RAIN AND HAIL INSURANCE SERVICE, INC., (INGRAM)	)	**AGBCA No. 97-193-F**
Appellant	)	
Representing the Appellant:	)	
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Representing the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

November 23, 1998

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal relates to the 1992 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), a wholly-owned Government corporation within the U.S. Department of Agriculture, and Rain and Hail Insurance Service, Inc., of West Des Moines, Iowa (Appellant). Under the SRA, Appellant was authorized to sell and administer Multi-Peril Crop Insurance (MPCI) policies in furtherance of the Government's crop insurance program. The appeal also relates to FCIC Manager's Bulletin, MGR 93-020, which allows reinsurers such as Appellant to recoup certain litigation expenses incurred administering MPCI policies.

FCIC denied Appellant's claim for litigation expenses incurred defending a suit brought by an insured under an MPCI policy issued by Appellant. FCIC concluded the litigation did not fall within the criteria for special litigation expense recoupment, defined in MGR 93-020. Appellant filed a timely appeal.

The Board has jurisdiction over this matter pursuant to 7 CFR § 400-169(a) - (d) and 7 CFR § 24.4(b). The Board is deciding this appeal under its Rule 11, Submission Without a Hearing, 7 CFR § 24.21, Rule 11.

FINDINGS OF FACT

1. In 1990, the parties entered into an SRA commencing July 1, 1990, and ending June 30, 1991. Under the terms of the SRA, the agreement automatically renewed itself from year to year. At the time the parties entered into the SRA, the Federal Crop Insurance Act (FCIA) at 7 U.S.C. § 1508(h) required FCIC to pay the operating and administrative expenses of reinsurers such as Appellant to the same extent that such costs were covered by FCIC on its own policies of insurance. Sections IV.A. and V.M. of the SRA provided for an expense reimbursement payment to Appellant of an amount equal to 33 percent of the net book value of the premiums of all MPCI contracts issued under the SRA. That included litigation expenses incurred by Appellant administering policies.

2. At all relevant times, FCIC regulations, 7 CFR §§ 400.351-52, prohibited state and local authorities from promulgating laws, regulations, or policies that directly or indirectly affect the crop insurance program. These regulations precluded the recovery of compensatory damages, punitive damages, attorney fees, and costs against reinsurers such as Appellant.

3. MGR 93-020 provided in pertinent part as follows:

> CRITERIA
>
> Cases submitted for consideration by FCIC under this bulletin must meet the following criteria:
>
> REQUESTS FOR FINANCIAL ASSISTANCE FOR ATTORNEY FEES AND OTHER COURT COSTS
>
> 1. The litigation must involve an attack on FCIC-approved program procedures, regulations and /or crop policies; and
>
> 2. The litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program.

4. Appellant sold an MPCI policy to the insureds[1] who later filed a claim for an indemnity based upon an alleged loss to the insured's 1993 peanut crop. The insureds described the conditions prior to planting on the acreage in question as extremely dry with Bermuda grass growing vigorously. The insureds planned to nevertheless plant their peanut crop, irrigate and then spray Roundup herbicide on the Bermuda grass. After planting, the acreage received large amounts of rain and the insureds

[1]The insureds in this matter are Dewitt Ingram, Sr., and Jr., and Hubert McDonald.

experienced more problems with grasses and weeds than normal. The insureds made extensive use of Roundup herbicide but stopped when the insureds noticed that the peanuts began to crack. Some peanuts were very large, some barely sprouted, some were cracked and others were rotted. The insureds attributed these problems to excessive rains, poor seed vigor, seedling diseases, and very poor soil. The insureds assert that there was no evidence that any of the peanuts failed to survive because of the herbicide applications. (Appeal File (AF) 1-2.)

5. The report from Appellant's claims adjuster on the crop failure concluded that the insureds' peanut crop losses were due to the post peanut crop emergence spraying with herbicides. The drift from the spraying caused the symptoms evident in the peanut crop and were the same symptoms as those described on the herbicide cautioning against contact with desirable vegetation. Moreover, no other claims from the same geographic area were made. The adjuster acknowledged that rainy weather in June caused problems with weeds and grasses, but that no problems with the crop should have been experienced if recognized peanut farming practices had been followed. These practices included properly preparing the seed bed, applying the correct amount of "pre-plant chemical," applying and follow up with Star-Fire and Basagram herbicides to control grass and weeds that emerged after the peanut crop sprouted. (AF 4-6.)

6. The insureds' claim was denied. The insureds objected, asserting they had made the best decisions regarding the crop management at the time and that the adjuster was using hindsight. (AF 34-36.)

7. The terms and conditions of the applicable MPCI policy were not placed in the record. However, such policy is found in 7 CFR Part 425, Peanut Crop Insurance Regulations (1992). The insurance provided was against unavoidable loss resulting from:

(1) Adverse weather;
(2) Fire;
(3) Insects;
(4) Plant disease;
(5) Wildlife;
(6) Earthquake;
(7) Volcanic eruption; or
(8) Failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting.

7 CFR § 425.7(d)(1)a. (1992).

Moreover, FCIC will not insure against any loss of production due to:

(1) The neglect, mismanagement, or wrongdoing of [the insured];
(2) Failure to follow recognized good peanut farming practices;

* * * *

(4) Any cause not one of the eight specified above.

7 CFR § 425.7(d)(1)b. (1992).

8. The insureds sued Appellant in the State Court of DeKalb County, Georgia.[2] The insureds asserted that "the 1992 peanut crop did not come in due to conditions beyond the control of the Plaintiffs and covered under the [insurance] policy." The insureds assert that a proper demand was made for the policy proceeds and that such proceeds are past due. The insureds prayed for damages in accordance with Georgia law including those for bad faith. The insureds also requested costs, attorney fees, interest, and a jury trial. (AF 178-181.)

9. Appellant's Answer in that proceeding asserted that the insureds failed to follow recognized good farming practices as required by the MPCI policy (AF 183-190). Appellant had the litigation moved to the U.S. District Court for the Northern District of Georgia, on the basis that Federal law was applicable and that such Federal law preempted state law (AF 192-195). The case was later transferred to the U.S. District Court for the Middle District of Georgia (AF 230).

10. At a U.S. District Court sponsored arbitration hearing, the insureds contended that their crops were insured for losses caused by adverse weather, and that even if there had been poor management decisions, the MPCI policy did not specifically exclude coverage for losses caused by bad management decisions. The insureds asserted that the MPCI policy did not sufficiently define recognized good farming practices, and that therefore, not applying a pre-emergent herbicide did not violate the policy. The insureds asserted crop loss of $195,000. (AF 236.)

11. Appellant asserted that the crop loss was not caused by bad weather (drought), and that the loss was in fact caused by the insureds' failure to use recognized farming practices. Appellant asserted that the policy adequately recognized farming practices as the farming practice which is carried out in the farming community. Appellant obtained the affidavit of the county agent regarding the recognized farming practices for the county where the peanuts were planted (AF 230). The arbitrator found in favor of Appellant and against the insureds (AF 232).

12. The insureds elected to set aside the arbitrator's decision and requested a jury trial (AF 238, 241, 245, 248). The question arose as to whether the insureds were entitled to a jury trial. Appellant's litigation position was that the insureds were not entitled to a jury trial because reinsurance companies stood in the same position as FCIC, and the Government was exempt from the requirement of a jury trial (AF 251-252, 437-439). The litigation was settled for $20,000.

13. Appellant filed a claim for recoupment of $11,657.59 in litigation expenses with FCIC pursuant to MGR 93-020. Appellant's claim was denied and Appellant filed this timely appeal.

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[2]The defendants were Appellant's agents, CIGNA Insurance Co., and E. L. Ross, Inc.

DISCUSSION

As a threshold matter, Appellant has raised as precedent for the Board's consideration instances for attorney fee recoupment which were paid by FCIC and not disputed. None of the "precedents" cited by Appellant involve an appeal taken under 7 CFR § 24.4(b) and thus involve no Board decision. The Board considers appeals made to the Board under 7 CFR § 24.4(b), such as the present appeal, on a de novo basis. Accordingly, the cases relied upon by Appellant are of no more value to the Board than cases under MGR 93-020 that were rejected by FCIC, but where no appeal was taken.

The Jury Trial Issue

Appellant asserts that insureds' demand for a jury trial was an attack on FCIC-approved program procedures, regulations, and /or crop policies within the meaning of MGR 93-020. Title 28 U.S.C. § 2402 requires that claims against the United States be tried in a U.S. District Court without a jury. Appellant reasons that since it stands in the place of FCIC regarding the indemnity of the insured, that a jury trial against Appellant is also prohibited, citing State of Kansas ex rel. Todd v. United States, 995 F.2d 1505 (10th Cir. 1993). Appellant's reliance on State of Kansas ex rel. Todd, supra, is misplaced because the issues there involved state taxing and regulation authority over the Federal crop insurance program, and had nothing to do with the question of privity.

The Government's position is that FCIC's regulations do not prohibit an insured's right to a jury trial against a reinsurance company, and that under the well established rules of privity, FCIC and Appellant are not the same entity, citing Unigard Security Insurance Co. v. North River Insurance Co., 4 F.3d 1049 (2nd Cir. 1993) and General Reinsurance Corp. v. Missouri General Insurance Co., 596 F.2d 330 (8th Cir. 1979). The Government asserts that while it is exempt from jury trials when sued directly pursuant to 28 U.S.C. § 2402, the Government has never sought to extend this prohibition to reinsurance companies.

In this instance, the parties have unduly complicated the issue because the insureds merely requested a jury trial as a part of their prayer for relief before the U.S. District Court. The right to a jury trial was not raised as an issue notwithstanding an asserted FCIC prohibition. A mere request for relief without more of a direct challenge does not meet the MGR 93-020 criteria for recoupment of litigation expenses. 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 ¶ 29,540.

The Punitive and Compensatory Damages, Costs and Attorney Fees Issue

FCIC regulations precluded recovery of compensatory damages, punitive damages, attorney fees and costs against insurers such as Appellant (Finding of Fact (FF) 2). Appellant requested damages in accordance with Georgia's attorney fees and costs in the prayer for relief in Appellant's Complaint (FF 8). On this basis, Appellant claims that the suit by Appellant qualifies for litigation expense recoupment under MGR 93-020 (FF 3).

This portion of Appellant's appeal is without merit. We have held a mere request for prohibited relief in the prayer of a Complaint, without more, does not constitute an attack on FCIC-approved regulations, policies and procedures. Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, supra, and Rain and Hail Insurance Service, Inc., AGBCA No. 97-157-F, supra.

Failure to Follow Good Farming Practices/Bad Management Decisions

The insureds' Complaint included an allegation that the crop was lost due to conditions beyond the insureds' control and that the loss was covered by the MPCI policy (FF 8). Appellant's Answer asserted that the insureds failed to follow good farming practices (FF 9), an affirmative defense which if proved excludes insurance coverage (FF 7). The Government's position is that the pleadings control the scope of the litigation and that the pleadings in this instance do not include an attack on FCIC-approved procedures, policies or practices.

While the pleadings are a good starting place to understand the issues and the scope of the appeal, the pleading allegations are not always very specific. Here, in addition to the pleadings, other evidence, including letters from counsel during the litigation, and the arbitration proceeding, shed additional light on the scope of the litigation. Therefore, contrary to the Government's position that the Board limit its scope of review to the pleadings, we decline to do so in this instance and instead we review the entire record.

The U.S. District Court sponsored an arbitration proceeding during which the insureds asserted that they were entitled to the insurance indemnity even though they engaged in poor management decisions (FF 10). The MPCI policy excludes insurance coverage for neglect, mismanagement, or wrongdoing by the insured (FF 7). The evidence indicates that the insureds' position was that they had made the best decisions they could at the time and that the Government should not use hindsight to decide whether to pay the indemnity (FF 6). Appellant obtained the affidavit of the county agent regarding the recognized good farming practices for peanuts (FF 10).

The MPCI policy exclusions to insurance coverage of neglect, mismanagement, or wrongdoing are essentially a failure to follow recognized good peanut farming practices (FF 7). Consequently, whether the insureds' losses were covered by the policy is primarily, though not exclusively, a question of fact. We have held that questions of fact relating to whether the insured used good farming practices did not qualify for litigation expense recoupment under MGR 93-020. Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, supra. We have also recently held that litigation defending against an insured's demands for payment of the indemnity, notwithstanding the terms of the MPCI, "without more," does not qualify for litigation expense recoupment under MGR 93-020. Rain and Hail Insurance Service, Inc., AGBCA No. 97-198-F, _____ BCA _____ (Nov. 20, 1998).

We recognize that during the arbitration hearing sponsored by the U.S. District Court, the insureds alleged that the MPCI policy did not adequately define recognized farming practices and that they,

therefore, did not violate this provision of the policy by failing to apply a pre-emergent herbicide to prevent weeds and grasses from sprouting. However, that general assertion does not change the essential nature of the proceeding or the issues being litigated.

The case defended by Appellant turned on what was or was not a recognized farming practice, in this instance, an issue requiring evidentiary proof, not an issue of ambiguity. If the insureds prevailed by a preponderance of the evidence, Appellant loses this particular case on the basis that the insureds met their burden of proof, not on the basis that the terms of the policy were ambiguous or unclear. Therefore, there is no attack on FCIC-approved policies, procedures, or regulations. Nor would such litigation establish a precedent detrimental to the crop insurance program. Consequently, Appellant has not met the MGR 93-020 requirements for litigation expense recoupment.

DECISION

The appeal is denied.

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EDWARD HOURY
Administrative Judge

Concurring:

_____ _____
HOWARD A. POLLACK **JOSEPH A. VERGILIO**
Administrative Judge Administrative Judge

Issued at Washington, D.C.
November 23, 1998