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Litigation
Summer, 1999

Legal Lore
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THE NORTH DAKOTA NINE AND THE FAMILY FARM

WESTLAW LAWPRAC INDEX

JUD--Judicial Management, Process & Selection

> *In national news today, a federal judge ordered the United States government to stop all FmHA farm foreclosures until such time as the farmers and their families have received their constitutionally guaranteed rights of due process under the law. The class action suit involved some 230,000 farmers in 44 states. The judge enjoined the FmHA from foreclosing on borrowers or from cutting off family living or farm operating expenses unless the farmers are given an opportunity to apply for loan extensions and deferrals. The judge ruled that if application for these services is rejected, the farmer may seek a hearing before a higher FmHA official who was not involved in the initial proceeding.*
>
> --from *Country*, a film starring Jessica Lange.

As the oldest son at home in the midst of the drought and depression that was 1934, I tried to farm a quarter section of land with one team as my power source. Queen was a strong, reliable mare. She did what I needed her to do when I needed her to do it. Prince was a lazy, rawboned gelding. No matter how hard I drove him, I could never get Prince to keep that whiffletree at right angles to the wagon tongue and do his share of the work.

In 1983, I presided over the Farmers Home Administration (FmHA) cases. As I worked through the problems and difficulties of those cases, I found myself comparing Queen to the local agencies--the County Committees, District Directors, and State Director--and Prince to the United States Office of the Secretary of Agriculture, because of the manner in which the farmers loan programs were being administered.

During the latter part of the 1970s and throughout the 1980s, farmers experienced a severe cost-price squeeze. The cost of farming rapidly increased as farmers paid more for fuel, seed, fertilizer, machinery, utilities, and interest on their ever-mounting debts. At the same time, prices they received for their crops and livestock declined. As long as the economy was inflationary, they appeared solvent because land values increased. Starting in 1981, however, land values began to drop. Many farmers were therefore unable to refinance their loans.

The group of farmers who first experienced a programmed trauma of delinquency foreclosures and repossessions were those

who had borrowed money from the FmHA. The FmHA (now the Consolidated Farm Service Agency) was the lender of last resort. If a farmer could not get a loan from traditional sources, he was eligible to apply for a FmHA loan. During the farm crisis of the late 1970s and early 1980s, many farmers turned to the FmHA for financial assistance. Unlike private lenders, ***50** the FmHA was designed in part as a social service agency, charged with supporting the continued existence of the family farm.

In 1978, Congress recognized the emerging farm crisis and enacted the Consolidated Farm and Rural Development Act, Title 7 U.S.C. §§ 1921-96 (CFRDA). Under the CFRDA, the Secretary of Agriculture was empowered in appropriate situations to defer principal, interest, and foreclosure on any outstanding loan for as long as the Secretary deemed necessary. 7 U.S.C. § 1981a. If, due to circumstances beyond his control, a borrower was temporarily unable to continue making payments of principal and interest without unduly impairing his standard of living, such a deferral would be appropriate:

> 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 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 deferred 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 the foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed.

By 1983, there was a widespread disregard of these provisions. Unfortunately, the Department of Agriculture failed to implement the law. The problem had intensified in 1982, when the administration placed delinquency reduction "goals" on FmHA borrowers. County supervisors of the FmHA were required to crack down on delinquent borrowers, and to reduce the delinquencies by 23 percent. State FmHA offices were told that if they failed to meet the "goals," they would lose state rural housing loan allocations. In many instances, the only way to reduce the percentage of delinquent borrowers was foreclosure and sale of the assets. The FmHA proceeded to foreclose on farmers throughout the country and began the liquidation of the secured assets.

Once the FmHA decided to liquidate, the farmer was prevented from using the proceeds of his labors for necessary family living and farm operating expenses. The practical result of the decision to liquidate was that the farmer could not use any of the money derived from crops for food, clothing, or shelter--even if he planned on appealing the decision. In addition, the farmer had only 30 days to pay off the debt in full. If he was unable to do so, the FmHA commenced foreclosure proceedings. The farmer, while surrounded by food, was starved off his property. If he used the results of his labors to feed his family, he was subject to being charged with conversion, a felony under federal law.

Many of the farmers who were in default to the FmHA were literally being starved off their lands in 1983. Their loans were accelerated, and they could not use farm proceeds to continue operation and provide necessary living expenses. All this was done without notice of intention to take action, without notice of a right to appeal, without access to a speedy appellate process, and without an opportunity to apply for a loan or foreclosure deferral as provided by the terms of the CFRDA. Not surprisingly, by 1983 there was already substantial case law holding that the foreclosure and liquidation proceedings of the FmHA were abusive and unlawful because of the failure of the FmHA leadership to obey the CFRDA mandate.

It was in this atmosphere that, on March 11, 1983, an action was filed in the United States District Court, District of North Dakota, Southwestern Division, by nine North Dakota farmers and others similarly situated. The plaintiffs had loans from the FmHA. The defendants were John R. Block, secretary of agriculture; the administrator of the Farmers Home Administration; the director of the Farmers Home Administration; six district directors of the Farmers Home Administration of North Dakota; and five county supervisors of the Farmers Home Administration of North Dakota.

The lead counsel in the case was a young woman named Sarah Vogel. She had been admitted to practice in North Dakota on

December 8, 1981. Of course, the farmers could not pay her because their chattels were frozen. They brought her what food they could spare, but food would not pay her bills. Her telephone was shut off, her house was repossessed, and she and her small son were forced to move to Grand Forks, where she worked out of her ***51** father's law firm. (She says that her father is the real hero of the story, because he made it possible for her to continue with the lawsuit.)

Here are the stories of some of the farmers, as told by Sarah Vogel:

> *In 1983, Dwight Coleman was in his early thirties. He was single and had been farming since 1979. After Dwight suffered through a drought in 1979, and excess moisture and a September blizzard in 1980, the USDA "froze" his farm income without prior notice or prior hearing. He was told to pay his loans in full by Christmas Eve, 1981, or face foreclosure.*
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> *Dwight and Sharon Crowsheart were young parents of three children. They were members of a North Dakota Indian tribe with centuries of farming experience in the Missouri River Valley. (Their tribe helped Lewis and Clark make it through the winters of 1804 and 1806 by trading corn, beans, sunflowers, other crops, and dried meat for metal products.) They started farming in 1977. Like Dwight Coleman, they suffered through drought and severe winters, as well as high costs from the Bureau of Indian Affairs grazing leases and low cattle prices. In 1980, FmHA froze their farm income, seized their bank account, and even intercepted 100 percent of Dwight's wages from other area farmers. In 1982, they were told they had 15 days to pay their loans. They were also told to have a "voluntary" sale of their cattle and machinery, which was to take place in the early summer of 1982. The Crow-shearts, however, would not voluntarily sell their land.*
>
> *George and June Hatfield were in their forties. They had one 14-year-old child who still lived with them; their other children were grown. The Hatfields were encouraged to expand their dairy herd by getting a bank loan, but once they did this, the USDA would not allow any payments to the bank. The USDA took all the milk checks, not even allowing the Hatfields money for living expenses except $1,000 released to the family to live on for a three-year period. And when the Hatfields found off-farm jobs to survive, the USDA in its Answer said that they were not really farmers.*
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> *Don and Dianne McCabe were in their late 20s with two children. They had a small dairy farm. The bank and the USDA took all their milk checks, leaving nothing for feed for the cattle or food for the family. The McCabes were told that they had to pay their loans in full within 30 days.*

The civil action was also brought on behalf of "others similarly situated." They were a class of approximately 8,400 farmers who had received farmer program loans from FmHA. That part of the suit sought to force the Secretary of Agriculture to implement the 1978 law entitled "Loan Moratorium and Policy on Foreclosures"--the section that permitted deferral of payments and foreclosure under appropriate circumstances. The action sought mandatory injunctive relief, requiring the defendants to promulgate regulations detailing the manner and conditions under which the plaintiffs could exercise the rights granted to them and under which the Secretary would honor the obligations imposed upon him by CFRDA. The complaint asserted that the FmHA had refused to allow the farmers' applications for deferral of loan payments, had terminated funds for necessary living and operating expenses without notice or hearing, and had subjected the farmers to a biased and unconstitutional appeals process. The farmers requested, and I approved, a state-wide class action status. *See Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983). The farmers also requested a two-part preliminary injunction. First, they asked that the FmHA be enjoined from taking any action adverse to those who held FmHA farm program loans until the FmHA promulgated regulations to implement the law. Second, they asked that the FmHA be enjoined from taking any loan servicing action that deprived the farmers of property needed for essential farm operations or living expenses until the FmHA promulgated regulations giving the farmers notice of the action, the reasons for it, and an opportunity to present additional facts before an impartial hearing examiner.

After identifying the issues, I issued a series of decisions addressing the manner in which the FmHA was administering the applied law. So that the decisions would be easily available to other judges who faced similar issues, most decisions were published in the Federal Supplement. The first decision, filed May 5, 1983, held that class certification of the North Dakota farmers holding farm program loans from FmHA was appropriate, that the class members were entitled to injunctive relief, and that class members were entitled to certain notice requirements.

The first part of the decision meant that the plaintiffs were entitled to proceed as a class. The class would consist of all persons who had obtained a farmer program loan from the FmHA together with those who were or might have been eligible to obtain such a loan, as long as the loans were or would have been administered through FmHA offices within the State of North Dakota.

The second part of the decision addressed the FmHA's argument that the action should be dismissed because the plaintiffs failed to exhaust administrative remedies. I found that the plaintiffs' claims could not be dismissed because the FmHA had failed to declare which plaintiffs had not exhausted administrative remedies. Alternatively, I found that the plaintiffs could not be compelled to exhaust administrative remedies until the FmHA had decided to foreclose or accelerate collection and the farmers had been informed of that fact.

Because the plaintiffs demonstrated that irreparable harm would result unless ***52** the FmHA was enjoined from taking adverse action, I granted temporary injunctive relief. More specifically, the defendants were enjoined from accelerating the indebtedness of the plaintiffs, foreclosing on the land or chattels of the plaintiffs, demanding "voluntary" conveyance by the plaintiffs, repossessing chattels of the plaintiffs, or in any way depriving the plaintiffs of property in which the defendants had a security interest. The injunction applied as long as the defendants failed to give any plaintiff against whom they proposed to proceed at least 30 days notice of (a) the borrower's right to a hearing to contest the proposed action; (b) the reasons for the proposed termination; (c) the factors that determine eligibility for loan deferral; and (d) the identity of the official before whom the borrower could request a hearing. In addition, if a hearing were held, the hearing officer was to present his decision, and its underlying reasons, in writing.

The defendants and their agents were also enjoined from terminating living and operating allowances unless the plaintiffs had at least 30-days notice of (a) the borrower's right to a hearing to contest the termination and to establish eligibility for loan deferral; (b) the reasons for the proposed termination; (c) the factors that determine eligibility for loan deferral; and (d) the identity of the official before whom the borrower could request a hearing. The FmHA could not choose an official who had been actively involved in the initial decision to terminate. If a hearing were held, the decision would be reduced to writing and a copy would be furnished to the borrower.

The final part of the decision provided that no bond would be required for the preliminary injunction because of the indigence of the plaintiffs and because the security held by the FmHA was pledged in part to cover the costs of protecting the lien. *Id.*

On November 24, 1983, I expanded the scope of the injunction to include as a national class all persons who had obtained a farmers program loan from the Farmers Home Administration and all those who were or who might have been eligible to obtain such a loan administered by the FmHA. *See Coleman v. Block,* 580 F. Supp. 192 (D.N.D. 1983); *Coleman v. Block,* 100 F.R.D. 705 (D.N.D. 1983).

On February 17, 1984, I reviewed the entire history of this litigation. After confirming my decision to create a national class, I ruled on other problems of the application and interpretation of relevant fields of law, including (a) the statutory and regulatory background of the federal loans; (b) the problems of loan deferrals and other servicing alternatives; (c) the conditions under which the FmHA could or should release chattel security; and (d) the problems of acceleration and notice of the right and procedures of appeal from an order for collection or termination of an outstanding loan. In this order, I also redefined the class to exclude certain persons who might elect to opt out.

More Decisions

Again, the defendants were enjoined from accelerating the indebtedness of a class member, foreclosing on real property, demanding a "voluntary" conveyance by the debtor, repossessing chattels, and proceeding against property in which the

FmHA had a security interest unless the debtor was kept fully informed of the FmHA claims and the plaintiffs' rights. Any decision was to be presented in writing and was to inform the borrower of the facts that justified the creditors' actions. *See Coleman v. Block,* 580 F. Supp. 194 (D.N.D. 1984).

On June 15, 1984, I allowed attorney fees and costs in the amount of $179,382 to be paid to the six counsel for the plaintiffs. *See Coleman v. Block,* 589 F. Supp 1411 (D.N.D. 1984).

On September 17, 1984, the defendants filed a notice of appeal from the order allowing attorneys' fees and costs, claiming that the awards were excessive. The appeal was filed 15 days late and was denied. *See Coleman v. Block,* 593 F. Supp. 367 (D.N.D. 1984).

By March 3, 1986, a new problem had developed. Joe and Louise Nelson had borrowed $40,000 from the FmHA for farm operating expenses incurred in 1983. In September 1983, the Nelsons borrowed an additional $22,000 to finance planting an additional 500 acres of winter wheat, but the sale of that 1984 crop brought in only $16,000. The FmHA county supervisor refused to provide further financing, insisted that the proceeds be applied only to the outstanding indebtedness, and would not permit the Nelsons to use any of the crop money for living and operating expenses. As support for this decision, the FmHA relied upon language in the prior injunctive order providing that "[t]he defendants … are enjoined from terminating the living and operating allowance previously determined in the administration of any existing loan."

Of course, the prior injunctive order applied to the situation that existed at that time. In fact, the applicable FmHA regulations--and not the injunctive relief--applied to the problems that the Nelsons faced. But the applicable regulations were actually more stringent than the injunction. Those regulations provided that the first priority in the distribution of income was to pay necessary farm, home, and other operating expenses planned for payment by cash as incurred.

Again, contrary to the law and regulations, the FmHA was starving the farmer off his land. So the injunction was amended to clarify that farmer/borrowers have a statutory and regulatory entitlement to reasonable living and operating expenses, and that those allowances could not be terminated until the borrower had been provided his due process protection as set forth in the court's order of February 17, 1984. *See Coleman v. Block,* 632 F. Supp. 997 (D.N.D. 1986).

The FmHA sought to comply with this order by drafting new forms and rules. But those forms and rules themselves created new problems. The problems arose primarily from the FmHA's attempt to apply restrictions found in the Food Security Act of 1985. That statute provided that when the Secretary of Agriculture accelerated a loan, he had the authority to release an amount that he determined to be sufficient to pay the essential household and farm operating expenses of the borrower. The plaintiffs claimed that the Secretary's application of this law gave the farmer no part in determining those necessary expenses. To resolve this problem, I required the defendants to provide the members of the plaintiff class who disputed an allocation established by the Secretary with an opportunity to appeal. *See Coleman v. Block,* 632 F. Supp. 1005 (D.N.D. 1986).

Of course, the problem of federal farm financing continued. By its very nature, family farming requires a high start-up cost for the land, machinery, equipment, and supplies necessary to operate a farm successfully. Further, the vagaries of weather, and the market for both buying and selling, create ***58** uncertainty. The resulting tension continually pits the FmHA's duty to advance monies in an extremely volatile market and under high risk against its duty to ensure that the nation's monies are appropriately used for the common welfare. New disputes led to new litigation in June 1987.

The issues were raised by a First Supplemental Class Action Complaint filed January 21, 1986. The supplemental complaint presented 14 claims for relief. Four of these--the first, second, third, and fifth--were resolved by the litigants.

The fourth claim asserted that the FmHA did not release an amount of money sufficient to pay the essential farm operating and household expenses of an impoverished borrower. The borrower admitted to having other outside income, however. The fourth claim was dismissed.

The plaintiffs' seventh claim for relief sought to invalidate three of the requirements considered by the FmHA in determining whether a borrower was eligible for a loan deferral. Those requirements were:

(1) The borrower would be required to make adjustments with other creditors before seeking aid from FmHA;

(2) Before experiencing hardship, the borrower must have paid all real estate taxes and property insurance when due; and

(3) The borrower must have applied recommended production and financial management practices.

The seventh claim for relief was denied in part and granted in part.

The plaintiffs' ninth claim for relief attacked a FmHA rule that dealt with situations in which the FmHA had made more than one type of loan, i.e., chattel and realty loans. The rule provided that if liquidation of one loan would jeopardize repayment of the other, both loans must be liquidated. The plaintiffs claimed that realty loans would be liquidated over a longer period of time than chattel loans and that the rule was therefore unreasonable. Because this was a policy argument more than a legal challenge, the ninth claim was dismissed.

The plaintiffs' eleventh claim for relief asserted that the FmHA occasionally failed to comply with the publication requirements for certain rules. The plaintiffs ultimately abandoned that claim when it was pointed out that the publications were not "rules."

The twelfth claim challenged a set of forms and procedures used to accelerate delinquent FmHA debts. Because the plaintiffs had slept on their rights from 1984 to 1987, this claim was rejected.

As a final resolution of the situation, I ordered that:

(1) The FmHA was enjoined from accelerating any loan which had not been accelerated before May 7, 1987, until the ***59** FmHA had provided the borrower with the corrected notice forms required by the court's Order of May 7, 1987;

(2) As to those class members whose loans had previously been accelerated, the acceleration was reversed and the FmHA was required to give the farmer a chance to comply with the corrected notice forms;

(3) The FmHA was enjoined from initiating or completing foreclosures on loans accelerated before May 7, 1987, until 30 days after the corrected notice forms had been made available to the debtor.

Finally--at least for a while--the whiffletree was straight across the wagon tongue.

AFTERWORD

by Sarah Vogel, Attorney for the North Dakota Nine

Coleman v. Block %Ihas inspired movies, law review articles, and massive changes in the way the United

States Department of Agriculture does business with farmer borrowers.

It has been just more than 16 years (May 16, 1983) since lawyers representing the Secretary of Agriculture called Dwight Coleman, Lester and Sharon Crowsheart, Russell and Anna Mae Folmer, George and June Hatfield, and Donald and Dianne McCabe "former" farmers. In its answer to the farmers' complaint, the Department of Agriculture denied that it violated any laws or constitutional rights and instead accused these farmers of being "bad managers" for whom foreclosure would have been inevitable anyway.

History has proven the government to have been wrong on both counts.

John Block--and his USDA successors, Clayton Yeutter, Richard Lyng, and Mike Espy--no longer hold their positions. In a series of decisions, Block, Yeutter, and Lyng were pummeled by the courts for their treatment of the farmers.

The North Dakota Nine fared far better.

Dwight Coleman is still on his farm. He used a bank loan to pay the Department of Agriculture and will soon have his bank loan paid off as well.

The Crowshearts are still on their land. Dwight also runs a long-distance trucking firm. He recently left full-time employment as a boiler plant supervisor at an electrical plant where he had worked since 1983.

Russell Folmer has died, but Anna Mae is still farming with her son as a partner. Her new fiancé lives down the road. The Folmers' loan to FmHA is paid off.

George and June Hatfield used a bank check to pay the Department of Agriculture about 10 years ago. They recently retired and sold most of their farm. They still live on 50 acres of homestead land, where George is known as "tractor grandpa" to his grandsons. June recently retired from her work as a bank officer.

After cruel and unusual harassment by the Department of Agriculture, Donald and Dianne McCabe left the farm in the mid-1980s. Dianne obtained a college degree, taught for several years, and is now a Deputy Court Administrator. She is working on her master's thesis. Don is a foreman at a tractor factory. Their children are married, and they have twin grandchildren.

These North Dakota Nine may not be as well known as the Chicago Nine, but they were brave, even heroic. They went to court and stood up for what they believed--a family farm system of agriculture and fairness in the government's treatment of farmer borrowers. In so doing, they put their own reputations on the line and were

falsely accused of being crooks and bad managers. (One can only ask, how could bad managers have outlasted four Secretaries of Agriculture?) Ultimately, they proved that the Department of Agriculture was wrong on the law, wrong in its treatment of farmers, and wrong in its assessment of the character and skills of these nine farmers.

In the filing of one lawsuit, they helped to protect thousands of family farms from foreclosure. And they stopped the unconstitutional and illegal conduct of the Department of Agriculture that had been starving out the farmers who feed us all.

Footnotes

[a1] *Bruce M. Van Sickle is Senior United States District Judge for the District of North Dakota. Sarah Vogel practices law in Bismarck, North Dakota.*

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