RAIN AND HAIL INSURANCE SERVICE, INC. (Robert W. Etheridge),	)	**AGBCA Nos. 2001-127-F 2001-135-F**
Appellant	)	
Appearing for the Appellant:	)	
Bruce B. Green, Esquire Willson & Pechacek, P.L.C. P. O. Box 2029 Council Bluffs, Iowa 51502	)	
Appearing for the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

June 25, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate opinion concurring in part, dissenting in part, by Administrative Judge VERGILIO.

These appeals arise out of a 1994 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC) and Cigna Property and Casualty Insurance Company of Philadelphia, Pennsylvania (Cigna), and Rain and Hail Insurance Service, Inc. of West Des Moines, Iowa (RHIS or Rain and Hail). [1] Cigna and RHIS are here referred to collectively as Appellant. Under the SRA,

[1] The SRA is captioned "Cigna Property and Casualty Insurance Company" and "Rain and Hail Insurance Service, Inc." (Appeal File (AF) 49). The parties entered into a 1994 SRA (Complaint, Answer Paragraph (¶) 6). Pursuant to a plan of reorganization approved and adopted by the shareholders of RHIS, Rain and Hail Limited Liability Company (RHLLC) replaced RHIS (continued...)

which recites that it is a "cooperative financial assistance agreement," Appellant sells and administers multi-peril crop insurance (MPCI) in furtherance of the Government's crop insurance program. Premiums are subsidized by FCIC, and FCIC reinsures a portion of Appellant's indemnity payments.

This appeal arises out of the same underlying facts as Rain & Hail Insurance Service, Inc. (Robert W. Etheridge), AGBCA No. 1999-194-F, 02-2 BCA ¶ 31,871. There the Board held that certain state court litigation in Alabama by a policy holder, Robert W. Etheridge, against Appellant, attacked an FCIC approved program procedure, regulation or crop policy and carried with it a probability for the setting of legal precedent detrimental to the crop insurance program and thus was eligible for the payment to Appellant of litigation expense under Manager's Bulletin MGR-93-020 (MGR-93-020 or the bulletin). Here, Appellant seeks (1) reinsurance on or (2) reimbursement or indemnification for, the compensatory and punitive damage portion of the Etheridge litigation judgment.

The Board has jurisdiction to decide the appeal under 7 CFR §§ 24.2(b) and 400.169(d). A hearing was held in Des Moines, Iowa, on August 21, 2002.

FINDINGS OF FACT

1. Both Cigna and RHIS are signatories to the 1994 SRA. Cigna has authorized RHIS to conduct litigation regarding the SRA in RHIS' name only. (AF 93.)

2. Appellant's initial claim (which has not been withdrawn) is that a judgment rendered against it in state court in Alabama should be treated as "ultimate net loss" under the terms of the 1994 SRA or that it should be reimbursed for that judgment under the terms of MGR-93-020. The insured had sued Cigna, RHIS, Frank Grimmett d/b/a Grimmett Insurance Agency and Frank Grimmett on the grounds that the defendants had wrongfully denied payment on a claim for loss on the insured's cotton crop. Payment had been denied on the ground that no insurable loss occurred when the crop on the farm, for which the loss was claimed, was added to the crop of another farm with which it had been combined as a single basic unit under the insured's policy. The Board's earlier Rain & Hail (Etheridge) decision contains detailed findings describing the course of the state court litigation, including Appellant's unsuccessful attempt to remove the litigation to federal court and the largely successful strategy of the plaintiff to prevent introduction of evidence of FCIC's role in provision of MPCI policies to insureds, such as Etheridge. The result of the litigation was a jury finding in favor of plaintiff Etheridge and against defendants Rain and Hail and Cigna. Damages were assessed as follows: compensatory - $14,000; punitive - $500,000; and mental anguish - $90,000.

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[1](...continued)
effective May 1, 1996, as the operational entity responsible for issuing, delivering, and administering the Federal Crop Insurance program for RHIS. Any rights or obligations that RHIS had under the SRA with FCIC now belong to RHLLC (Complaint, Answer ¶ 5).

The jury found in favor of defendant, Frank Grimmett, the local insurance agent. When the defendants moved for judgment notwithstanding the verdict, the court denied the motion holding:

> The insurance forms filled out and provided to Plaintiff by Cigna and Rain & Hail repeatedly misrepresented the coverage . . . . These misrepresentations occurred in the various copies of the 1994 Summary Coverage . . . the 1994 Acreage Report . . .
> and the 1994 crop insurance proposal . . . after the defendants initially denied the claim . . . the Plaintiff contacted the vice president of Rain & Hail . . . but was again given no redress.

3. Appellant promptly informed FCIC of the litigation, as required, and periodically updated it on the course thereof (Supplemental AF (SAF) 2243-52). The complaint sought punitive and compensatory damages (AF 1421-29). The answer alleged that any "extra contractual" damages, including compensatory damages and punitive damages were barred and preempted by the Federal Crop Insurance Act (FCIA or the Act) and the rules and regulations promulgated thereunder. It also alleged that an award of punitive damages violated the Alabama and Federal Constitutions. (AF 1434.) After the return of the verdict which included compensatory and punitive damages and preparatory to a contemplated appeal to the Alabama Supreme Court, Appellant discussed the value of FCIC filing an amicus curiae brief with both its local counsel in Alabama and with FCIC. Appellant considered the issues of federal preemption and the bar on awards of punitive damages to be particularly appropriate for argument by FCIC. (SAF 2259-60.) After FCIC's initial declination to provide this support on the ground that the state court verdict was based only on a finding of agent error and was not an attack on FCIC programs, policies or procedures, Appellant made repeated additional and unsuccessful efforts to alter that conclusion by providing transcripts and other evidence of the conduct of the litigation including the testimony of the FCIC employee who testified on behalf of Appellant and an offer of proof regarding the relationship between reinsured companies and FCIC. (SAF 2300-19.)

4. Upon appeal to the Alabama Supreme Court, the lower court judgment was affirmed without opinion. The previous appeal to the Board was from FCIC's determination not to provide litigation support to Rain & Hail, either monetary or in the form of an amicus curiae brief to the Alabama Supreme Court. Rain & Hail had requested litigation support and had provided the required information and status reports to FCIC on the course of the litigation. We sustained the appeal, holding that the litigation attacked an FCIC approved program procedure, regulation or crop policy and that the probability existed for the setting of a legal precedent detrimental to the crop insurance program. We based that conclusion on the fact that while the Alabama court found misrepresentation, it found in favor of the agent, the only person who dealt directly with the insured, leaving only the FCIC-approved forms as a possible vehicle for misrepresentation. We were mindful that Rain & Hail had attempted, through testimony, to explain the role of FCIC in the crop insurance program and that the trial court sustained the insured's objections to that explanatory evidence. We found those overt efforts to prevent a full description of the program and the players to be an attack on the policies, programs and procedures. We found the Alabama judgment and Supreme Court affirmation a precedent detrimental to the crop insurance program.

5. In the appeals now before us, Appellant claims entitlement to reinsurance on or reimbursement of the compensatory, punitive damages and mental anguish portion of the judgment rendered in favor of Etheridge in state court in Alabama and to reimbursement or indemnification from the Government for those portions of the judgment (Complaint, page (p.) 12).

6. Appellant's initial claim for reinsurance of the judgment was contained in its May 26, 2000, letter to FCIC. Appellant reasoned that it was so entitled notwithstanding the prohibition against the inclusion of punitive and consequential damages in ultimate net loss on the ground that other sections of the SRA required indemnification for all losses due to errors or omissions on the part of FCIC. Appellant cited 7 U.S.C. §1508(j)(3) as authority for that assertion. (SAF 2602-04.) Appellant repeated this argument in a June 29, 2000 letter to FCIC. Appellant did not mention the bulletin in this letter. (AF 94-102.) Appellant did not raise the bulletin as a theory under which it might recover punitive or compensatory damages until November 22, 2000, when it requested a review of FCIC's October 13, 2000 decision of the Director of Insurance Service. In that letter, Appellant argued for the first time that it was entitled to reimbursement of punitive and compensatory damages under the language of the bulletin as an Approved Judgment over and above the indemnity due, as provided by the SRA. (AF 115-16.)

7. Section 1508(j)(3) of the FCIA was not enacted until October 13, 1994, after the effective date of the 1994 SRA. Section 1507(c) of the Act was then in force. It, however, provided indemnification for errors and omissions of the FCIC only to agents and brokers, not to reinsured companies, as does the later enacted §1508(j)(3).

8. As defined in the SRA:

> "Ultimate net loss" is the sum paid by the Company under any eligible crop insurance contract reinsured under this Agreement in settlement of any claim and in satisfaction of any judgment rendered on account of such claim, less any recovery or salvage by the Company. "Ultimate net loss" may include interest and policyholder's court costs related to the eligible crop insurance contract provisions or procedures which are contained in a final judgment against the Company by a court of competent jurisdiction if FCIC determines: (1) that such interest or court costs resulted from the Company's substantial compliance with FCIC procedures or instructions in the handling of the claim or in the servicing of the insured; or (2) that the actions of the Company were in accordance with accepted loss adjustment procedures; and (3) that the award of such interest or court costs did not involve negligence or culpability on the part of the Company. "Ultimate net loss" may also include interest or policyholder's court costs related to the crop insurance provisions or procedures which are included in the settlement of any claim if FCIC, in addition to the determinations included above, is advised of the terms of and the basis for the settlement and determines that the settlement should be approved. Under no circumstances are any punitive or consequential damages included in the calculation of ultimate net loss.

(AF 52.)

9. The MPCI policy entered into between Appellant and the insured Etheridge, dated November 26, 1993, states the following as a preamble to its general provisions:

> This insurance policy is reinsured by the Federal Crop Insurance Corporation under the provisions of the Federal Crop Insurance Act, as amended (the Act) (7 U.S.C. 1501 et seq.), and all terms of the policy and rights and responsibilities of parties are specifically subject to the Act and the regulations under the Act published in Chapter IV of 7 CFR.

(AF 3.)

10. Paragraph 20, Recovery Limitations, of the same MPCI policy, provided that the insured's right, if any, to recover for punitive damages under the policy or in connection with the adjustment and settlement of claims is limited by FCIC regulations (AF 5).

11. FCIC regulations in effect at all times relevant to this action provide as follows:

> Title 7, CFR, Sec. 400.176 **State action preemptions**.
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> (a) No policyholder shall have recourse to any state guaranty fund or similar state administered program for crop or premium losses reinsured under such Standard Reinsurance Agreement. No assessments for such State funds or programs shall be computed or levied on companies for or on account of any premiums payable on policies of Multiple Peril Crop Insurance reinsured by the Corporation.
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> (b) No policy of insurance reinsured by the Corporation and no claim, settlement, or adjustment action with respect to any such policy shall provide a basis for a claim of damages against the Company issuing such policy, other than damages to which the Corporation would be liable under federal law if the Corporation had issued the policy of insurance under its direct writing program, unless the claimant establishes in a court of competent jurisdiction, or to the satisfaction of the Corporation in the event of a settlement, that such damages were caused by the culpable failure of the Company to substantially comply with the Corporation's procedures or instructions in the handling of the claim or in servicing the insured' policy, or unless the Company or its agents were acting outside the scope of their authority (apparent or implied) in performing or omitting the actions claimed as a basis for the damage action.

12. Regulations also provide:

Subpart P–Preemption of State Laws and Regulations

Title 7, CFR, Sec. 400.351 **Basis and applicability.**

The regulations contained in this subpart are issued pursuant to the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq*.) (the Act), to prescribe the procedures for federal preemption of State laws and regulations not consistent with the purpose, intent, or authority of the Act. These regulations are applicable to all policies of insurance, insured or reinsured by the Corporation, contracts, agreements, or actions authorized by the Act and entered into or issued by FCIC.

Title 7, CFR, Sec. 400.352 **State and local laws and regulations preempted.**

(a) No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.

b) The following is a non-inclusive list of examples of actions that State or local governmental entities or non-governmental entities are specifically prohibited from taking against the Corporation or any party that is acting pursuant to this part. Such entities may not:

1. Impose or enforce liens, garnishments, or other similar actions against proceeds obtained, or payments issued in accordance with the Federal Crop Insurance Act, these regulations, or contracts or agreements entered into pursuant to these regulations;
2. Tax premiums associated with policies issued hereunder;
3. Exercise approval authority over policies issued;
4. Levy fines, judgments, punitive damages, compensatory damages, or judgments for attorney fees or other costs against companies, employees of companies including agents and loss adjusters, or federal employees arising out of actions or inactions on the part of such individuals and entities authorized or required under the Federal Crop Insurance Act or by regulations, or procedures issued by the Corporation (nothing herein is intended to preclude any action on the part of any authorized entity concerning any actions or inactions on the part of the agent, company or employee of any company whose action or inaction is not authorized or required under the Federal Crop Insurance Act, the regulations, any contract or agreement authorized by the Federal Crop Insurance Act or by regulations or procedures issued by the Corporation); or
5. Assess any tax, fee, or amount for the funding or maintenance of any State or local insolvency pool or other similar fund.

> The preceding list does not limit the scope or meaning of paragraph (a) of this section.

13. The limitations set out in § 400.352 are incorporated into the MPCI by the opening paragraph of the MPCI and as to punitive damages by Paragraph 20. The MPCI governs the relationship between RHIS and Etheridge and sets the limits for recovery should the insured, Etheridge, sue the reinsurer. (AF 3, 5.)

14. MGR-93-020 provides that under the bulletin "FCIC may provide financial assistance in certain cases for reasonable attorney fees and litigation expenses, and may pay approved judgments over and above the indemnity due as provided by the SRA." MGR-93-020 provides criteria which cases submitted for consideration under the bulletin must meet: (1) [t]he litigation must involve an attack on FCIC-approved program procedures, regulations and/or crop policies; and (2) [t]he litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program. The bulletin provides no additional criteria or explanation regarding approval and payment of judgments over and above the indemnity due as provided by the SRA. By its terms, MGR-93-020 "does not amend any provisions" of the SRA. (SAF 2605-06.) It defines neither the phrase "over and above" nor does it define the word "indemnity." It is a pronouncement by FCIC. It is neither a contract provision nor a regulation or equivalent.

15. The Rain and Hail official responsible for claims and litigation testified that he was not aware of any published criteria other than the wording in MGR-93-020 outlining when FCIC will pay approved judgments over and above the indemnity due as provided in the SRA (Transcript (Tr.) 169).

16. FCIC's witness, E. Heyward Baker, testified that FCIC internally interpreted MGR-93-020 as providing for payments over and above the indemnity according to the follow the fortunes doctrine and only "up to the liability of the policy, the policy limits" (Tr. 54-55, 74-75).[2] He provided no context as to when, how or by whom this interpretation was formulated. On cross-examination, he was questioned about the drafting of MGR-93-020. In response, he testified that he "would imagine" that there had been internal discussion over the provision regarding the

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[2] Appellant filed a Motion in Limine immediately prior to the hearing. The second count of the Motion sought to limit FCIC testimony on certain subjects to the content of its answers to Interrogatories on such subject matter. Of relevance here, Appellant's Interrogatory No. 16 had asked whether FCIC had "issued" an interpretation of the language contained in MGR-93-020 and, if so, Appellant was asked to provide answers to additional questions relating to the interpretations. FCIC's response was negative. The Presiding Judge ruled orally at the start of the hearing that the Interrogatory pertained only to "issued" interpretations and thus did not bar testimony of internal or case-by-case basis interpretations on the ground that they were not issued. (Tr. 11.) Appellant objected to this ruling and all testimony regarding FCIC interpretations of MGR-93-020.

language about .the approval of judgments over and above that authorized by the SRA but he did not recall the nature of any such discussions. He did not know the intent of the manager who issued that bulletin in 1993. (Tr. 95-96.)

DISCUSSION

Contentions of the Parties

Originally, Appellant put FCIC on notice of its intent to treat the judgment as ultimate net loss. Appellant now also contends that it is entitled to payment for the Etheridge judgment over and above its entitlement to reinsurance under the SRA pursuant to MGR-93-020. Immediately prior to the hearing, Appellant filed a Motion in Limine in part seeking a ruling that the Board's findings of fact and conclusions of law could not be relitigated based on the doctrines of administrative estoppel, collateral estoppel and/or issue preclusion. The Presiding Judge's oral ruling denied that part of Appellant's Motion opting instead for a more complete record to assist the Board's understanding of the facts of this case and the business atmosphere in which the parties operate.

Alternatively, Appellant claims that it is entitled to be indemnified under Section 1508(j)(3) of the Act. Regarding the alternate argument, Appellant agrees that the Board has not made a determination whether it has jurisdiction to decide claims under the Act and concedes that the Board would have to make a jurisdictional finding before considering that alternate claim of entitlement. Appellant also contends that the Board need not reach the jurisdictional issue should it find entitlement under the SRA and/or MGR-93-020. FCIC objects to Appellant's failure to raise this jurisdictional issue when the appeal was filed.

FCIC defends against the claim under MGR-93-020 by focusing on the prohibition against inclusion of punitive and compensatory damages in the compilation of ultimate net loss. FCIC argues that because the bulletin affirmatively states that it does not amend the provisions of the SRA and because the SRA prohibits inclusion of punitive or consequential damages in the calculation of ultimate net loss, interpreting MGR-93-020 to require reimbursement for the compensatory and punitive damages award would amend the SRA by removing the exclusion.

Ultimate Net Loss

Appellant has not formally withdrawn its argument that it is entitled to treat the entire judgment as ultimate net loss. However, Appellant does not continue to press that argument in its briefs, perhaps having concluded that it cannot make a cogent case for claiming the SRA can be interpreted in such a way as to include punitive and compensatory damages in ultimate net loss. We have reached the conclusion that neither punitive, nor compensatory damages, nor mental anguish damages are available as part of ultimate net loss. We find that the definition of ultimate net loss in the SRA unambiguously excludes such damages from any calculation of ultimate net loss (Findings of Fact (FF) 8). Appellant clearly may not recover under that theory.

MGR-93-020

The Board has interpreted MGR-93-020 as containing no impediment to its jurisdiction over disputes relating to FCIC bulletins or directives affecting, interpreting, explaining or restricting an SRA. In an earlier decision, we found that the MGR-93-020 provided an incentive for a reinsured company to participate in certain litigation because of the possibility of recouping expenses in excess of those included in the 31 percent of net book value of premiums payable under the SRA as an expense reimbursement. Thus, MGR-93-020's provision of criteria and procedure for separate payment for such expenses caused it to have an "effect" on the evaluation of litigation brought under the SRA and any decision whether to become involved in the litigation. Similarly, the bulletin expanded FCIC's liability for litigation expense and conferred rights on reinsured companies once it was issued and such companies began to base litigation decisions on it. Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111. Thus, we have jurisdiction to consider an appeal arising out of MGR-93-020. In fact, we have already decided another appeal arising out of the same factual circumstances as the instant case. Rain & Hail Insurance Service, Inc. (Robert W. Etheridge), AGBCA No. 1999-194-F. That appeal, like Rain & Hail, 97-2 BCA ¶ 29,111, involved the question of payability of financial assistance for litigation expenses.

The appeal now before us pertains to the bulletin's parallel provision that FCIC may pay approved judgments over and above the indemnity due as provided by the SRA. Determinations relating to the payment of approved judgments are subject to conformity to the same criteria as litigation expenses. (FF 14).

Appellant claims entitlement to payment of the entire judgment levied against it in the Etheridge litigation in state court in Alabama. That judgment totaled $604,000, consisting of $14,000 in compensatory damages, $500,000 in punitive damages and $90,000 for pain and suffering. (FF 2.) In so doing, Appellant emphasizes that the bulletin provides for payments "over and above the indemnity as provided by the SRA." (Appellant's Brief, p. 9.) While conceding that it has authority to provide benefits in addition to those provided in the SRA, FCIC argues that compensatory or punitive damages cannot be provided. FCIC relies on the express SRA prohibition against including them in ultimate net loss and on the MGR-93-020 statement that it does not amend the SRA. FCIC provided testimony that it had internally interpreted the language in MGR-93-020 as providing for payment of judgments only to the extent that those judgments were within policy limits (FF 16). The failure to provide context evidence of the interpretation as well as the lack of any pre-dispute communication of the interpretation to the industry diminishes its evidentiary value. We do not find that interpretation binding on either Appellant or this Board. Moreover, we are not persuaded by its logic. Clearly, in issuing MGR-93-020, FCIC intended to offer the possibility that a reinsured company which defended against lawsuits meeting stated criteria might be rewarded by being repaid for a resulting adverse judgment. The bulletin's use of the language "pay approved judgments over and above the indemnity due as provided by the SRA," anticipates the possibility of payments of something more than would be attainable under the SRA in the absence of the bulletin. FCIC's arguments have attempted to use the phrase "as provided by the SRA" to limit payments to those provided by its terms. We do not find that suggested interpretation reasonable or persuasive. In asserting that limitation on the interpretation of the bulletin language, FCIC did not describe the circumstances under which a judgment "over and above the indemnity due as provided by the SRA" would be payable pursuant to its interpretation or its purpose in including the language which it contends offers nothing other than what is already payable under the SRA. We do not agree that the

language is reasonably interpreted to mean that only indemnities as provided by the SRA can be paid. Instead, we interpret the phrase "over and above" to provide for possible payment in excess of what is provided for in the SRA. We have considered FCIC's arguments that the term indemnity, as used in the SRA, refers only to payments between a reinsured company and its insureds. However, we do not find that contention a bar to interpreting the language of the bulletin according to its plain meaning, i. e., that a payment above that payable under the SRA is authorized if the criteria specified in the bulletin are met. The bulletin provided for payments of approved judgments subject to the same criteria as for payments of litigation expenses. We have already held that those criteria have been met. Rain & Hail (Etheridge). With one exception, we find nothing to distinguish the claim for payment of the judgment from the claim for payment of litigation expense.

That exception, however, is significant. We conclude that we must interpret the bulletin in light of the regulatory prohibition against imposition of punitive and compensatory damages against the Government and the provisions of the MPCI's limitation on an insured's recovery excluding punitive and compensatory damages. As the Court of Claims stated in Macke Co. v. United States, 199 Ct. Cl. 522, 467 F. 2d 1323 (1972), at 556, a case involving contract interpretation. In this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later of what the contract imported." In judging the meaning of words in a contract, the context and intention of the parties are more helpful than dictionary definitions. Rice v. United States, 192 Ct. Cl. 903, 908, 428 F.2d 1311, 1314 (1970). See Corman v. United States, 26 Ct. Cl. 1011 (1992).

When we view this dispute in the context of surrounding circumstances, we conclude that the bulletin did not include coverage of punitive and compensatory damages, elements for which both the FCIC and the company assumed they were insulated from liability. Thus, while we find that the bulletin's allowance for payment of litigation expense and approved judgments are subject to the same threshold criteria, we must look further at any judgments to ascertain whether they contain elements not within the contemplation of the drafters of the bulletin and of the parties as they conducted business pursuant thereto. We find that the parties did not contemplate that punitive and compensatory damages would be included.

Without question, the regulations prohibit recovery of punitive and compensatory damages against a reinsured company for actions taken by that party in accordance with FCIC procedure. The regulations are incorporated by reference into the MPCI between Appellant and its insured, Etheridge. (FF 10-13.) The regulations are clear that a state or other governmental body, including a court, is precluded from assessing punitive or compensatory damages against a company arising out of actions or inactions which are authorized or required under the FCIA, under regulations, under the contract authorized by FCIA, or under regulations or procedures of the FCIC. The regulation goes on to make an exception from the above for actions not so authorized or required. Appellant and FCIC shared this understanding. Appellant made this argument to the Alabama court (FF 3).

Thus, at the time the bulletin was issued, Appellant was protected by regulation from exposure to punitive or compensatory damages where it followed FCIC procedure. The parties, therefore, did not contemplate risk of such recovery by an insured. To find that the bulletin's "approved

judgments" provision covered such damages would require us to find that FCIC set up a provision for the possible payment of damages which were, by regulation, specifically excluded from being imposed on either FCIC or a company reinsured by it. It is not logical to conclude that FCIC would offer to pay damages which were not a potential liability.

We cannot conclude that Appellant viewed this matter any differently. In fact, its actions during the pendency of the Alabama litigation and thereafter, when it sought FCIC assistance, show that it was aware of the regulation and that it operated on the assumption that it would not be subject to punitive or compensatory damages so long as it conducted business within the scope of FCIC requirements. Appellant's contemporaneous conduct and communication was consistent with this understanding. (FF 3, 6.)

Sustaining this appeal would mean that the Board gives MGR-93-020 a meaning that clearly was not the intent of FCIC, was contrary to the Appellant's expressed understanding of its rights and obligations and was in conflict with the entire statutory and regulatory scheme underlying the parties' agreements. In so concluding, we are aware that our decision results in one party bearing the entire burden of a loss that both parties were by law and contract exempt from bearing. It is not a decision that we find appealing from the standpoint of equity.

Our previous decision in Rain & Hail Insurance Service, Inc. (Robert W. Etheridge), AGBCA No. 1999-194-F, 02-2 BCA ¶ 31,871, acknowledges our view that FCIC actions in its review of the Alabama litigation and consequent refusal to provide litigation support were unreasonable in light of the facts and circumstances there. If FCIC did not then see that the plaintiff's ultimately successful legal strategy was to provide an inaccurate and confusing description of the process by which MPCI policies, sold by Appellant and reinsured by FCIC, were marketed and underwritten, then FCIC was not reading the pleadings, correspondence and transcripts furnished to it by Appellant as required. At the very least, FCIC could have provided a headquarters level witness at the trial level and/or filed an amicus curiae brief at the appellate stage. The former might have insured FCIC understood the state court litigation. The latter might have made a difference in the Supreme Court's analysis of the appeal. Nonetheless, our analysis must be a legal, and not an equitable one, and we therefore conclude that Appellant is not entitled to recovery under MGR-93-020.

7 U.S.C. § 1508(j)(3)

It is unnecessary for us to address the jurisdictional issue Appellant raises as well as the merits of its argument as to 7 U.S.C. § 1508(j)(3). Section 1508(j)(3) of the Act was not in existence during the 1994 reinsurance year. The 1994 reinsurance year was from July 1, 1993, through June 30, 1994. Section 1508(j)(3) was not enacted until October 13, 1994, which makes it effective for the 1995 reinsurance year (FF 7). For the reinsurance year 1994, Section 507 deals with indemnification. It states that "The Board shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation errors or omissions on the part of the Corporation or its contractors for which the agent is sued or held liable, except to the extent the agent or broker caused the error or omission." RHIS is not an agent or broker. It is of note that if one looks at the enactment of Section 1508(j)(3) of the Act, in light of

the existing 507(c), which addressed brokers and agents, it is logical to conclude that 1508(j)(3) was adding something that 507(c) did not already cover. Otherwise, if 507(c) covered reinsurers, then 1508(j)(3) would have been unnecessary. As pointed out by FCIC, that would violate basic statutory construction, Freytag v. C.I.R., 501 U.S. 868 (1991); United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994). Because this provision was inapplicable to the SRA in question, we have no reason to address its merits or decide on jurisdiction to do so.

Comments on the Separate Opinion of Judge Vergilio

Judge Vergilio's separate opinion reargues, here more stridently, the position he expressed in his dissent in the previous Rain & Hail (Etheridge) appeal regarding Appellant's entitlement to litigation support. His first disagreement is with the Board's 1997 assumption of jurisdiction in cases arising under MGR-93-020 and its predecessor, a matter we consider well settled.

In response to his sharp criticism of our comments on FCIC's failure to provide litigation support, we believe that the facts speak for themselves.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

Administrative Judge VERGILIO, concurring in part, dissenting in part.

As explained in the following paragraphs, I concur with the majority decision to deny the aspect of the claim in AGBCA No. 2001-135-F seeking relief under the theory of ultimate net loss under the Standard Reinsurance Agreement (SRA). The remaining claims in the two docketed appeals should be dismissed for lack of jurisdiction.

AGBCA No. 2001-127-F

The appeal docketed as AGBCA No. 2001-127-F should be dismissed for lack of jurisdiction, and the Government's motion for such a dismissal, dated March 15, 2001, granted. By letter dated

November 22, 2000, the insurance company filed the appeal (seeking relief under the SRA under the single theory of ultimate net loss) without having previously sought or obtained a final administrative decision from the Director of Insurance Services. The insurance company sought such a determination by a letter with the same date as the notice of appeal to this Board. Without an appealable final administrative determination (or a deemed denial which did not here occur because of the passage of time), the insurance company could not properly come before the Board. 7 CFR 400.169 (1999) (the change in regulation, effective January 25, 2000, summarized as being applicable for the 1997 and subsequent reinsurance years, does not enhance the position of the insurance company. 65 Fed. Reg. 3781-82 (2000)); Rural Community Insurance Services, AGBCA No. 98-173-F, 99-1 BCA ¶ 30,144.

AGBCA No. 2001-135-F

The appeal docketed as AGBCA No. 2001-135-F should be denied, in part, and dismissed for lack of jurisdiction, in part.

Standard Reinsurance Agreement

Under the terms of the applicable SRA, the insurance company seeks reimbursement as an ultimate net loss for the compensatory, punitive, and mental anguish damages assessed by a state court. Prior to filing this docketed matter, the insurance company obtained the required final administrative determination, such that this Board has authority over this dispute. The SRA definition of "ultimate net loss" states: "Under no circumstances are any punitive or consequential damages included in the calculation of ultimate net loss" (Appeal File, Exhibit C at 52 (¶ I.AC)). The insurance company has not identified a provision in the SRA which would obligate the Government to reimburse the requested amounts. Under this theory of relief, the insurance company lacks entitlement. I deny this aspect of the appeal, brought pursuant to 7 CFR 400.169(d).

Manager's bulletin and statute

The insurance company also seeks reimbursement of the assessed damages under a manager's bulletin, MGR 93-020, and under statute, 7 U.S.C. § 1508(j)(3) (1994). Because the insurance company did not initially seek reimbursement from the Government under these theories, and therefore did not follow the procedures prescribed to bring a matter to this Board, 7 CFR 400.169(a), the Board lacks jurisdiction to reach the merits of the issues. However, because the Director of Insurance Services addressed and denied these matters and the majority resolves these matters, further comment here is provided.

Manager's bulletin

Notwithstanding decisions by this Board, Rain & Hail Insurance Service, Inc., AGBCA No. 1999-194-F, 01-1BCA ¶ 31,297, 02-2 BCA ¶ 31,871, this Board lacks authority to direct relief under MGR 93-020, as expressed in the dissenting opinion in those matters. Any such relief would arise

under that bulletin and not under the terms and conditions of the SRA. Further, the bulletin specifies: "FCIC may provide financial assistance in certain cases for reasonable attorney fees and litigation expenses, and may pay approved judgments over and above the indemnity due as provided by the SRA" and "FCIC will make the final determination regarding amount of settlements, paying of judgments, the awarding of attorney's fees and other court costs only after the court has rendered a decision or a formal settlement agreement has been presented by the parties involved." The Risk Management Agency (RMA), not the Board, has the authority to grant or withhold relief under the bulletin and regulation, 7 CFR 400.169(c). Relief is not guaranteed; the Government is to exercise discretion over the question of providing financial litigation assistance. A review of the Government's determination compels the conclusion that the Government reasonably exercised its discretion in denying assistance by concluding that the underlying damages were assessed because of actions or inactions of the insurance company, without the fault or negligence or impropriety of the Government.

The fully developed record in this matter does not demonstrate any Government error, fault, or cause involved in the misrepresentations to the insured for which the insurance company was assessed damages. The submissions by the insurance company and Government highlight the unsupported nature of the conclusion that the Government, which was not a party to the state action, is implicated by the assessment of damages. In support of its assertion that the underlying misrepresentation supporting the imposition of damages occurred on Government forms, the insurance company states in its initial claim letter dated June 29, 2000, to the Government:

> Rain and Hail moved for judgment notwithstanding the verdict. The trial court denied Rain and Hail's motion finding, in pertinent part:
>
> > With regard to the reprehensibility of the defendants' conduct, evidence was presented at trial that the insurance forms filled out and provided to the plaintiff by CIGNA and Rain & Hail repeatedly misrepresented the coverage for which the plaintiff agreed to and did pay thousands of dollars in premiums. These misrepresentations occurred in the various copies of the 1994 Summary of Coverage provided to the plaintiff, the 1994 Acreage Report provided to the plaintiff, and the 1994 crop insurance proposal provided to the plaintiff.

(Exhibit E at 5.) In further support, the insurance company references arguments by the insured's attorney in response to an appeal:

> With regard to which of the defendants made the misrepresentations to Etheridge regarding the insurance guarantees, it should be noted that the representations with regard to separate guarantees, etc., for each of the two farms made on the forms discussed previously herein, with the exception of the Grimmett letters and possibly the hail insurance invoice, were made by Rain & Hail, as agent for CIGNA. The summaries of coverage were filled out on Rain and Hail's computer and sent to Etheridge. The insurance quote, previously set forth herein, was filled out by Rain

> & Hail. Grimmett was not the one running Rain & Hail's computer system. Malcom, who was the Vice President of Rain & Hail, admitted in his testimony that every single form run on Rain & Hail's computer and sent to Etheridge, listed the following items separately for each of the two farms: acre guarantee, average yield, acreage, planting date, total guarantee, liability, risk areas, premium rates, premiums. . . .
>
> Thus, while plaintiff contended that Grimmett made misrepresentations, plaintiff also contended and provided that Rain & Hail, who was an agent of CIGNA, also provided documents to Etheridge misrepresenting his coverage. These were relied upon by Etheridge in purchasing and paying for the coverage. Bob Etheridge testified that if he had understood when he bought this coverage and committed himself to pay the premiums on the coverage, that the farms were going to be combined to see if the guarantee production was made, he would not have bought the coverage. Etheridge paid the premiums on the basis of the coverage represented to him. Payment of premiums was made based on the written documents he had been supplied with.

(Exhibit E at 5-6 (citations omitted).) The insurance companies, not the Government, were defendants in the litigated matter.

In a letter dated October 13, 2000, the Government responded to the request of the insurance company for payment. The well-supported letter states, in pertinent part:

> Your basis for concluding that the punitive and compensatory damage award by the court should be included under UNL [ultimate net loss] is that FCIC made errors and omissions with respect to the forms. However, as discussed above, you have never demonstrated how a blank form approved by FCIC misled the producer.
>
> RHIS filled in a blank form with information that contained separate lines for farm serial numbers 2325 and 2372, with separate guarantees and premiums for each. It was this manner in filling out the forms that misled the producer [i]nto believing that these were two separate units, not the blank forms themselves. Especially, since this manner of filling out the forms is contrary to FCIC procedure, which states that acreage and yields should be reported <u>by unit</u>. Under the procedures, the only instance where separate lines can be used on the acreage report for the same unit is when production has been reported separately by practice, type or variety that requires separate yields. In this case, the producer had the same practice and crop type for both farm serial numbers 2325 and 2372. Therefore, it was RHIS that was in error and misled the producer, not FCIC.

(Exhibit F at 2). Reviewing the record, one cannot reasonably conclude that the Government was a direct or indirect cause of the misrepresentations for which the insurance company was assessed damages.

As applied to the facts here, the Government's proffered interpretation of its limitation in reimbursing awards of compensatory and punitive damages is fully consistent with that revealed in the process of revising MGR 93-020. In a letter dated December 17, 1997, to an insurance company, while the Government was formulating a new financial litigation assistance bulletin, MGR 98-031, which rescinded MGR 93-020, the RMA stated, "RMA cannot legally provide reinsured companies indemnification of extra-contractual damages such as punitive or compensatory damages. This is prohibited by the Federal Crop Insurance Act, the Standard Reinsurance Agreement, the regulation." (Exhibit R.)

The bulletin provides that FCIC "may," not must, "pay approved judgments over and above the indemnity due as provided by the SRA." The Government has properly and reasonably concluded that it will not indemnify this insurance company for the costs in question. It would be unreasonable to compensate an insurance company for damages arising, not from misrepresentations by the Government, but from misrepresentations by the insurance company or one of its agents.

The insurance company also maintains that its claim for relief is contractual in nature, as it attempts to enforce an offer (said to exist in the manager's bulletin) by the FCIC to pay "approved judgments" (Appellants' Reply Brief at 10). The bulletin is not a contract and, by its very terms, does not amend the SRA. FCIC received no consideration when issuing the bulletin. Further, contrary to the views of the insurance company and others, the bulletin does not state that the Government must pay an "approved judgment." As previously noted, payment under the bulletin is discretionary not mandatory. The Government is not obligated under the bulletin to provide financial litigation assistance. Hence, there can be no reasonable reliance on the bulletin that any or all costs incurred or assessed will be reimbursed by the Government. Here, the Government appropriately denied the requested reimbursement.

Statute

In claiming entitlement to relief, the insurance company also relies upon statute, 7 U.S.C. § 1508(j)(3) (1994). This provision states that the Government "shall provide approved insurance providers with indemnification, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the [Government]." This provision has an effective date for insurance policies for the insurance year after that here at issue; therefore, this provision does not apply to this matter. The insurance company has not referenced a parallel statute applicable to the year in question, and has not demonstrated that an error or

omission by the Government occurred which would permit relief.[1] The statute does not provide a basis for relief through the SRA.[2]

The majority

I am at a loss to reconcile findings of facts and conclusions of the majority, both with the findings themselves and the conclusions in the state court action. In quoting from the state court denial of the insurance company request for judgment notwithstanding the verdict, the majority recognizes that the insurance company filled out and provided the insurance forms to the insured (Finding of Fact 2). The majority thereafter states that it rests its conclusion on the state court finding that the agent exonerated in the state court proceedings was the only person who dealt directly with the insured (Finding of Fact 4). From the first cited finding, one should conclude that the insured dealt directly with the insurance company, which had filled out the forms so as to constitute misrepresentation of the policy promised by the exonerated agent.

The analysis by the majority rests upon the faulty (arbitrary and capricious) conclusion that the state court imposed damages against the insurance company in contravention of regulation. The imposition of damages against the insurance company is fully in keeping with the law. Regulation, 7 CFR 400.352, permits a state court to impose punitive and compensatory damages in the event that insurance company actions are not authorized or required by the Federal Crop Insurance Act. The state court initially imposed such damages, which were upheld on appeal; the insurance company had made the courts aware of the regulation. The imposition of the damages supports the conclusion that the insurance company acted contrary to the Act. For the assessment of damages arising from improper actions of an insurance company, I would not mandate that the Government reimburse the insurance company; similarly, I would not have required the Government to reimburse the insurance

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[1] The insurance company contends that because the SRA specifies that the Federal Crop Insurance Act (FCIA) "as amended" is applicable, any amendments to the statute post-dating the SRA became applicable. This view is contrary to precepts of interpretation, given that the statute is specific in terms of its effective date and application.

[2] Akin to its reliance on an inapplicable statute, the insurance company propounds an unsupported view and interpretation of liability in the Government's crop insurance program. For example, the insurance company asserts in the complaint:

> The 1994 SRA and the FCIA required the FCIC to reimburse Rain and Hail for all losses and expenses it occurred in delivering the federal crop insurance program to producers including, but not limited to, all losses, judgments, and damages awarded to producers, attorney fees, and other costs incurred in defending the federal crop insurance program.

(Exhibit Q at 152 (¶ 11)). With this unrealistic interpretation of the obligations of the Government underlying the insurance company's position, this case has consumed much time and money to the detriment of deserving parties and issues.

company for its attorney fees incurred in defending its improper actions against an insured. Thus, while I agree that the Government never contemplated reimbursing an insurance company for damages imposed because of insurance company error, the imposition of such damages by a state court is not contrary to regulation or outside the contemplation of the parties, as the majority suggests. The majority-alleged insurance company insulation from liability for punitive and compensatory damages does not exist.

The majority's willingness to wreak havoc with the federal crop insurance program and overstep the authority of this Board should be apparent in the majority's unwarranted criticism of the FCIC's actions with regard to the state court proceedings and the majority's conclusion that the Government acted unreasonably in not providing litigation support. This Board is not called upon to second guess the actions of the FCIC regarding litigation assistance. The underlying manager's bulletin places within the FCIC the authority to make determinations regarding financial litigation assistance; such determination are reviewable by the RMA. This Board has no role in that litigation assistance process. The equities do not rest here with the insurance company.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
June 25, 2003