms through foreclosure in a period of unprecedented depression."

Thus, whereas before 1933 "bankruptcy proceedings did not generally affect secured creditors at all," such creditors (primarily the mortgagee of the farmland) now faced the spectre of a "cram down." Under the new subsection (s), if the creditor and farmer could not agree on a redemption plan, "the farmer was adjudged a bankrupt, but was given a moratorium of five to six years within which to buy back his property from the court and his creditors." During this moratorium, the farmer was allowed to keep his property in return for a "reasonable rental," and the farmer retained the exclusive right to redeem his property at its appraised value. What this meant was that the farmer could scale down his indebtedness, regardless of the encumbrances on it, to its depression-appraised value and redeem his property at that value, thereby forcing the creditor to assume the full brunt of the deflation in farm land values. Predictably, the addition of subsection (s) led creditors, already displeased with section 75 as originally enacted, to attack its

6. Anderson & Rainach, supra note 3, at 450 (emphasis in original).
7. Id.
8. Id. at 449.
9. Id.
10. Id. at 449-50.
11. Id. at 448. But see id. at 451 n.59, where Anderson cites to a particularly vitriolic

http://scholarlycommons.law.hofstra.edu/hlr/vol15/iss2/6
constitutionality. Initially creditors were able to persuade the Supreme Court to strike down section 75 as amended, but a subsequent legislative adjustment to section 75 survived a constitutional challenge. It remained in effect until 1949 when it expired since it had never been made a permanent part of the Bankruptcy Code.

The constitutional version of section 75, therefore, provided farmers with the capability of rehabilitating and thereby retaining their farms. First, it allowed farmers to attempt to negotiate a composition or extension plan with their creditors. If the negotiations proved unsuccessful, the farmer was adjudged a bankrupt, but then was permitted two further options in his endeavor to retain his farm. The farmer’s first option, subject to the creditors’ consent, was to pay one percent of the current appraised value of the property for the first year as interest and then over a six year period repay the full appraised amount of principal at a nominal interest rate. If the farmer could not obtain the creditors’ consent, as a second option he could choose to retain his property and farmland, and in return for a reasonable rental value approved by the court, he was given a three-year moratorium during which he retained the exclusive right to purchase his property at its appraised value.

This led one commentator to conclude that:

statement in support of section 75, by Congressman Charles U. Truax, who stated:
When this law becomes effective I can but wonder what will become of the ruthless money lender when the breath of Gold leaves his feculent body and a financial death stops the rattling of his grasping brain, for he is unfit for the higher realm of life and too foul for the one below. He cannot be buried in the earth, lest he provoke a pestilence; nor in the sea, lest he poison the fish; nor swing in space like Mahomet’s coffin, lest the circling worlds in trying to avoid contamination, crash together, wreck the universe, and bring again the noisome reign of chaos and Satan.

Id. (quoting Hanna, Agriculture and the Bankruptcy Act, 19 MINN. L. REV. 1, 8 n.8 (1934)).
12. See Anderson & Rainach, supra note 3, at 451-54. The Supreme Court, in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), struck down subsection (s) as unconstitutional by holding that the deprivation of the mortgagor’s property rights had been too broad under subsection (s). Anderson & Rainach, supra note 3, at 456. But see infra notes 13-18 and accompanying text.
13. Act of August 28, 1935, ch. 792, 49 Stat. 942. See Anderson & Rainach, supra note 3, at 455-60 (discussing Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937), and Wright v. Union Central Life Insurance Co., 311 U.S. 273 (1940), where the Supreme Court affirmed Congress’ “right, under the bankruptcy power, to take away certain property interests of creditors within constitutional limits in order to provide a comprehensive rehabilitation program for farmers during widespread conditions of economic depression”).
15. Id. at 463.
16. Id.
17. Id. at 464. The appraised value was fixed by the court upon initial adjudication of the case, but there could be a reappraisal prior to the actual redemption of the property.
Congress has been given the constitutional power to enact comprehensive legislation . . . expressly designed to (a) enable the farmer to keep his farm land and (b) allow him to rehabilitate himself through his labor and efforts in the face of depressed economic conditions. Specifically . . . bankrupt farmers . . . [were] required to pay only the appraised value of their property to redeem it, rather than the full amount of any burdensome mortgage debt. This . . . factor is especially important, since the Depression appeared to create a deflation in the fair market value of farmland. The deflation in farm values, when coupled with the overburdening farm debt existing prior to and during the Depression, created an impossible situation for the farmer, to wit; he was simply not able to produce enough from the sale or refinancing of his farm, especially in a forced liquidation, to pay off the entire mortgage indebtedness, especially as it increased as interest accrued.\(^{18}\)

It is apparent, therefore, that the legislative seed for the 1986 Act was planted more than fifty years ago via section 75. \(^{19}\)

**B. Chapter XII — Real Property Arrangements**

Due to the fact that section 75 was unavailable after 1949,\(^{20}\) a farmer who needed to affect his primary secured debt, the mortgage on his land, could instead turn to Chapter XII.\(^{21}\) While the primary utilizer of Chapter XII was the urban real estate entrepreneur who was caught in a real estate recession in the mid-1970's,\(^ {22}\) nevertheless, the options provided a Chapter XII debtor who sought to rehabilitate and retain his property are historically relevant to the farmer whose primary debt is his encumbered farmland.\(^ {23}\)

Under Chapter XII, the term and interest rate of the debtor's mortgage could be altered and future payments delayed. Any deferred payments could simply be added to the mortgage. Additionally, while the mortgagee's collateral had to be adequately protected, that protection was only to the extent of the value of the collateral. If the debtor retained the property he only had to pay the mortgagee the appraised value of the land with the deficiency treated as an un-
secured claim. While a mortgagee was entitled to adequate protection of the unsecured claim, unsecured creditors needed only to receive liquidation value. If there was zero equity securing the mortgagee’s claim, he was given unsecured creditor status and his recorded mortgage was expunged from the public records.

As a result, Chapter XII could be utilized in a way similar to section 75 in that it enabled the debtor to shift the risk of deflated land values to his creditors while simultaneously permitting the debtor to retain ownership of the property as part of his rehabilitation. The possibility of this maneuver has been revived in the 1986 Act.

C. Treatment of Farmers under the Bankruptcy Reform Act of 1978

Certain portions of the Bankruptcy Reform Act of 1978 afforded special status to farmers. Although an involuntary petition could not be filed against a farmer under the Bankruptcy Act of 1898, the vague definition of farmer under that Act led to costly threshold litigation. As a result, “farmer” was redefined as follows:

“[F]armer” means person that received more than 80 percent of such person’s gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was com-

24. Id. at 464.
25. Id. at 465. Additionally, in Chapter XII, an undersecured creditor’s deficiency claim could be extinguished under the plan. Also, if the debtor abandoned the collateral, the debt the collateral was securing was imputed to the collateral’s appraised value thereby satisfying the debt. Chapter XII, though, did not permit reduction in mortgage principal if there was equity in the property exceeding the amount of the mortgage. Id. at 465-66.
26. Id. at 469.
27. See infra notes 154-56 and accompanying text.
29. Ch. 541, 30 Stat. 544, § 4(b) (1898) (person engaged chiefly in farming or the tillage of soil could not be adjudged an involuntary bankrupt). See B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 2.04(2)(a), at 2-9 (1986).

Under the former bankruptcy act farmer was defined as follows:

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

menced from a farming operation owned or operated by such person.  

The eighty percent test, therefore, replaced the "principal part of income" test and brought more certainty as to which "farmers" would be protected from involuntary bankruptcy. The umbrella of protection, however, did not extend to all those whom Congress may have intended the exemption to cover. While the House reported that the exemption from involuntary proceedings "was intended to cover only small farmers," data indicated that sixty-three percent of the 2.4 million farmers in the United States in 1980 could not meet the eighty percent test. Statistics indicated, however, that larger farm operations had little problem qualifying for the exemption. Even having more impact on the scope of the exemption was the substitution in the 1978 Act definition of "farmer," of the term "person" for the term "individual personally engaged in." This opened up the exemption to partnerships and corporations, and even to conglomerates "engaged in [a] multimillion dollar agribusiness (who) may now receive the same protection from involuntary bankruptcy as does the individual who operates a small family farm." This, in conjunction with the broad definition Congress adopted for what constitutes a "farming operation," led one commentator to note that if:

Congress intended to protect the true small farmer from the filing of an involuntary bankruptcy proceeding . . . given the growing importance of off-farm income in the farm sector, particularly among smaller farmers, a definition of "farmer" that depends exclusively on an earnings-percentage test may be too restrictive. The current definition of "farmer" protects a minority of the farms in the United States by number, but does cover those enterprises which account for over 90% of our agricultural production.

31. See Marsh, supra note 29, at 164.
32. Id. at 164-66.
33. Id. at 166. Congress, in the 1986 Act, may have considered this anomaly by adopting both an income and debt test. See infra notes 35, 106-10 and accompanying text.
34. See B. Weintraub & A. Resnick, supra note 29, ¶ 2.04 (2)(a) at 2-8.
35. 11 U.S.C. § 101(18) (1982). Farming operation was defined as including "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state."
36. Marsh, supra note 29, at 166-67. See also Kunkel, Farmers’ Relief Under the Bankruptcy Code: Preserving the Farmers’ Property, 29 SAN DIEGO L. REV. 303, 304 (1984) (indicating that even with a broad construction of the income-percentage test, farmers with significant off-farm income may have been excluded from the then definition of farmer).
The policy rationale behind the farmers' involuntary exclusion is that "[f]armers are excepted because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy." This policy is reflected further in the 1978 Act. If a farmer files a voluntary Chapter 11 or Chapter 13 proceeding, these proceedings cannot be converted to a Chapter 7 liquidation over the farmer's objection. Farmers, however, were not fully protected from being involuntarily forced to liquidate. For example, Chapter 11 permits creditors to submit a liquidation plan, and courts have approved such plans over a farmer-debtor's objection when the debtor has failed to file his plan within the 120 day statutory period following his petition filing.

Another special protection afforded farmers is through the applicable exempt property rules permitted under the 1978 Code. Since states were permitted to opt out of the federal exemption system, in many states the state exemption laws are the debtor's only option. This, in turn, has proved to be a boon to farmers in certain states. For example, the Iowa exemption statute has no dollar cap on the tools and instruments a farmer may claim as exempt. Oklahoma, Minnesota, and Texas also provide farmers with advan-


39. See In re Jasik, 727 F.2d 1379 (5th Cir. 1984); In re Button Hook Cattle Co., 747 F.2d 483 (8th Cir. 1984); In re Tinsley, 36 Bankr. 807 (W.D. Ky. 1984). See also B. WEINTRAUB & A. RESNICK, supra note 29, ¶ 2.04 (2)(a) at 2-8 n.7. But see Bland, Insolvencies in Farming and Agribusiness, 73 Ky. L.J. 795, 817-19 (1985) (indicating that courts are split concerning whether to approve a farm creditor's liquidation plan).


42. See Pearson, supra note 29, at 309 n.16.

43. IOWA CODE ANN. § 627.6 (West Supp. 1986). It should be noted that debtors, other than farmers, are permitted tools of the trade exemption, however, Iowa provides separate subdivisions of their exemption statute for farmers and other professions. Compare IOWA CODE ANN. § 627.6(10)(c) (West Supp. 1986) (exemption for other professions) with IOWA CODE ANN. § 627.6(10)(d) (West Supp. 1986) (exemption for farmers). While there is a $5,000 cap on tools of the trade exemption for all Iowa debtors, the fact that a farmer performs mechanic and carpentry functions has led to a broader interpretation of what constitutes a farmer's tools of the trade. See In re Hahn, 5 Bankr. 242, 245 (S.D. Iowa 1980) (operation of farm requires many manual skills necessitating use of tools to maintain buildings, mend fences, repair machinery). See also Grossman, Troubled Times: The Farm Debtor Under the Amended Bankruptcy Code, 38 OKLA. L. REV. 579, 600-01 (1985) (discussing various state exemption statutes).
tageous exemption statutes.

II. ECONOMIC AND LEGISLATIVE ANTECEDENTS OF THE 1986 ACT

Historically, therefore, farmers have been afforded special attention by the Bankruptcy Code. Despite this attention, the inadequacies of the 1978 Act in meeting the current farm economic crisis have led Congress to focus on farmers as a distinct constituency under bankruptcy law.

A. The Economic Plight of the American Farmer

There is strong evidence that due to a unique set of natural and artificial forces the farm economy has faced depression-like conditions in the 1980's.

Unlike most other portions of the economy, an individual farmer's fortunes are dependent on the weather. While it is true that for years "farmers combatted drought and flood, pest and famine . . . without governmental intervention [and] prospered under those conditions," when the vagaries of the weather are combined with other factors, such as the 1980 grain embargo, a decreased demand for American agricultural products in the world market, several years of bountiful harvests, low commodity prices, and significant inflationary increases in production costs, it is easy to

44. See Grossman, supra note 43, at 601. See also Bland, supra note 39, at 802-03; Kunkel, supra note 36, at 312-15.

45. See Grossman, supra note 43, at 581-82. See also infra notes 46-59 and accompanying text.

46. See, e.g., Hearings II, supra note 1, at 105-06 (statement of R. Fred Dumbaugh) (noting severe drought conditions in Iowa from 1981-1983); Anderson & Rainach, supra note 3, at 442 (discussing the devastating economic effects of a 1981 drought in Louisiana).

47. Kotis, Chapter 13 and the Family Farm, 3 BANKR. DEV. J. 599, 601 (1986).

48. See, Kotis, supra note 47, at 609. See also Anderson & Rainach, supra note 3, at 439-43; Bland, supra note 39, at 795-97. Farmers seem to walk a very precarious tightrope. Poor weather conditions and weather catastrophes seem to wreak as much economic havoc as perfect weather conditions which lead to bountiful crop yields. See Kotis, supra note 47, at 609 n.87. For further discussion concerning the economic stress farmers have been under in the 1980's, see generally Massey, Farmers in Crisis: A Challenge to Legal Services, 18 CLEARINGHOUSE REV. 702 (1984) (detailing the social and legal problems low income farm families face when dealing with the Farmers Home Administration, a major farm lender). Another contributor to farm economic stress has been several grain elevator failures occurring in the late 1970's and early 1980's. For farmers' problems as grain elevator creditors see, e.g., Culhane, And When She Got There, The Cupboard Was Bare: The Producer's Plight in Grain Warehouse Insolvency, 17 CREIGHTON L. REV. 699 (1984); Dewey, Grain Elevator Bankruptcies, 30 SAN DIEGO L. REV. 326 (1985); Looney, Hamilton & Culver, Marketing Farm Products: The Farmer as Creditor and Related Problems of Bankruptcy, 4 AGRIC. L.J. 565 (1983).
understand the severe economic stress that might be caused. To most observers, however, the single most detrimental economic occurrence leading to the current farm crisis was the massive debt incurred by farmers in the 1970's.49

During the 1970's, inflation and high worldwide demand for American farm exports caused an increase in farm prices and income. More significantly, the value of farmland "increased faster than the rate of inflation and real interest rates fell to extremely low levels."50 Based on this newly created equity, and prompted by more than eager lenders willing to loan "upon appreciated farm land values rather than upon the farmer's ability to generate sufficient income,"51 the usually economically conservative farmer began borrowing heavily at relatively high interest rates in order to expand his production capability.52 This borrowing "creat[ed] a 'mountain of debt' nearly equal to one quarter the total debt of all developing nations."53 Unfortunately, due to unprecedented decreases in farm land values, the paper collateral collapsed as quickly as it had been generated.54 Testimony before Congress indicated that "[n]early $150 billion worth in owner's equity was lost through land value depreciation between 1981 and 1985."55 As a result of the excess production capacity, lower worldwide demand, and low commodity prices,56 the economic schism between farm income and farm debt grew increasingly worse during the 1980's.57 It was estimated that more than one-third of all farms were technically insolvent or exper-

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49. See Kotis, supra note 47, at 609-10. See also Anderson & Rainach, supra note 3, at 441; Bland, supra note 39, at 796.
50. Kotis, supra note 47, at 608.
51. Bland, supra note 39, at 796.
52. See Bland, supra note 39, at 796; Kotis, supra note 47, at 608.
54. See Kotis, supra note 47, at 610 n.96. Kotis cites a 1985 N.Y. Times article concerning a Department of Agriculture report that farmland values dropped 12% in the past year which was characterized as the largest one-year drop since the Depression. This drop came on the heals of four straight years of farmland value decreases. The article indicated that the drop was so steep the Department delayed the release of the report in order to re-check the figures.
56. Id. at 84. Evidencing the continuing problem with low commodity prices, the N.Y. Times recently reported corn prices to be at a 15 year low. N.Y. Times, Feb. 14, 1987, at 44, col. 5.
57. See, e.g., Grossman, supra note 41, at 581. (Department of Agriculture estimated net farm income for 1984 to be at $29 to $33 billion and farm debt for 1984 to be $215 billion with the picture for 1985 being even worse, i.e., $24 billion in income vis a vis $213 billion in debt).
iencing extreme financial difficulties by 1985. All of these extraordinary circumstances led to a renewed focus on the bankruptcy law as a possible means by which farmers could reduce the obligations incurred by over-leveraging in the 1970's.

B. Inadequacy of the 1978 Act to Meet the Rehabilitation Needs of the Farmer

As previously discussed, while the 1978 Act did afford farmers certain selected advantages, it could not anticipate the full breadth of circumstances that would shortly befall the American farmer. Thus, when farmers turned to the 1978 Act, looking to rehabilitate and gain the ubiquitous fresh start, bankruptcy law seemingly did not supply the needed remedy.

1. Problems with Chapter 13 Relief for Farmers. — Chapter 13 was enacted primarily to deal with consumer debtors. As a result, the relatively low debt ceiling requirement, of $100,000 in unsecured debt and $350,000 in secured debt, effectively precluded farmers from seeking Chapter 13 relief. Additionally, Chapter 13 relief is not available to corporations and partnerships. Since the definition of farmer in the 1978 Act was expanded to include corporations and partnerships, it seemed that Congress had not intended Chapter 13 to be available to such farmers. Chapter 13 presents other formida-

58. Kotis, supra note 47, at 599.
59. Evidencing this renewed interest was the breadth of law journal articles generated between 1982 and 1986. See supra notes 3, 29, 36, 39, 43, 47, 48 and accompanying text.
60. See supra notes 28-44 and accompanying text.
61. See supra notes 45-59 and accompanying text.
62. See infra notes 63-87 and accompanying text. But see Hearings II, supra note 1, at 24, where Congressman Tauke of Iowa stated that:
I think it is important for us to recognize that from a historical perspective, farmers have always made effective use of bankruptcy courts. While, as a general rule, Americans have used the bankruptcy courts on the ratio of 2 out of every 1,000, farmers have traditionally used the bankruptcy courts at the rate of about 8 out of every 1,000 . . . . Obviously this has been exacerbated substantially over the last several years when we have had record numbers of farmers making use of the bankruptcy courts.
Id. See also id. at 101 (statement of R. Fred Dumbaugh) (indicating that all 30 Chapter 11 farm reorganization cases that his firm handled resulted in successful plan confirmations).
63. See Kotis, supra note 47, at 622. But see Dole, The Availability and Utility of Chapter 13 of the Bankruptcy Code to Farmers Under the 1984 Bankruptcy Amendments, 16 Tex. Tech. L. Rev. 433, 434 (1985). Dole claimed Chapter 13 would be available to a substantial number of farmers based on Department of Agriculture statistics indicating that the average indebtedness of farm families at the beginning of 1983 was just slightly over $90,000.
64. See supra notes 34, 35 and accompanying text.
65. See Landers, Reorganizing a Farm Business Under Chapter 11, 5 J. Agric. Tax'n
ble barriers for farmers who do meet its basal requirements. For instance, the regular income requirement simply does not conform to the seasonal nature of farming, which dictates that a farmer's income will not be generated until his crops are harvested and sold. Projecting a farmer's disposable income, which needs to be considered for confirmation of a Chapter 13 plan, also is problematic in that:

[T]he yield of crops may never be predicted with a high degree of certainty until those crops are actually harvested and the price that a farmer receives for his crops and the income that he might earn can never be predicted until his crops are sold and he actually receives the funds.66

Since a Chapter 13 plan must be filed with the petition itself, or fifteen days thereafter, and payments under the plan must begin within thirty days of its filing,67 a farmer's inherent cash flow problem would effectively prevent an otherwise qualified farmer from availing himself of Chapter 13 relief. Finally, the inability, under section 1322(b)(2), to affect debt secured by one's principal residence made Chapter 13 difficult for farmers to utilize since their residence is inextricably part of the security farm lenders require.68

& L. 11, 13-14 (1983) (indicating why Chapter 13 is basically not available to farmers).


68. See Kotis, supra note 47, at 627. See also Hearings II, supra note 1, at 176, (statement of Judge Thomas M. Moore) (indicating that one or more of farm lenders security instruments usually included the farm residence). But see Dole, supra note 63, at 468, who indicated that a secured creditor whose collateral included the farm house, and the working area of the farm, would not be immunized from having his secured debt modified under § 1322(b)(2). The author's opinion was premised on In re Morphis, 30 Bankr. 589, 594 (N.D. Ala. 1983) where Transamerica, a secured creditor with a mortgage on a debtor's vacant lot, and debtor's mobile home located on an adjacent lot, was not protected by § 1322(b)(2) with the court holding to be protected by § 1322(b)(2), “[t]he claim must be secured only by a security interest in real property that is the debtor's principal residence [and here] Transamerica holds a mortgage on two lots owned by the debtor. The mobile home owned by the debtor is affixed to only one of these lots, with the other lot being vacant . . . . Consequently, Transamerica is secured by real property of the debtor other than the real property that constitutes the debtor's principal residence. Therefore . . . the debtor's plan may pro-vide for reducing the contractual rate of payment on Transamerica's claim. Id. (emphasis in original).
2. Problems with Chapter 11 Relief for Farmers. — By far, most farm reorganizations have been filed under Chapter 11. While some farmers have been able to successfully reorganize under Chapter 11, the breadth of the current farm crisis has rendered Chapter 11 relatively ineffective for farmers wishing to reorganize. The major hurdles farmers have faced when utilizing Chapter 11 have been the adequate protection standard imposed in order to retain collateral, the time constraints imposed on plan filing, the absolute priority rule, and the inability to liquidate non-essential assets free of liens prior to confirmation.

Providing secured creditors adequate protection while being overencumbered, and having little, if any, assets available to secure necessary operating capital is extremely difficult. If the American Mariner form of adequate protection is required as well, i.e., protecting a secured creditor's lost opportunity costs via periodic "interest payments at the market rate on the liquidation value of the collateral," most commentators agree that a farm reorganization will simply not succeed. What makes the lost opportunity cost requirement especially pernicious to the farmer's reorganization effort is that creditors invariably claim they are not adequately protected, and seek relief from the automatic stay early in the reorganization effort, thus "diverting the [farmer-debtor's] resources and attention away from the important task of plan formulation; the debtor is forced to spend his time and money in battling motions to lift the automatic stay."  

69. See, e.g., Hearings II, supra note 1, at 24-25 (statement of Congressman Thomas J. Tauke) (indicating that in the Northern District of Iowa 252 Chapter 11 cases were filed in 1985, the majority of which were farm related, and of the 604 pending Chapter 11 cases in the District over 500 were farm related); id. at 243 (statement of Terry M. Anderson) (indicating 148 of 215 farm bankruptcies filed in Nebraska were filed under Chapter 11). See also supra note 65. But see Hearings II, supra note 1, at 165 (statement of Judge A. Thomas Small) (indicating that 52% of all cases in the Eastern District of North Carolina were filed under Chapter 13, but not indicating what percent of those were farm bankruptcies).

70. See supra note 62.

71. See Hearings II, supra note 1, at 176-77 (statement of Judge Thomas M. Moore).

72. In re American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984).

73. Id. at 435. See also Hearings II, supra note 1, at 178 (statement of Judge Thomas M. Moore).

74. See, e.g., Hearings II, supra note 1, at 123 (statement of R. Fred Dumbaugh); id. at 163-64, 178 (statement of Judge Thomas M. Moore); id. at 165 (statement of Judge A. Thomas Small); id. at 251 (statement of Terry M. Anderson); id. at 267-68 (statement of William L. Nedler). But see id. at 156 (letter of John C. Dean).

Chapter 11 also imposes a 120 day period for filing a plan. Some commentators feel that 120 days is an unrealistic time-frame, however, since “[t]he farmer-debtor usually needs to complete one crop year under the Chapter 11 to determine whether he can devise a plan which he can fund out of his farm operations.” The importance of permitting farmers a more realistic time frame to file a plan is emphasized when one considers the fact that creditor liquidation plans have been approved when the farmer has failed to meet the 120 day deadline.

The fair and equitable standard, as applied via Chapter 11’s absolute priority rule, also makes obtaining confirmation of a farmer’s reorganization plan remote. Since each impaired class of creditors is entitled to vote on the plan, it is unlikely that the farmer will be able to obtain an acceptance confirmation since the farmer is usually faced with “a single secured creditor with a large deficiency (unsecured) claim [who] may, by casting a ballot rejecting the plan, prevent the debtor from obtaining the acceptances of the unsecured class.” For the farmer to obtain a cram down confirmation at this point, however, he must be able to meet the absolute priority rule, which calls for each senior class claim being satisfied in full before the next descending class can receive any payments. In essence, the debtor is not allowed to retain his non-exempt property unless the secured and unsecured creditors are paid in full. This has the effect of preventing the farmer from effectively using the cram down in order to continue in operation because:

Assuming the debtor can confirm a plan over the dissent of an impaired class of creditors in order to keep his farm, he must still, in cramming down on this class, pay in full. This creates many situa-

76. Hearings II, supra note 1, at 176 (statement of Judge Thomas A. Moore). But see Hearings II, supra note 1, at 135 (statement of Oliver Hansen) (calling for an accelerated confirmation hearing once farmer’s reorganization plan is filed).

77. See supra note 39 and accompanying text. See also Kotis, supra note 47, at 626.


79. Hearings II, supra note 1, at 168 (statement of Judge Thomas Small). See also Hearings II, supra note 1, at 176 (statement of Judge Thomas M. Moore).


tions where farmers come out of reorganization highly leveraged (after going into the reorganization case with too much debt), causing them to fail to consummate and fully complete their plans . . . . Therefore, the rule of absolute priority, applied in farmer reorganization cases under Chapter 11, often perpetuates the initial problem, that is, heavy indebtedness that cannot be repaid because of the diminished sales prices for crops created by over-production. 83

Finally, since commentators feel that scale down of a farmer's debt and his operations is the key to a successful reorganization, allowing farmers to expeditiously sell non-essential, but encumbered, farmland and equipment will enhance the reorganization efforts. 84 Currently, case law suggests that a trustee may not have authority via section 363(f) to permit a preconfirmation sale of the bulk of debtor's assets; rather, section 363(f) may permit just preconfirmation sales of comparatively small portions of the estate. 85 Additionally, since consent of the secured party is one method of obtaining authorization for such sales, 86 a secured party may strategically delay his decision, and perhaps ultimately refuse to consent, in hope of defeating the reorganization. Even though the trustee will eventually be able to conduct the sale without the secured parties' consent, the delaying tactics may adversely affect the reorganization's chances for success. 87

III. CONGRESSIONAL RESPONSE TO FARMER'S BANKRUPTCY PROBLEMS

In response to the apparent need for special bankruptcy relief for farmers, several bills were initiated and hearings in the House and Senate were conducted to examine the problem. 88 The final result of this Congressional activity was the enactment of Chapter 12. The initial proposals concerning farmer bankruptcy relief, however, suggested amending portions of Chapters 11 and 13.

83. Anderson, supra note 81, at S15082.
84. See Hearings II, supra note 1, at 176 (statement of Judge Thomas M. Moore).
87. Hearings II, supra note 1, at 179 (statement of Judge Thomas M. Moore).
88. See supra notes 1, 66.
A. Initial Congressional Proposals for Providing Farmer Bankruptcy Relief

H.R. 1397 and H.R. 1399 were the subject of the first Congressional hearing on this matter. Essentially, these bills were designed to allow more farmers to utilize Chapter 13 since it was felt that Chapter 13 was "simpler" and "less expensive" than Chapter 11. This attitude was summed up well by a witness:

[M]aking Chapter 13 more widely available to family farm debtors is desirable and . . . Chapter 11 is not adequate to meet their needs. Chapter 13 is less expensive, permits more expeditious adjustment in the form of a confirmed plan, does not permit displacement of the debtor in operation and possession of the property of the estate, obviates the need for and the expense of a creditors' committee, eliminates the necessity for preparation of and hearing on a disclosure statement and the solicitation and procuring of acceptances of a proposed plan, relieves the debtor from the pressure of co-debtors sued by creditors who are or will be provided for in the plan, relieves the debtor from the necessity of dealing with the complexities engendered by §1111(b) . . . and protects the debtor from the risk of the cram-down of a liquidation plan formulated by a creditor.

In order to make Chapter 13 more available to farmers, the bills sought to lower the percentage income test needed to qualify as a "family farmer," raise the Chapter 13 debt limit for family farmers to $1,000,000, and extend the Chapter 11 and 13 time limits for submitting a plan and making plan payments. Eventually the two bills were consolidated into H.R. 2211, which was passed by the House.

H.R. 2211 adopted a debt test in lieu of the income test for defining family farmer. It was felt that the debt test could more realistically reach the family farmer target group, "because many family farmers must accept non-farm employment in order to keep..."
their farms. In calculating the debt, the mortgage on a farmer’s principal residence was included if it arose out of the farming operation. H.R. 2211 also removed another barrier by amending section 1322(b)(2), and thus permitted a farmer to modify his home mortgage, as long as the residence was within a reasonable proximity to the farming operation. Additionally, H.R. 2211 raised the Chapter 13 debt ceiling for family farmers to $1,000,000, allowed a corporation to file as a family farmer, and recognized the seasonal nature of farming by requiring the family farmer simply to have *regular annual income*, rather than the *regular income* required of Chapter 13 debtors.

The other significant changes included in H.R. 2211 involved the time limits imposed by both Chapter 11 and Chapter 13. Farmers were given 240 days to present a Chapter 11 plan and, if the plan was not approved, creditors could not file a plan for an additional sixty days, i.e., 300 days from the original order for relief. Plan payments could be extended over ten years and initial payments in the Chapter 13 case did not have to occur within the thirty day consumer debtor limit, but rather within a reasonable time as determined pursuant to a court hearing.

Interestingly, H.R. 2211, and the House hearing which preceeded its passage, made little mention of the adequate protection issue. In fact, the only place the issue was prominently discussed was in a letter submitted by the Farm Credit Council, which indicated that the extended period of time to develop a Chapter 11 plan, or begin Chapter 13 payments, would adversely affect farm debtors in that “bankruptcy courts will be more inclined . . . to order adequate protection or to lift the stays because adequate protection is

95. *Id.* at H4773. See also Kotis, *supra* note 47, at 624-25.
101. It is discussed sparingly in three letters, *Hearings I*, *supra* note 66, at 82 (letter of Stephen M. Miller); *id.* at 132-33 (letter of Frank R. Kennedy); *id.* at 173 (letter of Delmar K. Banner). *See infra* note 102.
Within five months of the passage of H.R. 2211, the Senate held its farm bankruptcy hearing. By this time three additional bills were before the Senate, all presenting slight to moderate variations of H.R. 2211. During the hearings the prototype of what eventually became Chapter 12 was submitted by Bankruptcy Judges Moore and Small of the Eastern District of North Carolina. The focus, therefore, was drawn away from simply amending Chapter 11 and Chapter 13 and towards providing farmers limited constituency status via a separate chapter of the Code.

B. The Provisions of Chapter 12

Chapter 12, modeled after Chapter 13, is available only for family farmers with regular annual income. An income and debt test were both adopted in defining family farmer. Thus, to qualify as a family farmer an individual, or individual and spouse, must have not less than eighty percent of their aggregate, noncontingent, liquidated debts arising out of their farming operation as of the date of filing. The debt on the individual’s principal residence will be included in order to meet the eighty percent test as long as that debt arises out of a farming operation. The aggregate debt ceiling is $1,500,000. Additionally, at least fifty percent of the individual’s or couple’s gross income from the preceding tax year must have arisen from the farming operation.

102. *Hearings I*, supra note 66, at 173 (letter of Delmar K. Banner). Perhaps farm advocates' intention at this point was to avoid drawing attention of the creditor's bar. See *id.* at 102, where Herbert M. Graves, one of the drafters of H.R. 1399, stated:

I observe that House Bill 1397 addresses changes to Chapter 11. Professor TeSelle and I have opposed amending Chapter 11 for some rather obvious reasons... perhaps most importantly, any amendment to Chapter 11 draws the attention of the creditor's bar. I believe that amending Chapter 11 would draw unnecessary opposition to the amendment... It seems to me that the amendments proposed in Chapter 13 draw less attention and concern by the creditor's bar, hence less opposition.

*Id.*


104. *Id.* at 185-212.

105. *Id.* at 289 (statement by Senator Charles E. Grassley) (suggesting that the hearings indicated that there was precedent for creating a separate portion of the bankruptcy code exclusively for farmers' benefit).


107. *See 11 U.S.C.* § 101(17)(A) (Supp. 1987). Thus a farm couple with a $200,000 mortgage on the farmhouse, $1,000,000 in farm operating debts, and $300,000 non-farm related debts would meet the 80% test.
A corporation, or partnership, can also qualify as a family farmer. In this case, more than fifty percent of the outstanding stock or equity must be held by one family and/or its relatives, and the family or relatives must conduct the farming operation. Additionally, eighty percent of the entity’s assets must be related to the farming operation, and eighty percent of the entity’s debt (which can include debt associated with one shareholder’s or partner’s principal residence), must arise from the farming operation. The aggregate debt ceiling is $1,500,000, and any stock issued by the entity cannot be publicly traded.

Once the Chapter 12 petition is filed the automatic stay is in effect, as is a co-debtor stay. The adequate protection provision of section 361 is not applicable in Chapter 12, and instead is replaced by a separate test as contained in section 1205. Under section 1205 adequate protection can be provided via cash payments, periodic cash payments, additional or replacement liens, or any other relief (other than granting an administrative expense priority), that protects the secured parties’ property value, as opposed to “the value of the creditor’s ‘interest’ in property.” Thus, according to Congress, section 1205 “eliminates the need of the family farmer to pay lost opportunity costs . . . .” Additionally, adequate protection for the use of the farmland itself during the stay can be met by the payment of “the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property.”

Chapter 12 provides for the debtor to remain in possession, operate the farm, and gives the debtor most of the rights of a Chapter 11 trustee. The farmer, as debtor in possession, is subject to re-

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109. Id.
113. Id. H.R. CONF. REP. No. 958 at 49, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 5250.
114. 11 U.S.C. § 1205(b)(3) (Supp. 1987). Rent as “adequate protection” is based on the theory that, if the lender had to buy the farmland at foreclosure, the lender would have to rent the farmland until it was re-sold so the lender is simply receiving from the farmer-debtor, as adequate protection, what the lender in all probability would have been receiving had he foreclosed. See Hearings II, supra note 1, at 183 (letter of Judge A. Thomas Small).
moval "for cause, including fraud, dishonesty, incompetence, or gross mismanagement" if requested by a party in interest subject to a court hearing. A trustee is mandatorily appointed in a Chapter 12 case and the farmer is subject to his supervision. According to section 1206, the trustee, in order to scale down the farming operation, is allowed to sell unnecessary assets, including farmland and farm equipment subject to a lien, without the secured creditor's consent, prior to the Chapter 12 plan's confirmation. The secured creditor's interest (i.e., lien) attaches to the proceeds of the sale, and the secured creditor has the right to bid at the sale pursuant to section 363(k). Cash collateral, however, cannot be used without a secured creditors' consent.

The Chapter 12 plan can only be filed by the debtor and must be filed within ninety days of the petition filing. The court has the discretion to extend this period if it is "substantially justified." The Chapter 12 plan's mandatory and discretionary provisions are similar to those of Chapter 13 except that Chapter 12 permits modification of the mortgage on the debtor's principal residence. Additionally, section 1222(b)(8) provides for the sale or distribution of all or part of the property of the estate among those having an interest in such property, and section 1222(b)(9) permits payment of


123. For example the Conferees noted that:

Because section 1227 is modeled after section 1327, family farmers may provide in their plans for post-confirmation financing secured by assets that have revested in the debtor. The debtor may also use revested property to the extent it is not encumbered by the plan or order of confirmation to secure post-confirmation credit.


secured claims for a longer period than the five year outward limit contained in section 1222(c).\textsuperscript{125} Unlike Chapter 13, there is no requirement for plan payments to commence within a certain time of the plan filing.\textsuperscript{126}

Section 1224 provides that, except for cause, the confirmation hearing must occur within forty-five days of the plan filing.\textsuperscript{127} The plan can be confirmed over the objection of creditors. If secured creditors do not accept the plan the court must confirm the plan, if it calls for the secured creditor to retain his lien and receive distribution equal to the value of the allowed amount of the secured claim.\textsuperscript{128} The debtor, as in Chapter 13, can simply release to the secured party the collateral securing the claim in order to obtain confirmation without his acceptance.\textsuperscript{129}

Unsecured creditors must receive at least liquidation value under the Chapter 12 plan.\textsuperscript{130} If the unsecured creditor or the trustee objects to the plan the court can confirm over the objection if the plan calls for full payment of the unsecured creditor’s claim or provides that debtor’s projected disposable income over the length of the plan will be applied to making plan payments.\textsuperscript{131} While the Chapter 12 definition of projected disposable income is similar to the Chapter 13 definition,\textsuperscript{132} it is clear that the Conferees meant to exclude from the projected disposable income calculation monies reasonably necessary to be expended to preserve, continue, or operate a minor business not directly related to the farming operation.\textsuperscript{133}

Like Chapter 13, Chapter 12 provides for a regular discharge and a hardship discharge.\textsuperscript{134} The distinction in the Chapter 13 context is crucial because a hardship discharge does not discharge the debtor from section 523(a) debts while the regular discharge does

\begin{thebibliography}{99}
\bibitem{125} See \textit{11 U.S.C.} § 1222(b)(8), (b)(9) (Supp. 1987).
\bibitem{126} See \textit{11 U.S.C.} § 1326(a)(1) (Supp. 1987). \textit{See also supra note 67 and accompanying text.}
\bibitem{131} See \textit{11 U.S.C.} § 1225(b)(1)(A), (B) (Supp. 1987).
\end{thebibliography}
discharge all but one section 523(a) debt. The distinction in Chapter 12 does not seem as crucial since all section 523(a) debts survive both the regular and hardship discharge. The only distinction seems to be that administrative expenses are dischargeable under the regular discharge but are not under the hardship discharge.

IV. Evaluation of Chapter 12

A. Chapter 12 — Panacea or Detriment to the Farm Sector

Congress' decision to add a separate chapter to the Bankruptcy Code for farmer relief is controversial. One prominent criticism that emerged from the House and Senate hearings was that the real problem faced by farmers was not the bankruptcy law per se but rather the general Federal farm economic policy. For example, Representative Brown of Colorado noted:

If we are concerned about helping American farmers, we are going to be concerned about getting higher prices . . . . The bottom line is, if we want to help farmers it's not just a bankruptcy revision that's needed, but it's a balanced budget, it's elimination of the cargo preference, it's a method that provides higher prices for farmers that grow products.

Taking the argument one step further, several farm creditor witnesses felt that altering the Bankruptcy Code in order to help farmers would do more harm than good. Typical among this testimony was the following:

This legislation merely shifts the farm debt burden from insolvent farmers to farm lenders and suppliers. It does not deal with any of the underlying problems facing the family farmer, particularly the problem of depressed farm prices. Instead, it simply confers a special status on a particular group of farm-related debtors and shifts the losses to the small businessmen, agricultural suppliers, commercial banks, thrifts, and the farm credit system. The banks have limited capacity to absorb losses that are shifted to them. There have been more bank failures this year . . . than in any single year since

137. Hearings I, supra note 66, at 17.
the Great Depression. Roughly half of these are agricultural banks. Instead of making precipitous changes in the Bankruptcy Code at this time, we would encourage Congress to strengthen farm prices and income. 138

An example of Congress's response to the above criticism was given by Senator Grassley:

I harbor no illusions about the ability of the Federal Bankruptcy Code to redress farmers' grievances. I know as well as anyone that the economic cause of the crisis in agriculture lie well beyond the realm of bankruptcy. But hearings in the House and Senate led to the unmistakeable conclusion that the Bankruptcy Code doesn't work for farmers. 139

It is clear, therefore, that Congress intended Chapter 12 to be a temporary stop-gap response to a perceived crisis. As Representative Synar indicated in his opening remarks in the House hearing on his proposed farmer bankruptcy legislation, such legislation “is a short-term solution to a crisis which we see; and that crisis is simply that literally tens of thousands of farm families will hit our bankruptcy courts within the next 6 months to a year.” 140 The addition of a seven-year sunset provision reinforces Congress's intention to ensure the temporary status of Chapter 12. 141 Whether the avowed goal of Chapter 12, which is “to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land,” 142 will be met may depend, ironically, on behavioral and attitudinal characteristics seemingly indigenous to farmers. According to one observer:

Unfortunately, there is a great deal of mistrust and apprehension about lawyers in the agricultural community. . . .

Farmers have unique characteristics. As a group, they are fiercely independent, reluctant to seek or follow outside advice, and, in many instances, unable to admit a problem exists or discuss the

138. Hearings II, supra note 1, at 146, 148 (statement of John C. Dean) (representing the Independent Bankers Association of America). Dean's remarks were targeted for H.R. 2211. See also Hearings I, supra note 66, at 30-31 (statement of James Eartherly); id. at 156 (letter of John R. Block); id. at 168 (letter of Donald E. Wilkinson); id. at 169-70 (letter of B.F. Backlund); Hearings II, supra note 1, at 212-226.
140. Hearings I, supra note 66, at 16.
142. Id.
problem in a logical manner. They are eternal optimists.\footnote{143}

This tendency, therefore, to distrust lawyers and ignore financial problems, “hoping nature will provide the solution,”\footnote{144} may prove to be the bane of Chapter 12 as perhaps it was for farmers attempting to utilize Chapter 11 to reorganize.\footnote{145} If it is true that farmers will not turn to bankruptcy until their “backs [are] against the wall,”\footnote{146} Chapter 12 may be sought too late in the process to be of real help.

Congress, in its attempt to balance creditor and debtor interests in Chapter 12, may have erred in not considering the potential importance of the above “timing” question. For example, a portion of the testimony criticizing Chapter 11 centered around the 120 day deadline for submitting the reorganization plan, and several of the proposals called for, at a minimum, doubling that period.\footnote{147} Con-

\footnote{143. Meyer, \textit{Issues Concerning a Farmer’s Alternatives to Bankruptcy}} \textit{7 J. AGRIC. TAX’N \\& L.} 272 (1985). Meyer continues:

Many view farming first and foremost as a way of life; the land they farm is their life. Farms often are handed down through generations of families, and losing the farm is equated with failing ancestors and relatives. For many, the prospect of quitting farming is particularly frightening because of a lack of nonfarming marketable skills. Many lack good financial records. Farmers, like many others, ignore reality; become frustrated with the system; and become desperate, hostile, and bitter. A significant number of farmers in trouble consider themselves victims of the government’s inconsistent policies and creditors’ encouragement to expand. \textit{Id.} at 272-73.

\footnote{144. Bland, \textit{supra} note 39, at 797. Bland observes that it is common for farmers in financial difficulty to ignore it since they are accustomed to “feast and famine” years. Thus while farmers may tend to sit on their obligations, hoping nature will bail them out, “creditors seldom are optimistic and patient concerning the farmer’s financial situation.” \textit{Id. See also} Pearson \\& Coen, \textit{Bankruptcy Counseling for the Distressed Farmer, 3 THE COMPLEAT LAWYER} 57, 62 (1986) (“[c]ounsel must remember that farmers are generally optimistic. Counsel must restrain the farmer who wishes to make plans based on hoped-for crop yields and prices rather than on past yields and prices”).}

\footnote{145. \textit{See, e.g.}, Landers, \textit{Reorganizing a Farm Business Under Chapter 11}, \textit{5 J. AGRIC. TAX’N \\& L.} 11, 19 (1983). Landers advises that before a farmer considers filing Chapter 11: it is necessary to analyze why the farmer is having financial problems. For example, if the problem is that the farm simply is too small to be profitable, the soil has become unproductive, available markets have diminished in a permanent way . . . or myriad similar reasons, [c]hapter 11 will be of no help . . . [I]mplicit in a decision to file a [c]hapter 11 case is a commitment by the debtor to continue farming and, probably, to suffer some privation and uncertainty in the process. \textit{Id.}}

\footnote{146. \textit{Hearing II, supra} note 1, at 106 (statement of R. Fred Dumbaugh). \textit{See also} \textit{id.} at 176 (statement of Judge Thomas M. Moore) (indicating farmers’ Chapter 11 filing is usually precipitated by a foreclosure proceeding at a point in time where the farmer has little or no money and no available credit).}

\footnote{147. \textit{See, e.g.}, \textit{Hearings II, supra} note 1, at 111 (statement of R. Fred Dumbaugh) (“[i]t is virtually impossible to formulate and prepare a final Plan of Reorganization for a
gress settled on a ninety day period, though, in part to obtain lender support for Chapter 12.\textsuperscript{148} If the majority of expert testimony is to be believed, however, this compromise may have gone too far since, as Senator Grassley noted, "[i]f time limits are not met, the case will be dismissed and cannot be refiled. This will be a powerful incentive to get these cases moving, rather than languishing in the courts."\textsuperscript{149} Thus, while many provisions of Chapter 12 are clearly debtor oriented, if the amount of time given a farmer to devise a workable reorganization is a crucial variable, farmers may find Chapter 12 to be simply an empty promise if their case is dismissed on timeliness grounds.\textsuperscript{150} Since the ninety day period was imposed partly because of a concern over the deterioration of collateral,\textsuperscript{151} perhaps allowing secured creditors lost opportunity costs between day ninety-one and day 240, instead of summarily precluding the farmer from utilizing Chapter 12, would have been a preferable compromise.

From the creditor's viewpoint, while Senator Thurmond stated that, "[t]he conferees intended to maintain the balance in farm communities between suppliers, creditors, and farmers,"\textsuperscript{152} it is clear that Chapter 12 has rekindled the ability of a debtor with a substantially undercollateralized mortgage debt to write down the debt to the current depressed value of his land. The debtor, under Chapter 12, is allowed to keep his land, pay the former secured debtor only "liquidation value" on the newly created unsecured debt, and receive a bankruptcy discharge on the rest of the debt, while the creditor is precluded from sharing in any future reappreciation of the land.\textsuperscript{153} As Senator DeConcini duly noted:

\begin{itemize}
\item farmer much sooner than 240 days from filing
\item id. at 176 (statement of Judge Thomas M. Moore) ("[t]he farmer-debtor usually needs to complete one crop year under the Chapter 11 to determine whether he can devise a plan which he can fund out of his farm operations"). See also supra note 93 and accompanying text.
\item Id. at S15076.
\item 150. Admittedly, § 1221 does provide for court extensions of the 90 day period where substantially justified. See supra notes 114, 120 and accompanying text. Based on the legislative history, however, courts will probably be frugal in granting extensions. See H.R. CONF. REP. NO. 958, 99th Cong., 2nd Sess. 50 (1986), \textit{reprinted in} 1986 U.S. CODE CONG. & ADMIN. NEWS 5227, 5251 (proper operation of Chapter 12 depends on prompt action).
\item See 132 CONG. REC. S15076 (daily ed. Oct 3, 1986) (statement of Sen. Grassley indicating 240 day period to file Chapter 12 plan was rejected in favor of 90 day period due to concern for collateral deterioration without a concomitant promise of a confirmable reorganization plan).
\item Id. at S15075 (statement of Sen. Thurmond).
\item Id. at S15092 (statement of Sen. DeConcini).
\end{itemize}
Why won't every farmer with a substantially undercollateralized loan against his farm declare bankruptcy . . . . I fear that we have created a legal atmosphere that may well encourage farm bankruptcies and that farmers who can now manage to work things out with their creditors in some satisfactory manner to both will no longer have that incentive to reach mutual agreement.\textsuperscript{154}

What Congress could have done to mitigate the harshness of the above result on the creditor was to have included a section 1111(b) type provision in Chapter 12.\textsuperscript{155} This would have allowed the creditor the option of retaining a lien on the land in the amount he was unsecured in place of receiving liquidation value payments under the plan as an unsecured creditor. The creditor would, of course, also receive payments under the plan equal to the scaled down land value. Once the plan is completed the creditor would be left with a lien but without an underlying obligation to enforce the lien against the debtor. Thus, the lien would only become effective, for all practical purposes, if the property, upon appreciating, is transferred in the future. This would give the creditor, who is made to bear the brunt of land value deflation, the ability to participate in land reappreciation if market forces change.\textsuperscript{156}

The data evidencing the plight of the American family farm leaves little doubt that without Government intervention both farm debtors and farm creditors may suffer terminable economic injury.\textsuperscript{157} Whether it was expeditious to intervene through the back-door of the Bankruptcy Code remains to be seen.

\textsuperscript{154} Id.

\textsuperscript{155} Id. See also 11 U.S.C. § 1111(b) (1982).

\textsuperscript{156} Id. See Hearings I, supra note 66, at 40 (statement of James Eatherly). See also Anderson & Rainach, supra note 3, at 467-70. Senator DeConcini argues persuasively concerning why a § 1111(b) type provision should have been included in Chapter 12. Senator DeConcini also voices his fear concerning Congress' tampering with the long held doctrines of adequate protection and absolute priority rule. 132 CONG. REC. S15092 (daily ed. Oct. 3, 1986). It is clear, though, that without adjusting the above doctrines there would have been no point in enacting Chapter 12 since the overriding goal was ensuring that the farmer retain his farm in light of significantly devalued land values and little, if any, unencumbered assets. See H.R. CONF. REP. NO. 958, 99th Cong., 2nd Sess. 48 (1980), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5227, 5249 (Chapter 12 designed to give family farmers fighting chance to reorganize debts and keep their land).

\textsuperscript{157} See supra note 138 and accompanying text. See also Hearings I, supra note 66, at 27. The statement of James Eatherly cited statistics illustrating the dilemma facing agricultural banks. In 1983, 14% of the bank failures involved agricultural banks, but from June 1984 to mid-December 1984 agricultural bank failures had risen to 47%. Id.
B. Chapter 12 in the Non-Farm Bankruptcy Context

Chapter 12 has been described by Senator Thurmond as "an extraordinary response to what is, hopefully, a temporary crisis." Additionally, he labeled it, "an experimental approach to address the concerns of some farmers who cannot be financially restructured under current law." As a result the Senator concludes that:

I believe it will be necessary for Congress to monitor this program very carefully and to be prepared to act quickly to resolve any unintended consequences of its enactment. Perhaps the conditions which have led the Congress to enact the program will ease, making repeal of the program desirable before the 7-year sunset. We must recognize that a novel program such as this may be in need of further refinement.

As this note has indicated, Chapter 12 was enacted specifically in response to a unique set of economic circumstances afflicting a limited constituency. The drafter of an early version of a revised Chapter 13 for farmers indicated that:

We fear that the integration of the general terms and conditions which we describe for the benefit of farmers can and may be construed to be for the benefit of other debtors. The best way to prohibit that kind of construction by courts and lawyers is to place it in a separate subchapter of its own.

Ironically, putting the Family Farmer Act in its own chapter did not prevent courts and lawyers from immediately seeking to analogize their non-farm bankruptcy issues to Chapter 12. The Fifth Circuit in In re Timbers of Inwood Forest Associates, based upon an extended discussion of Chapter 12, and its legislative antecedents, rejected American Mariner and held that adequate protection did not require the payment of lost opportunity costs. While the merits of that decision are beyond the scope of this Note, the majority's reliance on the legislative history preceding Chapter 12 for support of its position was misplaced and misleading. Congress' intention was neither to endorse American Mariner nor to do away

159. id.
160. id.
162. See In re Timbers of Inwood Forest Assocs., 808 F.2d 363 (5th Cir. 1987).
163. 808 F.2d 363 (5th Cir. 1987).
164. In re American Mariner Indus., Inc., 734 F.2d 426 (9th Cir. 1984).
with it completely. Certainly, however, comments taken out of context from the legislative history of Chapter 12 could make it seem otherwise. The overwhelming sentiment of Congress in enacting the 1986 Act was to offer, "family farmers the important protection from creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive fair repayment." The drafters of the 1986 Act would probably find the use of Chapter 12 in a non-farm bankruptcy context to constitute an "abuse of the system" as well.

Steven Shapiro

165. In re Timbers, at 378-79 (J. Jones, dissenting) (accusing the majority of employing "statutory construction by omission" via its interpretation of the 1986 Act's legislative history to support its holding in In re Timbers).
