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An Agricultural Law Research Publication

**A Practitioner's Guide to the Litigation of Federally Reinsured
Crop Insurance Claims**

by

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Originally published in DRAKE JOURNAL OF AGRICULTURAL LAW
17 DRAKE J. AGRIC. L. 531 (2012)

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I. INTRODUCTION

The landscape of the American agriculture and farm risk management is quickly moving in directions that will present a fresh set of challenges for today's farmers and the attorneys who represent them. Severe regional droughts, as well as the regularly volatile nature of weather patterns, have resulted in a push by many in government and the agriculture industry to encourage farmers to sign up for crop insurance protection.¹ In 2011, crop insurance indemnities to farmers exceeded ten billion dollars, for the first time in history.² While the inherent risk related to farming remains, congressional leaders have explicitly stated that direct payments, which are made regardless of production conditions, will likely not be provided as a means of farm risk protection in the future.³ Crop insurance appears to have emerged as a "mainstay" of farm risk management and future farm legislation.⁴ Farmers have increased their reliance on crop insurance as a tool in their risk management portfolio.⁵ As such, the legal practitioners who represent American farmers must be prepared to address the potential legal issues that arise in the American production agricultural system, which relies increasingly on crop insurance.

Potential issues relating to the implementation of federally reinsured crop insurance policies are immense. This article will focus on procedural issues that arise when a farmer

¹ See Steve Karnowski, *Midwest Farmers Urged to Buy Crop Insurance Due to Dry Weather*, February 23, 2012, MyNewMarkets.com, <http://www.mynewmarkets.com/articles/181006/midwest-farmers-urged-to-buy-crop-insurance-due-to-dry-weather>.

² National Crop Insurance Services, *Crop Insurance Claims Break \$10 Billion*, Delta Farm Press, March 3, 2012, <http://deltafarmpress.com/management/crop-insurance-claims-break-10-billion>.

³ Keith Good, *FarmPolicy.com "Q and A." Senate Agriculture Committee Chairwoman Debbie Stabenow (D., Mich.)*, FarmPolicy.com, February 12, 2012, <http://farmpolicy.com/.../FarmPolicyQandAChairwomanStabenow12Feb.pdf>.

⁴ Jerry Hagstrom, *Vilsack Touts Need for Disaster Program and Crop Insurance*, Agweek, May 30, 2011, <http://www.agweek.com/event/article/id/18519/>.

⁵ See Stu Ellis. *2012 Farm Bill: Are you Ready To Loosen Your Grip On Direct Payments?*, Farmgate Blog.com, March 29, 2011, <http://www.farmgateblog.com/article/2012-farm-bill-are-you-ready-to-loosen-your-grip-on-direct-payments>.

believes that his crop insurance claim has been unfairly denied. As agricultural attorneys must understand the intricacies of federal crop insurance in order to best represent their clients, basic background information on the structure of U.S. crop insurance is also provided. Section II of this paper is dedicated to the background and overview of the federal crop insurance program, including an explanation of the role of private insurance companies and the federal government in administering crop insurance. Section III, on the other hand, practically outlines the process and particularities involved in the litigation and resolution of crop insurance disputes.

II. Background and Overview of Federally Reinsured Crop Insurance

To understand the nature of crop insurance in the United States, an attorney must not only understand the central tenants of insurance law. The federal government's role and responsibility under the federal crop insurance system must also be understood. Crop insurance offers financial protection for agricultural producers against natural losses to their crops.⁶ Congress enacted a federal crop insurance program "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and by providing the means for research and experience helpful in devising and establishing such insurance."⁷ The current federal crop insurance program was authorized by the Federal Crop Insurance Act (FCIA).⁸

Crop insurance is often considered confusing to those who have not devoted significant time to studying the implementation of the federal crop insurance program. Crop insurance is much more complex than other types of insurance. This results, in part, from the fact that the majority of crop insurance policies are reinsured by the federal government. The standard crop

⁶ 7 U.S.C. § 1508(a)(1) (2006).

⁷ 7 U.S.C. § 1502(a) (2006).

⁸ 7 U.S.C. §§ 1501-1524 (2006).

insurance agreement may appear to be a normal contract between a farmer and an insurance provider, but the USDA, through the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency (RMA) sets the basic policy terms, conditions, and rates. Crop insurance is further complicated by the fact that there are a wide variety of available policies with distinct terms and conditions. Policies are currently available for over 100 crops, and the policies will vary between counties and states.⁹ Moreover, in the event of a dispute as to coverage, the federal government may have the authority to make final determinations as to certain provisions and procedures in crop insurance agreements originally entered into between a farmer and an insurance agent.

A. Role of the Federal Crop Insurance Corporation

The Federal Crop Insurance Act authorized the federal crop insurance program and provided for the creation of a Federal Crop Insurance Corporation (FCIC). The FCIC is a corporation, within the United States Department of Agriculture, created to “carry out the purposes” of the Act.¹⁰ The FCIC is authorized to “insure or provide reinsurance” to approved, private insurance providers who insure the farmers of agricultural commodities in the United States.¹¹ The federal government is involved in subsidizing and limiting the risk of private crop insurance providers so the FCI may ensure that crop insurance is available to farmers at affordable rates throughout the country. Congress has made the determination that the inherent risk involved in production agriculture, including the variability of weather patterns and the high correlation of crop losses, mandate federal involvement in crop insurance.¹² The theory is that,

⁹ Risk Management Agency. *Crop Policies and Pilots*, 2011, <http://www.rma.usda.gov/policies/>.

¹⁰ 7 U.S.C. § 1503 (2006).

¹¹ 7 U.S.C. § 1508(a)(1) (2006).

¹² Stephen Frerichs, *Crop Insurance: Some Basics*, Agriculturelaw.com, <http://www.agriculturelaw.com/links/cropins/101.htm>.

without federal subsidization and reinsurance of private crop insurers, crop insurance would not be available, at affordable rates, to many farmers.¹³

The FCIC is managed by a Board of Directors that are subject to the supervision of the Secretary of Agriculture.¹⁴ The Board is composed of USDA officials as well as an individuals “experienced in the crop insurance business,” an individual “experienced in reinsurance or the regulation of insurance,” and “four active producers who are policy holders.”¹⁵ The FCIC has been granted the power to “adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted,”¹⁶ and the Corporation has been authorized to issue such regulations as necessary to carry out” statutory duties.¹⁷

The Federal Crop Insurance Corporation is managed and operated through the USDA’s Risk Management Agency (RMA).¹⁸ In 1996, as part of the reorganization of the USDA, the Risk Management Agency was created to carry out the administrative responsibilities of the FCIC.¹⁹ As a result, the RMA administers the federal crop insurance program, and activities statutorily designated to the FCIC are actually performed by the RMA. For example, RMA administers the Federal Crop Insurance Program by developing crop insurance policies, administering premium and expense subsidies, approving and supporting products, and reinsuring the private insurance companies that sell and service these federal crop insurance

¹³ Stephen Frerichs, *Crop Insurance: Some Basics*, Agriculturelaw.com, <http://www.agriculturelaw.com/links/cropins/101.htm>.

¹⁴ 7 U.S.C. § 1505(a)(1) (2006).

¹⁵ 7 U.S.C. § 1505 (a)(2) (2006).

¹⁶ 7 U.S.C. § 1506 (e) (2006).

¹⁷ 7 U.S.C. § 1506 (o) (2006).

¹⁸ Risk Management Agency, *About the Risk Management Agency*, November 2010, <http://www.rma.usda.gov/pubs/rme/aboutrma.pdf>.

¹⁹ United States Department of Agriculture, *A History of the Crop Insurance Program*, 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

policies.²⁰ In the 2010 crop year alone, the RMA managed nearly \$78 billion of insurance liability.²¹ The FCIC, on the other hand, retains the power to establish the prices, terms, and conditions for federal crop insurance contracts and oversees the delivery of these crop insurance policies to farmers.

Crop insurance policies are published in the Code of Federal Regulations, after being proposed and finalized by the FCIC.²² The RMA also publishes “handbooks” on its website, which outline the procedures relating to the administration of these crop insurance programs. In addition, private insurance providers may develop their own crop insurance products for proposal to the Board of the FCIC.²³ These privately developed policies are not published as regulations and must be approved by the FCIC, before these products may be reinsured by the FCIC.²⁴

B. What is Reinsurance?

Reinsurance of crop insurance policies is a major function of the FCIC. Reinsurance is a risk management tool for the private insurance providers who sell federal crop insurance policies to farmers. It is a contractual arrangement where an insurer transfers a portion of the risk it underwrites to another insurer.²⁵ “Reinsurance arrangements are often favored by insurers

²⁰ Risk Management Agency, *About the Risk Management Agency*, November 2010, <http://www.rma.usda.gov/pubs/rme/aboutrma.pdf>.

²¹ Risk Management Agency, *About the Risk Management Agency*, November 2010, <http://www.rma.usda.gov/pubs/rme/aboutrma.pdf>.

²² United States Department of Agriculture, *A History of the Crop Insurance Program*, 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

²³ Risk Management Agency, *A History of the Crop Insurance Program* 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

²⁴ Risk Management Agency, *A History of the Crop Insurance Program* 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

²⁵ See Ostrager, Barry & Thomas R. Newman, *Overview of Reinsurance*, 454 *Prac. L. Inst./Lit.* 339, 342 (1993).

because they reduce their reserve requirements and enhance their profitability.”²⁶ The reinsurance agreement between the FCIC and private insurers is governed by the Standard Reinsurance Agreement (SRA), and, in accordance with this agreement the FCIC pays a certain percentage of the policy premium as well as a portion of the company’s insurance costs,²⁷ therefore subsidizing the provision of crop insurance.

The Standard Reinsurance Agreement (SRA) is a “cooperative financial assistance agreement between the FCIC and an insurance company.”²⁸ It provides “the terms under which the FCIC provides reinsurance and subsidies on eligible crop insurance contracts sold” by approved insurance companies,²⁹ while incorporating the FCIA and FCIC regulations.³⁰ In turn, the SRA obligates the private insurance providers to sell and service crop insurance policies pursuant to the regulations and procedures established by the FCIC.³¹ The current SRA can be found at <http://www.rma.usda.gov/pubs/ra/> and is not published in the Code of Federal Regulations.

C. The Common Crop Insurance Policy

The Federal Crop Insurance Corporation also publishes a “Common Crop Insurance Policy,” codified in the Code of Federal Regulations.³² The common crop insurance policy contains terms and conditions for private insurance policies reinsured by the Federal Crop

²⁶ Scott Fancher, *FCIC’s Standard Reinsurance Agreement*, National AgLaw Center, 2002, http://www.nationalaglawcenter.org/assets/articles/fancher_reinsurance.pdf.

²⁷ Scott Fancher, *FCIC’s Standard Reinsurance Agreement*, National AgLaw Center, 2002, http://www.nationalaglawcenter.org/assets/articles/fancher_reinsurance.pdf.

²⁸ Risk Management Agency, *Reinsurance Agreements Overview*, 2011, <http://www.rma.usda.gov/pubs/ra/>

²⁹ Risk Management Agency, *Reinsurance Agreements Overview*, 2011, <http://www.rma.usda.gov/pubs/ra/>

³⁰ Scott Fancher, *FCIC’s Standard Reinsurance Agreement*. National AgLaw Center, 2002, http://www.nationalaglawcenter.org/assets/articles/fancher_reinsurance.pdf.

³¹ Scott Fancher, *FCIC’s Standard Reinsurance Agreement*, National AgLaw Center, 2002, http://www.nationalaglawcenter.org/assets/articles/fancher_reinsurance.pdf.

³² 7 C.F.R. § 457.8 (2011).

Insurance Corporation.³³ The terms and conditions found in the CCIP cannot be altered by private insurance providers or individual employees of the USDA unless a modification is authorized under the terms of the CCIP.³⁴ Crop insurance policies are to be administered by the RMA and private insurance providers, pursuant to procedures issued by the Department of Agriculture and published on the Risk Management Agency’s website, found at <http://www.rma.usda.gov/> “or a successor Web site.”³⁵ These procedures are contained in the “handbook” format.

D. Overview of Federal Crop Insurance

The involvement of the federal government in crop insurance contracts under the array of statutes, regulations, and guidelines applicable to the implementation of the Federal Crop Insurance Act may cause concern to attorneys when they first deal with a client’s crop insurance dispute. However, a crop insurance contract is, in its simplest description, an agreement between a farmer and a private insurance provider to insure an eligible crop.³⁶ The obligation of the private insurance provider is to indemnify the insured producer against covered losses that occur to the crop.³⁷ Crop losses incurred due to a producer’s “neglect or malfeasance,” failure “to reseed . . . under such circumstances as it is customary to reseed.” or “the failure of the farmer to follow good farming practices” will not be covered.³⁸

³³ 7 U.S.C. § 1501 et seq. (2006).

³⁴ 7 C.F.R. § 457.8 (2011).

³⁵ 7 C.F.R. § 457.8 (2011).

³⁶ Risk Management Agency, *A History of the Crop Insurance Program*, 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

³⁷ Risk Management Agency, *A History of the Crop Insurance Program*, 2011, <http://www.rma.usda.gov/aboutrma/what/history.html>.

³⁸ 7 U.S.C. § 1508(a)(3)(A) (2006).

Crop insurance is complicated due to the federal involvement in regulation and administration of the insurance coverage.³⁹ The legal priority of statutes, regulations, and RMA handbook procedures applicable to reinsured crop insurance can be confusing, particularly if there are inconsistencies. Federally reinsured crop insurance is governed by the United States Code, implemented by federal regulations, and administered under informal procedures contained in the RMA handbooks. As a result, practitioners must be aware of the order of their priority.

If there is any conflict, attorneys can remember the order of legal priority. This is stated in the following: (1) The Federal Crop Insurance Act; (2) the Federal Regulations; and (3) the procedures as issued by FCIC/RMA, with (1) controlling (2).⁴⁰ The procedures issued by the RMA are those guidelines contained in the crop insurance handbooks. Procedures and practices located in RMA handbooks are not codified in the federal regulations. If the federal regulations conflict with FCIC issued procedures, as outlined in RMA crop insurance handbooks, the federal regulations will control as the handbook procedures do not have the force of law and are only the Agency's interpretation of the applicable federal regulations.⁴¹ All federal regulations remain subject to the Federal Crop Insurance Act.⁴²

³⁹ 7 U.S.C. § 1505(a) (2006).

⁴⁰ 7 C.F.R. § 457.8 (2011).

⁴¹ See Graham v. Lawrimore, 185 F.Supp. 761, 764 (E.D.S.C. 1960) (USDA "Handbook does not have the force and effect of the law."); Hawkins v. State Agric. Stabilization & Conservation Comm., 149 F.Supp. 681, 686 (S.D. Tex. 1957) (Handbooks "were not intended by any officials in the Department of Agriculture to have the force or effect of regulations."); Westcott v. United States Dep't of Agric., 611 F.Supp. 351, 358 (D. Neb. 1984) (holding that USDA ASCS handbooks were "merely interpretive rules of regulations contained in the Code of Federal Regulations.").

⁴² 7 U.S.C. § 1501 *et seq.* (2006).

III. Resolving Crop Insurance Disputes

When a farmer experiences a crop loss, submits a claim for coverage, and that claim is denied, the farmer may wish to challenge the denial. The relevant federal regulations and the USDA/RMA Handbooks prescribe a detailed and complex process for contesting the denial of a claim for crop losses under a federally reinsured crop insurance policy. Tools that may be available to a farmer include mediation, arbitration, appeal, reconsideration, administrative review, judicial review, and suit.⁴³ The common crop insurance policy outlines the basic procedures for such a review, appeal, mediation, arbitration, or litigation of a crop insurance claim.⁴⁴ Regardless of which method is employed to reach resolution of a crop insurance claim, the Federal Crop Insurance Act, the terms of the common insurance policy, and the relevant federal regulations are binding.⁴⁵ Farmers who purchase federally reinsured crop insurance agreements are held to have notice of all relevant terms and conditions within the CCIP along with applicable regulations promulgated by the FCIC.⁴⁶ Moreover, federal courts have charged policy holders with notice of the content of their policy and the relevant federal regulations.⁴⁷

The attorney who represents a farmer contesting a denial of a crop insurance claim must take note of the particularities of a denial, as the denial will dictate the proper course of action for resolution of the dispute. In a crop insurance dispute, conflicts may certainly arise between the insured farmer and the private insurance provider, but the FCIC's role as a reinsurer creates the potential for a three-way disagreement. The FCIC, the private insurer, or both may have

⁴³ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (2011).

⁴⁴ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (2011).

⁴⁵ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (f) (2011).

⁴⁶ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290, 1295, 1300 (M.D. Ala. 2000), Walpole v. Great American Ins. Companies, 914 F.Supp. 1283, 1290 (D.S.C. 1994).

⁴⁷ Nobles v. Rural Community Ins. Servs, 303 F.Supp. 2d 1292, 1303 (M.D. Ala 2004), FCIC v. Merrill, 332 U.S. 380 (1947).

played a role in the denial of an insured's claim. The proper process under which an insured farmer may contest that denial will often be dependent on whether the private insurer or RMA chose to deny the claim. Section III highlights the available mechanisms for the resolution of a crop insurance dispute in a variety of potential scenarios and highlights the three primary avenues, available under the Federal Crop Insurance Act, for the appeal or review of a crop insurance denial. Subsection A details the mediation and arbitration of crop insurance disputes, while subsection B covers the FCIC administrative review and appeal procedures. Finally, subsection C provides an overview of the litigation of crop insurance disputes in state and federal courts.

A. Mandatory Arbitration of Crop Insurance Disputes

Arbitration is often required by the terms of the Common Crop Insurance Policy, under an arbitration clause⁴⁸ pertaining to disputes between an insured and the private insurance provider.⁴⁹ The current arbitration provision found within the CCIP provides that, when a disagreement arises between an insured farmer and the insurance provider, as to “any determination” made by the insurance provider, “the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association.”⁵⁰

As crop insurance contracts have been held to involve interstate commerce, the Federal Arbitration Act⁵¹ is applicable to the CCIP and underlying disputes.⁵² Federal courts have found

⁴⁸ The statutory authority for the arbitration clause found in the FCIC regulations is based upon the Federal Crop Insurance Act which provides the FCIC the authority to promulgate regulations to carry out the purposes of the Act. Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf.

⁴⁹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a) (2011).

⁵⁰ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (a) (2011).

⁵¹ The basic purpose of the Federal Arbitration Act is to overcome judicial hostility towards the enforcement of contractual agreements to arbitrate. The Act will preempt state statutes which bar the enforcement of arbitration agreements. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995).

⁵² *Nobles v. Rural Cmty Ins. Services*, 122 F.Supp. 2d 1290, 1295, 1299 (M.D. Ala. 2000).

arbitration to be mandatory and have upheld the enforceability of the arbitration provision contained in the Common Crop Insurance Policy, citing the Federal Arbitration Act⁵³ and “a federal policy favoring arbitration.”⁵⁴ As a result, arbitration is likely mandatory in all crop insurance disputes between the insured and the private insurance provider. Numerous attempts, by insured parties, to get around the arbitration clause found in the CCIP have failed,⁵⁵ and, as such, it now appears well settled that the parties to a crop insurance agreement are bound by the CCIP arbitration clause. While arbitration decisions are binding,⁵⁶ the findings of an arbitrator may be subject to judicial review in certain circumstances.⁵⁷

An arbitrator’s authority to resolve disagreements is limited by the CCIP.⁵⁸ Damages awarded by an arbitrator may not exceed the amount of liability established under the policy.⁵⁹ Recovery for any damages, aside from the covered policy amounts, “will likely require separate litigation beyond arbitration.”⁶⁰ Federal courts have also made clear that arbitrator’s do not have the authority to make equitable awards.⁶¹

One federal court, that also recognized the CCIP’s limitation on an arbitrator’s authority to make equitable awards, carved out an exception to the rule and allowed an arbitrator the power to award recovery for losses, not covered under a crop insurance policy, where the insured

⁵³ 9 U.S.C. § 1 *et seq.* (2006).

⁵⁴ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290, 1295 (M.D. Ala. 2000).

⁵⁵ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290 (M.D. Ala. 2000), IGF Ins. Co. v. Hat Creek Partnership, 76 S.W.3d 859 (2002), In Re 2000 Sugar Beet Crop Insurance Litigation, 228 F.Supp. 2d 992 (D. Minnesota 2002), Leford Farms, Inc. v. Fireman’s Fund Ins. Co., 184 F.Supp.2d 1242 (S.D. Fla. 2001), Bissette v. Rain & Hail, LLC, 2011 WL 2905059 (E.D. N.C. 2011).

⁵⁶ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (c) (2011).

⁵⁷ See Federal Arbitration Act, 9 U.S.C. §§ 9-10 (2006).

⁵⁸ Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf; Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (2011).

⁵⁹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (h) (2011).

⁶⁰ Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf (2002).

⁶¹ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290 (M.D. Ala. 2000).

“relied in good faith upon a misrepresentation of an insurance agent.”⁶² The Nobles Court found that an arbitrator had the authority to grant damages where the claimant relied on the misrepresentation of an agent.⁶³ However, the Court cited 7 C.F.R. § 457.6, which specifically stated that the “FCIC has a long standing policy of honoring the misinformation provided by its agents to insured,”⁶⁴ The Court held that language, found in the Federal Register, would provide an insured with a claim against the FCIC based upon misrepresentations by the private insurer. This reasoning can no longer be used in support of an arbitrator’s award of damages resulting from good faith reliance on a misrepresentation, however. The FCIC has since made revisions to the Federal Regulations “to reduce program vulnerabilities and clarify existing policy provisions to better meet the needs of the insured.”⁶⁵ One of these revisions was the elimination of the regulatory provision allowing recovery for “good faith reliance on misrepresentations.”⁶⁶

1) Procedural Notes on Arbitration Pursuant to the CCIP

The common crop insurance policy mandates that arbitration proceedings must be initiated within one (1) year of either the denial of the crop insurance claim or the date on which a disputed determination was issued.⁶⁷ Arbitration is “initiated” when a “Demand for Arbitration” is filed with the insurance provider.⁶⁸ This one year time frame stands, regardless of whether the parties choose to initiate a mediation process.⁶⁹ The failure to initiate arbitration within the one-year time period may bar proceedings against a crop insurance company and will

⁶² Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290, 1297 (M.D. Ala. 2000).

⁶³ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290 (M.D. Ala. 2000).

⁶⁴ Nobles v. Rural Cmty Ins. Services, 122 F.Supp. 2d 1290, 1297 (M.D. Ala. 2000), Quoting 56 Fed. Reg. 1345, 1347 (1991).

⁶⁵ 69 Fed. Reg. 48652-01, 48652 (2004).

⁶⁶ 69 Fed. Reg. 48652-01, 48655 (2004).

⁶⁷ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (b)(1) (2011).

⁶⁸ Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf.

⁶⁹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (b)(1) (2011).

consequently bar any later attempt to resolve the dispute through a judicial review.⁷⁰ The CCIP also mandates that arbitration be conducted in accordance with the rules of the American Arbitration Association (AAA), but there is not a requirement that an AAA Arbitrator conduct the arbitration.⁷¹

For an award given at arbitration to be enforceable, the arbitrator must provide both the insurer and the insured a written statement that describes the disputed issues, contains the findings of fact, includes the determinations of the arbitrator, and gives the amount, basis, and “breakdown by claim” for the awards.⁷² When an award has been granted at arbitration, a party to the arbitration has the right to petition a federal court for a confirmation or entry of said judgment, within a year of the date upon which the award was made.⁷³

This subsection highlights only a few of the basic procedural elements involved in arbitrating a crop insurance claim. As the AAA arbitration rules govern arbitration proceedings from the initial filing through the rendering of the arbitration award, the AAA arbitration rules should be consulted before proceeding towards arbitration.⁷⁴ The AAA rules can be found online at <http://www.adr.org/>.

2) *Mediation Prior to Arbitration*

The Common Crop Insurance Policy provides the opportunity for parties to settle a dispute without resorting to arbitration.⁷⁵ For a settlement to be enforceable, the CCIP requires

⁷⁰ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (b)(2) (2011).

⁷¹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a) (2011).

⁷² Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(2) (2011).

⁷³ See Federal Arbitration Act, 9 USC § 9 (2006).

⁷⁴ Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf.

⁷⁵ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a) (2011).

that the settlement agreement, reached between the parties with or without the aid of mediation, be written and include a statement of disputed issues along with the amount of the settlement.⁷⁶

Mediation is a potential dispute resolution tool when the insured and the private insurance provider can both agree to mediate the disputed issues and agree on a mediator.⁷⁷

Mediation may be a preferred course of action in certain circumstances as it can offer an opportunity for the quick resolution of the dispute. However, before seeking mediation attorneys should remember that private insurance providers are reinsured by the FCIC⁷⁸. This could be an important detail as there may be circumstances where a private insurance provider is hesitant to settle a case without a binding determination from an arbitrator, due to a fear that the FCIC may not approve payment of the reinsured portion of the claim to the private insurer. The RMA requires private insurance providers to provide RMA with all settlement agreements as well as “all briefs or other evidence.”⁷⁹ The failure of the private insurance provider to provide this information can lead to the RMA’s denial of FCIC reinsurance.⁸⁰ Reinsurance may also be denied to the private insurance company if RMA determines that an indemnity was paid to the insured in violation of FCIC procedures.⁸¹ Practitioners must take into consideration that, although the mediation or arbitration may only concern a disagreement between the insured and the private insurance provider, the private insurance provider has a significant interest in ensuring that the FCIC will pay a portion of any settlement amount. Attorneys representing insured claimants should be certain that the party representing a private insurance provider at

⁷⁶ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(2) (2011).

⁷⁷ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (g) (2011).

⁷⁸ 7 C.F.R. Part 400, Subpart L (2011).

⁷⁹ Risk Management Agency. *2012 Crop Insurance Handbook*, at 120, 2012, http://www.rma.usda.gov/handbooks/18000/2012/12_18010-2.pdf.

⁸⁰ Risk Management Agency. *2012 Crop Insurance Handbook*, at 120, 2012, http://www.rma.usda.gov/handbooks/18000/2012/12_18010-2.pdf.

⁸¹ Risk Management Agency. *Standard Reinsurance Agreement* (2013 SRA), at IV ¶(h)(6), <http://www.rma.usda.gov/pubs/ra/>.

mediation has the actual authority to settle the dispute in mediation. If that is not the case, mediation may not be an effective tool for resolution of the dispute.

3) *Arbitration of Policy and Procedural Disputes Between the Insured and the Private Insurance Provider*

Where a dispute arises as to “a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure”⁸² mediation and arbitration will remain available for the resolution of a crop insurance dispute, but the CCIP contains an additional hurdle for the insured, prior to the desired arbitration or mediation.⁸³ Arbitration or mediation of disputes involving “a policy or procedure interpretation” cannot proceed until the insured has received an interpretation of the disputed policy provision or procedure from the FCIC.⁸⁴ In short, arbitration or mediation of policy or procedures can only be used by the insured after the FCIC has handed down its own interpretation,⁸⁵ and the FCIC’s interpretation is binding on any subsequent arbitration or mediation.⁸⁶ The proper manner for requesting and obtaining an interpretation of a policy provision or procedure is contained in the CCIP.⁸⁷ The process of requesting an interpretation is a step that should not be overlooked as “failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.”⁸⁸

The applicability of this nullification provision may not always be clear. At least one federal court has addressed the question of whether a determination made by an arbitrator is a factual interpretation or a policy interpretation invoking the nullification provision, in Section 20.

⁸² Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

⁸³ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

⁸⁴ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

⁸⁵ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

⁸⁶ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1)(i) (2011).

⁸⁷ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011), See 7 C.F.R. part 400, subpart x (2011).

⁸⁸ Common Crop Insurance Policy. 7 CFR § 457.8, [For Reinsured Policies], Section 20 (a)(1) (2011).

In Great American Ins. Co. v. Moye, the court dealt with a dispute as to whether an insured farmer had “properly treated” the soil on his farm and held that the arbitrator’s determination was not an interpretation of a policy provision.⁸⁹ The Court did note, however, that “in order to decide if the land was properly treated, a person must first know or decide what it *means* to be properly treated.”⁹⁰ The Court then found that the arbitrator made a factual determination as to the issue due to the fact that Prefatory Comments to the Federal Register indicated that “properly treated” meant treating the soil to defend against nematodes.⁹¹ The Court went on to explain that to apply nullification to the dispute would require a “nonsensical” reading of the policy terms that “would wholly strip arbitrations of any importance when they concern a factual dispute over soil preparation” as the requirement that the land be “properly treated” would “have to be interpreted as requiring that the land be fumigated or treated in a manner approved by the FCIC.”⁹² Great American Ins. Co. v. Moye⁹³ serves as a warning that whether a dispute involves a policy or procedural issue may not always be a quick or easy determination. Practitioners would be wise to exercise caution when deciding whether an FCIC interpretation is necessary due to the harsh realities presented under the nullification provision of Section 20 of the CCIP.

While the FCIC’s interpretation of a procedure is binding, the interpretation is appealable to the USDA National Appeals Division (NAD).⁹⁴ If the insured disagrees with the interpretation of a *procedure*, rendered by the FCIC, the interpretation may be appealed.⁹⁵ FCIC

⁸⁹ Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298, 1305 (M.D. Fla. 2010).

⁹⁰ Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298, 1305 (M.D. Fla. 2010).

⁹¹ Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298, 1305 (M.D. Fla. 2010).

⁹² Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298, 1306 (M.D. Fla. 2010).

⁹³ Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298 (M.D. Fla. 2010).

⁹⁴ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1)(iv) (2011).

⁹⁵ Common Crop Insurance Policy. 7 CFR § 457.8, [For Reinsured Policies], Section 20 (a)(1)(iv) (2011). Rules outlining the appeals process for the National Appeals Division are found in the Code of Federal Regulations. See *infra* p.30.

interpretations of policy provisions, however, are considered to be determinations that qualify as a “matter of general applicability”⁹⁶ and are not appealable to NAD.⁹⁷ FCIC determinations as to matters of general applicability may, however, be subject to judicial review.⁹⁸

B. Potential FCIC Involvement in the Resolution of a Crop Insurance Dispute

All federally reinsured crop insurance policies include clauses which specify arbitration as a method for dispute resolution.⁹⁹ However, the CCIP provides for instances where an administrative review is required for the resolution of a crop insurance claim. These instances include situations where disputes relate to “determinations made by the FCIC,”¹⁰⁰ claims where the “FCIC is directly involved in the claims process”,¹⁰¹ and where the FCIC “directs” the insurance provider’s “resolution of the claim,”¹⁰² In addition, “good farming practices” disputes may not be arbitrated and must be appealed through the FCIC.¹⁰³ Generally, the involvement of the FCIC, through RMA, complicates the process for the resolution of a crop insurance dispute by requiring an administrative review or appeal, as opposed to arbitration. The procedural guidelines for the administrative resolution of crop insurance disputes outside of arbitration are discussed further below.

⁹⁶ Common Crop Insurance Policy. 7 CFR § 457.8, [For Reinsured Policies], Section 20 (a)(1)(iii) (2011).

⁹⁷ 7 C.F.R. § 400.768(g) (2011).

⁹⁸ Prior to seeking judicial review as to an FCIC determination on a “matter of general applicability,” an insured is required to request “an administratively final determination from the Director of the National Appeals Division on the issue of whether the final agency determination is a matter of general applicability. 7 CFR § 400.768(g)(2011), See *infra* p. 27, for final determination of non-appealability procedures.

⁹⁹ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (a) (2011).

¹⁰⁰ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁰¹ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁰² Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁰³ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (d) (2011).

1) Claims Involving Direct or Indirect FCIC Involvement

Attorneys who represent farmers in crop insurance disputes must be knowledgeable of the role that the FCIC, through RMA, may play in the denial of a crop insurance claim. When the FCIC becomes involved in an insured farmer's claim for an indemnity from a private insurer, the path towards resolution of the dispute will take a detour from the arbitration track that is required for indemnity disputes between the insured and the private insurance provider.

The opportunity for FCIC involvement in the denial or adjustment of a claim is immense. Under the SRA, private insurance providers are required to notify the FCIC of unusual or controversial claims, including instances where misrepresentation, fraud, waste, or abuse are suspected.¹⁰⁴ Furthermore, the insurance provider is required to assist the FCIC in its own investigation of the claim.¹⁰⁵ This SRA provision opens the gate for FCIC to participate in the adjustment of a farmer's claim. Another prime example of a situation where the FCIC will participate in the claims process is the RMA large claims process which requires private insurance providers give the RMA an opportunity to participate in the claims process when the claim total exceeds \$500,000.¹⁰⁶ The FCIC, "as a federal regulator of the crop insurance program," has asserted its authority to take actions regarding the adjustment of claims to ensure the program is administered in accordance with the Federal Crop Insurance "Act, applicable regulations, policy provisions, and procedures."¹⁰⁷

¹⁰⁴ Risk Management Agency. *Standard Reinsurance Agreement* (2013 SRA), at Appendix IV Section III. ¶(a)(5), <http://www.rma.usda.gov/pubs/ra/>.

¹⁰⁵ Risk Management Agency. *Standard Reinsurance Agreement* (2013 SRA), at Appendix IV Section III. ¶(a)(5), <http://www.rma.usda.gov/pubs/ra/>.

¹⁰⁶ Risk Management Agency, *Large Claims Handbook, 2010*, <http://www.rma.usda.gov/handbooks/14000/2010/14040.pdf>.

¹⁰⁷ Risk Management Agency, *Large Claims Handbook, 2010*, <http://www.rma.usda.gov/handbooks/14000/2010/14040.pdf>.

Once the FCIC has become “directly involved in the claims process or directs” a private insurer “in the resolution of a claim,” an administrative approach to the resolution of the disagreement is required.¹⁰⁸ The CCIP requires that these claims, denied either directly by the FCIC or an approved insurance provider, may not proceed to arbitration. Instead, the CCIP mandates an administrative review or appeal when the FCIC “elects to participate” in the claims adjustment process or ‘modifies, revises, or corrects” a claim prior to payment.¹⁰⁹ According to 7 CFR § 457.8, when the FCIC “elects to participate” in the claims process, the insured must proceed with the administrative review or appeal and may not pursue arbitration, mediation, or litigation.¹¹⁰

The process for pursuing an administrative review¹¹¹ is outlined in 7 CFR part 400, subpart J.¹¹² An appeal through the National Appeals Division¹¹³ is to be conducted pursuant to 7 CFR part 11.¹¹⁴ After the completion of a National Appeals Division administrative appeal, an insured farmer does have the right to bring suit against the FCIC, pursuant to 7 CFR part 400, subpart P.¹¹⁵

¹⁰⁸ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁰⁹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (j) (2011).

¹¹⁰ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (j) (2011). This restriction should not preempt state law causes of action as the FCIA does not bar the arbitration and litigation of state law claims. See Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Services, Inc., 121 F.3d 630 (11th Cir. 1997), Meyer v. Conlon, 162 F.3d 1264, 1268-1269 (10th Cir. 1998), Nobles v. Rural Community Ins. Servs., 303 F.Supp. 2d 1292, 1303 (M.D. Ala 2004).

¹¹¹ See infra p. 29.

¹¹² Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹¹³ See infra p. 30.

¹¹⁴ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹¹⁵ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e)(1) (2011).

2) *Good Farming Practices Determinations*

The failure of an insured to use good farming practices may lead to a determination that crop losses are uninsured.¹¹⁶ Disagreements between the insured farmer and the insurer regarding the use of good farming practices by the insured farmer demands special attention by the attorney, as “good farming practices” disputes are not treated, under the CCIP, as typical disputes between the insured and the insurance provider.¹¹⁷ A private insurance company may make decisions regarding good farming practices when assessing a farmer’s claim,¹¹⁸ but these private insurance providers may not be sued based upon their determinations of good farming practices with respect to the insured crop.¹¹⁹ Moreover, an insured may not use the arbitration process to argue a good farming practices determination. The FCIC has been given the sole authority to make determinations regarding the use of good farming practices by a farmer.¹²⁰

Good farming practices disputes require the insured to seek the FCIC’s opinion of what farm practices constitute a “good farming practice.”¹²¹ Farmers who have an insurance claim denied by a private insurance provider, on the basis of the farmer’s alleged failure to use good farming practices, do have some notice of the unique nature of “good farming practices” determinations in that insurance providers are required by FCIC to provide the insured with a written good farming practices decision, stating the basis for such a denial and informing the insured of the right to request a Risk Management Agency determination of good farming practices.¹²²

¹¹⁶ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(1) (2011).

¹¹⁷ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d) (2011).

¹¹⁸ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(1) (2011).

¹¹⁹ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(1)(iii) (2011).

¹²⁰ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2) (2011).

¹²¹ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(1)(i) (2011).

¹²² United States Department of Agriculture, Risk Management Agency. Manager’s Bulletin No: MGR-05-010 and FCIC Interpretation of Procedures-Interpretation of MRG-05-010.

The procedure for obtaining an FCIC determination of what constitutes a good farming practice is found at 7 CFR part 400, subpart X.¹²³ The FCIC will then make a finding of what “constitutes a good farming practice.”¹²⁴ Under the provisions of the common crop insurance policy, FCIC good farming practices determinations are not appealable to the National Appeals Division.¹²⁵ However, the insured “may request reconsideration by FCIC”¹²⁶ in the event that she disagrees with the FCIC’s determination. The process for requesting reconsideration of an FCIC determination as to good farming practices has been published at 7 CFR part 400, subpart J.¹²⁷

The insured is not required to request a reconsideration,¹²⁸ and, in the alternative, the insured has the option of filing suit against the FCIC.¹²⁹ Suits against the FCIC “must be brought in the United States District Court for the district in which the insured acreage is located.”¹³⁰ The time frame for filing a suit against the FCIC is limited to one year from the date of the determination that good farming practices were not followed or the date that the reconsideration was completed.¹³¹ The case law relating to “good farming practices” disputes is limited, but at least one court has found that an over-extended farmer who did not have sufficient time to care for his crop at the level expected by the FCIC could not recover under his crop insurance policies due to his failure to follow good farming practices.¹³² Other case law upholds the provision that a failure to follow recognized good farming practices will result in a loss of

¹²³ The procedures for obtaining a Final Agency Determination are discussed thoroughly later in this paper. See *infra* p. 24.

¹²⁴ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(2) (2011).

¹²⁵ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d) (2011).

¹²⁶ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(2) (2011).

¹²⁷ This process is discussed in detail in a later section of the paper. See *infra* p. 28.

¹²⁸ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2) (2011).

¹²⁹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2)(ii) (2011).

¹³⁰ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2) (2011).

¹³¹ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2)(c) (2011).

¹³² Royalty v. Federal Crop Ins. Corp., 618 F.Supp. 650 (W.D. Ky. 1985).

coverage to the insured.¹³³ In principle, the requirement that a farmer follow “good farming practices” seems to be a simple concept, but Practitioners should be aware that opinions, among farmers, as to “good farming practices” relating to crop production and farming techniques vary significantly and are likely to be a source of disagreement in the future.

3) ***Procedures for FCIC Agency Determinations, Good Farming Practices Reconsideration Requests, Administrative Review of FCIC Determinations, and Administrative Appeals through the National Appeals Division of USDA***

The administrative tools, often required for the resolution of a crop insurance dispute, mentioned within this paper are likely confusing to those unfamiliar with the USDA administrative review process and the NAD appeal procedures. This subsection serves to distinguish these available administrative tools and provides an overview of their individual applicability as well as an outline of the technical requirements and procedures relating to their use in the crop insurance dispute. Each of following tools has been addressed at some point earlier in this paper but has not yet been fully detailed. Subsection 3 is provided as an outline and descriptive summary of: a) FCIC Final Agency Determinations; b) the Director’s Review of Final Agency Determinations; c) The Good Farming Practices Reconsideration Process; d) Administrative Review of FCIC Agency Determinations; and e) the appeals process for the National Appeals Division of USDA.

(a). FCIC Final Agency Determinations

As mentioned earlier, an FCIC interpretation is required before the mediation or arbitration of a disagreement as to “a policy or procedure interpretation, regarding whether a

¹³³ Hill v. Federal Crop Ins. Corp., 669 F.Supp. 928 (E.D. Ark. 1987).

specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure.”¹³⁴ The CCIP specifies that interpretations are to be obtained in accordance with 7 CFR part 400, subpart X which outlines the procedure for a “Final Agency Determination.”¹³⁵ Thus, Final Agency Determinations interpreting a policy or procedure, in issue, are required prior to the arbitration or mediation of a crop insurance claim. Furthermore, a failure to request a Final Agency Determination, before proceeding with arbitration will lead to the nullification of any award granted in arbitration.¹³⁶ FCIC determinations are also required when an insured disputes a “good farming practices” determination.¹³⁷ It is important to note that, while the FCIC determination may be an interpretation of a policy or procedure, the FCIC will not make a determination as to the merits of a case, the actions of an insured, or specific factual situations.¹³⁸

An insured may request an FCIC determination by: 1) mail to the Associate Administrator of the Risk Management Agency; 2) facsimile at (202) 690-9911; 3) email at RMA.CCO@rma.usda.gov; or 4) by overnight delivery to the Associate Administrator of the Risk Management Agency.¹³⁹ The regulations also require that all requests specify the “name, address, and telephone number of a contact person affiliated with the request” and that the request is being submitted under Section 506(s) of the Federal Crop Insurance Act.¹⁴⁰ The request must also state the crop year for which the interpretation is sought and “identify and quote” the provision of the Act or regulations for which a determination is sought.¹⁴¹ The

¹³⁴ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

¹³⁵ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

¹³⁶ Garnett v. NAU Country Ins. Co., No. 5:09-CV-0144-R. 2009 WL 3644726 (W.D. Kentucky 2009).

¹³⁷ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d)(2) (2011).

¹³⁸ 7 C.F.R. § 400.768 (2011).

¹³⁹ 7 C.F.R. § 400.767 (2011).

¹⁴⁰ 7 C.F.R. § 400.767 (2011).

¹⁴¹ 7 C.F.R. § 400.767 (2011).

individual who seeks an FCIC interpretation or determination is further required to advise the FCIC if the determination will be used “in a lawsuit or the settlement of a claim,” and the requesting party must include her “detailed interpretation of the regulation.”¹⁴² Moreover, each request for a Final Agency Determination may include only one request for an agency interpretation.¹⁴³

The applicable regulations demonstrate the FCIC’s desire for specificity in the request, and the FCIC may determine that a request is “unclear, ambiguous, or incomplete.”¹⁴⁴ If the FCIC makes such a judgment, it will not attempt an interpretation.¹⁴⁵ The FCIC, instead, will notify the requesting party of her error within thirty (30) days of the request.¹⁴⁶ The requesting party maintains the opportunity to resubmit a request. A request deemed clear, unambiguous, and complete will, according to the regulations, be replied to within ninety (90) days of receipt by the FCIC.¹⁴⁷ The requesting party may assume the interpretation provided in the original request is correct if the FCIC fails to provide a response to the request within this ninety day time period.¹⁴⁸

Final Agency Determinations are subject to judicial review, but, prior to seeking judicial review, a party “must obtain an administratively final determination from the Director of the National Appeals Division on the issue of whether the Final Agency Determination is a matter of general applicability.”¹⁴⁹ The insured only has thirty days from receipt of the agency

¹⁴² 7 C.F.R. § 400.767 (2011).

¹⁴³ 7 C.F.R. § 400.767 (2011).

¹⁴⁴ 7 C.F.R. § 400.768 (2011).

¹⁴⁵ 7 C.F.R. § 400.768 (2011).

¹⁴⁶ 7 C.F.R. § 400.768 (2011).

¹⁴⁷ 7 C.F.R. § 400.768 (2011).

¹⁴⁸ 7 C.F.R. § 400.768 (2011).

¹⁴⁹ 7 C.F.R. § 400.768 (2011).

determination to submit a personally signed, written request for the Director’s determination of appealability.¹⁵⁰

(b). Director’s Review of FCIC Final Agency Determinations

Final Agency Determinations are subject to judicial review, but, prior to seeking judicial review, a party “must obtain an administratively final determination from the Director of the National Appeals Division on the issue of whether the Final Agency Determination is a matter of general applicability.”¹⁵¹ The insured only has thirty days from receipt of the agency determination to submit a personally signed, written request for the Director’s determination of appealability.¹⁵² The procedure for requesting a Director’s determination as to the appealability of an FCIC agency determination and an insured’s right to a National Appeals Division hearing is found at 7 CFR § 11.6 and is outlined below.

First, an insured only has 30 days from the time she receives a Final Agency Determination to submit a written request for review to the Director of the National Appeals Division.¹⁵³ The Director, or an individual to whom the Director has delegated this authority, will then review the request to determine whether the determination is a matter of general applicability and, as a result, is not appealable.¹⁵⁴ The Director may reverse the agency determination and hold that the decision is appealable, allowing the insured to proceed with an appeal in the National Appeals Division.¹⁵⁵

¹⁵⁰ 7 C.F.R. § 11.6 (2011).

¹⁵¹ 7 C.F.R. § 400.768 (2011).

¹⁵² 7 C.F.R. § 11.6 (2011).

¹⁵³ 7 C.F.R. § 11.6(a)(1) (2011).

¹⁵⁴ 7 C.F.R. § 11.6(a)(2) (2011).

¹⁵⁵ 7 C.F.R. § 11.6(a)(2) (2011).

(c). The Good Farming Practices Reconsideration Process

An insured farmer who disagrees with an FCIC Final Agency Determination as to “good farming practices” has the opportunity to request a “reconsideration” from the FCIC.¹⁵⁶ The insured does not have an opportunity to appeal an FCIC good farming practices determination to the National Appeals Division.¹⁵⁷ The process for requesting reconsideration of an FCIC determination as to good farming practices has been published at 7 CFR part 400, subpart J and is described below. This reconsideration process is only available to Final Agency Determinations regarding good farming practices.¹⁵⁸

Reconsideration is requested by filing a written request for a reconsideration to the USDA/RMA/Deputy Administrator for Insurance Services/Stop 0805, at 1400 Independence Avenue SW., Washington, DC 20250–0801.¹⁵⁹ The reconsideration request has a time limitation and “must be filed within 30 days of receipt of written notice of the determination.”¹⁶⁰ Filing is accomplished when the request is “personally delivered” to FCIC or when the request is postmarked.¹⁶¹ The request must include a basis from which the insured plans to show that:

- (i) The decision was not proper and not made in accordance with applicable program regulations and procedures; or
- (ii) All material facts were not properly considered in such decision.¹⁶²

¹⁵⁶ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(d) (2011).

¹⁵⁷ 7 C.F.R. § 400.98(b) (2011).

¹⁵⁸ 7 C.F.R. § 400.98 (2011).

¹⁵⁹ 7 C.F.R. § 400.98(d) (2011).

¹⁶⁰ 7 C.F.R. § 400.98(d)(1) (2011).

¹⁶¹ 7 C.F.R. § 400.98(d)(1) (2011).

¹⁶² 7 C.F.R. § 400.98 (2011).

(d). Administrative Review of FCIC Agency Determinations

An insured who disagrees with a determination of the FCIC may be able to seek an administrative review of the FCIC’s determinations and/or directions.¹⁶³ Administrative review is not limited to Final Agency Determinations and is available for any “adverse decision” made by an employee or Director of RMA.¹⁶⁴ The insured is also allowed the opportunity to mediate a Administrative reviews of adverse determinations made by the FCIC are governed by the rules located in 7 CFR part 400, subpart J. Requests for administrative review must be written and state the basis upon which the insured plans to show that:

- (1) The decision was not proper and not made in accordance with applicable program regulations and procedures; or
- (2) All material facts were not properly considered in such decision.¹⁶⁵

The deadline for filing a request for administrative review is within 30 days of the receipt of written notice of the decision.¹⁶⁶ Filing is complete when personally delivered or postmarked.¹⁶⁷ While the Federal Regulations applicable to the administrative review process contain a provision entitled “Time limitations for filing and responding to requests for administrative review,”¹⁶⁸ the regulations do not contain a time limitation within which the Agency must render a decision.¹⁶⁹

¹⁶³ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁶⁴ 7 C.F.R. §400.90 (2011).

¹⁶⁵ 7 C.F.R. § 400.93 (2011).

¹⁶⁶ 7 C.F.R. § 400.95 (2011).

¹⁶⁷ 7 C.F.R. § 400.95 (2011).

¹⁶⁸ 7 C.F.R. § 400.95. (2011).

¹⁶⁹ See 7 C.F.R. § 400.95. (2011).

(e). Appeals through the National Appeals Division of USDA

An insured who disagrees with an adverse decision¹⁷⁰ of the FCIC¹⁷¹ may be afforded the opportunity for an administrative appeal¹⁷² of the FCIC's determinations and/or directions,¹⁷³ pursuant to 7 CFR part 11.¹⁷⁴ Private crop insurance providers may also have the right to participate in the NAD appeal process, as an interested party whose rights may be effected by a NAD determination.¹⁷⁵ It must also be noted that, aside from Good Farming Practices issues, an insured can appeal an adverse decision of FCIC directly to the National Appeals Division (NAD) instead of requesting an administrative review.¹⁷⁶ NAD appeals may be conducted in a formal hearing process or by a record review, at the request of the appealing party.¹⁷⁷

There is a thirty day time limitation on requesting a NAD hearing or record review, which runs from the later date of either when the insured received notice of an adverse decision or when the insured received notice that the Director's review determined the FCIC decision was appealable.¹⁷⁸ All requests must be written and signed personally by the insured, not the attorney representing the insured.¹⁷⁹ Generally, an appeal request must include a brief reasoning of why the insured believes that the agency decision was incorrect.¹⁸⁰ An insured has a right to a hearing by the National Appeals Division within forty-five (45) days of the Division's receipt of

¹⁷⁰ An adverse decision is defined as "a decision by an employee or Director of the Agency that is adverse to the participant." 7 C.F.R. § 400.90.

¹⁷¹ NAD appeals are only available for agency decisions, not those of private insurance providers. 7 C.F.R. § 400.91(b)(2).

¹⁷² Decisions as to "matters of general applicability" are not appealable to NAD, but the appellant must pursue a NAD Director's Review, pursuant to 7 C.F.R. 11.6(a), prior to seeking judicial review of the adverse agency decision. 7 C.F.R. § 400.91(e).

¹⁷³ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁷⁴ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

¹⁷⁵ 7 C.F.R. § 11.15(b). (2011).

¹⁷⁶ 7 C.F.R. § 400.92 (2011).

¹⁷⁷ 7 C.F.R. § 11.6 (b)(2) (2011).

¹⁷⁸ 7 C.F.R. § 11.6 (b)(1) (2011).

¹⁷⁹ 7 C.F.R. § 11.6 (b)(2) (2011).

¹⁸⁰ 7 C.F.R. § 11.6 (2011).

the request for a hearing.¹⁸¹ Included with the request should be “a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant’s reasons for believing that the decision, or the agency’s failure to act, was wrong.”¹⁸² Copies of this request are to be provided to the FCIC by the insured, but a failure to follow this procedure shall not result in a dismissal of the subject appeal.¹⁸³ Practitioners should also note that, if the individual requesting an appeal is “represented by an authorized representative, the authorized representative must file a declaration with NAD, executed in accordance with 28 U.S.C. 1746.”¹⁸⁴

In a NAD hearing, the burden of proof resides with the insured who must demonstrate that the adverse decision made by the FCIC was erroneous by a preponderance of the evidence.¹⁸⁵ Generally, a hearing officer is required to issue the determination of the appeal within thirty (30) days of the closing of the appeal record.¹⁸⁶

Once the determination of the appeal is finalized, either party to the appeal has the right to request a review of the Hearing Officer’s appeal determination by the Director of the National Appeals Division.¹⁸⁷ An insured’s request for the Director’s review must also be written, signed by the insured, contain reasoning why the insured believes the Hearing Officer’s determination was incorrect, and be submitted no later than thirty (30) days after the insured received the determination of the Hearing Officer.¹⁸⁸ The Director’s Review will be based on the agency record, the hearing record, the request for review, written responses of the opposing party to the request for the Director’s review, and other information “as may be accepted by the Director.”¹⁸⁹

¹⁸¹ 7 C.F.R. § 11.8 (2011).

¹⁸² 7 C.F.R. § 11.6 (b)(2) (2011).

¹⁸³ 7 C.F.R. § 11.6 (b)(2) (2011).

¹⁸⁴ 7 C.F.R. § 11.6 (c) (2011).

¹⁸⁵ 7 C.F.R. § 11.8 (2011).

¹⁸⁶ 7 C.F.R. § 11.8 (2011).

¹⁸⁷ 7 C.F.R. § 11.9 (2011).

¹⁸⁸ 7 C.F.R. § 11.9 (2011).

¹⁸⁹ 7 C.F.R. § 11.9 (2011).

The Director will either issue a determination or remand the determination within thirty (30) days of a request for review made by the insured.¹⁹⁰ The Director's determination is not appealable within the USDA,¹⁹¹ but is subject to judicial review.¹⁹²

C. Litigation of Crop Insurance Claims in State and Federal Court

Crop insurance claims do make their way into state and federal courts, despite the presence of mandatory dispute resolution mechanisms in the CCIP, including arbitration and administrative review. Attorneys who represent insured farmers must be prepared to litigate crop insurance claims in federal and state courts, if they are to adequately represent the interests of their clients. For example, suit may be initiated against the FCIC after a mandatory agency determination in a good farming practices dispute.¹⁹³ Moreover, the decisions of arbitrators¹⁹⁴ and rulings of the National Appeals Division¹⁹⁵ are subject to federal judicial review in certain circumstances.¹⁹⁶ Various state law claims may also survive the arbitration proceeding,¹⁹⁷ possibly presenting the insured an opportunity to litigate these claims in state court. Regardless of the manner in which a crop insurance dispute is begun, there is the potential for a case to make its way to a judicial proceeding.

¹⁹⁰ 7 C.F.R. § 11.9 (2011).

¹⁹¹ 7 C.F.R. § 11.9 (2011).

¹⁹² 7 C.F.R. § 11.13 (2011).

¹⁹³ Common Crop Insurance Policy. , 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(2)(ii) (2011).

¹⁹⁴ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (c) (2011).

¹⁹⁵ 7 C.F.R. § 11.13 (2011).

¹⁹⁶ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (c) (2011); 7 C.F.R. § 11.13 (2011).

¹⁹⁷ See Nobles v. Rural Community Ins. Servs., 303 F.Supp. 2d 1292, 1299 (M.D. Ala 2004), IGF Insurance Co. v Hat Creek Partnership, 76 S.W.3d 859 (Ark. 2002).

1) Judicial Review of Arbitration Awards

After arbitration, an insured farmer has the right to petition for judicial review of the arbitrator's decision.¹⁹⁸ The CCIP explicitly provides for the judicial review of arbitration awards,¹⁹⁹ but, in reality, judicial review is a tool with significant limitations.²⁰⁰ Crop insurance awards granted in arbitration are subject to the same standards of judicial review that are applied in other arbitration awards.²⁰¹ Judicial Review of an arbitration award will not involve a de novo analysis of an arbitrator's factual determinations or the merits of a crop insurance claim.²⁰²

The high level of deference granted to an arbitrator's decision is evidenced in the United States Supreme Court's decision in United Paperworkers Int'l Union v. Misco, Inc.²⁰³ In United Paperworkers, the Supreme Court stated that, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced the arbitrator committed serious error will not be sufficient to vacate the award²⁰⁴ Put simply, a Federal Court cannot vacate an arbitration award because it decides the arbitrator erred in her findings,²⁰⁵ and a court will not re-evaluate the merits of a case that has been arbitrated nor will it make factual determinations.²⁰⁶ "Mere disagreement supported by objective evidence" will not provide a basis for a court to overturn an arbitrator's decision.²⁰⁷

¹⁹⁸ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(c) (2011).

¹⁹⁹ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(c) (2011).

²⁰⁰ See ALG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 579 F.3d 1268, 1271 (11th Cir. 2009).

²⁰¹ Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause, 2002*, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf.

²⁰² See Farmer's Crop Insurance Alliance v. Laux, 422 F.Supp. 2d 898, 902 (S.D.Ohio 2006).

²⁰³ United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

²⁰⁴ United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

²⁰⁵ Great American Ins. Co. v. Moyer, 733 F.Supp.2d 1298, 1301 (M.D. Fla. 2010).

²⁰⁶ Great American Ins. Co. v. Moyer, 733 F.Supp.2d 1298, 1303 (M.D. Fla. 2010).

²⁰⁷ Great American Ins. Co. v. Moyer, 733 F.Supp.2d 1298, 1304 (M.D. Fla. 2010).

Judicial review of an arbitration award in a crop insurance dispute is subject to the Federal Arbitration Act,²⁰⁸ and the Federal Arbitration Act limits the judicial review of arbitration awards by stating exclusive grounds for the review of arbitration awards.²⁰⁹ The Federal Arbitration Act states that a court may only vacate an arbitration award:

- 1). Where the award was procured by corruption, fraud or undue means;
- 2) Where there was evident partiality or corruption in the arbitrators, or either of them;
- 3). Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- 4). Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²¹⁰

The United States Supreme Court has also found that an arbitration award may be vacated when the award explicitly contradicts public policy²¹¹ and where an arbitrator has demonstrated “manifest disregard of the law”²¹² in making an award.

While the court’s authority to vacate an arbitration award is very limited, federal courts also have the power to modify or correct an arbitration award, upon the petition of a party to the

²⁰⁸ Great American Ins. Co. v. Moye, 733 F.Supp.2d 1298, 1302 (M.D. Fla. 2010). (The Court found that the Federal Arbitration Act was applicable to crop insurance contracts and that arbitration award should not be vacated as the Act significantly limits the scope of judicial review).

²⁰⁹ 9 U.S.C. § 10(a) (2006).

²¹⁰ 9 U.S.C. § 10(a) (2006).

²¹¹ W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).

²¹² Wilko v. Swan, 346 U.S. 427, 436-37 (1953).

arbitration.²¹³ Under the federal arbitration act, arbitration awards can be corrected or modified in the following situations:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.²¹⁴

Again, the courts will give significant deference to the decision of the Arbitrator. While the courts have entertained a significant amount of litigation over whether an arbitrator has “exceeded their powers” under the 9 U.S.C. § 10(a)(4), interpretive errors on the part of an arbitrator do not necessarily constitute such an action.²¹⁵ It now appears settled that if an arbitration award “draws from the essence of the agreement, and is not merely the application of the arbitrator’s own brand of justice, an arbitrator has not exceeded his powers.”²¹⁶

Attorneys must be cognizant of the fact that, in a Judicial Review, costs may be taxed against their clients if they are not the prevailing party.²¹⁷ Rule 54(d)(1) of the Federal Rules of Civil Procedure specifically provides that “costs-other than attorney’s fees-shall be allowed to the prevailing party.” The decision to award costs is within the discretion of the district court,²¹⁸ but there is a presumption that the prevailing party is entitled to costs that may only be overcome

²¹³ 9 U.S.C. § 11 (2006).

²¹⁴ 9 U.S.C. § 11 (2006).

²¹⁵ Mich. Family Resources, Inc. v. SEIU Local 517 M, 475 F.3d 746, 752 (6th Cir. 2007).

²¹⁶ Great American Ins. Co. v. Moya, 733 F.Supp.2d 1298, 1302 (M.D. Fla. 2010).

²¹⁷ FED. R. CIV. P. 54(d)(1).

²¹⁸ Chapman v. Al Transp., 229 F.3d 1012, 1038 (11th Cir. 2000).

by demonstrating that an assessment of costs to the non-prevailing party would be inequitable.²¹⁹ Costs associated with the mandatory arbitration of crop insurance disputes, including arbitration transcripts and depositions, have been held as taxable costs after judicial review.²²⁰

In a 2007 case, *Nobles III*, the court found that such arbitration costs²²¹ were taxable upon judicial review due to the fact that “at the time the depositions were taken and at the time the transcripts were ordered,” a party intended them for use in court proceedings as well as arbitration proceedings.²²² The Court based its reasoning on the finding that, at the time of the arbitration depositions and transcripts, the insured had already filed a lawsuit which had been stayed pending conclusion of the Ordered arbitration.²²³ The Court focused its attention on the fact that “the parties understood that after the arbitration proceeding Nobles and Hales could return to court to litigate the non-arbitrable claims.”²²⁴ If suit on “non-arbitrable claims” had not already been filed, it would seem that an intent to use arbitration transcripts and depositions would be more difficult to demonstrate. Practitioners might note that the lack of a pre-filed suit may make an award of costs less certain.

If judicial review is sought, the suit must be filed no later than one year after the date of the arbitration decision.²²⁵ Of course, judicial review is appealable, and, if a District Court

²¹⁹ Moore’s Federal Practice, § 54.01 [1][b] at 54-152.

²²⁰ *Nobles III*. *Nobles v. Rural Community Ins. Servs.*, 490 F.Supp.2d 1196 (2007).

²²¹ The Bill of Costs totaled \$3,231.00, consisting of \$1,878.00 for six deposition transcripts and \$1,353.00 for transcripts of the arbitration hearing. *Nobles v. Rural Community Insurance Servs.*, 490 F.Supp.2d 1196, 1198 (2007).

²²² *Nobles v. Rural Community Ins. Servs.*, 490 F.Supp.2d 1196, 1201-1202 (2007).

²²³ *Nobles v. Rural Community Ins. Servs.*, 490 F.Supp.2d 1196 (2007).

²²⁴ *Nobles v. Rural Community Ins. Servs.*, 490 F.Supp.2d 1196, 1202 (2007).

²²⁵ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20(b)(3) (2011).

enters an Order modifying, correcting, or vacating an award, the Order may be appealed to the United States Court of Appeals.²²⁶

2) *Judicial Review of an FCIC Determination*

The CCIP provides for suit against the FCIC after certain FCIC determinations²²⁷ or following the completion of a required administrative appeal.²²⁸ Consequently, the right of an insured to file suit against the FCIC is significantly limited.²²⁹ Specifically, suit against the FCIC, to be brought in federal court, is contemplated after an administrative review or appeal²³⁰ and in cases of an administrative “good farming practices” determination by the FCIC.²³¹ In these circumstances, an insured has the option to file a suit against the FCIC but is subject to a one year period,²³² for filing such suit, after the date of the decision, and may not recover expenses or attorney’s fees incurred while pursuing the action.²³³

There is a time restriction and where an action against the FCIC was not commenced within one year after the date of a claim denial, summary judgment in favor of the FCIC has been granted.²³⁴ A suit following an appeal of an adverse FCIC determination typically takes the

²²⁶ 9 U.S.C. § 16 (2006).

²²⁷ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(1)(i) (2011).

²²⁸ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e)(1) and Section 20(k) (2011).

²²⁹ The FCIC cannot be sued in a crop insurance dispute unless there is a provision which allows for such suit. Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Services, Inc., 121 F.3d 630, 633 (11th Cir. 1997). The FCIA has been held to not confer a general statutory consent to suit. Conover v. Crop Hail Management Corp., 1989 WL 65614 (D.N.J. 1989). Tort actions against the FCIC should be pursued in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (2006). Conover v. Crop Hail Management Corp., 1989 WL 65614 (D.N.J. 1989).

²³⁰ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e)(1) (2011).

²³¹ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (d)(1)(i) (2011).

²³² Summary judgment has been granted the FCIC when one year filing limitation was not met. Goldbold v. Federal Crop Ins. Corp., 365 F.Supp. 836 (N.D. Miss. 1973).

²³³ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e) (2011).

²³⁴ Godbold v. Federal Crop Ins. Corp., 365 F. Supp. 836 (N.D. Miss. 1973).

form of a judicial review, which is governed by the Administrative Procedure Act.²³⁵ While the right to judicial review of an FCIC determination is available, an agency determination “may not be reversed or modified as the result of judicial review unless the determination is found to be arbitrary and capricious.”²³⁶

An insured who seeks to initiate suit against the FCIC must always exhaust his administrative remedies, such as hearings in the National Appeals Division, prior to filing suit against the agency.²³⁷ For example, before seeking judicial review of an FCIC determination, an insured must appeal the agency decision to the National Appeals Division.²³⁸ The judicial review of an FCIC “Final Agency Determination” is even more complicated in that an insured is required to request a determination of non-appealability²³⁹ from the Director of the National Appeals Division of the Department of Agriculture, prior to filing suit.²⁴⁰ If the Director determines that the agency decision was, in fact, appealable, the insured must then go through with a NAD appeal, before filing for judicial review.²⁴¹

In summary, the exhaustion of administrative remedies is a prerequisite to filing suit against the FCIC.²⁴² Moreover, judicial review of National Appeals Division findings will not be *de novo* but will be based solely on the administrative record.²⁴³ Proceedings of the National

²³⁵ See Stewart v. Fed. Crop Ins. Corp., 4:09-CV-101 2010 WL 3341863 (E.D. Tenn. Aug. 25, 2010)., Hammit v. Federal Crop Ins. Corp., 712 F.Supp. 832 (D. Colo. 1989).

²³⁶ 7 U.S.C. § 1508 (a)(3)(B)(iii) (2006).

²³⁷ Stewart v. Fed. Crop Ins. Corp., 4:09-CV-101 2010 WL 3341863 (E.D. Tenn. Aug. 25, 2010).

²³⁸ 7 C.F.R. § 400.96(a) (2011).

²³⁹ The Process for obtaining a determination of non-appealability is located at 7 C.F.R. 11.6.

²⁴⁰ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (k) (2011).

²⁴¹ 7 CFR § 400.96(b) (2011).

²⁴² Stewart v. Fed. Crop Ins. Corp., 4:09-CV-101 2010 WL 3341863 (E.D. Tenn. Aug. 25, 2010).

²⁴³ See Stewart v. Fed. Crop Ins. Corp., 4:09-CV-101 2010 WL 3341863 (E.D. Tenn. Aug. 25, 2010), Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Appeals Division are subject to the provisions of the Administrative Procedure Act.²⁴⁴

Following the outline of the Administrative Procedure Act, a decision of the National Appeals Division may be set aside if NAD findings are:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence. . .; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.²⁴⁵

Interest may be obtained from an insurance provider when a court enters a judgment finding that an indemnity is owed a claimant.²⁴⁶ However, the CCIP provides that, in suit against the FCIC, the insured may not recover expenses, attorney’s fees, or “any punitive, compensatory or any other damages from FCIC.”²⁴⁷ There is, however, a limited exception to this rule, disallowing the collection of attorney’s fees, expenses, and damages in a judicial review.²⁴⁸ A claimant may obtain fees, expenses, or damages if the claimant first obtains an FCIC determination²⁴⁹ that the insurance provider, insurance agent, or loss adjuster did not comply with the FCIC procedures or the terms of the common insurance policy, and, as a result

²⁴⁴ 7 C.F.R. § 11.4 (2011).

²⁴⁵ 5 U.S.C. § 706 (2006).

²⁴⁶ Common Crop Insurance Policy. 7 C.F.R. § 457.8, Section 26 (2011).

²⁴⁷ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (e)(3) (2011).

²⁴⁸ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (i) (2011).

²⁴⁹ A request for this FCIC determination should be addressed to the “USDA/RMA/Deputy Administrator of Compliance/ Stop 0806, 1400 Independence Avenue, SW., Washington DC 20250-0806. Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (i) (2011).

of that failure, the claimant received a payment less than that to which she was entitled.²⁵⁰

3) Claims Based Upon State Law

While federal courts have previously determined that the Federal Crop Insurance Act does not create a federal cause of action against private insurance providers,²⁵¹ most courts that have addressed the issue have held that the Federal Crop Insurance Act does not preempt actions against private insurance providers brought in state court on the basis of traditional state law contract and tort theories.²⁵² At the same time, attorneys need always be mindful of the arbitration provisions within the CCIP. The initiation of a state-law suit prior to arbitration will likely result in a court order compelling arbitration and staying the litigation.²⁵³

Courts that have addressed the preemption issue have opined that the FCIC and Congress, in enacting and effecting the Federal Crop Insurance Act, did not intend to extinguish state law claims arising from the tortious conduct of private insurance providers selling federally reinsured crop insurance policies.²⁵⁴ For example, misrepresentations of a private crop insurance company or agent may supply an insured grounds for proceeding against the insurance company with a state law cause of action.²⁵⁵ As such, an insured farmer may be able to pursue state law claims,

²⁵⁰ Common Crop Insurance Policy. 7 C.F.R. § 457.8 [For Reinsured Policies], Section 20 (i) (2011).

²⁵¹ Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Services, Inc., 121 F.3d 630, 633 (11th Cir. 1997), Rio Grand Underwriters, Inc. v. Pitts Farms, Inc., 276 F.3d 683, 686 (5th Cir. 2001).

²⁵² See Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Services, Inc., 121 F.3d 630, 635 (11th Cir. 1997), Meyer v. Conlon, 162 F.3d 1264, 1268-1269 (10th Cir. 1998), Agre v. Rain & Hail LLC, 169 F.Supp. 2d 906, 911-912 (D. Minn. 2002), Farmers Crop Ins. Alliance v. Laux, 442 F.Supp. 2d 488, 498-499 (S.D. Ohio 2006).

²⁵³ Ledford Farms v. Fireman's Insurance Co., 184 F.Supp.2d 1242 (S.D. Fla. 2001), Wardlaw v. Rural Community Services, 2010 WL 4259792 (W.D. Ar. Sept 27, 2010), Hays v. Rural Comty. Ins. Services, 2010 WL 4269413 (W.D. Ar. Oct. 7, 2010).

²⁵⁴ Nobles v. Rural Community Ins. Servs, 122 F. Supp.2d 1290, 1294 (M.D. Ala. 2000); see also Williams Farms of Homestead, Inc. v. Rain & Hil Ins. Serv., Inc., 121 F.3d 630, 634 (11th Cir. 1997).

²⁵⁵ See Farmers Crop Insurance Alliance v Laux, 442 F. Supp.2d 488, 503 (S.D. Ohio 2006), Nu-Air Mfg. Co. v. Frank B. Hall & Col. Of New York, 822 F.2d 987, 994-995 (11th Cir. 1987).

in court, after the mandatory arbitration has been completed.²⁵⁶ One federal court specified that the arbitration clause contained in the CCIP did not prohibit suit but instead was a condition precedent.²⁵⁷ In Ledford Farms, the Court went on to say that an insured cannot bring legal action against a private insurance provider, “unless it complies with all of the policy provisions,” including arbitration.²⁵⁸

Federal courts have further held that the terms and provisions of crop insurance contracts preempt “any contrary state laws that would apply to other insurance contracts normally issued by private insurance companies.”²⁵⁹ As a result, a state law barring mandatory arbitration clauses, within insurance contracts, will not be applicable to crop insurance contracts. Before initiating state law causes of action based on a private insurer’s failure to inform an insured as to provisions in a crop insurance policy, attorneys must resign themselves to the fact that insured farmers are charged with notice of the content of their policy and the relevant federal regulations.²⁶⁰ Federal regulations are binding as the requisite legal notice, of crop insurance policy provisions, is satisfied by the appearance of rules and regulations in the Federal Register.²⁶¹ The failure of an insurance provider or agent to provide this information will likely not give rise to a justifiable state law action.²⁶²

(a). Notes on CCIP Limitations of State Law Claims

Paragraph (j) of Section 20 of the CCIP deserves attention as it may exceed the statutory authority of the FCIC under the Federal Crop Insurance Act. Federal courts have repeatedly held

²⁵⁶ Nobles v. Rural Community Ins. Servs, 122 F. Supp.2d 1290, 1301 (M.D. Ala. 2000), IGF Insurance Co. v Hat Creek Partnership, 76 S.W.3d 859 (Ark. 2002).

²⁵⁷ Ledford Farms v. Fireman’s Insurance Co., 184 F.Supp.2d 1242, 1245 (S.D. Fla. 2001).

²⁵⁸ Ledford Farms v. Fireman’s Insurance Co., 184 F.Supp.2d 1242, 1245 (S.D. Fla. 2001).

²⁵⁹ Nobles v. Rural Community Ins. Servs, 122 F. Supp.2d 1290,1294 (M.D. Ala. 2000).

²⁶⁰ Nobles v. Rural Community Ins. Servs, 303 F.Supp. 2d 1292, 1303 (M.D. Ala 2004), FCIC v. Merrill, 332 U.S. 380 (1947).

²⁶¹ FCIC v. Merrill, 332 U.S. 380, 384 (1947).

²⁶² See Nobles v. Rural Community Ins. Servs,303 F.Supp. 2d 1292, 1299 (M.D. Ala 2004).

that the FCIA did not preempt state law claims against a private insurance provider, yet, this provision dictates that an insured may not bring “arbitration, mediation, or litigation” against the private insurance provider when the FCIC is involved in the adjustment, modification, revision, or correction of a claim.²⁶³ As such, this provision may be interpreted as an impermissible attempt at the preemption of state law claims. It should also be noted that at least one court has found the twelve month limitation period in the FCIA, for the filing of claims, does not bar state law claims against insurers.²⁶⁴ The court held that this limitation is permissive rather than mandatory and will not bar state law claims against private insurers.²⁶⁵

(b). Preclusive Effect of Arbitration on State Law Claims

The decision of an arbitrator can have an impact on later filed state law claims, under the theories of res judicata or collateral estoppel.²⁶⁶ These theories are even more important to the claimant than in years past as the CCIP now contains a requirement that “all disputes involving determinations by us”²⁶⁷ are subject to arbitration.²⁶⁸ Most of the reported cases dealing with the arbitration requirement and issues relating to preemption of state law claims were decided pursuant to the former version of the CCIP which only required arbitration as to “factual” determinations made by private insurance providers.²⁶⁹ If arbitration is now required for state law tort claims, the ability of an insured to file these state law claims, after the arbitration, would now appear to be severely limited.

²⁶³ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (j).

²⁶⁴ Bullinger v. Trebas, 245 F.Supp. 2d 1060 (D.N.D. 2003).

²⁶⁵ Bullinger v. Trebas, 245 F.Supp. 2d 1060 (D.N.D. 2003).

²⁶⁶ Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985).

²⁶⁷ “us” denotes the private insurance provider. See Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (a)(1).

²⁶⁸ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (a)(1).

²⁶⁹ See Nobles v. Rural Community Ins. Servs., 122 F. Supp.2d 1290, 1301 (M.D. Ala. 2000), see also Nobles v. Rural Community Ins. Servs., 303 F.Supp. 2d 1292, 1303 (M.D. Ala. 2004), IGF Insurance Co. v Hat Creek Partnership, 76 S.W.3d 859 (Ark. 2002).

Under the current CCIP, collateral estoppel may not be of vital concern in the crop insurance dispute as “all disputes” are to be arbitrated.²⁷⁰ The former version of the CCIP did not require arbitration of all disputes, just “factual” determinations.²⁷¹ Concerns of collateral estoppel’s effect of issue preclusion may have become obsolete now that all issues appear to be subject to arbitration. Moreover, the incentive to “preserve” issues for later litigation in state court would seem to be lessened, as state law tort claims will apparently be arbitrated in accordance with the CCIP. The Doctrine of res judicata may also, realistically, preclude the litigation of state law tort claims, against private insurance providers, in state courts. There are currently no reported cases that address the effect of res judicata on state law tort claims against private crop insurance providers, but the broad scope of the arbitration provision, found in the CCIP, suggests that tort claims are not outside the scope of the arbitration clause. The arbitration of tort claims, in the crop insurance context, has not yet been the source of reported litigation.

Res Judicata (Claim Preclusion) is a doctrine which bars the re-litigation of claims that have been “previously tried and decided,” while collateral estoppel (issue preclusion) bars re-litigation of issues previously adjudicated in litigation between the parties.²⁷² These doctrines are potentially significant in any arbitration as federal courts have previously held that determinations, made by an arbitrator, “should be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.”²⁷³ As a result, practitioners should be aware that the doctrine of res judicata may bar the re-litigation of tort claims in state court.

²⁷⁰ Common Crop Insurance Policy. 7 CFR § 457.8 [For Reinsured Policies], Section 20 (a)(1) (2011).

²⁷¹ See IGF Insurance Co. v Hat Creek Partnership, 76 S.W.3d 859 (Ark. 2002).

²⁷² Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, 2002, National AgLaw Center, http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf (2002).

²⁷³ Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985).

For collateral estoppel to preclude the litigation of issues determined in an arbitration, the following requirements must be satisfied: “1) the issue at stake must be identical to the one alleged in the prior litigation; 2) the issues must have been actually litigated in the prior litigation; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action;” and 4) “the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.”²⁷⁴

In *Nobles II*, the Court found that collateral estoppel prevented the later litigation of insurability, after the arbitrator had made the factual determination that certain crop land was insurable, but did not bar the re-litigation of the issue that the insured relied in good faith on misrepresentations by the insurance provider.²⁷⁵ The Court found that the issue of misrepresentation was not a critical part of the arbitration panel’s judgment as the arbitration award was not granted on the basis of good faith reliance on “misrepresentations” by the insurance provider.²⁷⁶ As a result, all of the requirements for collateral estoppel were not met, and the issue could be litigated in court.

As such, the implications arising from this situation present interesting questions which remain unanswered in the present. In conclusion, the reported case law suggests that an insured is free to pursue state law claims after arbitration,²⁷⁷ but, in reality, there may be no claims or issues left for resolution once an arbitration proceeding has ended.

²⁷⁴ *Nobles v. Rural Community Ins. Servs*, 303 F.Supp. 2d 1292, 1299 (M.D. Ala 2004), *Quoting Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985); see *Allen v. McCurry*, 449 U.S. 90 (1980).

²⁷⁵ *Nobles v. Rural Community Ins. Servs*, 303 F.Supp. 2d 1292, 1299 (M.D. Ala 2004).

²⁷⁶ *Nobles v. Rural Community Ins. Servs*, 303 F.Supp. 2d 1292, 1299 (M.D. Ala 2004).

²⁷⁷ See *Nobles v. Rural Community Ins. Servs*, 122 F. Supp.2d 1290, 1301 (M.D. Ala. 2000), *Nobles v. Rural Community Ins. Servs*, 303 F.Supp. 2d 1292, 1303 (M.D. Ala 2004), *IGF Insurance Co. v Hat Creek Partnership*, 76 S.W.3d 859 (Ark. 2002).

IV. Conclusion

Federally reinsured crop insurance is an important risk management tool for today's farmer. This is not likely to change, and, in the near future, crop insurance will likely become more widely used as it replaces the traditional "safety net" farm programs of the past. The federal crop insurance programs are complex, and attorneys who represent farmers in crop insurance matters must be adequately prepared. Hopefully, this article presented the procedural framework for the resolution of a crop insurance claim as clearly as is possible.

In addition, the previous discussion in this article often referenced federal cases where the proper procedure and forum for a crop insurance dispute was litigated. These cases have failed to answer all of the questions that might arise in future disputes, and applicable federal regulations have been modified by the FCIC since most of these cases were reported. As a result, there certainly remains the potential for additional litigation in this arena. The scope of the current CCIP arbitration clause, the proper forum for litigation of state law tort claims against private insurance providers, and the FCIC's attempted preemption of state law claims where the FCIC was involved in the denial of a claim are all good examples of circumstances that present issues which have not been settled. Attorneys who represent farmers in crop insurance disputes have a professional duty to remain informed as to developments in these areas. Crop insurance is at the forefront of the debate as to national agricultural policy.

