RAIN AND HAIL INSURANCE SERVICE, INC., (Edith Kelley)) **AGBCA No. 97-198-F**

Representing the Appellant:

Frank W. Pechacek, Jr.
Bruce B. Green
Willson & Pechacek, P.L.C.
P.O. Box 2029
Council Bluffs, Iowa 51502

Representing the Government:

Mark Simpson
Office of the General Counsel
U. S. Department of Agriculture
Suite 576
1718 Peachtree Road, N.W.
Atlanta, Georgia 30309-2409

DECISION OF THE BOARD OF CONTRACT APPEALS

November 20, 1998

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal relates to the 1993 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 (RHIS or 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[1] under an MPCI policy issued by Appellant. FCIC concluded the litigation did not fall within the criteria for special litigation expense recoupment, as defined in MGR 93-020. Appellant filed a timely appeal.

[1]The insured in this instance was Edith Kelley.

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 Rule 11, Submission Without a Hearing, 7 CFR § 24.21, Rule 11.

FINDINGS OF FACT

1. In 1990, the parties entered into an SRA for the period commencing July 1, 1992, and ending June 30, 1993. Under the terms of the SRA, the agreement automatically renewed itself from year to year unless terminated by the parties. (Complaint, Answer paragraph (¶) 6; Exhibit A of Complaint.)

2. The SRA required Appellant to utilize MPCI policies that were approved by FCIC. Generally, these policies were provided by the National Crop Insurance Service. The policies might deviate slightly from explicit policy terms and conditions published by the FCIC in the Federal Register. The SRA required Appellant to utilize loss adjustment procedures approved by FCIC. (Complaint, Answer ¶¶ 7, 8.)

3. At the time the parties entered into the SRA in 1990, 7 CFR § 400.166(a) and 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 cost was covered by FCIC on its own policies of insurance. (Complaint, Answer ¶¶ 9, 10.)

4. Section IV.A., Expense Reimbursement, of the SRA provides that FCIC agrees to pay 32.5 percent of the net book premiums for all eligible contracts and that such payment constitutes full reimbursement for expenses associated with the sales and service of crop insurance contracts. Section V.O., Litigation Assistance, of the SRA provides that a company's expenses incurred as a result of litigation are considered a part of the reimbursement stated above. Section V.O. allows FCIC to intervene in any litigation at its option, and to allow Appellant to request FCIC to intervene.

5. At all relevant times, FCIC regulations, 7 CFR § 400.351-352, prohibited state and local authorities from promulgating laws, regulations, or policies that directly or indirectly affect the Federal crop insurance program. These regulations preclude recovery by an insured of compensatory damages, punitive damages, attorney fees and costs in litigation against insurers such as Appellant (Complaint, Answer ¶ 14).

6. At all relevant times MGR 93-020 provided in pertinent part as follows:

> CRITERIA
>
> Cases submitted for consideration by FCIC under this bulletin must meet the following criteria:

REQUEST 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.

(Appeal File (AF) 197-198.)

7. At the time the insured completed her application for crop insurance, the insured intended to irrigate the insured acreage if necessary. The MPCI policy was issued to Appellant with certain acreage designated as irrigated acreage. However, the insured was forced to sell the irrigation equipment for financial reasons. The insured claimed to have forgotten to change the terms of the application and/or the MPCI policy. Doing so would have required the insured to pay a greater premium. (AF 2-4.)

8. The insured filed a claim with Appellant for crop loss on the insured's peanut crop. Appellant determined that the crop loss was due to drought and that drought was not an insured risk on irrigated acreage under the terms of the MPCI policy. Appellant denied this portion of the insured's claim.

9. By Complaint dated October 19, 1994, the insured filed a suit in the Superior Court of Baker County, Georgia, against Appellant's agents,[2] alleging that the insured suffered a $91,037 loss as a result of a peanut crop failure and that Appellant only paid $40,106.57, leaving a balance of $50,930.43. Appellant claimed the balance along with damages, attorney fees and costs. (AF 29-32.)

10. By Responsive Pleading of Defendant dated November 1994, Appellant asserted that the insured had elected insurance coverage on the basis of irrigating certain portions of the planted acreage, that the crop loss was due to drought, and that such cause was an uninsured cause, because the insured failed to adequately irrigate the affected acreage. Appellant also asserted that the insured failed to file the suit within 12 months of the occurrence causing the loss as required by the MPCI policy. (AF 49-56, 161.)

11. The insured and Appellant submitted the litigation to an arbitrator who concluded that 40 percent of the claimed loss was due to disease and awarded the insured $15,000 in full and complete settlement of the claim (AF 61-68).

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[2] Appellant's agents were E. L. Ross, Inc., and the Century Indemnity Company.

12. Appellant requested recoupment from FCIC of its attorney fees and costs under MGR 93-020. FCIC denied Appellant's request on the basis that the criteria in MGR 93-020 had not been met, and that the litigation involved a factual dispute regarding whether the peanut loss was due to insurable causes. Appellant filed this timely appeal at this Board.

DISCUSSION

As a threshold matter, Appellant has raised as precedent for the Board's consideration cases for attorney fee recoupment which were paid and not disputed by FCIC, i.e., there was no appeal taken under 7 CFR § 24.4(b) and no Board decision. The Board considers appeals made to the Board on a de novo basis. Accordingly, the cases cited are of no more value to the Board than cases rejected by FCIC for payment that were not appealed. Consequently, these cases cited by Appellant were not considered by the Board to be binding.

The facts in this appeal are simple, straightforward and undisputed. The insured suffered a loss to her peanut crop, allegedly because of drought. Appellant refused to pay for the crop loss suffered on that acreage that the insured had agreed to irrigate. In exchange for Appellant's agreement to irrigate, the insurance premiums were reduced and drought was eliminated as a basis for a claim. Disease and factors other than drought remained as proper bases for recovery. The insured nevertheless sued and recovered a portion of her claim on the basis that the crop loss on the portion recovered was due to disease, rather than drought. (Findings of Fact (FF) 7-11.)

The Government's position is that the suit brought by the insured against Appellant was limited to a factual dispute about whether the crop loss was due to an insurable cause, i.e., whether the crop loss resulted from a lack of irrigation. As such, the Government asserts, the suit did not involve an attack on FCIC-approved program procedures, regulations and/or crop policies. In addition, the Government asserts that the litigation was fact specific and would not have resulted in a case precedent detrimental to the crop insurance program, within the meaning of MGR 93-020. Finally, the Government asserts that the mere request for the relief of punitive damages, compensatory damages, attorney fees and costs is not an attack on FCIC policies and regulations.

Appellant asserts that because the insured acknowledged that she did not irrigate but sued to recover in any event, such suit was in fact an attack on FCIC-approved crop policies.

Under the present facts, the Appellant denied the insured's crop loss claim on the basis that the crop loss was caused by a lack of irrigation. The issue presented by the suit is a factual one, i.e., what caused the crop loss. The insured's suit against Appellant was partly successful because the arbitrator concluded that a part of the crop loss that Appellant had denied compensation for was caused by disease rather than a lack of irrigation.

The issues raised by the above litigation did not amount to an attack on FCIC-approved program procedures, regulations and/or crop policies, or the probability of a court ruling which may set a legal precedent detrimental to the crop insurance program. Thus, the litigation does not meet the criteria

set forth in MGR 93-020, such that the expenses are not reimbursable under the SRA (FF 3); Appellant may not recoup the litigation expenses. See Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, 98-1 BCA ¶ 29,448 and Rain and Hail Insurance Service, Inc., AGBCA No. 97-157-F, 98-1 BCA ¶ 29,540.

Even if the insured had contended, as Appellant asserts, that Appellant should pay the claim even though the insured had not irrigated, notwithstanding the provisions of the MPCI policy, Appellant still would not recover. Such a suit would not have been based upon any identified legal rights the insured possessed under the MPCI policy. Therefore, the suit would not have been an attack on FCIC-approved policy or constituted the probability of a detrimental legal precedent, as required by MGR 93-020.

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.
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