RAIN AND HAIL INSURANCE SERVICE, INC. (Robert W. Etheridge),	)	**AGBCA No. 1999-194-F**
Appellant	)	
Representing the Appellant:	)	
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Representing the Government:	)	
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RULING ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

February 9, 2001

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

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

This appeal arose under a 1994 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), a wholly-owned Government corporation within the U. S. Department of Agriculture (USDA), and Rain and Hail Insurance Service, Inc., of West Des Moines, Iowa (RHIS or Appellant).[1] Under the SRA, which recites that it is a "cooperative financial

[1] The SRA in the Rule 4 File is captioned "Cigna Property and Casualty Insurance Company" and "Rain and Hail Insurance Service, Inc." (RHIS) (Appeal File (AF) 1). The parties entered into a 1994 SRA (Complaint, Answer Paragraph (¶) 6). Pursuant to a plan of reorganization approved and adopted by the shareholders of RHIS, Rain and Hail

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

Under Section IV of the SRA, Expense Reimbursement, Appellant is paid 31% of the net book premiums as its expense reimbursement, which under Section V.N., Litigation and Assistance, includes litigation expenses. The appeal relates to FCIC Manager's Bulletin, MGR 93-020, which allows reinsurers such as Appellant to directly recoup certain litigation expenses, if conditions in MGR 93-020 are met. For direct recoupment of litigation expenses, MGR 93-020 requires that the litigation must involve an attack on FCIC-approved procedures, policies, or regulations, and the probability of a court ruling setting a precedent detrimental to the crop insurance program.

For the 1994 crop year, Appellant extended insurance to a Robert W. Etheridge (the insured) for a cotton crop on Agricultural Stabilization and Conservation Service (ASCS)[2] farm serial numbers 2325 and 2372, both located in Marengo County, Alabama. The insured filed a claim for a loss in section 9, a section that was a part of both farms. Appellant refused to pay the claim, asserting that under the MPCI policy, the insurable "farm unit" was neither section 9, nor farm 2325 or 2372, but was comprised of all acreage within the county, and that when the section 9 cotton production was added to the cotton production of the other acreage comprising the insurable unit, an insurable loss had not occurred.

The insured filed a suit against Appellant in the Marengo County Circuit Court alleging that Defendants (Cigna, Appellant, Appellant's local agent, the Grimmett Insurance Agency, and others) represented that the MPCI policy would pay benefits on a field-by-field, or farm-by-farm basis. FCIC declined involvement in the suit. A jury found in favor of the insured and assessed against Appellant $14,000 for compensatory damages, $90,000 for mental anguish, and $500,000 for punitive damages. The jury absolved Appellant's local agent, the Grimmett Insurance Agency, of liability and fault. Appellant filed a Motion for Judgment Notwithstanding the Verdict which was denied by the court. Appellant's appeal to the Alabama Supreme Court was also denied.

Appellant filed a claim with the FCIC under MGR 93-020 seeking recoupment of $76,925.97[3] in litigation expenses. The claim was denied by the Deputy Administrator for Insurance Services. Appellant filed a timely appeal to the Board. The Board has jurisdiction over the appeal under 24 C.F.R. §§ 24.4(b) and 400.169. The Complaint, Answer, and Rule 4 File have been submitted. 7

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 terms of the SRA with the FCIC now belong to RHLLC. (Complaint, Answer ¶ 5.)

[2] ASCS was an agency within USDA whose functions have been largely superseded by the Farm Service Agency.

[3] Under AGBCA No. 2001-127-F, filed January 11, 2001, Appellant has appealed FCIC's denial of its $604,000 claim for reinsurance under the SRA.

C.F.R. § 24.21. Appellant elected a hearing and asserted the right to conduct discovery, although no specific discovery request was made.

The Government filed a Motion for Summary Judgment, supported by evidentiary materials, essentially stating that the insured's suit raised issues related to misrepresentation by Appellant and/or Appellant's agent, and thus did not qualify for reimbursement under MGR 93-020. Appellant filed a Resistance to Appellee's Motion for Summary Judgment, supported by evidentiary material, essentially asserting that the state court decision indicated problems with the FCIC prescribed forms, thereby implicating FCIC approved policies and procedures. The Government filed a Reply to Appellant's Resistance, supported with additional evidentiary materials, and essentially asserting that if there had been a problem with the forms, it was because Appellant failed to properly complete them.

FINDINGS OF FACT (FF)

Events Preceding The Insured's 1994 MPCI Policy

1. The insured began farming ASCS farm serial number 2325 (farm 2325), and first purchased insurance for the 1989 crop year. At the time, Appellant was utilizing the Pruett Insurance Agency, and the insured's direct contacts were with Pruett. In 1989, the insurance covered a "farm unit" which was then defined in the MPCI Special Provision for cotton, as all insurable acreage of cotton in the county, identified by an ASCS farm serial number. (Appellant's Resistance, Exhibit (Ex.) 5, pages (pp.) 9, 18.) In 1990, FCIC implemented a change in the definition of a farm unit that defined a "farm unit" either as a "basic unit" or an "optional unit."[4] The "basic unit" is the unit relevant here, and "basic unit" was further defined as all insurable acreage of cotton in the county. Thus, beginning with 1990, if more than one ASCS farm serial number existed within the county, both farms would be included as a "basic unit" for purposes of insurance coverage (id. pp. 11-12). The change in the definition of a farm unit was reflected in the MPCI policy of the insured (AF 56). However, since the insured farmed only farm 2325 from 1989 through 1991, the changes had no actual effect on the insured at the time the change was implemented. In 1992, the insured began farming ASCS farm serial number 2372 (farm 2372), in addition to farm 2325, both located in Marengo County, Alabama.

The Insured's 1994 MPCI Policy

2. In December 1993, Pruett completed a handwritten MPCI Application and Production History form signed by the insured for the 1994 insurance year. It had the production history entered separately for farm 2325 and farm 2372. However, the unit description above farm 2325 was filled in with a "1.00" and the unit description above farm 2372 was left blank. (AF 74.) In February

[4] An optional unit was generally defined as an insurable unit within the county that could be an ASCS farm serial number, or a section within a farm serial number, that had clearly visible boundaries, and written verifiable production records for at least the one prior year.

1994 the insured switched from the Pruett Insurance Agency to the Grimmett Insurance Agency (AF 76). Grimmett also completed a handwritten MPCI Application and Production History form signed by the insured on February 11. This form showed no production history, had both farm numbers entered, as well as a "1.00" 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, except that the form that Appellant prepared included the separate production histories for farms 2325 and 2372 (AF 78).

3. A March 3, 1994 letter from Frank Grimmett stated that "I 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 important points. Example: You have unit 100, farm #2325." (Appellant's Resistance, Ex. 5, p. 20). On June 17, 1994, Grimmett sent the insured a summary of coverage stating that "This is your Summary of Coverage. This summary is the most important of any form that 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, ..." The Summary of Coverage[5] 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. The farm unit number had been changed from 1.00 to 1.01, because acreage had been added (id. p. 21; Appellant's Resistance, p. 4, n. 2.) The MPCI policy of the insured continued to reflect the fact that a "farm unit" included all acreage farmed in the county (AF 56).

4. 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 "optional 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 company. 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. (Appellant's Resistance, Ex. 5, pp. 21-22; AF 84.)

The Insured's Claim And Appellant's Denial

5. 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. An insurable loss was determined not to have occurred, and the insured's claim was denied. (AF 91-93, 105-06.)

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[5] FCIC states that it has no specific procedures applicable to the Summary of Coverage (FCIC's Reply to RHIS's Resistance, p. 3). The Summary of Coverage form has numerous vertical columns that were filled in including "farm unit," "ASCS Number," "Risk Area," "Rate," and "Premium." 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.

The Insured's Suit Against Appellant

6. In the Complaint filed August 8, 1996, in the Marengo County Circuit Court, the insured named, among others, Appellant and Appellant's agent, Grimmett Insurance Agency, as defendants, but not the FCIC or the United States. Appellant timely advised FCIC of the litigation (AF 108). The insured alleged that Defendants' representations that insurance would cover losses to the insured's crops "on a field by field or a farm by farm basis, as numbered by the ASCS office, were false and known to be false or Defendants recklessly made said representations without regard for the truth, and the Plaintiffs have not been paid according to the representations made." (AF 141, 143.) The insured "demanded judgment against Defendants for compensatory and punitive damages." (AF 143.). The trial transcript made a portion of the record further indicates that the insured asserted misrepresentation (AF 257-61), but did not focus upon why the policy was written in a certain way (AF 275, 299-302).

7. The insured's position during trial was that he did not receive a policy from Pruett for 1989, although there was persuasive evidence that Appellant did receive a policy. Similarly, the insured denied receiving the 1990 MPCI Special Provisions for cotton redefining the farm unit, although there was persuasive evidence that Appellant did receive these provisions and that the insured was aware of the changed farm unit definition. (id. pp. 14-18; AF 258-61, 271, 275-78, 301-04, 307, 313, 315-16, 320-21.)

8. The jury returned a verdict exonerating Appellant's agent, the Grimmett Insurance Agency of any misrepresentation or other wrongdoing, but found against Appellant, assessing $14,000 for compensatory damages, $90,000 for mental anguish, and $500,000 for punitive damages (AF 193-94, 197). Appellant's motion for judgment notwithstanding the verdict was denied, with the court holding that:

> 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).

9. 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 representations 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.)

10. The FCIC declined Appellant's request to file an *amicus brief* (AF 189, 198). On December 30, 1999, the Alabama Supreme Court affirmed the decision of the trial court, without rendering an opinion (Appellant's Resistance, Ex. 9).

The Forms Appellant Used

11. Generally, Appellant was required to use FCIC forms, or forms approved by the FCIC, for the insurance coverage. There is no dispute that the forms used were FCIC forms, or forms that were approved by the FCIC. There is also no dispute that the FCIC forms, or forms approved by FCIC, were templates, that is, blank forms, to be filled in by Appellant or its agent. (Government Motion, Attachments A, B.) These forms included APH, Acreage Reports, and Summary of Coverage.

12. FCIC provided guidance for completing the APH form. The Crop Insurance Handbook, at Section C, Preparation of the APH (NCIS 765 Form - General Instructions, paragraph 3, provided that "Separate yield determinations by year are required each year certified for: a. Each unit." (FCIC's Reply to RHIS's Resistance, Attachment F.) 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 "1.00," indicating that the two farms were a part of the same unit (AF 70).

13. FCIC provided guidance for completing the Acreage Report at NCIS 750 Application And Acreage Report (FCIC's Reply to RHIS's Resistance, Attachment G). Page 1 in the Handbook for completing the unit description provides "Make a separate line entry for each unit . . ." Page 1 of the Handbook also requires the entry of the farm serial number for the unit in the "ASCS #" column. The latest acreage report in the record was completed on June 23, 1993 (AF 71), too early to have been a factor for the 1994 MPCI policy. In any event, the FCIC instructions in Attachment G for the alphabetical column headings on the acreage report do not match with the columns in the acreage report itself (Compare Attachment G, to acreage report at AF 71).

FCIC's Denial Of Appellant's Claim And Appellant's Timely Appeal

14. Appellant's request for reimbursement under MGR 93-020 was denied by the FCIC, stating:

> FCIC does not agree that this case involved an attack on FCIC approved policy or procedure. This case involved the insured specifically alleging that RHIS's agent misled 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. . . . Therefore, the issue, in this case, involves a [sic] allegation of agent error, not a legal challenge to an FCIC approved policy or procedure. . . . You also claim that this case involves a challenge to FCIC's regulations [precluding] payment of compensatory and punitive damages. Although compensatory and punitive damages cannot be awarded against the Federal Government, this preclusion does not fully extend to reinsured companies. FCIC's regulations at 7 C.F.R. 400.352(b)(4) state that compensatory and punitive damages are not authorized against reinsured companies or its agents or employees unless the reinsured company or its agent or employee's action or inaction is not authorized or required by the Federal Crop Insurance Act, the [SRA], the regulations, or FCIC's procedures. Therefore, in those cases where the insured can prove that the reinsured company failed to follow FCIC approved policy or procedure, the state court can assess compensatory and punitive damages against the company. In this case the insured alleged that RHIS's agent's conduct was not authorized by FCIC's procedures.

DISCUSSION

The issue here is whether Appellant is entitled to recover the $76,925.97 in litigation expenses directly under MGR 93-020, or whether Appellant must be satisfied with the indirect recoupment afforded by the SRA's treatment of litigation expenses as a part of the overall expenses for which Appellant is paid 31% of the net book premiums. To qualify for reimbursement under MGR 93-020, the litigation must involve an attack on FCIC-approved procedures, policies, or regulations, and the probability of a court ruling setting a precedent detrimental to the crop insurance program. In deciding these issues we review the record made available by the parties in the litigation between the insured and Appellant, rather than limit our review to the pleadings. Rain and Hail Insurance Service, Inc., (Ingram), AGBCA No. 97-193-F, 99-1 BCA ¶ 30,143.

In determining whether to grant or deny the Government's motion, the Board looks to Federal Rule of Civil Procedure (FRCP) 56, Summary Judgment, for guidance. In this regard, in Anderson v. Liberty Lobby, 477 U.S. 242, 248-52, the Court held that only disputes over facts that might have an affect on the outcome of the suit will properly preclude the entry of summary judgment (at 248). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted (at 249-50). If reasonable minds can differ, however, a verdict should not be directed (at 250-51). The mere existence of a scintilla of evidence in support of the nonmovant's position will not be sufficient. There must be evidence on which a jury can find for the nonmovant (at 252).

The state courts' decisions could stand for the proposition that the information on FCIC insurance forms, properly completed by an insurance company, can amount to misrepresentation, where the insured can persuade a jury that the policy was never received, and that the insured's understanding of the insurance coverage is contrary to the terms and conditions of the MPCI policy. Here, the insured claimed that he had not received the policy from the prior local agent, Pruett, who was not a party to the litigation; and the present local agent, Grimmett, was exonerated from wrongdoing. There is authority that state court jury verdicts should be granted collateral estoppel by the Board. Caldera v. Northrop Worldwide Aircraft Services , Inc.,192 F.3d 962 (Fed. Cir. 1999).[6] Therefore, for our purposes, the state court, rightly or wrongly, concluded that the insurance forms completed by Appellant misrepresented the insurance coverage. Contrary to the position taken in the dissenting opinion, the courts' conclusion does not automatically preclude Appellant's qualifying for relief. If the FCIC prescribed forms or instructions are at least partly implicated in the misrepresentation, and Appellant otherwise meets the criteria for relief set forth in MGR 93-020, Appellant may recover.[7]

Did the Litigation Involve an Attack on FCIC-Approved Procedures, Policies, or Regulations

The Alabama courts clearly implicated the FCIC forms utilized as the vehicle for Appellant's misrepresentation (FF 8-10). There is no dispute that Appellant was required to utilize, and did in fact utilize, forms that were prescribed by the FCIC, or approved by the FCIC (FF 11). Further, FCIC is not asserting that the forms utilized are not FCIC-approved procedures, policies, or regulations, within the meaning of MGR 93-020. Therefore, the pivotal question is whether the forms themselves are implicated, as Appellant asserts, or whether the improper completion of the forms is implicated, as FCIC asserts.

The allegations in the insured's Complaint involved misrepresentation by the collective defendants. The insured's day-to-day contacts for the 1994 MPCI were with Grimmett, Appellant's local agent, who was specifically exonerated by the jury of any liability (FF 1-4, 6-8). Appellant's liability was premised on the fact that the forms used misrepresented the fact that insurance had not been extended to the insured on a field-by-field or farm-by-farm basis for farms 2325 and 2372 (FF 8-10), even though the MPCI policy defining the "farm unit" stated that the farm unit included all acreage

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[6] In Northrop the contractor was required to pay a judgment levied by an Oklahoma state court jury in favor of employees who alleged that the contractor had terminated them in retaliation for their failure to participate in fraudulent activities, where the Army Criminal Investigative Service determined that there was not enough evidence to prosecute Northrop. In an action before the Armed Services Board of Contract Appeals (ASBCA) involving the recovery of the Northrop's litigation expenses incurred defending the Oklahoma suit, the ASBCA found no substantial evidence that Northrop was engaged n conduct to defraud the Army, and granted the appeal for recoupment of legal expenses. On appeal, the Board's decision was reversed with the court holding that the Board should have granted the jury verdict collateral estoppel.

[7] In Rain and Hail Insurance Service, Inc., AGBCA No. 97-185-F, 98-1 BCA ¶ 29,706, the insurance company qualified for relief under MGR 93-020 where it failed to provide the insured with a copy of the policy, where this failure had little impact on the litigation, and the insurance company established that it met the criteria for relief under MGR 93-020.

within the county (FF 1, 3).

The APH form completed by Appellant did include separate production histories for farms 2325 and 2372, and these might not have been needed because both farms were a part of the same farm unit. However, the insured had kept separate records, and the form showed both farms as a part of the same farm unit, unit 1.01 (FF 2, 12). Further, for the Summary of Coverage form for which FCIC concedes it had no instructions, Appellant entered the farm numbers on separate lines, although they were a part of the same farm unit. However, risks, rates, and premiums for the two farms were different, and the form required the entry of this data (FF 3, n. 5.) In any event, both farms were shown as the same unit 1.01 in the unit column (FF 3, n. 5). The FCIC instructions for the acreage report did not match the columns on the acreage report form (FF 13). In any event, the acreage report form, like all the forms, showed the same unit number for both farms.

It is questionable whether the state court decision would have been any different had Appellant not listed the production histories separately, or had not separated the farm entries by line. In any event, there appears to be no strict FCIC prohibition of the manner in which the FCIC forms were completed. Therefore, within the meaning of Anderson v. Liberty Lobby, supra, here, there is sufficient evidence favoring the nonmoving party on the question of whether the litigation involved an attack on FCIC-approved procedures, policies, or regulations, to warrant denial of the Government's motion.

Did the Litigation Involve the Probability of a Court Ruling Setting a Precedent Detrimental to the Crop Insurance Program

While there was a question based upon the initial pleadings as to whether the litigation should have involved the probability of a court ruling setting a precedent detrimental to the crop insurance program, within the meaning of MGR 93-020, the litigation in fact established such a precedent, at least in Alabama. As stated above, the courts' decisions stand for the proposition that the information on FCIC insurance forms can amount to misrepresentation by the insurance company, when the forms are viewed in isolation from the terms and conditions of the MPCI policy, where the insured can persuade a jury that the policy was never received, and that the insured's understanding of the insurance coverage is contrary to the terms and conditions of the MPCI policy.

MGR 93-020 leaves open the question of when the probability of a detrimental court ruling must be determined. For example, it does not state this determination be made at the time of filing by the insured, after the pleading stage, after discovery, prior to jury instruction, after the verdict, or prior to an appeal, or for that matter, after a decision on appeal has been rendered. Since the issues are sometimes developed during litigation, or even on appeal, the present terms of MGR 93-020 do not preclude recovery in the present circumstances.

Within the meaning of Anderson v. Liberty Lobby, supra, here, there is sufficient evidence favoring the nonmoving party on the question of whether the litigation involved the probability of a court ruling setting a precedent detrimental to the crop insurance program, so as to warrant denial of the

Government's motion.

Appellant has offered other reasons to deny the Government's motion. These include the fact that the litigation had not ended at the time the Government filed its motion; that Appellant had requested the opportunity for discovery; that the insured had recovered compensatory and punitive damages, contrary to FCIC's regulations; and that the insured had filed the suit after the 12-month limitation period in the MPCI policy. Since we have already expressed the reasons above to deny the Government's motion, we need not deal with these other issues for purposes of this motion.

RULING

The Government's Motion for Summary Judgment is denied.

_____
EDWARD HOURY
Administrative Judge

Concurring:

_____
ANNE W. WESTBROOK
Administrative Judge

Dissenting Opinion by Administrative Judge VERGILIO.

I dissent from the decision of the majority. The majority is overreaching the authority of this Board, in attempting to provide relief to an insurance company by second-guessing the Federal Crop Insurance Corporation (FCIC) under a bulletin which permits (and does not compel) the FCIC to grant relief to an insurance company outside of the terms of the Standard Reinsurance Agreement (SRA). 7 C.F.R. § 400.169(c) ("A company may also request reconsideration by the Director of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not affect, interpret, explain, or restrict the terms of the reinsurance agreement. . . . Such determinations will not be appealable to the Board of Contract Appeals."). The bulletin does not affect the terms of the SRA (payment occurs pursuant to the bulletin not the SRA). Although an insurance company's actions in response to litigation may be affected by the prospect of reimbursement under the bulletin, such an "effect" of the bulletin does not affect, interpret, explain, or restrict the terms of the SRA which specifies the obligations of the parties thereunder.

If the Board reaches the issue, as precedent suggests, Rain & Hail Insurance Service, Inc., AGBCA

No. 97-143-F, 97-2 BCA ¶ 29,111, the final determination of the FCIC should be upheld now, not potentially set-aside. The FCIC reasonably concluded that the criteria for reimbursement of litigation expenses were not satisfied. I would grant the Government motion for summary judgment.

Bulletin MGR 93-020 specifies that it does not amend any provisions of the SRA and that under the bulletin "FCIC may provide financial assistance in certain cases for reasonable attorney fees and litigation expenses, and may pay approved judgments over and above the indemnity due as provided by the SRA." Cases submitted for FCIC consideration must meet explicit 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.

The bulletin further directs that the FCIC will make the final determination only after the court has rendered a decision or a formal settlement agreement has been presented by the parties involved.

Pursuant to the bulletin, the insurance company timely filed a request for financial assistance, after an insured filed suit in state court for the recovery of compensatory and punitive damages (Exhibits D, G (all exhibits are in the appeal file)). The insurance company was one of the defendants in that proceeding; the Government was not a party (Exhibit D at 94). The insured alleged that the insurance company issued an insurance policy on a field by field or farm by farm basis but utilized a different standard when it refused to pay the insured benefits (an indemnity) (Exhibit U at 137 (¶ 7), 138 (¶ 10), for example).

Finding for the insured and against the insurance company, a jury assessed damages, characterized as compensatory, mental anguish, and punitive. In the order denying a motion of the defendants (including the insurance company) for judgment as a matter of law notwithstanding the verdict or in the alternative motion for a new trial, the Circuit Court Judge for Marengo County, Alabama, considered the defendants' conduct in addressing the support for the punitive damages:

> 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 . . . .

(Exhibit AV at 213.)

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 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. . . .
>
> 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 FCIC did not authorize payment.

The undisputed facts fully support the conclusion of the FCIC. A suit alleging and finding active misrepresentation by an insurance company does not involve FCIC-approved program procedures, regulations or crop policies. The state proceedings 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 FCIC's final determination to deny recovery of litigation expenses.

Observations regarding the analysis of the majority

I do not find Caldera v. Northrop Worldwide Aircraft Services, Inc., 192 F.3d 962 (Fed. Cir. 1999), to compel the conclusion reached by the majority. In Caldera, state court proceedings concluded that a contractor had wrongfully terminated employees. The Federal Circuit held that those conclusions had a preclusive effect against the contractor in a suit before a board of contract appeals. The Federal Circuit followed the law on collateral estoppel of the state of the underlying proceedings.

Those laws required that: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated; (3) the determination of the issue was necessary to the final judgment; and (4) the party against whom estoppel is invoked was adequately represented in the prior action. Caldera at 971.

Under such an analysis, estoppel cannot be invoked against the Government in the present matter because the Government was not a party to the underlying action. However, the underlying litigation is a given in this case. The issue here is whether or not the FCIC reasonably concluded that the criteria in MGR 93-020 were not satisfied. If one engages in the estoppel analysis, the state court proceedings would merit preclusive effect against the insurance company, in that those proceedings concluded that the insurance company actively misrepresented the coverage of the insurance policies sold to the insured. Such misrepresentation does not implicate "FCIC-approved program procedures, regulations and/or crop policies." Moreover, a determination that an insurance company may become liable for misrepresentations made to an insured under the FCIC insurance program is not detrimental to the crop insurance program.

The majority states: "The Alabama courts clearly implicated the FCIC forms utilized as the vehicle for Appellant's misrepresentation" and "The state courts' decisions could stand for the proposition that the information on FCIC insurance forms, properly completed by an insurance company, can amount to misrepresentation, where the insured can persuade a jury that the policy was never received, and that the insured's understanding of the insurance coverage is contrary to the terms and conditions of the MPCI policy" (majority opinion at 8). I find no support for these assertions. Rather, I conclude that the underlying proceedings determined that the insured agreed to and paid for insurance coverage that was not properly reflected in the forms filed out by the insurance company--the actual policies sold varied from the agreed upon coverage. Thus, I find that the majority misdirects this case when it posits that "the pivotal question is whether the forms themselves are implicated, as Appellant asserts, or whether the improper completion of the forms is implicated, as FCIC asserts" (majority opinion at 8).

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JOSEPH A. VERGILIO
Administrative Judge

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