AMERICAN GROWERS INSURANCE COMPANY (Koulter D. Farms),	)	**AGBCA No. 99-118-F**
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Appellant	)	
	)	
Representing the Appellant:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

April 6, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

On December 14, 1998, the Board received an appeal from American Growers Insurance Company (Appellant or American Growers). The appeal was stated to be from American Growers and its related entities, subsidiaries and parent companies, included but not limited to, American Agrisurance, Inc., Redland Insurance Company, and U.S. Ag Insurance Services, Inc., all to be referred to as American Growers. Appellant filed an Amended Notice of Appeal to correct an error in which the Appellant was misidentified in one place. The appeal arises out of a July 1, 1987 Standard Reinsurance Agreement (SRA) executed between Redland Insurance Company of Council Bluffs, Iowa (Appellant or Redland), and the Federal Crop Insurance Corporation (FCIC or Government) which originally applied to the 1988 crop year. Under the SRA, Appellant and previously, Redland, sells and administers Multi-Peril Crop Insurance (MPCI) contracts in furtherance of the Government's crop insurance program. This SRA automatically renewed for the

1989 crop year which is the period pertinent to this appeal. In 1995, American Growers assumed all liability for the multiple peril crop insurance agreements between the FCIC and Redland. Hence, American Growers is the Appellant before the Board.

This appeal involves FCIC Manager's Bulletin No. MGR-009 (MGR-009) and Manager's Bulletin No. 93-020 (MGR 93-020) under which FCIC under certain conditions reimburses to reinsurance companies litigation expenses incurred defending FCIC's policy provisions and procedures. Appellant appeals a September 22, 1998 determination of the Deputy Administrator of Insurance Services in which he concluded that litigation expenses in the amount of $29,608 for which Appellant wished to be reimbursed did not meet the MGR-009 criteria. For the reasons set out below, the appeal is denied.

The Board has jurisdiction under 7 C.F.R. §§ 24.4(b) and 400.169(d).

FINDINGS OF FACT

Background

1. This appeal arises under the 1989 renewal of a 1988 SRA between FCIC and Redland for which American Growers assumed all liabilities as of July 14, 1995 (Government's letter of January 10, 2000, and attachment; Appellant's letter of January 11, 2000, and affidavit of Mary L. Sutton, attached thereto; Appellant's letter of February 8, 2000; and Appeal File (AF) 387).[1]

2. After submission of the 1989 plan of operation, but during that crop year, Redland entered into a servicing agreement with U.S. Ag Insurance Services, Inc., authorizing U.S. Ag Insurance Services to sell MPCI policies in Texas, New Mexico, and Oklahoma and to service its 1989 policies (Exhibit B to Appellant's January 11, 2000 letter). The record is silent as to whether FCIC was notified of this agreement. U.S. Ag Insurance Services was included on the 1990 plan of operation as a managing general agent.

3. MGR-009, issued July 5, 1988, instituted a review program to determine whether or not to assume litigation expenses and pay any judgment over and above the indemnity found to be due under the contract in litigation on certain specific claims. FCIC would review cases which the reinsured company believed to involve a program problem or a litigation attack on an FCIC-approved program procedure which the company believed it must defend to prevent a bad precedent and therefore, submitted to FCIC for review. In cases approved by FCIC under this review procedure, FCIC was to be consulted and approve significant steps in the litigation as it progressed. In exchange, the company would reimburse FCIC an amount equal to 50 percent of the expense reimbursement due the company on the policy. (AF 103-04.)

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[1] Despite the 1995 assumption of liabilities by American Growers all correspondence continued to be conducted in the name of Redland and on Redland letterhead. American Growers and Redland will be referred to as Appellant or by the name used at the time.

4. Bulletin No. MGR 93-020, issued June 1, 1993, rescinded MGR-009. MGR 93-020 established criteria for providing financial assistance for certain litigation expenses and outlined procedures for requesting financial assistance for litigation expenses. Criteria were that the litigation involve (1) an attack on FCIC-approved program procedures, regulations and/or crop policies and (2) the probability of a court ruling which might set legal precedent detrimental to the crop insurance program. It also outlined procedures for requesting financial assistance and stated that an FCIC determination would be made only after the court had rendered a decision or a formal settlement agreement had been presented by the parties involved. MGR 93-020 did not include the language from MGR-009 relative to FCIC being consulted and approving significant steps in the litigation. By its terms, MGR 93-020 amended no SRA provisions. (AF 165-67.)

5. MGR-009 was in effect when the litigation expense request was made and was rescinded by MGR 93-020 during the pendency of the underlying litigation. The parties have made reference to both bulletins in the course of this appeal. Neither has made an argument that the outcome of the appeal would be different depending on which bulletin is applicable.

6. The 1988 SRA, here renewed for the 1989 crop year, contained no provision addressing litigation and assistance.

The Underlying Litigation

7. Redland sold MPCI policy No. MP-099664 to the insured for the crop year 1989 to Koulter D. Farms. Policy No. MO-099722 was sold to T & R Cattle Company. The principal of both insureds was Steve Green. (AF 22, 49.) On February 5, 1990, the policy holders made claims for crop damage to U.S. Ag Insurance Services, Inc. (AF 1). After the claims were denied as having been the result of an uninsured cause of loss, the insureds sued U.S. Ag Insurance Services, Inc., in state court in Texas (AF 2-11).

8. The petition, filed July 18, 1990, alleged generally that U.S. Ag Insurance Services, Inc., without acting in good faith and using false excuses, failed to pay crop loss on the farms, in one case without visiting the farm in question. The petition further alleged violations of the Texas Deceptive Trade Practices-Consumer Protection Act in its representations, and failures of disclosure, regarding policy provisions. Further, it contained allegations that U.S. Ag Insurance Services' actions violated the Texas Insurance Code and that it breached its duty of good faith and fair dealing. The petition also alleged that U.S. Ag Insurance Services, Inc., was grossly negligent in failing to properly instruct and supervise its employees with regard to the prompt and correct investigation and payment of claims. (AF 5-11.)

9. By letter dated September 13, 1990, U.S. Ag Insurance Services, Inc., wrote FCIC requesting FCIC participation in the litigation under MGR-009 (AF 22-23).

10. In a September 28, 1990 response, FCIC agreed that the losses were due to uninsured causes. FCIC agreed that the company followed FCIC-approved policy provisions and related procedures.

FCIC determined that it would support the company in defending the legal issues pertaining to the FCIC-approved policies and procedures concerning poor farm practices upon certain conditions. The court's judgment would have to be based on policy provisions and not agent or company error or waiver of provisions by agent or company. Negligence, culpability or breach by the agent or company would also result in FCIC's refusal to pay litigation expenses. The letter expressly stated that it was making a conditional agreement to indemnify the company for its litigation expenses and reasonable attorney's fees to preserve the approved FCIC policy provisions that any loss of production due to uninsured causes of loss would count against the insured's production guarantee. If the company decided to make a settlement offer, the company was to advise FCIC of the terms and basis. FCIC would then determine whether it agreed with the terms and basis. The letter also indicated that FCIC should be advised of all further developments in the action. (AF 25-27.)

11. The standard policy relevant to the underlying litigation and to this appeal provided a method for insureds to divide their farming units into more than one insurable unit and provided that losses would be determined on each individual unit. A basic unit was all insurable acreage of all insurable crops in the county on an insured's schedule of insured. A basic unit was permitted to be divided into more than one optional unit for payment of an additional premium with separate written records maintained and acreage planted to the insured crops located within separate sections or identified by separate farm serial numbers. (AF 216.) Losses would be determined by the reinsured company for each farm unit and calculated from the information supplied by the insured (AF 217).

12. During the course of litigation, the agent who sold the policy was deposed. His deposition testimony was that during appraisal of the extent of the loss, the agent felt that the field should have been blocked off and different sections given different appraisals. He brought this up to the U.S. Ag Insurance Services' representatives who disagreed. He acknowledged that blocking off is a standard appraisal technique that the FCIC recognizes as a standard-approved appraisal technique. (Attachment II to Appellee's Response Brief, page (p.) 875.)

13. Litigation was delayed for several years. The parties corresponded sporadically and FCIC requested documents and information several times (AF 25-42). On June 18, 1997, FCIC wrote Redland asking the status and specifically whether the court had set a new trial date and ruled on dispositive motions filed on behalf of "U.S. Ag Insurance Services, Inc." (AF 41). By letter of June 26, 1997, Redland informed FCIC that the dispositive motions had been denied. Trial had been scheduled to begin June 16, 1997, but was resolved "based on additional information disclosed during discovery" (AF 44). Redland furnished the motion, order and settlement agreement to FCIC by transmittal of December 5, 1997. The transmittal stated that [Redland] defended FCIC procedures regarding irrigated practice and loss adjustment practices. It also stated that the decision to resolve the case was based upon additional information disclosed during discovery regarding irrigation practice, amounts of water and other issues that were in dispute. Parties to the agreement were Kolter [sic] D. Farms, Inc., and T & R Cattle Company (Insureds) and U.S. Ag Insurance Services, Inc., and Redland Insurance Company (Insurers). The additional information was not described. (AF 45.)

FCIC Analysis of the Request for Litigation Expense Reimbursement

14. In January 1998, Redland sent an accounting of attorney's fees and legal expenses. The total was $29,608.20, $6,247.30 by Smith, Peterson of Council Bluffs, Iowa, and $23,360.90 from W. Hollis Webb of Lubbock, Texas (AF 57-62).

15. FCIC analyzed the request for review. The Appeals, Litigation and Legal Liaison staff of the Risk Management Agency (RMA) recommended payment based on the September 28, 1990 FCIC letter which they interpreted as agreeing to assume litigation expenses if agent error were not involved (AF 63-67). The Office of the General Counsel (OGC) disagreed in a memorandum dated April 2, 1998. The OGC memorandum interpreted the September 28, 1990 letter as indicating FCIC's intent not to cover the insurer's litigation expenses if the litigation were settled without a determination of the insurer's wrongdoing. OGC concluded that settlement meant there was no potential for adverse legal precedent; that the litigation involved insurer wrongdoing, not policy provisions; and, that the litigation never required FCIC to protect the integrity of the crop insurance program. (AF 68-69.)

16. FCIC Appeals, Litigation and Legal Liaison staff, responded to Redland April 22, 1998, denying the request for litigation expenses. The letter stated the criteria for acceptance under MGR-009 as (1) that the court's judgment be based on policy provisions and not agent/company error; (2) that reimbursement be to the extent that the agent or company not be found in violation of policy provisions and related procedures; and (3) FCIC will make a determination as to whether it agrees with the terms and basis of the settlement offer to insureds. According to the letter, FCIC examines pleadings and other documents provided by the parties to determine if the case involves a specific challenge to a policy provision or procedure or a factual dispute, an allegation of agent, loss adjuster or reinsured company error, or a challenge to a provision in a state mandatory amendment. In this case, FCIC examined the complaint which alleged that the defendants practiced deceptive trade practices, breached the insurance contract and committed gross negligence. FCIC found that the litigation did not involve the probability of a detrimental precedent because it was settled, and therefore, there was no potential for adverse legal precedent. The litigation involved insurer wrongdoing and not policy provisions and never required FCIC to protect the integrity of the crop insurance program. The letter informed Appellant of its right to request reconsideration within 45 days after receipt of the determination. (AF 70-71.)

17. By letter of June 1, 1998, Appellant requested reconsideration. Appellant stated that it understood the bases for denial to be (1) that because the litigation was settled, there was no potential for adverse legal precedent and (2) that the litigation involved allegation of insurer wrongdoing and not challenges to policy provisions and thus never required FCIC to protect the integrity of the crop insurance program. Appellant disputed that examination of a complaint necessarily established the basis for a suit. Appellant presented a May 22, 1998 letter of its local counsel to the effect that issues became clear only after discovery. That letter stated that by the time discovery was complete the plaintiffs in the underlying litigation were alleging that while Redland may have complied with FCIC-approved appraisal techniques, rules, regulations, and policy provisions, those provisions, etc.,

did not lead to a correct allocation of loss between insured and uninsured losses. Appellant also pointed out that Board decisions and FCIC communications were to the effect that settlement does not necessarily affect a company's right to reimbursement of litigation expenses. (AF 73-82.)

18. FCIC reconsidered but again denied the reimbursement request. By letter dated September 22, 1998, FCIC conceded that settlement alone does not preclude reimbursement under MGR-009. FCIC also concluded that the case did not otherwise meet the MGR-009 criteria because it involved only insurer wrongdoing, not policy provisions, the insureds having alleged deceptive trade practices, breach of the insurance contract, and gross negligence by the insurer. (AF 88.) This appeal followed. The parties have agreed to submit this appeal for a decision on the written record without a hearing pursuant to Board Rule 11.

DISCUSSION

Contentions of the Parties

Appellant argues that the September 28, 1990 FCIC letter was a binding agreement to assume all litigation expenses in the Koulter Farms litigation unless Redland or its agents were found to be in violation of FCIC procedures. Appellant concedes that the complaint alleged agent error but contends that the plaintiffs produced no evidence to support their allegations of agent error during the course of litigation. Rather, according to Appellant, the plaintiffs in the underlying litigation argued that the FCIC appraisal techniques employed by Redland did not lead to a correct allocation of losses, specifically that the plaintiffs had claimed that Redland should have divided their field into small subplots and each subplot be appraised separately for insured and uninsured losses. Appellant contends that the only remaining reason relied upon by FCIC to defend its failure to reimburse litigation expenses is Redland's decision to settle the case.

FCIC contends that the complaint in the underlying lawsuit did not level an attack on, or challenge the validity of FCIC program procedures, regulations and/or crop policies. Further, FCIC argues that the September 28, 1990 letter, relied upon by Appellant, contained a number of conditions and stipulations. These were that court judgment be based on policy provisions and no company error; if the company chose to make a settlement offer to the insureds, FCIC must be advised of the terms of and basis for the settlement offer to determine whether or not it agreed with the terms and basis; FCIC was to be consulted and approve significant litigation steps; and that only when a settlement is reached or a jury verdict returned can FCIC make a determination whether or not reimbursement is warranted.

FCIC also argues that the standard policy applicable to this case did provide a method for insureds to divide their farming units into more than one insurable unit and did provide that losses would be determined on each individual unit. FCIC contends that Appellant has provided no indication that the plaintiffs in the underlying litigation were asserting the FCIC policy provisions to be invalid or that they should not be applied. Rather, if anything, argues FCIC, the plaintiffs in the underlying litigation asserted that Appellant failed to appraise using FCIC-approved appraisal techniques.

MGR-009 and MGR 93-020 Criteria

MGR-009 established a program under which FCIC would review cases to determine if they involved a program problem or a litigation attack on an FCIC-approved program procedure which the reinsured company must defend to prevent a bad precedent. In those cases FCIC was to be consulted and approve significant steps in the litigation as it progressed. In exchange, the company would reimburse FCIC an amount equal to 50 percent of the expense reimbursement due the company on the policy. (Finding of Fact (FF) 3.) MGR 93-020 established criteria for providing financial assistance for certain litigation expenses and to outline procedures for requesting financial assistance for litigation expenses. Criteria were that the litigation involve an attack on FCIC-approved program procedures, regulations and/or crop regulations which might set legal precedent detrimental to the crop insurance program. (FF 4.) MGR 93-020 omitted the provision of MGR-009 pertaining to FCIC consultation and approval during the course of litigation.

To recover under either of these bulletins, Appellant must show that the underlying litigation for which litigation expense and attorney's fees are sought constituted an attack on FCIC-approved program procedures, regulations or crop policies. The record in this case does not support such a finding. The original complaint alleges bad faith and failure to follow acceptable trade practices on the part of the defendant. When the case was settled, Appellant informed FCIC that the decision to resolve the case was based upon additional information disclosed during discovery regarding irrigation practice, amounts of water and other issues. Neither the original allegations nor the issues described by Appellant after settlement constitute an attack on FCIC program procedures, regulations or policies.

Appellant now argues that by the time of settlement, the focus of the litigation was the plaintiff's assertion that while Redland may have complied with FCIC appraisal methods, those methods did not lead to a correct allocation between insured and uninsured losses. Appellant supports this claim with a letter from its local counsel written almost a year after the case was settled. This letter is the sole evidence supporting an allegation that the lawsuit attacked FCIC-approved program procedures, regulations or crop policies. (AF 17.) Evidence contemporaneous with the litigation, including the settlement, indicate otherwise (FF 8, 12, 13).

We conclude that the litigation for which Appellant seeks reimbursement of litigation expense made no attack on FCIC-approved program procedures, regulations or crop policies. It is therefore not necessary that we consider the second criterion: the probability of an adverse precedent being established.

FCIC Letter Not a Binding Agreement

Appellant relies on the FCIC's September 28, 1990 letter as being a binding agreement to reimburse litigation expense absent a finding that Appellant or its agents acted in violation of FCIC procedures. The Board does not find that there was a binding agreement allowing payment. The letter was

replete with conditions, regarding both the substance of the case and its outcome and procedures to be followed during the course of litigation. One condition was that any judgment be based on policy provisions and not company or agent error. Another was that agent or company not be found in violation of policy provisions and related procedures. (FF 10.) There was no judgment or finding because the case was settled. Appellant is correct that the fact of settlement does not, in and of itself, foreclose payment for litigation expenses under MGR-009 and/or MGR 93-020. Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, 98-1 BCA ¶ 29,448; Rain and Hail Insurance Service, Inc., AGBCA No. 97-157-F, 98-1 BCA ¶ 29,450. That said, however, as noted above, Appellant did not meet the conditions necessary to bind the FCIC.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
April 6, 2000