RAIN AND HAIL INSURANCE SERVICE, INC. (Robert W. Etheridge),	)	**AGBCA No. 1999-194-F**
Appellant	)	
Representing the Appellant:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS [1]

May 2, 2002

Before POLLACK, VERGILIO and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate Dissenting Opinion by Administrative Judge VERGILIO.

[1] The panel has changed from the interlocutory decision, Rain & Hail Insurance Service, Inc., AGBCA No. 99-194-F, 01-1 BCA & 31,297, due to the retirement of Administrative Judge Houry.

This appeal arises 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). [2] Cigna and RHIS are here referred to collectively as Appellant. Under the SRA, which recites that it is a Acooperative 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 also pertains to FCIC Manager=s Bulletin MGR 93-020, which authorizes the recoupment of litigation expenses in excess of those otherwise payable under the SRA under certain circumstances. In this appeal, Appellant seeks such costs in an amount no less than $76,925.97 for defending litigation initiated by an insured in state court in Alabama. FCIC denied payment on the ground that the conditions set forth in MGR 93-020 had not been met. This appeal received at the Board September 3, 1999, ensued. Thereafter, FCIC filed a Motion for Summary Judgment which the Board denied.

The Board has jurisdiction to decide the appeal under 7 CFR ' ' 24.4(b) and 400.169(a), (c) and (d). In Rain & Hail Insurance Services, Inc., AGBCA No. 97-143-F, 97-2 BCA & 29,111, this Board held that MGR 93-020 affected the SRA and therefore the Board has jurisdiction over disputes relating to the SRA and MGR 93-020.

FINDINGS OF FACT

1. Manager=s Bulletin MGR 93-020 establishes criteria for providing financial assistance for certain litigation expenses and outlines procedures for requesting financial assistance for litigation expenses. The criteria established are (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. A request for assistance must be accompanied by (1) a copy of pleadings; (2) a litigation report summarizing events to date; (3) a statement describing how FCIC=s program procedures,

[2] The SRA is captioned ACigna Property and Casualty Insurance Company@ and ARain and Hail Insurance Service, Inc.@ (AF 1). The parties entered into a 1994 SRA (Complaint, Answer & 6). Pursuant to a plan of reorganization approved and adopted by the shareholders of RHIS, Rain and Hail Limited Liability Company (RHLLC) replaced RHIS 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).

regulations and/or policies are being attacked; (4) a statement of legal issues detrimental to the crop insurance program; (5) a statement addressing FCIC=s exposure to financial loss, and the probability of plaintiff=s winning the case; and, (6) any additional information needed by FCIC in reviewing the case for financial assistance. FCIC makes final determinations regarding financial assistance only after a court has rendered a decision or a formal settlement agreement. (Appeal File (AF) 45-46.)

2. The action for which litigation expense is here sought was initiated July 28, 1995. Robert W. Etheridge and Deborah D. Etheridge filed suit against Cigna, Grimmett Insurance Agency, Frank Grimmett d/b/a Grimmett Insurance Agency, and Frank Grimmett. Fictitious defendants were also listed to represent corporations, partnerships or individuals unknown to the plaintiffs. (AF 94-104.) An amended complaint was subsequently filed (AF 136). A later amendment added RHIS as a defendant (AF 1685-95). The insured sued Appellant and the other defendants on the ground that they wrongfully denied payment on a claim for loss on the insured=s cotton crop. Appellant denied payment on the ground that no insurable loss occurred when 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 first, third and fourth causes of action of the Amended Complaint alleged that Cigna through its agents represented to plaintiffs that they would be entitled to benefits for a crop loss on a field-by-field or farm-by-farm basis as identified by the ASCS office in the county. These counts provided no details regarding the time, place, method or manner of these alleged representations. Further, they provided no information as to whether affirmative actions of Cigna or any of Cigna=s agents were the cause of the alleged representations.

3. By letter dated August 18, 1995 Appellant furnished FCIC a copy of the complaint and requested relief and support under MGR 93-020. No responsive pleading had then been filed. Appellant informed FCIC at that time that the case revolved around the issue of units. The letter stated that a successful result for the plaintiff in the litigation would place in jeopardy Athe concept and procedural aspect of the policy=s definition of unit structure.@ The letter continued stating that as units are one of the fundamental building blocks of a sound, actuarially based crop insurance program, any and all attacks upon this part of the policy required a vigorous defense. (AF 108.) FCIC responded September 29, 1995 listing the documentation needed to make a decision whether to accept the case under MGR 93-020. The letter provided no response one way or the other to Appellant=s description of the case as revolving around units. (AF 120.) Appellant transmitted a litigation report October 9, 1995 and informed FCIC that it had not yet received a copy of the response. Other items requested by FCIC=s September 29 letter were said to have been furnished with the August 18, 1995 letter from Appellant. The only remaining item of correspondence, a letter appointing local counsel was also enclosed. (AF 122.)

4. The litigation for which Appellant seeks assistance was initiated by a cotton farmer, Robert W. Etheridge (Etheridge). Etheridge began farming Agricultural Stabilization and Conservation Service (ASCS) farm serial number 2325 (farm 2325) and first purchased the MPCI for the 1989 crop year. At that time, he purchased the MPCI through the Pruett Insurance Agency (Pruett Agency). His direct contacts then were with Eddie Pruett (Pruett) or employees in Pruett=s office. (AF 346.)

5. In 1989, the insurance covered a Afarm unit@ then defined in the MPCI Special Provision for cotton as all insurable acreage of cotton in the county (AF 2114, 2123-24). Beginning in 1990 the special provisions for cotton were changed to define a farm unit for cotton in one of two ways, as a basic unit or an optional unit. A basic unit included all insurable acres of cotton in the county. The optional unit definition allowed a basic unit to be divided into more than one optional unit if the insured had maintained records of planted acreage and harvested production in the optional units for at least a year. (AF 56.) Pruett Agency=s records indicate that the 1990 changes in the special provisions were sent to Etheridge on March 7, 1990 (AF 522).

6. Sometime between December 1993 and February 1994 Etheridge changed insurance agents (AF 76). In December 1993, Pruett completed a handwritten MPCI Application and Production History form signed by the insured for the 1994 insurance year. The Application and Production History form provided separate production history for farms 2325 and 2372. However, the unit descriptions above farm 2325 was filled in with a A1.00" and the unit description above farm 2372 was left blank. (AF 74.) The new agent, Frank Grimmett (Grimmett) completed a handwritten MPCI Application and Production History form signed by Etheridge on February 11. This form showed no production history, had both farm numbers entered as well as a A1.00" in the unit description above each farm (AF 75). On February 24, Appellant completed an Actual Production History (APH) form that was the same as the form prepared by Grimmett Agency, except that the form Appellant prepared included the separate production histories for farms 2325 and 2372 (AF 78).

7. On March 3, 1994 Grimmett wrote Etheridge stating, AI am enclosing your copy of Actual Production History. I am also enclosing a printout that gives your coverage, guarantee and premium per acre. I have highlighted the important points. Example: You have unit 100, farm #2325.@ (AF 1594.) On June 17, 1994, Grimmett sent the insured a summary of coverage stating that AThis is your Summary of Coverage. This summary is the most important of any form you will receive for crop insurance. It shows your policy number at the top right corner. It shows your farm number, acre guarantee, number of acres planted on each unit, [.]@ (AF 1601.) The Summary of Coverage[3] listed farms 2325 and 2372 on separate, horizontal lines on the form template, but indicated that they were one farm unit, 1.01, because the 1.01 appeared in the line for each farm. (AF 84.)

8. The Summary of Coverage also showed that the insured obtained insurance coverage for 47.7 acres of ASCS farm serial number 1462 as farm unit 1.03, and 9 acres of farm 1462 as farm unit 1.04. Farm 1462 had been divided into separate farm units, called Aoptional units,@ which were allowed if production was separated, the farm sections were distinct, and an actual production history for each optional unit had been maintained by the insured and provided to the insurance

[3] FCIC states that it has no specific procedures applicable to the Summary of Coverage (FCIC=s Reply to RHIS=s Resistance to FCIC=s Motion for Summary Judgment, page (p.) 3). The Summary of Coverage form has numerous vertical lines that were filled in including Afarm unit,@ AASCS Number,@ ARisk Area,@ ARate,@ and APremium.@ There was one horizontal line each filled out for farms 2325 and 2372, but each line showed the farm unit as 1.01 for both farms. Further, the risk area, rate, and premium entries were each different for farms 2325 and 2372. Thus, the farms appear properly listed on separate lines. They are identified under a single farm unit (unit 1.01) on the Summary of Coverage form.

company. (AF 84.) These facts appear as contrary to the insured=s later assertion that he understood that each farm stood on its own for purposes of insurance coverage.

9. The insured asserted that an insurable loss occurred on farm 2372 for the 1994 cotton crop. However, because farm 2372 was a part of farm unit 1.01, comprised of farms 2372 and 2325, Appellant measured the alleged loss against the production for farm unit 1.01, not farm 2372. Thus, because the loss was measured over the properties, no insurable loss was found to have occurred and the claim was denied. (AF 91-93, 105-06.)

10. Thereafter Etheridge sued, among others, Appellant and Appellant=s agent Grimmett Agency and Grimmett individually. Neither FCIC nor the United States were sued. (AF 94, 136.) Appellant timely informed FCIC of the litigation (AF 106). The complaint alleged that Cigna, acting through agents including RHIS and Grimmett, represented that plaintiffs would be entitled to benefits for a loss to their crops in the county on a field by field or farm by farm basis as identified by the ASCS office of the county; that the denial of the claim was based on a false ground, i.e, that a field or farm must contain all land in a governmental section that was farmed; and that refusal breached the contract. Other counts bad faith, fraud, false representations, reckless disregard for the truth. The insured Ademanded judgment against Defendants for compensatory and punitive damages.@(AF 136-43.) Trial transcript excerpts made a portion of the record indicates that the insured asserted misrepresentation (AF 257-61). The transcript also shows that the insured successfully objected to testimony concerning the origins of the MPCI language, and, indeed, any testimony of the role of FCIC in the MPCI program (AF 273-302).

11. The insured took the position during trial that the insured did not receive a policy from Pruett for 1989 although the Appeal File in this appeal contains documentary evidence that Appellant did receive a policy. Similarly, the insured denied receiving the 1990 MPCI Special Provisions for cotton redefining the farm unit, although again there is evidence before the Board that Appellant did receive those provisions. (AF 258-61, 271, 275-78, 301-04, 307, 313-16, 320-21, 346, 522-26; Appellant=s Resistance to Appellee=s Motion for Summary Judgment, (Exhibit (Ex.) 5, pp. 14-18.)

12. Throughout the course of the litigation, Appellant kept FCIC updated on the case (AF 108, 115-16, 122, 132, 153-55, 158, 159-60, 161-65, 169-70, 173-78, 2599-2601). In one of these letters, dated November 15, 1996, Appellant=s counsel described its view of the litigation as constituting an attack on an FCIC program:

> Plaintiff is challenging the FCIC program and policy as to the definition of unit structures and how the units are assigned. FCIC regulations at the time required that field in the same section of land be assigned to the same unit. Because both of plaintiff=s farms have fields in the same section, they were assigned to the same unit. Plaintiff also challenges the proper procedures to calculate losses on units containing multiple fields. The production from all fields in the unit must be combined to determine the total production.

In addition, the letter described legal issues as including the right of FCIC, CIGNA and Rain and Hail to designate and define terms of the policy, to set the amount of coverage per acre available and the proper method of calculating production and unit assignment. In addition, the letter informed FCIC that the cases presented a challenge to the federal law and regulatory limitations on damages for mental anguish, punitive damages, costs and pre-judgment interest. (AF 154.)

13. The jury found in favor of plaintiff Etheridge and against defendants Cigna and Rain and Hail, assessing the plaintiff=s damages (compensatory damages, $14,000; punitive damages, $500,000 and mental anguish $90,000 against Cigna and Rain and Hail). The jury found in favor of defendant Frank Grimmett. (AF 2411.) The defendants moved for judgment notwithstanding the verdict; the motion was denied. (AF 2421-2428). In the order denying the motion the court held:

> 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.

(AF 213).

14. Appellant appealed the trial court decision. On appeal the insured argued that:

> With regard to which of the defendants made the misrepresentations ...it should be noted that the representation with regard to separate guarantees...for each of the two farms made on the forms...were made by Rain & Hail.... The Vice President of Rain & Hail, admitted in his testimony that every single form...sent to [the insured] 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,... plaintiff also contended and proved that Rain & Hail ...provided documents misrepresenting coverage. [The insured] testified that if he had understood when he bought this coverage...that the farms were going to be combined to see if the guarantee production was made, he would not have bought the coverage.

(Appellant=s Resistance, Ex. 8, pp. 35-36.)

15. Appellant informed FCIC of the jury verdict in a letter dated November 14, 1997. The letter set out the previous request for litigation expense which had not yet been decided by FCIC. It also explained that Appellant=s refusal to pay the claim was in accordance with FCIC=s stated rules, regulations and policies regarding unit structure. The letter outlined both Appellant=s attempts to defend (removal to Federal court where it was remanded to state court and settlement attempts) and the bases of the insured=s actions (assertion that the losses were not excluded by policy language; demand for damages prohibited by FCIC regulations). Appellant informed FCIC of its intent to appeal Athis detrimental precedent made by the jury and endorsed by the Judge.@ (AF 179-82.)

Subsequently, in a telephone conversation, confirmed by letters, Appellant requested that FCIC submit an Amicus Curiae Brief in the appeal to the Supreme Court of Alabama (AF 189, 190). After FCIC replied orally that it was unwilling to submit an Amicus Curiae Brief, Appellant confirmed that refusal by letter dated December 19, 1997. Appellant expressed its belief that such a brief would carry weight with the Alabama Supreme Court and requested to hear the reasons for the refusal. (AF 198.)

16. FCIC denied Appellant=s request for reimbursement of litigation expenses in a letter dated September 25, 1998. Therein FCIC stated:

> An examination of the complaint and order of the court reveals that the insured claims that he did not understand that two of his farms were counted in the same unit for production purposes, and the agent induced him to obtain crop insurance by misleading him to believe that the insurance was on a field-by-field or farm-by-farm basis, as identified by the farm serial numbers.
>
> Therefore the sole issue in this case involves a factual dispute with respect to the conduct of RHIS, not a legal challenge to any program provision. The jury and the court found that RHIS had misrepresented coverage to the insured. As a result, Etheridge was awarded the compensatory and punitive damages sought.

(AF 228-29.)

17. By a letter of November 9, 1998, Appellant requested a director review of its request for reimbursement of litigation expenses (AF 230). Thereafter, on June 11, 1999, the Deputy Administrator, Insurance Services Division, denied the request for reconsideration. In so doing, he stated that the issue involved an allegation of agent error, not a legal challenge to an FCIC approved policy or procedure. He answered Appellant=s claim that the case involved a challenge to FCIC=s regulations regarding the payment of punitive and compensatory damages by pointing out that regulations provide that such damages are not authorized unless the company=s or its agent=s action or inaction are unauthorized. He decided that since the insured alleged Appellant=s agent=s conduct was not authorized and since the jury awarded compensatory and punitive damages, it found the conduct was not authorized. Thus, per the Deputy Administrator, the imposition of such damages was consistent with regulations and the decision would not have a detrimental impact on the crop insurance program. (AF 236-37.)

18. On December 30, 1999, the Alabama Supreme Court affirmed the decision of the trial court without rendering a written decision (Appellant=s Resistance, Ex. 9). Briefs filed in the appeal raise a number of issues relating to the relationship of FCIC to the MPCI and the propriety of actions of the trial court in that regard, e.g., disallowance of certain testimony by an FCIC employee, whether punitive damages should be payable, whether federal law preempts state law, whether a party to a federally reinsured crop insurance contract is entitled to extra-contractual damages. (Appellant=s Resistance, Exs. 5-9.)

19. Neither party has asserted that the insured Etheridge had direct dealings with Appellant. All interaction was with the agent, first Pruett and then Grimmett, and through the submission of the various forms filled out. Generally Appellant was required to use FCIC forms, or forms approved by FCIC, to write MPCI insurance. There is no dispute that the forms used were FCIC forms, or forms that were approved by FCIC. There is also no dispute that the FCIC forms, or forms approved by FCIC, were templates, i.e., blank forms, to be filled in by Appellant or its agent. (AF 752, 831-32.) These forms included APH, Acreage Reports, and Summary of Coverage.

20. FCIC approved guidance for completing the APH form. The 1994 NCIS 760 MANUAL (14th Edition 8/93) RATES AND RULES FOR MPCI at section III, sub-section C, PREPARATION OF THE APH (NCIS 765) FORM - GENERAL INSTRUCTIONS, paragraph 3, provided that ASeparate yield determinations by year are required each year for: a. Each unit.@ (AF 897.) Farm 2325 was comprised of sections 9, 10, and 16, and farm 2372 was comprised of sections 8 and 9 (AF 72). The insured kept his records and planted his fields by farm serial number and both farms had acreage located in section 9 (Appellant=s Resistance, Ex. 5, p. 19). The APH form completed by Appellant in June 1993 for the 1993 insurance showed the yield determinations broken down by farm serial numbers. However, the unit description at the top of the form for both farms was A1.00,@ indicating that the two farms were a part of the same unit (AF 70).

21. FCIC approved guidance for completing the Acreage Report at NCIS 750 APPLICATION AND ACREAGE REPORT (AF 752). Instructions for Column G, relating to AUnit Number,@ provides AMake a separate line entry for each unit....@ Column L, ASCS #, requires that the applicant enter the ASCS Farm Serial Number for the unit. (AF 752.) The latest acreage report in the record was completed on June 9, 1993 (AF 71) too early to have been a factor for the 1994 MPCI policy. In any event, the FCIC approved instructions for the alphabetical column headings on the acreage report do not match with the columns in the acreage report itself (Compare AF 752 to acreage report at AF 71).

DISCUSSION

Criteria

To recover under MGR 93-020, a reinsured company must meet the two criteria set out in the Manager=s Bulletin: that the litigation for which expense reimbursement is sought attacks an FCIC approved program procedure, regulation or crop policy and that probability exists for the setting of legal precedent detrimental to the crop insurance program.

Contentions of the Parties

Appellant contends that the litigation that is the subject of this appeal attacked the forms used by FCIC in the crop insurance program and the procedures developed by FCIC to complete the forms; the method for transmitting and storing the information stored on the forms; and, the preemptive authority of the Federal Crop Insurance Act, 7 U.S.C. ' 1506(1) and of FCIC. Appellant also asserts that the litigation involved the probability of a court ruling setting legal precedent detrimental to the

crop insurance program in that the jury concluded that the forms and reporting procedures misled farmers about the nature and extent of their coverage.

FCIC initially argues that misrepresentation by Appellant and its agent was the sole issue in the state court litigation. In its opening brief FCIC directs attention to statements by the insured and his counsel to that effect (FCIC Brief, p. 11). But later in that brief, FCIC contends that decisions regarding whether litigation is an attack on a policy or procedure rests on more than Ajust@ the opinion of the judge and that the issue of how Appellant filled out the forms tells only half of the story. Rather, argues FCIC, the insured claimed misrepresentation based on a failure to tell the insured that the separate lines on the acreage report and Summary of Coverages needed to be combined to find the totals for the unit. FCIC also asserts that the Board should draw no conclusion from the verdict in favor of the agent, but should rest only on the fact that claims of agent error being made at the trial Appellant, asserts FCIC, could have been found liable for the acts of its agent. (Brief, pp. 12-13.) In its reply brief, FCIC suggests that because the trial judge precluded any testimony or evidence regarding FCIC policy or procedures, Appellant could not have been defending policy or procedure. FCIC repeats its assertion that whether Appellant or its agents made a misrepresentation and whether the information on the forms was misleading were both factual disputes. (Reply Brief, p. 3.)

Issue

The issue is whether Appellant is entitled to recover litigation expenses incurred in the state court litigation under MGR 93-020. Criteria in the bulletin are that the litigation involve both an attack on FCIC-approved procedures, policies and regulations and that the probability exists for a court ruling setting a precedent detrimental to the crop insurance program. The bulletin also provides that FCIC will make a determination regarding the payment of such expense after a court has rendered a decision or after a formal settlement agreement. (Finding of Fact (FF) 1.)

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

FCIC has denied litigation support to Appellant on the grounds that the state court litigation was solely based on misrepresentation. We do not agree. Allegations of misrepresentation were made. However, the state court case, like the many suits by an insured against a reinsured company, such as RHIS, revolved around the MPCI and the rights and obligations of the parties under that agreement. It is undisputed that the provisions of an MPCI policy sold by a reinsured company pursuant to an SRA with FCIC, contains provisions either written or approved by FCIC. Procedures followed by MPCI producers and the reinsured companies are likewise set by FCIC. The overall regulatory scheme under which the parties to the MPCI conduct business is the regulatory scheme of FCIC. Hence, litigation between a producer and a company reinsured by FCIC will often involve interpretation of the MPCI. If such litigation involves an attack on FCIC-approved program procedures, regulations or crop policies, it falls within the criteria for the provision of financial assistance. Not all cases fall within the criteria. A case clearly involving only agent negligence has been held not to comply with the criteria. Rain & Hail Insurance Service, Inc., AGBCA No. 97-157-F, 98-1 BCA & 29,540. Cases which involve only a factual finding such as the cause of a loss did

not. Rain & Hail Insurance Service, Inc. and Rain & Hail L.L.C. (Kates), AGBCA No. 99-122-F, 00-2 BCA & 30,974; Rain & Hail Insurance Service, Inc. (Edith Kelley), AGBCA No. 97-198-F, 99-1 BCA & 30,142. Not all interpretation cases will involve prohibited attacks.

One must look to the specific circumstances of the dispute between the producer and the reinsured company to determine whether the underlying litigation meets the criteria of the bulletin. In this case, if the evidence before us were that the Appellant or any one or more of its agents provided misrepresented assurances or other indications, either verbally or in writing, that the coverage was being provided on a field-by-field or farm-by-farm basis, then the litigation would not meet the criteria set out by MGR 93-020. The record, however, notwithstanding the contrary understanding of the dissent, is to the contrary. There is no evidence that the insurance agent who sold the insured an MPCI policy sometime between December 1993 and February 1994 (well over three years after the regulatory change which provided for provision of coverage on a unit basis took place) made any such overt representations. The only way he could have made a misrepresentation would be by not pointing out or clarifying a form that he deemed to correctly make clear that coverage was being provided on a unit and not a farm-by-farm basis. The jury found in his favor leading to a conclusion that they saw no evidence of any overt or tacit misrepresentation on his part. No other agent or representative of Appellant had any direct dealings with the insured at all either in person or in correspondence. (FF 4, 5, 6.)

The underlying litigation therefore seems to have been about whether Appellant and its agent, taking the MPCI (FF 5) and the relevant forms (FF 6, 19, 20) together were reasonable in concluding that the farm loss had to be read in conjunction with the unit and could not be applied on a single farm basis. That position was consistent with FCIC policy. In the state court litigation, Appellant was compelled to defend that its action was reasonable and in accordance with the terms of both the MPCI which defined its relationship with the insured and the SRA which dictated how it conducted this business under its cooperative agreement with FCIC. Appellant defended the state court litigation by contending that the only reasonable reading of the policy in conjunction with the FCIC-approved form was that the loss had to be applied on the basis of the entire unit. To do so, Appellant attempted to present evidence regarding the entire program and FCIC=s role. This attempt was made difficult by the insured=s theory of the case which was to keep out all evidence of the true nature of the crop insurance program and FCIC=s role in it. We find that the true nature of the state court case was one requiring the interpretation of the policy and the forms together; and hence that the litigation constituted an attack on program procedures, regulations and/or policies and within the criteria of MGR 93-020.

While FCIC contends we should overlook the jury=s verdict in favor of Grimmett and the judge=s refusal to set it aside (FF 13), we are obliged to acknowledge the efficacy of that finding. Caldera v. Northrop Worldwide Aircraft Services, Inc., 192 F.2d 962 (Fed. Cir. 1999). And doing so requires the conclusion that if there were no misrepresentation by the agent, we must determine in what other manner Appellant dealt with the insured. Because Appellant had no direct contact or communication with the insured other than through Grimmett or the FCIC approved forms, if Grimmett is removed as the source of misrepresentation, the forms remain as the only possible vehicle by which Appellant could have been found to have misrepresented the nature of the coverage

to the insured (FF 6, 8, 14). Indeed, as the Board stated in our ruling denying FCIC=s motion for summary judgment, the state court clearly implicated the FCIC forms utilized as the vehicle for Appellant=s misrepresentation (FF 13).

FCIC=s argument that because the trial judge sustained objections to testimony regarding FCIC policies, programs and procedures, Appellant was necessarily not defending them is disingenuous. Attempts by the insured and his counsel, over Appellant=s vigorous objections, to prevent the judge and jury from understanding the true nature, terms and conditions of the MPCI and its relationship to the SRA and to minimize the effect of those terms, conditions and relationships are indeed an attack on those policies, programs and procedures (FF 11). They are an attempt to deny the very applicability to any dispute regarding the MPCI of the FCIC program which subsidizes the insured=s premiums and reinsures the company selling the policies.

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

The second criterion of MGR 93-020 is whether there exists the probability of a court ruling setting a precedent detrimental to the crop insurance program. The litigation here did just that. The Alabama decisions stand for the proposition that the information on FCIC-approved insurance forms amounted to misrepresentation by the insurance company.

MGR 93-020 leaves open the question of when the probability of a detrimental court ruling must be determined. Since the issues can be developed during litigation, or even on appeal, the present terms of MGR 93-020 do not preclude recovery in the present circumstances. In fact, the bulletin provides that FCIC will not make a determination regarding litigation expense reimbursement until there has been a court ruling or settlement agreement. This anticipates that FCIC wishes the flexibility of waiting until all evidence is in and all issues decided before making a decision as to whether the criteria have been met. It also suggests that there may be cases where early examination and evidence may not be sufficient to make such a determination and that later developments may influence or change any early tentative decision. Thus, we find that the probability for the setting of a precedent detrimental to the crop insurance program existed, and that the second criterion was satisfied.

Quantum

Appellant has claimed attorney=s fees of no less than $76,925.97. FCIC has not challenged the accuracy or the reasonableness of this amount. Nonetheless, we find that the record is not adequate for the Board to make a decision on the amount of quantum.

Comments on the Dissent

The dissenting judge disagrees with the 1997 decision of this Board finding we have jurisdiction to decide disputes under MGR 93-020. Rain & Hail Insurance Services, Inc., AGBCA No. 97-143-F, 97-2 BCA & 29,111. There, a prior unanimous panel of this Board held that MGR 93-020

Aaffected@ the SRA and thus disputes under the bulletin are within the Board=s regulatory jurisdiction. Since then, the Board has decided numerous such appeals without objection as to jurisdiction. That the Board has jurisdiction is now embedded within the fabric of our growing body of law in this area. We consider the question of jurisdiction settled.

The dissent also takes the position that we should not grant relief because relief under the bulletin is permissive and not mandatory. The dissent asserts that the decision of FCIC in this matter is not reversible if FCIC=s determination is reasonable. We are mindful of the permissive language. However, here the decision to deny reimbursement was made because FCIC concluded that the case in issue was a challenge to the agent=s actions and refused to acknowledge that the case was about enforcing the standard MPCI policy in light of problems caused by the construction and wording of forms required to be used in the MPCI contract. RHIS had in fact made that focus clear through a number of letters sent to FCIC throughout the proceeding in support of its request for reimbursement. (FF 12.) In this matter, FCIC denied the request because it mischaracterized the focus of the case and ignored the fact that an FCIC-approved program, procedure, regulation and/or crop policy, i.e., the wording of its prescribed forms, was a central focus of this case. That was not a reasonable action and as such this is an appropriate case to grant relief.

The dissent correctly points out that the major differences between that opinion and this pertain to our views of the facts. We have carefully perused the entire record. The crux of our disagreement is that we see the facts of what happened at all relevant times quite diversely. Without belaboring those differences, we will point out in particular that we found not one scrap of evidence from either party to the state court litigation nor one allegation from either party to this appeal, that the insured Awas told@ he would obtain insurance on a farm-by-farm basis. Indeed, we find the entire record to be to the contrary. We find the fact that the jury found for the local agent, the only party with whom the insured dealt, to be support for our view of the facts. The view of the dissent that the state court litigation involves only misrepresentation ignores the totality of the record there and the record before us.

DECISION

The appeal is sustained on the issue of entitlement, and is remanded to the parties for determination of the amount of quantum. In the event the parties are unable to reach an agreement on the amount of litigation expense due, Appellant is to request and FCIC issue a final administrative determination appealable to the Board of Contract Appeals on that issue only.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I dissent from the decision of the majority, which I view as legally, factually, and analytically flawed.

As stated in my dissent in the opinion resolving the Government=s motion for summary judgment, the Board is not the proper forum to resolve a dispute regarding relief under Bulletin MGR 93-020, which by its terms does not alter or affect the underlying Standard Reinsurance Agreement (SRA). A determination by the Director of Insurance Services regarding any FCIC (Federal Crop Insurance Corporation) bulletin or directive which does not affect, interpret, explain, or restrict the terms of the reinsurance agreement is not appealable to this Board. 7 CFR 400.169(c) (1996). Further, the language of the bulletin vests in the FCIC the authority to reimburse or not various expenses. The bulletin permits, but does not compel, the FCIC to grant reimbursement if specified factors are satisfied. Here, I find that the factors were not satisfied. Even if one deems the factors to have been satisfied, the determination by the Government to not reimburse litigation expenses is not erroneous or reversible, as it is a reasonable determination. Rain & Hail Insurance Service, Inc., AGBCA No. 1999-194-F, 01-1 BCA & 31,297. In short, the majority here usurps the functions of the FCIC and the Director of Insurance Services. I view the majority decision to be dicta, at best, as it addresses a matter over which this Board lacks authority.

As explained below, I view the majority decision to be arbitrary and capricious as it misconstrues and incorrectly analyzes the facts. In the underlying state court action, the insured alleged a misrepresentation of the policy provided to him. The record demonstrates that the insured provided information to the insurance company=s agent on a farm-by-farm basis, was told that he would obtain insurance on such a basis, and paid a premium on such a basis.[1] After the insured claimed entitlement to an indemnity under the insurance policy, the insurance company refused to provide the indemnity because the terms of the actual policy sold reflected insurance on a combined farm basis. The state court action concluded that the insurance agent did not misrepresent the policy to the insured, but that the insurance company engaged in misrepresentation regarding the written policy provided to the insured. That is, the actual policy did not provide the coverage the insured purchased. Hence, the finding of misrepresentation. That the insurance company utilized FCIC forms to formalize the written insurance agreement is of no consequence.

[1] The FCIC policy permitted an insured to purchase insurance on a unit (or combined farm) basis. This was the standard, or default, basis of insurance. Alternatively, an optional basis of insurance could be purchased, that is, on a farm-by-farm basis. To obtain such insurance, the insured was required to provide records of planted acreage and harvested production for at least the prior year. Under the unit basis of insurance, the productivity of the entire unit (that is, the combined farms) would be assessed to determine if an indemnity was due. Under the farm-by-farm basis of insurance, the productivity of each separate farm would be assessed to determine if an indemnity was due for each farm.

Separate from the conclusion on entitlement, I also part company from the majority regarding its treatment of quantum. The record was developed without bifurcating entitlement and quantum. The insurance company bears the burden of proof to recover. Given the conclusion of the majority, that the record is not adequate to make a decision on quantum, it would appear that the insurance company did not meet its burden, such that the Board should deny relief.

The bulletin

Bulletin MGR 93-020 establishes criteria which must be satisfied before the Government will consider providing financial assistance to an insurance company--assistance distinct from that under the SRA. Specifically:

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.

Regarding its scope, the bulletin specifies: AUnder this 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.@ This language identifies the bulletin, not the SRA, as the basis for relief. Also, relief is permissive, not mandatory, as the FCIC may (not must) pay approved judgments over and above the indemnity due as provided by the SRA.

The facts

A review of the underlying facts involving the insured and the state court proceeding is necessary for the analysis called for by the bulletin.

The insured provided information to obtain insurance on a farm-by-farm basis; he paid for coverage on a farm-by-farm basis. (Exhibit C at 72-90) (Exhibits are in the Appeal File). The written policy he received reflected insurance on a combined farm basis. After only one of the farm units was less productive than anticipated, he could not collect an indemnity under the policy as written (because the productivity of the combined farms did not represent a loss), although an indemnity would have been recoverable on the one farm unit.

The complaint and the amended complaint in the underlying state court litigation do not suggest that the FCIC was involved directly or indirectly with the dispute (Exhibits D, U). The insured maintained that representations were made by the insurance company and through its agent regarding the coverage of the insurance policy it purchased, and the policy reflected in the forms he was provided misrepresented the policy he was told he would receive. Finding for the insured and against the insurance company, a jury assessed damages, characterized as compensatory, mental

anguish, and punitive. The state court proceeding resulted in the conclusion that the insurance company provided a written policy (on a combined farm basis) which differed from the policy that the insured was led to believe he had purchased and which he did purchase (on a farm-by-farm basis). Hence, the finding of misrepresentation and the recovery by the insured of various damages.

One may analyze the record with the following steps: (1) The insured believed he purchased insurance on a farm-by-farm (optional) basis. (2) The insured did purchase insurance on the farm-by-farm basis, otherwise relief would not have been granted. (3) The insurance company concluded that the policy (as written) was on a combined farm (unit) basis. Otherwise, it would have paid the indemnity as requested. (4) As written, the policy reflects insurance on a combined farm basis. The insurance company correctly interpreted the written policy. If the policy reflects insurance on a farm-by-farm basis, there would be no misrepresentation, and the agreement would have been enforced as written. (5) Given the conclusion above, that the written policy reflects insurance on a combined farm basis, there is no expansion of the written policy beyond what FCIC agreed to reinsure. (6) The policy as written does not reflect what the insured purchased. Therefore, the state court proceeding concluded that misrepresentation occurred.

The FCIC=s conclusion under the bulletin

Regarding the request of the insurance company for payment of its litigation expenses under MGR 93-020, the FCIC concluded that the criteria were not satisfied:

> This case involved the insured specifically alleging that Rain and Hail Insurance Service, Inc.=s (RHIS) agent mislead [sic] him into believing that his insurance was on a field by field or farm by farm basis as identified by the ASCS farm serial numbers. The insured alleged that as a result of these false representations intended to induce the insured to obtain crop insurance, the insured was entitled to actual, compensatory and punitive damages. Therefore, the issue, in this case, involves a[n] allegation of agent error, not a legal challenge to an FCIC approved policy or procedure.
>
> You also claim that this case involved a challenge to FCIC=s regulations regarding the payment of compensatory and punitive damages. . . .
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> In this case, the insured alleged that RHIS=s agent=s conduct was not authorized by FCIC=s procedures. When the jury awarded compensatory and punitive damages, it found that such conduct was not authorized. This is consistent with the regulations. Therefore, an adverse decision would not have a detrimental impact on the crop insurance program.

(Exhibit BB at 236-37.) The Government did not authorize payment under the bulletin.
As detailed below, the record fully supports the conclusion of the Government. A suit which alleges, and results in a finding of, active misrepresentation by an insurance company does not involve FCIC-approved program procedures, regulations or crop policies. The state proceeding

determined that the insured agreed to and paid for insurance coverage which was not properly reflected in the policy as represented by the completed forms. Such a factually based state court case did not involve the probability of precedent detrimental to the crop insurance program. An award of damages against an insurance company for unauthorized conduct does not implicate FCIC programs, regulations, or procedures. The Board should not set aside the Government=s final determination to deny recovery of litigation expenses.

Analysis under the bulletin

The litigation did not involve an attack on FCIC-approved program procedures, regulations and/or crop policies. The insurance policy as issued was relevant because it differed from what the insured was led to believe he had purchased. Further, the litigation did not involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program. Holding an insurance company responsible for material misrepresentation of the coverage an insured receives is not detrimental to the crop insurance program.

In denying a motion for a judgment as a matter of law notwithstanding the verdict or, in the alternative, a motion for a new trial, the court observed:

> The evidence presented at trial supports the jury=s finding that the amount of the premiums paid by the plaintiff and his loss due to not having the coverage represented to him resulted in $14,000.00 damages, which the jury labeled as Acompensatory damages@. Similarly, the jury=s verdict for damages in the amount of $90,000.00 for Amental anguish@ is also supported by the evidence presented at trial. . . . [I]t is significant that it became necessary for the plaintiff to get his father to pledge land as collateral on the plaintiff=s farm loan at the bank when the defendants did not pay plaintiff under the policy as represented to him; that the plaintiff was angered and embarrassed by being duped by the defendants[.]

(Exhibit 46 at 2421-22) (Exhibits are in the Appeal File). The court also stated:

> 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. After the defendants initially denied the claim, which the evidence showed should have been paid if the representations made to the plaintiff in these documents had not been untrue, the plaintiff contacted the vice president of Rain & Hail in an attempt to obtain payment of the claim, but was again given no redress. Thus, the defendants continued to deny a claim which the evidence showed should have been paid had the representations to the plaintiff been true. . . . Finally, the affirmative acts of the defendants did inflict

> economic injury on the plaintiff, which is also significant pursuant to the decision of the United States Supreme Court in [BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)].

(Exhibit 46 at 2424.) These observations of the court do not implicate the FCIC or FCIC policies or procedures. Rather, the statements support the conclusion that the insured reasonably believed that for his premium he obtained coverage on a farm-by-farm basis, notwithstanding the fact that the written policy provides otherwise. Ultimately, the insured obtains the coverage he was told he had purchased and did purchase. Parting company from the majority, I view the above-quoted words of the court, with the references to representations and payment for premiums of a given coverage, to constitute more than Aone scrap of evidence@ in support of my view of the record in this case.

The insurance company sold the insured an insurance policy which differed from what the insured was told he would receive; the agreed upon policy was not reflected in the written instrument provided by the insurance company. As a result of the court action, the insured obtained relief, not on the policy as written, but on the policy as represented to him. The insurance company was liable for misrepresenting the coverage of the policy sold. The result does not reflect an attack on any FCIC matter.

Regarding the second criterion, there was no probability of a court ruling which would set legal precedent detrimental to the crop insurance program. The issues before the court related to alleged misrepresentation. To find an insurance company liable for misrepresenting the policy actually sold to an insured does not work to the detriment of the crop insurance program. To the contrary, insurance companies are encouraged to correctly convey the coverage which the insured is obtaining.

As pursued in the complaint, initially, and in the amended complaint, ultimately, and as decided in the state court proceeding, the underlying litigation culminated in an unremarkable holding. An agent of an insurance company described a policy with particular coverage for a given premium. The insured agreed to and purchased that policy. The insurance company accepted the premium, but reduced the agreement to a writing which does not reflect the agreed-upon coverage. The insurance company is liable for the particular coverage promised, even when the policy (an instrument prepared by the insurance company) does not reflect the promised coverage. The forms utilized by the insurance company in reducing the agreement to writing do not alter the analysis or the result. The creator of the forms, here the FCIC, is not at fault for the impropriety of the insurance company. It is not the forms which serve as a linchpin of the case, but the misrepresentation that occurred because the insurance company did not provide the promised coverage.

An analogy belies the conclusion of the majority. Assume that the insured purchases a policy for corn, but the written agreement identifies cotton as the crop. After experiencing a loss on his corn crop, the insured seeks to collect an indemnity. The insurance company denies the claim, saying that the policy is for cotton. One assumes that the insurance policy is written on FCIC-approved forms, given the language in the SRA. If a court proceeding concludes that the insured agreed to obtain and paid for insurance on his corn crop, a finding of misrepresentation by the insurance company would

follow. The agent is not necessarily implicated in the misrepresentation, as he sold insurance for corn and assured that premiums were paid for corn. It is the insurance company that reduced the policy to writing; a writing not reflecting the policy sold. The insurance company would incur liability. The FCIC policies or procedures would not be implicated in the action by the insured against the insurance company.

Alternatively, assume that through an agent, the insured purchases a policy for corn, but the policy is not, in fact, available as an FCIC-reinsured policy. If the insurance company accepts the premium and provides a written policy different from that agreed upon, the state court proceeding suggests that the insured would have purchased the policy agreed upon. The insurance company would be liable for reimbursing indemnities under the agreed upon policy and for other amounts. Without more, the FCIC would not be liable for premium or indemnity reimbursement for a policy which is not an FCIC-approved policy. Again, FCIC policies or procedures would not be implicated in the action by the insured against the insurance company.

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JOSEPH A. VERGILIO
Administrative Judge

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