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Supreme Court No. 88293-2

Court of Appeals No. 30357-8-III

SUPREME COURT
OF THE STATE OF WASHINGTON

E CCB
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TIMOTHY WEIDERT and L.W. WEIDERT FARMS, INC.,

Respondents,

v.

JERALD A. HANSON d/b/a WALLA WALLA INSURANCE
SERVICES, and JERALD AND JANE DOE HANSON,

Defendants,

PRODUCERS AGRICULTURE INSURANCE COMPANY,

Petitioner.

**MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW
FROM AMICUS CURIAE NATIONAL CROP INSURANCE
SERVICES**

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STATE OF WASHINGTON

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ORIGINAL

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GLOSSARY

CP	Clerk's Papers
FAA	Federal Arbitration Act, 9 U.S.C. § 1, <i>et seq.</i>
FCIA	Federal Crop Insurance Act, 7 U.S.C. § 1501, <i>et seq.</i>
FCIC	Federal Crop Insurance Corporation
MPCI	Multiple Peril Crop Insurance
NCIS	National Crop Insurance Services
Op.	Court of Appeals Opinion, dated November 29, 2012 (attached at App. 1-6)
Pet.	Petition for Review, dated January 31, 2013
ProAg	Petitioner Producers Agriculture Insurance Company
Weiderts	Respondents Tim Weidert and L.W. Weidert Farms

I. INTRODUCTION

Amicus Curiae National Crop Insurance Services (“NCIS”) respectfully urges the Court to grant the pending Petition for Review. The Court of Appeals in this matter affirmed a trial court’s ruling that “its *equitable* powers allow the Court to *override* any arbitration requirement, under the unique facts of this case.” CP 213 (emphases added). Even if that were true with regard to arbitration provisions generally, the arbitration provision at issue in this lawsuit is set forth in a *federal crop insurance policy* – the contents of which are *prescribed* by *regulations* promulgated by the Federal Crop Insurance Corporation (“FCIC”) pursuant to the Federal Crop Insurance Act, 7 U.S.C. § 1501, *et seq.* (“FCIA”). In order to provide a uniform and accessible system of federal crop insurance, the U.S. Congress specifically stated in the FCIA that states cannot override or affect the terms and conditions in federal crop insurance policies. 7 U.S.C. § 1506(l); *see also* 7 C.F.R. § 400.352. The Court of Appeals’ opinion ignores that federal mandate.

This case merits review under both RAP 13.4(b)(1) and (4). First, the pending Petition for Review involves an issue of substantial public interest that should be determined by this Court: whether trial courts in this state, acting pursuant to their “equitable powers,” can “override” an arbitration provision in a federal crop insurance policy. Second, the Court

of Appeals' decision conflicts with this Court's recognition in *State v. James River Insurance Co.*, 176 Wn.2d 390, 292 P.3d 118 (2013), that reverse preemption under the McCarran-Ferguson Act does not apply to federal statutes, *like the FCIA*, that specifically relate to the business of insurance. On behalf of its members, all of which issue federal crop insurance policies under the FCIA, NCIS respectfully urges the Court to grant review of the Court of Appeals' decision.

II. BACKGROUND SUMMARY

This lawsuit involves a Multiple Peril Crop Insurance ("MPCI") policy issued by Petitioner Producers Agriculture Insurance Company ("ProAg") and reinsured by the FCIC. CP 2, ¶ 3.1. The policy contains a dispute resolution clause that provides, in relevant part, that if ProAg and the policyholder "fail to agree on any determination" by ProAg, then "the disagreement must be resolved through arbitration." CP 12 (citing 7 C.F.R. § 457.8(20)); CP 82, ¶ 20(a). The policy also states: "If you fail to initiate the arbitration and complete the process, you will not be able to resolve the dispute through judicial review." CP 12 (citing 7 C.F.R. § 457.8(20)(b)(2)); CP 83, ¶ 20(b)(2).

After suffering crop losses, Respondents Tim Weidert and L.W. Weidert Farms (the "Weiderts") submitted a claim to ProAg under their MPCI policy. Dissatisfied with the compensation they received, the

Weiderts initiated arbitration pursuant to their MPCCI policy. CP 119. The Weiderts then filed this lawsuit *without* completing the arbitration process. *Id.* Accordingly, ProAg moved to compel arbitration and stay the trial court proceedings as required by the MPCCI policy. CP 7-19. The trial court denied the motion, ruling that “its *equitable* powers allow the Court to *override* any arbitration requirement, under the unique facts of this case.” CP 213 (emphases added). ProAg appealed.

On appeal, ProAg argued that the trial court erred in overriding the arbitration agreement because both the FCIA and the Federal Arbitration Act (“FAA”) “preempt Washington law.” Op. 2. The Court of Appeals did not accept that argument; instead, it concluded that the trial court did not abuse its discretion in denying ProAg’s motion “because tenable grounds exist to support the trial court’s decision to exercise its equitable powers.” Op. 6. ProAg then filed the pending Petition for Review asserting, among other arguments, that the proper application of federal preemption principles is an issue of substantial public interest that should be determined by this Court. Pet. at 7-13.

III. ARGUMENT

A. ProAg’s Petition For Review Involves An Issue Of Substantial Public Interest That Should Be Determined By This Court: Whether Trial Courts In This State, Acting Pursuant To Their “Equitable Powers,” Can “Override” An Arbitration Provision In A Federal Crop Insurance Policy.

The preemption issue in this lawsuit arises under both the FCIA and the FAA. Starting with the FCIA, the U.S. Congress first authorized federal crop insurance in the 1930s to help agricultural producers recover from the Great Depression. 7 U.S.C. § 1502(a). Originally the FCIC directly provided crop insurance to eligible farmers, but in 1980 Congress revised the FCIA to require the FCIC “to contract with private companies” for insurance “to the maximum extent possible.” 7 U.S.C. § 1507(c). Congress also provided for federal cost-sharing by directing the FCIC to pay a portion of farmers’ premium costs. 7 U.S.C. § 1508(e).

As the above discussion shows, the FCIC plays a central role in this program. It develops a Common Crop Insurance Policy, which is published in the Code of Federal Regulations. 7 C.F.R. § 457.8. It also executes reinsurance agreements (cooperative financial assistance arrangements) with commercial insurance providers that participate in the program. 7 C.F.R. § 400.164. This federal assistance allows agricultural producers to purchase higher levels of coverage and makes federal crop insurance more affordable to current and prospective producers.

Given this critical partnership between the private sector and the federal government, both the U.S. Congress and the FCIC have decreed that inconsistent state regulation is preempted. Congress, for its part, enacted 7 U.S.C. § 1506(l), which states:

State and local laws or rules shall not apply to contracts, agreements, or regulations of the [FCIC] or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

Exercising its rulemaking powers, the FCIC has likewise stated:

No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.

7 C.F.R. § 400.352(a). In addition, *the MPCCI policy itself confirms this point*, thus providing fair notice of applicable preemption principles.¹

Numerous courts have enforced these preemption principles in the context presented here. In *IGF Insurance Co. v. Hat Creek Partnership*, 76 S.W.3d 859, 866 (Ark. 2002), for example, the Arkansas Supreme

¹ See 7 C.F.R. § 457.8 (“Common Crop Insurance Policy,” stating: “This insurance policy is reinsured by the [FCIC] under the provisions of the [FCIA]. All provisions of the policy and rights and responsibilities of the parties are specifically subject to the [FCIA].” Also stating (¶ 31): “If the provisions of this policy conflict with statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.”).

Court held that the above-cited statute and regulation preempted an Arkansas statute making arbitration clauses unenforceable in insurance contracts. In *Kremer v. Rural Community Insurance Co.*, 788 N.W.2d 538, 611 (Neb. 2010), the Nebraska Supreme Court similarly held that the FCIA and its implementing regulations preempted a Nebraska statute to the same effect. Numerous federal courts agree.²

The FAA is to the same effect. Enacted to counter judicial hostility to arbitration agreements, section 2 of the FAA expressly states that a written agreement to arbitrate “shall be valid, irrevocable, and enforceable.” *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting 9 U.S.C. § 2). Consistent with the “liberal federal policy favoring arbitration” (*id.*), the U.S. Supreme Court held in *Concepcion* that federal law preempted California’s judicial rule that class arbitration waivers in consumer contracts are unconscionable. *Id.* at 1753.

The U.S. Supreme Court reinforced that holding in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), and *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012). In both cases, the

² See, e.g., *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d 992, 997 (D. Minn. 2002) (federal crop insurer’s motion to compel arbitration governed by federal law, not state law); *Hays v. Rural Cmty. Ins. Servs.*, No. 1:10-cv-01020, 2010 WL 4269413, at *2-3 (W.D. Ark. Oct. 7, 2010) (Report and Recommendation of Mag. Bryant), *adopted*, 2010 WL 4269411 (W.D. Ark. Oct. 26, 2010) (granting federal crop insurer’s motion to compel arbitration notwithstanding contrary state law).

Court granted certiorari and *unanimously* reversed a state supreme court's ruling invalidating an arbitration agreement on public policy grounds, holding in *Marmet* that the West Virginia Supreme Court's ruling "was both incorrect and inconsistent with clear instruction in precedents of this Court" (132 S. Ct. at 1203) and in *Nitro-Lift* that the Oklahoma Supreme Court's ruling "disregards this Court's precedents" (133 S. Ct. at 503).

The proper application of the foregoing legal principles is clearly an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Congress enacted the FCIA "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502(a). The FCIC, in turn, made a policy determination, as reflected in the Common Crop Insurance Policy, to require arbitration. 7 C.F.R. § 457.8(20).

For the crop insurance program to operate as intended by Congress and the FCIC, federal preemption is essential. As one court noted:

The court finds it most unlikely that when Congress created the federal crop insurance, specifically intending to provide a uniform and accessible system of farmer protection, it also intended to allow fifty states to administer that program according to fifty different state insurance regulatory schemes.

In re 2000 Sugar Beet Crop Ins. Litig., 228 F. Supp. at 997. By applying state law to ProAg's motion to compel arbitration, and by ignoring federal preemption principles, the Court of Appeals' ruling threatens the FCIC's

ability “to carry out its Congressional mandate to establish crop insurance *uniformly* throughout the United States.” 55 Fed. Reg. 23,066, 23,067-68 (June 6, 1990) (emphasis added).

In addition, the federal crop insurance program is of significant public importance, both nationally and in Washington. In 2012, more than 281 million acres of farmland were protected by 1.1 million policies issued nationwide through the program.³ In Washington alone, crop insurance in 2011 protected \$2.1 billion of liability on crops, with 2.8 million acres insured and more than \$54 million paid in indemnities and revenue losses.⁴

Equally important, there is nothing in the Court of Appeals’ holding that limits its application to arbitration provisions in federal crop insurance policies or even to crop insurance policies. As a result, the Court of Appeals’ ruling could upset any number of established contractual relationships. This Court has rightly rejected “such result-oriented jurisprudence, particularly in an area of the law so vitally enmeshed in our economy and dependent on settled expectations.” *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 422, 745 P.2d 1284 (1987). For this

³ See <http://www.cropinsuranceinamerica.org/about-crop-insurance/facts-figures/>.

⁴ See <http://www.cropinsuranceinamerica.org/wp-content/uploads/washington.pdf>.

reason too, the pending Petition for Review plainly involves an issue of substantial public interest that should be determined by this Court.

B. The Court Of Appeals’ Decision Conflicts With This Court’s Recognition In *James River* That Reverse Preemption Under The McCarran-Ferguson Act Does Not Apply To Federal Statutes, Like *The Federal Crop Insurance Act*, That Specifically Relate To The Business Of Insurance.

In *James River*, this Court applied “reverse preemption” principles to hold that a Washington statute prohibiting binding arbitration agreements in insurance contracts “is shielded from preemption by the FAA under the McCarran-Ferguson Act.” 176 Wn.2d at 402. At the same time, the Court made clear that reverse preemption does *not* apply to federal statutes that specifically relate to the business of insurance. *Id.* at 401. The FCIA is precisely such a statute: it expressly regulates the business of crop insurance and is therefore not subject to reverse preemption under the McCarran-Ferguson Act. *Id.*; 7 U.S.C. § 1502(a). By applying state law to ProAg’s motion to compel arbitration, the Court of Appeals’ decision conflicts with this portion of *James River*, thus warranting review under RAP 13.4(b)(1).

Consistent with the Court’s analysis in *James River*, many of the opinions cited in Section III.A above expressly recognize that federal law preempts state law where, as here, an arbitration provision is prescribed by the FCIA precisely because that statute specifically relates to the business

of insurance.⁵ Thus, even if the correct standard of review is abuse of discretion (Op. 4), the trial court's ruling denying ProAg's motion to compel arbitration should be reversed. *See State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (“[A]pplication of an incorrect legal analysis or other error of law can constitute abuse of discretion.”). This, too, warrants review under RAP 13.4(b)(1) as well as under RAP 13.4(b)(4).

IV. CONCLUSION

For the reasons stated above, NCIS urges this Court to accept review of the Court of Appeals' decision and reverse the trial court's decision on preemption grounds.

March 14, 2013.

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By: /s/ Leonard J. Feldman

Leonard J. Feldman, WSBA No. 20961

Hunter O. Ferguson, WSBA No. 41485

Attorneys for Amicus Curiae National
Crop Insurance Services.

⁵ *See, e.g., Kremer*, 788 N.W.2d at 553-54 (holding that FCIA and related regulations preempt state law regarding arbitration provisions in insurance policies); *IGF Ins. Co.*, 76 S.W.3d at 866 (“McCarran-Ferguson Act does not apply.”); *Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 997 (“Because Congressional statutes specifically relating to the business of insurance supersede state law, the FAA and other federal laws are applicable.”); *Hays*, 2010 WL 4269413, at *2-3 (holding that “no state law ... can preempt the FCIA” and staying proceedings pursuant to FAA § 3).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on the 14th day of March, 2013, I caused a true and correct copy of the foregoing document, "Memorandum in Support of Petition for Review from Amicus Curiae National Crop Insurance Services," to be sent via email and United States mail postage prepaid to the following counsel of record:

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

TIMOTHY WEIDERT, individually and)
L. W. WEIDERT FARMS, INC., a)
Washington corporation,)

Respondents,)

v.)

JERALD A. HANSON, d/b/a WALLA)
WALLA INSURANCE SERVICES, and)
JERALD AND JANE DOE HANSON,)
Husband and Wife,)

Defendants,)

and)

PRODUCERS AGRICULTURE)
INSURANCE COMPANY, a Florida)
corporation,)

Petitioners.)

No. 30357-8-III

PUBLISHED OPINION

BROWN, J. — Producers Agriculture Insurance Company (ProAg) appeals the trial court’s equitable decision to deny its motion to stay proceedings and compel contractual arbitration in a crop damage dispute with Tim Weidert and L.W. Weidert Farms, Inc. (collectively Mr. Weidert). ProAg contends the trial court erred in overriding the

arbitration agreement because the Federal Crop Insurance Act (FCIA), 7 U.S.C. § 1501, and the Federal Arbitration Act (FAA), 9 U.S.C. § 1, preempt Washington law. Because the superior court properly exercised its equitable powers, we affirm the ruling denying the motion to stay proceedings without prejudice to either party to renew the motion to compel arbitration of the remaining issues at some future time.

FACTS

Mr. Weidert purchased a Multi-Peril Crop Insurance (MPCI) policy for the 2009 crop year. In general, an MPCI policy provides catastrophic insurance protecting farmers from losses resulting from specified perils. Jerald Hanson, owner of Walla Walla Insurance Services, sold the policy to Mr. Weidert. The policy was insured by ProAg, a private insurer, and reinsured by the Federal Crop Insurance Corporation (FCIC) as part of a government program established by the FCIA.

The policy contains a dispute resolution clause partly providing:

Mediation, Arbitration, Appeal, Reconsideration, and
Administrative and Judicial Review.

(a) If you and we fail to agree on any determination made by us . . . the disagreement may be resolved through mediation[.] If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement *must be* resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA).

Clerk's Papers (CP) at 12 (citing 7 C.F.R. § 457.8(20)). The policy goes on to state, "If you fail to initiate arbitration . . . and complete the process, you will not be able to resolve the dispute through judicial review." CP at 12 (citing 7 C.F.R. § 457.8(20)(b)(2)).

A drought occurred during the 2009 crop year; consequently, Mr. Weidert filed a crop loss claim with ProAg. Mr. Weidert was indemnified for approximately \$522,306. Mr. Weidert believed he was inadequately advised and misled regarding his planting and coverage needs. Mr. Weidert initiated arbitration. He then sued ProAg and his insurance agent, Mr. Hanson and his spouse.

ProAg asked the court to stay proceedings and compel arbitration under the terms of the MPCCI policy and the FAA. The trial court denied ProAg's motion to compel, finding "its equitable powers allow the Court to override any arbitration requirement, under the unique facts of this case." CP at 213. ProAg appealed.¹

ANALYSIS

The issue is whether the trial court erred in exercising its equitable powers to stay the court proceedings and override the arbitration clause in the parties' policy. ProAg contends federal law preempts the court's equitable powers.

We review arbitrability questions de novo. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The burden of proof is on the party seeking to avoid arbitration. *Id.*

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Our state constitution vests trial courts with the power to fashion equitable remedies. CONST. art. IV, § 6; *see Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997) (Industrial Insurance Act does not “alter the constitutional equity power of Washington’s courts over industrial injury cases.”). Additionally, a trial court’s inherent powers encompass “all the powers of the English chancery court.” *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415, 63 P.2d 397 (1936) (quoting *State ex rel. Roseburg v. Mohar*, 169 Wash. 368, 375, 13 P.2d 454 (1932)).

The power of equity has been construed “as broad as equity and justice require.” *Agronic Corp. of Am. v. deBough*, 21 Wn. App. 459, 463-64, 585 P.2d 821 (1978) (quoting 27 Am. Jur. 2d *Equity* § 103 (1966)). Indeed, the whole idea behind courts of chancery and their equitable powers was to mitigate the harsh absolute dictates of common law rules.

The standard of review for a judge’s exercise of equitable authority is abuse of discretion. *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 397, 3 P.3d 217, (2000), *review dismissed*, (No. 70030-3 May 8, 2001). Thus, we review the record to determine whether the trial judge’s grant of equitable relief is based upon tenable grounds or tenable reasons. *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 454, 922 P.2d 126 (1996).

¹ The Hansons are not parties to this appeal.

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The Washington Uniform Arbitration Act, chapter 7.04A RCW, provides circumscribed decision-making authority for the courts stating, “An agreement contained in a record to submit to arbitration . . . is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity.” RCW 7.04A.060(1). The FAA likewise states that a “written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In this sense, state and federal law are in harmony.

ProAg is not the sole party to Mr. Weidert’s claim; the Hansons are additionally named defendants concerning separate non-contractual state-based negligence and consumer protection claims. Ordering a portion of the proceedings to be arbitrated and the other portion tried in the superior court results in discouraged piecemeal litigation. *Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965). Judicial economy, duplicative costs, and the potential of inconsistent results provide tenable grounds for the trial court’s decision.

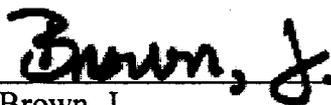
The right to arbitration depends upon contract; while a motion to compel arbitration is “simply a suit in equity seeking specific performance of that contract.” *Eng’rs & Architects Ass’n v. Cmty. Dev. Dep’t*, 35 Cal. Rptr. 2d 800, 805 (1994). Here, the controversy is not about the right to arbitration but rather whether arbitration is the

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appropriate means of conflict resolution given the number of defendants and causes of action. The parties' policy states, "if [Mr. Weidert] and [ProAg] fail to agree on any determination made by [ProAg] . . . disagreement must be resolved through arbitration." CP at 12. The trial court could reasonably conclude Mr. Weidert's causes of action do not mainly concern a determination by ProAg; rather they relate to whether he was wrongly induced to purchase an inadequate insurance policy. Our reasoning, and that of the trial court, does not preclude the parties from submitting ProAg's determinations to eventual arbitration. The timing of when arbitration is necessary in relation to litigation of Mr. Weidert's noncontractual state-based negligence and consumer protection claims is left to the discretion of the trial court.

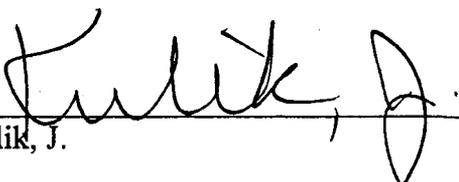
In sum, because tenable grounds exist to support the trial court's decision to exercise its equitable powers, the court did not abuse its discretion in denying ProAg's motion to stay the state court litigation.

Affirmed.


Brown, J.

WE CONCUR:

 CJ
Korsmo, C.J.


Kulik, J.

7 U.S.C. § 1502(a)

**7 U.S.C. § 1502. Purpose; definitions; protection of information;
relation to other laws**

(a) Purpose

It is the purpose of this subchapter to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.

* * *

7 U.S.C. § 1506(l)

7 U.S.C. § 1506. General powers.

* * *

(l) Contracts

The Corporation may enter into and carry out contracts or agreements, and issue regulations, necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

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7 U.S.C. § 1507. Personnel or Corporation.

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(c) Use of associations of producers and private insurance companies; payment of administrative and program expenses; sale of crop insurance through private agents and brokers: renewals, exclusion of compensation from premium rates, indemnification for errors or omissions of Commission or its contractors

In the administration of this subchapter, the Board shall, to the maximum extent possible, (1) establish or use committees or associations of producers and make payments to them to cover the administrative and program expenses, as determined by the Board, incurred by them in cooperating in carrying out this subchapter, (2) contract with private insurance companies, private rating bureaus, and other organizations as appropriate for actuarial services, services relating to loss adjustment and rating plans of insurance, and other services to avoid duplication by the Federal Government of services that are or may readily be available in the private sector and to enable the Corporation to concentrate on regulating the provision of insurance under this subchapter and evaluating new products and materials submitted under section 1508(h) or 1523 of this title, and reimburse such companies for the administrative and program expenses, as determined by the Board, incurred by them, under terms and provisions and rates of compensation consistent with those generally prevailing in the insurance industry, and (3) encourage the sale of Federal crop insurance through licensed private insurance agents and brokers and give the insured the right to renew such insurance for successive terms through such agents and brokers, in which case the agent or broker shall be reasonably compensated from premiums paid by the insured for such sales and renewals recognizing the function of the agent or broker to provide continuing services while the insurance is in effect: *Provided*, That such compensation shall not be included in computations establishing premium rates. The Board shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission. Nothing in this subsection shall permit the Corporation to contract with other persons to carry out the responsibility of the Corporation to review and approve policies, rates, and other materials submitted under section 1508(h) of this title.

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7 U.S.C. § 1508(e)

7 U.S.C. § 1508. Crop insurance.

* * *

(e) Payment of portion of premium by Corporation

(1) In general

For the purpose of encouraging the broadest possible participation of producers in the catastrophic risk protection provided under subsection (b) of this section and the additional coverage provided under subsection (c) of this section, the Corporation shall pay a part of the premium in the amounts provided in accordance with this subsection.

(2) Amount of payment

Subject to paragraphs (4), (6), and (7), the amount of the premium to be paid by the Corporation shall be as follows:

(A) In the case of catastrophic risk protection, the amount shall be equivalent to the premium established for catastrophic risk protection under subsection (d)(2)(A) of this section.

(B) In the case of additional coverage equal to or greater than 50 percent, but less than 55 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 67 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional coverage equal to or greater than 55 percent, but less than 65 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 64 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(D) In the case of additional coverage equal to or greater than 65 percent, but less than 75 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal

7 U.S.C. § 1508(e)

to the sum of--

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(E) In the case of additional coverage equal to or greater than 75 percent, but less than 80 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(F) In the case of additional coverage equal to or greater than 80 percent, but less than 85 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 48 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(G) Subject to subsection (c)(4) of this section, in the case of additional coverage equal to or greater than 85 percent of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 38 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(3) Prohibition on continuous coverage

Notwithstanding paragraph (2), during each of the 2001 and subsequent reinsurance years, additional coverage under subsection (c) of this section shall be available only in 5 percent increments beginning at 50 percent of the recorded or appraised average

7 U.S.C. § 1508(e)

yield.

(4) Premium payment disclosure

Each policy or plan of insurance under this subchapter shall prominently indicate the dollar amount of the portion of the premium paid by the Corporation.

(5) Enterprise and whole farm units

(A) In general

The Corporation may carry out a pilot program under which the Corporation pays a portion of the premiums for plans or policies of insurance for which the insurable unit is defined on a whole farm or enterprise unit basis that is higher than would otherwise be paid in accordance with paragraph (2).

(B) Amount

The percentage of the premium paid by the Corporation to a policyholder for a policy with an enterprise or whole farm unit under this paragraph shall, to the maximum extent practicable, provide the same dollar amount of premium subsidy per acre that would otherwise have been paid by the Corporation under paragraph (2) if the policyholder had purchased a basic or optional unit for the crop for the crop year.

(C) Limitation

The amount of the premium paid by the Corporation under this paragraph may not exceed 80 percent of the total premium for the enterprise or whole farm unit policy.

(6) Premium subsidy for area revenue plans

Subject to paragraph (4), in the case of a policy or plan of insurance that covers losses due to a reduction in revenue in an area, the amount of the premium paid by the Corporation shall be as follows:

(A) In the case of additional area coverage equal to or greater than 70 percent, but less than 75 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(B) In the case of additional area coverage equal to or greater than 75 percent, but less than 85 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

7 U.S.C. § 1508(e)

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional area coverage equal to or greater than 85 percent, but less than 90 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 49 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(D) In the case of additional area coverage equal to or greater than 90 percent of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 44 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(7) Premium subsidy for area yield plans

Subject to paragraph (4), in the case of a policy or plan of insurance that covers losses due to a loss of yield or prevented planting in an area, the amount of the premium paid by the Corporation shall be as follows:

(A) In the case of additional area coverage equal to or greater than 70 percent, but less than 80 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(B) In the case of additional area coverage equal to or greater than 80 percent, but less than 90 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

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(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional area coverage equal to or greater than 90 percent, [FNI] of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 51 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

* * *

7 C.F.R. § 400.164. Availability of the Standard Reinsurance Agreement.

Federal Crop Insurance Corporation will offer Standard Reinsurance Agreements to eligible Companies under which the Corporation will reinsure policies which the Companies issue to producers of agricultural commodities. The Standard Reinsurance Agreement will be consistent with the requirements of the Federal Crop Insurance Act, as amended, and provisions of the regulations of the Corporation found at Chapter IV of Title 7 of the Code of Federal Regulations.

7 C.F.R. § 400.352. State and local laws and regulations preempted.

(a) No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.

(b) The following is a non-inclusive list of examples of actions that State or local governmental entities or non-governmental entities are specifically prohibited from taking against the Corporation or any party that is acting pursuant to this part. Such entities may not:

(1) Impose or enforce liens, garnishments, or other similar actions against proceeds obtained, or payments issued in accordance with the Federal Crop Insurance Act, these regulations, or contracts or agreements entered into pursuant to these regulations;

(2) Tax premiums associated with policies issued hereunder;

(3) Exercise approval authority over policies issued;

(4) Levy fines, judgments, punitive damages, compensatory damages, or judgments for attorney fees or other costs against companies, employees of companies including agents and loss adjustors, or Federal employees arising out of actions or inactions on the part of such individuals and entities authorized or required under the Federal Crop Insurance Act, the regulations, any contract or agreement authorized by the Federal Crop Insurance Act or by regulations, or procedures issued by the Corporation (Nothing herein precludes such damages being imposed against the company if a determination is obtained from FCIC that the company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled); or

(5) Assess any tax, fee, or amount for the funding or maintenance of any State or local insolvency pool or other similar fund.

The preceding list does not limit the scope or meaning of paragraph (a) of this section.

7 C.F.R. § 457.8. The application and policy.

* * *

Reinsured Policies

This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act (Act) (7 U.S.C. 1501 et seq.). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act. The provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. We will use the procedures (handbooks, manuals, memoranda and bulletins), as issued by FCIC and published on RMA's Web site at <http://www.rma.usda.gov/> or a successor Web site, in the administration of this policy, including the adjustment of any loss or claim submitted hereunder. In the event that we cannot pay your loss because we are insolvent or are otherwise unable to perform our duties under our reinsurance agreement with FCIC, your claim will be settled in accordance with the provisions of this policy and FCIC will be responsible for any amounts owed. No state guarantee fund will be liable for your loss.

Throughout this policy, "you" and "your" refer to the named insured shown on the accepted application and "we," "us," and "our" refer to the insurance company providing insurance. Unless the context indicates otherwise, use of the plural form of a word includes the singular and use of the singular form of the word includes the plural.

AGREEMENT TO INSURE: In return for the payment of the premium, and subject to all of the provisions of this policy, we agree with you to provide the insurance as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures as issued by FCIC, the order of priority is: (1) The Act; (2) the regulations; and (3) the procedures as issued by FCIC, with (1) controlling (2), etc. If there is a conflict between the policy provisions published at 7 CFR part 457 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 457 control. If a conflict exists among the policy provisions, the order of priority is: (1) The Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Commodity Exchange Price Provisions, as applicable; (4) the Crop Provisions; and (5) these Basic Provisions, with (1) controlling (2), etc.

* * *

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association

7 C.F.R. § 457.8 (introductory provisions, ¶¶ 20 and 31)

(AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a 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, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(4) In any suit, if the dispute in any way involves a 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, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400,

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subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

(d) With respect to good farming practices:

(1) We will make decisions regarding what constitutes a good farming practice and determinations of assigned production for uninsured causes for your failure to use good farming practices.

(i) If you disagree with our decision of what constitutes a good farming practice, you must request a determination from FCIC of what constitutes a good farming practice before filing any suit against FCIC.

(ii) If you disagree with our determination of the amount of assigned production, you must use the arbitration or mediation process contained in this section.

(iii) You may not sue us for our decisions regarding whether good farming practices were used by you.

(2) FCIC will make determinations regarding what constitutes a good farming practice. If you do not agree with any determination made by FCIC:

(i) You may request reconsideration by FCIC of this determination in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J; or

(ii) You may file suit against FCIC.

(A) You are not required to request reconsideration from FCIC before filing suit.

(B) Any suit must be brought against FCIC in the United States district court for the district in which the insured acreage is located.

(C) Suit must be filed against FCIC not later than one year after the date:

(1) Of the determination; or

(2) Reconsideration is completed, if reconsideration was requested under section 20(d)(2)(i).

(e) Except as provided in sections 18(n) or (o), or 20(d) or (k), if you disagree with any other determination made by FCIC or any claim where FCIC is directly involved in the claims process or directs us in the resolution of the claim, you may obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative

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review) or appeal in accordance with 7 CFR part 11 (appeal).

(1) If you elect to bring suit after completion of any appeal, such suit must be filed against FCIC not later than one year after the date of the decision rendered in such appeal.

(2) Such suit must be brought in the United States district court for the district in which the insured acreage is located.

(3) Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC.

(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 31. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

(g) To resolve any dispute through mediation, you and we must both:

(1) Agree to mediate the dispute;

(2) Agree on a mediator; and

(3) Be present, or have a designated representative who has authority to settle the case present, at the mediation.

(h) Except as provided in section 20(i), no award or settlement in mediation, arbitration, appeal, administrative review or reconsideration process or judicial review can exceed the amount of liability established or which should have been established under the policy, except for interest awarded in accordance with section 26.

(i) In a judicial review only, you may recover attorneys fees or other expenses, or any punitive, compensatory or any other damages from us only if you obtain a determination from FCIC that we, our agent or loss adjuster failed to comply with the terms of this policy or procedures issued by FCIC and such failure resulted in you receiving a payment in an amount that is less than the amount to which you were entitled. Requests for such a determination should be addressed to the following: USDA/RMA/Deputy Administrator of Compliance/Stop 0806, 1400 Independence Avenue, SW., Washington, DC 20250-0806.

(j) If FCIC elects to participate in the adjustment of your claim, or modifies, revises or corrects your claim, prior to payment, you may not bring an arbitration, mediation or litigation action against us. You must request administrative review or appeal in accordance with section 20(e).

(k) Any determination made by FCIC that is a matter of general applicability is not subject to administrative review under 7 CFR part 400, subpart J or appeal under 7

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CFR part 11. If you want to seek judicial review of any FCIC determination that is a matter of general applicability, you must request a determination of non-appealability from the Director of the National Appeals Division in accordance with 7 CFR 11.6 before seeking judicial review.

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31. Applicability of State and Local Statutes

If the provisions of this policy conflict with statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.

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