RAIN AND HAIL INSURANCE SERVICE, INC.,) **AGBCA No. 97-143-F**
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Appellant)
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Representing the Appellant:)
)
Frank W. Pechacek, Jr.)
Bruce B. Green)
Attorneys At Law)
Willson & Pechacek, P.L.C.)
P.O. Box 2029)
Council Bluffs, Iowa 51502)
)
Representing the Government:)
)
Kimberley E. Arrigo)
Office of the General Counsel)
U. S. Department of Agriculture)
Room 2449 South Building)
1400 Independence Avenue, S.W.)
Washington, D.C. 20250)

RULING ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

November 25, 1997

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal relates to a Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), a Government corporation within the U. S. Department of Agriculture, and Rain and Hail Insurance Service, Inc. (RHIS), Appellant. Under the SRA, Appellant sells and administers crop insurance policies in furtherance of the Government's crop insurance program. The appeal also relates to FCIC Manager's Bulletin, MGR-93-020, which allows reinsurers such as Appellant to recoup certain litigation expenses incurred administering Multi-Peril Crop Insurance (MPCI) policies.

The FCIC denied Appellant's claim for litigation expenses incurred defending a suit brought by an insured under an MPCI policy issued by Appellant. FCIC concluded that the litigation did not fall within the criteria for special litigative expense recoupment, as defined by MGR-93-020. Appellant filed a timely appeal.

In prior proceedings, the Board denied the Government's Motion to Dismiss for lack of jurisdiction. Rain and Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111. The Board has jurisdiction over this matter pursuant to 7 CFR §§ 400.169(a)-(d) and 7 CFR § 24.4(b).

The parties have filed cross motions for summary judgment.[1]

FINDINGS OF FACT

1. The FCIC entered into an SRA with Appellant effective July 11, 1988. The SRA was to continue in effect from year-to-year, with an annual renewal date of July 1 (SRA, pages (pp.) 18, 23, Section VII A and B). The SRA established the terms and conditions under which the FCIC would reinsure MPCI contracts sold or reinsured by Appellant.

2. Under the SRA, as amended, FCIC agreed to pay Appellant 31 percent of the net book value of the premiums on crop insurance contracts as an expense reimbursement (SRA, p. 9, Section II A; Amendment 6, December 30, 1988).

3. The SRA provided that Appellant "may," consistent with sound insurance practices, contest by legal proceedings, any claim by an insured. Appellant was required to use loss adjustment procedures and methods approved by FCIC. FCIC was authorized at its own option and expense to cooperate with Appellant in the adjustment of any loss or claim, or to participate in any legal proceeding involving the company and any insurance contract issued under the SRA. If FCIC determined that Appellant's loss adjustment performance and practice were not in accordance with the SRA, FCIC could perform these obligations and reduce the amount of expense reimbursement to reflect costs incurred by FCIC (SRA, pp. 15, 16, Section IV A).

4. Appellant issued MPCI policy No. 004549 to a producer in Georgia who filed a claim for loss to the insured's peanut crop for 1989. The basis for the claim was too much rain. Appellant denied the producer's claim after having determined that the crop loss did not result from too much rain, but rather from the producer's failure to follow recognized good farming practices. Specifically, Appellant determined that the producer planted the peanut crop after the May 25, 1989, final planting date for peanuts established by the FCIC, that the producer allowed too many weeds, and that these were the cause of the claimed crop failure. (Appeal File (AF) 84, 87, 93, 98, 121, 165, 166, 208-210, 211-213.)

5. In July 1993, the producer sued Appellant[2] in state court claiming that Appellant wrongfully rejected the producer's claim, demanding judgment of $40,000 for actual damages, $100,000 for

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[1] Appellant filed two motions for summary judgment. The first, on the basis that the Government did not timely respond to its request for admissions, is hereby denied for the reasons stated in Rain and Hail Insurance Service, Inc., AGBCA No. 97-182-F, 1997 WL 634533 (October 10, 1997).

[2] The suit brought by the producer was actually against E.L. Ross, Inc., Appellant's agent and/or subcontractor (AF 92).

punitive damages, plus reasonable attorney fees and costs. The Complaint filed against Appellant charged that Appellant was arbitrary and capricious. The producer also charged that Appellant engaged in misrepresentations that caused the producer to delay filing its claim until after the 12-month filing period allowed by the MPCI. (AF 89-90.)

6. The Answer filed September 1993 asserted that the producer failed to follow recognized good farming practices, that it failed to timely plant the crop, that Appellant followed crop loss adjustment procedures established by FCIC, and that the producer's suit was untimely (AF 92-95). Appellant had the case transferred from the state court to a U.S. District Court because the state court lacked jurisdiction (AF 122, 146-157). The suit was dismissed by stipulation on February 4, 1994 (AF 143-144).

7. Appellant, by letter dated September 21, 1993, requested financial assistance for attorney fees and court costs pursuant to FCIC Manager's Bulletin MGR-93-020. MGR-93-020 was issued to all reinsured companies, such as Appellant, by the Acting Manager of FCIC. In pertinent part, MGR-93-020 provided:

> Under 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.
>
> CRITERIA
>
> Cases submitted for consideration by FCIC under this bulletin must meet the following criteria:
>
> 1. The litigation must involve an attack on FCIC-approved program procedures, regulations and/or crop policies; and
>
> 2. The litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program.

(AF 110-112.)

8. By letter dated April 4, 1996, FCIC denied Appellant's request for litigation expense assistance. By letter dated May 10, 1996, Appellant requested reconsideration of FCIC's decision. Appellant stated that Federal regulations and FCIC rules govern when a crop must be planted to be insured, and that while a factual determination was necessary, FCIC procedures, regulations and policy were also involved. Moreover, Federal regulations and FCIC policy require a producer to file suit within 12 months after the occurrence. Since the producer filed the suit after the 12-month

period, Appellant claimed it was necessary to aggressively defend against such suit or risk establishing a precedent detrimental to FCIC. (AF 115-116.)

9. By letter dated December 16, 1996, FCIC denied Appellant's request for reconsideration, again concluding the litigation presented only a factual dispute with respect to whether the producer timely planted the peanut crop, and not an attack on FCIC policy or procedure. FCIC also noted that the lawsuit was dismissed by stipulation on February 3, 1994, and could not, therefore, have established an adverse precedent, one of the requirements for payment under MGR-93-020. (AF 108.) Appellant filed a timely appeal with the Board.

DISCUSSION

This is the Board's first decision or ruling on the merits relating to recovery of litigation expenses under MGR-93-020. Other appeals involving MGR-93-020 are in process. In order to assist the parties in settling the other appeals, we have ventured opinions here regarding the nature of the issues governed by MGR-93-020.

The 12-Month Filing Requirement

Appellant asserts that the litigation brought by the producer attacked FCIC's MPCI policy provisions requiring that all suits be brought within 12 months from the date of loss. The Government's position is that factual disputes regarding whether MPCI provisions were met generally do not involve an attack on FCIC-approved programs, procedures, regulations and/or crop policies within the meaning of MGR-93-020.

The producer asserted in its Complaint that misrepresentation by Appellant caused the producer to file its Complaint more than 1 year after the loss, contrary to the provisions of the MPCI (Finding of Fact (FF) 5). Appellant's Answer simply asserted that the Complaint was untimely (FF 6).

The aspect of the litigation between Appellant and the producer involving the 12-month MPCI claim filing requirement involved only the question of whether Appellant's alleged misrepresentation would have excused the producer's late filing. It did not involve an attack on FCIC-approved program procedures, regulations and/or crop policies within the meaning of MGR-93-020. Moreover, the litigation was very fact specific and would not have set a precedent, detrimental, or otherwise, to the crop insurance program, as specified under the criteria for payment of litigation expenses in MGR-93-020.

An attack on FCIC-approved program procedures, regulations and/or crop policies might have occurred if the producer had asserted that a state statute of limitations should apply in lieu of the 12-month MPCI filing period, thus raising an issue regarding FCIC's right to preempt state law. Similarly, if the producer had alleged the 12-month MPCI filing requirement was too onerous and should have been set aside, this might also have affected FCIC-approved programs and procedures. However, the producer did not make such allegations, and they were not issues in the litigation.

Therefore, FCIC's rejection of Appellant's claim for litigation expenses on the basis of the MPCI 12-month filing requirement was proper.

The May 25, 1989 Final Planting Date/Poor Farming Practices, Excessive Weeds

The producer claimed that its loss resulted from too much rain. Appellant denied the claim on the basis that the producer had not planted the crop by the May 25, 1989 final planting date, and because the producer had failed to control weeds (FF 4-6).

Appellant asserts that this aspect of the producer's suit also involved an attack on FCIC-approved program procedures, regulations and/or crop policies. The record fails to support Appellant's position. The producer claimed that it sustained a loss because of too much rain. Appellant denied the claim because the loss was incurred by causes not covered by the policy. This presented a simple question of fact. The producer did not assert that the May 25, 1989 final planting date should have been set later. Such assertion might have involved an attack on an FCIC-approved policy or rule. However, the producer's litigation did not raise this issue, and therefore, the litigation was not an attack on an FCIC policy or rule. Similarly, the producer did not assert that the required good farming practices were unnecessarily onerous and that it had adequately controlled weeds.

The issues presented by the producer involved questions of fact which did not involve attacks on FCIC-approved program procedures, regulations and/or crop policies. Moreover, since the litigation was very fact specific, it would not result in a case precedent detrimental to the crop insurance program, as specified under the criteria for payment of litigation expenses in MGR-93-020.

Punitive Damages, Attorney Fees, and Costs

The producer's prayer for relief included a request for $100,000 in punitive damages, attorney fees, and costs. Appellant asserts that the litigation therefore involved an attack on FCIC regulations, because such regulations prohibit recovery of punitive damages, attorney fees, and costs. FCIC states that the producer could have recovered such damages at the time of the loss, but only if the producer could have shown that its damages were caused by the culpable failure of Appellant to substantially comply with FCIC's procedures or instructions in servicing the producer's policy.

Under the present facts, the producer simply requested punitive damages, attorney fees, and costs. There was no assertion that such damages were linked to Appellant's culpable failure to substantially comply with FCIC's procedures or instructions in servicing the producer's policy. Even if the producer had made such an assertion, it would simply have raised a question of fact as to whether there had been a culpable failure by Appellant. It would not have necessarily involved an attack on FCIC-approved program procedures, regulation and/or crop policies.

If, on the other hand, the producer had questioned FCIC's right to limit the producer's damages, there might well have been an attack on FCIC-approved regulations or policies. Similarly, if the litigation required resolution of whether certain actions by Appellant amounted to a culpable failure to

substantially comply with FCIC procedures in servicing the MPCI policy, this might also be viewed as an attack on FCIC-approved program procedures. However, merely requesting punitive damages, attorney fees and costs, as in the present case, does not amount to an attack on FCIC-approved program procedures, regulations and/or crop policies. Nor would such litigation involve the probability of a court precedent detrimental to the crop insurance program. Accordingly, Appellant is not entitled to recoup its litigation expenses under MGR-93-020.

We note that one of the reasons that FCIC failed to pay Appellant's litigation expenses was because the litigation was dismissed by stipulation, and could not have resulted in a case precedent adverse to FCIC (FF 6, 9). The fact that the litigation was settled or dismissed, as here, would not appear to have been an adequate reason for refusing to pay the litigation expenses under MGR-93-020, had the other criteria for payment been met.

RULING

Appellant's Motions for Summary Judgment are denied. The Government's Motion for Summary Judgment is granted. Appellant's appeal is denied and dismissed.

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EDWARD HOURY
Administrative Judge

Concurring:

_____ _____
HOWARD A. POLLACK **ROBERT M. M. SETO**
Administrative Judge Administrative Judge

Issued in Washington, D.C.,
November 25, 1997