FARMERS ALLIANCE MUTUAL INSURANCE COMPANY,	)	**AGBCA No. 2000-163-F**
COUNTRY MUTUAL INSURANCE CO.,	)	**AGBCA No. 2000-164-F**
FIREMAN'S FUND INSURANCE CO.,	)	**AGBCA No. 2000-165-F**
GREAT AMERICAN INSURANCE CO.,	)	**AGBCA No. 2000-166-F**
HARTFORD FIRE INSURANCE CO.,	)	**AGBCA No. 2000-167-F**
IGF INSURANCE CO.,	)	**AGBCA No. 2000-168-F**
THE ALLIANCE INSURANCE COMPANY,	)	**AGBCA No. 2000-169-F**
Appellants	)	
Representing the Appellants:	)	
P. John Owen, Esq. C. Brooks Wood, Esq. Matthew J. Salzman, Esq. Thomas E. Nanney, Esq. Morrison & Hecker, L.L.P. 2600 Grand Avenue Kansas City, Missouri 64108-4606	)	
Representing the Government:	)	
Kimberley E. Arrigo, Esq. Office of the General Counsel U. S. Department of Agriculture 1400 Independence Avenue, SW Room 4344 - South Building Washington, D.C. 20250	)	

RULING ON GOVERNMENT'S MOTION TO DISMISS

February 28, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Dissenting opinion by Administrative Judge VERGILIO.

These appeals arise out of Standard Reinsurance Agreements (SRAs) between the above-captioned Appellants and the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC). These appeals concern a dispute involving prevented planting for the 1996 reinsurance year (July 1, 1995, through June 30, 1996). The SRA represents a cooperative financial assistance agreement between the parties to deliver multiple peril crop insurance (MPCI) policies to various farmers/producers. The appeals involve claimed reimbursements from the various Appellants (all reinsurers) in excess of 50 million dollars for excess indemnities paid and in excess of 2.4 million dollars in excess loss adjustment expenses. A principal issue in these appeals is a rule involving prevented planting, published in the Federal Register of November 8, 1995. It was published as a final rule December 7, 1995, with an effective date of November 30, 1995. The rule was to be applicable beginning with the 1996 crop year for spring crops.

These appeals ask for reimbursement due to the affect of the prevented planting changes on Appellants' obligations under their SRAs. This set of appeals is the fourth appeal addressed by this Board regarding claims involving the 1996 prevented planting rules.

For details as to the history of the 1996 prevented planting rules and actions of FCIC in the fall of 1995 as to the rule publication, the Board directs the parties to the decisions of this Board. Those appeals are identified below. Because of the detailed discussions in those earlier decisions, for purposes of this ruling, we will limit and summarize our recitations of the facts and our discussion of the law.

Further, the record before the Board in these appeals is sparse. It consists of Appellants' Complaint, FCIC's Motion to Dismiss and Answer, an Appeal File (AF) submitted by FCIC consisting of tabs A-Z and the parties' briefs. Tabs A-H of the AF consist of the respective SRAs, and include some limited correspondence as to some of the Appellants' dealings with the approval of their Plans of Operation. The remainder of the tabbed documents either deal with events involving the publication of the 1996 prevented planting rule or are correspondence between the parties and FCIC leading up to FCIC's final determination and Appellants' appeals. Unlike the records in the three previous appeals, the AF contains very little setting out the positions and actions during the time period from publication of the 1996 prevented planting rules in late 1995 until some time in 1999 when the Appellants first appeared to request a final determination. Thus, there is a significant gap as to what went on in that time period as to objections by Appellants regarding the effect of the rule on Appellants' views of their contract obligations.

In their response to the Government's Motion, Appellants did provide an additional document, that being an affidavit from counsel, wherein the affiant contended that if discovery proceeded (at the time of filing the affidavit, no discovery had been started and none has been taken since, pending action on the Motion) that discovery would establish a number of material facts. A number of those anticipated facts, as identified below, parallel matters addressed in the appeals of Rain & Hail Insurance Service, Inc. (RHIS), AGBCA No. 97-182-F (Dec. 10, 2001), and Rural Community Insurance Co. (Rural), AGBCA No. 2000-154-F (Feb. 12, 2002), and matters which the Board found to be material facts in dispute and items that had to be resolved prior to deciding those appeals on the merits.

HISTORY OF THE ISSUE AND PRIOR LITIGATION

As noted above, this is the fourth appeal before this Board addressing the 1996 prevented planting rule change and its effect on SRAs. The first appeal in which this Board rendered a decision was American Growers Insurance Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980, *recon. denied*, AGBCA No. 2000-160-R, 00-2 BCA ¶ 31,107. In that decision, two members of the Board, for different reasons, found that FCIC was entitled to have its motion for summary judgment granted and concluded that American Growers was not entitled to relief for the breach damages claimed to be due as a result of FCIC's changes to the 1996 prevented planting rules in late 1995. The remaining Board member dissented. Appellant thereafter filed for reconsideration. Reconsideration was denied on the same split bases. For purposes of brevity, we will not here set out the specific holdings in the American Growers opinions nor will we set out our disagreements with those holdings. For those purposes, the Board refers the parties to the American Growers majority opinions and dissent and also to that section of the RHIS decision, pages 25-30, where this Board discusses in depth its concerns with the two majority opinions in American Growers.

On December 10, 2001, the Board revisited the issue of 1996 prevented planting (previously addressed in American Growers) in our decision in Rain & Hail Insurance Service, Inc., AGBCA No. 97-182-F. In the appeal in RHIS, FCIC initially filed a Motion for Summary Judgment essentially arguing the same legal points as it was then arguing in American Growers. The two cases were both before the Board at the same time. While the legal issues in the two appeals were essentially the same, there were some factual differences. Then, once the Board issued the American Growers decision, FCIC supplemented the RHIS record by filing a Motion to Dismiss, asserting additional grounds of *stare decisis* and lack of jurisdiction due to untimeliness (relying on the decision in American Growers). In this Board's decision in RHIS, the Board in an undivided majority opinion denied FCIC's motion. The remaining judge filed a dissent. As to the issue of jurisdiction due to a claimed lack of timeliness on the part of RHIS, the Board ruled that the publication of the prevented planting rule in issue did not start the running of the 45-day period to ask for a final administrative determination. Thus, the Board concluded that FCIC did not establish the predicate for summary judgment on that issue. As to the other arguments put forth by FCIC (again essentially paralleling those argued in American Growers, as well as other issues first identified by the majority opinions in American Growers), the Board essentially rejected the conclusions in the two American Growers opinions. Instead, the Board found in RHIS that there

were issues of fact and mixed issues of fact and law which needed to be resolved on the merits and thus the appeal was not appropriate for summary judgment.

Following the decision in RHIS, the Board rendered a third decision on the matter of prevented planting, this time in Rural. In the two-judge majority opinion in Rural, the Board again rejected FCIC's Motion to Dismiss. FCIC's motion was based on *stare decisis* and asked the Board to adopt the conclusion of the two judges in American Growers. In the majority decision in Rural, the Board rejected the applicability of *stare decisis* to Rural noting that the American Growers decision was a plurality and further pointing out that the Board had decided similar facts and law adversely to the majority in American Growers in the recent RHIS opinion.

In addition, the Board in Rural noted that the reinsurance company had presented adverse comments to the proposed prevented planting rule during the comment period and that after the rule became final, Appellant twice informed FCIC of its view that the rule was illegal and sought to be held harmless. The Board found questions of material fact. The Board further specifically rejected the FCIC position, based on American Growers, that the rule publication started the running of a 45-day period during which Appellant had to ask for a final administrative determination from FCIC.

THE APPEAL

On June 8, 2000, FCIC issued a final administrative determination denying Appellants' reimbursement for costs and indemnification associated with the 1996 prevented planting rule changes. At the time FCIC issued the final determination it made no charge that Appellants' request for that determination had not been timely. The final administrative determination set out the Appellants' appeal rights. On July 31, 2000, Appellants filed their complaint with the Board.

On September 11, 2000, FCIC filed a Motion to Dismiss and Answer to the above-captioned appeals. The Motion was in two parts. The first contended that the appeal should be dismissed due to lack of jurisdiction because the reinsured companies in these appeals failed to object to the prevented planting rule on December 7, 1995, or 45 days after the reimbursement of FCIC of premium subsidy loss or other FCIC actions on the individual policies with the prevented planting coverage. FCIC cited for authority the opinion of this Board in American Growers, Inc., AGBCA No. 98-200-F, pages 9-10, 24, and 7 CFR 400.169(a). According to FCIC, the Appellants failed to object to the final published rule until April 14, 1999, and therefore should be barred from proceeding before the Board on the basis of untimeliness.

The second portion of FCIC's Motion to Dismiss was based on the doctrine of *stare decisis*. According to FCIC, at the time it filed the motion, the Board through its decision in American Growers had already examined FCIC's conduct with respect to the implementation of the 1996 prevented planting provisions and held that none of the claimed theories behind that claim for breach of the SRA was sustainable under the facts or the law. FCIC acknowledged that "while in some instances the reasoning may have been different" for the two majority judges, the outcome of no recovery was the same. FCIC then proceeded to argue the law as to *stare decisis*. FCIC also

addressed various factual matters including, but not limited to, alleged parallels between actions of Appellants in these appeals as to their Plans of Operation, and actions of the Appellant in American Growers. Throughout its Motion in these appeals, FCIC has weaved together portions of the decisions from the two majority judges in the American Growers appeal, but has not given adequate recognition to the fact that each judge relied on different theories and analyses to reach his respective conclusions. In summarizing its position, FCIC contended that since in its view there was no evidence that the findings of the majority judges were ill-founded, or not in accordance with the facts or law applicable to this dispute, the principles of *stare decisis* should apply. According to FCIC, to relitigate these issues would be a waste of the Board's time and resources.

RULING

These appeals present similar factual and legal issues to those before us in RHIS and in Rural. In each of those appeals, we rejected FCIC's motions and directed that the cases proceed on the merits.

As in those appeals, these appeals present various issues and material factual disputes for resolution. Among the issues before us are the following: Can Appellants establish that both they and FCIC understood that any change by FCIC to the terms of the 1996 SRA (governing spring planted crops in 1996) had to be made by publication in the Federal Register by November 30, 1995? Can Appellants establish that they made timely demand for reimbursement for the losses? Did Appellants take any action such that FCIC had a right to believe that Appellants were waiving their rights to seek compensation under the SRA? Is there a contract clause giving FCIC the right to make changes when it did, without having to provide additional compensation beyond the premium adjustments made?

In addition, there are numerous issues surrounding the affect of the approval of the Plans of Operation, the parties' use and interpretation of various contract clauses and, if recovery is found to be warranted, how the risk allocation nature of the contract would affect any recovery.

We have treated FCIC's Motion as one for summary judgment. FCIC has failed to establish sufficient basis for us to grant that Motion. The Appellants have put before us an appeal which they are entitled to develop and litigate on the merits. Accordingly, and for reasons stated above, as well as reasons set forth in RHIS and Rural, the Motion of FCIC is denied.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

ANNE W. WESTBROOK
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I respectfully dissent from the decision of the majority to deny the motion for summary judgment submitted by the Government, the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC). The Board should deny these appeals. Not one of the insurance companies has demonstrated that it sought a determination addressing the disputed action within the 45-day period established in the disputes clause of its underlying Standard Reinsurance Agreement (SRA) (¶ V.R) ("If the [insurance company] disputes action taken by FCIC under any provision of this Agreement, the [insurance company] may appeal to FCIC in accordance with the provisions of 7 C.F.R. § 400.169"), and in applicable regulation, 7 CFR 400.169 (1996). Because the Government's conclusions are final at this time, the Board is compelled to deny these appeals.

Prior decisions of this Board, which address the timeliness of an insurance company seeking a determination under the regulation, do not establish a final rule that is to be followed in this case. In a recently-issued decision denying a Government motion for summary relief, Rural Community Insurance Co., AGBCA No. 2000-154-F (Feb. 12, 2002), with the same panel and split, the majority rejected the interpretation I find compelled by the regulation. Namely, I found the disputed action to be the publication of the final rule on December 7, 1995, with a stated effective date of November 30, 1995. The insurance company, as a majority had found, did not seek a determination regarding the disputed action until December 1999. Alternatively, the insurance company did not demonstrate that it sought a determination within 45 days of receipt of indemnity reimbursements; the insurance company sought increased payments for indemnity payments. I concluded that the insurance company foreclosed its right to pursue the bases for relief it raised, because it had not sought a determination pursuant to 7 CFR 400.169 in a timely manner. A majority rejected my rationale, as it denied the Government's motion for summary judgment. The decision in Rural establishes the law of that case. However, the decision does not establish precedent for other cases, because the Board has not reached the merits of the case. With the case pending before the Board, the determination is not final and is not beyond review by a court.

Rain & Hail Insurance Service, Inc., AGBCA No. 97-182-F (Dec. 10, 2001), focuses upon the same final rule underlying this dispute. The Board denied the Government's motion for summary judgment. The insurance company pursues relief on the merits of its prevented planting claim. The matter remains before the Board, which has yet to reach the merits. As with Rural, because the determination is not final and is not beyond review by a court, the Board's decision does not create precedent for me to follow in this case.

A third prevented planting case is American Growers Insurance Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980, mot. for reconsid. denied, AGBCA No. 2000-160-R, 00-2 BCA ¶ 31,107, appeal filed, No. 1:01-CV-10059 (S.D. Iowa Nov. 27, 2001). The Board granted summary judgment for the

Government, although with separate opinions and rationales granting the motion, as well as with a dissent. The case is on appeal. The district court may well address the legal issue which now divides this Board. The Board's decision in American Growers does not require the Board to deny the Government's motion in this case. As the Government requests, the decision supports granting the motion. Given these referenced cases and their status, I discern no established rule of law that I need follow in the present case.

The affidavit submitted by an attorney for the insurance companies, who has entered an appearance in this matter, is both inappropriate and does not create a disputed material fact. The affidavit is inappropriate because the views of the attorney (a non-witness, given that he remains an attorney of record) are not material, as they reflect argument, not evidentiary material. To be considered, the individual should have first withdrawn his notice of appearance in this matter. Substantively, the affidavit identifies the individual as an attorney who has "been involved in the investigation of this action. Based on discussions with my clients and their representatives, review of documents and other investigative actions, I believe that discovery will establish, among others, the following material facts[.]" (Affidavit at 1). These conclusory statements of alleged material fact provide for the record no substantive support for the assertions, and reflect nothing more than what would be expected in a well-pled complaint. The affidavit does not constitute proof to be considered when resolving the motion for summary judgment. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (in response to a challenge of jurisdiction or a claim for relief, a party cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction). Nothing in the affidavit illuminates or contradicts what is in the written record regarding when the insurance companies first disputed the Government's actions.

By letter dated April 14, 1999, the insurance companies suggested to the Government that they would be seeking relief regarding claims for 1996 crop year prevented planting losses. The letter specifies that it is not a request for relief; rather, it precedes any such request. For example, it states "In preparing to assert claims on behalf of the Companies for reimbursement of 1996 prevented planting losses" and, if the Government does not accede to requested stipulations, "the Companies then would proceed under the SRA and 7 C.F.R. § 400.169(a) to have us seek a final agency determination preparatory to an appeal to the BCA." (Exhibit N at 181-83) (Exhibits are in the Appeal File).

By letter dated September 13, 1999, the insurance companies initially demanded from the FCIC to be paid "an amount equal to the entirety of their prevented planting losses for spring and fall planted crops in the 1996 crop year and corresponding reinsurance years." (Exhibit Q at 187). No insurance company has suggested, much less supported with any proof, that it earlier sought reimbursement pursuant to the disputes clause of its SRA and 7 CFR 400.169(a) or (b). Further, no insurance company has demonstrated that the request for payment in September 1999, was timely under 7 CFR 400.169 in terms of challenging the amount of indemnities the Government reimbursed for the 1996 crop year or otherwise. September 1999 is well after the disputed actions occurred regarding the 1996 crop year.

Because the insurance companies did not pursue relief as dictated by the regulation and the SRAs underlying these disputes, for the reasons I have expressed in Rural and American Growers, I would deny the underlying claims. In summary, the underlying disputed action is the publication of the final rule, which the insurance companies now maintain was illegal and contained an improper effective date. The insurance companies did not seek an administrative determination within 45 days of the publication of the final rule (or more technically, the receipt by the insurance company of that rule which was published in the Federal Register). Further, no insurance company has demonstrated that it objected to the amount of indemnities reimbursed by the Government within 45 days of its receipt of payments for the 1996 crop year.

Each insurance company demands that the FCIC fully reinsure policies under terms and conditions different from those offered by the Government to the insurance company. That is, the insurance company asks that the Government be liable for all indemnities paid out and be liable for alleged expenses of the insurance company which are in excess of those provided under the SRA. It is the province of the FCIC, not an insurance company, to determine the terms and conditions of insurance and reinsurance. 7 U.S.C. § 1508(a)(1). The terms of the SRA do not provide for the relief sought by the insurance companies. The law does not permit the insurance companies to recover as they request, given that each maintains that it administered insurance policies pursuant to the final rule without objection and without identifying a basis in the SRA for the relief requested.

CONCLUSION

A majority here frustrates the provisions of the SRA, statute, and regulations, as it goes beyond the authority of this Board. The majority permits the insurance companies to pursue litigation which is inconsistent with the terms of the agreements with the Government, while the insurance companies fail to provide specifics demonstrating any basis for relief. I need no further record to deny the claims before the Board on the Government's motion.

While the unambiguous language of the Disputes clause of the SRA and the related regulation, 7 CFR 400.169, and the undisputed facts are sufficient to deny the claims, the litigation is being unnecessarily complicated by the failure of the insurance companies to have provided specifics to the Government in the initial demands for payment and to this Board in this appeal. For example, the insurance companies demand that they be paid "an amount equal to the entirety of their prevented planting losses for spring and fall planted crops in the 1996 crop year and corresponding reinsurance years" details of the calculation are absent from the existing record. Further, no basis to include losses for the fall planted crops appears to have been raised. At the same time that the insurance companies appear to recognize that the Government sets the terms and conditions of reinsurance (Complaint at 5 (¶¶ 19, 20)), the insurance companies do not offer a legal basis for them to dictate

the terms and conditions of reinsurance after the fact, that is, after the insurance companies remained silent regarding any alleged dispute as they offered insurance and received benefits under the now-disputed terms.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
February 28, 2002