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Application of North Dakota's Confiscatory Price Statutes: Sections 28-29-04 and -05 of the North Dakota Century Code

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APPLICATION OF NORTH DAKOTA'S CONFISCATORY PRICE STATUTES: SECTIONS 28-29-04 AND -05 OF THE NORTH DAKOTA CENTURY CODE

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I. INTRODUCTION

The agriculture industry in North Dakota and throughout the United States is in a transition. Recent years have been characterized by high levels of production and a diminished rate of growth in world demand for food.[1] An immediate consequence of these two factors has been a downward pressure on the

1. K. Robinson, Lecturer at the Benjamin H. Hubbard Memorial Lecture Series, *Coping With Excess Capacity in Agriculture* 2 (April 11, 1986) (additional copies can be obtained from the Department of Agricultural Economics, University of Wisconsin-Madison).

international market price for major agricultural commodities, especially the basic grains. Congressional reaction has been to permit a lower market price for major agricultural commodities by reducing the loan rates.[2] In addition, Congress has increased government support, primarily with augmented deficiency payments, in an attempt to maintain the overall level of income for the industry.[3]

Farmers and other persons involved in production agriculture have responded to the situation by rethinking and adjusting their expectations as to the future. Most farmers no longer expect commodity prices to increase on a regular basis as was experienced during the 1970s. Few people anticipate a resurgence of inflation during the next few years or a rate of increase in demand for food that would outstrip the increase in its supply. Consequently, agriculturalists no longer project increasing levels of income after paying production costs. These less optimistic expectations have led to a decreased market value for resources used in agriculture, with a primary impact on farmland and equipment.

Operators who committed themselves to servicing debt during the time of high expectations remain obligated to meet those cash commitments even though the higher levels of income necessary to service the debt are not being realized. These fixed cash commitments, coupled with a narrow margin between revenue and operating expenses, have left many farm operators unable to meet their financial obligations. Unpaid creditors respond by enforcing their loan agreements, land mortgages, and security interests in crops, livestock, and equipment. The encumbered land and equipment are often integral parts of the farm business, that, in turn, provides the primary source of income for the operator's family. Furthermore, farm operators often feel the situation is beyond their control. They alone did not generate the high expectations; it was fostered by an entire industry. Yet, current economic conditions are threatening the farm operators' livelihoods. Many farmers react with a reluctance to surrender their encumbered farms and instead seek ways to avoid what may be the inevitable.

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2. *See, e.g.*, 7 U.S.C. § 1445b-3(a) (Supp. III 1985) (reducing loan rate for wheat); *see also* Note, *Save the Small Farm? The 1985 Farm Bill is Not the Answer*, 13 J. LEGISLATION 247, 261 (1986) (reducing loan rates will bring United States prices closer to prevailing market rate).

3. Congress froze target prices for various commodities for 1986-87. *See, e.g.*, 7 U.S.C. § 1445b-3(c) (i) (G) (Supp. III 1985) (freezing target prices for wheat at $4.38 per bushel). Freezing target prices while lowering the loan rate to decrease market prices results in a larger gap between market prices and target prices. Note, *supra* note 2 at 261-62. Therefore, deficiency payments to farmers are increased. *Id.*

One legal recourse available to North Dakotans is sections 28-29-04 and -05 of the North Dakota Century Code, which were enacted during the economic depression of the 1930s.[4] These statutes are commonly referred to as the confiscatory price defense.[5] The basic theme of the statutes is to grant state courts additional discretion to postpone legal proceedings of creditors seeking to collect unpaid obligations when the price of farm products is so low that a judicial sale would be equivalent to a confiscation of the debtor's property.[6]

This Article discusses some of the numerous issues and uncertainties that surround the confiscatory price statutes. Many issues dealing with the statutes' interpretation are without a

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4. Act of Mar. 6, 1933, ch. 99, 1933 N.D. Sess. Laws 145 (codified at N.D. CENT. CODE §§ 28-29-04 to -06 (1974)). Section 28-29-04 provides as follows:

> Until the price of farm products produced in this state shall rise to a point to equal at least the cost of production, in comparison with the price of other commodities in general, entering into the business of agriculture, the supreme court of this state and all district and county courts in this state shall have power, when it is deemed for the best interests of litigants, to extend the time for serving and filing all papers requisite and necessary for the final determination of any cause. Any such court, in like manner, may stay the entry of judgment or the issuance of execution thereon, or may defer the signing of any order for judgment, or may defer terms of court, whenever in the judgment of the court the strictly legal procedure in any cause will confiscate or tend to confiscate the property of any litigant by forcing the sale of agricultural products upon a ruinous market.

N.D. CENT. CODE § 28-29-04 (1974). Section 28-29-05 provides as follows:

> Whenever any foreclosure proceeding is pending in any court in this state and the amount of the debt is less than the value of the property involved, and when any order for judgment will have the force and effect of depriving a defendant of his home and confiscating his property, the court may construe further proceedings to be unconscionable, and may delay the signing of such order to such time as it shall deem it advisable and just to enter the same.

Id. § 28-29-05. While sections 28-29-04 and -05 contain the substantive provisions of the confiscatory price defense, section 28-29-06 allows courts to take judicial notice of the situation farmers are in when prices of farm products are confiscatory. *Id.* § 28-29-06. Section 28-29-06 provides as follows:

> Any court mentioned in section 28-29-04 may take judicial notice of the situation of producers and laborers when prices of farm products are confiscatory, and upon the ground of public policy may do all things necessary to be done lawfully to carry out the provisions of sections 28-29-04 and 28-29-05.

Id.

5. *See* Lang v. Bank of North Dakota, 377 N.W.2d 575, 579 (N.D. 1985) (referring to sections 28-29-04 and 28-29-05 as confiscatory price defense); Heidt v. State, 372 N.W.2d 857, 858 (N.D. 1985) (same); Folmer v. State, 346 N.W.2d 731, 732 (N.D. 1984) (same). Although the North Dakota Supreme Court has referred to sections 28-29-04 and -05 of the North Dakota Century Code as the confiscatory price defense, the court has also indicated that the statutes contain more than one defense. *See* Federal Lank Bank v. Halverson, 392 N.W. 2d 77, 81 (N.D. 1986) (stating that an affidavit set forth one of the confiscatory price defenses). For the purposes of this Article, confiscatory price defense will refer to sections 28-29-04 and -05 collectively.

6. *See* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of sections 28-29-04 and -05, see *supra* note 4.

definite answer, although several uncertainties have been resolved through judicial decisions. Some issues will be briefly introduced while others will be more thoroughly discussed. A general overview of the statutory language is presented first[7] followed by a discussion of the constitutional issues[8] and the statutes' applicability to government agencies and instrumentalities.[9] The Article then focuses on the details of the statutes, including the availability of summary judgment once the statutory defense has been raised[10] and the meaning of the terms used in the statutes.[11]

II. GENERAL OVERVIEW OF THE CONFISCATORY PRICE STATUTES

Sections 28-29-04 and 28-29-05 of the North Dakota Century Code set forth the substantive law of the confiscatory price statutes.[12] Section 28-29-04 is comprised of two sentences whereas section 28-29-05 is a single sentence.[13] Each sentence authorizes state courts to exercise additional discretion if the requisite conditions are met.[14] Although they are similar, the sentences differ slightly in the criteria that triggers the law, the alternatives available to the court once the law is triggered, and the standards for exercising the additional discretion.[15]

The first sentence of section 28-29-04 is applicable when the price of farm products does not at least equal the cost of production

7. *See infra* notes 12-25 and accompanying text.

8. *See infra* notes 35-92 and accompanying text.

9. *See infra* notes 93-133 and accompanying text.

10. *See infra* notes 134-57 and accompanying text.

11. *See infra* notes 169-243 and accompanying text.

12. *See* N.D. CENT. CODE §§ 28-29-04 to -06 (1974). For the texts of sections 28-29-04 to -06, see *supra* note 4. The confiscatory price statutes were enacted by the 1933 North Dakota Legislature when the state was in the depths of a severe economic depression. *See* Act of Mar. 6, 1933 ch. 99, 1933 N.D. Sess. Laws 145 (codified at N.D. CENT. CODE §§ 28-29-04 to -06 (1974)). There is little legislative history concerning the confiscatory price statutes except for one comment by Representative Herbert Swett. *See* 1933 N.D. HOUSE JOUR. 1265-66. Representative Swett stated that the confiscatory price statutes were one of the few measures aimed at helping farmers. *Id.* at 1265. In addition, Representative Swett noted that the statutes required courts to take judicial notice of the economic situation in which people were finding themselves. *Id.* Furthermore, Representative Swett concluded with the idea that these laws were not to be considered a moratorium but an act of economic justice. *Id.* at 1265-66. There is little record of the application of the confiscatory price statutes during the remaining years of the 1930s, except for the case of *Peterson v. Points*. *See* Peterson v. Points, 67 N.D. 631, 632, 275 N.W. 867, 868 (1937) (district court applied confiscatory price statutes in conjunction with other debtor relief laws of the 1930s to provide the owner of property a four year redemption period). *See generally* Vogel, *The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session*, 60 N.D.L. REV. 489 (1984) (discussion of *Points* and debtor relief laws enacted during the 1930s).

13. *See* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of sections 28-29-04 and -05, see *supra* note 4.

14. *See id.*

15. *See id.*

in comparison to other commodities in general, entering into the business of agriculture.[16] Once that criteria has been met, state courts are allowed to extend time for serving and filing all papers necessary for the final determination of any cause.[17] In addition, the courts must exercise this authority in the best interest of the litigants.[18]

The second sentence of section 28-29-04 has four criteria that must be met prior to triggering the sentence. These criteria are that strict legal procedure will: (1) confiscate or tend to confiscate the property of the defendant; (2) by forcing sale; (3) of agricultural products; (4) upon a ruinous market.[19] When these criteria are met, the judge may stay entry of judgment, stay issuance of a writ of execution, or defer signing of an order for judgment.[20] This sentence, however, does not explicitly state a standard by which courts are to exercise this discretionary authority.[21]

The third sentence of the confiscatory price statutes, section 28-29-05, lists three conditions that must exist before a judge can act pursuant to the sentence.[22] These conditions are the following: (1) a foreclosure proceeding must be pending; (2) the amount of the debt must be less than the value of the property; and (3) a judgment in favor of the plaintiff must have the effect of depriving the defendants of their home and confiscating their property.[23] If these conditions are satisfied, the judge may delay the signing of an order for judgment to foreclose.[24] Moreover, the duration of the stay will be for a period of time determined to be advisable and just.[25]

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16. *Id.* § 28-29-04.

17. *Id.*; *see* Folmer v. State, 346 N.W.2d 731, 733 (N.D. 1984) (section 28-29-04 allows the court to extend the time for serving and filing papers in "any cause").

18. N.D. CENT. CODE § 28-29-04 (1974); *see* Production Credit Ass'n of Minot v. Burk, Civ. No. 16903, mem. op. at 11 (N.W. Dist. Ct. N.D. Dec. 3, 1986) (noting that § 28-29-04 provides that a delay must be in the best interest of the litigants). For the text of § 28-29-04, see *supra* note 4.

19. N.D. CENT. CODE § 28-29-04 (1974); *see* Folmer v. State, 346 N.W.2d 731, 733 (N.D. 1984) (the court may stay the entry of judgment or execution thereon, or defer terms of court or the signing of an order for judgment, whenever such procedures in any cause would confiscate or tend to confiscate the property of any litigant by forcing the sale of agricultural products upon a ruinous market). For the text of § 28-29-04, see *supra* note 4.

20. N.D. CENT. CODE § 28-29-04 (1974); *See* First Am. Bank v. McLaughlin Inv., 407 N.W.2d 505, 508-09 (N.D. 1987) (court denied motion to quash writ of execution had that already been issued because § 28-29-04 only authorizes a stay of issuance of an execution); Federal Land Bank of St. Paul v. Halverson, 392 N.W.2d 77, 79-80 (N.D. 1986) (relief sought pursuant to §§ 28-29-04 and -05 may include the delay of entry of judgment, the deferral of the signing of an order for judgment, or the delaying of signing of an order of foreclosure). For the text of § 28-29-04, see *supra* note 4.

21. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

22. *See id.* § 28-29-05.

23. *Id.*; *see* Federal Land Bank of St. Paul v. Halverson, 392 N.W.2d 77, 81 (N.D. 1986) (defendants' contended that because the debt was less than the value of the collateral, foreclosure would deprive them of their home and confiscate their property). For the text of § 28-29-05, see *supra* note 4.

24. N.D. CENT. CODE § 28-29-05 (1974). For the text of § 28-29-05, see *supra* note 4.

25. *Id.*

III. SELF-TERMINATION OF THE CONFISCATORY PRICE STATUTES

Although there has been a number of memorandum opinions during the past decade that dealt with the confiscatory price statutes, district courts have been reluctant to invoke their discretionary powers pursuant to the laws.[26] Several district courts determined that the statutes self-repealed.[27] The courts reasoned that they were only entitled to grant relief pursuant to section 28-29-04, *until* the price of farm products was at least equal to the cost of production.[28] Because the price of farm products had exceeded the cost of production since the statute's enactment, the courts concluded that they had self-terminated.[29]

The issue of whether section 28-29-04 self-terminated was subsequently addressed in *Production Credit Association v. Lund.*[30] The North Dakota Supreme Court reversed the district court's determination that the statute repealed, explaining that the

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26. *See, e.g.*, Federal Land Bank of St. Paul v. Kalenze, Civ. No. 53676, mem. op. at 7 (N.W. Dist. Ct. N.D. April 22, 1987) (confiscatory price defense is not in the best interests of litigants); Production Credit Ass'n of Minot v. Burk, Civ. No. 16903, mem. op. at 9-11 (N.W. Dist. Ct. N.D. Dec. 3, 1986) (confiscatory price statutes did not operate as defense because debtor had no equity in property, the market was not ruinous, and a delay would not be in the best interests of the parties); Production Credit Ass'n of Mandan v. Kreller, Civ. No. 3029, mem. op. at 1-2 (S. Cent. Dist. Ct. N.D. Oct. 3, 1985) (confiscatory price statutes did not operate as a defense because the price of farm products exceeded cost of production); Prudential Ins. Co. of Am. v. Hoggarth, Civ. No. 5935, mem. op. at 3 (S.E. Dist. Ct. N.D. July 21, 1986) (allegation of confiscatory price defense did not reopen judgment); Federal Land Bank v. Hansey, Civ. No. 6409, mem. op. at 2 (S.W. Dist. Ct. N.D. June 13, 1985) (confiscatory price defense preempted by federal law); Federal Land Bank v. Mittelstadt, Civ. No. 6-CV85, mem. op. at 3-4 (S.W. Dist. Ct. N.D. May 2, 1985) (confiscatory price statutes terminated by their own language); Federal Land Bank v. Orwick, Civ. No. 5216, mem. op. at 8-9 (N.E. Cent. Dist. Ct. N.D. Jan. 14, 1985) (confiscatory price statutes did not apply to federal land banks); Federal Land Bank v. Maddock, Civ. No. 10065, mem. op. at 2-3 (S.E. Dist. Ct. N.D. Nov. 7, 1984) (confiscatory price defenses do not apply because statutes self-repealed, they were preempted by federal law, and there was no economic emergency); United Bank v. Martineson, Civ. No. 34137, mem. op. at 2 (S. Cent. Dist. Ct. N.D. Aug. 29, 1984) (prices were not confiscatory); Equitable Life Soc'y of the United States v. Schultz Ranch, Civ. No. 5048, Amended Findings of Fact, Conclusions of Law and Order for Judgment at 5 (S. Cent. Dist. Ct. N.D. Dec. 13, 1984) (section 28-29-04 automatically repealed and section 28-29-05 did not apply); Federal Land Bank v. Ostlie, Civ. No. 36928, mem. op. at 5-6 (N.E. Cent. Dist. Ct. N.D. Oct. 19, 1983) (confiscatory price defense did not apply to federal land banks); Midwest Fed. Sav. & Loan Ass'n v. Herzig, Civ. No. 42905, mem. op. at 2 (N.W. Dist. Ct. N.D. June 22, 1977) (confiscatory price defense automatically repealed).

27. *See, e.g.*, Federal Land Bank v. Maddock, Civ. No. 10065, mem. op. at 2-3 (S.E. Dist. Ct. N.D. Nov. 7, 1984) (confiscatory price statutes terminated by their own language); Equitable Life Soc'y of the United States v. Schultz Ranch, Civ. No. 5048, Amended Findings of Fact, Conclusions of Law and Order for Judgment at 5 (S. Cent. Dist. Ct. N.D. Dec. 13, 1984) (section 28-29-04 terminated by its own language).

28. *See* N.D. CENT. CODE § 28-29-04; *see, e.g.*, Equitable Life Soc'y of the United States v. Schultz Ranch, Civ. No. 5048, Amended Findings of Fact, Conclusions of Law and Order for Judgment at 5 (S. Cent. Dist. Ct. N.D. Dec. 13, 1984) (section 28-29-04 terminated by its own language). For the text of § 28-29-04, see *supra* note 4.

29. See *supra* note 27.

30. 389 N.W.2d 585 (N.D. 1986).

legislature did not intend for section 28-29-04 to self-terminate.[31] The court emphasized that the confiscatory price statutes contained no express language terminating the statutes within a specified period of time, as was the case with several other remedial laws enacted during the 1930s.[32] Moreover, the court noted that section 28-29-04 could reasonably be interpreted to mean that *whenever* legal procedure would result in the confiscation of property, courts could act pursuant to the statutes *until* the price of farm products equaled or exceeded the cost of production.[33] Furthermore, the court stated that the validity of the confiscatory price statutes was affirmed by their recodification in 1943 and their reenactment in 1961.[34]

As a consequence of *Lund,* other issues concerning the confiscatory price statutes must be addressed. The following section examines whether the statutes violate the United States or North Dakota Constitution.

IV. CONSTITUTIONAL ISSUES

Several constitutional issues have been identified as a result of applying the confiscatory price laws during the past several years.[35] These issues include whether the statute violates the contract

31. Production Credit Ass'n v. Lund, 389 N.W.2d 585, 588 (N.D. 1986); *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4. In *Lund* the debtors had borrowed $150,000 from Production Credit Association. *Lund,* 389 N.W.2d at 586. The loan was secured by mortgages on two separate properties. *Id.* The debtors defaulted on the loans, and Production Credit Association filed an action to foreclose the mortgages. *Id.* The debtors raised the confiscatory price statutes as a defense to Production Credit Association's action, and the district court determined that § 28-29-04 had self-terminated once the price of farm products equalled the cost of production. *See id.*

32. *Lund,* 389 N.W.2d at 587; *see* Act of Feb. 15, 1937, ch. 161, § 6, 1937 N.D. Sess. Laws 299, 301-02 (court can extend redemption period, but not beyond July 1, 1939); Act of Mar. 9, 1935, ch. 242, § 6, 1935 N.D. Sess. Laws 341, 345-46 (court can extend redemption period, but not beyond July 1, 1937); Act of Feb. 21, 1933, ch. 157, § 5, 1933 N.D. Sess. Laws 226, 227 (Act that extended redemption period was in force for a period of two years).

33. *Lund,* 389 N.W.2d at 587; *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4. Although the question before the court was whether § 28-29-04 had self-terminated, the court noted that it was helpful to review all three provisions of the 1933 Act. *Lund,* 389 N.W.2d at 587. The court stated that the language of § 28-29-04, construed together with the other provisions of the 1933 Act, showed a legislative intent that the remedies provided in the Act were to remain in effect whenever the conditions in the statutes were met. *Id.*

34. *Lund,* 389 N.W.2d at 588; *see* Act of Jan. 15, 1961, ch. 96, 1961 N.D. Sess. Laws 93 (reenactment of confiscatory price statutes); Act of Mar. 4, 1943, ch. 201, 1943, N.D. Sess. Laws 276 (recodification of confiscatory price statutes).

35. *See, e.g.,* United Bank v. Martineson, Civ. No. 34137, mem. op. at 3-4 (S. Cent. Dist. Ct. N.D. June 27, 1987) (confiscatory price statutes do not impair contractual relations nor violate equal protection); Federal Land Bank v. Bagge, Civ. No. 8403, mem. op. at 4-5 (E. Cent. Dist. Ct. N.D. Oct. 19, 1984) (confiscatory price statutes are not unconstitutionally vague, they violate due process of law, and impair obligations of contract) *aff'd on other grounds,* 394 N.W.2d at 695.

Although the confiscatory price statutes raise questions under the United States Constitution as well as the North Dakota Constitution, the following discussion of the constitutional issues does not treat the United States and North Dakota Constitutions separately. While the North Dakota Supreme Court has recognized that North Dakota may provide broader rights pursuant to the North

clause,[36] the due process clause,[37] the prohibition against the taking of property without just compensation,[38] or the equal protection clause.[39] Although the North Dakota Supreme Court has yet to consider these constitutional questions, some district courts have ruled as to these issues.[40]

A. IMPAIRMENT OF CONTRACTUAL OBLIGATIONS

Both the United States and North Dakota Constitutions prohibit states from enacting legislation that impairs the obligation

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Dakota Constitution than those enumerated in the United States Constitution, the provisions discussed herein have usually been similarly construed. City of Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1984); *e.g.*, State v. Orr, 375 N.W.2d 171, 178-79 (court finding violation of right to counsel pursuant to the North Dakota Constitution but no violation pursuant to the United States Constitution). Thus, a discussion of each issue pursuant to the North Dakota Constitution and the United States Constitution would be repetitive.

36. U.S. CONST. art. I, § 10, cl. 1; N.D. CONST. art. I, § 18. Article I, § 10, clause one of the United States Constitution provides, in relevant part, as follows: "No state shall. . . pass any. . . law impairing the obligations of contract. . . ." U.S. CONST. art. I, § 10, cl. 1. Article I, § 18 of the North Dakota Constitution provides, in relevant part, as follows: "No. . . law impairing the obligations of contracts shall ever be passed." N.D. CONST. art. I, § 18.

37. U.S. CONST. amends. V, XIV, § 1; N.D. CONST. art. I, § 9. The fifth amendment to the United States Constitution provides, in relevant part, as follows: "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V. Section one of the fourteenth amendment to the United States Constitution provides, in relevant part, as follows: "No state shall. . . deprive any person of life, liberty or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1. Article I, § 9 of the North Dakota Constitution provides, in relevant part, as follows: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law. . . ." N.D. CONST. art. I, § 9.

38. U.S. CONST. amend. V, cl. 4; N.D. CONST. art. I, § 16. The fifth amendment to the United States Constitution provides, in relevant part, as follows: "No person . . . shall [have] private property be taken for public use without just compensation." U.S. CONST. amend. V, cl. 4. Article one, § 16 of the North Dakota Constitution provides, in relevant part, as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner. . . ." N.D. CONST. art. I, § 16. The taking clause of the United States Constitution is made applicable to the states through the due process clause of the fourteenth amendment. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 1240 n. 10 (1987); *see* U.S. CONST. XIV § 1.

39. U.S. CONST. amend. XIV. The fourteenth amendment to the United States Constitution provides, in relevant part, as follows: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* While the North Dakota Constitution does not contain an equal protection clause similar to that contained in the United States Constitution, the North Dakota Supreme Court has provided equal protection pursuant to § 21 of the North Dakota Constitution. *See* Hanson v. Williams County, 389 N.W.2d 319, 323 n.8 (N.D. 1986) (Article I, § 21 guarantees equal protection of the laws); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (section 21 is the equal protection provision of the North Dakota Constitution similar to the fourteenth amendment of the United States Constitution). Section 21 of article 1 of the North Dakota Constitution provides as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." N.D. CONST. art. I, § 21.

40. *See* cases cited *supra* note 35. Prior to analyzing the constitutionality of a statute, it is important to note that a legislative enactment is presumed constitutional. N.D. CENT. CODE § 1-02-38 (1975) (presumption that in enacting a statute, compliance with the United States and North Dakota Constitutions was intended); *see also* Richter v. Jones, 378 N.W.2d 209, 211 (N.D. 1985) (statutes are entitled to a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution). Furthermore, the North Dakota Constitution provides that

of contracts.[41] Early United States Supreme Court decisions distinguished between the obligations and remedies of a contract; the Constitution was interpreted as prohibiting state laws that impaired contractual obligations.[42] These decisions also distinguished between retroactive and prospective application; a law could not be retroactively applied if it impaired contractual obligations.[43] The Court reasoned that a contract incorporates the law as it exists at the time the agreement was reached, and to amend the law would be to alter the contract.[44] These legal principles apparently resolve the impairment question regarding the confiscatory price statues, because it is unlikely that any mortgages currently in force were entered into prior to the statutes' enactment. Since application of the confiscatory price laws would be prospective, the laws would not interfere with contractual relations.[45]

Even assuming that sections 28-29-04 and -05 did impair contractual agreements, the constitutional guarantee against impairment of contracts is not absolute. The proper exercise of police power can justify a law which impairs the obligation of a contract.[46] In *Home Building & Loan Association v. Blaisdell,*[47] the leading modern case on the contract clause, the United States

The North Dakota Supreme Court cannot declare a legislative enactment unconstitutional unless at least four of the five members of the court so decide. N.D. CONST. ART. VI, § 4. As a result, persons attacking the constitutionality of a law will be expected to "bring up their heavy artillery." Southern Valley Grain Dealers v. Board of City Comm'rs, 257 N.W.2d 425, 434 (N.D. 1977).

41. U.S. CONST. art. I, § 10, cl. 1; N.D. CONST. art. I, § 18. For the texts of article I, § 10, clause 1 of the United States Constitution and article I, § 18 of the North Dakota Constitution, see *supra* note 36.

42. *See, e.g.,* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 353 (1827) (stating that the obligation of contract is different from the remedy because the obligation is created by the parties, while the remedy is afforded by the government); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819) (state can modify remedy as long as it does not impair the obligation of the contract).

43. *E.g., Ogden,* 25 U.S. at 262 (laws impairing contracts retrospectively are invalid, while laws impairing contracts prospectively are valid); State v. Klein 63 N.D. 515, 522, 249 N.W. 118, 122 (1933) (same).

44. *See, e.g., Ogden,* 25 U.S. at 259 (statute in effect at the time a contract is made forms a part of the contract); *see also* 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PROPERTY 272-73 (1965) (discussion of *Ogden*).

45. *But see* Federal Land Bank v. Bagge, Civ. No. 8403, mem. op. at 4-5 (E. Cent. Dist. Ct. N.D. Oct. 19, 1984) *aff'd on other grounds,* 394 N.W.2d at 695. In *Bagge,* the district court stated that the confiscatory price statutes impaired obligations of contract because, pursuant to the statutes, courts had the right to indefinitely postpone the right of foreclosure. *Id.* at 5; *see* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of §§ 28-29-04 and -05, see *supra* note 4. The court reasoned that abuse of the discretion by a judge would result in the confiscation of the mortgagee's rights under the contract. *Bagge,* mem. op. at 5. Therefore, the court concluded the confiscatory price statutes violated the United States and North Dakota Constitutions. *Id.* at 4-5; *see* U.S. CONST. art. I, § 10, cl. 1; N.D. CONST. art. I § 18. For the text of article I, § 10, clause one of the United States Constitution and article I, § 18 of the North Dakota Constitution, see *supra* note 36.

46. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983) (contract clause must be accommodated to the police power of states); Home Blding & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934) (contract clause is qualified by states' authority to safeguard the interests of its people).

47. 290 U.S. 398 (1934).

Supreme Court upheld the constitutionality of a Minnesota mortgage moratorium law.[48] The Minnesota statute allowed a court to extend the redemption period following a mortgage foreclosure if the debtor paid the mortgagee the rental value of the property during the redemption period.[49] The Court identified five criteria that must be met in order to sustain a law that impaired an existing contract. The legislation must: (1) serve a basic societal interest and not benefit only a favored group; (2) be justified by an emergency; (3) be appropriately tailored to the emergency; (4) be limited to the duration of the emergency; and (5) be reasonable.[50] Applying these factors, the Court concluded that the Minnesota statute was not repugnant to the contract clause because the legislation addressed a broad economic problem that had reached emergency proportions, and the legislature had tailored it to meet the needs of the problem.[51]

Subsequent decisions have modified the criteria set forth in *Blaisdell* by applying a test which weighed the extent of impairment of the contractual relationship against the nature and purpose of the state law.[52] *Energy Reserves Group Inc. v. Kansas Power & Light Co.*[53] involved the issue of whether a Kansas state law violated the contract clause.[54] The United States Supreme Court delineated a

48. Home Blding & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447-48 (1934); *see* Minnesota Mortgage Moratorium Law, ch. 339, 1933 Minn. Laws 514.

49. Minnesota Mortgage Moratorium Law, ch. 339, 1933 Minn. Laws 514.

50. *See Blaisdell,* 290 U.S. at 444-47.

51. *See id.*

52. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983) (once the court determines that a substantial impairment exists, the state must justify the impairment by having a significant and legitimate public purpose behind the regulation); Allied Structural Steel v. Spannuas, 438 U.S. 234, 244-45 (1978). In *Spannuas* the Court stated:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Id.

53. 459 U.S. 400 (1983).

54. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 409 (1983). *Energy Reserves* involved a dispute between Kansas Power & Light (KPL), a utility company, and Energy Reserves Group, Inc. (ERG), an oil and gas company. *Id.* at 403. The dispute centered around clauses contained in two contracts for the sale of natural gas. *See id.* at 403-04. The clauses permitted ERG to raise the price of natural gas if a governmental authority fixed a price for natural gas higher than the price set in the contract. *Id.* at 403. Subsequently, the federal government enacted legislation that set a price for natural gas higher than the specified price contained in the contracts. *See id.* at 415 n.21. In response to this federal action, the Kansas Legislature passed laws that prohibited ERG and KPL from considering the prices set by the federal government. *Id.* at 407; *see* KAN. STAT. ANN. § 55-1404 (1983) (prohibiting consideration of ceiling prices set by federal authorities). Thus, the Kansas law prevented ERG from raising the contract prices pursuant to the clauses.

three step test for determining whether retroactive application of the statute would violate the contract clause.[55] The first step in the test is whether the law constitutes a substantial impairment.[56] Given that there is a substantial impairment, the second part of the test is whether the state can justify a substantial impairment by demonstrating a significant and legitimate public purpose behind the regulation.[57] Assuming that there is a legitimate public purpose, the final question is whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.[58]

Both the criteria set forth in *Blaisdell* and the test in *Energy Reserves* considered whether the alteration of the parties' rights were based on reasonable conditions.[59] One condition that the *Blaisdell* Court viewed favorably was the statutorily mandated requirement that a borrower pay the lender the rental value for the premises during the delay in repossession.[60] This raises the question of whether, after *Energy Reserves,* a similar payment would be

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55. *Energy Reserves,* 459 U.S. at 411-12.

56. *Id.* at 411 (quoting *Spannuas,* at 438 U.S. 244). The Court determined that the state legislation did not substantially impair ERG's contractual rights. *See id.* at 416. The Court reasoned that since ERG and KPL operated in a heavily regulated industry, ERG's reasonable expectations were not impaired by the Kansas legislation. *Id.*

57. *Id.* at 411. The Court stated that the purpose behind the legislation need not be addressed to an emergency, as was the case in *Blaisdell. Id.* at 412; *see Blaisdell,* 290 U.S. at 445. For a discussion of *Blaisdell, see supra* notes 47-52 and accompanying text. Moreover, the Court noted that purposes such as remedying a broad social or economic problem could justify the exercise of a state's police power. *Energy Reserves,* 459 U.S. at 412. The Court concluded that the Kansas legislation was a justified exercise of the State's police power because Kansas had a significant and legitimate interest in protecting its consumers from increases in natural gas prices. *Id.* at 416-17.

58. *Energy Reserves,* 459 U.S. at 412 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)). The Court added that, in reviewing whether the adjustment of the rights of the contracting parties were based on reasonable conditions, it could defer to the legislative judgment as to the reasonableness of a particular measure. *Id.* at 412-13. The Court, analyzing the means chosen to implement the purpose of the Kansas legislation in light of deference to which the legislature was entitled, determined that the means were reasonable. *Id.* at 418. Therefore, the Court concluded that the Kansas law did not violate the contract clause. *Id.* at 419.

59. *Compare Energy Reserves,* 459 U.S. at 412 (adjustment of the rights and responsibilities of the contracting parties must be based upon reasonable conditions) *with Blaisdell,* 290 U.S. at 445 (the conditions upon which a period of redemption is extended must be reasonable).

60. *Blaisdell,* 290 U.S. at 445. The Court in *Blaisdell* viewed a number of conditions other than payment of rental value as favorable. *See id.* The Court stated:

> The conditions upon which the period of redemption is extended do not appear to be unreasonable. . . . [T]he integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to the interest upon the indebtedness.

Id.

necessary for the confiscatory price statutes to survive a contract clause analysis. In addition, it should be noted that even though the confiscatory price statutes do not explicitly provide for payments during the delay in foreclosure, the North Dakota Supreme Court has suggested that payments could be a prerequisite to exercising forbearance pursuant to the statutes.[61] Thus, there is also a question of whether the United States Supreme Court would view a judicially mandated payment as favorably as the statutory language in *Blaisdell.*

B. DUE PROCESS

Due process requirements raise two questions regarding the confiscatory price statutes.[62] The first question is whether the laws violate substantive due process. The second question is whether the confiscatory price statutes violate due process because they are unconstitutionally vague. Both these issues are briefly discussed in this subsection.

1. *Substantive Due Process*

The United States Supreme Court has applied a number of tests to determine whether a law violates substantive due process. Earlier in this century, the United States Supreme Court scrutinized state laws to determine whether the means of the law had a direct relation to its end and whether the end was a proper purpose for legislation.[63] Beginning in the mid-1930s, however, the Court altered its level of review by de-emphasizing its scrutiny of the legislation's purpose.[64] Currently, there appears to be a two-tier test with respect to substantive due process. If a law interferes with

61. *See* Federal Land Bank v. Halverson, 392 N.W.2d 77, 82 (N.D. 1986) (forebearance pursuant to the confiscatory price defense may depend upon appropriate conditions); Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 n.1 (N.D. 1986) (substantial application of the rent on the debt may be an appropriate condition for the exercise of forebearance pursuant to the confiscatory price defense).

62. *See* U.S. CONST. amend. XIV, § 1. For the text of the due process clause, see *supra* note 37. The confiscatory price statutes do not appear to create a procedural due process problem. Procedural due process requires that parties to an action be given notice and a hearing to present the merits of their case. Schmidt v. Thomas, 347 N.W.2d 315, 323 (N.D. 1984). This requirement of due process appears to be fulfilled since the confiscatory price statutes do not diminish the obligation of courts to provide notice or an opportunity of a hearing. *See* N.D. CENT. CODE §§ 28-29-04 to -05 (1974). For the texts of §§ 28-29-04 and -05, see *supra* note 4.

63. *See* Lochner v. New York, 198 U.S. 45, 57 (1905) (a law must have a direct relationship between the means and the end, and the end itself must be appropriate and legitimate if the law is to survive a substantive due process challenge).

64. *See* Ferguson v. Skupa, 372 U.S. 726, 731-32 (1963) (Court stating that it will not substitute its opinion as to the reasonableness of the purpose of legislation for that of the legislature); Williamson v. Lee Optical Co., 348 U.S. 483, 490 (1955) (Court conceiving possible reasons for

marriage, family, or privacy, the state must show a compelling interest for the law to withstand a constitutional challenge.[65] If, however, the statute interferes with financial matters, the state need only show that a rational relation exists between the means employed in the law and its purpose.[66] It follows that because the confiscatory price statutes deal with financial matters, a substantive due process challenge would merely require the statutes to survive a rational relation test.

2. *Vagueness*

Perhaps one of the more difficult issues regarding the confiscatory price statutes is whether they are unconstitutionally vague.[67] Generally, due process requires that laws give fair warning of what will constitute a violation and provide standards that will enable judges and juries to fairly administer laws.[68] Restated, a statute violates the due process clause of the United States Constitution if persons of common intelligence must necessarily guess at the meaning of a law and differ as to its application.[69] On the other hand, "the test of definitiveness of a statute is met if the meaning of the statute is fairly ascertainable by reference to similar statutes or to the dictionary, or if the questioned words have a common and generally accepted meaning."[70] Thus, the question

legislation that would provide a rational basis for the law). In *Ferguson,* the Court illustrated the deference it afforded the legislature, with respect to the purpose of legislation, when it stated:

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . ." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.

Ferguson, 372 U.S. at 731-32.

65. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.4 (3d ed. 1986) (if government seeks to deprive persons of fundamental rights, it must show that the law is necessary to promote a compelling interest).

66. *Id.; see* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (the Court will not determine the wisdom, need and propriety of laws concerning economic problems or business affairs).

67. The due process guarantee against vagueness applies to civil statutes as well as criminal statutes, although the definitiveness of criminal statutes is more frequently challenged. *In re* E.B., 287 N.W.2d 462, 463 (N.D. 1980). Furthermore, a less exacting standard is likely to be applied against a civil law than against a criminal statute in determining whether it is unconstitutionally vague. *In re* Wall, 295 N.W.2d 455, 457 (Iowa 1980).

68. *See* United States v. Harris, 347 U.S. 612, 617 (1954) (the constitutional requirement of definiteness is met if the statute provides a person with fair notice that his or her contemplated conduct is forbidden pursuant to the statutes); State v. Woodworth, 234 N.W.2d 243, 245 (N.D. 1975) (the due process clause of the North Dakota and United States Constitutions require that statutes give adequate warning of the conduct specified and mark boundaries so that judges and juries can equitably administer the law).

69. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

70. *Woodworth,* 234 N.W.2d at 246.

becomes whether the confiscatory price statutes are unconstitutionally vague because of the lack of clear statutory definitions. This lack of definitions is discussed more fully in section seven of this Article.

C. TAKING OF PROPERTY

Both the United States and North Dakota Constitutions prohibit the taking of private property for public use without just compensation.[71] Judicial decisions have recognized that a regulation that goes too far will be recognized as a taking of property.[72] Furthermore, the United States Supreme Court has noted that a temporary deprivation of property may constitute a taking.[73] Consequently, a relevant inquiry is whether the confiscatory price statutes, by authorizing state courts to delay foreclosure proceedings, equates a taking of property without just compensation.

A regulation can effect a taking if it does not substantially advance legitimate state interests or denies an owner economically viable use of the property.[74] Although deciding whether a taking occurs is frequently an ad hoc factual inquiry, there are several factors of specific importance in the determination.[75] These include the economic impact of the regulation, its interference with reasonable investment backed expectations, and the nature of the government action.[76] The goal of these considerations is to determine when justice and fairness require that economic injury

71. U.S. CONST. amend. V, cl. 4; N.D. CONST. art. I, § 16. For the texts of clause four of the fifth amendment to the United States Constitution and article 1, § 16 of the North Dakota Constitution, see *supra* note 38.

72. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

73. First English Evangelical Lutheran Church v. Los Angeles, 107 S. Ct. 2378, 2389 (1987); *see* Kimball Laundry Co. v. United States, 338 U.S. 1, 6-8 (1949) (discussing damages for temporary taking).

74. Agins v. Tiburon, 447 U.S. 255, 260 (1980); *see also* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987) (explaining when a taking occurs). Although the United States Supreme Court has stated that a regulation must substantially advance the state's interest if it is not to be considered a taking, it appears that the Court has applied only a rational basis test to determine if there has been a taking. *See Nollan,* 107 S. Ct. at 3152-53 (Blackmun, J., dissenting). The *Nollan* opinion, however, appears to give some bite to the language "substantially." *See id.* at 3147 n.3. Thus, the just compensation clause of the fifth amendment to the United States Constitution may provide a more fertile ground for litigation then it has in the past. *See* U.S. CONST. amend. V, cl. 4.

75. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

76. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). To determine the economic impact of the regulation, the Court may compare the value of the property prior to the enactment of the restriction with the value of the property after the regulation is initiated. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1248 (1987). The North Dakota Supreme Court has suggested that payments by the debtor to the creditor may be a prerequisite to exercising the forebearance authority granted by §§ 28-29-04 and -05 of the North Dakota Century Code. Federal Land Bank v. Halverson, 392 N.W.2d 77, 82 (N.D. 1986); *see* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of §§ 28-29-04 and -05, see *supra* note 4. Thus, if mandated, these payments will be a factor in considering the value of the creditor's property rights.

resulting from public action should be compensated by the government, rather than disproportionately concentrated on a few persons.[77] With the foregoing in mind, it is possible that a delay in foreclosure proceedings pursuant to the confiscatory price statutes could raise a taking question under the North Dakota and United States Constitutions.

D. EQUAL PROTECTION

District courts have split on whether the confiscatory price statutes violate the equal protection clause of the United States Constitution.[78] A state law violates the equal protection clause if it provides dissimilar treatment to persons classified on the basis of criteria unrelated to the purpose of the statute.[79] Courts will, however, subject statutes to different levels of scrutiny, depending on the type of right that the statute affects.[80] Since the confiscatory price statutes deal with business or commercial affairs, the equal protection clause would merely require that the statutes pass a rational basis test.[81] This test has been explained as only requiring

77. *Kaiser Aetna,* 444 U.S. at 175.

78. *See* U.S. CONST. amend. XIV. For the text of the equal protection clause, see *supra* note 39. *Compare* Federal Land Bank v. Bagge, Civ. No. 8403, mem. op. at 6 (E. Cent. Dist. Ct. N.D. Oct. 19, 1984) (confiscatory price statutes violate equal protection) *aff'd on other grounds,* 394 N.W.2d at 695 *with* United Bank of Bismarck v. Martineson, Civ. No. 34137, mem. op. at 4 (S. Cent. Dist. Ct. N.D. June 27, 1984) (confiscatory price statutes do not raise an equal protection question).

79. Reed v. Reed, 404 U.S. 71, 75-76 (1971). In *Reed* the United States Supreme Court stated:

> In applying [the equal protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

Id.

80. *See* Nygaard v. Robinson, 341 N.W.2d 349, 358 (N.D. 1983). In *Nygaard* the North Dakota Supreme Court explained the different levels of scrutiny that may be applied when there is an equal protection challenge pursuant to the United States and North Dakota Constitutions. *See id.;* U.S. CONST. amend. XIV; N.D. CONST. art. I, § 21. For the texts of the equal protection clause of the United States Constitution and article one, § 21 of article one of the North Dakota Constitution, see *supra* note 39. The court noted that when a fundamental right or an inherently suspect classification is involved, courts have required strict judicial scrutiny. *Nygaard,* 341 N.W.2d at 358. Pursuant to this test, a statute will be held invalid unless it is shown that the law promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further the purpose of the statute. *Id.; see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interference with fundamental right must be justified with compelling interest); State v. Maxwell, 259 N.W.2d 621, 627 (N.D. 1977) (same). Furthermore, the court stated that there is an intermediate standard of review that requires a close correspondence between statutory classifications and legislative goals. *Nygaard,* 341 N.W.2d at 358. The court concluded by stating that when statutes deal with the rights of parties with respect to business and commercial affairs, courts apply a rational basis test. *Id.; see, e.g.,* McGowan v. Maryland, 366 U.S. 420, 425 (1961) (rational basis test was appropriate for equal protection challenge to Sunday Blue Laws); Signal Oil & Gas Co. v. Williams County, 206 N.W.2d 75, 83 (N.D. 1973) (rational basis test was appropriate for equal protection challenge to tax law).

81. *See Nygaard,* 341 N.W.2d at 358 (when a law governs the rights of parties with respect to business matters, courts apply a rational basis test).

a rational relation between the classification and the purpose of the statutes.[82] In other words, a state law does not violate equal protection "if the classification it draws is not patently arbitrary so as to constitute invidious discrimination and if it is rationally related to a legitimate government interest."[83] As a result of this low level of scrutiny, extremely few statutes pertaining to business or commerical affairs have been declared unconstitutional in the past decades.[84]

The confiscatory price statutes present three possible classification schemes. The first would be that some farmers are treated differently than other farmers based on their indebtedness. Assuming that the cost of production is higher for operators with larger debt, section 28-29-04 would allow farmers with substantial debt to use the statute when it would not be available to others because the statute applies when the cost of production exceeds the price of farm products.[85] The second classification would be if the confiscatory statutes were interpreted only to apply to agricultural debt and farm properties.[86] The final classification would involve different treatment of creditors when commodity prices are, and when they are not, confiscatory.[87]

82. State v. Knoefler, 279 N.W.2d 658, 662 (N.D. 1979).

83. Mauch v. Manufacturers Sales Serv., Inc., 345 N.W.2d 338, 344 (N.D. 1984).

84. *But see* Morey v. Dodd, 354 U.S. 457, 461 (1957), *overruled,* New Orleans v. Duke, 427 U.S. 297, 306 (1976). In *Morey,* an Illinois statute made it a crime to operate a community currency exchange without a license. *Morey,* 354 U.S. at 460; *see* ILL. ANN. STAT. ch. 17 §§ 4801-52 (§ 4801 repealed 1977, § 4837 repealed 1985, § 4842 repealed 1949, § 4844 repealed 1965). The United States Supreme Court, applying a rational basis test, held that the statute denied the appellees equal protection of the laws guaranteed by the fourteenth amendment. *Morey,* 354 U.S. at 458. *See* U.S. CONST. amend. XIV. For the text of the equal protection clause, see *supra* note 39. The Illinois statute, as applied to the appellees, was discriminatory because the classification was not reasonably related to the Act's purpose. *Morey,* 354 U.S. at 469. The *Morey* decision has been described as the only case that has invalidated an economic regulation pursuant to an equal protection analysis. *See* Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward,* 38 STAN. L. REV. 1, 25 (1985).

85. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

86. *See* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the text of §§ 28-29-04 and -05, see *supra* note 4. In *First American Bank v. McLaughlin Investments,* the debtors defaulted on a non-agricultural loan obtained from First American Bank. *See* First American Bank v. McLaughlin Investments, 407 N.W.2d 505, 505 (N.D. 1987). Subsequently, a default judgment was entered and an execution was issued. *Id.* at 506. Pursuant to the execution, farmland owned by the debtors was levied upon. *Id.* The debtors then motioned to reopen the default judgment. *Id.* Furthermore, the debtors motioned to quash the execution pursuant to § 28-29-04. *Id.* at 508; *see* N.D. CENT. CODE § 28-29-04 (1974). The trial court denied the motions. *McLaughlin,* 407 N.W.2d at 506. On appeal to the North Dakota Supreme Court, the court reiterated that, to reach the merits of a confiscatory price defense after a judgment has been entered, the party must justify reopening pursuant to rule 60(b) of the North Dakota Rules of Civil Procedure. *Id.* at 508; *see* N.D. R. CIV. P. 60(b) (reasons for relieving a party from final judgment). The court noted, however, that since the debtors did not set out the confiscatory price defense in their affidavit in support of reopening, the debtors only invoked the confiscatory price defense in support of their motion to quash execution. *McLaughlin,* 407 N.W.2d at 508. The court then denied the debtors' motion to quash execution, stating that § 28-29-04 did not authorize quashing of an execution. *Id.; see* N.D. CENT. CODE § 28-29-04 (1974). Apparently, the confiscatory price statutes apply if farm property is involved even though the initial obligation was nonagricultural.

87. *See* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the text of §§ 28-29-04 and -05, see *supra* note 4.

The first classification can be avoided by basing cost of production estimates on the typical or average farmer, rather than on each farmer's situation.[88] Moreover, interpreting the "any cause" language in section 28-29-04 to encompass nonagricultural debt as well as agricultural debt would be one way to avoid the second classification.[89] Alternatively, the second and third classifications would be constitutional if the accepted purpose of the statutes is to assist members of North Dakota's agricultural industry during depressed economic times, and the classification relates to this purpose.

E. WHAT REMAINS OF THE CONFISCATORY PRICE STATUTES AFTER A CONSTITUTIONAL CHALLENGE

A ruling that any part of the confiscatory price statutes were unconstitutional would certainly be succeeded with the question of what remains after the offending language is deleted. North Dakota law provides that should any clause or sentence be declared invalid by a court of competent jurisdiction, the remaining provisions of the sentence or section are unaffected.[90] It is clear, however, that the remaining provision must be "complete and comprehensive in itself" if it is to remain in force.[91] Furthermore, the unconstitutional provision cannot be separated from the remainder of the statute if the offending provision was intended to limit the reach of the entire statute, and the provision is fundamental to the law defined by the legislature.[92] Thus, assuming that part of the confiscatory price statutes are determined to be unconstitutional, the issue becomes whether the unconstitutional provision is an integral part of the statute which, if deleted, would render the

88. The effect of basing the cost of production on the average farmer rather than the individual farmer has not been discussed in an equal protection context. Some district courts, however, have generally stated that the cost of production should be calculated on the basis of average costs rather than individual costs. *See* United Bank of Bismarck v. Martineson, Civ. No. 34137, mem. op. at 3 (S. Cent. Dist. Ct. N.D. June 27, 1984); Federal Land Bank v. Ostlie, Civ. No. 36928, mem. op. at 7-8 (N.E. Cent. Dist. Ct. N.D. Oct. 19, 1983).

89. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

90. N.D. CENT. CODE § 1-02-20 (1975). Section 1-02-20 provides as follows:

> In the event that any clause, sentence, paragraph, chapter, or other part of any title, shall be adjudged by any court of competent or final jurisdiction to be invalid, such judgment shall not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Id.

91. State v. Bickford, 28 N.D. 36, 87, 147 N.W. 407, 425 (1914).

92. People v. Mirmirani, 30 Cal. 3d 375, 387, 636 P.2d 1130, 1137, 178 Cal. Rptr. 792, 799 (1982).

whole law invalid, or whether the remaining provisions are enforceable despite removal of the offending language.

V. TO WHOM DO THE CONFISCATORY PRICE STATUTES APPLY

Another question that has surrounded the confiscatory price statutes is whether they are preempted by federal law, and therefore inapplicable to certain creditors.[93] The supremacy clause of the United States Constitution provides Congress with the power to preempt state law.[94] State laws violate the supremacy clause and are therefore subject to preemption if they "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[95] Furthermore, a state law is not only preempted when there is an outright conflict between the federal scheme and the state requirement, but also when the state law interferes with achieving congressional purposes and objectives.[96]

First, this section will examine the applicability of the confiscatory price laws to federal agencies, with primary focus on Farmers Home Administration[97] (FmHA), since it is the premier federal government agricultural lender.[98] Finally, this section will conclude with a discussion of the applicability of the confiscatory price statutes to the Farm Credit System (FCS) which consists of farmer-owned lending cooperatives authorized by federal statute.[99] While FmHA is a governmental agency, FCS cooperatives are considered federal instrumentalities.[100]

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93. *See, e.g.*, Federal Land Bank v. Lillehaugen, 404 N.W.2d 452, 455 (N.D. 1987) (addressing the issue of whether the confiscatory price statutes are preempted by federal law).

94. U.S. CONST. art. VI, cl. 2. Article six, clause two of the United States Constitution provides as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Id.

95. Hines v. Davidowitz, 312 U.S. 52, 66-7 (1941); *see also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984) (stating circumstances under which a state regulation is preempted).

96. *Hines*, 312 U.S. at 67.

97. *See* 11 N. HARL, AGRICULTURAL LAW § 96.01, at 96-5 (1986) (describing FmHA as an agency of the United States Department of Agriculture).

98. *See id.* § 96.01 at 96-7 (FmHA's multi-billion dollar budget makes it the largest federal loan agency dealing directly with borrowers).

99. *See id.* § 100.03 at 100-22. The Farm Credit System (FCS) is operated by a democratic process in which the users of the system and their elected representative participate in the decision-making for the banks and institutions that serve them. *See id.* Furthermore, the users become the owners of the system by subscribing to a stock interest in the system. *See id.*

100. *See* 12 U.S.C. § 2011 (1982) (federal land banks are federally chartered instrumentalities).

A. FARMERS HOME ADMINISTRATION

The question of whether the confiscatory price statutes are applicable to federal agencies has not been addressed.[101] In *United States v. Elverud,*[102] however, the court determined the issue of whether North Dakota's one year redemption period applied to the foreclosure of real estate mortgages held by the FmHA.[103] The United States argued that an equitable redemption period of sixty days should be given to the Elveruds, while the Elveruds contended that they were entitled to a one year redemption period pursuant to North Dakota law.[104] Therefore, the court was faced with the question of whether to use the one year redemption period adopted by North Dakota or an equitable redemption period as the federal rule of decision.[105]

The court considered three factors in deciding whether to adopt North Dakota's state law or the equitable redemption period for the federal rule of decision.[106] First, the court examined whether there was a need for a nationally uniform body of law.[107] The court determined that there was no need for a national body of law because local laws did not impede FmHA's processing of loans.[108] Thus, the court concluded, pursuant to the first factor, that state law could provide the federal rule of decision.[109]

A second consideration was whether the application of state law would frustrate the specific objective of the federal program.[110] The court stated that the purpose of FmHA loans was to assist farmers with limited assets.[111] The court reasoned that the application of North Dakota's redemption period would not further the policies of the FmHA because an extended redemption period could result in lower bidding at foreclosure sales and increased costs to the FmHA.[112] Furthermore, the court noted that North Dakota's

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101. *But cf.* United States v. Kimball Foods, Inc., 440 U.S. 715, 726 (1979) (federal law governs when the United States disburses its funds under a nationwide federal program such as FmHA).

102. 640 F. Supp. 692 (D.N.D. 1986).

103. *See* United States v. Elverud, 640 F. Supp. 692, 695 (D.N.D. 1986); N.D. CENT. CODE § 28-24-02 (Supp. 1987) (debtor may redeem within one year of sale).

104. *Elverud,* 640 F. Supp. at 694; *see* N.D. CENT. CODE § 28-24-02 (Supp. 1987) (debtor may redeem within one year of sale).

105. *Elverud,* 640 F. Supp. at 695.

106. *Id.* (citing United States v. Kimball Foods, Inc., 440 U.S. 715, 728-29 (1979)).

107. *Id.*

108. *Id.* (citing *Kimball,* 440 U.S. at 732-33).

109. *Id.*

110. *See id.* at 695-96.

111. *Id.; see* H.R. REP. NO. 95-986, 95th Cong. 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1106, 1127 (primary purpose of FmHA is to help farmers with limited resources become established in agriculture).

112. *Elverud,* 640 F. Supp. at 696; *see* N.D. CENT. CODE § 28-24-02 (Supp. 1987) (debtor may redeem within one year of sale). The court also noted that applying a one year redemption period

redemption period could interfere with the United States' interest in protecting its funds because application of the one year redemption period would delay the government's ability to resell lands obtained through foreclosure.[113] Therefore, the court concluded that the application of state law would frustrate the objective of the FmHA.[114]

Finally, the court considered whether the application of a federal rule would disrupt commercial relationships predicated on state law.[115] The court determined that application of a federal rule of decision would not disrupt commerical relationships because third parties having an interest in the mortgaged property should be aware of the FmHA loans.[116]

After considering these three factors the court concluded that North Dakota's one year redemption period did not apply to the FmHA, and adopted an equitable redemption period for the federal rule of decision.[117] A postponement of foreclosure due to the confiscatory price laws would have the same effects as those described for the right of redemption.[118] Consequently, a similar

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could force the United States to buy the property at the foreclosure sale and hold it until the redemption period expired. *Elverud,* 640 F. Supp. at 696.

113. *Elverud,* 640 F. Supp. at 696. The United States also contended that application of the one year redemption period could deprive other farmers of Farmers Home Administration (FmHA) monies because the funds would be tied up in loans to farms that were no longer viable. *Id.*

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id. Contra* United States v. Ellis, 714 F.2d 953, 957 (9th Cir. 1983). In *Ellis,* the court addressed the question of whether Washington's one year statutory redemption period applied to real estate mortgages held by FmHA. *See id.* at 955; WASH. REV. CODE ANN. § 6.24.140 (Supp. 1987) (debtor may redeem within one year of sale). The government contended that application of the redemption period would increase the costs of FmHA loan programs by chilling bidding at foreclosure sales and requiring the FmHA to purchase the property and hold it during the redemption period. *Ellis,* 714 F.2d at 955. The government argued that these additional expenses would defeat the federal policy of maintaining a credit fund available to farmers at reasonable rates. *Id.*

The court stated that whether state law was adopted as the federal rule of decision depended upon whether the state law conflicted with federal policy. *Id.* The court noted, however, that increased costs did not prevent the adoption of state law when the state law did not jeopardize other federal interests. *Id.* The court then stated that the purpose of FmHA was to help ease the financial burden on farmers when they encountered financial difficulties. *Id.* at 956. The court determined that application of the state redemption law was not inconsistent with this overriding purpose. *Id.* Furthermore, the court noted that FmHA acknowledged the applicability of state redemption laws in its regulations. *Id.* at 957; *see* 7 C.F.R. § 1872.2(c)(1)(v)(1983) (current version at 7 C.F.R. § 1955.13 (1987)) (when the government did not protect its interest in security property in a foreclosure by another lienholder and if the government has redemption rights the state director will determine whether to redeem the property prior to the expiration of the redemption period). The court reasoned that since the only source of redemption rights for the government was state law, the regulation implicitly acknowledged that the state law was applicable. *Ellis,* 714 F.2d at 957. Therefore, the court concluded that borrowers from the FmHA were entitled to state law redemption rights. *Id.*

118. *Compare* N.D. CENT. CODE § 28-24-02 (Supp. 1987) (debtor may redeem within one year of sale) *with* N.D. CENT. CODE § 28-29-04 (1974) (court may stay entry of judgment whenever strict legal procedure would confiscate property) *and* N.D. CENT. CODE § 28-29-05 (1974) (whenever foreclosure proceeding is pending and the amount of debt is less than the value of the property and an

ruling is likely should debtors assert the confiscatory price statutes as a basis for delaying FmHA foreclosure proceedings.[119]

B. FARM CREDIT SERVICES

The issue of whether the confiscatory price statutes apply to FCS was addressed in *Federal Land Bank v. Lillehaugen.*[120] Federal Land Bank loaned the Lillehaugens money in exchange for a promissory note secured by real property.[121] The Lillehaugens defaulted on the loan and Federal Land Bank initiated a foreclosure action.[122] In response to the foreclosure action, the Lillehaugens raised the confiscatory price statutes as a defense.[123] The trial court determined that the confiscatory price statutes were preempted by the Farm Credit Act of 1971 (Farm Credit Act),[124] and therefore rejected the Lillehaugens' defense.[125] On appeal to the North Dakota Supreme Court, the Lillehaugens contended that the trial court erred in concluding that the confiscatory price statutes were preempted by federal law.[126]

The North Dakota Supreme Court noted that the initial inquiry into a preemption analysis was whether Congress intended to preempt state law.[127] The court determined that Congress did not intend to preempt state law governing mortgage foreclosures because the Farm Credit Act permitted the Farm Credit Administration to ban states from the benefits of the FCS if the laws of the state provided insufficient protection against loss in the event of default.[128] The court reasoned that since Congress provided the

order for judgment would deprive a defendant of his property the court may delay signing of such judgment). For the texts of §§ 28-29-04 and -05, see *supra* note 4.

119. *Contra* 86-5 N.D. Op. Att'y Gen. 13-16 (Jan. 30, 1986) (confiscatory price statutes are applicable to FmHA).

120. 404 N.W.2d 452, 455 (N.D. 1987).

121. Federal Land Bank v. Lillehaugen, 404 N.W.2d 452, 454 (N.D. 1987).

122. *Id.*

123. *Id.; see* N.D. CENT. CODE § 28-29-04 to -06 (1974). For the texts of §§ 28-29-04 to -06, see *supra* note 4.

124. Farm Credit Act of 1971, 12 U.S.C. §§ 2001-260 (1982 & Supp. III 1985).

125. *Lillehaugen,* 404 N.W.2d at 454. Although the trial court's grounds for rejecting the confiscatory price defense were unclear, the North Dakota Supreme Court interpreted the primary basis for the trial court's decision to be that the confiscatory price statutes were preempted by federal law. *Id.*

126. *Id.* at 455.

127. *Id.* (citing Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2372 (1986)). The North Dakota Supreme Court also noted that since federal land banks were "federally chartered instrumentalities of the United States," Congress had the authority to determine the extent to which state law was preempted with respect to federal land bank activities. *Id.*

128. *Id.* at 456; *see* Farm Credit Act of 1971, 12 U.S.C. § 2259 (1982). Section 2259 of the Farm Credit Act of 1971 provides as follows:

> Whenever it is determined by the Farm Credit Administration, or by judicial decision, that a State law is applicable to the obligations and securities authorized to

Farm Credit Administration with a way to avoid unfavorable state laws, it clearly intended state law to govern federal land banks in mortgage foreclosure proceedings.[129]

Next, the court addressed Federal Land Bank's contention that the application of the confiscatory price statutes would frustrate the purposes and objectives of the Farm Credit Act because they diminished Federal Land Bank's right to foreclose its mortgages.[130] The court noted that while the authority to foreclose mortgages was one function created for federal land banks, the confiscatory price statutes did not relieve a mortgagor of its obligations, but merely allowed the court to delay foreclosure proceedings when deemed in the best interests of litigants.[131] Furthermore, the court stated that the confiscatory price statutes were consistent with the policies adopted in support of Congress' goal of advancing agricultural development.[132] Therefore, the court concluded that the confiscatory price laws did not frustrate the objectives of the Farm Credit Act, and the statutes were not preempted by federal law.[133]

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be held by the institutions of the System under this chapter, which law would provide insufficient protection or inadequate safeguards against loss in the event of default, the Farm Credit Administration may declare such obligations or securities to be ineligible as collateral for the issuance of new notes, bonds, debentures, and other obligations under this chapter.

Id.

129. *Lillehaughen,* 404 N.W.2d at 457. The court also noted that Congress had explicitly preempted some areas of state law. *Id.* at 457-58; *see* 12 U.S.C. §§ 2055, 2079 (1982) (preempting taxation legislation); 12 U.S.C. §§ 2015, 2205 (1982) (preempting interest rate legislation). The court reasoned that explicit preemption of some areas of state law evidenced an intent not to preempt state foreclosure laws. *See Lillehaugen,* 404 N.W.2d at 457.

130. *Lillehaugen,* 404 N.W.2d at 458. The policies and objectives of the Farm Credit Act of 1971 are set forth in the United States Code. *See* Farm Credit Act of 1971, 12 U.S.C. § 2001 (1982). Section 2001 of the Farm Credit Act provides as follows:

> (a) It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owner cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.
>
> (b) It is the objective of this chapter to continue to encourage farmer-and rancher-borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit and credit for housing in rural areas made available through the institutions constituting the Farm Credit System as herein provided.

Id.

131. *Lillehaugen,* 404 N.W.2d at 458.

132. *Id.; see* Farm Credit Act of 1971, 12 U.S.C. § 2001 (1982) (policies and objectives of Farm Credit Act). For the text of § 2001, see *supra* note 130.

133. *Lillehaugen,* 404 N.W.2d at 459. Federal Land Bank also asserted that the application of the confiscatory price statutes would frustrate the objectives of the Farm Credit Act because the Farm

VI. AVAILABILITY OF SUMMARY JUDGMENT AFTER THE CONFISCATORY PRICE LAWS HAVE BEEN RAISED

In *Folmer v. State,*[134] the North Dakota Supreme Court stated that the exercise of judicial forbearance pursuant to the confiscatory price statutes was in the court's discretion.[135] Yet *Folmer* as well as subsequent decisions[136] determined that once the confiscatory price statutes were raised as a defense, trial courts could not allow creditors to foreclose by advertisement.[137] Therefore, creditors must proceed by action once the confiscatory price statutes are raised.[138]

A related question was whether trial courts could exercise their discretion by granting summary judgment to creditors after the statutes are asserted as a defense. In *Federal Land Bank v. Thomas*[139] the court determined that summary judgment was improperly granted to the creditor when the debtors had asserted the defenses contained in the confiscatory price statutes.[140] The court noted that

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Credit Administration might make North Dakota mortgages ineligible as collateral for new loans. *Id.* at 458; *see* Farm Credit Act of 1971, 12 U.S.C. § 2259 (1982) (if state law provides insufficient safeguards against loss in the event of default the Farm Credit Administration can declare such obligations ineligible as collateral). For the text of § 2259, see *supra* note 128. The North Dakota Supreme Court noted that the confiscatory price statutes had been in existence over 50 years, and the statutes had not curtailed federal land bank lending activity in North Dakota. *Lillehaugen,* 404 N.W.2d at 458. Therefore, the court refused to determine that the confiscatory prices statutes were preempted by federal law. *Id.* at 459.

134. 346 N.W.2d 731 (N.D. 1984).

135. Folmer v. State, 346 N.W.2d 731, 735 (N.D. 1984). In *Folmer* the defendants borrowed $95,000 from the State of North Dakota in exchange for a note and a first mortgage on their farm. *Id.* at 732. Subsequently, the Folmers defaulted on the loan and the State sought to foreclose by advertisement. *Id.; see* N.D. CENT. CODE § 35-22-01 (Supp. 1985) (mortgage held by state may be foreclosed by advertisement). In response to the State's attempt to foreclose by advertisement, the Folmer's motioned to enjoin the State from foreclosing by advertisement on the basis that the confiscatory price statutes provided them with a valid defense to the foreclosure proceeding. *Folmer,* 346 N.W.2d at 732; *see* N.D. CENT. CODE §§ 28-29-04 and -05 (1974); *id.* § 35-22-04 (1980) (if mortgagor has a valid defense the court can enjoin mortgagee from foreclosing by advertisement). For the texts of §§ 28-29-04 and -05, see *supra* note 4. Thus, the question before the court was whether the confiscatory price statutes constituted a defense to foreclosure by advertisement. *See Folmer,* 346 N.W.2d at 734.

136. *See, e.g.,* Heidt v. State, 372 N.W.2d 857, 860 (N.D. 1985) (mortgagee was prevented from foreclosing by advertisement as a matter of law because the mortgagor alleged the confiscatory price defense).

137. *See Folmer,* 346 N.W.2d at 736; N.D. CENT. CODE § 35-22-04 (1980) (if mortgagor has a valid defense the court can enjoin mortgagee from foreclosing by advertisement).

138. *Heidt,* 372 N.W.2d at 860. The North Dakota Supreme Court has explained that foreclosure by advertisement is only a legal short cut which is permitted when there is no purpose to be served by judicial intervention. *Folmer,* 346 N.W.2d at 735. If the mortgagor alleged any facts which could prevent the mortgagee from obtaining all the relief sought, the mortgagee is entitled to have his claim adjudicated in a formal judicial proceeding. *Id.*

139. 386 N.W.2d at 29 (N.D. 1986).

140. Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 (N.D. 1986). In *Thomas,* the defendants borrowed $110,000 from the Federal Land Bank in exchange for a note secured by a mortgage on real property. *Id.* at 30. The defendants defaulted on the note, and Federal Land Bank initiated foreclosure proceedings. *Id.* In response to Federal Land Bank's foreclosure action, the defendants raised the confiscatory price defense. *Id.*; *see* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of §§ 28-29-04 and -05, see *supra* note 4. Subsequently, Federal Land Bank

summary judgments should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[141] The court stated that since the confiscatory price statutes had been properly pleaded as a valid defense, a trial on the merits was warranted.[142] The court reasoned that the determination of whether or not a farm emergency existed was a material fact that must be determined by the trial court.[143] Moreover, the court stated that if the trial court determined that there was a farm emergency, it would then be for the court to decide whether to exercise its discretion pursuant to the confiscatory price statutes.[144] Consequently, the court's discretion under section 28-29-04 appears to be in applying the law to the merits of the case rather than ruling on a motion for summary judgment.[145]

Another question pertaining to summary judgment is whether it is appropriate when the value of the land being foreclosed is less than the amount of the debt, and the debtor has raised the confiscatory price defense.[146] Section 28-29-05 provides that it is applicable only when "the debt is less than the value of the property involved."[147] Thus, it appears that section 28-29-05 would not be available to a debtor who has no equity in the mortgaged property. Section 28-29-04, on the other hand, does not contain language limiting its application based on a debtor's equity in the collateral.[148] However, creditors have contended that section 28-29-04 is inapplicable as a matter of law when the debtor has no equity in the collateral, and they are therefore entitled to summary judgment.[149] This issue was addressed in *Prudential Insurance Co. of America v. Butts Farming Association.*[150]

moved for summary judgment, and the district court granted its motion. *Thomas,* 386 N.W.2d at 30; N.D.R. CIV. P. 56(c) (court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

141. *Thomas,* 386 N.W.2d at 30; *see* N.D.R. CIV. P. 56(c) (court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

142. *Thomas,* 386 N.W.2d at 31. The defendants had raised the confiscatory price defense in their answer to Federal Land Bank's complaint. *Id.* at 30. Furthermore, the defendants had set out the confiscatory price defense in an affidavit in response to Federal Land Bank's motion for summary judgment. *Id.*

143. *Id.* at 31.

144. *Id.; see* N.D. CENT. CODE §§ 28-29-04 and -05 (1974). For the texts of §§ 28-29-04 and -05, see *supra* note 4.

145. *See Thomas,* 386 N.W.2d at 31.

146. *See* Prudential Ins. Co. of Am. v. Butts, 406 N.W.2d 662, 663 (N.D. 1987) (addressing the issue of whether summary judgment is appropriate when the debtor has no equity in the property).

147. N.D. CENT. CODE § 28-29-05 (1974). For the text of § 28-29-05, see *supra* note 4.

148. *See id.* § 28-29-04. For the text of § 28-29-04, see *supra* note 4.

149. *See Butts,* 406 N.W.2d at 664; N.D.R. CIV. P. 56(c) (court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law).

150. 406 N.W.2d 662, 664 (N.D. 1987).

In *Butts*, the district court had determined that section 28-29-04 was inapplicable as a matter of law because the value of the collateral was less than the debt.[151] The district court reasoned that since the debtors had no equity in the property they had no interest in the collateral that could be protected pursuant to section 28-29-04.[152] On appeal to the North Dakota Supreme Court, the debtors contended that the district court erred in deciding section 28-29-04 was inapplicable as a matter of law.[153]

The North Dakota Supreme Court first noted that section 28-29-04 was applicable to land mortgage foreclosures.[154] The court then stated that whether or not the debtor has equity in the collateral may be relevant in the district court's determination to grant or deny relief pursuant to section 28-29-04.[155] The court added, however, that the lack of equity alone was insufficient for the district court to determine that section 28-29-04 was inapplicable as a matter of law.[156] Therefore, the North Dakota Supreme Court concluded that the district court erred in granting the creditors summary judgment.[157]

The *Butts* decision is significant for another reason. As stated previously, sections 28-29-04 and -05 are comprised of three sentences that express similar, but not identical, concepts.[158] It also was suggested that each sentence delineates criteria and resulting authority sufficient to define a distinct defense.[159] This raises the question of how many defenses are actually contained in the confiscatory price statutes.

The *Butts* decision provides some guidance as to the number of possible defenses contained in the confiscatory price statutes. In

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151. Prudential Ins. Co. of Am. v. Butts, 406 N.W.2d 662, 664 (N.D. 1987); *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

152. *Butts,* 406 N.W.2d at 664; *see* N.D. CENT. CODE§ 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4. The North Dakota Supreme Court assumed that the trial court, in concluding that the debtors did not have an interest in the property, meant that the debtors did not have an equity interest in the collateral, since the debtors did have an ownership interest in the collateral. *Butts,* 406 N.W.2d at 664.

153. *Butts,* 406 N.W.2d at 663; *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4. The debtors did not raise on appeal the trial court's determination that § 28-29-04 was inapplicable. *Butts,* 406 N.W.2d at 663 n.1; *see* N.D. CENT. CODE § 28-29-05. For the text of § 28-29-05, see *supra* note 4.

154. *Butts,* 406 N.W.2d at 664 (citing Folmer v. State, 346 N.W.2d 731, 733 (1984)); *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29- 04, see *supra* note 4.

155. *Butts,* 406 N.W.2d at 664; *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

156. *Butts,* 406 N.W.2d 664; *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

157. *Butts,* 406 N.W.2d at 664; *see* N.D.R. CIV. P. 56(c) (court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law).

158. *See supra* text accompanying note 15.

159. *Id.*

Butts, the district court suggested that section 28-29-05 imposed additional requirements that had to be met prior to applying section 28-29-04 to real estate foreclosures.[160] The North Dakota Supreme Court, however, by determining that section 28-29-04 was not inapplicable as a matter of law when a debtor has no equity in the property, construed the two provisions to be independent.[161] Assuming then, that sections 28-29-04 and -05 can be applied independent of each other, the confiscatory price laws could only be construed in one of two ways: (1) there are two defenses with each sentence containing one defense;[162] or (2) there are three defenses with each sentence defining one defense.[163]

VII. TERMINOLOGY REQUIRING DEFINITION

The terminology contained in the confiscatory price statutes haunt attorneys who tread in this area of North Dakota law. This

160. *See* Prudential Ins. Co. of Am. v. Butts, Civ. No. 6360 slip op. at 3-4 (S.E. Dist. Ct. N.D. Aug. 13, 1986).

161. *See Butts,* 406 N.W.2d at 664. Since the court determined that § 28-29-04 was not inapplicable as a matter of law when the debtor had no equity in the property, it construed §§ 28-29-04 and-05 independently because it appears that § 28-29-05 would be inapplicable if the debtor had no equity in the collateral. *See* N.D. CENT. CODE § 28-29-05 (1974) (amount of the debt must be less than the value of the property involved). For the text of § 28-29-05, see *supra* note 4.

162. One possible interpretation of § 28-29-05 is that it only applies to real estate foreclosures in which the value of the land exceeds the amount of the debt and the mortgage encumbers the debtor's home. *See* N.D. CENT. CODE § 28-29-05 (1974). Pursuant to this line of thought, § 28-29-04 would define a distinct defense which could be applied in all other cases, including a proceeding in which the mortgage was not on the debtor's home or the debtor had no equity in the property. *See id.* § 28-29-04. This distinction between §§ 28-29-04 and -05 would only be meaningful, however, if the standard for exercising judicial forebearance was more favorable for a debtor pursuant to § 28-29-05 (advisable and just) than to § 28-29-04 (best interest of the litigants). *See id.* §§ 28-29-04 and - 05. For the text of §§ 28-29-04 and -05, see *supra* note 4.

163. *See id.* §§ 28-29-04 and -05. For the texts of §§ 28-29-04 and -05, see *supra* note 4. It is not clear whether each sentence contained in § 28-29- 04 constitutes a separate defense. *See id.* § 28-29-04. In two opinions, however, the North Dakota Supreme Court appears to suggest that the two sentences of § 28-29-04 describe the same defense. *See* Production Credit Ass'n v. Lund, 389 N.W.2d 585, 587 (N.D. 1986); Folmer v. State, 346 N.W.2d 731, 733 (court can extend time for filing and serving papers if prices are confiscatory). In *Lund,* the court merged the language of the two sentences when it stated:

> A fair reasonable interpretation of Section 28-29-04 . . . is that "whenever" legal procedure will result in the confiscation of property "by forcing the sale of agricultural products upon a ruinous market" the courts, within their discretion may act as authorized under the provision "until farm products . . . equal at least the cost of production."

Lund, 389 N.W.2d at 587.

In *Heidt v. State,* however, the court stated that § 28-29-04 did not require possession of agricultural commodities to invoke the confiscatory price defense. Heidt v. State, 372 N.W.2d 857, 861 (N.D. 1985); *see also* Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 n.1 (N.D. 1986). The decision focused on the first sentence of § 28-29-04, and did not address the second sentence. *See Heidt,* 372 N.W.2d at 861. Arguably, the language of the second sentence (by forcing sale of agricultural products) requires possession of farm products. *See* N.D. CENT. CODE § 28-29-04 (1974). Thus, the sentences have different criteria and appear to be discrete defenses.

section identifies words and phrases contained in section 28-29-04 and -05 whose meanings are unclear. Possible definitions are suggested for some terms whereas in other cases the amibiguity is only indicated.

A. PRICE OF FARM PRODUCTS

Section 28-29-04 provides state courts with additional authority when the price of farm products is less than the cost of production.[164] A primary issue regarding the calculation of the price of farm products is whether courts should only consider the current market price, or whether revenue from participation in federal farm programs also needs to be included in the price of farm products.[165]

It is unclear whether the 1933 North Dakota Legislature intended income received from federal farm programs to be included in the price of farm products.[166] Revenue from federal farm programs should, however, be included into the price of farm products because federal payments represent a large portion of farmers' income. In 1986, for example, payments from federal farm programs constituted approximately twenty-five percent of North Dakota farmers' total income.[167] Because these payments

164. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

165. *See* United Bank of Bismarck v. Martineson, Civ. No. 34137, mem. op. at 2 (S. Cent. Dist. Ct. N.D. Aug. 29, 1984) (considering the effect of federal programs on farm prices). Apparently the North Dakota Supreme Court will closely follow the letter of the law in applying some of the language of the confiscatory price statutes. *See* First American Bank v. McLaughlin Instruments, 407 N.W.2d 505, 508-09 (N.D. 1987) (section 28-29-04 authorizes courts to stay issuance of an execution but not to quash an execution).

166. When the confiscatory price statutes were enacted in 1933, the Agricultural Marketing Act was the current farm program. Agricultural Marketing Act, Pub. L. No. 10, 46 Stat. 11 (1929) (current version at 12 U.S.C. §§ 1141 to 1141j (1982)). While the Agricultural Marketing Act attempted to control surplus agricultural products by making loans to cooperatives for purchase and storage of agricultural products, it did not provide for direct payments to farmers. *See id.* §§ 1, 7 (current version at 12 U.S.C. §§ 1141, 1141e (1982)); *see also* R. KNUTSON, J. PENN & W. BOEHN, AGRICULTURAL AND FOOD POLICY 213 (1983) (Agricultural Marketing Act attempted to support prices through storage programs). Within several months of the enactment of the confiscatory price statutes, however, Congress replaced the Agricultural Marketing Act with the Agricultural Adjustment Act of 1933. Agricultural Adjustment Act of 1933, Pub. L. No. 10, 48 Stat. 31 (current version at 7 U.S.C. §§ 601 to 624 (1982 & Supp. 1985)). The 1933 Act was the first federal farm program to attempt to control surpluses by providing direct payments to farmers who voluntarily reduced the acreage of the basic crops that they planted. *See id.* § 8(1) (current version at 7 U.S.C. § 608 (1982 & Supp. III 1985)), *see also* Harkin & Harkin, *Roosevelt to Reagan "Commodity Programs and Food Act of 1981"*, 31 DRAKE L. REV. 499, 500 (1982) (discussing Agricultural Adjustment Act of 1933). Since the Agricultural Adjustment Act of 1933 was enacted contemporaneously with the confiscatory price statutes, it is unclear whether the 1933 North Dakota Legislature intended payments from farm programs to be included in the price of farm products.

167. *See* N.D. AGRIC. STAT. SERV., AGRIC. STAT. NO. 56, NORTH DAKOTA STATISTICS 1987 at 9 (1987). In 1986 federal farm program payments to North Dakota farmers were $700,180,000 while the total cash income of North Dakota farmers was $2,834,604,000. *Id.* Thus, government payments constituted 24.7% of North Dakota farmers' total income in 1986. *See id.* In 1934 payments to North Dakota farmers were $18,150,000 while total cash income was $86,164,000. U.S. DEP'T OF AGRIC.,

amount to a substantial part of the farmers' income, they must be included into the price of farm products to equitably determine whether a farm family has adequate resources to pay production expenses.[168]

B. COST OF PRODUCTION

Section 28-29-04 requires that the cost of producing agricultural commodities be greater than the price of farm products in order to trigger additional discretionary authority for state courts.[169] The cost of production, however, like the price of farm products, is not defined in the statute. Furthermore, the North Dakota Supreme Court has not had an opportunity to define the phrase.[170]

There is no one definition of cost of production.[171] Furthermore, it is well-recognized that when defining a cost, the

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AGRICULTURAL STATISTICS 383 (1937). Therefore, government payments equaled 21% of total income in 1934. *See id.*

Records do not indicate that farmers received payments pursuant to the Agricultural Act of 1933 until 1934. However, government payments as a percent of total farm income for North Dakota farmers from 1935 to 1985 ranged from .7 of 1% to 20.9%, with an average of 9.2% for years 1934 through 1986. *See generally* U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS (1936 to 1986) (annual reports containing tables which indicate total income and amount of federal farm program payments).

168. A related question is which price should be considered. The alternatives include the futures price, a terminal price, or the debtor's local market price. Local market price appears most relevant since it is the amount a farmer will receive for his product.

169. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

170. Although the North Dakota Supreme Court has not defined the cost of production for the purposes of the confiscatory price statutes, the court has referred to the current agricultural condition and generally compared it with that experienced in the 1930s. *See, e.g.*, Lang v. Bank of North Dakota, 377 N.W.2d 575, 580 (N.D. 1985) (court recognizing parallels between current agricultural conditions and those in the 1930s). These statements are perhaps best understood as describing the *likely* situation in which the confiscatory price statutes would be triggered. Since § 28-29-04 specifically provides that cost of production must exceed the price of farm products for the statute to be applicable, statements analogizing the agricultural economy of the 1930s with the current situation should not be interpreted as holding that § 28-29-04 is applicable when current economic conditions are equivalent to those in the 1930s. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

171. J. Lee, Calculating and Using Costs of Production for Policy Decisions — The Case of the United States 11 (seminar paper presented at the Instituto de Economia Agricola, Sao Paulo, Brazil, Jan. 23, 1976). Discussing costs, Lee stated:

> An issue encountered early in policy-related discussions is that of which costs to use. If a policy maker asks "what does it cost to produce wheat?" one might respond by asking: "Do you mean the national average cost for all wheat produced?" "Median cost?" "Average cost for 'typical' farmer?" "Or most efficient farmers?" "Or do you want a distribution of costs from lowest cost producers to highest?" "Do you mean total costs, including land charges?" "Or variable costs?" "Including overhead?" and so on, ad infinitum. The response is usually bewilderment.
>
> . . .
>
> Clearly there is no single cost of production that is correct to the exclusion of all others. It is likely that most of the ways of calculating production costs are legitimate — but legitimate and appropriate for specific purposes.

Id.

purpose of the definition must be considered.[172] Accordingly, the purpose of the confiscatory price statutes must be understood to define the cost of production. Unfortunately, legislative history does not clearly indicate the objective of the confiscatory price laws.[173] Furthermore, the North Dakota Supreme Court has only indicated that the purpose of the statutes is to "protect the farmer-landowner."[174] The language of the statutes, however, suggests a purpose for the legislation.

The perceived purpose of the statutes is to assist borrowers by providing a temporary delay in repayment of obligations during a time when they are unable to make current payments as a result of adverse economic conditions in agriculture.[175] Accepting that as the purpose of the statute also delineates the parameters for defining the cost of production. The law will not be applicable until the economic situation for agriculture is generally depressed. The law must trigger, however, before economic conditions deteriorate to the point at which a delay would no longer benefit borrowers. An understanding of some basic economic principles is necessary to translate these ideas into a definition of the cost of production.

There are several ways to categorize costs. One way is to divide inputs and their associated costs into two groups: (1) fixed inputs and fixed costs; and (2) variable inputs and variable costs.[176] Fixed inputs are those which cannot be readily removed from productions;[177] land is a common example. The annual payment required to satisfy a debt incurred to acquire land is a fixed cost because it must be paid whether or not agricultural product is

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172. A. MATZ, O. CURRY & M. USRY, COST ACCOUNTING — PLANNING AND CONTROL 41 (5th ed. 1972). The authors state:

> It is [a] fundamental axiom that a cost must be understood in its relationship to the aims or purposes which it is to serve. A request for cost data must be accompanied by a description of the decision situation in which the data are to be used, for the same cost data cannot serve all purposes equally well.

Id.

173. *See supra* note 12.

174. Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 n.1 (N.D. 1986); Heidt v. State, 372 N.W.2d 857, 861 (N.D. 1985). In *Thomas* the debtors had sold their farm machinery in an attempt to appease creditors. *Thomas,* 386 N.W.2d at 30. Subsequently, the debtors leased the farm land. *Id.* Federal Land Bank then initiated a foreclosure action on lands located in Morton County. *Id.* The debtors subsequently raised the confiscatory price defense. *Id.; see* N.D. CENT. CODE § 28-29-04 and -05 (1974). Federal Land Bank contended that since the debtors leased the land, they were not "farmer-landowners" and therefore could not raise the confiscatory price defense. *Thomas,* 386 N.W.2d at 31 n.1; *see Heidt,* 372 N.W.2d at 861. The North Dakota Supreme Court, however, determined that the term "farmer-landowner" should not be interpreted to mean only landowners who are personally farming their land. *Thomas,* 386 N.W.2d at 31 n.1. Therefore, the court concluded that the confiscatory price statutes could be available to the debtors. *Id.* at 31.

175. *See* Folmer v. State, 346 N.W.2d 731, 735 (N.D. 1984) (the confiscatory price statutes give state courts the power to delay foreclosure in periods of economic hardship).

176. J. PENSON, R. POPE & M. COOK, INTRODUCTION TO AGRICULTURAL ECONOMICS 126 (1986).

177. *See id.*

raised. Variable costs, on the other hand, change with the level of production.[178] Fertilizer is a common example. Should a farmer attempt to alter the level of production by increasing or decreasing the amount of fertilizer that is applied, the total expenditure for fertilizer will also increase or decrease. Moreover, the farmer who decides not to plant a crop will not incur any variable costs. The sum of the fixed and variable costs is referred to as the total cost.[179]

A farm operator experiences a profit whenever the revenue received from the sale of the agricultural produce is greater than the total cost of growing the produce.[180] On the other hand, a loss is incurred if revenues are less than total costs. Incurring a loss, however, does not mean that the prudent farm operator will cease production. Since fixed costs must be paid whether or not a crop is raised, the farm operator benefits from producing agricultural commodities as long as revenues are sufficient to pay all variable costs and a portion of fixed costs.[181] Should revenue drop to a level at which variable costs would not be recovered, the farmer should cease production.[182]

1. *The Variable Cost Approach*

At least one district court appears to have defined the cost of production as the amount of revenue necessary to pay variable costs.[183] In *United Bank of Bismarck v. Martineson* the court stated that prices are not confiscatory if the amounts received for farm commodities reflect positively on the balance sheet.[185] The court explained that some farm operators increase their net worth or equity as a consequence of farming their land while other operators

178. *Id.* at 126, 128.
179. *Id.* at 126.
180. *See id.* at 133.
181. *See id.* at 136, 138.
182. *Id.*
183. *See* Production Credit Ass'n of Mandan v. Kreller, Civ. No. 3029, mem. op. at 1-2 (S.Cent. Dist. Ct. N.D. Oct. 2, 1986); United Bank of Bismarck v. Martineson, Civ. No. 34137, mem. op. at 102 (S.Cent. Dist. Ct. N.D. Aug. 29, 1984). In *Kreller,* the court appeared to be defining cost of production as the amount of revenue needed to pay variable costs when the court stated:

> [M]ost farmers can with most crops make a profit upon selling the crops planted by them, provided costs of production do not include embedded land costs which exist whether or not the crop is planted. . . . Although crop prices could be and should be higher, all farmers have been better off planting crops than they would have been if they had not done so.

Kreller, mem. op. at 1-2.
184. Civ. No. 34137, mem. op. (S.Cent. Dist. Ct. N.D. Aug. 29, 1984).
185. United Bank of Bismarck v. Martineson, Civ. No. 34137, mem. op. at 2 (S.Cent. Dist. Ct. N.D. Aug. 29, 1984). The court stated that there is a positive result on the balance sheet whenever farmers are better off planting crops than letting the land lay idle. *Id.*

suffer a decrease in their net worth.[186] The court then stated that as long as operating the land produces a gain in net worth or a slower loss in equity than if the land was idle, prices are not confiscatory.[187]

This concept can be restated into terms of variable and fixed costs. A farmer who does not plant will reduce the operation's net worth on a balance sheet by the amount of fixed costs for that year.[188] The balance sheet of a farmer who plants a crop or raises livestock will be affected by the same magnitude if revenue exactly equals variable costs.[189] A corollary is that net worth will decrease faster by planting crops rather than not planting crops only if revenue is less than variable costs.[190] Therefore, in order for prices to be confiscatory pursuant to the court's analysis in *Martineson,* revenue would have to be less than variable costs.

This definition would be illogical and inconsistent with the perceived purpose of the confiscatory price statutes. Defining costs of production as variable costs would allow forebearance pursuant to section 28-29-04 only if the farm operator could not raise agricultural products sufficient to repay variable costs.[191] Thus, the court would allow farmers to continue operating even though the resulting revenue was insufficient to pay variable costs. This is contrary to the basic economic theory explained above, in which all prudent business persons cease operation when revenue drops to a level less than variable costs. Adoption of this definition of cost of production would be inappropriate because courts would encourage farmers to continue operation when common sense dictates that the business should be terminated.

2. *The Opportunity Cost Approach*

The opposite of defining cost of production in terms of variable costs would be to include all economic costs in the definition. The concept of economic cost encompasses not only variable and fixed

186. *Id.*

187. *Id.*

188. Fixed costs must be paid whether or not there is production. Therefore, a farmer who does not produce must use equity to pay the amount of fixed costs.

189. The balance sheet of a farmer who receives revenue equal to variable costs will be affected the same as if no crops were planted. In either case, equity would have to be used to pay all fixed costs.

190. If income is less than variable costs, the balance sheet would be negitively affected because the farmer would have to use equity to pay fixed costs plus the portion of variable costs that are not covered by revenues.

191. *See* N.D. CENT. CODE § 28-29-04 (1974) (applicable when cost of production exceeds farm prices). For the text of § 28-29-04, see *supra* note 4.

costs, but also opportunity costs.[192] Opportunity cost is the rate of return that would have been received had resources owned by the farm operator been invested in another business rather than used on the farm.[193] For example, the opportunity cost of a landowner farming his or her land is the amount of money that would have been received if the land had been rented to a neighbor. Thus, by including opportunity costs, the cost of production would be the total of all variable and fixed costs plus an amount equal to what would have been received if resources owned by the farmer would have been used differently.

There are several reasons why economic costs should not be adopted as the definition for cost of production. First, agriculture is a competitive industry which means in the long run revenue will equal costs.[194] This indicates that there will be times when revenue is less than total economic costs in order to average out years when revenue exceeds economic costs. Consequently, economic cost in excess of revenue is not unexpected nor does it forecast the demise of the agricultural industry.

Second, including opportunity cost as a component of production costs adds rigidity to the market value of assets owned by the farm operator. The market price of assets owned by the farm operator reflects the earning capacity of the asset; the greater the expected future income, the higher price for the asset.[195] Since including opportunity costs into the cost of production would require that assets earn income equal to the amount of revenue that would have been generated if the assets were alternatively invested, the court would have to set the rate of return for farmers' assets to determine the cost of production. By establishing the earning capacity of the asset, the market price of the asset would also be determined. The disadvantage of an inflexible price for an asset is that the market price will not reflect a change in the value of the asset which occurs after the rate of return is established.

Finally, people operate a business for the wealth it generates

192. *See* J. DOLL & F. ORAZEM, PRODUCTION ECONOMICS: THEORY WITH APPLICATION 81-82 (2d ed. 1978) (discussing opportunity cost as part of cost of production).

193. *Id.* at 82.

194. *See generally* H. HALCROW, ECONOMICS OF AGRICULTURE 143-46 (1980) (explaining economics of competitive firm in the long run). One characteristic of a competitive industry is the ease with which firms may enter and exit. *See* C. MCCONNELL, ECONOMICS PRINCIPLES, PROBLEMS AND POLICIES 560-63 (10th ed. 1987). Additional firms will enter a competitive industry that is enjoying substantial profits whereas firms will exit the industry if they are incurring losses. *See id.* Long run equilibrium for a competitive industry will have no extra profit nor persistent losses; that is, revenues will equal costs. *See id.*

195. R. KNUTSON, J. PENN & W. BOEHN, AGRICULTURAL AND FOOD POLICY 171 (1983). The process by which the earning potential of an asset is converted into the value of the asset is referred to as capitalization. *Id.*

and the satisfaction it provides. If outdoor activities and proximity to nature is important to someone, that person will likely continue to farm even though the business does not generate the same level of income which the person would receive in other employment. Economic theory reflects that willingness to exchange income for amenities by reducing that person's opportunity costs.[196] Therefore, even if economic cost is accepted as the definition for cost of production, the estimation may need to reflect a lower rate of return for capital and labor to reflect the satisfaction obtained by operating a farm.

3. *The Cost Accounting Approach*

Cost of production for the purpose of the confiscatory price laws must entail more than variable costs and less than economic costs. One definition that falls within this range is the cost of production as generally recognized by the accounting profession.[197] Pursuant to this definition, cost of production would include variable costs as well as a depreciation allowance for fixed assets.[198] This definition, however, would not include principal payments on debts, capital expenditures, or opportunity costs.

Since depreciation is a noncash expense,[199] including it in the cost of production assures that a farmer will have some cash remaining after paying cash costs as long as revenue at least equals the cost of production. This, however, does not assure that the farmer's cash income will be sufficient to meet all cash obligations. Ideally, this remaining cash should be reinvested to maintain and replace depreciable assets. If the income is not used for this purpose, fixed assets will expire which, in turn, will result in reduced efficiency and the eventual demise of the farm. Since this remaining cash must be used for fixed assets, there might not be sufficient income to cover other cash obligations such as a family living allowance and principal payments on debts, which are not included in the cost of production. Therefore, this definition of cost

196. *See generally* R. LEFTWICH & R. ECKERT, THE PRICE SYSTEM AND RESOURCE ALLOCATION 150-79 (8th ed. 1982) (discussing costs).

197. Cost of production as recognized by the accounting profession is similar to cost for the purpose of federal income tax. *See* D. SMITH & J. BUTTERS, TAXABLE AND BUSINESS INCOME 9-10 (1949). The two definitions, however, differ slightly because accountants are likely to use the accrual method of accounting, whereas farmers compute income tax liability using the cash method. The two methods also vary in the method employed to calculate depreciation.

198. *See generally* A. MATZ, O. CURRY & M. USRY, COST ACCOUNTING — PLANNING AND CONTROL (5th ed. 1972) (discussing cost accounting).

199. J. DOLL & F. ORAZEM, *supra* note 192, at 81. Noncash costs consist of depreciation and opportunity costs. *Id.*

of production does not assure that forbearance pursuant to the confiscatory price statutes would aid the farmer because there is no guarantee that cash obligations necessary for survival of the farm business will be met.

4. *An Alternative Approach*

Another alternative for calculating the cost of production is based on the cash outflows of the typical North Dakota farm. This definition would require a description of the typical farm's acreage, indebtedness, interest rates, and repayment schedule.

The cost of production based on cash outflows would include an estimate of all variable costs and an estimate of fixed costs which require a cash outflow, except principal payments on debts. Pursuant to this definition, fixed cash outflows relating to land would be replaced by the following three-part estimate: (1) average rental payments on the portion of land that is typically leased; (2) average debt servicing payments and property tax payments on the portion of land that is typically encumbered; and (3) average property tax payments on the portion of land that is owned free and clear. Furthermore, this definition of cost production would include an estimated family living allowance to replace the opportunity cost of family labor and nonreal estate equity in the business. Moreover, even though depreciation is a noncash cost, a portion of the farm's depreciation would be included so that equipment and machinery would not be consumed without being replaced.[200] The portion of depreciation included as a cost would be the average farmer's ratio of equity in the depreciable assets to the assets' value.

Several points about this definition can be identified. First, as long as principal payments are delayed but interest payments are kept current, the only equity the farmer loses is the amount which results from the depreciation of encumbered assets. Second, an income level that exceeds cash needs and depreciation allowances indicates that at least some debt principal can be repaid. Third, income that is less than cash needs will not force a farmer to cease production if the family living expenses and equipment replacement expenditures are decreased in order to assure that creditors are paid their interest. Fourth, persons with cash needs in

200. For a discussion of depreciation, see *supra* note 199 and accompanying text. An alternative to including only a portion of depreciation in this definition of cost of production would be to include all depreciation as a cost, but then require a principal payment to the lender who holds the debts on the depreciable assets. The amount of payment would be the total amount of depreciation multiplied by the portion of depreciable assets that is encumbered.

excess of the average farmer will need to restructure their business in order to increase their efficiency and make their principal payments. Fifth, regardless of farmer's level of efficiency, the business should cease production when its revenue is not adequate to pay variable costs. Finally, an ability to meet cash obligations, even if it requires reducing family living expenses and equipment expenditures, demonstrates that the business should survive a temporary downswing in the industry.

Regardless of the cost of production that is adopted, it is probably desirable to have information concerning the cost of production based on a regional level rather than on a state-wide basis.[201] Since production levels vary greatly from region to region,[202] it would be inequitable to assume that a farm product produced in the western part of North Dakota would have a cost of production similar to the same product produced in the eastern part of North Dakota.[203]

C. IN COMPARISON TO OTHER COMMODITIES IN GENERAL, ENTERING INTO THE BUSINESS OF AGRICULTURE

The language "in comparison to other commodities in general, entering into the business of agriculture"[204] poses some of the most difficult questions of the confiscatory price statutes. The language appears to be a key requirement in determining whether section 28-29-04 is triggered and yet its meaning is perhaps least understood.[205] Consequently, this clause may form the core of an argument that section 28-29-04 is unconstitutionally vague.[206] For the purpose of this discussion, the clause will be divided after the word "general," with the second phrase being addressed first.

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201. *But see* Federal Land Bank v. Ostlie, Civ. No. 36928, mem. op. at 7-8 (N.E. Cent. Dist. Ct. N.D. Oct. 19, 1983) (suggesting cost of production figures should be based on economic studies applicable to the state).

202. R. JOHNSON, M. ALI, D. SAXOWSKY & R. LITTLE, COST OF PRODUCING FARM COMMODITIES IN NORTH DAKOTA (Agricultural Economics Report No. 90, Department of Agricultural Economics, North Dakota State University, 1986).

203. Two related issues are identifying which commodities the court should consider and which year's (or years') prices and costs are relevant. By considering commodities generally produced in the county or region of the state where the debtor's farm is located, the court continues to focus upon the economic situation of a typical farmer. This is more relevant to the issue of the overall condition of North Dakota's agriculture than are the commodities produced by the indebted farmer. In terms of time, current prices and costs are most relevant since an underlying question is whether a delay in repayment at the time of the producing will benefit the producer. Past costs and revenues have little bearing on current or future production costs and income.

204. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

205. *See id.*

206. For a discussion of vagueness, see *supra* notes 67-70 and accompanying text.

1. *Entering into the Business of Agriculture*

An initial question is whether "entering into the business of agriculture" modifies "cost of production" or "in comparison to other commodities in general."[207] The comma after "general" would indicate that the phrase modifies "cost of production." Consequently, the phrase would be an explicit statement as to which items should be considered in calculating the cost of production; that is, those inputs that are used in the production of agricultural commodities.

An alternative interpretation would be that the phrase modifies "in comparison to other commodities in general." Pursuant to this interpretation "entering into the business of agriculture" would describe what "other commodities" should be used to complete the comparison required by section 28-29-04.[208]

2. *In Comparison to Other Commodities in General*

Interpreting "in comparison to other commodities in general" raises three questions: (1) what are the "other commodities"; (2) to what should the price of these "other commodities" be compared; and (3) what is the criteria for determining the outcome of the comparison.

The answer to the first question is apparent if it is accepted that "entering into agriculture" modifies "other commodities." In that case, "other commodities" are the inputs used in the production of grain and livestock. If, however, it is accepted that "entering into agriculture" modifies "cost of production," the definition of "other commodities" is not easily discerned. Possible meanings for "other commodities" include the following: (1) other North Dakota agricultural commodities; (2) nonagricultural commodities in North Dakota; (3) major agricultural commodities for a multistate region or the nation; or (4) nonagricultural commodities for a multistate region or the nation.

Defining "other commodities" as North Dakota agricultural commodities would be unnecessary because section 28-29-04 already provides that the price of all farm products produced in the state are to be considered.[209] Moreover, interpreting "other commodities" to mean nonagricultural commodities for a multistate region or the nation would be illogical because those

207. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.
208. *Id.*
209. *Id.*

commodities bear no relation to the agricultural or general economy of North Dakota. Thus, the probable meaning of "other commodities" is the second or third alternative.

The second question is to what should the price of these "other commodities" be compared. Section 28-29-04 already requires a comparison of farm prices to the cost of production.[210] The statute is triggered whenever the ratio of farm prices to cost of production (price/cost ratio) is less than one.[211] The phrase "in comparison to other commodities in general" suggests that a second comparison is to be made. This second comparison would involve "the price of other commodities" and another value. Section 28-29-04 does not indicate what this "other value" is or how it should be determined, but there are some possible alternatives.[212] First, the price of other commodities could be compared to the price/cost ratio of farm commodities.[213] Second, the price of other commodities could be examined against their cost of production. Third, the price of other commodities could be compared to the price of farm products in North Dakota. Finally, the price/cost ratio of other commodities could be compared to the price/cost ratio for North Dakota agricultural products. This last suggestion may be most sensible if "other commodities" is defined as nonagricultural commodities in North Dakota because it would compare the profitability of North Dakota agriculture to the profitability of other segments of the state's economy.[214]

The third question regarding the phrase "in comparison to other commodities in general" is what determines the outcome of the comparison. In addition to a price/cost ratio for North Dakota agricultural products of less than one, must this ratio be less favorable than the "price of other commodities" in order to invoke section 28-29-04,[215] or is the statute triggered when the "price of other commodities" also has a cost/price ratio of less than one? Section 28-29-04 does not suggest an answer.[216]

An alternative to answering all these questions would be to accept that "entering into the business of agriculture" describes

210. *Id.*
211. *See id.*
212. *See id.*
213. Comparing the absolute price of the "other commodities" to a price/cost ratio would, of course, be meaningless unless there is historical data to indicate how this comparison has changed.
214. Section 28-29-06 of the North Dakota Century Code directs courts to take notice of the situation of producers and laborers. N.D. CENT. CODE § 28-29-06 (1974). For the text of § 28-29-06, see *supra* note 4. If this includes nonagricultural laborers, § 28-29-06 supports the idea that the comparison should be between agricultural and nonagricultural sectors of the North Dakota economy. *See id.*
215. *Id.* § 28-29-04. For the text of § 28-29-04, see *supra* note 4.
216. *Id.*

"other commodities." Next, interpret "in comparison' to mean "considering," and use the information about the "price of other commodities" in the estimation of cost of production. The most persistent question, however, may be whether this clause is unconstitutionally vague.[217]

D. BEST INTEREST OF LITIGANTS

Although the first sentence of section 28-29-04 grants state courts added discretion as long as the price of farm commodities does not at least equal the cost of production, the court must exercise this discretion in the "best interests of litigants."[218] Consequently, a relevant issue is what should be considered in determining whether a delay is in the best interests of the parties.

Although section 28-29-04 permits courts to delay legal actions for debt collections,[219] the statute does not allow courts to delay payment indefinitely, nor terminate or reduce the debtor's obligation.[220] Since the debtor's obligation cannot be reduced, interest on the debt will accrue during any court imposed delay. Thus, a delay in repayment will not unequivocally be in the best financial interest of the parties.

Delinquent borrowers benefit economically from a delay in repayment only if the income earned on the property that is retained as a result of the postponement exceeds the cost of securing the delay. Since revenue from farm property depends on the season of the year, a three month delay in foreclosing farm land during the winter may not generate any income for the farmer. Accruing interest will definitely exceed the income in such a situation. Similarly, a delay for an entire year is not beneficial to the borrower if the annual interest cost exceeds earnings. An indebted farmer,

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217. For a discussion of vagueness, see *supra* notes 67-70 and accompanying text. For a discussion of the severance of an unconstitutional clause from a statute, see *supra* notes 90-92 and accompanying text.

218. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4. While § 28-29-04 requires state courts to exercise their discretion in the best interests of the parties, § 28-29-05 requires that a court-imposed delay in a foreclosure proceeding be "advisable and just." *Id.* § 28-29-05. This is probably a less stringent standard from the debtor's perspective than "for the best interests of the litigants." *See id.* §§ 28-29-04 and -05.

219. *See* Federal Land Bank v. Halverson, 392 N.W.2d 77, 82 (N.D. 1986); N.D. CENT. CODE § 28-29-04 (1974). In *Halverson,* the North Dakota Supreme Court stated that forebearance pursuant to the confiscatory price statutes means some delay in enforcing the debtor's obligation by the exercise of restraint and patience. *Halverson,* 392 N.W.2d at 82.

220. Folmer v. State, 346 N.W.2d 731, 734 (N.D. 1984). In *Folmer* the North Dakota Supreme Court noted that courts, in applying the confiscatory price statutes, could not force a mortgagee to accept less than the amount due under the mortgage or determine that the mortgagee was released from making further payments. *Id.* at 735.

however, is likely to benefit economically from a delay that extends for only the growing season.

Whether or not a delay in repayment is economically beneficial to the borrower may not be determinative of whether forebearance granted pursuant to section 28-29-04 is in the best interests of the parties.[221] Nonmonetary interests of borrowers, such as a place to live, should also be considered in determining whether forbearance is in the best interests of the parties. Furthermore, the impact the delay would have on creditors must be considered.[222]

E. ANY CAUSE

The breadth of cases in which section 28-29-04 can be invoked is limited to "any cause."[223] Although section 28-29-04 offers no explicit indication that it applies only to debtor-creditor relationships, the North Dakota Supreme Court has stated that the statute should "be liberally construed to protect the interest of the debtor-mortgagor."[224]

Another indication as to the breadth of the statute is provided by section 28-29-06, which authorizes state courts to "take judicial notice of the situation of producers and laborers when prices of farm products are confiscatory."[225] Assuming that laborers are not limited to farm workers, the confiscatory price statutes appear to be available to persons outside agriculture.[226]

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221. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

222. A question related to what constitutes the best interests of the parties is whether courts will require a debtor to pay interest on the debt that accrues subsequent to the granting of forebearance during the perod of the delay. Clearly, the principal portion of the debt and interest that accrued prior to delay will not need to be paid during forebearance. The North Dakota Supreme Court has stated, however, that judicial forebearance pursuant to the confiscatory price statutes might depend on appropriate conditions, such as using rental payments made by a debtor to pay real estate taxes or a portion of the debt. Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 n.1 (N.D. 1986); *see Halverson,* 392 N.W.2d at 82. This statement seems to suggest that there may be cases in which payment of some interest accruing during the delay also may be postponed.

223. N.D. CENT. CODE § 28-29-04 (1974). Section 28-29-04 provides that, when the requisite conditions are met, state courts can extend deadlines for the filing and serving of papers "necessary for the final determination of any cause." *Id.* The North Dakota Supreme Court has recognized that the deadlines for filing and serving papers might be extended on appeal pursuant to § 28-29-04. Lang v. Bank of North Dakota, 377 N.W.2d 575, 580 (N.D. 1985); *see* N.D. CENT. CODE § 28-29-04 (1974). Thus, it appears that "final determination" may include the appellate process. For the text of § 28-29-04, see *supra* note 4.

224. *Folmer,* 346 N.W.2d at 733. In *Folmer* the court also noted that § 28-29-04 was applicable to any cause. *Id.; see* N.D. CENT. CODE § 28-29-04 (1974). The court, however, refused to speculate about the various fact situations in which the statute would apply. *Folmer,* 346 N.W.2d at 733. Moreover, the court stated that § 28-29-04 was not limited to cases dealing specifically with the sale of agricultural commodities, and that the statute was applicable to any cause in which the factors specified in § 28-29-04 were present. *Id.; see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

225. N.D. CENT. CODE § 28-29-06 (1974). For the text of § 28-29-06, see *supra* note 4.

226. Perhaps one agrument that could be advanced to defeat an overly expansive interpretation of "any cause" would be, pursuant to § 28-29-04, delay of the legal proceeding is not in the best

F. IN LIKE MANNER

The second sentence of section 28-29-04 empowers state courts "in like manner" to delay, among other items, entry of judgment.[227] Obviously, some requirement specified in the first sentence has been incorporated into the second sentence. Accepting that each sentence in section 28-29-04 specifies a distinct defense allows an interpretation of "in like manner." Since the court's authority to act and the conditions under which it is empowered to use this authority are detailed in the second sentence of section 28-29-04, "in like manner" is not referring to the authority and conditions specified in the first sentence of section 28-29-04.[228] Therefore, "in like manner" must incorporate "for the best interests of litigants" into the second sentence of section 28-29-04 as the standard for exercising the court's discretion.[229] Accepting this interpretation indicates that a court stay would not be automatic upon a showing that legal procedure would confiscate property by forcing a sale of agricultural products.

G. CONFISCATE OR TEND TO CONFISCATE

Section 28-29-04 allows courts to stay various activities if strict legal proceeding would "confiscate or tend to confiscate the property of " the parties.[230] Confiscation is generally defined as an action in which the government acquires ownership of property, often without payment.[231] Since application of the confiscatory price statutes is not limited to situations in which government is a party to the action, confiscatory must have meaning other than its technical definition for the purpose of this law. Furthermore, a forced sale of agricultural products as well as foreclosure of a mortgage will involve a payment, although it may be a reduced payment. Therefore, confiscation for the purpose of the confiscatory price statutes must be a diminished payment. The ensuing issue, however, will be how extensive the decrease in selling price must be in order to consider the transaction confiscatory. The North Dakota Supreme Court appears to imply that a price below the cost of production would be confiscatory.[232]

interests of both parties. N.D. CENT. CODE § 28-29-04 (1974). For a discussion of what constitutes the best interests of the parties, see *supra* notes 218-22 and accompanying text.

227. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

228. *See id.*

229. *See id.*

230. *Id.*

231. WEBSTER'S NEW INTERNATIONAL DICTIONARY 560 (2d ed. 1947).

232. *See* Folmer v. State, 346 N.W.2d 731, 733 (N.D. 1984) (stating first sentence of § 28-29-04 applies when farm prices are confiscatory).

Perhaps this suggests that confiscation, as used in the confiscatory price statutes, is merely a way of describing costs in excess of price.

H. RUINOUS

The second sentence of section 28-29-04 provides state courts with authority to delay various court activities if strict legal procedure would confiscate the property of the litigant "by forcing the sale of agricultural products upon a ruinous market."[233] Ruinous, according to the dictionary, is defined as bringing or tending to bring ruin, destruction, or harm.[234] A disastrous market is a relative term because what is ruinous to a seller may be beneficial to a buyer. Several North Dakota Supreme Court opinions refer to the economic situation of the 1930s,[235] and perhaps that period of history is an example of a ruinous market. On the other hand, "ruinous" as used in section 28-29-04 may be a descriptive term rather than a statement of substantive law.[236] Accordingly, the relation between cost of production and the price of farm products, despite its inherent definitional problem, is a more exact measure than "ruinous" and therefore, should be used in determining whether the law is triggered.[237]

I. AGRICULTURAL PRODUCTS

The second sentence of section 28-29-04 appears to provide state courts with discretionary authority when legal procedure would confiscate property "by forcing the sale of agricultural products upon a ruinous market."[238] The North Dakota Supreme Court, however, determined in *Heidt v. State*[239] that a debtor was not required to own agricultural products, at the time of a hearing to enjoin foreclosure by advertisement, to invoke the confiscatory price defense.[240] The court noted that the purpose of the

233. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

234. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2182 (2d ed. 1947).

235. *E.g.*, Lang v. Bank of North Dakota, 377 N.W.2d 575, 580 (N.D. 1985) (noting parallels between present economic conditions and those in the 1930s); *Folmer*, 346 N.W.2d at 732 (referring to agricultural economy during 1930s).

236. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

237. For a discussion of the price of farm products and the cost of production, see *supra* notes 164-203 and accompanying text.

238. N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

239. 372 N.W.2d 857 (N.D. 1985).

240. Heidt v. State, 372 N.W.2d 857, 861 (N.D. 1985); *see* N.D. CENT. CODE § 28-29-04 (1974); *id.* § 35-22-04 (1980) (after expiration of the period provided by notice of intention to foreclose an order enjoining foreclosure will only be made by motion); *see also* Federal Land Bank v. Thomas, 386 N.W.2d 29, 31 n.1 (N.D. 1986) (debtor need not own agricultural commodities). For the text of § 28-29-04, see *supra* note 4.

confiscatory price defense was to aid farmers and to require farmers to possess agricultural commodities might violate the intent of the statute.[241] The court reasoned that if the cost of production actually exceeded the price of farm products, the farmer would probably be forced to sell any commodities that were once owned.[242]

Since the court in *Heidt* stated only that agricultural products need not be owned at the time a case is heard, agricultural products must be defined.[243] One interpretation could be that agricultural products encompasses only items such as wheat and grain, while a broader interpretation could include farm machinery or equipment. The answer may influence the elements that a debtor must prove to be granted a delay pursuant to the confiscatory price statutes.

VIII. IS THERE ANOTHER INTERPRETATION?

With all the uncertainties that surround the confiscatory price statutes, it may be appropriate to inquire whether the statutes, if viewed from another perspective, could have an alternative meaning. One district court has stated that the confiscatory price laws are "not a question of vagueness but of ambiguity."[244] Accepting this as a premise, the next logical step is to examine the legislative intent to determine how the statutes should be interpreted.[245] Consequently, it is necessary to briefly review the agricultural and legal situation at the time the confiscatory price statutes were passed.[246]

The confiscatory price laws were enacted several months after the 1932 crop had been harvested. Historical data indicates that

241. *Heidt,* 372 N.W.2d at 861; *see* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

242. *Heidt,* 372 N.W.2d at 861. *Heidt* determined that ownership of farm commodities is not necessary to invoke § 28-29-04. *Id.; see* N.D. CENT. CODE § 28-29-04 (1974). However, in *Production Credit Ass'n v. Lund,* the North Dakota Supreme Court stated that a reasonable interpretation of § 28-29-04 was that courts could act pursuant to the statute when "legal procedure will result in the confiscation of property 'by forcing the sale of agricultural products upon a ruinous market.' " Production Credit Ass'n v. Lund, 389 N.W.2d 585, 587 (N.D. 1986). This implies that possession and a forced sale of agricultural products are requisite conditions to applying the statute. In reconciling these two opinions, however, *Heidt* should be granted greater deference because the court was addressing whether ownership of farm commodities was necessary, whereas the question in *Lund* was whether § 28-29-04 had repealed by its own terms. *Compare Lund,* 389 N.W.2d at 587 (whether § 28-29-04 self-terminated) *with Heidt,* 372 N.W.2d at 861 (whether ownership of commodities is necessary).

243. *Heidt,* 372 N.W.2d at 861.

244. United Bank v. Martineson, Civ. No. 34137, mem. op. at 1 (S.Cent. Dist. Ct. N.D. Aug. 29, 1984).

245. *See* N.D. CENT. CODE § 1-02-39 (1975) (if statute is ambiguous court may consider, among other factors, the circumstances pursuant to which the statute was adopted to determine the intent of legislation).

246. *See id.*

North Dakota farmers owned approximately 600,000 horses and draft animals.[247] Furthermore, less than half of the farmers reported owning tractors, while more than ninety percent reported owning draft animals.[248] Statutory law guided court procedure because the North Dakota Rules of Civil Procedure would not be adopted for twenty-five years.[249] It was within this setting that the confiscatory price statutes were adopted.

A. THE FIRST SENTENCE

The first sentence of section 28-29-04 empowers state courts with authority "to extend the time for serving and filing all papers requisite and necessary for the final determination of any cause" whenever the price of agricultural products does not at least equal the cost of production.[250] Arguably, this language implies that the time period for filing answers, motions, and responses may be extended at the court's discretion. The apparent legislative intent was to protect parties from an adverse judicial ruling based on a technicality, such as missing a filing deadline. The corollary would be that the 1933 North Dakota Legislature desired foreclosure cases to be decided on their merits rather than on a procedural aspect.

With the foregoing in mind, the first sentence of section 28-29-04 should apply to any proceeding to foreclose a mortgage on a crop as well as on real or personal property.[251] This breadth is reflected by the statutory reference to "any cause."[252] This sentence, however, would apply only to the initial stages of litigation, and would have no relevance once the proceeding entered the trial stage.

B. THE SECOND SENTENCE

The second sentence of section 28-29-04 explicitly grants courts authority to delay entering a judgment, issuing an

247. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 16TH UNITED STATES CENSUS OF AGRICULTURE, NORTH DAKOTA, USES OF LAND, PRINCIPAL CROPS AND CLASSES OF LIVESTOCK WITH STATISTICS FOR COUNTIES 8 (1st ser. 1941). [hereinafter USES OF LAND CENSUS]. The total number of mules, colts and horses in North Dakota dropped from 664,536 in 1930 to 565,860 in 1935. *Id.*

248. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 16TH UNITED STATES CENSUS OF AGRICULTURE, NORTH DAKOTA, FARM MORTGAGES, TAXES, LABOR FACILITIES EXPENDITURES, AND MISCELLANEOUS FARM INFORMATION; FRUITS, VEGETABLES AND MINOR CROPS WITH STATISTICS FOR COUNTIES 11 (2d ser. 1941). Data indicates that 43.8% of the approximately 77,950 North Dakota farmers owned tractors in 1930, whereas 71,864 farmers owned horses. *Id.*; *see* USES OF LAND CENSUS, *supra* note 245 at 8.

249. N.D. CENT. CODE, note to North Dakota Rules of Civil Procedure 1 (1974). The North Dakota Rules of Civil Procedure were promulgated pursuant to an order of the North Dakota Supreme Court on April 25, 1957. *Id.*

250. *Id.* § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

251. *See id.*

252. *See id.*

execution, or signing an order for judgment if the legal proceeding would confiscate property of a party by "forcing a sale of agricultural products upon a ruinous market."[253] The use of "agricultural products" implies that to invoke the second sentence of section 28-29-04, there must be a forced sale of agricultural products such as crops and livestock, rather than a forced sale of land or capital assets.[254] Suggesting that the debtor must own agricultural products does not conflict with the North Dakota Supreme Court's statement that ownership of agricultural products is not necessary to utilize section 28-29-04 if the first sentence is interpreted to apply to any cause.[255]

Moreover, the explicit language of the statute suggests that the two sentences contained in section 28-29-04 provide the court with different alternatives.[256] While the first sentence allows the court to extend time for serving and filing papers, it does not explicitly permit the court to delay entry of judgment.[257] Arguably, such authority should not be implied since section 28-29-04 specifically provides the court's authority pursuant to each sentence.[258]

The second sentence of section 28-29-04 should be applied only to crop mortgages and other encumbrances upon actual produce.[259] It is primarily available once the legal proceeding has reached the merits of the case.

C. THE THIRD SENTENCE

Section 28-29-05 applies in foreclosure cases.[260] The emphasis of section 28-29-05 is on real estate mortgage foreclosures, since its application is triggered when an order for judgment would deprive a debtor of a home and confiscate the debtor's property.[261] The legislature probably emphasized real estate because it was more vital than farm equipment at the time the confiscatory price statutes

253. *Id.*

254. *See id.*

255. *See* Heidt v. State, 372 N.W.2d 857, 861 (N.D. 1985) (debtor is not required to own farm commodities to raise confisacatory price defense); N.D. CENT. CODE § 28-29-04 (1974). For a discussion of *Heidt,* see *supra* notes 239-42. For the text of § 28-29-04, see *supra* note 4.

256. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

257. *See id.*

258. *See* Wills v. Schroeder Aviation Inc., 390 N.W.2d 544, 546 (N.D. 1986) (when a statute is clear the letter of the statute can not be disregarded under the pretext of following the spirit of the law); Haggard v. Meier, 368 N.W.2d 539, 542 (N.D. 1985) (when a statute is clear it is improper for courts to add provisions which the words of the statute do not provide); N.D. CENT. CODE § 1-01-05 (1975) (when a statute is clear and free from ambiguity the words of the statute are not to be disregarded under the pretext of pursuing its spirit).

259. *See* N.D. CENT. CODE § 28-29-04 (1974). For the text of § 28-29-04, see *supra* note 4.

260. *Id.* § 28-29-05. For the text of § 28-29-05, see *supra* note 4.

261. *Id.*

were enacted. Foreclosure of a land mortgage meant an end to the farm business, a place to live, and an opportunity to raise food for the family. Loss of equipment did not cause such drastic consequences because it could be replaced with a combination of draft animals and human labor. Therefore, the legislature sensibly emphasized real estate; it was not aware that personal property would become such an essential element to the successful operation of a farm business.

Section 28-29-05 is similar to the second sentence of section 28-29-04 because it applies only after reaching the trial stage of litigation.[262] This conclusion is supported by the language of section 28-29-05 which permits a court only to delay the signing of an order for judgment.[263] Thus, section 28-29-05 could be interpreted as applying only in real estate foreclosure cases once the proceeding reached the merits of the case.[264]

IX. CONCLUSION

The objective of this Article was to identify some of the many issues which surround the confiscatory price statutes. Although enacted over fifty years ago, the statutes' application was limited during periods of agricultural prosperity. Now, however, with the agricultural economy in distressful condition, numerous questions surrounding the confiscatory price statutes are being raised for the first time. These range from the statutes' constitutionality to appropriate definitions for terms contained in the statutes. Perhaps legislative amendment is the best solution for the problems raised by these statutes, which have been antiquated by technological advances, changed circumstances, and lack of revision during the past fifty-four years.

262. *See id.*
263. *Id.*
264. *See id.*