FEDERAL CROP INSURANCE: *LEGAL UPDATES AND DEVELOPMENTS*

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OVERVIEW

- Policy Changes
- New Products
- Litigation
- Organic Production & Good Farming Practices concerns

POLICY CHANGES

- Revised definition of "Good Farming Practices" (18-BR)
  - The production methods utilized to produce the insured crop and allow it to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance, including any adjustments for late planted acreage, which are those **generally recognized by agricultural experts or organic agricultural experts**, depending on the practice, for the area. We may, or you may request us to, contact FCIC to determine if production methods will be considered "good farming practices."
  - -Removed farming practices "contained in the organic plan." (17-BR)

POLICY CHANGES

- Section 2(f)(2)(iii) – Revised to broaden the authority given to the RMA's Administrator to reinstate producers who inadvertently failed to pay a debt timely. (21-BR)

- Section 2(f)(2)(iii)(C)(1)(iv) – Added to authorize the insurance providers to allow reinstatement up to 15 calendar days after a due date for payment received during a previously executed payment agreement (21-BR)

POLICY CHANGES (21-BR)

- Section 14(b)(5) - Clarified a notice of loss must be filed, by the producer, for an insurance provider to consider whether the delayed notice impacts their ability to adjust losses as provided by section 14(b)(5)

- Section 17(e)(1)(iii)(C) – Added a new paragraph to clarify how eligible acres are determined for crops that require a processor contract to be insured

POLICY CHANGES – 21.1 BR

- Section 17(f)(1) – Revised to provide an exception allowing the producer to be paid a prevented planting payment based on a crop other than the crop planted on the acreage if proof is provided that the producer intended to plant another crop or crop type on the acreage.

- •Section 17(f)(5)(iii) – Added to clarify prevented planting coverage will not be provided if the act of haying or grazing a cover crop contributed to the acreage being prevented from planting or the cover crop was otherwise harvested prior to the end of the late planting period.

- •Section 17(f)(8) – Revised to expand nationwide the “1 in 4” requirement that the acreage must have been planted to a crop, insured, and harvested (or if not harvested, adjusted for claim purposes due to an insurable cause of loss) in at least 1 out of the previous 4 crop years

POLICY CHANGES 21.1-BR

.•Section 20(a)(1) – Revised to clarify the responsibility is on the producer to start dispute resolution through arbitration when the producer disagrees with an insurance provider determination.

-appears to be a response to *Occidental Insurance vs. Franklin Bush*

-an attempt to place the burden on an insured to initiate arbitration even when the insured is not seeking relief and/or damages

-raises significant questions

NEWER PRODUCTS

- ENHANCED COVERAGE OPTION (ECO)
  - provides **additional area-based coverage** for a portion of your underlying crop insurance policy deductible. It must be purchased as **an endorsement** to the Yield Protection, Revenue Protection, Revenue Protection with the Harvest Price Exclusion, Actual Production History or Yield Based Dollar Amount of Insurance policy. **ECO offers producers a choice of 90 or 95 percent trigger levels**. Trigger means the percentage of expected yield or revenue at which a loss becomes payable.
  - 31 crops including Corn, Soybeans, Rice

NEWER PRODUCTS

- MARGIN PROTECTION (MP)- corn, soybeans, rice, and wheat

- Margin Protection is offered as an area based plan that can be purchased as a stand-alone policy or purchased in conjunction with a Yield Protection or Revenue Protection policy. **The plan provides producers with coverage against an unexpected decrease in their operating margin**.
- The plan provides coverage that is **based on an expected margin, which is the expected area revenue minus the expected area operating costs**, for each applicable crop, type and practice. Margin protection is area-based coverage and may not necessarily reflect a producer's individual experience.
- **A producer may choose coverage from 70 percent to 95 percent of their expected margin**. A higher level of coverage will have a higher premium rate. The catastrophic (CAT) level of coverage is not available under this policy.

CROP INSURANCE DISPUTE RESOLUTION

- The Crop Insurance Policy provides a unique dispute resolution process which includes an arbitration clause along with USDA administrative review requirements

- The party who makes the adverse determination decides the track on which the case will travel

- Generally:

1) Disputes with an AIP go to Arbitration (some tort claims may go to Circuit Court)
2) Disputes with an Agency of USDA go to Administrative Review
3) Agent Negligence cases may be taken to Circuit Court.

CROP INSURANCE ARBITRATION

- Arbitration is required but there remain issues for the Court?
  - Who has the burden to initiate arbitration?
    - 21.1 BR (November 2020)- the policy was revised to address this question.
  - What issues can the arbitrator resolve?
  - What claims survive arbitration?

SCOPE OF ARBITRATION

- **The Basic Provisions carve out from arbitration any "policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure**." 7 C.F.R. § 457.8 ¶ 20(a)(1).
- "**Failure to obtain any required interpretation from [the Agency] will result in the nullification of any agreement or award**." ¶ 20(a)(1)(ii).

FAILURE TO OBTAIN A FAD

- Serves as a basis for vacatur
- About the only realistic way to obtain review of a crop insurance arbitration.

  -This can lead to a rehearing
- Courts have demonstrated a willingness to enforce the FAD Requirement
  - *Garnett v. NAU Country Ins.*, 2009 WL 3644762 (W.D. Kentucky 2009).
  - *Davis v. Pro Ag*, No. 5:12 CV -92 (MTT) (M.D. Ga. 2013). Reversed by the Eleventh Circuit in *Davis v. Pro Ag*, 762 F.3d 1276 (2014).

OVERVIEW OF FEDERAL COURT REVIEW OF "FAD DISPUTES"

- Multiple United States District Courts have vacated arbitration awards upon a finding that the Arbitrator rendered a policy or procedure interpretation without obtaining a FAD or IOP.
  - This attack remains relevant
- However, Appellate Courts have been hesitant to affirm such Orders of Vacatur.
  - It appears to the presenter that the Eighth and Eleventh Circuits have reversed vacaturs based upon a policy preference that arbitration be final.

RMA HAS ALSO RESPONDED TO THE FAD CONTROVERSY

- By establishing a regulation allowing RMA/FCIC to determine whether a FAD or IOP should have been obtained for a dispute.
- Clearly demonstrates the desire of RMA to control the dispute resolution process.
- RMA has even taken the position that their determinations should be binding on Federal Courts.

CONSTITUTIONALITY OF THE FAD/IOP

- The constitutionality of a Federal Agency Regulation which purports to limit and "bind" the decision-making authority of a United States District Judge is highly suspect and should trigger separation of powers concerns.
- "Article III of the Constitution establishes an independent Judiciary with the "province and duty ... to say what the law is" in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1315, 194 L. Ed. 2d 463 (2016). An executive branch agency such as the USDA RMA/FCIC, which derives its powers from Congress, may not "prescribe rules of decision to the Judicial Department ... in [pending] cases." Id.

CHALLENGING THE FAD/IOP

- If RMA takes a position in contradiction of its own regulations, there may be an argument that this is an illegal or arbitrary agency action, possibly even a violation of the *Accardi* Doctrine.
- However, at the arbitration, the Defense will argue that pursuant to the arbitration clause the interpretation is binding.
- There may be avenues to attack specific determinations

RECENT CASES REGARDING THE AUTHORITY OF THE ARBITRATOR

- The 4th Circuit Court of Appeals recently affirmed a vacatur in favor of a crop insurance provider on the partial basis that the arbitrator lacked authority to interpret potentially ambiguous policy provisions
  - Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247 (4th Cir. 2019)

-In this case, the insured attempted to confirm an arbitration victory in Federal Court and the District Court instead granted insurer's motion to vacate the award.

RECENT CASES REGARDING THE AUTHORITY OF THE ARBITRATOR

- The Fourth Circuit wrote that

"*As the policy makes clear, the arbitrator was required to obtain and apply the FCIC's interpretation of any ambiguous policy provision, and the arbitrator could not substitute her own interpretation for that of the FCIC.*"

Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247, 255 (4th Cir. 2019)

"***the unusual world of federal crop insurance does, in fact, appear to leave very little decision making authority to the arbitrator***." Id.

THEN CAME THE 8TH . . .

- The Eighth Circuit also recently reversed a vacatur of a crop insurance arbitration award in the case of *Terry Balvin vs. Rain and Hail*, 943 F.3d 1134 (2019).
- This is a case where one of Terry Balvin's primary arguments was that the arbitrator engaged in policy and procedure interpretation by allowing the insurance company to establish "appraised production," on acres that were not appraised and acres that were not appraised in conformance with the applicable procedure.
- The District Court agreed with Mr. Balvin and held that this dispute "is precisely the type of dispute regarding the application of policy and procedure that needed to be submitted to the FCIC for interpretation."

THEN CAME THE 8TH . . .

- And Held that the arbitrator did not exceed his powers because the dispute about the interpretation of "appraised value" was not even before the arbitrator.
- **The Court noted that "**Balvin argued to the arbitrator that the appraisals were irrelevant and inaccurate." and "Balvin did point out that the appraisals were not signed and were incomplete"
- This is a departure from RMA Guidance which suggests a question of policy or procedure can arise at any time, even after a hearing.

THEN CAME THE 8TH. . .

- And noted the policy's arbitration clause incorporated the American Arbitration Association ("AAA") rules. "By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability." *Terry Balvin vs. Rain and Hail*, 943 F.3d 1134 (2019).
- "the arbitrator was free to determine any threshold arbitrability questions to the extent they were at issue." Id.
- Definite deference to the Arbitrator.

SCOPE OF AN ARBITRATOR'S AUTHORITY

- Per the terms of the crop insurance policy and applicable Federal Regulations, determinations as to the interpretation or application of the crop insurance policy and Federal guidance relating to crop insurance are reserved for the RMA, and the arbitration agreement within the policy specifically provides that an arbitrator lacks the authority to make such determinations.
- Whether a Federal Court will engage in meaningful review of an arbitration award is another question

GOOD FARMING PRACTICES

- What does the policy say about resolving good farming practices disputes?
  - "You may not sue us for our decisions regarding whether good farming practices were used by you"
  - "You must request a determination from FCIC of what constitutes a good farming practice before filing any suit against FCIC"
  - See Common Crop Insurance Policy Basic Provisions at Par. 20(d).

ORGANIC PRODUCTION & GOOD FARMING PRACTICES

- Organic Plan is no Longer Good Enough- Organic Farmers Lack Certainty
- Confusion regarding Organic Certification Requirements
  - NOP vs. RMA Requirements
- Organic Experts?

  -do they exist for the area?
- Uninsurable Causes of Loss?

ORGANIC PRODUCTION AND GOOD FARMING PRACTICES

- *Troy Owen vs. Federal Crop Insurance Corporation,* Case No. 3:19 CV-00161 (D.C. Southern Dist. Texas, 2020)
  - RMA tried to base its GFP determination on organic experts from other areas
  - RMA ignored compliance with the Organic Plan (under 2017 policy)
  - Court finds FCIC acted arbitrarily and capriciously
  - Set aside determination and order him paid for insurance claim.

OWEN V. FCIC

- Important not only because a farmer won a GFP dispute
  - RMA criticized fertilization, defoliation/harvest, weed control
  - Ignored that a hurricane made landfall
  - Magistrate focused finding on RMA's refusal to recognize that Owen did follow his organic plan to the best of his ability
- This case also provide persuasive authority for the appropriate nature of relief
  - AIP still attempted to argue that this farm did not experience flooding

WHO MUST INITIATE ARBITRATION?

- Is arbitration a two way street? Maybe Not.
- An insurer's claim to a repayment of an overpaid indemnity falls within the scope of the crop insurance policy's arbitration provision.
  - *Occidental Insurance vs. Franklin Bush*, District Court Case No. 2:19 CV 67 (E.D. Mo. 2020).
  - Arbitration is mandatory without regard for the identity of the initiating party. Id.
    - Takeaway is that at least one District Court has no recognized that the arbitration requirement in the basic provisions of crop insurance applies to both the insurer and the insured
    - Whether Arbitration is timely is a question for the arbitrator
    - November 2020 policy revisions do not answer the question of whether arbitration is mandatory

REPAYMENT LITIGATION

- "if we or FCIC have evidence that you, or anyone else assisting you, knowingly misreported any information related to any yield you have certified, we or FCIC will replace all yields in your APH database determined to be incorrect with the lesser of an assigned yield determination in accordance with section 3 or the yield determined to be correct:
  - (i) If an overpayment has been made to you, you will be required to repay the overpaid amount....
- "But by its express terms, Section 21(b)(3) applies only where FMH or the FCIC have evidence of a knowing misrepresentation."
  - *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, 366 F. Supp. 3d 974, 978–79 (W.D. Mich. 2018)

REPAYMEN T LITIGATION

- The dispute over a retroactive redetermination over the 2012 and 2013 crop years squarely raises policy interpretation issues. There is nothing in the policy language that expressly permits a redetermination of previously settled crop years, let alone allocates a burden of proof in any such retroactive redetermination to the farmer.
- *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, 366 F. Supp. 3d 974, 978 (W.D. Mich. 2018).
  - AIP's suggest all arbitration proceedings be initiated by the insured and that the insured bears the burden of proof.
  - Policy revisions suggest the same conclusion

DEBARMENT OF A CROP INSURANCE AGENT

- *Gubbels v. Perdue*, No. 4:20-CV-3060, 2020 WL 6873362, (D. Neb. Nov. 23, 2020).
  - Very interesting case where the Court appeared to duck strong due process claims on the basis that the Agent admitted he did not follow the applicable regulations (he argued simply technical violations, not substantive)
  - Inaccurate marketing by an agent/ Failure to timely submit applications
  - Temporary Suspension pending completion of debarment proceedings
  - But the debarment proceedings apparently never occurred
    - RMA instead appears to have turned the case over to the USA for criminal prosecution

GUBBELS V. PERDUE

- Gubbels finally contests the temporary (yet indefinite) debarment
- Points out the RMA did not follow their own regulations and makes compelling due process arguments- The Court offered some apparent sympathy for his situation.
- Court finds there was no "final agency action" for review and declined APA jurisdiction
  - Based on pending "Debarment proceedings"

GUBBELS V. PERDUE

- The Court recognized "legitimate" questions regarding due process
  - The Court found due process satisfied by a pre-hearing conference for a hearing that never occurred- where Counsel laid out its anticipated argument
    - It is not clear whether the Court recognized no relief could be provided at this conference
    - "The plaintiffs' assertion that they were entitled to an evidentiary hearing on Gubbels' suspension pursuant to the regulations is accurate in part, but the assertion that they are entitled to a hearing on demand is without support."- Direct Quote

GUBBELS V. PERDUE

- "The plaintiffs' assertion that they were entitled to an evidentiary hearing on Gubbels' suspension pursuant to the regulations is accurate in part, but the assertion that they are entitled to a hearing on demand is without support."- Direct Quote
- "The defendants agree that Gubbels is entitled to, and will be afforded, an evidentiary hearing, but not until the matters pending before the Inspector General and United States Attorney have been addressed."

GUBBELS V. PERDUE

- The District Court recognized that "It is true that in most, but not all cases, some type of pre-deprivation notice and hearing are constitutionally required before invading a property interest." *Lunon v. Botsford*, 946 F.3d 425, 430-31 (8th Cir. 2019); *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

- ***"Here, however, the risk of an erroneous deprivation and the value of additional safeguards are obviated by the fact that Gubbels admitted his violation regarding the sales closing date."***

CONCLUSION

- **Thank you**

- **Questions?**

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