RAIN AND HAIL INSURANCE SERVICE, INC., and RAIN AND HAIL L.L.C. (Billy J. Freeze, d/b/a Freeze Brothers),	)	**AGBCA No. 98-159-F**
Appellant	)	
Representing the Appellant:	)	
Bruce B. Green Attorney at Law Willson & Pechacek, P.L.C. P.O. Box 2029 Council Bluffs, Iowa 51502	)	
Representing the Government:	)	
Barry D. Hersh Office of the General Counsel U. S. Department of Agriculture 3201 Federal Building 700 West Capitol Avenue Little Rock, Arkansas 72201	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

March 26, 1999

OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK

This appeal arose under Standard Reinsurance Agreements (SRAs) between the Federal Crop Insurance Corporation (FCIC), a wholly-owned Government corporation within the U. S. Department of Agriculture, and Cigna Property and Casualty Insurance Company and Rain and Hail Insurance Service, Inc., of West Des Moines, Iowa (RHIS or Appellant).[1] Under the SRA, Appellant sells and

[1] The notice of appeal and all pleadings have been filed in the names of Rain and Hail Insurance Service, Inc. and Rain and Hail L.L.C., rather than Cigna Property and Casualty Insurance Company and Rain and Hail Insurance Service, Inc. Paragraph 5 of the Complaint contains allegations concerning the relationship between the Rain and Hail Insurance Service, Inc., and Rain and Hail L.L.C. Paragraph 5 of the Answer denies those allegations for want of sufficient information to admit or deny them. The record contains a document dated October 16, 1991, signed by Cigna's vice president authorizing RHIS to execute the SRA and associated documents on behalf of Cigna. It contains no authorization for administering the SRA. The pleadings do not address the rights and liabilities of Cigna Property and

administers crop insurance 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 Multi-Peril Crop Insurance (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, as defined in MGR 93-020. Appellant filed a timely appeal.

The Board has jurisdiction over this matter pursuant to 7 C.F.R. § 400.169(a) - (d) and 7 C.F.R. § 24.4(b).

The Board is deciding this appeal under Rule 11, Submission Without a Hearing, 7 C.F.R. § 24.21, Rule 11.

FINDINGS OF FACT

1. The parties entered into an SRA in 1992 for the reinsurance fiscal year commencing July 1, 1992, and ending June 30, 1993 (the 1993 SRA). The parties also entered into an SRA for the reinsurance fiscal year commencing July 1, 1993, and ending June 30, 1994 (the 1994 SRA). These SRAs established the terms and conditions under which the FCIC would reinsure MPCI policies sold by Appellant. Under the SRA, FCIC agreed to pay Appellant a percentage of the premiums on the crop insurance contracts as an expense reimbursement. (Appeal File (AF) 0197, 0373, Book 2.)

2. FCIC Bulletin No. MGR 93-020 provides, in pertinent part:

> SCOPE
>
> Bulletin No. MGR 93-009, dated July 5, 1988, established a litigation case review program for companies reinsured with Federal Crop Insurance Corporation (FCIC) who write Multi Peril Crop Insurance policies. Bulletin No. MGR 93-020, rescinds MGR-009. It does not amend any provisions of the Standard Reinsurance Agreement (SRA).
>
> The purpose of Bulletin No. MGR 93-020 is to:
>
> > Establish criteria for providing financial assistance for certain litigation expenses; and

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Casualty Insurance Company. The Government has interposed no objection to the discrepancy between the names on the SRAs and the names under which the appeal has been conducted. In the absence of objection from the Government, the Board need not resolve the question of Appellant's authority to act for Cigna in prosecuting the appeal.

> Outline procedures for requesting financial assistance for litigation expenses.
>
> Under this bulletin, FCIC may provide financial assistance in certain cases for reasonable attorneys fees and litigation expenses, and may pay approved judgments over and above the indemnity due as provided by the SRA.
>
> CRITERIA
>
> Cases submitted for consideration by FCIC under this bulletin must meet the following criteria:
>
> REQUESTS FOR FINANCIAL ASSISTANCE FOR ATTORNEYS 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.

(AF 0193, Book 2).

3. For the crop years 1993 and 1994, Appellant sold MPCI policies to an insured in Arkansas.[2] However, the insured failed to pay the premiums on the policies for either year. In April 1996, Appellant filed suit against the insured in the Circuit Court of Independence County, Arkansas, to collect the premiums. (AF 000001.)

4. The insured counterclaimed alleging that his 1993 peach crop was a complete loss due to a freeze in April 1993 and a wind and hail storm "[o]n Sunday, before Defendant planned to began picking his peaches on Monday." According to the insured, "subsequent to the rain storm," he notified the agent through whom he bought the MPCI of the loss and approximately 10 days later Appellant's adjuster visited the orchard. The insured's counterclaim provides no exact or approximate dates for wind and hail storm, the notice to the agent or the visit from the adjuster. Nor did it make allegations relating to the content or provisions of the MPCI policy, the SRA or any regulation pertaining to the crop insurance program. The counterclaim did contain an allegation that the insured had not been furnished a copy of the policy. (AF 000004.)

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[2]In this instance the insured was Billy J. Freeze, d/b/a Freeze Brothers.

5. Appellant's answer to the insured's counterclaim admitted the allegations regarding the notice and the visit from the adjuster but also provided no dates or approximate dates.[3] In an amended answer, Appellant asserted the following affirmative defenses: (1) the insured failed to bring its action within 1 year after loss as required by the insurance contract; (2) the insured failed to comply with contract provisions for filing a proper claim; and, (3) laches. It is undisputed that Appellant had denied the insured's claim for loss of the peach crop.

6. The state court litigation was subsequently settled by payment of $2,000 in premiums and the dismissal of the counterclaim. Appellant incurred $3,122.25 in attorneys fees and costs in the course of the litigation and sought to recover the expenses under MGR 93-020.

7. In a letter dated October 24, 1997, Nancy Kreitzer, Director, Appeals, Litigation and Legal Liaison Staff, denied the claim for litigation expense on the grounds that MGR 93-020 does not cover litigation initiated by the reinsured company; that whether the counterclaim constitutes a challenge to FCIC procedure for notice of damage or loss is a factual issue; and that the claim that the agent had not provided the insured with a copy of the policy was merely a factual dispute with regard to whether the insured had adequate notice of the requirements of the policy. Appellant had previously sought director review of the matter and after receipt of the October 24, 1997 denial provided the Deputy Administrator of the Risk Management Agency with another copy of that request.

8. The Deputy Administrator rendered a final administrative determination dated January 12, 1998. He decided that the facts of this case do not support the Appellant's argument that the countersuit was an attack on the FCIC's approved policy and program procedures, including FCIC's requirements for written notice of loss; notice prior to harvest; preserving a sample of the crop for loss adjustment purposes; and, bringing suit within 1 year after loss in order to sue under the policy.

9. In its Complaint before the Board, Appellant alleged that the insured's state court counterclaim challenged FCIC rules, regulations, policies, procedures, and standard policy language in five particulars: requirement for written notice of loss; requirement for notice prior to harvesting the crop; requirement for preservation of a sample of the crop for loss adjustment purposes; requirement to bring an action on the FCIC-approved MPCI policy within 1 year after the loss; and, prohibition against states, governmental, and non-governmental entities from promulgating rules, regulations, laws, policies, or issuing decisions that directly or indirectly affect FCIC's crop insurance policies or reinsurance agreements with private insurers, including *inter alia*, levying of judgments against companies arising out of actions authorized or required under the Federal Crop Insurance Act, a reinsurance agreement, or regulations or procedures issued by the FCIC. However, Appellant's complaint provided no factual allegations tending to explain how the insured challenged the rules and

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[3] In this appeal before the Board, the Government in its Motion for Summary Judgment averred that the insured suffered a loss on eight (8) varieties of peaches in April 1993 and notice of loss was received by RHIS on August 25, 1993. In its Response to the Motion for Summary Judgment before the Board, Appellant alleged that the insured had claimed the loss to the 1993 peach crop was due to frost in the first part of April 1993 and that excessive wind and rain thereafter blew the damaged peaches from the trees during the first part of August 1993. Appellant further alleged that the insured notified its agent who notified RHIS on or about August 25, 1993.

policies, etc. Appellant also provided no detail to support the allegation of probability of a court ruling setting detrimental precedent.

10. The Government's Answer generally denied the allegations that the state court litigation constituted a challenge to FCIC rules, regulations, policies, procedures, and standard policy language. In addition, the Government affirmatively defended on the ground that the Board lacks jurisdiction over appeals involving MGR 93-020 because MGR 93-020 does not affect, interpret, explain, or restrict the terms of the SRA. The Government also asserted the affirmative defense that under Appellant's interpretation of MGR 93-020, all disputes between the insured and an insurance company would involve a challenge to policy, procedures and regulations and would be covered under MGR 93-020. Without further description, the Government claims that MGR 93-020 "specifically requires a valid challenge to a policy provision." Next, the Government defended on the ground that the litigation with the insured did not involve the probability of a court ruling that would set legal precedent detrimental to the crop insurance program. The final Government defense is that requirements for written notice of loss, notice of loss prior to harvest, preservation of a crop sample for loss adjustment purposes and bringing an action within 1 year of loss are standard, have been in effect for years, and are simple factual disputes not intended to be covered by MGR 93-020.

11. The Government filed a Motion for Summary Judgment and Appellant responded. Subsequent to those submissions, however, the parties agreed to have the appeal decided pursuant to Board Rule 11, Submission Without a Hearing. The record consists of the Appeal File and supplement thereto, the pleadings, and the Motion for Summary Judgment and Appellant's Response. The Motion for Summary Judgment and Appellant's Response provided somewhat more factual detail than the pleadings. Reading the two together it appears that the insured suffered a peach loss in April 1993. Harvest nonetheless began in June 1993 and was completed by August 20. Sometime in August 1993 additional damage took place due to excessive wind and rain. The insured notified its agent who notified RHIS on or about August 25, 1993. An adjuster inspected the damage and found no remaining peaches to determine the extent of the loss. The claim was denied. In 1996, RHIS sued for the unpaid premium and the insured counterclaimed for loss of the 1993 peach crop, as set out above.

DISCUSSION

Contentions of the Parties

Appellant asserts that the insured's counterclaim to Appellant's own collection action constituted an attack on FCIC rules, regulations, policies, procedures and standard policy language including the requirement to give notice of loss; notice of loss prior to harvesting the crop; and to preserve a sample of the crop for loss adjustment purposes; and to bring an action on the FCIC-approved MPCI policy within 1 year after the loss. Appellant claims the action also attacked the policy prohibiting states, governmental and non-governmental entities from promulgating rules, regulations, laws, policies, or issuing decisions that directly or indirectly affect FCIC's crop insurance policies or reinsurance agreements with private insurers including, but not limited to, the levying of fines, judgments,

punitive damages, compensatory damages, or judgments for attorneys fees and costs against companies arising out of actions authorized or required under the FCIA, a reinsurance agreement, or regulations or procedures issued by the FCIC.

The Government contends that the Board lacks jurisdiction over appeals involving MGR 93-020 because MGR 93-020 does not affect, interpret, explain or restrict the terms of the SRA. The Government also asserts that the insured's counterclaim did not involve a challenge to FCIC policy, procedures or regulations which would be covered by MGR 93-020; that the litigation by the insured did not involve the probability of a court ruling which would set legal precedence detrimental to the crop insurance program and that the notice and other questions presented by this appeal are standard, have been in effect for years and are factual disputes.

Jurisdiction

The Board decided the issue of jurisdiction over appeals made pursuant to the MGR 93-020 rather than directly under the SRA in Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111, holding that the MGR 93-020 "affected" the SRA, and therefore, the Board had jurisdiction. In the Notice of Appeal here, Appellant alleged that the dispute arises under and is governed by the 1993 and 1994 SRAs between RHIS and the FCIC, MGR 93-020 and MGR-009. The Board has jurisdiction to decide the appeal.

Criteria

MGR 93-020 sets forth criteria to be met in cases of requests for financial assistance for attorneys fees and other court costs. Those criteria are litigation involving an attack on FCIC-approved program procedures, regulations and/or crop policies; and litigation involving the probability of a court ruling which may set legal precedent detrimental to the crop insurance program.

Attack on FCIC-Approved Program Procedures, Regulations and/or Crop Policies

Appellant argues generally that this criterion has been met. In effect, it contends that because the insured did not give written notice of loss; did not give notice of loss prior to harvesting the crop; did not preserve a sample of the crop; and, did not bring action on the policy within 1 year, the insured was necessarily challenging the requirements. The record before us does not support that argument. The insured did not argue that the requirements are invalid or attempt to create an exception to them. The insured merely ignored those requirements in contesting Appellant's denial of its claim for crop loss. In so doing, the insured made nothing more than factual allegations on its own behalf. Nothing in the record indicates that the insured challenged the validity of the requirements with which it had failed to comply. Rather, the insured claimed that it had not been informed that the requirements existed. That defense does not rise to the level of an attack on the program procedures, regulations and/or crop policies. Filing a suit after the 12-month period without specifically raising a question or issue regarding the applicability of such 12-month period, has not been interpreted as attacking the validity of the provision. Rain and Hail Insurance Service, Inc., AGBCA No. 97-188-F, 98-2 BCA

¶ 29,748 and Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, 98-1 BCA ¶ 29,448. Similarly, the insured did not challenge the requirements for written notice of loss and for sample preservation. It simply chose to ignore and/or excuse its failure to comply. It is not enough that an insured press a claim in contravention of an FCIC program procedure, regulation and/or crop policy. At the least, the litigation must address the propriety of the provision. Rain and Hail Insurance Service, Inc., AGBCA No. 97-188-F, 98-2 BCA ¶ 29,748.

Appellant also contends that the counterclaim challenged the prohibition against states, governmental and non-governmental entities from issuing decisions that directly or indirectly affect FCIC's crop insurance policies or reinsurance agreements with private insurers, including judgments. Appellant here was defending against a possible judgment from a state court, albeit one whose jurisdiction, in the first instance, had been invoked by Appellant itself. The insured initiated no action requiring Appellant to defend the crop insurance program from state judgment. The insured appears to have simply decided that the best defense is a good offense. Once the insured had made its factual allegations, Appellant filed both an answer and an amended answer to the counterclaim. In neither did Appellant plead lack of state court jurisdiction over the dispute. Like the insured, Appellant chose to treat the issues as a factual dispute.

Probability of a Court Ruling Which May Set Legal Precedent Detrimental to the Crop Insurance Program

Appellant's contention on the second criterion is incomplete. Appellant asserts that a ruling favorable to the insured in this case would have resulted in producers across the country circumventing the FCIC's standard language requiring notification of an alleged loss before, or during, harvest. Appellant fails to address the probability of such a ruling occurring. Appellant also omits examining the probability of such a ruling setting legal precedent detrimental to the crop insurance program. However, as we have decided that the insured's counterclaim did not constitute such an attack on FCIC-approved program, policies, etc., it is not necessary for the Board to address Appellant's contentions on the probability of a detrimental precedent.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

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EDWARD HOURY
Administrative Judge

_____
JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
March 26, 1999