

Tulsa Law Review

Volume 29 | Issue 1

Fall 1993

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Recommended Citation

Cheryl L. Cooper, *The Role of Mediation in Farm Credit Disputes*, 29 Tulsa L. J. 159 (2013).

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THE ROLE OF MEDIATION IN FARM CREDIT DISPUTES

Cheryl L. Cooper*

I. INTRODUCTION

Thanks to the Farm Credit Mediation Program farmers have a better source of expertise and are able to organize the directions they need to take during a financial and emotional crisis. Mediation shortened these periods, taking away high stress, allowing the farmer to farm and focus on his family and future directions rather than thinking about his failures. Help us keep the mediation process.¹

Farm credit mediation brings together borrowers and lenders of agricultural loans in an attempt to find mutually acceptable alternatives to bankruptcy or foreclosure. Farm credit mediation programs apply mediation techniques developed in the conflict resolution field to delinquent or distressed loan situations. Faced with record numbers of farm and bank failures, legislators in several agricultural states approved legislation in the mid-1980's which established mediation programs requiring that creditors offer to participate in mediation before proceeding against farm property. Congress enacted federal legislation in 1987 which authorized matching grants for state mediation programs. The legislation also required government agencies which make agricultural loans to participate in state mediation programs. In this regard, the Act has had the greatest effect on the Farmers Home Administration.

The discussion which follows examines the federal and state legislation, regulations, and programs which provide for farm credit mediation. It focuses on the need for mediation in this context, the fairness

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1. Quote from a Minnesota farmer. RICHARD KRUEGER ET AL., *Farm Credit Mediation: Is It Working? A Report of Pope County Minnesota*, FARM CREDIT MEDIATION PROGRAM STUDIES 1986-1990, 94 (Univ. of Minn., Minn. Extension Serv., 1990).

of the legislation, the effectiveness of farm credit mediation, and possibilities for use of the programs to resolve other types of disputes involving debtor/creditor relationships or agricultural issues. Recurring concerns include the long-term availability of credit and the attitude of financially stable farmers towards mediation for delinquent borrowers. The discussion concludes that well-tailored mediation programs can continue to play a useful role not only in resolving debtor/creditor disputes, but in addressing other issues affecting the agricultural sector of the United States economy.

II. THE NEED FOR MEDIATION

A. *Arguments For*

An underlying issue of the legislation providing for farm credit mediation is whether agricultural credit disputes are appropriate for mediation. The arguments advanced by many legislators and lobbyists reflect a national or state policy to "save the family farm." The legislative findings in the Minnesota Farmer-Lender Mediation Act provide one example: "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."² Proponents of agricultural legislation point to the "unique" business position of the farmer whose income is irregular and seasonal. Some argue that the easy credit of the 1970's, when farm income and land prices increased dramatically, obligates lenders to take some of the blame for their contribution to the liquidity crunch that farmers feel. Mediation may be one means of buying time for the farmer to recover.

Some authors portray mediation as the answer to the agricultural credit crisis. Morse, for example, concludes that mediation is "an effective means of reducing the social and economic costs of the premature termination of debtor/creditor relationships in business contexts."³ He argues in favor of mandatory mediation statutes that require creditors to offer to mediate prior to initiation of debt collection proceedings. Morse favors mandatory mediation because of three characteristics of debtor/creditor relationships which may hinder

2. MINN. STAT. ANN. § 583.21 (West 1988).

3. Edward A. Morse, Note, *Mediation in Debtor/Creditor Relationships*, U. MICH. J.L. REF. 587, 588 (1987).

mediation efforts: (1) limited mutuality of interest due to rights consciousness; (2) problems of reconciling multiparty interests; and (3) the risk of dominance by the creditor.

The first characteristic reflects each party's awareness that the creditor has a legal right to the collateral if the debtor defaults on the loan. Undersecured creditors have a greater incentive to mediate than fully secured creditors because the value of the loan may not be covered by repossession and sale of the collateral. Morse sets aside "intangible concerns about business relationships and reputation in the community."⁴ These concerns, however often make mediation worthwhile even for fully secured creditors. Furthermore, it makes no sense to penalize a fully secured creditor, who may have been more prudent about extending a loan in the first place, by making mediation mandatory. The second characteristic, multiparty interests, does not seem to be much of a problem in practice, if one at all, as Morse's article indicates with regard to the Iowa program.⁵

Morse asserts that the creditor's right to repossess collateral may also give creditors superior bargaining strength in the mediation process because mediation presents a potential means of circumventing the legal constraints intended to protect the debtor.⁶ This third characteristic, i.e. the risk of dominance by the creditor, would seem a strong reason for encouraging states to provide for financial planning assistance to debtors as an integral part of any state mediation program. Such assistance would serve to even out the relative bargaining strengths of the parties without impinging upon the debt collection process. Yet, it prevents creditors from using mediation at the expense of legal protection for debtors.

B. *Arguments Against*

The arguments against farm credit mediation emphasize its unfairness to lenders; to non-agricultural property and business owners; and to financially stable farm owners. The statutes which authorize mediation for financially distressed farmers may be characterized as procedural debtor relief statutes which "hinder, block, or delay the efficacy of the creditor's remedies within the judicial system."⁷ Lawless examines, among other things, historical precedents for procedural

4. *Id.* at 595.

5. *Id.* at 605 at n.115.

6. *Id.* at 596.

7. Robert M. Lawless, Note, *The American Response to Farm Crises: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037, 1037 n.2 (1988).

debtor relief in response to difficult economic times. The “emergency” aspect of debtor-relief statutes explains the relatively short time element of the state and federal statutes discussed below, most of which are set for repeal by 1995. Unfortunately, that leaves the long-term benefits of mediation for the agricultural community in jeopardy. It also precludes serious attention to long-term effects of some aspects of these statutes.

Lawless posits that procedural debtor relief statutes cause creditors to turn to other credit markets such as commercial lending and consumer lending, thereby making credit harder to obtain for farmers who pay their debts.⁸ However, many farm creditors are located in small, rural, agricultural communities; they cannot stay in business if they cannot lend to the farm sector. It also discounts the impact of government lending programs such as that administered by the Farmers Home Administration. Debtor relief statutes do tend to make credit harder to obtain, however, because creditors may exact a higher interest rate from farmers due to additional procedural requirements that debtor relief statutes may impose. Thus, for farmers in communities where creditors are able to turn to other credit markets, the availability of credit may be reduced.

Nonetheless, the solution advanced by Lawless does not seem appropriate. He argues that procedural debtor relief statutes are inadequate alternatives to statutes which subsidize the reduction of farm debt. This solution makes governments become farm creditors by paying off private farm lenders. He asserts that government should be more lenient to farm debtors because government must address societal interests.⁹ Although farm subsidies and guaranteed loans to farm creditors do address the problem regarding fairness of mediation statutes to lenders, they still do not make the statutes fair to financially stable farmers. One could argue that subsidies and guaranteed loans are even more unfair to farmers who do not qualify for subsidies or guaranteed loans because they pay their debts on time. In effect, they penalize sound financial management.

While the mandatory mediation advocated by Morse may leave the problems described by Lawless, subsidies do not seem beneficial for the long-term health of the agricultural economy. The best available alternative may be voluntary mediation that educates both creditors and debtors in alternative dispute resolution techniques.

8. *Id.* at 1065.

9. *Id.* at 1065-67.

Mediation programs may educate farmers on better financial management. They may also convince creditors that it may not be in their best long-term interests to enforce the debt in legal proceedings. In any event, agricultural credit statutes should move beyond the "quick-fix" characteristic of many state statutes. Voluntary mediation programs provide greater stability for the farm community without harming financially healthy farmers.

III. FEDERAL RESPONSE

A. Legislation

The Agricultural Credit Act of 1987¹⁰ authorized the federal government to provide matching grants to eligible States for operation of farm loan mediation programs. The act requires the Secretary of Agriculture to certify a state if the state has in effect a program that meets the following criteria:

- (1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program;
- (2) is authorized or administered by an agency of the State government or by the Governor of the State;
- (3) provides for the training of mediators;
- (4) provides that the mediation sessions shall be confidential; and
- (5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program.¹¹

The Act authorizes the Secretary to provide 70% of the cost of the operation and administration of the state program, with a \$500,000 annual limit per state.¹² Section 503 of the Act requires the participation of Department of Agriculture programs that make, guarantee or insure agricultural loans, to participate in good faith in the certified state programs. The section also requires the Farm Credit Administration (an independent agency which regulates a collection of banks, associations, affiliated service organizations and other entities known as the Farm Credit System):

10. Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 7 U.S.C. and 12 U.S.C.).

11. 7 U.S.C. § 5101 (1988).

12. *Id.* § 5102. The Agricultural Credit Improvement Act of 1992, Pub. L. No. 102-554 § 22, 106 Stat. 4142 (1992), raised the matching grant level from 50% to 70%.

- (1) to cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 5101 of this title; and
- (2) to present and explore debt restructuring proposals advanced in the course of such mediation.¹³

Another section of the Act requires the Farmers Home Administration (FmHA) to restructure loans if it is in the government's financial interest and would "ensure that borrowers are able to continue farming or ranching operations."¹⁴ These provisions are applicable only where the borrower acted in good faith, the default is due to circumstances beyond the borrower's control, and the borrower submits a reasonable restructuring plan.¹⁵ If borrowers do not meet these criteria, the Act allows some borrowers to buy out their FmHA loan for its net recovery value.¹⁶ The Act includes incentives for the FmHA to involve other creditors of a borrower in a restructuring plan or in mediation.¹⁷ The Act required the Secretary to make a one-time report on (1) the "effectiveness" of the certified state mediation programs; (2) "recommendations for improving the delivery of mediation services to producers"; and (3) the "savings to the States as a result of having a program."¹⁸ Section 506 authorizes \$7,500,000 for each of the fiscal years 1988-1995.¹⁹ Congress has consistently appropriated half, or almost half, that amount.²⁰

The legislative history of the act reveals that legislators debated whether mediation should be voluntary or mandatory and whether the Farm Credit System and the Farmers Home Administration should be required to participate. The House Report notes that Representative Ed Jones, Chairman of the subcommittee which heard testimony on the bill, requested a report from the General Accounting Office on the Minnesota and North Dakota farm loan mediation programs. Minnesota used a mandatory approach, while North Dakota used a

13. Agricultural Credit Act of 1987, 7 U.S.C. § 5103(b) (1988).

14. *Id.* § 2001(a).

15. *Id.* § 2001(b).

16. *Id.* § 2001(c)(6).

17. *Id.* § 2001(d).

18. *Id.* § 5105.

19. *Id.* § 5106. The Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1363, 104 Stat. 3359 (1990), extended the appropriation for fiscal years 1992 through 1995.

20. Telephone Interview with Chester Bailey, Mediation Coordinator, Farmers Home Administration (Dec. 7, 1992).

voluntary one. "In both cases, the overall results were mixed. Generally, under the programs borrowers were afforded a better chance to stay in farming, but the programs appeared to have a negative impact on credit availability and higher interest cost to other farm borrowers."²¹

The House Report includes a summary of the hearings before the House Agriculture Subcommittee on Conservation, Credit, and Rural Development. Testimony elicited by Chairman Jones revealed that lenders were generally opposed to mediation, and some witnesses opposed mandatory mediation because they thought it might encourage lenders to be more reluctant to lend to farmers.²² On the other hand, other witnesses argued for mandatory mediation. One cited a study by his organization, the Center for Rural Affairs, which found an inverse relationship between state mediation systems and bankruptcy.²³ Although no one made the argument, voluntary mediation at the state level could be reconciled with the need to require the federal government agencies that make agricultural loans to participate in mediation because these government agencies make credit easier for farm borrowers to obtain. Unlike commercial banks or private lenders, these agencies will not abandon farm lending for other credit markets because lending to farmers is part of their legislative mandate.

The legislative history also demonstrates that the legislature rejected provisions requiring support services. The Senate bill, which was not adopted by the Conference Committee, would have required the mediator in each state program to advise each participant of the existence of available assistance programs.²⁴ The Senate version would also have required the state laws authorizing state mediation programs to provide farm management counseling, technical support, and financial advice available to farm borrowers in financial distress, or to creditors who requested such support.²⁵ The Conference Committee's deletion of these requirements is regrettable, because such a requirement reflects a commitment to the long-term financial health of the farm sector instead of a "quick-fix" response to an economic

21. H.R. REP. NO. 295(I), 100th Cong., 1st Sess. 73 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2723, 2744.

22. *Id.* at 172 (statements of Michael Fitch, American Bankers' Association and John Dean, Independent Bankers' Association of America).

23. *Id.* at 80 (statement of Gene Severens, Director, Center for Rural Affairs).

24. H.R. CONF. REP. NO. 490, 100th Cong., 1st Sess. 295-96 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2956, 3090-91.

25. *Id.*

crisis. Indeed, the educational aspects of the state programs, as discussed below, appear to be essential to the effectiveness of the programs.

B. Regulation

1. Farm Credit Administration (FCA)

On September 14, 1988, the Farm Credit Administration adopted a final rule to implement section 503(b) of the Agricultural Credit Act. The final rule requires cooperation by Farm Credit System institutions with the state mediation programs certified by the Secretary of Agriculture only if initiated by the borrower, although it allows System institutions to initiate mediation "if provided in the certified program."²⁶ The rule tracks the language of the Act in requiring System institutions to "cooperate in good faith with requests for information or analysis of information made in the course of mediation under any such loan mediation program."²⁷ It also forbids a System institution from requiring a borrower to waive rights to mediation in order to obtain a loan secured by a mortgage or lien on agricultural property.²⁸

Comments to the rule indicate that the FCA rejected the view that foreclosure proceedings should be stayed pending mediation, and the view that, regardless of who initiates mediation, System institutions should be required to participate.²⁹ Directors of the state mediation programs report that the rule has had a mixed effect on System institutions' participation in the state programs. Although some Farm Credit institutions cooperate well, others are reluctant.³⁰

More recently, the FCA has adopted a policy statement as required by the Administrative Dispute Resolution Act.³¹ The policy statement requires the FCA to consider ADR when there is "a stalemate in the settlement negotiations," and to consider whether an

26. Participation in State Agricultural Loan Mediation Programs, 53 Fed. Reg. 35,427 (1988)(codified at 12 C.F.R. § 614.4521(a) (1991)).

27. 12 C.F.R. § 614.4521(b).

28. § 614.4521(c).

29. 53 Fed. Reg. 35,427, 35,446 (1988).

30. LEONARD L. RISKIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *The Farmer-Lender Mediation Program: Implementation by the Farmers Home Administration 24-25* (Nov. 1991).

31. Pub. L. No. 101-552, 104 Stat. 2736 (1990).

ADR procedure would be beneficial to the FCA in fulfilling its regulatory obligations.³² The statement limits the use of ADR to situations where all parties agree to participate, and it provides for the designation of an ADR "Specialist" to implement the policy.³³ The FCA has appointed a person to fill that position, but no other actions have yet taken place pursuant to the policy.³⁴

2. Farmers' Home Administration (FmHA)

The Farmers Home Administration is known as the "lender of last resort" for many farmers who cannot obtain financing elsewhere. It exists, in part, to "serve as a temporary source of supervised credit and technical support for rural Americans . . . until they are able to qualify for private sector resources."³⁵ The Secretary of Agriculture delegated to the FmHA the duty to implement the provisions of the Agricultural Credit Act regarding matching grants for the state mediation programs.³⁶ On August 26, 1988, the FmHA promulgated its final rule controlling administration of matching grants to the state programs.³⁷ The regulations essentially reiterate the language of the statute in the provisions which specify eligibility criteria and those that require FmHA participation.³⁸

The rule requires states which receive matching grants to provide an annual report to the FmHA, but it did not impose detailed requirements as to what the reports should contain.³⁹ Therefore the information submitted by each state program varies considerably, and it is difficult to accurately measure or assess the accomplishments of the programs as a whole. The effort to assess the programs might have been aided if the statute had required an annual, as opposed to a single, report from the FmHA.

The agency declined to adopt suggestions that it require participation in voluntary mediation state programs by private lenders whose loans are guaranteed by the FmHA.⁴⁰ The agency explained

32. Policy Statement Concerning Alternative Means Of Dispute Resolution, 57 Fed. Reg. 33,198 (July 27, 1992).

33. *Id.*

34. Telephone Interview with Francis Pedersen, Senior Attorney, Litigation and Enforcement Division, Office of General Counsel, Farm Credit Administration (Dec. 7, 1992).

35. RISKIN, *supra* note 30, at 1 (quoting 7 C.F.R. Pt. 2003, Subpt. A. Ex. A, 6 (1991)).

36. FmHA, FARM CREDIT MEDIATION, REPORT TO CONGRESS 1 (1989).

37. 7 C.F.R. § 1946 (1991).

38. *See supra* notes 11, 14-16 and accompanying text.

39. 7 C.F.R. § 1946.

40. *Id.*

this refusal in response to comments submitted for a final rule regarding its guaranteed loans:

The guaranteed program depends upon commercial lenders requesting guarantees to cover their higher risk loans. If a number of the suggestions were implemented, lenders would pull out of the guarantee program, thus reducing the amount of credit available for farmers whose financial conditions are better than what FmHA deals with, but still weak enough that the lender is requesting a guarantee to continue with the borrower.⁴¹

However, the agency emphasized that, under the requirements of the Agricultural Credit Act, lenders of guaranteed loans would be required to participate if the borrower requested mediation in states which have mediation programs.⁴²

The agency published another final rule concerning its participation after the Food, Agriculture, Conservation, and Trade Act of 1990⁴³ made significant changes in the agency's debt restructuring and loan servicing processes.⁴⁴ The rule follows the requirements under section 615 of the Agricultural Credit Act,⁴⁵ and they emphasize that the FmHA will participate in the state mediation programs under the same terms and conditions as other creditors, including payment of the same fees.⁴⁶ The rule also establishes procedures enabling the agency to participate in mediation proceedings for states which do not have programs eligible for matching funds. These alternative mediation proceedings are termed "voluntary meetings of creditors."⁴⁷

One important aspect about the FmHA's participation is that the agency will not initiate mediation until all other loan servicing options have been considered and none will pay FmHA an amount greater than the "net recovery value" of the loan.⁴⁸ The agency has developed a computer program to assist its county officers in determining whether the borrower can take advantage of any of the loan servicing options.⁴⁹ If mediation does not produce adjustments which will allow

41. Revision of Guaranteed Farm Program Loan Regulations, 54 Fed. Reg. 1534, 1542 (1989)(codified at 7 C.F.R. § 1980.126).

42. *Id.*

43. Pub. L. No. 101-624, § 1816, 104 Stat. 3359, 3826 (1990).

44. Farmer Program Account Servicing Policies, 7 C.F.R. § 1951.912(b)(1991).

45. *See supra* notes 14-17.

46. 7 C.F.R. § 1951.912(a).

47. Farmer Program Account Servicing Policies, 7 C.F.R. § 1951.912(b)(1991).

48. 7 C.F.R. § 1951.909(d)(1991). The "net recovery value" is essentially the amount that the FmHA would obtain by foreclosing on the property pledged as collateral. 7 C.F.R. § 1951.909(f)(1991).

49. 7 C.F.R. Pt. 1951, Subpt. S, Ex. J (1991).

the borrower to take advantage of any of the options, the FmHA will notify the borrower of the agency's intent to accelerate the account. At the same time, the agency will offer the borrower a "buyout" opportunity to keep the security property by paying FmHA the net recovery value.⁵⁰

The buyout opportunity is perceived, by some, to be an unfortunate and unfair aspect of the FmHA's policy and in the statute.⁵¹ It may well breed resentment in non-farm borrowers who do not have the opportunity to buy-out their loans. It may also cause resentment in farm borrowers who are not eligible for FmHA loans because commercial lenders deem them credit-worthy. If mediation can prevent net recovery buyout, then perhaps these borrowers and others in the rural community would be more eager to support it. The rural community may view it, nonetheless, as only second-best to traditional restructuring negotiations, and as third-best to farm borrowers' compliance with the terms of their original agreements with creditors.

IV. STATE REACTIONS

A. *Certified State Programs*

The Farmers Home Administration has certified 20 state programs as of December 1992: Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Wisconsin, and Wyoming.⁵² In 1989, the program coordinators for the state programs formed the Coalition of Agriculture Mediation Programs (CAMP) to provide "a framework for people to work together on: (1) common legislative goals; (2) expansion of USDA's use of mediation beyond FmHA farm debt restructuring; and (3) representing [and] promoting rural/agricultural mediation."⁵³ Aside from the standards for certification that each state program must meet, the programs vary significantly. These variations are inevitable because

50. 7 C.F.R. § 1951.909(h)(3)(iii) (1991).

51. See *supra* note 16.

52. Telephone Interview with Chester Bailey, Mediation Coordinator, Farmers Home Administration (Dec. 4, 1992) and FmHA, *BACKGROUND: ACCOMPLISHMENTS IN THE USDA CERTIFIED STATES AGRICULTURAL LOAN MEDIATION PROGRAM* (1992). Mississippi is no longer certified.

53. RISKIN, *supra* note 30, at 19 (quoting from the Coalition of Agricultural Mediation Programs Mission Statement (Sept. 6, 1990)).

of the differences in state funding, farming practices, and lenders involved, among other things.⁵⁴

Table 1 summarizes various characteristics of the state programs in an attempt to highlight the differences and similarities in each. Thirteen of the states established their programs by statute. Four of the states are "mandatory" in that they require a creditor to participate in mediation before initiating proceedings to foreclose. A few states require that creditors notify borrowers of the availability of mediation before proceeding on an agricultural debt, but they do not require that creditors participate in mediation. Many of the statutes provide services which assist the farmer in preparing for mediation. The programs are administered by a variety of agencies or organizations, including state offices, state university extension services, non-profit corporations, and even church ministry organizations. Other variables include requirements for a stay of foreclosure proceedings pending mediation, exemptions for creditors upon a showing of irreparable harm, limited liability or immunity for mediators, good faith requirements for participation, and dates of repeal for statutes.

Three variables deserve further discussion. One is the importance of the financial assistance provided to borrowers in preparation for mediation and the other types of support services provided to farmers through the mediation program. Wisconsin, for example, operates both a farm advocacy and an agricultural loan mediation program. The program staffers believe that there is a strong positive correlation between the amount of time spent in preparation and the number of settlement agreements with debt restructuring terms.⁵⁵ Nebraska is very active in public awareness efforts to educate borrowers and lenders on the mediation process. These efforts include, among other things, the conducting of mediation "clinics" for farmers and ranchers.⁵⁶ Such assistance would seem to have positive long-term benefits for the rural community which could mitigate or prevent farm credit crises in the future. As farmers learn to better manage their finances, they can perhaps avoid liquidity crunches.

On the other hand, broad-based assistance can also address the more endemic problem in rural America of economic structural adjustment. As one mediation program brochure points out, many of

54. Telephone Interview with John Gamble, President of CAMP (Dec. 8, 1992).

55. COALITION OF AGRIC. MEDIATION PROGRAMS, MINUTES OF CAMP MEETING (May 18-19, 1992).

56. NEB. DEP'T. OF AGRIC., NEB. FARM MEDIATION PROGRAM ANNUAL REPORT 2 (1992).

the credit problems farmers face may be due to circumstances beyond their control: "Farmers have experienced several years of low prices, high interest rates, declining land values and uncooperative weather. What was once viewed as a crisis is now best described as a chronic condition."⁵⁷ The agricultural loan mediation programs in North Dakota, Nebraska, and Wisconsin cooperate with state efforts in farmer retraining, relocation, and dislocated farmer issues.⁵⁸ For many, farming is no longer an affordable way of life. The Texas Mediation Program Director pointed out that the benefits of mediation even in this situation:

If the outcome is a total voluntary liquidation which precludes the borrower from continuing in farming, the primary benefit is that this outcome is reached in a voluntary fashion, rather than through foreclosure or bankruptcy. While the borrower is seldom happy with this outcome, at least the nature of the mediation process allows the borrower to more readily accept the reality of the situation and inevitability of the outcome.⁵⁹

The Oregon state director has developed an excellent state-wide resource directory for distressed farmers. The directory explains the mediation process and takes the reader step-by-step through preparation of financial forms and debt restructuring proposals. It also alerts the reader to lenders' concerns and to the tax consequences of debt forgiveness. In addition to listing various types of assistance services, the directory also includes a job skills assessment section. The directory thus appears to provide valuable, easy-to-understand information on mediation, and it may also serve to be helpful in structural adjustment for those who can no longer make a living being farmers.⁶⁰

The problems of structural adjustment relate to the third variable significant to this discussion: mandatory versus voluntary mediation. If mandatory mediation programs are justified by the emergency situation to which a legislature reacts, then perhaps voluntary mediation programs are more appropriate when the crisis has passed. In this regard, it may prove useful to examine one mandatory program in more detail.

The University of Minnesota Extension Service has operated an extensive, and successful, mandatory mediation program since 1986. One of the stated goals of the Minnesota program is to facilitate non-

57. OKLA. AGRIC. MEDIATION PROGRAM, PROGRAM REPORT.

58. CAMP MEETING, *supra* note 55.

59. TEX. AGRIC. LOAN MEDIATION PROGRAM, ANNUAL REPORT 11 (Sept. 30, 1991).

60. OR. DEP'T. OF AGRIC., FARM FINANCIAL RESOURCE DIRECTORY.

violent social and economic change in rural communities.⁶¹ In this sense, the state mediation programs can successfully act as structural adjustment mechanisms in response to economic crisis. The Minnesota annual report is a well-written, fairly-detailed account of the impact of its mandatory mediation program on the state. It emphasizes the impact on the rural community of mediations which result in avoidance of foreclosure. Given the mandatory nature of the program, the state has a higher number of cases and a higher level of funding than most states. Minnesota estimates that 54,828 people have participated in farm mediations in its state since 1986.⁶²

In 1986 a team of researchers conducted a study on the effectiveness of the Minnesota Farm Credit Mediation Program. The results indicated that the program was successful in preparing farmers for decision-making, reaching settlements, improving communications between farmers and lenders, and in fostering peaceful change within communities.⁶³ The research team solicited responses from five groups: farmers in mediation, farmers not in mediation, mediators, extension agents, and lenders. The study indicated an overall high level of participants' satisfaction with the process and its outcomes. While all respondent groups identified aspects of the program which were beneficial to farmers, two groups, lenders and farmers not in mediation, were generally less confident about whether the situation of farmers had improved because of the program.⁶⁴ In general, the respondents had mixed perceptions about whether the lenders benefited from the program, with farmers not in mediation and lenders the least confident of any benefits.⁶⁵ In response to inquiry about how well the program worked, "[f]armers not in mediation most frequently questioned the process because of its perceived long-term effect on the availability of credit."⁶⁶

A 1990 study on one county in Minnesota also mentions the misgivings about mediation that some in the rural community possess.⁶⁷ The researchers found, among other things, that mediation had been

61. FARM CREDIT MEDIATION-ANNUAL REPORT ON PROGRAM ACTIVITY (Draft) 6 (Minn. Extension Serv., Oct. 1992).

62. *Id.* at 19.

63. RICHARD KRUEGER, ET AL., *Assessment of Farm Credit Mediation Evaluation*, FARM CREDIT MEDIATION STUDIES 1986-1990 4 (Minn. Extension Serv., 1990).

64. *Id.* at 20.

65. *Id.* at 23-24.

66. *Id.* at 15.

67. RICHARD KRUEGER, ET AL., *Farm Credit Evaluation Report for Pope County Minnesota*, FARM CREDIT MEDIATION STUDIES 1986-1990 (Minn. Extension Serv., Jan. 1990).

successful in improving communications, keeping farmers in the community, and preventing serious personal crisis.⁶⁸ Nonetheless, the report indicated that the mediation program had generated some resentment in the rural community. In particular, the report estimated that 55% of the farmers who had not participated in mediation believed that farmers in mediation had “gained an unfair advantage or received special treatment.” Moreover, 60% of all respondents believed there were some “hard feelings” between farmers whose debts had been restructured in mediation and creditors. Forty-eight percent of all respondents believed hard feelings existed between farmers in mediation and those that were not.⁶⁹ On the whole, however, most respondents believed the program was worthwhile and should be continued. The report also indicated that the mandatory aspect of the Minnesota program had encouraged many farmers to consider mediation who would not otherwise have done so.⁷⁰

While the mandatory state programs have played a valuable role in educating rural communities about mediation, perhaps voluntary programs are more likely to receive long-term support, especially if they include comprehensive assistance service to the rural community, and if their scope is broadened to include other types of rural issues. Voluntary programs may serve to reduce the level of resentment among farmers who are not delinquent on their loans if they know that they can take advantage of the assistance programs in the same manner as farmers who are preparing for mediation. Perhaps voluntary programs would also be less likely to reduce the availability of credit among non-government lenders. These assertions are mere speculation, however, and require further empirical research for support.

B. *Pending Legislation*

Several states have recently considered or passed laws regarding farm credit mediation. Hawaii introduced legislation relating to a state agriculture loan mediation program in January of 1992.⁷¹ The Mississippi legislature deliberated in the spring of 1992 on establishing a farm mediation office within its Department of Agriculture and

68. *Id.* at 95.

69. *Id.* at 89.

70. *Id.* at 94-95.

71. S. 2343, 16th Leg., 1992 Reg. Sess., 1991 Hawaii.

Commerce.⁷² South Carolina introduced two bills in April of 1991 which would have required mediation between farm debtors and creditors.⁷³ Illinois passed legislation in 1991 which establishes a voluntary farm debt mediation program under the direction of the Agriculture Department. The bill was signed by the Governor on August 13, 1991.⁷⁴

C. *Assessment of the State Programs*

The 1989 Report to Congress, required by section 505 of the Act,⁷⁵ did not provide much empirical data regarding the effectiveness of the state programs or of the savings to the states. The FmHA had little information from the states, however, upon which to base any quantifiable assertions. As noted above, state programs vary significantly. Given the general lack of standard procedures to measure the effectiveness of the state programs, the lack of statistical information in most of the annual reports is understandable. The FmHA has taken some steps to remedy this problem, but the information is still either nonexistent or difficult to obtain.⁷⁶ The 1989 Report outlined several measures of effectiveness, however, and made broad generalizations based on reports from state mediation coordinators. These included (1) heightened public awareness of mediation ; (2) the number of requests for mediation from debtors and creditors; (3) the number of agreements reached as well as the level of communication facilitated; (4) cost savings to the parties involved; (5) the level of satisfaction; and (6) increased awareness among farmers of other resources, including financial, educational, and personal resources.⁷⁷

The recommendations for improving mediation programs emphasized the need for consistent information and training materials, strong legislative support and increased federal and commercial lender participation. One recommendation, in particular, suggested that Congress consider requiring other federal agencies which extend

72. H.R. 839, 1992 Leg. Sess., 1992 Mississippi. Farm credit mediation sections can be found at MISS. CODE ANN. §§ 96-2-43 to 69-2-51.

73. H.R. 3945, S. 896, Statewide Sess., 1992 South Carolina.

74. H.R. 204, 87th Gen. Assembly, 1991-92 Reg. Sess., Illinois. Farm credit mediation sections can be found at ILL. REV. STAT. 30 Finance § 75-35.

75. FmHA, FARM CREDIT MEDIATION, REPORT TO CONGRESS (1989).

76. Riskin reports that the state mediation coordinators have agreed to adopt a uniform reporting form. RISKIN, *supra* note 30, at 17.

77. FmHA, *supra* note 75, at 5-6.

loans to the agricultural sector of the economy to participate in the mediation programs.⁷⁸

The Report emphasized, as many annual reports emphasize, the “intangible” benefits of mediation which result in savings to the states. These include the “ripple effect” in the rural community of keeping a farmer solvent; the cost savings to the taxpayer, to creditors, and to the state when litigation is avoided; and the administrative time and effort spared when delinquent loans problems are resolved.⁷⁹ The Report described a study conducted by the Texas Agricultural Loan Mediation Program which estimated net savings to the state between \$1,208,025 and \$4,181,613. The study estimated the benefit/cost ratio between \$3.20 and \$5.92 for each dollar spent for mediation services in Texas.⁸⁰ Using these estimates, the FmHA estimated that the net savings in the 16 states which had been had received matching funds from the agency would be somewhere between \$18,191,761 and \$36,974,302. The report concluded, based on these estimates, that the matching grants had been cost-effective.⁸¹

An attempt at a comprehensive assessment of the FmHA’s success in administering the grant program is contained in a 1991 report prepared by Leonard Riskin for the Administrative Conference of the United States.⁸² At that time, the FmHA estimated that the average cost to the government per mediation in the certified states at \$651.⁸³ The Riskin report includes data detailing the number of mediations in eight states. These states were the only ones to have returned a form developed and circulated by the FmHA by April 12, 1991. (See Exhibit A). The form solicits information on the number of requests for mediation, the number of cases, and the disposition of cases. While all eight states had an agreement rate of higher than 50%, the percentages range from a low of 55.5% in Minnesota to a high of 93% in Montana.⁸⁴ One assumes that the differences in agreement rates are

78. *Id.* at 7-8.

79. *Id.* at 8.

80. *Id.* at 9-10. The 1991 Report by the Texas program estimated the benefit-cost ratio at 4.14, meaning that, for every \$1.00 the mediation program spent in providing mediation services, creditors received \$4.14 in benefits. TEX. AGRIC. LOAN MEDIATION PROGRAM, ANNUAL REPORT 16-17 (1991).

81. FmHA, *supra* note 77, at 11-12.

82. RISKIN, *supra* note 30, at 3-5.

83. *Id.* at 16.

84. RISKIN, Ex. A (reprinted by permission as Exhibit A *infra*).

due, in part, to whether a state has a mandatory or voluntary mediation program, and to the disparities in the number of cases each state processes.

More recent information from the FmHA provides the following data. Since 1989 the agency has obligated \$12,075,908 for certified state mediation programs. Eighteen state programs have qualified for certification. In 1992 these states provided more than \$2,885,313 as their match for the USDA grant; the total mediation budget for 1992 was \$5,572,771. The 18 states combined have conducted more than 27,000 cases from 1987 - 1992, which involved more than 52% of FmHA's delinquent borrowers nationwide.⁸⁵

V. POSSIBILITIES FOR EXTENSION OF MEDIATION PROGRAMS

The activities and accomplishments of the state programs reflect the experience and competence of the program staff and mediators. Several people have advocated that such experience should be put to use resolving a broader range of disputes. For example, the Minnesota program staff has encouraged the Minnesota legislature and the USDA to increase the availability of mediation to other types of disputes such as wetland designations, boundary issues, land use, timber issues, pesticide use, environmental compliance, water access and quality, seed failures, feedlot and hog sites, animal welfare, and conservation issues.⁸⁶ In a 1992 letter to the USDA, the chair of the Coalition of Agricultural Mediation Programs offered the services of the Coalition for use by the USDA in resolving many types of disputes which affect rural communities. The chair stated, "We . . . have already developed systems which could be expanded to handle many other disputes within USDA jurisdiction."⁸⁷ Likewise, Oregon's 1992 Annual Report recommends that other types of rural disputes be mediated by the program.⁸⁸

The Iowa legislature has already expanded its mediation service's mandate to assist in resolving other types of disputes which affect

85. FmHA, BACKGROUND: ACCOMPLISHMENTS IN THE USDA CERTIFIED STATE AGRICULTURAL LOAN MEDIATION PROGRAM (1992).

86. FARM CREDIT MEDIATION - ANNUAL REPORT ON PROGRAM ACTIVITY (Draft) 21 (Minn. Extension Serv., Oct. 1992); Letter from Kathy Mangum, 1991-92 Chair of the Coalition of Agricultural Mediation Programs to Secretary Edward Madigan, U.S. Department of Agriculture (April 8, 1992).

87. Letter from Kathy Mangum, *supra* note 86.

88. OR. DEP'T. OF AGRIC., FARM LOAN MEDIATION PROGRAM, ANNUAL REPORT TO THE FARMERS HOME ADMINISTRATION (Sept. 1992).

farmers, such as livestock feeding contracts, nuisance, and conservation matters.⁸⁹ The Executive Director of the Iowa Farm Mediation Service is an ardent supporter of expanding the mediation programs to mediate other kinds of disputes in rural communities even beyond those related to agriculture. He stated, "The hurdle is to get people to see the applications beyond just the application to agriculture."⁹⁰ The Iowa director also mentioned the opportunities for the Small Business Administration in particular.⁹¹ Similarly, the 1991 North Dakota legislature made changes which provide for mediation between farmers and persons or entities other than creditors.⁹²

Riskin reports that the Small Business Administration (SBA) already participates effectively in the Oklahoma and Texas farm mediation programs.⁹³ Riskin also notes other efforts by the FmHA to induce other federal agencies to participate in the farm mediation programs.⁹⁴ The FmHA's 1989 Report to Congress articulated the reason that Congress should extend the mediation provisions of the Agricultural Credit Act to cover other federal agencies:

A significant number of distressed loan cases involve debts to the Small Business Administration (SBA) and the Federal Deposit Insurance Corporation (FDIC). SBA and FDIC also often hold their positions junior to FmHA and FCS. Thus, in many cases a write-down of debt by FmHA or the FCS does not allow the development of a feasible plan, but just gives SBA or FDIC a more favorable lien position.⁹⁵

The FmHA Mediation Coordinator has indicated that the Small Business Administration is considering setting up a mediation program similar to that administered by the FmHA.⁹⁶ Moreover, the IRS has two pilot programs for participation in the state mediation programs of Arkansas and Wisconsin.⁹⁷

89. IOWA CODE § 654B (1990).

90. Telephone Interview with Michael Thompson, Executive Director, Iowa Farm Mediation Service (Dec. 14, 1992).

91. *Id.*

92. NORTH DAKOTA AGRIC. MEDIATION SERVICE, 1 AG MEDIATION NEWS (vol. 1 Dec. 1991)(now entitled COMMON GROUND).

93. RISKIN, *supra* note 30, at 25 (citing James Stovall, Jr, State Coordinator, Oklahoma Agriculture Mediation Program, and Carter Snodgrass, Texas Agricultural Loan Counseling and Mediation Program, at CAMP meeting, St. Paul, Minn. (April 11, 1991).

94. RISKIN, *supra* note 30, at 26.

95. FmHA, *supra* note 77, at 80.

96. Telephone Interview with Chester Bailey, Mediation Coordinator, Farmers Home Administration (Dec. 4, 1992).

97. *Id.*

On an even broader scale, Morse examines the possibility for application of statutory mediation, like the agricultural loan mediation statutes in four states, to other creditor situations.⁹⁸ Morse's evaluation of extending mediation beyond the agricultural context acknowledges that self-interest alone may compel creditors to pursue negotiations with debtors. Yet, he asserts that mandatory mediation is preferable. "Self-interest may support a voluntary mediation program, or inclusion of a mediation clause in the security agreement. Statutorily mandated mediation, however, depends upon other social values that are implicated when creditor's [sic] rights in collateral are affected."⁹⁹

The social values on which Morse's argument for statutory mediation hinges beg further inquiry. First, is the social value on which it is based, i.e. saving the family farm, strong enough to merit such legislation? Is it strong enough to merit such legislation at the expense of other social values? Is it fair to other types of property owners? Is it beneficial, in the long run, to financially responsible farmers who strive to be good managers and adapt to changing market conditions? Is it beneficial, in the long run, to rural communities? Mandatory programs appear to be effective in the short run; voluntary programs appear superior in the long run. The solution chosen by Congress "voluntary programs for non-governmental creditors; mandatory for governmental creditors" appears prudent because government lenders will not restrict credit availability in response to a mandate to mediate. They have a legislative mandate to offer loans to those who cannot obtain loans elsewhere.

VI. CONCLUSION

A re-evaluation of the underlying problem of whether farm debt and subsidies are worth government funding requires a reassessment by legislators. In many states, they responded to a crisis in the farm sector by establishing and funding mediation programs. The danger is that they will cut the funding when the crisis subsides. The economic "crisis" impetus to funding for the program undermines its long-term viability. The economic crisis aspect also ignores the silent majority of farmers who feel resentful about the special treatment given financially strapped farmers.

98. Morse, *supra* note 3, at 614.

99. *Id.* at 613.

Furthermore, non-agricultural borrowers may legitimately question why agricultural or farm-related lending receives special treatment. Any business venture involves risk. Farmers may be exposed to higher levels of risk, but they choose to be farmers knowing the risks they face. Some may argue that farmers did not understand the risks they were taking or that they miscalculated the returns on their investments. They may also feel powerless against the institutionalized lender. These arguments, however, seem flawed because many other small business owners could make the same assertions. Instead, perhaps mediation should be available to debtors and lenders in all economic sectors as an alternative to legal proceedings.

Another reason that mediation should be more broadly available is that, if the farm mediation programs are effective, there is less of a need for mediation as farmers learn how to be better financial managers or are better able to negotiate. Expanding the scope of the mediation programs would justify the continuance of the programs while making efficient use of a valuable resource: the knowledge, experience, and abilities of the individuals who have been involved with these programs.

One state director explained that "success breeds success." He acknowledged that his state did not have a "well-entrenched history" of alternative dispute resolution which could have created an "environment of awareness."¹⁰⁰ That state, however, like many others, is creating an "environment of awareness" through the use of agricultural loan mediation programs. If the states are to continue creating an environment of awareness concerning the benefits of mediation, political will is needed.

100. Letter from Alan Schroeder, Associate Professor, Department of Agricultural Economics, University of Wyoming (Dec. 21, 1992).

TABLE 1.

State	Date Enacted	Administration	Voluntary/ Mandatory	Preparation Services	Stay of Legal Proceedings	Exemption for Irreparable Harm	Time Period for Mediation	Liability/ Immunity for Mediator	Good Faith Required	Repeat Date
Alabama	(executive action)		voluntary							
Arizona		Dept. of Agriculture	voluntary							
Arkansas	1989	Arkansas Industrial Development Authority	mandatory (\$20,000 debt)	referral					attendance at first meeting	
Indiana ¹	1988	Commissioner of Agriculture	voluntary	provided for a reasonable fee	if agreed upon					
Iowa	1986	Non-profit Corporation	mandatory (\$20,000 debt)	legal & financial provided w/o charge	yes	yes	42 days after request	yes	attendance at first meeting	July 1, 1993
Kansas	(executive action)	State Board of Agriculture	voluntary	Farmers Assistance Counseling & Training						1996
Minnesota	1986	University of Minnesota Extension Service	mandatory (\$5,000 debt)	provided free	yes		60 days after first meeting	yes	yes	July 1, 1993
Mississippi ²	1987	Department of Agriculture and Commerce	voluntary					yes		July 1, 1992
Montana ³	1986	Department of Agriculture	voluntary	financial, support counseling & referral						July 1, 1993
Nebraska	1983	Nebraska Legal Aid Society & Interchurch Ministries	voluntary (\$40,000 debt)	financial & legal		yes	60 days after request		no	June 30, 1995
New Mexico	1989 (executive)	Cooperative Extension Service	voluntary							
Nevada	1989	Department of Agriculture	voluntary							
North Dakota	1985	Department of Agriculture	voluntary	financial, legal, tax				yes		

101. The Montana legislature cut the funding for the program in 1992. State of Montana, Department of Agriculture, Debt Mediation Program Annual Report (1992).

State	Date Enacted	Administration	Voluntary/ Mandatory	Preparation Services	Stay of Legal Proceedings	Exemption for Irreparable Harm	Time Period for Mediation	Liability/ Immunity for Mediator	Good Faith Required	Repeal Date
Oklahoma	(executive action)	Oklahoma Conference of Churches	voluntary	assistance available	none			yes		June 30, 1995
Oregon	1989	Department of Agriculture	voluntary (\$100,000 debt)	financial analysis				yes		
South Dakota	1988	Department of Agriculture	mandatory (\$50,000 debt)	financial, emotional support & referral	yes	yes	42 days after notice	yes		
Texas	1988 (executive)	Texas Tech University	voluntary	Texas Tech Financial Analysis Project			90 days after request			
Utah		Department of Agriculture	voluntary							
Wisconsin	1985	Department of Agriculture	voluntary	Farmers Assistance Program	if agreed upon			yes		
Wyoming	1987	University of Wyoming	voluntary	financial analysis				yes		

NOTES

SOURCES OF INFORMATION FOR TABLE 1:

1. Indiana is not certified by the USDA.
 2. Mississippi is no longer certified by the USDA.
 3. The Montana legislature cut the funding for the program in 1992. State of Montana, Department of Agriculture, Debt Mediation Program Annual Report (1992).
- Ark. Code Ann. §§ 2-7-101 through 2-7-310 (Michie 1987 & Supp. 1991)
 Ind. Code Ann. §§ 15-7-6-1 through 15-7-6-20 (Burns 1990)
 Iowa Code Ann. §§ 13.13 through 13.25; 654.2C - 2D; 654A.1 through 654A.17 (West 1992)
 Minn. Stat. Ann. §§ 583.20 through 583.32 (1988)
 Miss. Code Ann. §§ 69-2-43 through 69-2-51 (1991)
 Mont. Code Ann. §§ 80-13-101 through 80-13-214 (1991)
 Neb. Rev. Stat. §§ 2-4801 through 2-4816 (1990 & Supp. 1991)
 Nev. Rev. Stat. Ann. § 561.247 (Michie 1991)
 N.D. Cent. Code § 609.10.08.3 (1987 & Supp. 1991)
 Or. Rev. Stat. § 36.210 (1991)
 S.D. Codified Laws Ann. §§ 54-13-1 through 54-13-20 (1990 & Supp. 1992)
 Wis. Stat. Ann. §§ 93.50 through 93-51 (West 1990 & Supp. 1992)
 Wyo. Stat. §§ 11-41-101 through 11.41-110 (1989)
 Coalition of Agricultural Mediation Programs. Minutes of CAMP Meeting. Orange Beach, Alabama (May 18-19, 1992).

EXHIBIT A
 USDA CERTIFIED STATE AGRICULTURAL
 LOAN MEDIATION PROGRAMS

Oct. 8, 1989 to Sept. 30, 1990	KS	UA	MN	MT	ND	NE	SD	WI
1. Open Cases Carried Forward	176	247	374	2	63	28	87	46
2. Notices/Requests Received:	208	1236	620	275	1100	81	204	92
3. Total Cases	384	1483	994	277	1163	109	291	138
4. Closed Cases	298	1345	701	174	1104	96	270	46
5. Open Cases Remaining	86	138	293	103	59	13	21	92
6. Disposition of "Closed" Cases:								
7. a) cases closed w/o mediation	214	847	971	134	657	29	126	7
8. b) cases closed prior to mediation meeting	127	847	73	30	133	14	—	15
9. 1) agreement reached	76	396	—	28	126	14	—	8
10. 2) no agreement reached	51	451	—	2	7	—	—	7
11. c) Cases closed following mediation meeting	84	498	604	14	314	53	144	24
12. 1) agreement reached	79	411	376	13	214	44	97	19
13. 2) no agreement reached	5	87	228	1	100	9	47	5
14. AGREEMENT RATE	73%	60%	55.5%	93%	76%	87%	67%	69%
OPEN CASES REMAINING	KS	LA	MN	MT	ND	NE	SD	WI
September 30, 1990								
Notices/Requests Received From:								
FmHA	6	34	79	20	21	2	14	0
FCS	3	51	47	0	32	0	5	0
Other Creditor	0	53	167	0	6	0	2	0
Debtor	77	0	0	3	0	11	0	92
TOTAL	86	138	293	23	59	13	21	92

(Distributed by Chester Bailey at C.A.M.P. meeting, April 11, 1991, St. Paul, MN)