



## An Agricultural Law Research Article

# Scope of the Federal Crop Insurance Arbitration Clause

by

Scott Fancher

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*Editor's note: Certain changes have occurred to the crop insurance dispute resolution process, including arbitration, since the publication of this article. The information contained in this article should be read in light of these changes. An article that details the changes in the crop insurance dispute resolution process is forthcoming.*

# A National AgLaw Center Research Article

## Scope of the Federal Crop Insurance Arbitration Clause

**Scott Fancher**

Former National AgLaw Center Graduate Fellow  
Practicing Attorney, Harrison, Arkansas

### Introduction

Farmers are routinely encouraged to use federally subsidized crop insurance to manage the risks associated with their farming operations.<sup>1</sup> The types of insurance products available and the number of crops eligible for coverage have significantly increased in recent years.<sup>2</sup> The promotion of crop insurance as a risk management tool can be expected to result in greater numbers of disputed claims. The increasing likelihood of disagreement suggests that both farmers and their attorneys need to understand how disputed crop insurance claims are handled.

Federal crop insurance is presently sold and serviced exclusively by private insurance companies under reinsurance agreements with the Federal Crop Insurance Corporation (FCIC).<sup>3</sup> FCIC programs are administered by USDA's Risk Management Agency.<sup>4</sup> Common to every current FCIC reinsured policy is a provision requiring arbitration of disagreements between the private insurer and the policyholder.<sup>5</sup> This article examines the scope of the FCIC's arbitration clause and its implications for disputes between policyholders and their reinsured private providers. A separate appeals process applies to disputed FCIC determinations.<sup>6</sup>

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1. See e.g., Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, tit. I § 164(1)(A), 114 Stat. 358, 395-96 (explaining that encouraging producer participation was one of the purposes of the Federal Crop Insurance Act).

2. See Christopher R. Kelley, *The Agricultural Risk Protection Act of 2000: Federal Crop Insurance, the Non-insured Crop Disaster Assistance Program, and the Domestic Commodity and Other Farm Programs*, 6 DRAKE J. AGRIC. L., 141, 159 (2001).

3. See 7 C.F.R. §§ 400.161-.176 (2002). See also Scott Fancher, *FCIC's Standard Reinsurance Agreement*, AGRIC. L. UPDATE, Feb. 2002, at 4.

4. See 7 C.F.R. § 2.44.

5. See 7 C.F.R. § 457.8 para. 20(a) (2002).

6. See *id.* ("Failure to agree with any factual determination made by FCIC must be resolved through the FCIC appeal provisions published at 7 CFR Part 11.").

## Background

While it was not always so, judicial enforcement of agreements to arbitrate is compelled by statute.<sup>7</sup> Early American courts were reluctant to enforce arbitration agreements owing to their common law treatment as revocable by either party.<sup>8</sup> Congress, however, supported arbitration for policy reasons and responded by enacting the Federal Arbitration Act (FAA).<sup>9</sup> Authority for the FAA was rooted in Congress' power to regulate interstate commerce and admiralty.<sup>10</sup> There have been various challenges to the FAA's preemptive effect on state law since its passage. However, it is now well established that written agreements to arbitrate are enforceable under the FAA, irrespective of contrary state law.<sup>11</sup> Unless there was some fraud in the inducement of the arbitration provision itself, the FAA instructs the courts to refer the matter for arbitration according to the contract.<sup>12</sup>

Statutory authority for the FCIC's arbitration clause is provided in the Federal Crop Insurance Act (FCIA).<sup>13</sup> The FCIA invests the FCIC with the authority to promulgate regulations to carry out its purposes.<sup>14</sup> Initially, the arbitration provision applied only to disagreements over the production to count under the FCIC reinsured policies.<sup>15</sup> Mandatory arbitration of all factual disputes between the reinsured private providers and FCIC policyholders began in 1994.<sup>16</sup> Given that the FCIC's arbitration

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7. The statute provides as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or part of any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2

8. See *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 111 (2001).

9. See Act of Feb. 12, 1925, ch. 213, §§ 1-14, 43 Stat. 883 (current version at 9 U.S.C. §§ 1-16).

10. See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

11. See *Circuit City*, 532 U.S. at 122 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984))("Congress intended the FAA to apply in state courts, and to preempt state antiarbitration laws to the contrary.").

12. See 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.").

13. See Federal Crop Insurance Act, ch. 30, 52 Stat. 72 (1938) (codified as amended at 7 U.S.C. §§ 1501-1515).

14. See *id.* § 1506.

15. See Common Crop Insurance Regulations; Regulations for the 1994 and Subsequent Crop Years, 59 Fed. Reg. 42751 (Aug. 19, 1994)(amending 7 C.F.R. § 457.8).

16. See *id.*

provisions are written into the policy and published in the Federal Register, there is no way to plausibly argue that they were fraudulently induced.<sup>17</sup> Moreover, courts have uniformly compelled arbitration where requested by the crop insurer.<sup>18</sup> Consequently, it is evident that disputes between policyholders and their reinsured companies will be resolved, at least in part, through arbitration. Rights or causes of action beyond arbitration will be discussed later in this article.

Current FCIC reinsured policies contain the following provision: "If you and we fail to agree on any factual determination, the disagreement will be resolved in accordance with the rules of the American Arbitration Association."<sup>19</sup> The American Arbitration Association (AAA) is a nonprofit corporation providing a wide range of dispute resolution services, including arbitration, through its affiliated offices.<sup>20</sup> The AAA's rules, forms, and office locations can be obtained from the AAA's headquarters in New York City (800-778-7879). This material is also available on the internet at [www.adr.org](http://www.adr.org). Unlike that found in many contracts, the FCIC's clause does not require that the AAA actually administer the arbitration. Crop insurance disputes can be arbitrated by any alternative dispute resolution organization provided it applies the AAA's rules to the proceedings.<sup>21</sup> Accordingly, references herein to the AAA will also apply to other arbitration service providers.

## The Arbitration Process

This section is not intended to be a definitive treatment on arbitration but attempts to acquaint the reader with the basics of the arbitration process. Readers are cautioned that while all arbitration proceedings share common elements, the rules applicable to a particular dispute may vary according to the amount in controversy or other subtleties not fully addressed below.<sup>22</sup> Therefore, readers should refer to the AAA's rules for specific guidance rather than relying on the general information presented here.

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17. See generally *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (observing that "Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."); See also *Nobles v. Rural Community Ins. Servs.*, 122 F. Supp. 2d 1290, 1297-98 (M.D. Ala. 2000) (finding that FCIC's arbitration clause provided sufficient notice that factual disputes would be arbitrated).

18. See, e.g., *Ledford Farms, Inc. v. Fireman's Fund Ins. Co.*, 184 F. Supp. 2d, 1242 (S.D. Fla. 2001) (compelling arbitration); *Hoeft v. Rain & Hail, LLC*, No. 01-581-AS, 2001 U.S. Dist. LEXIS 23586 (D. Or. Oct. 3, 2001) (compelling arbitration).

19. See 7 C.F.R. § 457.8 para. 20(a).

20. The AAA is headquartered at 335 Madison Avenue, New York, NY 10017-4605 and has affiliate offices in twenty one states and the District of Columbia.

21. See USDA-RMA Final Agency Determination: FAD-007 (May 18, 2001), available at <http://www.rma.usda.gov/regs>.

22. See AMERICAN ARBITRATION ASS'N, COMMERCIAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) (2000). Unless objected to by the parties or the arbitrator, expedited procedures are applied where no disclosed claim or counterclaim exceeds \$75,000.00, excluding interest and arbitration costs. See *id.* at 17 (R-7); See also "Optional Procedures for Large, Complex Commercial Disputes." *Id.* at 41 (L-1).

Arbitration is initiated by filing an original "Demand for Arbitration" with the reinsured company. Demands are usually made using preprinted forms but may be made by other correspondence. A demand provides written notice to the insurer that the policyholder intends to have a dispute arbitrated. At a minimum, it must contain "a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested."<sup>23</sup>

Two copies of the demand must be provided to the AAA at the same time the insurer is put on notice. If not quoted on the form, a copy of the arbitration clause from the insurance policy should be attached to the demand. The demand must be signed by the policyholder or their representative and an appropriate filing fee must be remitted when the demand is filed.<sup>24</sup> Initial filing fees depend upon the amount of claim involved and can range anywhere from \$500.00 to \$13,000.00.<sup>25</sup>

The insurance company has fifteen days after receiving confirmation from the AAA to respond to the demand with an answering statement and to assert any counterclaim(s) it may have.<sup>26</sup> Failure to file an answer within the allotted time is deemed a denial. Such a denial will not delay the arbitration process.<sup>27</sup> New or amended claims or counterclaims can be filed with notice to the other party until an arbitrator is appointed. After that, new or amended claims cannot be filed unless the arbitrator agrees.<sup>28</sup>

Once an answer has been filed or the time limit for doing so has passed, an arbitrator will be appointed.<sup>29</sup> Except in certain situations, the parties are encouraged to agree on an arbitrator from a list of potentials provided by the AAA.<sup>30</sup> If they are unable to agree, the AAA will appoint an arbitrator.<sup>31</sup> Normally, only one arbitrator is appointed, but either party can request a panel of three arbitrators and the AAA can, in its discretion, grant or deny the request.<sup>32</sup>

Appointees are obligated to disclose to the AAA conflicts of interest or any circumstances affecting their ability to be impartial. Either party may challenge an arbitrator's appointment to the AAA.<sup>33</sup> The AAA, in turn, will determine whether to replace an appointee and notify the parties of its

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23. See *id.* at 15 (R-4(a)(i)).

24. See *id.* (R-4(a)(ii)).

25. See *id.* at 49.

26. See *id.* at 15 - 17 (R-4(b), R-6).

27. See *id.* at 16 (R-4(c)).

28. See *id.* at 16-17 (R-6).

29. See *id.* at 19 (R-13(a)).

30. See *id.* at 20 (R-13(c)).

31. See *id.* (R-13(b)).

32. See *id.* at 22 (R-17).

33. See *id.* at 22-23 (R-19(a)).

decision. The AAA's decision on a challenged appointment is final.<sup>34</sup> The parties are not permitted to communicate unilaterally with the arbitrator or any potential arbitrator, and communications to the arbitrator are normally routed through the AAA.<sup>35</sup>

Once an arbitrator has been appointed, a preliminary hearing is scheduled to clarify the issues and make the other arrangements necessary to the hearing.<sup>36</sup> The arbitrator will set the date, time, and place for that hearing and will arrange for an exchange of requested or directed information between the parties, including documents and intended witnesses, prior to the scheduled date of the hearing. At a minimum, the parties are required to exchange copies of all exhibits intended to be submitted at the hearing at least five business days prior to the hearing.<sup>37</sup> Any disputes relating to this exchange will be resolved by the arbitrator. Once a date has been agreed upon, the AAA will send a formal notice of hearing to the parties at least ten days prior to the hearing.<sup>38</sup> The AAA will not go forward with a hearing until the appropriate case service fee is deposited<sup>39</sup> and may also require additional deposits from the parties prior to a hearing to cover the arbitrator's compensation.<sup>40</sup>

Parties to an arbitration hearing may be represented by legal counsel or other designees with sufficient notice to the AAA and the other party.<sup>41</sup> Only those persons having a direct interest in the arbitration are entitled to be present during witness testimony. Otherwise, the arbitrator has the authority to exclude non-parties from the hearing.<sup>42</sup> Witnesses are required to testify under oath if the arbitrator so directs.<sup>43</sup> A stenographic record will be made upon the request and at the expense of either party.<sup>44</sup> Parties are individually responsible for arrangements and costs for interpreters if necessary to their case.<sup>45</sup> Each party is also responsible for the expenses associated with his or her own witnesses.<sup>46</sup>

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34. *See id.* at 23 (R-19(b)).

35. *See id.* (R-20(a)).

36. *See id.* at 24 (R-22). No preliminary hearings are held in disputes resolved under the Expedited Procedures. *See id.* at 39 (E-8).

37. *See id.* at 25 (R-23(b)).

38. *See id.* (R-24).

39. *See id.* at 49 (case service fees currently range from \$0.00 to \$3,000.00 depending upon the amount of the claim).

40. *See id.* at 36 (R-54).

41. *See id.* at 25 (R-26).

42. *See id.* (R-25).

43. *See id.* at 26 (R-27).

44. *See id.* (R-28).

45. *See id.* (R29).

46. *See id.* at 35 (R-52).

Postponements are allowed where agreed to by the parties or upon a showing of good cause by either party. Hearings can also be postponed at the discretion of the arbitrator.<sup>47</sup> A hearing can proceed even in the absence of a party where the party has received notice and has not obtained a postponement.<sup>48</sup> The absence of either party does not result in a default award. Rather, the arbitrator will require the present party to submit its evidence and make its case before making an award.<sup>49</sup>

Arbitration hearings are less formal than conventional court proceedings. The parties can agree to waive oral hearings and proceed solely on the written record submitted.<sup>50</sup> When a hearing is held, the arbitrator has considerable discretion in how it is conducted. Under the AAA's rules, this discretion is only limited by the requirement that the arbitrator treat the parties equally and that each be "given a fair opportunity to present its case."<sup>51</sup> The arbitrator is allowed to question witnesses, direct the order of proof, and otherwise manage the proceeding in the manner necessary to expedite resolution of the dispute.<sup>52</sup>

Formal rules of evidence are relaxed in arbitration hearings.<sup>53</sup> The arbitrator determines the admissibility, materiality, and relevance of any evidence offered.<sup>54</sup> Arbitrators can subpoena witnesses or documents on their own initiative or at the request of either party.<sup>55</sup> The arbitrator will receive witness evidence "by declaration or affidavit" and will assign it such weight as he or she deems appropriate.<sup>56</sup> Upon agreement by the parties or at the arbitrator's direction, documents and other evidence can be submitted after the hearing.<sup>57</sup> Once all evidence is received, the arbitrator will declare the hearing closed.<sup>58</sup> However, a hearing may be reopened at any time prior to an award being made upon application by either party or at the direction of the arbitrator.<sup>59</sup>

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47. *See id.* at 26 (R-30).

48. *See id.* at 27 (R-31).

49. *See id.*

50. *See id.* (R-32(c)).

51. *See id.* (R-32(a)).

52. *See id.* (R-32(b)).

53. *See id.* at 28 (R-33(a)).

54. *See id.* (R-33(b)).

55. *See id.* (R-33(c)).

56. *See id.* (R-34(a)).

57. *See id.* (R-34-(b)).

58. *See id.* at 29-30 (R-37).

59. *See id.* at 30 (R-38).

The arbitrator will make an award within thirty days of the date of the closing of a hearing or reopened hearing, unless oral hearings were waived by the parties.<sup>60</sup> In that instance, the award will be made within thirty days of the date that the arbitrator received the final statements and proofs submitted by the parties.<sup>61</sup> The arbitrator's award must be in writing but does not have to be reasoned unless requested in writing by the parties prior to the arbitrator's appointment.<sup>62</sup> The parties can request that the arbitrator issue a "consent award" if they settle their dispute during the arbitration.<sup>63</sup>

The arbitrator can grant any relief deemed "just and equitable and within the scope of the agreement."<sup>64</sup> The arbitrator will assess each party the "fees, expenses, and compensation" prescribed by the AAA's rules in the final award.<sup>65</sup> Unless the arbitrator directs otherwise, the parties will share the the arbitrator's expenses equally.<sup>66</sup>

The arbitrator's decision on the merits of any claim cannot be reconsidered.<sup>67</sup> However, the parties are allowed twenty days to request correction of any "clerical, typographical, or computational errors."<sup>68</sup> The opposing party has ten days to respond to such requests. The arbitrator then has twenty days after receipt from the AAA to decide and dispose of correction/modification requests.<sup>69</sup> Certified copies of any materials relating to the arbitration that may be necessary to other legal action are available from the AAA upon request. No liability attaches to the AAA or an arbitrator for acts or omissions connected to the arbitration, and neither is considered a necessary party to any subsequent judicial proceeding.<sup>70</sup>

## **Role of the Courts in Arbitration Proceedings**

Under the AAA's rules, the parties are deemed to have consented that an arbitrator's award may be entered into any state or federal court having jurisdiction.<sup>71</sup> Either party may apply for

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60. See *id.* at 32 (R-43).

61. See *id.*

62. See *id.* (R-44).

63. See *id.* at 33 (R-46).

64. See *id.* at 32 (R-45(a)).

65. See *id.* at 33 (R-45(c)).

66. See *id.* at 35 (R-52).

67. See *id.* at 34 (R-48).

68. *Id.*

69. See *id.*

70. See *id.* (R-50(b),(d)).

71. See AMERICAN ARBITRATION ASS'N, *supra* note 22, at 34 (R-50(c)); see also *P & P Indus. v. Sutter Corp.*, 179 F.3d 861, 867 (10<sup>th</sup> Cir. 1999)(discussing implicit consent to judicial confirmation of arbitration awards under AAA rules).



confirmation and entry of judgment on an arbitration award within one year after an award is made.<sup>72</sup> Once entered, an award is enforceable and will be treated in all other respects as if rendered by the docketing court.<sup>73</sup>

The FAA provides that application for entry of an award may be filed in federal court within the district where the award was made if a particular court is not specified in the agreement.<sup>74</sup> The United States Supreme Court has held that the FAA's venue provisions are permissive.<sup>75</sup> Thus, application for confirmation of an award can be properly entertained by any federal district court of competent jurisdiction.<sup>76</sup> The FAA does not provide an independent basis for federal jurisdiction.<sup>77</sup>

## **Modification, Correction, and Vacation of Arbitration Awards**

Except in very limited situations, an award under the AAA's rules will be binding on the parties.<sup>78</sup> The FAA allows modification or correction of an arbitration award only when necessary "to effect the intent thereof and promote justice between the parties."<sup>79</sup> Any order that modifies, corrects, or vacates an arbitration award can be appealed.<sup>80</sup> The recognized grounds for court modification or correction of an award are: 1) where there was a material miscalculation of figures or a mistake with respect to the description of persons or property in the award, or 2) where the arbitrator decides matters beyond the scope of arbitration, or 3) where the form of an award not affecting the merits is somehow flawed.<sup>81</sup>

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72. See 9 U.S.C. § 9.

73. See *id.* ("Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.")

74. See *id.*

75. See *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 204 (2000).

76. See *id.* at 195 (concluding that motions to confirm, vacate, or modify an arbitration award were permitted "either where the award was made or in any district proper under the general venue statute.").

77. See *P & P Indus. v. Sutter Corp.*, 179 F.3d 861, 866 (10<sup>th</sup> Cir. 1999)(quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)("[T]he FAA 'does not create any independent federal-question jurisdiction,' 'there must be diversity of citizenship or some other independent basis for federal jurisdiction.'").

78. See *generally*, *McKee v. Home Buyers Warranty Corp.*, 45 F.3d 981 (5<sup>th</sup> Cir. 1995). "The decisions holding that reference to AAA rules as permitting entry of judgment are longstanding. Consequently, all parties are on notice that resort to AAA arbitration will be deemed both binding and subject to entry of judgment unless the parties expressly agree otherwise." *Id.* at 983 (citations omitted).

79. See 9 U.S.C. § 11.

80. See 9 U.S.C. § 16(a)(1)(E).

81. See *id.* §11(a-c).

The FAA authorizes vacating awards that were obtained by “corruption, fraud, or undue means.”<sup>82</sup> It takes something more than an allegation of impropriety to persuade a court to vacate an award on these grounds. Courts interpret these FAA vacatur grounds very narrowly.<sup>83</sup> The burden is on the moving party to demonstrate that the alleged corruption, fraud, or undue means wrongfully influenced the arbitrator’s award.<sup>84</sup> The fraud complained of must not have been discoverable with due diligence prior to or during arbitration.<sup>85</sup> Moreover, the mere existence of fraud at arbitration does not provide a basis for vacating an award. There must be a nexus between any such fraud and the arbitrator’s decision.<sup>86</sup>

An award can also be vacated upon a showing of “evident partiality or corruption” on the part of the arbitrator.<sup>87</sup> The mere appearance of bias by an arbitrator does not justify vacation.<sup>88</sup> To vacate an award for bias, the arbitrator’s partiality must be shown to have prejudicially influenced the award.<sup>89</sup> Arbitrators are under a duty to fully disclose past dealings with either party to the dispute, and their failure to do so is grounds for vacation.<sup>90</sup> However, past associations or business dealings with one party will not automatically result in a finding of bias.<sup>91</sup> In the context of crop insurance, an argument that a reinsured company received preferential treatment from an arbitrator as a repeat player in arbitration would fail, absent some factual demonstration of partiality.<sup>92</sup>

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82. See 9 U.S.C. § 10(a)(1).

83. See, e.g., *Denver & Rio Grande Western R.R. Co. v. Union Pacific R.R. Co.*, 119 F. 3d 847, 849 (10<sup>th</sup> Cir. 1997)(“Once a dispute is properly before an arbitrator, the function of the courts in reviewing the arbitrator’s decision is quite limited.”)(citing *First Options v. Kaplan*, 514 U.S. 938, 942 (1995)); See also *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5<sup>th</sup> Cir. 1990)(“Judicial review of an arbitration award is extraordinarily narrow.”).

84. See e.g., *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11<sup>th</sup> Cir. 1988)(explaining that a movant “must establish the fraud by clear and convincing evidence.”).

85. See *id.*

86. See *id.* (“explaining that the fraud “must have materially related to the arbitration.”); See also *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5<sup>th</sup> Cir. 1990)(reading FAA to require a “nexus between the alleged fraud and the basis for the panel’s decision.”).

87. See 9 U.S.C. § 10(a)(2).

88. See *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2<sup>nd</sup> Cir. 1981)(reversing lower court’s vacation of arbitration award for appearance of bias).

89. See *id.*

90. See generally *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (reversing lower court’s refusal to vacate an arbitration award where arbitrator did not disclose business relationship with one the parties). “We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *Id.* at 149.

91. See *Health Services Mgmt. Co. v. Hughes*, 975 F.2d 1253, 1264 (7<sup>th</sup> Cir. 1992).

92. See e.g., *LLT Int’l, Inc. v. MCI Telecomm. Corp.*, 18 F. Supp. 2d 349, 354 (S.D.N.Y. 1998)(rejecting argument that the AAA forum was biased in favor of a big company with many disputes decided in arbitration).

Misconduct or misbehavior by an arbitrator that prejudices the rights of any party to the arbitration is grounds for vacating an award.<sup>93</sup> Vacation under these grounds often involves evidentiary or procedural issues. As to the former, the following have been characterized as misconduct or misbehavior sufficient to vacate an award: 1) where an arbitrator refused to hear timely offered, non-cumulative evidence,<sup>94</sup> 2) receipt of ex parte evidence to the detriment of the other party,<sup>95</sup> 3) reference to items not admitted into evidence to support a finding.<sup>96</sup> On the procedural side, awards have been vacated for misconduct where: 1) the arbitrator failed to notify parties of the time and place for a hearing,<sup>97</sup> or 2) where the arbitrator failed to postpone a hearing for good cause.<sup>98</sup>

Finally, the FAA provides that an award can be vacated “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.”<sup>99</sup> The FAA also provided that an award can be modified or corrected where an arbitrator exceeded his or her authority.<sup>100</sup> An arbitrator’s authority to resolve any dispute is circumscribed by the underlying agreement giving rise to the arbitration.<sup>101</sup> Consequently, an arbitrator’s authority in resolving crop insurance disputes is dictated by the FCIC policy. The scope of an arbitrator’s authority under an FCIC reinsured policy will be examined in more detail in the next section.

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93. *See id.* § 10(a)(3).

94. *See e.g.*, *Teamsters Local 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 578 (N.D.N.Y. 1982)(“Here, the Court finds that the arbitrator violated section 10(c) [of the FAA] by refusing to hear evidence pertinent and material to the controversy.”).

95. *See, e.g.*, *Totem Marine Tug & Barge v. North Am. Towing, Inc.* 607 F.2d 649 (5<sup>th</sup> Cir. 1979)(vacating award where arbitrators violated AAA’s rules relating to ex parte evidence). “The ex parte receipt of evidence bearing on this matter constituted misbehavior by the arbitrators prejudicial to Totem’s rights in violation of 9 U.S.C. § 10(c).” *Id.* at 653.

96. *See, e.g.*, *Zeigler Coal Co. v. United Mine Workers*, 484 F. Supp. 445 (C.D. Ill. 1980)(vacating award where arbitrator relied on term definitions other than those in the record to support his conclusions).

97. *See, e.g.*, *Seldner Corp. v. W.R. Grace & Co.*, 22 F. Supp. 388, 393 (D. Md. 1938)(“The whole award must be vacated for the lack of notice to the plaintiff and an opportunity to it to be heard.”).

98. *See e.g.*, *Allendale Nursing Home, Inc. v. Local 1115 Joint Bd.*, 377 F. Supp. 1208, 1214 (S.D.N.Y. 1974)(vacating award where arbitrator refused good faith request to adjourn by party with necessary principal ill and hospitalized).

99. *See* 9 U.S.C. § 10(a)(4).

100. *See* 9 U.S.C. § 11; *see also supra* text accompanying note 79.

101. *See Totem Marine*, 607 F.2d at 651 (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (“Arbitration is contractual and arbitrators derive their authority from the scope of the contractual agreement.”). “The arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.” *Id.* at n.2.

In challenges that an arbitrator exceeded his or her authority, arbitrators are afforded great deference.<sup>102</sup> Courts will presume that an arbitrator has acted within the scope of his or her authority absent some compelling evidence to the contrary.<sup>103</sup>

In addition to the statutory vacatur grounds, a handful of judicially created doctrines have been used to vacate arbitration awards and thus deserve mention. The United States Supreme Court has recognized “manifest disregard of the law” as grounds for vacating an award.<sup>104</sup> As with those enumerated in the FAA, this ground is extremely narrow. It requires more than that an arbitrator made an error of law. Instead, it requires something more akin to the arbitrator deliberately ignoring governing law.<sup>105</sup>

Another judicially created doctrine that has been recognized by the Supreme Court allows for an award to be set aside where it clearly violates an explicit public policy.<sup>106</sup> This typically arises in employment arbitrations and probably has little potential for application in the crop insurance context.

Some courts have set aside arbitration awards where the arbitrator did not conduct a “fundamentally fair hearing.”<sup>107</sup> This grounds is not necessarily available in every jurisdiction.<sup>108</sup> Other courts have allowed an arbitration award to be vacated where it was “completely irrational.”<sup>109</sup> Given differences in the law among different jurisdictions, a thorough review of the law applicable to their jurisdiction should be made by an insured before challenging a crop insurance arbitration award on the basis of any judicially created doctrines.

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102. See *United Paperworkers Int'l v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) (“Because the parties have contracted to have disputes settled by an arbitrator . . . , it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator . . .”).

103. See, e.g., *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 301 (3<sup>rd</sup> Cir. 2001) (affirming vacation of award where arbitrator’s decision violated terms of the agreement at issue). The 3<sup>rd</sup> Circuit articulated the following principles in regards this question: “(1) a reviewing court should presume that an arbitrator acted within the scope of his or her authority; (2) this presumption may not be rebutted by an ambiguity in a written opinion; but (3) a court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion.” *Id.*

104. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *rev'd on other grounds* 490 U.S. 477 (1989).

105. See e.g., *Reynolds Secur., Inc. v. MacQuown*, 459 F. Supp. 943 (W.D. Pa. 1978).

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

107. See e.g., *McDaniel v. Bear Stearns & Co.*, 196 F.Supp. 2d 343, 350 (S.D.N.Y. 2002) (citing *Bell Aerospace Co. v. UAW Local 516*, 500 F.2d 921, 923 (2<sup>nd</sup> Cir. 1974); See also *Bowles Fin. Group v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10<sup>th</sup> Cir. 1994).

108. See *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8<sup>th</sup> Cir. 2001) (“We have never recognized “fundamental unfairness” as a basis for vacating an arbitration award. Indeed, our narrow construction of extra-statutory review militates against such a standard.”).

109. See e.g., *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 578 (8<sup>th</sup> Cir. 1998); See also *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 749-50 (8<sup>th</sup> Cir. 1986).

In summary, parties to arbitration should expect that an arbitrator's award will be binding. Courts are very reluctant to meddle with an award and will require a substantial showing by the moving party, regardless of the grounds asserted.<sup>110</sup> Arbitrators enjoy substantial deference, and a court will not disturb an award absent one or more of the above-referenced statutory grounds or judicially created justifications. In the great majority of arbitration cases, the court's role will be limited to entering the award for judgment.

### **Arbitrator's Authority Under the FCIC's Arbitration Clause**

The grounds for challenging an arbitrator's award in crop insurance disputes are no different than those applied in other arbitration venues.<sup>111</sup> As previously mentioned, the scope of any arbitrator's authority is defined by the underlying agreement. Therefore, in the context of crop insurance arbitrations, an arbitrator's authority is limited by the provisions contained in the reinsured policy at issue and the FCIA which is incorporated by reference.<sup>112</sup>

The potential range of factual disputes involving crop insurance is daunting. Factual disputes can arise at every step of the insurance cycle regarding whether the reinsurer or the insured performed as required by the terms of their particular crop policy. Such disputes might involve, but are not necessarily limited to: planting intentions, acreage planted or prevented from planting, replanted acreage, crop husbandry, loss reporting and adjustment, acreage reporting, harvest, production reporting, premium payment, and claims processing. Arbitrators have the authority to resolve any and all factual disputes connected with these elements of the crop insurance contract, and their decision(s) will be binding on the parties.<sup>113</sup>

However, not every dispute can be resolved through arbitration.<sup>114</sup> A common scenario in crop insurance disputes involves allegations by an insured that the terms of coverage were somehow misrepresented to them. An arbitrator's authority to resolve such disputes is limited: "No award determined by arbitration or appeal can exceed the amount of liability established or which should

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110. See, e.g., *McDaniel v. Bear Stearns & Co., Inc.*, 196 F. Supp. 2d 343, 351(S.D.N.Y. 2002)(explaining that "arbitration awards are subject to very limited review"); See also 9 U.S.C.S. § 10 and accompanying interpretive notes and decisions.

111. See e.g., *Duke v. Crop Growers Ins., Inc.*, 70 F. Supp. 2d 711, 716 (S.D. TX 1999)(denying request for de novo review of arbitrator's award)(citing 9 U.S.C. § 9 for proposition that in absence of fraud in the inducement, the only grounds "for setting aside the arbitrator's decision would be if the arbitrator were guilty of misconduct, partiality, corruption, or if the arbitrator demonstrated an absolute disregard for the law.").

112. See 7 C.F.R. § 457.8(b). "This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.) (Act). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act."

113. See *Duke*, 70 F. Supp. at 714-15 (citing cases from four different Circuits to support that arbitration under "AAA rules will be deemed both binding and subject to entry of judgment unless the parties expressly agree otherwise").

114. See generally *IGF Ins. Co. v. Hat Creek P'ship*, No. 01-1267, 2002 Ark. LEXIS 348, at 17-23, (Ark. 2002)(Corbin, J., concurring).

have been established under the policy.”<sup>115</sup> The arbitrator’s authority is further limited by this provision: “Under no circumstances will we be liable for the payment of damages (compensatory, punitive, or other), attorney’s fees, or other charges in connection with any claim for indemnity, whether we approve or disapprove such claim.”<sup>116</sup>

While the above-cited provisions suggest that an arbitrator has no authority to make equitable awards, at least one court would disagree. In *Nobles v. Rural Community Insurance Services*,<sup>117</sup> the court opined that 7 C.F.R. § 457.6 invested the arbitrator with the authority to allow recovery for uninsured crop losses.<sup>118</sup> The cited section is found in the general crop insurance regulations rather than the policy itself. It provides that a reinsured company may use arbitration panels or may establish administrative procedures for granting relief to policyholders who relied in good faith upon the misrepresentations of its agents or employees.<sup>119</sup>

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115. See 7 C.F.R. 457.8 para. 20(b) (2002).

116. See *id.* at 457.8 para. 26(a); See also *id.* at 457.8 para. 25(c) (“Your right to recover damages (compensatory, punitive, or other), attorney’s fees, or other charges is limited or excluded by this contract or by Federal Regulations.”).

117. 122 F. Supp. 2d 1290 (M.D.Ala. 2000).

118. See *Nobles v. Rural Community Ins. Servs.*, 122 F. Supp. 2d 1290, 1297 (M.D.Ala. 2000) (citing 7 C.F.R. § 457.6 for the proposition that “the arbitrator is empowered to grant recovery for losses—even if they are not covered by the policy—if Plaintiffs establish that they relied in good faith upon a misrepresentation of an insurance agent. Thus, even if the terms of Defendant’s policy do not insure against losses on some 5,000 acres of Plaintiff’s cotton crop, the arbitrator may nevertheless award relief as if they do.”).

119. 7 C.F.R. § 457.6 provides: Notwithstanding any other provision of the crop insurance contract, whenever:

(a) A person entering into a contract of crop insurance under these regulations who, as a result of a misrepresentation or other erroneous action or advice by an agent or employee of the Corporation:

(1) Is indebted to the Corporation for additional premiums; or

(2) Has suffered a loss to a crop which is not insured or for which the insured is not entitled to an indemnity because of failure to comply with the terms of the insurance contract, but which the insured believed to be insured, or believed the terms of the insurance contract to have been complied with or waived; and

(b) The Board of Directors of the Corporation, or the Manager in cases involving not more than \$100,000.00, finds that:

(1) An agent or employee of the Corporation did in fact make such misrepresentation or take other erroneous action or give erroneous advice;

(2) Said insured relied thereon in good faith; and

(3) To require payment of the additional premiums or to deny such insured’s entitlement to the indemnity would not be fair and equitable, such insured shall be granted relief the same as if otherwise entitled thereto. Requests for relief under this section must be submitted to the Corporation in writing. The Corporation reviewing officers must, upon application by the person claiming relief under this section, refer such application to the appropriate official of the Corporation for determination as to whether to grant relief under this section. Corporation reviewing officers do not have authority to grant relief under this section.

(c) The reinsured companies may use arbitration panels established under contracts for reinsurance issued by them under the FCIC Act to grant relief under the same terms and conditions as contained in paragraphs (a) and (b) of this section or, may

In *Nobles*, the plaintiff sued the insurer under state contract and tort theories when 5,000 of his 7,700 acres of destroyed cotton were determined ineligible after-the-fact.<sup>120</sup> In granting the insurer's motions to stay and to compel arbitration, the court found that arbitration was the only viable means for resolving the dispute because the reinsured company had no "meaningful or appropriate administrative procedures in place" for providing relief for the misrepresentations of its agent.<sup>121</sup>

While the proposed interpretation would work to the advantage of policyholders, it may be overly broad. On its face at least, the provision's language seems discretionary rather than mandatory.<sup>122</sup> Moreover, authority to grant equitable relief is contrary to language in the arbitration clause itself.<sup>123</sup> Consequently, until there is some definitive precedent established, it may be imprudent for policyholders to assume that the equitable relief contemplated in *Nobles* will be universally available at arbitration.

Even if the *Nobles* interpretation survives, an arbitrator would have no authority to award anything beyond what was owed under the policy where the reinsured company had established administrative procedures for handling equitable claims. Reinsured companies are not reimbursed by the FCIC for the errors or omissions of their own agents.<sup>124</sup> It seems likely, therefore, that they would prefer to handle such issues in-house, rather than be at the mercy of an impartial arbitrator. Accordingly, it seems reasonable to expect those presently without administrative procedures in place to establish such procedures if the interpretation of the *Nobles*' court gains broad acceptance.

FCIC reinsured policyholders should not expect to be made whole in arbitration. Absent relief under the equitable provision discussed above, they will be out considerable arbitration expenses, with recovery limited to what they would have been entitled to under a properly processed application and claim. Recovery for other damages will likely require separate litigation beyond arbitration on the

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establish procedures to administratively handle relief in accordance with such terms and conditions.

7 C.F.R. § 457.6.

120. See *Nobles*, 122 F. Supp. 2d at 1292-93.

121. See *Nobles*, 122 F. Supp. 2d at 1296 n.2.

122. See 7 C.F.R. § 457.6(c).

123. See *supra* note 115 and accompanying text.

124. See 7 U.S.C. § 1507(c)(providing that FCIC will indemnify costs and attorney fees where a reinsured company is sued and held liable "except to the extent the agent or broker has caused the error or omission.")(emphasis added); See also *Meyer v. Conlon*, 162 F.3d 1264, 1268 (10<sup>th</sup> Cir. 1998)(citing 7 U.S.C. § 1507(c) for the proposition that "the FCIC contemplates that private insurance companies will be sued and will have to pay when they are at fault.").

crop insurance contract. The bifurcation of contract and tort damages is not unique to crop insurance arbitration.<sup>125</sup>

Arbitration often lives up to its billing as an economical and expeditious means of resolving contract disputes. Policyholders should not be reluctant to demand arbitration when necessary to protect their rights. Moreover, any factual disputes must be arbitrated before state law causes of action against the reinsured private insurance company can be litigated.<sup>126</sup> However, as discussed later in this article, there may be an advantage to bringing a court action before demanding arbitration in some situations. Consequently, policyholders may want to review their options with counsel before deciding how to proceed.

## Rights Beyond Arbitration

Prior to 1994, preemption and/or jurisdiction were the dominant issues in most crop insurance litigation. Preemption challenges typically involved whether the FCIA precluded suits by policyholders against their reinsured private providers.<sup>127</sup> The circuit courts entertaining this issue agree that the FCIA does not foreclose other avenues for relief.<sup>128</sup>

The other common question was whether the FCIA invested federal courts with exclusive jurisdiction over crop insurance disputes. Arguments in favor of federal jurisdiction were usually based on a provision in the FCIA stating that actions against the FCIC or a reinsured company for denying claims “may be brought only in the United States district court for the district in which the insured farm is located.”<sup>129</sup> Relying on canons of statutory construction, most courts have interpreted

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125. See e.g., *Terminix Int'l Co., v. Stabbs*, 326 Ark. 239, 242 (1996)(citing Ark. Code Ann. § 16-108-201)(“Written agreements to arbitrate have no application to tort matters”)(“[T]he existence of a contractual relationship does not preclude the institution of a tort action.”).

126. See 7 C.F.R. § 457.8 para. 25(a)(“You may not bring legal action against us unless you have complied with all of the policy provisions.”); See also *Nobles*, 122 F. Supp. at 1301 (“Plaintiffs may litigate their remaining causes of action after first complying with the relevant contractual provisions [including arbitration].”); See also *Ledford Farms, Inc. v. Fireman’s Fund Ins. Co.*, 184 F. Supp. 2d 1242, 1245 (S.D. FLA. 2001)(“The arbitration clause, however, is not an absolute bar to suit. Rather, [it] is a condition . . . that must be satisfied before an insured can commence legal action.”).

127. See, e.g., *Meyer v. Conlon*, 162 F.3d 1264 (10<sup>th</sup> Cir. 1998)(affirming lower court finding that the FCIA did not preempt state law causes of action); *Williams Farms v. Rain & Hail Ins. Servs.*, 121 F.3d 630 (11<sup>th</sup> Cir. 1997)(reversing lower court finding that the FCIA preempted suit against private insurer); *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 (9<sup>th</sup> Cir. 1993) (finding “that the FCIA [did] not have the extraordinary preemptive force necessary for the application of the doctrine of complete preemption.”).the inn

128. See generally Christopher R. Kelley, *Fifth Circuit Rules Federal Crop Insurance Act Does Not Preempt State Law Claims Against Crop Insurance Agents*, AGRIC. L. UPDATE, Dec. 2001, at 1 (explaining that in *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683 (5<sup>th</sup> Cir. 2001), the Fifth Circuit had joined with the Ninth, Tenth, and Eleventh Circuits in ruling that the FCIA did not “preempt state law claims against crop insurers and their agents.”).

129. See 7 U.S.C. § 1508(j).



this provision to be permissive rather than mandatory.<sup>130</sup> Consequently, it does not invest the federal district courts with federal question jurisdiction over suits against reinsured companies.<sup>131</sup>

While suits against the FCIC must be brought in federal district court, policyholders can bring suit against a reinsured company in either a state or a federal court.<sup>132</sup> As was the case with the FAA, the FCIA does not create an independent federal cause of action against a reinsured company.<sup>133</sup> Therefore, a federal court will only have jurisdiction if there is an independent basis for asserting jurisdiction, either through diversity or because a federal question is raised.<sup>134</sup> Under the well-pleaded complaint rule, policyholders “may avoid federal jurisdiction by exclusive reliance on state law.”<sup>135</sup>

While preemption issues still arise in the context of crop insurance disputes, there are other less settled questions before the courts now.<sup>136</sup> Most notably, it is presently unclear how an arbitrator’s decision may affect a policyholder’s rights beyond arbitration. Several courts have touched on the subject, but none has clearly articulated which decisions in a crop insurance arbitration will bind the parties in subsequent litigation.<sup>137</sup> Until the courts have spoken directly to this issue, the

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130. See *e.g.*, *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., Inc.*, 121 F.3d 630, 634 (11<sup>th</sup> Cir. 1997)(“Thus, we read § 1508(j)(2)(A) as permitting a suit against the FCIC or the Secretary of Agriculture—not as mandating such a suit.”); *But see Brown v. Crop Hail Mgmt.*, 841 F. Supp. 297, 304 (W.D. Mo. 1994)(holding that FCIA completely preempted state law cause of action).

131. See *Agre v. Rain & Hail LLC*, 196 F. Supp. 2d 905, 913 (D. Minn.. 2002)(“The mere fact that a case touches on questions of federal law – here crop insurance – does not alone provide this Court with subject matter jurisdiction.”)(citing *Dow Pharm., Inc. v. Thompson*, 478 U.S. 904, 813 (1986)).

132. See 7 U.S.C. § 1506(d).

133. See *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 (9<sup>th</sup> Cir. 1993)(“[A] review of the FCIA and its legislative history uncovers no congressional intent that claims against insurance agents for the agents’ own errors or omissions are deemed to create federal-question jurisdiction.”); see *also Rio Grande Underwriters v. Pitts Farms, Inc.*, 276 F.3d 683, 687 (5<sup>th</sup> Cir. 2001)(“The court finds no evidence that Congress intended to so displace state law claims against agents who sell policies reinsured by the FCIC as to convert them to federal claims and subject them to federal jurisdiction.”).

134. See *supra* note 77 and accompanying text.

135. See *O’Neal v. Cigna Prop. & Cas. Ins. Co.*, 878 F. Supp. 848, 850 (D.S.C. 1995)(quoting *Caterpillar v. Williams*, 482 U.S. 386, 391 (1987)).

136. See *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683 (5<sup>th</sup> Cir. 2001)(finding FCIA did not completely preempt state law claims); see *also Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816 (Iowa 2002)(finding sufficient economic nexus between sale of crop insurance and interstate commerce for the Federal Arbitration Act to preempt Iowa statute making agreement to submit to arbitration unenforceable in contract of adhesion); see *also IGF Ins. Co. v. Hat Creek P’ship*, No. 01-1267, 2002 Ark. LEXIS 348 at 16 (Ark. 2002)(finding lower court erred in concluding that conflicting state law was not preempted by the FCIA).

137. See *e.g.*, *Hoeft v. Rain & Hail, LLC*, No. 01-581-AS, 2001 U.S. Dist. LEXIS 23586 at 11-12 (D. OR. 2001)(staying defamation and breach of contract claims pending mandatory arbitration to avoid inconsistent outcome in subsequent litigation).

most that can be definitively stated is that arbitration decisions may preclude re-litigation of certain claims and issues.<sup>138</sup>

While many questions remain, there are some well-established principles in this area that should guide the courts. First, we know that two separate doctrines are implicated: *res judicata* and collateral estoppel. The doctrine of *res judicata*, otherwise known as claim preclusion, bars re-litigation of a claim “previously tried and decided.”<sup>139</sup> Collateral estoppel, or issue preclusion, prevents re-litigation of “issues actually adjudicated in previous litigation between the same parties.”<sup>140</sup> We also know that, in general, arbitration decisions involving federal laws and regulations can have a preclusive effect on subsequent litigation.<sup>141</sup> Finally, we know that the party asserting that a claim or an issue should be precluded under either doctrine has the burden “of showing with clarity and certainty what was determined by the prior judgment.”<sup>142</sup>

These principles have tactical implications for crop insurance litigations. For example, a policyholder might want to file a state law cause of action alleging all of his or her claims before requesting arbitration. This would prevent their being precluded from doing so after arbitration under the doctrine of *res judicata*.<sup>143</sup> The requirement that factual issues be arbitrated before state law causes of action can be entertained does not require that a demand for arbitration be filed before a court action is filed. Under the FAA, a court will stay action and retain jurisdiction of causes of action involving issues that are referable to arbitration upon application by either party.<sup>144</sup>

The courts have not yet addressed the *res judicata* doctrine in the context of crop insurance arbitrations. It is conceivable that an insured could be denied relief at trial for failing to raise a claim he or she believed was beyond the scope of arbitration. This outcome is more probable in jurisdictions that adopt the *Nobles* construction of 7 C.F.R. § 457.6 and invest the arbitrator with authority to grant equitable relief. Pre-filing would avoid any risk that a claim might be inadvertently lost since it would at least be preserved for subsequent litigation if not resolved at arbitration.

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138. See *e.g.*, *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d at 1298 (“[T]he court does not rule out the likelihood that, under the doctrine of claim preclusion, at least some of the arbitrator’s findings can serve as the basis for Plaintiff’s common law claims . . .”).

139. See *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9<sup>th</sup> Cir. 1992)(citing 18 CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981)).

140. See *id.*

141. See *id.* at 1321 (noting that an “arbitration decision can have *res judicata* or collateral estoppel effect . . .”); see also *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11<sup>th</sup> Cir. 1985)(“When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.”)(citing RESTATEMENT (SECOND) OF JUDGMENTS § 84(3) (1982)).

142. See *Clark*, 966 F.2d at 1321.

143. See *id.*(“*Res judicata* bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action.”)(citing *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9<sup>th</sup> Cir. 1986)).

144. See 9 U.S.C. § 3.

These principles also suggest that where a party expects to rely on arbitration determinations in subsequent litigation, it may be in his or her best interest to request a reasoned opinion from the arbitrator. Arbitrators are not required to give reasoned opinions unless requested in advance by the parties.<sup>145</sup> A court will not preclude claims or issues on the basis of an arbitration judgment without a sufficient record. This quote from the Ninth Circuit Court of Appeals is instructive: “It is not enough that the party introduce the decision of the [arbitrator]; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.”<sup>146</sup> A reasoned opinion would be more likely to satisfy this standard than a non-reasoned one.

Also, parties to arbitration who expect to use its results in subsequent litigation should insist that every issue raised be entered in the record and that the proceedings be thoroughly documented. Parties are allowed twenty days to review the arbitrator’s decision and request correction or modification.<sup>147</sup> This is the last chance that a party has to review the record for completeness and accuracy. Parties should avail themselves of this opportunity, especially where they intend to rely on that record to preclude re-litigation of certain issues at trial.

A discussion of rights beyond arbitration in crop insurance disputes between an insured and the reinsured provider would be incomplete without some mention of who can or should be sued. The nature of the claim and relevant state law will dictate who an insured would want to name as the defendant(s).<sup>148</sup> There are several possibilities, including, the reinsured company itself, its managing general agents, or its local sales agents.<sup>149</sup> Generally speaking, the preemption cases does not distinguish between these actors relative to an insured’s right to bring a state law cause of action.

However, dicta in a recent decision has challenged that understanding and so requires comment. In *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*,<sup>150</sup> the Fifth Circuit Court of Appeals found that the FCIA did not completely preempt state law causes of action.<sup>151</sup> However, it limited its holding to sales agents and at least left open the possibility that it might decide the preemption issue with regard to a reinsured company differently.<sup>152</sup> As with the equitable relief question addressed

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145. See *supra* note 62.

146. See *United States v. Lasky*, 600 F.2d 765, 769 (9<sup>th</sup> Cir.1979).

147. See *supra* note 68.

148. See *Meyer v. Conlon*, 162 F.3d 1264, 1270 (10<sup>th</sup> Cir. 1998)(“The FCIA does not wholly preempt state law; rather, it preempts state law inconsistent with the purpose of the Act.”).

149. See *id.* at 1266 (entertaining policyholder appeal of lower court’s finding in favor of defendants National Farmers Union Property & Casualty, its subsidiary Rain and Hail Insurance Services, Inc., and Rain and Hail’s agent Jay Conlon).

150. 276 F.3d 683 (5<sup>th</sup> Cir. 2001).

151. See *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 687 (5<sup>th</sup> Cir. 2001).

152. See *id.* (“The court finds no evidence that Congress intended to so displace state law claims *against agents who sell policies* reinsured by the FCIC as to convert them to federal claims and subject them to federal jurisdiction.”)(emphasis added); see also *id.* at 686 n.9(discussing 7 C.F.R. § 400.176(b))(“[E]ven if this section could be construed as creating a separate cause of action against insurers, there is no language

earlier, prudence suggests that the sales agent be included as a named defendant wherever possible until a definitive holding is available in the applicable jurisdiction.

## Conclusion

Many questions about crop insurance litigation beyond arbitration remain unanswered. It is a fertile and evolving field of law. Until the courts have had an opportunity to answer those questions, it behooves the parties to be circumspect in their approach to arbitration. Parties should not presume that an arbitration record will preclude certain claims or issues at trial. Nor should they ignore the opportunity that arbitration may provide to resolve issues in their favor that are necessary to subsequent state law action. There may be certain tactical advantages to filing prior to arbitration and seek advice from competent counsel should be sought before a decision on how to proceed is made.

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in this section pertaining to agents.”).

