CROP GROWERS INSURANCE, INC.,	)	**AGBCA No. 98-171-F**
	)	
Appellant	)	
	)	
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RULING ON GOVERNMENT'S MOTION TO DISMISS

June 15, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge HOURY.

This appeal arose from the Federal Crop Insurance Corporation's (FCIC's) denial of a $125,000 claim by Crop Growers Insurance, Inc., of Coeur d'Alene, Idaho (Appellant). The FCIC is a wholly-owned Government corporation within the U. S. Department of Agriculture. Appellant asserts the Board has jurisdiction under 7 C.F.R. § 24.4(b) and § 400.169(d). These regulations authorize the Board to adjudicate appeals from disputes arising under Standard Reinsurance Agreements (SRAs). Under an SRA, an insurance company sells and administers Multi-Peril Crop Insurance (MPCI) policies in furtherance of FCIC's crop insurance program.

During the 1996 SRA year, Appellant asserts that FCIC orally agreed to pay "any" expenses associated with extending insurance coverage to certain nursery producers. Appellant extended coverage to these producers through an existing contract it had with Farmers Financial Services, Inc.

However, Farmers Financial later sued Appellant alleging that Appellant wrongfully terminated and tortiously interfered with its contract, by insuring producers that had been insured by Farmers Financial. Appellant paid Farmers Financial $125,000 to settle the suit. Appellant seeks recoupment of the $125,000 from FCIC.

By letter dated September 24, 1997, FCIC denied Appellant's claim stating that "This is FCIC's final determination in this matter." Appellant did not appeal the final determination until May 15, 1998, more than 90 days after receipt, contrary to the requirement in 7 C.F.R. § 24.5 that appeals be filed within 90 days.

The Complaint, Answer, and Rule 4 File have been submitted, and Appellant has supplemented the Rule 4 File. The Government filed a motion to dismiss asserting that the appeal was untimely, and that Appellant's claim does not arise from MPCI policies and is therefore not compensable under the SRA. Appellant asserts that the appeal is timely because it was filed within 90 days of a letter dated March 23, 1998, from the Director of Insurance Services responding to Appellant's inquiry; and that FCIC is liable for the $125,000, because FCIC agreed to pay "any" expenses arising from the insurance policies in issue.

The Board raised a question regarding Appellant's standing to appeal, because the record failed to indicate that the parties had entered into an SRA. The Board allowed the parties ample time to respond with any relevant evidence and argument, and the record has been fully developed on the question of standing. Thus, the Board considers the question of standing on the full and closed record compiled on that issue. However, the Board considers the Government's motion dealing with timeliness and the merits as a motion for summary judgement. Therefore, all disputed material facts relating to the Government's motion will be construed in favor of Appellant.

FINDINGS OF FACT (FF)

1. By letter dated November 9, 1995, the Chief of the Reinsurance Service Liaison Branch, Office of Risk Management, Consolidated Farm Service Agency, confirmed a November 7, 1995 telephone conversation with Appellant's president regarding "Orphaned Florida Nursery Crop Insurance Policies." Appellant had agreed to accept applications and provide service for the orphaned policies which were rejected by Rural Community Insurance Company. FCIC agreed to "allow Crop Growers to designate the orphaned policies to the Assigned Risk Fund [of the SRA]. This is due, in part because the cut-off date for designating the policies had passed." FCIC would provide Appellant with assistance in the review of loss adjustments involving the policies when such losses equaled or exceeded $250,000 per crop policy. The letter ended by requesting comments or questions from Appellant. (Appeal File (AF) 24.) Appellant did not offer comments. The letter represents the written agreement of the parties. These events occurred during the 1996 reinsurance year. However, the parties were not able to produce a 1996 SRA between FCIC and Appellant.

2. The Risk Management Agency's policy information data base indicates that Appellant was not a party to an SRA during 1995 or 1996 that covered crop insurance sales to nurseries in Florida

(Exhibit A to the Government's letter of May 12, 2000). The SRA provided by the Government in the Rule 4 File, is a 1995 SRA between FCIC and the Plains Insurance Company, of Cimarron, Kansas (AF tab A). The SRA provided by Appellant is a 1995 SRA between FCIC and the Continental Insurance Company, of Overland Park, Kansas (AF tab Z). Appellant is not listed in the Plan of Operation (Plan) of the Continental SRA as an insurance company eligible to issue crop insurance contracts that are insured or reinsured by Continental (AF 161, 171-72). Appellant is only listed as the managing general agent (MGA) responsible for producing and electronically processing MPCI business under the SRA (AF 161, 171). A June 15, 1995 letter provided by the Government indicates that the 1995 Plains and 1995 Continental SRAs[1] would be combined for 1996. An organization chart dated September 5, 1996, indicates that "Crop Growers Corporation" owned "Plains Insurance Company." A Plan attached to the June 15, 1995 letter indicates that Appellant was the MGA for Plains for 1996.

3. Under the SRA's Assigned Risk Fund, mentioned in the November 7, 1995 letter in Finding of Fact 1, above, FCIC was liable for 80 percent of the Ultimate Net Losses (UNL) on the designated eligible crop insurance contracts. The SRA defines UNL as the amount paid by the company under "eligible crop insurance contracts" in settlement of any claim and in satisfaction of any judgment rendered on account of such claim. Under the UNL provisions of the SRA, FCIC is liable for 100 percent of the amount by which the Appellant's retained UNLs, in accordance with prescribed formulas, exceed 500 percent of the Appellant's retained net book premiums in a state and fund for the reinsurance year. (AF 2, 4-8.) Appellant does not claim that the $125,000 it seeks meets these criteria.

4. Under 7 C.F.R. § 400.169(a) and (b), the "company" is entitled to appeal final administrative determinations of the FCIC regarding an SRA, or any reinsurance agreement with FCIC. Company is defined in 7 C.F.R. § 400.161(a) (1995), as "the company reinsured by FCIC or apply [sic] to FCIC for [an SRA]."

5. By Complaint dated May 6, 1996, Appellant was sued by Farmers Financial in the Circuit Court for Broward County, Florida. Farmers Financial alleged that on July 18, 1994, they had contracted with Appellant to solicit crop insurance contracts, that in late May 1995 Appellant improperly terminated the contract, and that Appellant improperly solicited Farmers Financial's insureds. Farmers Financial asserted breach of contract, and tortious interference with contracts (AF 35-51). Appellant paid Farmers Financial $125,000 to settle the suit (AF 83-85).

6. By letter dated January 15, 1997, Appellant sought payment from FCIC of the $125,000, asserting that the affected nursery policies were for the 1996 crop year (AF 28-29). FCIC denied Appellant's request stating it could not pass such a settlement through the ultimate net loss provisions of the SRA (AF 30). Further requests from Appellant resulted in review of FCIC's

[1] References to an SRA in the remainder of the decision are to the 1995 Plains and Continental SRAs, which are the only SRAs in the record, and which are identical for purposes of this decision.

position. After a further rejection of Appellant's request on May 6, 1997, FCIC indicated Appellant should contact it for any questions (AF 87-88).

7. By letter dated May 16, 1997, Appellant requested that FCIC consider the letter as a request for an appeal under 7 C.F.R. § 400.169 of FCIC's rejection (AF 90). After FCIC failed to respond, by letter dated September 19, 1997, Appellant referred to its prior letter and reiterated its request for an appeal of the FCIC decision in accordance with 7 C.F.R. § 400.169 (AF 105). By letter dated September 24, 1997, Robert Prchal, Deputy Administrator for Insurance Services, stated that FCIC had no authority to pass such a settlement through the UNL provision of the SRA. The letter specifically stated: "This is FCIC's final determination in this matter." (AF 106.)

8. By letter to Mr. Robert Prchal dated October 8, 1997, Appellant acknowledged receipt of FCIC's letter of September 24, 1997. Appellant advised it would like to request an appeal of the decision under 7 C.F.R. § 400.169, and that if anything further were needed, to advise Appellant (AF 108). By letter dated March 6, 1998, Appellant confirmed a conversation with FCIC wherein Appellant had been informed that the matter "is now a final determination," and that the matter is now ripe for the appeal to the [AGBCA]. Appellant closed by stating "if I have misunderstood this conversation or the FCIC's position in any manner, please let me know" (AF 109).

9. By letter dated March 23, 1998, E. Heyward Baker, Director, Reinsurance Services Division, Risk Management Agency, advised "your understanding is correct. FCIC's final determination in this matter is to deny Crop Growers' request for reimbursement . . . If you wish to pursue this further, the next level of appeal is to the Agriculture Board of Contract Appeals in accordance with 7 C.F.R. § 400.169. Please contact me: . . . if you have any further questions." (AF 110.) By letter dated May 15, 1998, Appellant filed an appeal with the Board. In filing the appeal, Appellant referred to the determination of September 24, 1997, not the letter of March 23, 1998 (AF 112).

10. The Complaint, Answer, Rule 4 File,[2] and Appellant's Supplement to the Rule 4 File have been submitted.

DISCUSSION

Standing: The Party Before The Board

Crop Growers bears the burden of establishing its standing to pursue this appeal. To be a proper party Crop Growers must establish, for the crop year in question, that it had an SRA with the FCIC or that Crop Growers was reinsured by FCIC. 7 C.F.R. § 400.161(a) (1995); 7 C.F.R. § 400.169(a), (d) (1996). Crop Growers has not satisfied its burden.

[2] 7 C.F.R. § 24.21, Rule 4, Preparation, Content, Organization, Forwarding and Status of Appeal File.

The record demonstrates that Crop Growers did not have an SRA with FCIC. Crop Growers asserts that the Continental Insurance Company had an SRA with the FCIC and that Crop Growers was an approved MGA. Crop Growers does not maintain that it had an SRA with the FCIC.

Further, Crop Growers states: "Although Continental did appear on the 'face' of the policies at issue, said policies could have been directly issued by the other companies set forth in the SRA's Plan of Operation." Crop Growers' Letter to Board (Apr. 6, 2000) at 3. This assertion that Continental, not Crop Growers, appeared on the insurance policies, supports the conclusion that Continental, not Crop Growers, was reinsured by the FCIC. Crop Growers has provided and the record contains no insurance policies, such that a contrary conclusion is not supported in the record.

At best, Crop Growers has demonstrated that it wrote policies as an MGA for Continental (a party to an SRA), which would be liable to the insureds. The record does not demonstrate that the FCIC and Crop Growers agreed that FCIC would reinsure Crop Growers for any action or insurance policy it simply administered. The reinsurance agreement was between FCIC and Continental, not FCIC and Crop Growers. The interpretation proffered by Crop Growers permits any company identified in a plan of operation of an SRA to establish a reinsurance agreement with the FCIC, thereby subjecting the FCIC to suit and liability. The SRA envisions direct liabilities and obligations between the signatories to the agreement, which here does not include Crop Growers. Thus Crop Growers lacks standing to pursue this appeal.

Jurisdiction: Timeliness Of Appeal

Even if Appellant had standing, the appeal was untimely.

Appellant's claim was rejected by FCIC (FF 6). Thereafter, Appellant initiated the FCIC appeal procedure referring to 7 C.F.R. § 400.169 (FF 7). This regulation at 7 C.F.R. § 400.169(a) allows Appellant to request a final administrative determination from the Director of Insurance Services within 45 days. Appellant received the Director's determination by letter dated September 24, 1997, denying Appellant's claim (FF 7). Appellant could appeal the final determination to the Board of Contract Appeals. Such an appeal had to be filed within 90 days. 7 C.F.R. §§ 24.5 and 400.169 (d). Appellant did not appeal to the Board until May 15, 1998 (FF 9). Appellant's failure to follow the 7 C.F.R. § 400.169 (d) procedure renders the appeal untimely. See Rain and Hail Insurance Service, AGBCA Nos. 97-173-F, 97-174-F, 97-175-F, 97-2 BCA ¶ 29,210; Rural Community Insurance Services, AGBCA No. 98-173-F, 99-1 BCA ¶ 30,144; American Agrisurance, AGBCA No. 98-169-F, 1999 WL 79360 (Feb. 10, 1999); cf. American Growers Insurance Co., AGBCA No. 99-134-F, 1999 WL 984394 (Oct. 28, 1999).

Appellant opposes the Government's motion, contending that it appealed within 90 days of the FCIC letter of March 23, 1998. While this fact is true, Appellant cannot unilaterally extend the 90-day period by notifying the agency it wished to appeal and stating that, "if anything further is needed please advise," when the regulation clearly sets forth Appellant's obligations (FF 8). FCIC had no obligation to respond to the letter of October 8, 1997, or to Appellant's oral queries, after issuing the

final determination. The FCIC letter of March 23, 1998, clearly was not the final determination and did not supersede the September 24, 1997 final determination (FF 6-9). Indeed, when Appellant appealed by letter dated May 16, 1998, Appellant referred to the letter of September 24, 1997, as the final determination, not the March 23, 1998 letter. Appellant's appeal is therefore untimely and the Board has no jurisdiction over it.

The Merits Of The Appeal

If Appellant had standing and had filed a timely appeal, Appellant would not have prevailed on the merits.

Under the understanding between the parties memorialized in the November 9, 1995 letter, and the UNL provisions in the only SRAs in the record, FCIC's reinsurance obligation is limited to "eligible crop insurance contracts" (FF 1-3). Appellant's claim does not arise under the crop insurance policies themselves, but from an alleged tortious interference and breach of an agency contract between Appellant and its agent, Farmers Financial (FF 5).

Appellant asserts that FCIC made oral representations that "any" losses would be covered. However, Appellant did not object to the understanding memorialized in the letter (FF 1), which did not contain language that indicated that "any" losses would be covered. Nor in opposing the Government's motion has Appellant offered any credible evidence supporting its assertion, as it is obligated to do under Federal Rules of Civil Procedure (FRCP) 56(e).[3] Even if Appellant could prove that such an oral representation was made, this representation goes beyond the understanding in the November 9, 1995 letter, the terms of the only SRAs in the record (FF 1-3), and the Federal Crop Insurance Act,[4] which limits reinsurance to crop insurance losses arising from claims made under eligible crop insurance policies. Therefore, such agreement, if any, is not enforceable because it is beyond the authority of FCIC. FCIC v. Merrill, 332 U.S. 380 (1947).

[3] FRCP 56(e) provides that an adverse party may not rest upon mere allegations and denials, but must by affidavits or otherwise, set forth specific facts showing there is a genuine issue for trial. The advisory notes also indicate that the adverse party may not rest on averments of the pleading which on their face present a material issue.

[4] Appellant's claim is for reinsurance under the SRA. FCIC's authority to provide reinsurance is limited to losses arising from drought, flood, or other natural disaster. 7 U.S.C. § 1508(a)(1). While FCIC may indemnify insurers for losses resulting from FCIC errors or omissions, 7 U.S.C. § 1508(j)(3), Appellant's claim is not based on FCIC error or omission.

RULING

The appeal is dismissed because this Appellant lacks standing, and, in any event, the appeal is untimely.

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EDWARD HOURY
Administrative Judge

Concurring:

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JOSEPH A. VERGILIO
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
June 15, 2000