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Alternative Dispute Resolution in Farmer-Lender Disputes: Mandatory Mediation in Minnesota

Niel D. Willardson*

I'm scared what's going to happen out in rural America. Something [bad] is going to happen unless something is done and done real quick.¹

Introduction

In the spring of 1986, there were more than 20,000 farmers in debt in the United States, most of whom were located in the troubled Midwest.² Thirty percent of Minnesota's farmers had severe financial difficulties.³ Cash flow problems, decline in farm asset values, and downward price pressure on many farm products led to this recent crisis.⁴

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1. Statement by a farm advocate, in United Press International Release, Dec. 19, 1985.

2. William Robbins, *States Helping Their Own Farmers*, N.Y. Times, May 18, 1986, at A30, col. 1.

3. Kathy Mangum, *Farm Credit Mediation: Policy Manual and Operational Guidelines for Extension Agents and Mediators* 5 (1986).

4. See Minn. Stat. § 583.21 (1986) ("The legislature finds that the agricultural sector of the state's economy is under severe financial stress due to low farm commodity prices, continuing high interest rates, and reduced net farm income."); *Farm Optimism Rises, but Woes Persist*, Wall St. J., May 11, 1987, at 4, col. 1. ("The price of Iowa farmland, at roughly \$900 to \$1000 an acre, has plummeted from \$3,000 to \$4,000 five years ago."). It appears as though the trend toward low land prices is reversing, however. *Farmland Values May be Steadying*, Mpls. Star & Trib., May 13, 1987, at 2M, col. 1 (Federal Reserve Bank quarterly surveys indicate that farmland values slipped little in the spring of 1987).

Low farm product prices have contributed greatly to the farmer's dilemma. The Food Security Act of 1985, Publ. L. No. 99-198, 99 Stat. 1354, 1645, passed by Congress intending to help the farmer through a "market oriented" program by reducing the price of farm products was largely unsuccessful due to a depressed world economy and other nations' increased production. See *Vote Called Hope for Farmers*, Mpls. Star & Trib., Nov. 25, 1986, at 1B, col. 3. The Harkin-Gephardt "Save the Family Farm" bill would replace this market oriented approach and replace it with a supply-management approach. See *infra* notes 129-130 and accompanying text.

Farm earnings are rising recently, even in the face of these low prices. Earnings of a surveyed group of Minnesota farmers increased 85% — from \$9,636 to \$17,839 — between 1985 and 1986. This earning rise is due to a drop in farm expenses, however, not because of rising farm prices. *Farm Earnings Rise, But Fail to Cover Expenses*, Mpls. Star & Trib., May 3, 1987, at 1D, col. 1.

Farm families in financial difficulty faced emotional stress, hunger, health problems, family violence, and social stress.⁵ The farm crisis also affected the rural community as a whole.⁶ Business closures, increased demand for public assistance, community tension, decreased community involvement, decrease in the quality of life, and population losses were all negative results of the farm crisis.⁷

Pressure from farm groups brought attention to the plight of the Minnesota farm family. In December 1985, a group of farm protesters kept a farm credit office chained shut for six hours in protest of recent farm foreclosures.⁸ After meeting with the advocates, Minnesota Attorney General Hubert H. Humphrey III announced: "We need to postpone all foreclosures now being processed and this action is urgently needed now."⁹ A coalition of twelve farm groups urged the Minnesota Legislature in February, 1986 to pass the farm aid legislation quickly, stating that the rural crisis will force many farmers out of business.¹⁰

The Minnesota Legislature passed a farm relief bill in March, 1986, responding to "severe financial stress" in the agricultural sec-

5. See generally *Farmers Recovering, But Not Small Towns*, Mpls. Star & Trib., Dec. 27, 1987, at 1A; *A Family's Farm Fight Takes Turn*, Mpls. Star & Trib., Apr. 5, 1987, at A1, col. 6. In 1986, a Carver County, Minnesota, family filed for bankruptcy. In 1987, they lost their livestock and machinery to creditors. As a result of these farm problems, this otherwise "respectable" farm family faced charges of contempt of court and criminal charges for their actions which included attempting to destroy a trailer and threatening creditors with firearms when they tried to repossess the family's farm equipment. *Id.* See also *State v. Sobocinski*, 395 N.W.2d 128 (Minn. Ct. App. 1986) (a farm advocate was accused of interfering in the sale of a farm at a public auction).

6. Family farms may cease to exist if farmers continue to go bankrupt at current rates. Insurance companies now own more farmland nationwide than any other single entity in the United States. See *Farmland at Risk with Insurance Firms*, Sioux Falls Argus Leader, May 17, 1987, at 1A, col. 2 (article cites a recent study by the Land Stewardship Project which concluded that absentee owners like insurance companies abandon traditional conservation techniques and damage the land).

7. See generally Stephen Erickson & Marilyn McKnight, *Farm Finance Mediation* (1985); *Economic and Social Vulnerability in Rural Minnesota: An Urgent Needs and Resource Assessment*, Rural Enterprise Institute, Minneapolis, Minn. (1986).

8. United Press International Release, Dec. 18, 1985.

9. *Id.* Hubert H. Humphrey III and State Agriculture Commissioner James Nichols met with Norm Larson of Worthington, Minnesota, and Bobbi Polzine of Brewster, Minnesota, co-chairs of the farm group, Groundswell. Groundswell leaders contended that the banks' voluntary ninety-day moratorium, endorsed by Governor Rudy Perpich, was unsuccessful, stating that the banks were not honoring the agreement.

10. *Farm Groups Urge Legislature to Pass Farm Legislation*, United Press International Release, Feb. 28, 1986.

tor of the state's economy.¹¹ The major aspect of this bill is the mandatory mediation provision—a requirement that farmers and lenders participate in mediation before lenders may initiate proceedings to enforce an agricultural debt above a threshold amount.¹²

The law was hailed by Minnesota Agricultural Commissioner Jim Nichols and Senate Majority Leader Roger Moe as “one of the best in the country.”¹³ According to some legislators, the bill would salvage 10,000 farms in Minnesota.¹⁴ The law contained comprehensive farm legislation and provided \$16 million for a variety of farm support programs—including an interest rate subsidy program, creation of a state bonding program for farm debt restructuring, and mandatory mediation to resolve disputes between farmers and lenders.¹⁵

The large number of financial problems, combined with lim-

11. 1986 Minn. Laws Ch. 398. See *infra* note 18 and accompanying text.

12. See Minn. Stat. §§ 583.20-32 (1986 & Supp. 1987). The Farmer-Lender Mediation Act is repealed effective July 1, 1989. Minn. Stat. § 583.32 (Supp. 1987).

13. *Farm Bill Sent to Governor*, United Press International Release, Mar. 19, 1986.

Other states' measures to remedy the farm crisis include research into the nature, causes, and scope of the farm problem, hotlines, debt moratoriums, inexpensive credit, and mediation services. Andrea Bennett, *Midwest Lawmakers Seek to Help Farmers*, Am. Banker, Apr. 1, 1986, at 24 [hereinafter Bennett, *Midwest Lawmakers*]. Much of the legislation is intended to help farmers get operating loans for the coming year. The most common programs include interest rate buy-downs, direct loans, or loan guarantees. *Id.* See *infra* note 21 and accompanying text.

14. These legislators include Charles Berg, author of the bill, an Independent from Chokio, Minnesota. United Press International Release, Mar. 19, 1986.

15. The \$16 million authorized by the Act includes \$5 million for interest buy-downs to give farmers lower interest rates on loans and \$4.8 million for bonding to restructure farm debt. On April 16, 1986, the Minnesota Commerce Department reported that the \$5 million for interest buy-downs had already been depleted, 10 days after applications began being accepted. *Minnesota Quickly Runs Out of Money for Farm Interest Rate Subsidy Program*, 46 Wash. Fin. Rep. 625 (1986) [hereinafter *Minnesota Quickly*].

The provisions of the farm bill are summarized as follows. Under the interest rate subsidy program, a farmer agrees to pay one-half of the interest on a loan. The remaining one-half of the interest is divided between the state which will pay three-quarters of that figure and the lender who will absorb the other one-quarter. *Id.* The average subsidy of the average loan (\$70,000) will be about \$3880.

The bill also creates a Minnesota Rural Finance Administration. The Administration's purpose is to assist agricultural lenders and borrowers in restructuring existing farm debt, and to provide new sources of farm credit for agricultural loans. Under this voluntary program, the lender, the borrower, and the rural finance administration must all agree to any debt restructuring plan. See Minn. Stat. § 41B.04(7) (Supp. 1987). The Act appropriates \$4.8 million to the Administration, and the money will be used to issue up to \$50 million in general obligation bonds. See Minn. Stat. § 41B.08(1) (Supp. 1987). These bonds will be used to guarantee \$200 million in revenue bonds, which can be leveraged to restructure up to \$800 million in real estate debt. Minn. Stat. § 41B.09 (Supp. 1987). Debt restructuring

ited communications between borrowers and lenders, were an impetus to the new legislation in Minnesota. Voluntary mediation was not successful according to farm leaders,¹⁶ and critics of the Farm Credit System contended that these lenders foreclosed aggressively on farmers.¹⁷

The Minnesota Legislature was determined to respond to the plight of the farmer. The Act states:

The legislature finds that the agricultural sector of the state's economy is under severe financial stress due to low farm commodity prices, continuing high interest rates, and reduced net farm income. The suffering agricultural economy adversely affects economic conditions for all other businesses in rural communities as well. Thousands of this state's farmers are unable to meet current payments of interest and principal payable on mortgages and other loan and land contracts and are threatened with the loss of their farmland, equipment, crops, and livestock through mortgage and lien foreclosures, cancellation of contracts for deed, and other collection actions. The agricultural economic emergency requires an orderly process with state assistance to adjust agricultural indebtedness to prevent civil unrest and to preserve the general welfare and fiscal integrity of the state.¹⁸

Minnesota was the first state to adopt a mandatory farm mediation law.¹⁹ Iowa has also passed a mandatory mediation law,²⁰ and sim-

help, however, is limited to farmers with a debt-to-asset ratio of 50% or greater. See Minn. Stat. § 41B.03(2) (Supp. 1987).

Other provisions of the farm relief law include a \$650,000 program to provide legal aid to financially distressed farmers; Agricultural Extension Service funding of \$1.2 million for project support and mediator training; and \$1.3 million for tuition assistance and new farm management programs for farmers at vocational and technical schools. See Bennett, *Midwest Lawmakers*, *supra* note 13, at 24.

16. Groundswell leader Bobbi Polzine stated that "voluntary forbearance is a failure and a farce," and that farmers need a "blanket moratorium." United Press International Release, Dec. 19, 1985.

Other farm groups share the same opinion of voluntary mediation. Mary Tacheny of the Minnesota Catholic Rural Life Conference stated that "voluntary mediation has proven not to work." United Press International Release, Feb. 28, 1986.

A different opinion of voluntary mediation's success was held by some farm lenders. Rodger J. Johnston, the chief executive officer of the First National Bank of Long Prairie, Minnesota, in reference to mandatory mediation stated: "The legislature came in at the last minute on something we were already doing." He continued, "Compulsory mediation now throws into the system those farmers . . . so far gone that mediation is used as a tool to, in essence, [make bankers] give more than is fair." Andrea Bennett, *Minnesota, Iowa Pass Farm-Loan Mediation Laws; Lenders, Strapped Farmers Must Discuss Alternatives Before Foreclosure*, Am. Banker, Jan. 5, 1987, at 3 [hereinafter Bennett, *Minnesota, Iowa Pass*].

17. *Farm Credit System District in St. Paul Challenges Law Restraining Lenders*, Am. Banker, July 8, 1986, at 9.

18. Minn. Stat. § 583.21 (1986).

19. United Press International Release, Sept. 23, 1986.

20. The Iowa law was effective May 23, 1986. H.F. 2473, 1986 Iowa Legis. Serv.

ilar programs are being studied closely by other states.²¹

In their rush to pass the Mediation Act, legislators and others failed to address the hazards of the process. Farmer-lender mediation may not adequately protect farmers from inequities of Alternative Dispute Resolution (ADR).²² Although the program has been generally successful, other solutions to the farm crisis will not be considered if mandatory mediation inhibits discussion and instills a false sense of security in policy makers and the public.

This article provides a detailed analysis of the procedure and policies of the Farmer-Lender Mediation Act, discussing the steps which are followed before mediation begins, and detailing the rights and responsibilities of the farmer and lender while they participate in mediation. Further, the article critiques ADR in the farmer-lender context, discussing the appropriateness of ADR, while giving attention to lender concerns, 1987 amendments, and constitutional challenges made to the Act. The article concludes with an analysis of the formal evaluation of the Act by the Minnesota Extension Service, and suggestions to make the Mediation Act more effective.

I. The Farmer-Lender Mediation Act

The Farmer-Lender Mediation Act ("Mediation Act") authorized the Minnesota Extension Service to institute and administer a farm credit mediation program. The Extension Service implemented an orderly process for voluntary, mandatory, and court-supervised mediation under the statute.²³ Through the statute, the

21 (West) (No. 7); See Andrea Bennett, *Interest Grows in Farm Loan Mediation*, Am. Banker, Jan. 12, 1987, at 9 [hereinafter Bennett, *Interest Grows*]. There are several differences between the Minnesota and Iowa laws. The Iowa law applies to farm debt in excess of \$20,000. Iowa Code § 654A.4 (1987). The mediation period in Iowa is 42 days, longer if all parties agree to extension. Bennett, *Interest Grows*, *supra*, at 9. The maximum time for mediation in Iowa is 72 days. Iowa Code § 654A.12 (1987).

21. See Bennett, *Minnesota, Iowa Pass, supra* note 16, at 3 (programs are being discussed by Illinois, Indiana, Kansas, Oklahoma, Wyoming, Colorado, and Nebraska); *Debt Mediation in Iowa Gives Farmers A Way to Survive*, Wall St. J., May 5, 1987, at 20, col. 1 (mediation being considered by the California and Missouri legislatures; in Montana, the banking lobby persuaded legislators to reject mandatory mediation and adopt voluntary mediation).

22. Alternative Dispute Resolution involves using a different technique, such as minitrials, arbitration, negotiation, or mediation as a vehicle to resolve a dispute, rather than the traditional court trial. Marc Hequet, *Resolving Business Disputes*, Minn. Law., Aug. 1987, at 1. See *infra* notes 48-61 and accompanying text.

23. Voluntary mediation is provided for in Minn. Stat. § 583.25 (1986) which states that debtors who own agricultural property or their creditors may request mediation at any time by filing an application with the director of the agricultural extension service. The statute does not indicate whether the non-requesting party can refuse to participate.

Extension Service provides a mediator to lead discussion on either restructuring farm debt or proceeding toward orderly liquidation, among other alternatives.²⁴

The Mediation Act states that before farm lenders²⁵ can foreclose, they must take part in sessions with the farmer and a mediator to try to find other solutions to the debt problem. The program only requires that lenders take part in mediation, but does not require them to restructure the debt.²⁶ The scope of the Act's application is likewise limited. Mediation is required only when a creditor attempts to collect a debt over \$5000²⁷ against agricultural property²⁸ and the debtor requests mediation.²⁹ The Mediation Act also does not apply to creditors of a debtor who "owns and leases less than 60 acres with less than \$20,000 in gross sales of agricultural products in the preceding year."³⁰

The creditor who wishes to garnish, levy on, execute on, seize, or attach agricultural property must serve a mediation notice on the farm debtor and the director.³¹ The farmer must then request mediation from the Extension Service director within fourteen days.³² The creditor may proceed to enforce the debt if the

24. Minn. Stat. § 583.26(6) (Supp. 1987).

25. The Farmer-Lender Mediation Act applies to (1) the United States or an agency of the United States; (2) corporations, partnerships, and other business entities; and (3) individuals. Minn. Stat. § 583.24(1) (Supp. 1987).

26. See Minn. Stat. § 583.27 (1986 & Supp. 1987).

27. Minn. Stat. § 550.365(1) (Supp. 1987).

28. "Agricultural Property" is defined as "real property that is principally used for farming . . . and personal property that is used as security to finance a farm operation or used as part of a farm operation including equipment, crops, livestock, proceeds of the security, and removeable agricultural structures under lease with option to purchase." Minn. Stat. § 583.22 (Supp. 1987).

29. Minn. Stat. § 583.26(2)(a) (Supp. 1987) (The farmer must respond to the request for mediation within 14 days).

30. Minn. Stat. § 583.24(1)(b) & (2)(b) (1986).

31. Minn. Stat. § 583.26(1) (Supp. 1987). This notice must describe the action that the lender, creditor or seller intends to take and the property that is to be taken. The language of the notice is required to include the following:

You have the right to have the debt reviewed for mediation. If you request mediation, a debt that is in default will be mediated only once. If you do not request mediation, this debt will not be subject to future mediation if the secured party enforces the debt.

If you participate in mediation, the director of the agricultural extension service will provide an orientation meeting and a financial analyst to help you prepare financial information. If you decide to participate in mediation it will be to your advantage to assemble your farm finance and operation records and to contact a county extension office as soon as possible. Mediation will attempt to arrive at an agreement for handling future financial relations.

Minn. Stat. § 336.9-501(7) (Supp. 1987) (minor changes made to the notice provision by the 1987 Legislature are reflected above).

32. Minn. Stat. § 583.26(2) (Supp. 1987). The statute states in relevant part: The debtor must state all known creditors with debts secured for agri-

debtor does not request mediation—the debtor is deemed to have “waived” the operation of the statute.³³

If the farmer requests mediation, the director of the Extension Service must provide the debtor with a financial analyst to prepare the relevant financial information needed for the mediation.³⁴ This analyst is trained to help the farmer prepare “cash-flow” projections.³⁵ Within ten days of receipt of the mediation request, the director of the extension service will send a mediation meeting notice to the debtor.³⁶ All known creditors of the debtor will also be mailed the mediation meeting notice, along with a claim form.³⁷

For the farmer entering mediation, the time periods under the Mediation Act are critical because there is a stay on collection proceedings while mediation is in progress.³⁸ The mediation period runs for sixty days from the first mediation meeting.³⁹ Subject to some exceptions, the creditor may not proceed to enforce the debt until ninety days after the date the debtor files a mediation request with the director of the Extension Service,⁴⁰ unless a mediation agreement is reached.

cultural property. The mediation request form must include an instruction that the debtor must state all known creditors with debts secured by agricultural property and unsecured creditors that are necessary for the farm operation of the debtor.

33. Minn. Stat. § 583.26(2)(b) (1986). After waiver, the director notifies the creditor that they may proceed to enforce the debt. *Id.*

34. See Minn. Stat. § 583.26(3)(a) (Supp. 1987). The director of the Extension Service must also provide the debtor with a list of farm advocates that may be available to assist the farmer. Minn. Stat. § 583.26(3)(b) (Supp. 1987). For a discussion of the farm advocate, see *infra* notes 145-150 and accompanying text.

35. Under 1987 amendments, the “credit analyst” was changed to a “financial analyst” and the duties of the position were enhanced. See *infra* notes 138-141 and accompanying text. The financial analyst must “assure that information relative to the finances of the debtor is prepared for the initial mediation meeting.” Minn. Stat. § 583.26(3)(a) (Supp. 1987).

The role of the financial analyst is very important. Lenders are hesitant to restructure debt unless they are convinced that the farmer will be able to make payments under the restructured debt plan. Minnesota Family Farm Law Project, *Mediation From the Farmer's Perspective 2* (1986) (on file with Law & Inequality). The credit analyst will help assemble data to indicate that the farmer's plan will work. *Id.*

36. Minn. Stat. § 583.26(4) (Supp. 1987).

37. Minn. Stat. § 583.26(4)(a) (1986). The notice must include a time and place for the initial meeting and a list of three mediators. Minn. Stat. § 583.26(4)(b) (Supp. 1987). The initial mediation meeting must be held within 20 days of notice. Minn. Stat. § 583.26(4)(c) (Supp. 1987).

From this list of three mediators, each creditor and debtor may request the director to exclude one mediator. Minn. Stat. § 583.26(4)(d) (Supp. 1987).

38. Minn. Stat. § 583.26(5)(a) (Supp. 1987).

39. Minn. Stat. § 583.26(8) (1986).

40. Minn. Stat. § 583.26(5)(a) (Supp. 1987). If the creditor is an agency of the United States, enforcement of the debt against agricultural property may not begin

If the parties reach an agreement, a contract will be drafted by the mediator. By their signature, creditors are bound by the agreement and they may enforce it as a legal contract. The agreement is also a defense to any action which may be brought contrary to the agreement.⁴¹ Not all mediation sessions reach agreement,⁴² however, because the parties are not required to make concessions.

The Mediation Act states specifically, however, that during the mediation period the parties are obligated to "engage in mediation in good faith."⁴³ Lack of good faith includes: (1) failure to attend and participate in mediation sessions without cause; (2) failure to provide full information regarding financial obligations of the parties and other creditors; (3) failure of the creditor to designate a representative with authority to make binding commitments; (4) lack of a written statement of debt restructuring alternatives; (5) failure of the creditor to release funds from the sale of farm products to the debtor for "necessary living and farm operating expenses"; or (6) other similar behavior which indicates lack of good faith.⁴⁴

The statute provides that "[a] failure to agree to reduce, restructure, refinance, or forgive debt *does not*, in itself, evidence lack of good faith by the creditor."⁴⁵ The 1987 amendment to the statute defines the amount creditors must release from the sale of farm products for necessary farm operating expenses.⁴⁶

Lack of good faith evidenced by the creditor or debtor is determined by the mediator. If the mediator finds that a party acted in bad faith, he or she must file an affidavit with the director and all parties to the mediation indicating the reasons for the conclusion.⁴⁷

until 180 days after the date the debtor files a mediation request with the director. Minn. Stat. § 583.26(5)(b) (Supp. 1987).

41. Minn. Stat. § 583.26(9)(b) (Supp. 1987).

42. Mediation Case Reports (on file with Law & Inequality). From the period March 22, 1986 to November 5, 1987, 1792 cases were left unsettled with no agreement. *Id.*

43. See Minn. Stat. § 583.27(1)(a) (Supp. 1987).

44. Minn. Stat. § 583.27(1) (Supp. 1987).

45. *Id.* (emphasis added).

46. See Minn. Stat. § 583.27(1)(a)(5) (1986 & Supp. 1987). The creditor must release \$1600 per month less the debtor's off-farm income for necessary living expenses. Minn. Stat. § 583.27(1)(b) (Supp. 1987).

47. Minn. Stat. § 583.27(2) (1986). If a creditor is found to have acted in bad faith, the debtor may request court supervised mediation by filing the mediator's affidavit with the district court and by serving a copy of the request on the creditor. Minn. Stat. § 583.27(3) (Supp. 1987). Also, upon request, the court will require both parties to mediate in good faith for a period of not more than 60 days. *Id.* All creditor remedies are suspended for this period. If the court finds that the creditor did

The mediation process was carefully considered by legislators and was intended to be a fair, orderly, and informal process to resolve disputes between farmers and lenders. The Mediation Act provides an interesting model for examining ADR, a theoretical concept supported by many, but not often instituted to a great degree. Farmer-lender mediation offers the opportunity to examine the advantages and pitfalls of ADR in a particular context.

II. Alternative Dispute Resolution: Mediation in the Farmer-Lender Context

A. *Alternative Dispute Resolution*

Mediation is part of a larger dispute resolution system—a system which is popularly known as Alternative Dispute Resolution (ADR). There is a great deal of literature on ADR⁴⁸ and the movement enjoys broad support from many, including: former Chief Justice Warren Burger,⁴⁹ the American Bar Association,⁵⁰ legal educators,⁵¹ the federal government,⁵² and many others.⁵³

not participate in the supervised mediation in good faith, the creditor's remedies will be suspended for an additional 180 days. *Id.* The creditor must also pay the debtor's attorney fees and costs. *Id.*

If the debtor is found to have acted in bad faith, the creditors may proceed with their remedies immediately, except in a few circumstances. Minn. Stat. § 583.27(4) (Supp. 1987). The new amendments to the Mediation Act impose additional requirements on the farmer to participate in good faith. See *infra* notes 117-118 and accompanying text.

48. For an excellent, although slightly outdated, bibliography on ADR, see Am. Bar Ass'n Special Comm. on Alternative Means of Dispute Resolution, *A Selected Bibliography* (1982). See also *The Summary Jury Trial & Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 478-79 (1983).

49. Larry Ray, Prue Kestner & Larry Freedman, *Dispute Resolution: From Examination to Experimentation*, Mich. Bar J., Sept. 1986, at 898. Former Justice Burger has encouraged mechanisms "that can produce an acceptable result in the shortest . . . time, with the least . . . expense and with a minimum of stress to the participants." *Id.* See *Chief Justice Burger Calls on Bar to Pursue Alternatives to Litigation*, The Third Branch, Feb. 1982, at 1.

50. The current ADR movement was articulated as a concept at the 1976 Roscoe Pound Conference. One of the legacies of the Pound Conference was the establishment of the ABA Special Committee on Resolution of Minor Disputes. See John Wolf & Gary A. Weissman, *Alternative Dispute Resolution*, Minn. Bench & Bar, July 1985, at 24; John C. Metaxas, *Alternatives to Litigation are Maturing; But are Goals Valid?*, Nat'l L.J., May 12, 1986, at 1.

51. Derek Bok, former President of Harvard Law School, stated:

The law's response to disputes is cumbersome and expensive even in the best of circumstances. By complicating the rules and insisting on an adversary process conducted by the parties, judges can undermine justice in many types of cases Devising adequate remedies for this predicament will be extremely difficult. . . . An effective program will require not only multiple efforts but a mixture that involves attempts to simplify rules and procedures as well as measures that give greater access to the poor middle class. *Access without simplification will be unjust.*

ADR includes any steps taken to resolve a dispute short of formal litigation; its forms are as diverse as court-annexed arbitration, summary jury trials, private adjudication, corporate minitrials and community mediation.⁵⁴ In short, ADR is a catch-all term for every out-of-court method for terminating civil disagreement.

Proponents of ADR suggest several advantages. First, ADR is less time consuming than formal adjudication because it eliminates many formalities of judicial proof. Second, the cost of ADR is much less because jurors, court personnel, and lawyers are often not part of the process.⁵⁵ Third, ADR is presumably more accessible to disadvantaged people than the court system because of informality and low cost. Fourth, the traditional adversarial process is ill-suited to resolve certain types of disputes.⁵⁶ Finally, ADR avoids the "all or nothing" outcome typical of trial judgments, re-

Mary A. Bedikian, *Overview of Alternative Dispute Resolution Techniques*, Mich. Bar J., Sept. 1986, at 876 (citing Derek Bok, *President's Report to the Board of Overseers* (1981-82)) (emphasis added).

52. See *Government Tries Alternative Dispute Resolution*, Nat'l L. J., June 15, 1987, at 5 (acknowledging, however, that ADR creates special problems in government because the public interest must be considered in any decision).

53. See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359, 1366 [hereinafter Delgado].

ADR has historical roots in the United States back to colonial times. Jerold S. Auerbach, *Alternative Dispute Resolution? History Suggests Caution*, Boston Bar J., May-June 1984, at 37. Indeed, ADR can count among its supporters Abraham Lincoln, who said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time." Metaxas, *supra* note 50, at 6. An interesting development in the ADR field is the "rent-a-judge" services becoming more available to private litigants. Private trials, generally presided over by retired judges, resolved between 150 and 200 disputes in California in 1987. Gail Cox, *The Best Judges Money Can Buy*, Nat'l L.J., Dec. 21, 1987, at 1, 23. See also Jeanne E. Langworth, *Private Judging: An Effective and Efficient Alternative to the Traditional Court System*, 21 Val. U.L. Rev. 681 (1987).

54. Metaxas, *supra* note 50, at 1.

55. One of the major attractions of ADR is the decreased burden on the court system. For a discussion of the increased frequency of civil disputes and the ways ADR can be used to decrease this burden, see, for example, Jeanne A. Girgan, *Problem Solving in the 1980's: A Qualitative Analysis of Alternative Means of Minor Dispute Resolution*, 14 Seton Hall 987 (1984); James A. White, *Alternative Methods of Dispute Resolution*, Mich. Bar J., Sept. 1986, at 875.

56. See Marguerite Millhauser, *In Choosing ADR, the People, as Well as the Problem, Count*, Nat'l. L. J., Apr. 6, 1987, at 15 ("One of the key features of alternative dispute resolution is its adaptability. Rather than forcing every problem into the somewhat narrow confines of the traditional adversary system, ADR provides a wider range of mechanisms that allow for greater flexibility.")

Opponents of ADR argue that alternative methods are not always effective in certain types of disputes. For example, mediation is not very effective when one party has an extremely strong contractual claim or defense. Bedikian, *supra* note 51, at 876, 879.

ducing risk for both parties.⁵⁷

Justification for mediation, a form of ADR, is based on the fact that the court system is not suited to handle the amount and diversity of disputes being brought to it and the adversary process is not always suited to the resolution of all disputes.⁵⁸ In mediation, a neutral and non-coercive third party coordinates and facilitates negotiations between the parties in dispute.⁵⁹ The mediator is not concerned with finding liability, but helps the parties arrive at resolution through clarification, acknowledgment, suggestion, and negotiation.⁶⁰ The third party has no state-enforced power. The mediator's power lies in the ability to persuade the parties to reach a voluntary settlement. It involves the *creation* of consensus in hopes of discovering shared values as a means of coming to agreement.⁶¹

B. ADR in Farmer-Lender Disputes

The statutory duties of the mediator operating under the Minnesota Farmer-Lender Mediation Act closely parallel the theoretical characteristics and goals of ADR and mediation. According to Minnesota Statutes, section 583.26, subdivision 6, the mediator shall:

- (1) listen to the debtor and the creditors desiring to be heard;
- (2) attempt to mediate between the debtor and creditors;
- (3) advise the debtor and creditors of assistance programs available;
- (4) attempt to arrive at an agreement to fairly adjust, refinance, or pay the debts; and
- (5) advise, counsel, and assist the debtor and creditors in attempting to arrive at an agreement for the future conduct of financial relations among them.⁶²

Mediation can be an inexpensive way to find common ground

57. Leo Herzel & Alan N. Salpeter, *Alternative Dispute Resolution May Have Limits*, Legal Times, Dec. 23, 1985, at 1. See *contra* Stephan Landsman, *The Adversary System* 44 (1984) ("The adversary process provides litigants with the means to control their lawsuits. . . . Ultimately, the whole procedure yields results tailored to the litigants' needs and in this way reinforces individual rights.")

58. Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 *Law & Inequality* 21, 21 (1984) (citing Daniel McGillis, *Recent Developments in Minor Dispute Processing*, National Institute of Law Enforcement Assistance Administration, U.S. Dept. of Justice by ABT Associates under Contract No. JLEAA 81378).

59. Delgado, *supra* note 53, at 1363.

60. See generally Nancy A. Welch, *The Lawyer's Buffet: Options in Resolving Disputes*, Bench & Bar Minn., Nov. 1987, at 19; Jeffrey S. Klein, *Legal View: Mediation Helps Avoid Costs of Trial*, L.A. Times, Mar. 6, 1986, at 17, col. 1.

61. Rifkin, *supra* note 58, at 25.

62. Minn. Stat. § 583.26(6)(b) (1986 & Supp. 1987).

between farmers and creditors. It can give troubled farmers breathing room; the result of mandatory mediation in Minnesota is an automatic stay of foreclosure proceedings for 90 to 180 days.⁶³ Mediation can also help bankers resolve delinquent loan problems by encouraging farmers to discuss their financial outlook in detail. Through the process, tensions may be eased, communications improved between the two parties involved, and farmers come face to face with their problems and their future.⁶⁴

C. Criticism of Mandatory Mediation

Despite all of these advantages, many agricultural lenders and others initially criticized ADR in the farmer-lender mediation context. Besides their formal challenges to the laws,⁶⁵ lenders contended that mediation would lead to less available farm credit, cause lengthy delay in the foreclosure process, and paint them as villains in debt restructuring.⁶⁶

Lender antagonism to the 1986 farm relief bill is a concern to farmers and farm leaders. The Mediation Act has provided protection for many farmers through the automatic stay. The combination of mandatory mediation and the new family farm bankruptcy code, however, may have a drastic effect on the number of new farm loans banks will process. For these reasons, a critical analysis of these concerns is necessary.

Lenders indicated that mandatory mediation would result in less available farm credit.⁶⁷ According to a survey by the Minnesota Extension Service, farmers favored mandatory mediation by a large margin, but also said that they felt a change in lending policy in the state.⁶⁸ This cutback in credit has caused some concern

63. Minn. Stat. § 583.26(5) (1986 & Supp. 1987). See *supra* notes 38-40 for a discussion of the timing of mediation.

64. See generally Bennett, *Minnesota, Iowa Pass*, *supra* note 16, at 3.

65. See *infra* notes 81-100 and accompanying text for a discussion of these formal challenges.

66. Bennett, *Minnesota, Iowa Pass*, *supra* note 16, at 3. Norbert McCrady, executive vice president of the Independent Bankers of Minnesota stated: "It [mandatory mediation] has not been satisfactory, partly because we have created a procedure in which those who choose to do so . . . can delay their obligation to a lender by means that are procedural rather than fundamental." *Id.* Senator Dave Durenberger (R. Minn.) has also criticized mandatory mediation saying it hurts farmers by setting up an arrangement which ignores realities of the negotiation process. *Durenberger Called Wrong on Farm Mediation Criticism*, Mpls. Star & Trib., Oct. 25, 1986, at 17A, col. 3.

67. *Loan Mediation Praised By Most — Except Lenders*, Mpls. Star & Trib., Dec. 8, 1986, at 1B, col. 1.

68. See Farm Credit Mediation Evaluation Report: An Assessment of Farm Credit Mediation, Minnesota Extension Service (1986) [hereinafter Evaluation Report]. The coordinator of the mediation program stated that "They were feeling

among farmers and farm advocates. The "drying up of credit" felt by farmers may be the result of financial decisions made by lenders to not loan money to farmers because of the strict requirements of the Mediation Act.⁶⁹

Lenders also suggested that mandatory mediation and the corresponding stay in collection proceedings leads to unfair, substantial delays in the foreclosure process. Under the current Mediation Act, if no agreement is reached between the parties, proceedings to enforce a debt are delayed considerably.⁷⁰ This delay was the major cause of contention in the formal challenges lodged against the Farmer-Lender Mediation Act by the Federal Land Bank of St. Paul and Production Credit Associations.⁷¹

The Minnesota Legislature recognized the need to act immediately and drastically to the plight of farm families in Minnesota.⁷² The stay of collection proceedings may give many farmers time to restructure debt and settle their finances, thus saving many family farms. The delay may provide significant benefits to lenders, who have a strong interest in mandatory mediation. The farmer, given added time, may be able to make the appropriate regular payments to the lender. The delay to the foreclosure process acts as an added benefit to the farming industry *and* the lender. In addition to the prevention of farmer eviction, a delay and restructuring of debt will mean less land dumped on an already glutted market.⁷³ Less land on the market will lead to higher prices, preserving the creditor's asset in their other farm loans.⁷⁴

Lending officials also contend that mandatory mediation portrays the banker as a villain in the farm crisis. Bank officials face emotional stress as a result of the crisis. One banking official states: "We know nobody cares about the family bank. Everybody cares about the family farm. When we get done with mediation, everybody shakes hands with everybody—but not with the banker.

that there has been a restriction on credit, which they attribute to mediation in Minnesota." Bennett, *Minnesota, Iowa Pass, supra* note 16, at 6.

69. The 1987 Minnesota Legislature seemed to be influenced by the arguments of lenders outlined in this section. This influence led to amendments to the Mediation Act in 1987 and, according to some, a "largely indifferent" attitude toward farmers by legislators. See *Legislature was Largely Indifferent to Farmers*, Mpls. Star & Trib., May 22, 1987, at 1B, col. 1.

70. See Minn. Stat. § 583.27 (Supp. 1987). See *supra* notes 38-40 and accompanying text.

71. See *infra* notes 81-100 and accompanying text.

72. See *supra* note 18 and accompanying text.

73. See *supra* note 4.

74. For a discussion of farmland prices, see *supra* note 4.

The banker is the one who usually has given all the concessions."⁷⁵ Research indicates that mediation provides the farmer with a different view of the lender—the human side.⁷⁶ Communication and understanding gained through the mediation program in Minnesota have helped farmers understand the position of farm lenders.⁷⁷

Some farm lenders balked at mediation in the farmer-lender context at a time when the banking industry had accepted ADR as a method of dispute resolution for their other lending disputes.⁷⁸ The complaints of lenders led to a lawsuit challenging the constitutionality of the statute⁷⁹ and some recent amendments to the Mediation Act.⁸⁰ The next two sections of this article discuss the 1987 amendments and analyze the constitutional claims.

D. *Constitutionality of the Mediation Act*

The St. Paul district of the Farm Credit System and various Production Credit Associations in Minnesota [FCS] filed a lawsuit on July 1, 1986 challenging the constitutionality of parts of the 1986 farm bill.⁸¹

The lenders objected to four provisions of the farm relief bill, most of which delay the time before a lender can begin collection

75. Bennett, *Minnesota, Iowa Pass*, *supra* note 16, at 5.

76. Evaluation Report, *supra* note 68, at 18-19.

77. *Id.*

78. BankAmerica Corporation and Chase Manhattan Bank signed an "ADR pledge," a corporate policy statement formulated by the Center for Public Resources, which expresses a commitment to ADR. Coleman T. Mobley, *Banking Institutions Urged to Try ADR*, *Legal Times*, Apr. 28, 1986, at 10. The banks cite streamlined, less expensive, and less divisive procedures as reasons for the pledge. *Id.*

79. *See infra* notes 81-100 and accompanying text.

80. *See infra* notes 101-118 and accompanying text.

81. Complaint, *Federal Land Bank of St. Paul v. Humphrey*, No. 3-86-605 (D. Minn.) (filed July 1, 1986). The challenged provisions include the mandatory mediation provision; a provision exempting 160 acre homesteads; a provision postponing a lender's ability to enforce deficiency judgments for one year; and a provision that gives a farmer the first right of refusal to buy or lease back his land after its foreclosure. *See id.*

The Farm Credit System [FCS] consists of the federal land banks, the federal land bank associations, the federal intermediate credit banks, the production credit associations and the banks for cooperatives, located throughout the United States. Established originally under piecemeal legislation, the various Farm Credit System entities operate under 12 U.S.C. §§ 2001-2259 (1982 & Supp. 1985). The FCS in St. Paul serves about 150,000 farmers in Minnesota, Wisconsin, Michigan, and North Dakota. United Press International Release, Mar. 27, 1986. FCS holds outstanding loans totalling \$1,937,483,211 in principal alone. *See Complaint, supra*. Named Production Credit Associations had a total of \$663,020,243 in outstanding loans at the time the action was filed. *Id.* at 4.

actions.⁸² They alleged that the Mediation Act is unconstitutional because their "contract rights with respect to each such borrower have been and will be substantially impaired by the provisions of [the Act]."⁸³ Further, the lenders alleged that the Act is violative of the due process clause,⁸⁴ that the Act violates Article I, Section 8 of the United States Constitution because it is an unconstitutional alternative to reorganization under the Bankruptcy Code,⁸⁵ and finally, that the Act is preempted by the Federal Farm Credit Act.⁸⁶

Although the lawsuit was dismissed without prejudice on August 12, 1987 pursuant to a stipulation, the constitutional claims made by the farm lenders were substantial, are part of the recent history of the Act, and may be reconsidered by other farm lenders in other states if they or Congress passes similar legislation. For these reasons, the claims warrant consideration.

Primarily, the plaintiffs in *Federal Land Bank of St. Paul v. Humphrey*⁸⁷ alleged that the Act substantially impaired contract rights and relationships of debtor and creditor.⁸⁸ To analyze the

82. *See id.* at 9-12.

83. *Id.* at 9.

84. *Id.* at 14.

85. *Id.* at 15.

86. *Id.* The State of Minnesota denied the claims of the Federal Land Bank, filing its Answer on July 23, 1986. Further, Minnesota Attorney General Hubert Humphrey III asked for a federal investigation of the lender in a letter mailed on July 10, 1986. Andrea Bennett, *Angry Minnesota Attorney General Asks for Probe of Farm Credit*, Am. Banker, July 11, 1986, at 9. Humphrey attacked the Farm Credit System's St. Paul district for "a pattern of conduct . . . that shows a lack of responsiveness, lack of accountability and failure to fulfill the Farm Credit System's congressional purpose." *Id.* The St. Paul district defended its lawsuit, stating that "the lawsuit is based on sound business principles of questions of constitutionality." *Id.* at 10. Humphrey cited the lawsuit as an example of the uncooperativeness of the Federal Land Bank, stating that "[w]hen a state has taken careful steps to aid its farmers, it should not be thwarted by an institution designed by Congress to assist farmers." *Id.*

Farm Credit officials did not raise objections to the farm bill during legislative committee hearings, but issued a post-enactment press release and letter campaign. The press release stated that the lenders would deny loans to "several thousand" farmers if the 1986 law was not changed. Alison Grant, *Humphrey Asks Farm Credit Officials to be Helping Partners*, United Press International Release, Mar. 27, 1986.

The lenders suggested that the press release was sent after enactment because they were unaware of the progress of the farm relief bill. Attorney General Humphrey met with officials of the St. Paul District of the Farm Credit System on March 26, 1986 out of a concern that the FCS was "pressing forward with a letter going out to 40,000 farmers." *Id.*

87. No. 3-86-605 (D. Minn.) (filed July 1, 1986).

88. *Id.* *See also* U.S. Const. art. I, § 10. Article I, section 10 of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The contract clause restricts the power of state or local governments to modify the obligations of parties to a private contract. This restriction is not an

constitutionality of the Farmer-Lender Mediation Act, a 1934 United States Supreme Court case, *Home Building & Loan Association v. Blaisdell*,⁸⁹ and a 1986 Minnesota Court of Appeals case, *Laue v. Production Credit Association*,⁹⁰ will be discussed in this article. In *Blaisdell*, the Court reviewed a law enacted by the Minnesota Legislature in 1933 which gave state courts the authority to extend the redemption period after a foreclosure sale, contrary to the parties' contract rights. The mortgagees in *Blaisdell* contended that the law violated the contract clause of the United States Constitution.⁹¹

The United States Supreme Court sustained the debtor relief law as a valid exercise of state police power, despite the law's retroactive impact. The *Blaisdell* Court recognized that the Midwest faced an economic emergency when Minnesota passed the Mortgage Moratorium Law of 1933.⁹² Relying on *West River Bridge Co. v. Dix*⁹³ and other cases, the Supreme Court stated that a state always retained power to react to emergency situations and protect the security of its people.⁹⁴ The Court held that Minnesota's adoption of the Mortgage Moratorium Law fell within this reserved power of the states and did not violate the United States Constitution.⁹⁵

A modern-day application of the impairment of contract claim parallels the Court's analysis in *Blaisdell*. The Mediation Act was a compromise between farmers who were demanding a moratorium on foreclosures like that in *Blaisdell* and creditors who suggested that a moratorium would dry up credit and violate constitutional rights. In *Laue*,⁹⁶ the Minnesota Court of Appeals considered the impairment of contract claims similar to those brought in *Federal Land Bank of St. Paul v. Humphrey*, the case filed in the United States District Court in Minnesota. The court held that farmers who were subject to foreclosure, cancellation, replevin, or other collection proceedings on the date of enactment are entitled to the protection of the Farmer-Lender Mediation

absolute prohibition, however. In order to protect the health, safety, and welfare of its citizens, a state may enact legislation which impairs contracts. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Severe impairment" of contractual rights, however, will "push the constitutional inquiry to a careful examination of the nature and purpose of the state legislation.").

89. 290 U.S. 398 (1934).

90. 390 N.W.2d 823 (Minn. Ct. App. 1986).

91. *Blaisdell*, 290 U.S. at 402.

92. *Id.* at 424-30.

93. 47 U.S. (6 How.) 507 (1848).

94. See *Blaisdell*, 290 U.S. at 426, 434.

95. See *id.* at 445-47.

96. 390 N.W.2d at 823.

Act.⁹⁷ Even though the debtors in *Laue* were involved in foreclosure proceedings that were *pending prior* to the effective date of the Act, the court found the legislative intent of the Act to include them. The court thus found that this application of the statute was not retroactive.⁹⁸

In *Laue*, the Court of Appeals also considered the impairment of contract claims to the Mediation Act. In discussing the merits of the impairment of contract claim, the court stated that the reviewing court must determine whether: (1) the Act imposes a substantial impairment; (2) the state has shown a significant and legitimate public purpose for the Act; and (3) the action taken by the legislature is reasonable in light of the public purpose.⁹⁹

In applying this test, the court stated:

The seriousness of the farm crisis and its orderly alleviation are legitimate public purposes for legislative action. By limiting the time for mediation, imposing obligations of good faith upon participating debtors and creditors, and repealing the Act effective July 1, 1988, the legislature has carefully tailored the means to protect the public purpose without unreasonably burdening creditors.¹⁰⁰

The *Blaisdell* and *Laue* decisions combine to indicate that the impairment of contract claims made in *Federal Land Bank of St. Paul v. Humphrey* would be rejected. Like *Blaisdell*, the crisis in the Midwest required drastic action. The Act is technically an "impairment of contract" but is justified because of the public purpose of the legislation.

E. 1987 Amendments to the Mediation Act

Three groups of amendments to the Mediation Act were proposed in 1987.¹⁰¹ A conference committee was required for the Minnesota House and Senate to resolve their differences on these

97. *Id.* at 830.

98. *Id.* at 829. *Cf.* *Carnel v. Travelers Ins. Co.*, 402 N.W.2d 190 (Minn. Ct. App. 1987), where the Minnesota Court of Appeals held that the Mediation Act *does not* apply to a mortgage foreclosure which occurred before the Act was enacted and does not toll the statutory one-year redemption period associated with that sale. *Id.* at 193. The court reasoned that there was no existing debt subject to mediation proceedings and there was no appropriate creditor-debtor relationship subject to the purview of the Act. *Id.*

99. *Laue v. Production Credit Ass'n*, 390 N.W.2d 823, 829 (Minn. Ct. App. 1986) (citing *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983)).

100. *Laue*, 390 N.W.2d at 829.

101. The amendments were proposed by Senator Berg [hereinafter Berg amendments], Senators Redalen, Dille, McDonald, Uphus [hereinafter Redalen amendments] and House member Schoenfeld [hereinafter Schoenfeld amendments] (all are on file with Law & Inequality).

amendments, and the committee reached a final agreement in May, 1987.¹⁰² In some cases, the amendments are helpful in explaining and assisting the new process, but the amendments fail to address significant issues in other situations. Senator Charlie Berg suggested that amendments to the Act were necessary to "smooth out the process and eliminate several glitches in the law."¹⁰³

In addition to the financial analyst position discussed earlier,¹⁰⁴ there are several important procedural changes to the Act. These amendments lengthen the mediation period to eighty-five days, but shorten the overall "nonforeclosure period" to ninety days.¹⁰⁵ The maximum stay of proceedings, unless the creditor is found to have acted in bad faith, became ninety days under the amendments.¹⁰⁶ The financial analyst may provide the farmers with the expertise and assistance necessary to expedite the process, however, limiting the severity of the amendment.¹⁰⁷

Under the Berg compilation, proposed amendments would have raised the minimum notification amount from \$5,000 to \$20,000.¹⁰⁸ The rationale for this raise was that farmers with lower loan amounts do not need the protection of the Act. This amendment was defeated in conference committee, however, and the minimum notification amount remained at \$5,000.¹⁰⁹

Another amended provision excludes custom farm machinery dealers from the definition of "agricultural property."¹¹⁰ This provision is designed to address machinery dealers' complaints about farmers who were filing for mediation, then subjecting their machinery to heavy use during the mediation period. The new provisions were disputed by farm lenders, saying they may be disastrous to the farmer if seasonal use machinery can be taken during the busiest time of the season.¹¹¹ Under the amendments, farmers who are unable to come up with payment will lose the seasonal

102. *Conferees Agree on Farm Mediation*, Mpls. Star & Trib., May 16, 1987, at B3, col. 1.

103. Joe Kimball, *Farm Mediation Law Change Gains in Senate Vote*, Mpls. Star & Trib., Mar. 10, 1987, at B4, col. 1.

104. See *supra* notes 34-36 and accompanying text.

105. See *supra* notes 38-40 and accompanying text for the applicable time periods under the current statute.

106. Minn. Stat. § 583.26(5)(a) (Supp. 1987).

107. See *infra* notes 138-141 and accompanying text.

108. See Berg amendments, *supra* note 101, to Minn. Stat. § 581.015.

109. See Conference Committee Report on S.F. No. 89, May 14, 1987, at 11 (on file with Law & Inequality).

110. Minn. Stat. § 583.22(2) (Supp. 1987). Machinery dealers can also file a priority lien on crops for rental value of seasonal farm machinery. *Id.*

111. See Kimball, *supra* note 103, at B4, col. 1.

machinery, if the creditors wish to enforce the debt.¹¹²

The definition of good faith was another issue in dispute for the Legislature. The elusiveness of "good faith mediation" has caused considerable controversy in practice.¹¹³ The sanction for a finding of lack of good faith may include a suspension of creditor remedies for an additional 180 days following the mediation period.¹¹⁴ If the farmer is found to have mediated in bad faith, the lender may take collection action immediately.¹¹⁵ It is a major procedural advantage for either party to establish bad faith, but the finding is subject to court review upon the filing of a petition by the party.¹¹⁶

The 1987 amendments made the following addition to the statute regarding debtor lack of good faith:

A debtor is not mediating in good faith if the debtor fraudulently conceals, removes, or transfers agricultural property in which the debtor knows there is a security interest. The concealing, removing, or transferring must be in violation of a security agreement without remitting the proceeds to the secured party and must have occurred during the the mediation period.¹¹⁷

This amendment to the Farmer-Lender Mediation Act should resolve lender complaints about delay and the possibility of abuse by the farmer.¹¹⁸ The amendments do not, however, resolve the diffi-

112. See Berg amendments, *supra* note 101, to Minn. Stat. § 583.235(1). See also Kimball, *supra* note 103, at B4, col. 1.

113. See, e.g., Obermoller v. Fed. Land Bank, 409 N.W.2d 229, 231-32 (Minn. Ct. App. 1987) (refusal to issue temporary injunction affirmed because debtor failed to establish bad faith).

114. Minn. Stat. § 583.27(3) (Supp. 1987). See *supra* note 47 and accompanying text for a discussion of this provision. A creditor found not to have participated in good faith "shall pay" attorney fees and costs of the farmer. *Id.*

115. Minn. Stat. § 583.27(4)(a) (Supp. 1987).

116. See Minn. Stat. § 583.27(6)(a) (1987) which states:

Upon petition by a debtor or creditor, a court may review a mediator's affidavit of lack of good faith or a mediator's failure to file an affidavit of lack of good faith of a creditor. . . . The review is limited to whether the mediator committed an abuse of discretion in filing or failing to file an affidavit of lack of good faith. The petition must be reviewed by the court within ten days after the petition is filed.

117. Minn. Stat. § 583.27(4) (Supp. 1987). The proposed Berg amendment tracked this language, but the last clause stated that "[the concealing, removing, or transferring] must have occurred within 24 months prior to the mediation period or during the mediation period." Berg amendments, *supra* note 101, to Minn. Stat. § 583.27(4).

118. The legislature chose to codify and statutorily protect lenders who were protected by the common law of fraudulent transfer through amendment. Although a discussion of fraudulent transfer is beyond the scope of this article, a fraudulent transfer is any transfer of property of the debtor 1) made with actual intent to defraud, delay or hinder a past or future creditor, or 2) made for less than reasonably equivalent value if the debtor was or thereby became insolvent, was left

culty of proving bad faith, nor do they clarify the definition for the mediator, who must determine what "lack of good faith" means. As a whole, the 1987 amendments were helpful in providing for farmer preparation, assistance and clarification of the initial legislation.

F. Formal Evaluation of Mandatory Mediation

Minnesota officials have estimated that approximately 3,000 farmers took part in mandatory mediation during the first eight months of the program.¹¹⁹ Of those cases, forty percent resulted in a settlement agreement, while the other sixty percent were still in progress or could not be settled.¹²⁰ According to the Extension Service study, "the mandatory mediation program has reduced tension, improved communications, promoted settlements, and helped farmers make decisions about their future . . ."¹²¹ Overall, negative lender response¹²² is probably attributable to complaints of an "anti-creditor" climate in Minnesota, but these initial responses may be linked to the quick passage of the law without lender interaction.

Some observers question whether mediation really accomplishes anything for farmers, because lenders are not obligated to reduce loan obligations. Solutions used in the mediation proceedings include reduced interest rates, rescheduled principal payments, and forgiven debt.¹²³ Results of mediation also include relinquishing personal or farm business assets or partial liquidation of the farm operation.¹²⁴

Although the majority of farm lenders indicated publicly that they do not favor Minnesota's mandatory mediation program, others are more positive about the program. Agricultural lenders suggest that mediation can be a "useful tool for stimulating dia-

with unreasonably small capital or intended to incur debts beyond the ability to repay. See Minn. Stat. § 583.27(7) (Supp. 1987).

119. A comprehensive survey by the Minnesota Extension Service was completed in December 1986. See generally Evaluation Report, *supra* note 68. The evaluation was monitored by the Division of Agricultural Education and respondents were assured of confidentiality. *Id.* at 30.

120. Evaluation Report, *supra* note 68, at 7. The Iowa program has similar results. Sixty-two percent of the 2,200 Iowa mediation cases reached some agreement. *Debt Mediation*, *supra* note 21, at 20, col. 1. The agreements include refinancing, partial liquidation, workout, or total liquidation. *Id.*

121. Evaluation Report, *supra* note 68, at 20-21.

122. See *Farmer-Lender Mediation Helps Ease Tensions in Minnesota*, Am. Banker, Jan. 6, 1987, at 11.

123. Evaluation Report, *supra* note 68, at 13-14.

124. See *id.* at 14. See also Mediation Case Reports, *supra* note 42.

logue between farmers and lenders."¹²⁵ In addition, lenders feel "mediation has helped [both parties] move past the emotional stage and produced orderly resolution between lenders and farmers."¹²⁶

The evaluation indicates that mediation offers farmers and lenders the opportunity to resolve difficult problems and to avoid formalistic rules and procedures using open communication and a neutral mediator. Courts are often seen as creating an intimidating and illusive atmosphere for the fair resolution of conflicts.¹²⁷ In most disputes, each party has a profound sense of its own virtue and a correlated sense of the opponent's villainy. The formal evaluation indicates that farmer-lender mediation can encourage relatively friendly resolution of these difficult and emotional disputes and lessen hostilities between farmers and lenders. Much of the success depends upon the cooperation of the parties and ability of the mediator to steer the conversation away from blame and keep the focus forward: how to make the future situation better than the current one.

G. *Farmer Concerns and Possible Solutions to the Pitfalls of ADR in the Farmer-Lender Context*

In addition to the above criticisms, constitutional claims, and amendments, there are additional aspects of the Farmer-Lender Mediation Act which should be scrutinized. Although the law takes precautions to avoid some of the pitfalls of ADR,¹²⁸ problems still remain. First, by creating an environment that em-

125. United Press International Release, Jan. 17, 1987.

126. *Id.*

127. See *infra* notes 132-133 and accompanying text.

128. For example, ADR commentators have noted that although the mediator in theory is a neutral intervener with no self-interest, a mediator often becomes a negotiator. In that role, the mediator inevitably brings to the process certain ideas, knowledge and assumptions. See, e.g., Rifkin, *supra* note 58, at 23. If the mediator "identifies" with one party, having the same sex or occupation, for example, this may lead to a "two versus one" situation. Ruth R. Budd, *Divorce Mediation: Some Reservations*, Boston Bar J., May-June 1983, at 33, 34.

The danger of favoritism by occupation or other means was resolved by the statute. The Mediation Act provides a procedure by which "the initiating creditor and the debtor may each request the director to exclude one mediator from the list by sending the director a notice to exclude the mediator within three days after receiving the mediation meeting notice." Minn. Stat. § 583.26(4)(c) (Supp. 1987). Although these provisions do not completely immunize the farmer or lender from bias, because the mediator may still be biased and parties may not know about it, the statute does much to alleviate a potential problem. Revisions made in the 1987 Minnesota Legislature also provide that "[a] person is not eligible to be a mediator if the person has a conflict of interest that does not allow the person to be impartial. A conflict of interest includes being a current officer or board member or officer of the initiating creditor." Minn. Stat. § 583.26(6)(a) (Supp. 1987).

phasizes and imposes cooperation, mediation may deny or de-emphasize the national importance of the farm crisis.¹²⁹ The mediation process forces the conflict to be on a case-by-case level, losing federal and state scope. The farm crisis is a national crisis¹³⁰ and national policy (or the lack thereof) will affect farming in the future. Farmer-lender mediation could be detrimental to farm policy if the crisis is neglected, if private resolution defeats public discussion and conscience.¹³¹

The Mediation Act puts much of the burden of the farm crisis on Minnesota farm lenders. Other than promoting federal financial assistance to farmers through various farm programs, the Minnesota mediation program could be assisted through federal certification, which would make it eligible for matching federal funds. Through such assistance, the Mediation Act would be more effective and apply to other federal lenders, including the Farmers Home Administration, an agricultural lender with substantial loans to Midwest farmers.

Critics of ADR suggest that the system fails to protect the weaker party in the particular conflict.¹³² Professor Delgado suggests that "[o]ur judicial system . . . has incorporated societal norms of fairness and even-handedness into institutional expectations and rules of procedure at many points." Delgado further asserts that "these norms create a 'public conscience and a standard for expected behavior that check overt signs of prejudice.'" ¹³³ Mandatory farmer-lender mediation may not offer protection for the weaker party due to these concerns. The mediator need not comply with strict rules of procedure or law, but merely acts as a facilitator. There is no tribunal to make sure that the individuals participating in mediation comport themselves in accordance with society's perceptions of fairness. Under the Mediation Act, the mediator does not have a duty to advise parties about the law or a duty to assist parties in establishing legal rights. When the mediator perceives that a particular party is being dominated or forced

129. See Richard Abel, *The Contradiction of Informal Justice*, in 1 *The Politics of Informal Justice* 289-90 (Richard Abel ed. 1982).

130. The national farm bankruptcy rate rose to 2.6 percent in 1984, the highest of any year since the Great Depression. A Financial Crisis in Minnesota's Agricultural Industry: A Summary, Minnesota Extension Service (1985).

131. See Bennett, *Midwest Lawmakers*, *supra* note 13, at 24. The Harkin-Gephardt "Family Farm Act of 1987" is one proposal among others which may alleviate the farm crisis. Beyond the supply-oriented approach to farm production, see *supra* note 4, the credit provision of the bill provides federal financial support for state mediation programs. It also provides emergency debt-restructuring loans and instructs the Farm Credit System to negotiate in good faith.

132. See Delgado, *supra* note 53, at 1388.

133. *Id.* at 1387-88 (citing G. Allport, *The Nature of Prejudice* 470 (1979)).

into an inequitable agreement, the mediator quite clearly has a duty to the system and must avoid favoritism to either the farmer or lender.

ADR may also reduce political confrontation, preserving the power of legal institutions and the stability of the social system.¹³⁴ Informal systems of resolution deemphasize the concerns and rules constructed by courts to protect weaker parties and presume "that the people or entities that interact outside formal legal institutions are roughly equal in political power, wealth, and social status."¹³⁵ Such a presumption by ADR advocates may be invalid in the farmer-lender context. Farmers facing foreclosure may not only have emotional problems¹³⁶ that may affect their ability to negotiate, but they may also labor under an inequity in power; lenders will likely have more experience in the mediation process and in financial matters.

These problems of inequity are of concern to several groups involved in farmer-lender mediation in Minnesota. Lenders admit that farmers are often disadvantaged; that many farmers are coming to the sessions unprepared.¹³⁷ Some problems of preparation and the comparative lack of financial sophistication of the farmer are resolved with the amendments passed by the 1987 Minnesota Legislature. The financial analyst's¹³⁸ duties were tightened up and spelled out, providing for more consistency in the farmer's preparation for the mediation sessions. The amendments provide a clearer notice provision which states specifically that it will be to the farmer's advantage to assemble farm finance and operation records.¹³⁹ The amendments also require the financial analyst to certify that the financial records and farm plans are prepared before a mediation meeting will be held.¹⁴⁰

The job description of the new financial analyst, in addition to the certification, will lead to better farmer preparation because of the abilities and characteristics required of the position in the statute. The 1987 amendments state:

"Financial analyst" means a person: (1) knowledgeable in agricultural and financial matters that can provide financial analysis; (2) who is able to aid the debtor in preparing the financial information required under section 583.26, subdivision 3; and (3) who is approved by the director. A financial analyst may

134. *Id.* at 1394 (citing J. Auerbach, *Justice Without Law?* (1983)).

135. *Id.* at 1394.

136. *See supra* notes 5-7 and accompanying text.

137. Bennett, *Minnesota, Iowa Pass, supra* note 16, at 22.

138. *See supra* notes 34-35 and accompanying text.

139. Minn. Stat. § 581.015(2) (Supp. 1987).

140. Minn. Stat. § 583.26(3) (Supp. 1987).

include county extension agents, adult farm management instructors, AVTI instructors, and other persons able to carry out the duties of a financial analyst.¹⁴¹

The new amendments also require the director of the Extension Service to schedule an orientation session to be held at least five days before the first mediation meeting.¹⁴² The farmer, financial advisor and mediator must attend this meeting.¹⁴³ At the session, the financial analyst is required to review the farmer's records and inform the farmer of the mediation process.¹⁴⁴

These changes will aid the preparation of the farmer by providing alternatives to liquidation or bankruptcy and should alleviate lender complaints regarding lack of preparation by farmers. In addition, these precautions will diminish the possibility that lenders will have an unfair advantage in the mediation session.

The problem of farmer disadvantage in mediation has another solution, one not fully addressed by Minnesota legislators. The farmer could get further support through additional state funding for the farmer advocate program. This advocacy program is a network of farmers helping farmers. COACT, a coalition of 12 farm groups, considers the farm advocacy program essential. Polly Vesser, Minnesota COACT president, said "the advocacy program is the first place a farmer goes for help."¹⁴⁵ Analogizing the state's rural crisis to "a disease," Vesser stated that you "don't take the farm advocates out of this program until you've cured the disease."¹⁴⁶ The advocacy program was only allocated \$70,000, a far cry from the \$360,000 proposal.¹⁴⁷

The advocacy program should have additional support from the Legislature. The authors of the proposed amendments before the 1987 Minnesota Legislature failed to address the importance of the farm advocate.¹⁴⁸ It has been documented that many of the problems which farmers face in mediation proceedings are emo-

141. Minn. Stat. § 583.22(6)(a) (Supp. 1987).

142. Minn. Stat. § 583.26(3)(a) (Supp. 1987).

143. Creditors "may participate" in the mediation session. *Id.*

144. Minn. Stat. § 583.26(3) (Supp. 1987).

145. United Press International Release, Feb. 28, 1986 [hereinafter Vesser Release].

146. *Id.*

147. *Id.*

148. The sole mention of the farmer advocate program was made by the House amendments proposed by Schoenfeld, who suggested that Minn. Stat. § 583.26(3)(b) be changed to "the director of the Extension Service *shall* supply the debtor with a *list of farm advocates . . .*" (emphasis added). This minor addition is a slight change from the earlier requirement that the director notify the debtor that advocates may be available. See Minn. Stat. § 583.26(3)(b) (1986) (amended 1987).

tional¹⁴⁹; these advocates, people who *are* farmers, often have experienced credit difficulty, and are in the best position to advise the farmer in mediation.¹⁵⁰

ADR in farmer-lender dispute may lead to a power imbalance between mediating parties. Minnesota legislators considered and enacted certain amendments to the Mediation Act, but did not completely resolve these problems. Additional financing is needed to aid preparation and fairness in the procedure. Finally, mediation should only be a part of a solution to the farm crisis—a national problem which requires comprehensive action.

Conclusion

The Farmer-Lender Mediation Act is a crucial aspect of the 1986 farm relief bill. Action was desperately needed in order to save thousands of family farms in Minnesota. Farmer-lender mediation can produce a result that may prevent the recurrence of farm foreclosure and drastic farm debt. Mediation addresses the cause of debt problems, rather than dealing with the superficial symptoms of farm foreclosures. A stay in foreclosure proceedings during mediation and the opportunity to restructure debt or resolve the debt problem through mediation with farm creditors offer farmers with financial difficulty a last chance before foreclosure.

Concerns for farmers still exist, however. Farmers need additional protection in mediation through emotional, financial, and legal assistance. The Mediation Act should not be thought of as a cure to the farm crisis, but only as a partial solution to a national problem. Other national farm assistance should not be abandoned as other states consider similar programs. Constitutional claims and complaints of farm lenders are well-taken; they should not be required to bear the entire burden of the farm crisis. Other farm states should consider mandatory mediation—but its enactment or continuation in other states should not defeat discussion of other and more comprehensive solutions to the continuing farm crisis.

149. See Erickson & McKnight, *supra* note 7, at 51-54A.

150. See Vesser Release, *supra* note 145.

