

## STATUTES OF LIMITATION AND CROP INSURANCE

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## INTRODUCTION

“Equity aids the vigilant and not those who slumber on their rights.”<sup>1</sup> This often-cited equitable maxim, which reflects the equitable doctrine of laches,<sup>2</sup> represents a judicial policy that those aggrieved who have a legal cause of action are barred from relief if they commence their cause of action after an unreasonable amount of time has passed.<sup>3</sup> This policy is firmly expressed in the various statutory statutes of limitations, which are found for numerous causes of action at both the federal and state levels across the United States, including trademark infringement claims,<sup>4</sup> patent infringement claims,<sup>5</sup> certain maritime deaths occurring on the high seas<sup>6</sup> under the Death on the High Seas Act,<sup>7</sup> claims for breach of

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1. BILLY G. BRIDGES & JAMES W. SHELSON, GRIFFITH MISSISSIPPI CHANCERY PRACTICE § 41 (2000 ed.).

2. See FRANK B. CROSS & ROGER LEROY MILLER, THE LEGAL ENVIRONMENT OF BUSINESS 6 (10th ed. 2018) (“The last maxim listed in the exhibited—‘Equity aids the vigilant, not those who rest on their rights’—merits special attention. It has become known as the equitable doctrine of *laches* (a term derived from the Latin *laxus*, meaning ‘lax’ or ‘negligent’), and it can be used as a defense.”).

3. See, e.g., A.C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1029–30 (Fed. Cir. 1992).

4. See, e.g., CSL Silicones, Inc. v. Midsun Grp. Inc., 170 F. Supp. 3d 304, 309 (D. Conn. 2016) (quoting CONN. GEN. STAT. § 42-110g(f) (2017)) (noting that a three-year statute of limitations applies for cases involving trademark infringement brought under the Connecticut Unfair Trade Practices Act).

5. See 35 U.S.C. § 286 (2012) (“Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”).

6. See 46 U.S.C. § 30106 (2012) (“Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.”).

7. 46 U.S.C. § 30302 (2012). The Death on the High Seas Act provides the following:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent’s spouse, parent, child, or dependent relative.

contract,<sup>8</sup> torts,<sup>9</sup> and wrongful death claims,<sup>10</sup> for example. Strict compliance with statutes of limitations is an essential duty for attorneys in the practice of law and failure to comply with a statute of limitations generally results in the dismissal of a case,<sup>11</sup> and in some cases, such a failure will result in professional disciplinary action.<sup>12</sup>

In the realm of litigation, upon first glance a statute of limitations would seem to be a fairly straightforward deadline to discern. But this is sometimes not the case. In the area of medical malpractice, does a statute of limitations begin to run the date the patient undergoes an operation, or is it the date when the patient discovers, or should reasonably discover, an injury?<sup>13</sup> Cases involving breaches of insurance contracts also present a statute of limitations question—does the statute begin to run on the date of loss, or when the insurance company breaches the policy? Various jurisdictions differ on this question.<sup>14</sup>

Crop insurance litigation, for both multi-peril crop insurance (MPCI) and crop hail policies, presents a number of statute of limitations-related questions.<sup>15</sup> A variety of academic scholarship has appeared in

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8. See, e.g., IOWA CODE § 614.1(4) (2017) (providing a five-year statute of limitations for unwritten contracts in the state of Iowa); *Id.* § 614.1(5) (providing a ten-year statute of limitations for most written contracts in the state of Iowa).

9. See, e.g., GA. CODE ANN. § 9-3-31 (2007) (providing for a four-year statute of limitations for negligence in the state of Georgia).

10. See, e.g., NEB. REV. STAT. § 30-810 (2016) (providing for a two-year statute of limitations for wrongful death claims in the state of Nebraska).

11. See, e.g., *Newman v. Krintzman*, 723 F.3d 308, 312 (1st Cir. 2013) (quoting *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 194 (1981)); *Basye v. Fayette R-III Sch. Dist. Bd. of Educ.*, 150 S.W.3d 111, 114 (Mo. Ct. App. 2004) (citing *Braun v. Petty*, 31 S.W.3d 521, 523 (Mo. Ct. App. 2000)).

12. See, e.g., *Law. Disciplinary Bd. v. Barbara*, 729 S.E.2d 179, 181, 183 (W. Va. 2012) (imposing a one-year suspension on the practice of law in West Virginia on an attorney who missed a statute of limitations deadline for a client and then did not subsequently promptly notify the client of the missed deadline).

13. See, e.g., Ann Louise Zarick, Note, *Damage Deferred: Determining When a Cause of Action Begins to Accrue for a Cancer Misdiagnosis Claim*, 41 U. TOL. L. REV. 445, 448 (2010) (discussing the three principal statute of limitations rules in medical malpractice claims: the “occurrence” rule, the “discovery” rule, and the “damage” rule).

14. Compare *W. Palm Gardens Villas Condo. Ass’n v. Aspen Specialty Ins. Co.*, No. 11-23912, 2012 U.S. Dist. LEXIS 104861, at \*5 (S.D. Fla. June 25, 2012) (holding that under Florida law a claim for breach of an insurance contracts accrues at the time of loss), with *Brown v. Liberty Mut. Ins. Co.*, 513 N.W.2d 762, 764 (Iowa 1994) (holding “that a claimant’s cause of action for bad-faith failure to pay workers’ compensation benefits accrues upon receipt of notification that the carrier has denied the claim”).

15. See *Crop-Hail Insurance: What You Need to Know*, THAMS AGENCY, <https://thamsagency.com/crop-hail-insurance-what-you-need-to-know/> (last visited Sept. 27, 2018).

law reviews relating to crop insurance and the federal crop insurance program, including articles relating to the effects of climate change on crop insurance,<sup>16</sup> organic farming and crop insurance,<sup>17</sup> legal practitioners and crop insurance disputes,<sup>18</sup> the role of the federal government in the crop insurance arena,<sup>19</sup> crop insurance bad faith claims,<sup>20</sup> crop insurance and fraud,<sup>21</sup> the Merrill Doctrine and crop insurance,<sup>22</sup> arbitrating federal crop

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Crop-hail insurance is different than MPCCI because it is not part of the federal crop insurance program. Instead, private crop insurance companies sell these policies, and the premiums are not subsidized.

Another difference between the two types of coverage is that, unlike MPCCI, farmers may purchase a crop-hail policy at any time during the growing season. Also, while MPCCI policies tend to have high deductibles to cover catastrophic loss of huge yields, crop-hail allows for a smaller deductible to cover spot losses.

*Id.* Throughout this Article, I will be discussing cases involving both multi-peril crop insurance policies as well as crop hail policies (along with one case involving a farm owner's insurance policy).

16. See Chad G. Marzen & J. Grant Ballard, *Climate Change and Federal Crop Insurance*, 43 B.C. ENVTL. AFF. L. REV. 387, 388 (2016); Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENVTL. L. 59, 77–78 (2016); Paul Janda, Note, *Fire, Flood, Famine, and Pestilence: Climate Change and Federal Crop Insurance*, 26 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 81, 83 (2015); Ann Jaworski, Note, *Encouraging Climate Adaptation Through Reform of Federal Crop Insurance Subsidies*, 91 N.Y.U. L. REV. 1684, 1686 (2016); Sara Dewey et al., *Opportunities to Address Climate Change in the Next Farm Bill*, HARV. ENVTL. L. REV. ONLINE (Nov. 10, 2017), <http://harvardelr.com/2017/11/10/opportunities-to-address-climate-change-in-the-next-farm-bill/>.

17. See L. Alenna Bolin, Note, *An Ounce of Prevention: The Need for Source Reduction in Agriculture*, 8 PACE ENVTL. L. REV. 63, 82 (1990); Patricia Robért, Note, *The Aftermath of Irene: Organic Farming, Consumer Protection and Revising Federal Policies*, 14 VT. J. ENVTL. L. 303, 320 (2012).

18. See J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. AGRIC. L. 531, 533 (2012); J. Grant Ballard, *Representing Farmers in Crop Insurance Disputes: When Your Client is Denied the Farm Safety Net*, 48 ARK. LAW., Summer 2013, at 26, 26.

19. See Steffen N. Johnson, *A Regulatory 'Wasteland': Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505, 507 (1996); 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, 143–44 (2001); David F. Rendahl, *Federal Crop Insurance: Friend or Foe?*, 4 SAN JOAQUIN AGRIC. L. REV. 185, 185 (1994).

20. See Chad G. Marzen, *Crop Insurance Bad Faith: Protection for America's Farmers*, 46 CREIGHTON L. REV. 619, 624 (2013).

21. See Chad G. Marzen, *Crop Insurance Fraud and Misrepresentations: Contemporary Issues and Possible Remedies*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 675, 679 (2013).

22. See Chad G. Marzen, *The Merrill Doctrine and Federally Reinsured Crop Insurers*, 89 N.D. L. REV. 585, 589 (2013).

insurance disputes,<sup>23</sup> crop insurance and biotechnology,<sup>24</sup> and the relationship between bankruptcy law and federal crop insurance.<sup>25</sup> Despite this rich scholarship, there is an absence of a comprehensive examination of the significant legal cases relating to the application of statutes of limitations and contractual limitations periods to crop insurance disputes.

This Article is intended to contribute to the academic literature on crop insurance by analyzing key cases involving statute of limitations questions in state and federal cases involving crop insurance. Part I of this Article discusses cases involving the Federal Crop Insurance Corporation (FCIC). Part II examines cases which have addressed the question of when a crop insurance claim accrues. Part III analyzes the issue of tolling and equitable tolling with crop insurance claims. Part IV of this Article examines the question of whether the Federal Crop Insurance Act (FCIA) preempts state statutes of limitation in the crop insurance context. Part V analyzes several other legal issues involving statutes of limitation and crop insurance. Finally, this Article concludes that with the presence of crop insurance cases that have been decided in recent years, statute of limitations-related questions in the crop insurance area are likely to be litigated in the future.

#### I. LITIGATION INVOLVING THE FEDERAL CROP INSURANCE CORPORATION

While the federal government has had a role in issuing crop insurance policies since the passage of the FCIA in 1938,<sup>26</sup> from 1938 until 1980 only the federal government directly issued federal crop insurance policies through the FCIC.<sup>27</sup> While a number of private insurers today offer crop insurance policies which may be reinsured by the federal government, this did not begin until after 1980.<sup>28</sup>

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23. See John I. Halloran et al., *Arbitrating Multi-Peril Crop Insurance Disputes*, 64 DISP. RESOL. J. 38, 40 (2009).

24. See Steve Cooper, Note, *Crop Insurance in the Age of Biotechnology: Should Federal Crop Insurance Endorse Biotechnology?*, 15 CONN. INS. L.J. 495, 497 (2009).

25. See Chad G. Marzen, *Bankruptcy and Federal Crop Insurance*, 34 VA. ENVTL. L.J. 328, 331 (2016).

26. See Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281–407 (2012)).

27. See *Bullinger v. Trebas*, 245 F. Supp. 2d 1060, 1063 (D. N.D. 2003).

28. *Id.*

[W]hen the Federal Crop Insurance Act was amended in 1980, Congress authorized the utilization of private insurance companies to provide crop insurance to the nation's farmers. These private insurance companies sell and service crop insurance policies and are reinsured by the Federal Crop Insurance Corporation. As a result, under the current scheme, the Federal Crop Insurance Corporation both insures framers directly and reinsures private companies to ensure farmers.

The FCIC “promotes the economic stability of agriculture through a sound system of crop insurance” and currently manages the federal crop insurance program.<sup>29</sup> A Board of Directors, which consists of the administrator of the Risk Management Agency (RMA), two individuals who are Under Secretaries of the Department of Agriculture, the Chief Economist of the Department of Agriculture, an individual “experienced in the crop insurance business,” an expert on insurance regulation and/or reinsurance, and four farmers (one whom grows specialty crops), governs the FCIC.<sup>30</sup> As the U.S. District Court for the District of North Dakota noted in *Bullinger v. Trebas*, the FCIC has three primary functions: “1) selling insurance through private insurance agents; 2) reinsuring private insurance companies that provide crop insurance; and 3) providing crop insurance directly to the farmer.”<sup>31</sup>

#### A. Strict Compliance with Statutes of Limitations

Prior to 1980, the FCIC was subject to litigation in a number of cases involving the federal crop insurance program.<sup>32</sup> One of the first key questions involving statutes of limitation in the federal crop insurance program arose in the case of *Godbold v. Federal Crop Ins. Corp.*<sup>33</sup> In the *Godbold* case, a farmer filed a claim for indemnity on a loss to a cotton crop in northern Mississippi.<sup>34</sup> The farmer received a letter rejecting the claim in February 1971, and did not file suit for wrongful denial of the claim until August 1972, essentially eighteen months later.<sup>35</sup> At the time of the *Godbold* litigation, the federal statute of limitations in effect for claims against the FCIC when an insurance claim was allegedly improperly denied was one year after the claimant received notice of a mailed

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*Id.* (citing 7 U.S.C. § 1508(a) (2012)); see Federal Crop Insurance Act of 1980, Pub. L. No. 96-365, 94 Stat. 1312 (codified as amended in scattered sections of 7 U.S.C.).

29. 7 U.S.C. § 1502 (2012); see also *Federal Crop Insurance Corporation (FCIC)*, USDA RMA, <https://www.rma.usda.gov/fcic/> (last visited Sept. 27, 2018).

30. See 7 U.S.C. § 1505(a)(1)–(2) (2012); see also *Federal Crop Insurance Corporation (FCIC)*, *supra* note 29.

31. 245 F. Supp. 2d at 1063 (citing *Owen v. Crop Hail Mgmt.*, 841 F. Supp. 297, 300 (W.D. Mo. 1994)).

32. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 381 (1947); *Dauzat v. Fed. Crop Ins. Corp.*, 339 F. Supp. 567, 568 (W.D. La. 1972); *Hubert v. Fed. Crop Ins. Corp.*, 299 F. Supp. 467, 467 (N.D. Ala. 1968); *Roberts v. Fed. Crop Ins. Corp.*, 158 F. Supp. 688, 689 (E.D. Wash. 1958); *Fed. Crop Ins. Corp. v. De Cell*, 76 So. 2d 826, 827 (Miss. 1955).

33. See 365 F. Supp. 836, 838 (N.D. Miss. 1973).

34. *Id.* at 837.

35. *Id.*

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denial.<sup>36</sup> Today, the statute of limitations remains at one year following the claimant's receipt of the final notice of denial.<sup>37</sup>

The U.S. District Court for the Northern District of Mississippi noted in the *Godbold* case that the crop insurance statute is “unequivocal, and a dissatisfied claimant must adhere to it strictly.”<sup>38</sup> In the context of the Federal Tort Claims Act (FTCA), the U.S. Court of Appeals for the Fifth Circuit has expressed in case law that “exact compliance” is required.<sup>39</sup>

With the filing of the suit taking place over one year following the rejection of the claim,<sup>40</sup> it would appear that the case would be a straightforward one where a plaintiff completely missed the deadline. However, the plaintiff in *Godbold* advanced the argument that there is a distinction between a “rejection” of a claim and “denial” of a claim pursuant to the crop insurance statute.<sup>41</sup> The *Godbold* court dismissed this argument, noting that there is no distinction made between “rejection” and “denial” with the crop insurance statute.<sup>42</sup> Furthermore, the *Godbold* court noted a decision from the U.S. District Court for the Southern District of Ohio which noted that the statute applies to cases “where the F.C.I.C. rejects claims for damages made pursuant to an insurance contract.”<sup>43</sup>

The significance of *Godbold* is that the general rule that statutes of limitation must be complied with strictly applies no differently in cases involving federal crop insurance.

*B. The Relationship Between Federal Crop Insurance and the Federal*

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36. *Id.* (citing 7 U.S.C. § 1508(c) (1970)). The statute provided that “no suit on such claim shall be allowed under this section unless the same shall have been brought within one year after the date when notice of denial of the claim is mailed to and received by claimant.” 7 U.S.C. § 1508(c).

37. *See* 7 U.S.C. § 1508(j)(2)(B) (2012). The statute specifically states: “A suit on the claim may be brought not later than 1 year after the date on which final notice of denial of the claim is provided to the claimant.” *Id.*

38. *See* 365 F. Supp. at 838.

39. *See* *Simon v. United States*, 244 F.2d 703, 704 (5th Cir. 1957) (“In full agreement with the position of the United States, we think it clear that appellant’s insistence is in direct conflict with the fundamental principle of law controlling here, that when, as in the Federal Tort Claims Act, the sovereign, by statute creating a cause of action and consenting to be sued upon it, makes it clear that the consent of the United States to be sued in tort is conditioned upon the suit’s being filed within the time fixed in the Act and not otherwise, exact compliance with the terms of consent is condition precedent to suit.”).

40. *Godbold*, 365 F. Supp. at 837.

41. *See id.*

42. *Id.* at 838.

43. *Id.* (quoting *Knisely v. Fed. Crop Ins. Corp.*, 334 F. Supp. 425, 430 (S.D. Ohio 1971)) (emphasis omitted).

*Torts Claim Act*

In cases involving crop insurance claims, sometimes a plaintiff will have a claim that involves multiple defendants and multiple causes of action.<sup>44</sup> Confusion on the proper procedural mechanisms to address all claims can arise in “mixed” cases where there are non-governmental as well as governmental defendants.<sup>45</sup> Confusion can cause certain claims to be filed incorrectly.<sup>46</sup>

This was the case in *Conover v. Crop Hail Management Corp.*, a 1989 case decided by the U.S. District Court for the District of New Jersey.<sup>47</sup> The plaintiffs operated an apple and peach orchard in New Jersey and were allegedly told by a representative of an insurance company that crop insurance was not available during the 1987 crop year.<sup>48</sup> During that year, their orchards sustained damages due to the weather.<sup>49</sup> After attempting to obtain disaster assistance from the Federal Housing Administration (FHA) for the losses, they were informed they could not receive any disaster assistance since they did not have crop insurance on the orchards.<sup>50</sup> Subsequently, the plaintiffs found out that crop insurance indeed had been available for the apple and peach crops that year.<sup>51</sup>

The plaintiffs filed claims against the insurance agency involved with the claim, the managing organization of the multi-peril crop insurer, as well as the FCIC.<sup>52</sup> As the *Conover* court noted, three theories of recovery appeared in the complaint—breach of contract, breach of fiduciary duty, and negligence.<sup>53</sup> The plaintiffs’ complaint alleged that the

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44. See *Conover v. Crop Hail Mgmt. Corp.*, No. 88-5495, 1989 U.S. Dist. LEXIS 6714, at \*3, \*5 (D. N.J. June 14, 1989).

45. See *id.* at \*1–2 (first citing Fed. R. Civ. P. 12(b)(1), (6); then citing Fed. R. Civ. P. 56; and then citing Fed. R. Civ. P. 12(c)).

46. See *id.* at \*8–10 (citing 28 U.S.C. §§ 2671–80 (2012)).

47. See *id.* at \*1.

48. *Id.* at \*2.

49. *Conover*, 1989 U.S. Dist. LEXIS 6714, at \*2.

50. *Id.* at \*2–3.

51. *Id.* at \*3.

52. *Id.*

53. *Id.* at \*5.



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FCIC was liable for the losses through the principles of respondeat superior,<sup>54</sup> as well as agency principles.<sup>55</sup>

The FCIC argued that the plaintiffs' complaint against them should be dismissed as the claims sounded in tort, not contract, and were subject to the FTCA.<sup>56</sup> The FTCA provides the exclusive remedy for personal injuries which result from the negligent or wrongful act or omission of any employee of the U.S. government while acting within the scope of authority and employment.<sup>57</sup> As the FCIC contended, such claims require an administrative claim to be presented to the FCIC first and then denial of the claim as a prerequisite to filing suit.<sup>58</sup>

While the *Conover* court remarked it was unclear from the facts of the case whether the two-year statute of limitations for filing a claim pursuant to the FTCA had passed,<sup>59</sup> it held that since the plaintiffs had not filed an administrative claim with the FCIC that their claims against the FCIC should be dismissed.<sup>60</sup>

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54. *Conover*, 1989 U.S. Dist. LEXIS 6714, at \*7; see also Bradley P. Humphreys, Comment, *Assessing the Viability and Virtues of Respondeat Superior for Nonfiduciary Responsibility in ERISA Actions*, 75 U. CHI. L. REV. 1683, 1689 (2008) (“Respondeat superior or to ‘look to the higher man up’ is a strict liability theory based in the common law of agency, which rests on the notion that the principal does for herself what she does through another. Agency relationships exist where one party, the principal, exercises control over another, the agent, for the attainment of the goals of the former. While most agency law is based on the agent’s actual or apparent authority to act on behalf of the principal, respondeat superior is based specifically on the employment relationship between the two.”).

55. See *Conover*, 1989 U.S. Dist. LEXIS 6714, at \*7.

56. *Id.* at \*8–10 (citing 28 U.S.C. §§ 2671–80 (2012)).

57. See 28 U.S.C. § 2675(a); see also 28 U.S.C. § 2679(b)(1).

58. See *Conover*, 1989 U.S. Dist. LEXIS 6714, at \*9–10 (citing 28 U.S.C. § 2675(a)).

The statute states the following:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. § 2675(a).

59. See 1989 U.S. Dist. LEXIS 6714, at \*16; 28 U.S.C. § 2401(b) (2012).

60. 1989 U.S. Dist. LEXIS 6714, at \*16 (“Because plaintiffs have not submitted an administrative claim to begin with, this Court lacks jurisdiction over the claim and the suit must be dismissed.”).

*Conover* illustrates the complexity of pleading claims against the FCIC in crop insurance cases and the application of statute of limitations questions. Had the plaintiffs filed only contractual claims against the FCIC, they would have been subject to the one-year statute of limitations as provided under the federal crop insurance contract.<sup>61</sup> By filing claims based upon negligence against the FCIC, the plaintiffs then became subject to the requirements of the FTCA,<sup>62</sup> which requires an administrative determination prior to filing suit.<sup>63</sup> While a number of claims today based upon torts in the crop insurance context are filed against private insurers who are reinsured through the federal government,<sup>64</sup> and thus not subject to the FTCA, the FTCA would apply with claims against the FCIC as a governmental entity.<sup>65</sup> Such considerations must be analyzed by practitioners in cases where both the FCIC and private entities are involved as defendants in the litigation.

*C. An Approved Insurance Provider as a Plaintiff Against the FCIC*

The FCIC not only has faced litigation from farmer-insureds in crop insurance cases, it has also faced claims brought by an insurance company participating in the federal crop insurance program.<sup>66</sup> Approved Insurance Providers (AIPs) are insurance companies authorized by the FCIC to sell and service multi-peril crop insurance policies.<sup>67</sup> The Standard Reinsurance Agreement (SRA) between the FCIC and insurance companies governs the terms and conditions of the contractual relationship under the federal crop insurance program.<sup>68</sup>

The facts of the *American Growers Ins. Co. v. Federal Crop Ins. Corp.* litigation involved changes in the FCIC's terms and conditions for "prevented planting coverage" during the 1996 crop year.<sup>69</sup> The insurer contended the FCIC did not adjust the indemnification rates using actuarially sound principles and thus suffered losses during the 1996 crop

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61. See 7 U.S.C. § 1508(j)(2)(B) (2012).

62. *Conover*, 1989 U.S. Dist. LEXIS 6714, at \*15.

63. See 28 U.S.C. § 2675(a) (2012).

64. See, e.g., *Dixon v. Producers Agric. Ins. Co.*, 198 F. Supp. 3d 832, 834 (M.D. Tenn. 2016); *Pelzer v. ARMtech Ins. Servs.*, 928 F. Supp. 2d 1071, 1073 (E.D. Ark. 2013).

65. See 28 U.S.C. § 2674 (2012).

66. See *Am. Growers Ins. Co. v. Fed. Crop Ins. Corp.*, 210 F. Supp. 2d 1088, 1090 (S.D. Iowa 2002).

67. See *Public-Private Partnerships: Approved Insurance Providers*, USDA RMA, <https://www.rma.usda.gov/news/partnerships/> (last visited Sept. 28, 2018).

68. See *Reinsurance Agreements Overview*, USDA RMA, <https://www.rema.usda.gov/pubs/ra/> (last visited Sept. 28, 2018).

69. 210 F. Supp. 2d at 1090.

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year as a result.<sup>70</sup>

In denying the FCIC's motion for summary judgment on the insurer's indemnification claim, the *American Growers* court closely analyzed the text of 7 U.S.C. § 1508(j)(3),<sup>71</sup> which states the following: "The Corporation shall provide approved insurance providers with indemnification, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the Corporation."<sup>72</sup>

While the statute definitely applies in cases where an insured sues an AIP and the AIP makes a claim for indemnity, the FCIC argued that it only applied in such situations.<sup>73</sup> In disagreeing with the FCIC's argument, the *American Growers* court noted that the statute did not contain any limitation on suits by AIPs against the FCIC.<sup>74</sup>

In addition, the FCIC argued that the AIPs' complaint was time-barred due to 7 U.S.C. § 1508(j)(2)(B), which provides a statute of limitation for claims to be brought no later than one year following final notice of the denial of the claim to the claimant.<sup>75</sup> In rejecting the FCIC's argument, the *American Growers* court noted that the statute of limitation provision did not apply to American Growers as the provisions of 7 U.S.C. § 1508(j)(2)(B) only apply to "claim[s] for indemnity" on a crop insurance policy.<sup>76</sup> Instead, the *American Growers* court stated that the AIP was seeking indemnification "for the FCIC's alleged errors and omissions."<sup>77</sup> Thus, the FCIC's motion for partial summary judgment on the indemnification issue was denied.<sup>78</sup>

## II. THE ACCRUAL OF A CROP INSURANCE CLAIM

A legal question also often arises in litigation as to when exactly a crop insurance claim will accrue. In some cases, it might be the date of

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70. *Id.*

71. *See Am. Growers Ins. Co. v. Fed. Crop Ins. Corp.*, No. 1:01-CV-10059, 2003 U.S. Dist. LEXIS 3754, at \*7-8 (S.D. Iowa Mar. 3, 2003) (first citing 7 U.S.C. § 1508(j)(3) (2012); and then citing *Farms of Homestead, Inc. v. Rain and Hail Ins. Servs.*, 121 F.3d 630, 635 (11th Cir. 1997)).

72. *See* 7 U.S.C. § 1508(j)(3).

73. *See Am. Growers*, 2003 U.S. Dist. LEXIS 3754, at \*6-7 (S.D. Iowa 2003) (citing 7 U.S.C. § 1508(j)(1)-(2)).

74. *Id.* at \*8 (citing 7 U.S.C. § 1508(j)(3)) ("The text of § 1508(j)(3), however, contains no language limiting its application only to indemnification for claims brought by insureds.")

75. *Id.* at \*9 (quoting 7 U.S.C. § 1508(j)(2)(B)).

76. *Id.* (first citing 7 U.S.C. § 1508(j)(2)(A); and then citing 7 C.F.R. § 457.8 (2018)).

77. *Id.* (citing 7 U.S.C. § 1508(j)(3)).

78. *See Am. Growers*, 2003 U.S. Dist. LEXIS 3754, at \*16.

loss, and in others it might be when the claim is formally denied.<sup>79</sup> Sometimes a question will arise as to the exact timing of the final denial.<sup>80</sup>

*A. Time of Date of Loss*

While not an action upon a crop insurance policy and rather a farm owner's insurance policy, the facts of *Bronsteatter & Sons v. American Growers Ins. Co.* involved alleged corn crop losses in Wisconsin.<sup>81</sup> In the *Bronsteatter* case, a farmer suffered vandalism to a corn planter in May 2002, which caused overfertilization of corn seeds.<sup>82</sup> At the time of the planting, the plaintiff was unaware of the vandalism and only after the corn started growing did the farmer realize that two rows of every twelve rows of corn planted did not grow.<sup>83</sup> On June 3, 2002, the farmer reported the discovered vandalism to the police department and to the insurer.<sup>84</sup> Approximately one year later, on June 4, 2003, the farmer filed a breach of contract lawsuit against the insurer.<sup>85</sup>

The applicable statute of limitations was a Wisconsin statutory provision which requires legal action to commence within twelve months "after the inception of the loss."<sup>86</sup> There were three possibilities when the claim accrued: the completion of the corn harvest (what the plaintiff argued); when the vandalism actually occurred (what the insurer argued); and finally the time of planting (what the trial court held was the accrual date).<sup>87</sup>

The plaintiff contended that the term "loss" meant "damage," and thus the "damage" did not occur until the completion of the harvest in December 2002.<sup>88</sup> The Wisconsin Court of Appeals rejected this argument, holding that the inception of the loss occurred when the farmer planted the corn utilizing the vandalized corn planter.<sup>89</sup> Thus, the *Bronsteatter* court upheld the dismissal of the complaint due to the running of

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79. Compare *Bronsteatter & Sons, Inc. v. Am. Growers Ins. Co.*, 703 N.W.2d 757, 760 (Wis. Ct. App. 2005) (holding that the insured's crop insurance claim began to accrue on the date of loss), with *Price v. AgriLogic Ins. Servs.*, 37 F. Supp. 3d 885, 898 (E.D. Ky. 2014) (holding that the insured's crop insurance bad-faith claim began to accrue when his insurance benefit was denied).

80. See *Price*, 37 F. Supp. 3d at 898.

81. See 703 N.W.2d at 758.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. WIS. STAT. § 631.83(1)(a) (2015–16).

87. See *Bronsteatter*, 703 N.W.2d at 759.

88. *Id.* (citing § 631.83(1)(a)).

89. *Id.* at 760.

the statute of limitations.<sup>90</sup>

*B. Accrual Date for Statutes of Limitations—Date of Loss or Date of Claim Denial?*

An accrual question also arose in the context of a crop-hail insurance policy in *Price v. Agrilogic Ins. Services*.<sup>91</sup> In *Price*, an insured suffered a wind and hail loss on corn and tobacco crops on July 20, 2012.<sup>92</sup> On February 28, 2013, the insurer denied the insured's claim on the corn crop loss on the basis that the National Weather Service Reports reviewed on that date were inconsistent with wind and/or hail damage.<sup>93</sup> The insured filed a complaint on January 8, 2014, within twelve months of the date of claim denial on the corn crop; the complaint included claims for breach of contract and bad-faith insurance.<sup>94</sup>

The crop hail policy at issue included a statute of limitations provision which required the insured to file suit "within 12 months of the occurrence causing loss or damage."<sup>95</sup> The *Price* court issued differing rulings on the statute of limitations for the breach of contract and bad faith claims.<sup>96</sup> For the breach of contract claim, the *Price* court held the plaintiff did not timely file as the corn crop incurred damage in July 2012, and suit was not filed until January 2014.<sup>97</sup> Essentially, the *Price* court held the statute of limitations began to accrue on the date of loss, not the date of claim denial.<sup>98</sup>

However, with regard to the bad faith claim, the *Price* court found that the insurance policy was invalid since it violated section 304.14-370 of the Kentucky Revised Statutes.<sup>99</sup> The statute provides that no contract of insurance shall "limit the time for commencing actions against such insurers to a period of less than one (1) year from the time when the cause of action accrues."<sup>100</sup> The *Price* court held that bad faith claims accrue

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90. *Id.* at 758 (citing § 631.83(1)(a)).

91. 37 F. Supp. 3d 885, 888, 893 (E.D. Ky. 2014).

92. *Id.* at 889.

93. *Id.* at 890.

94. *Id.*

95. *Id.* at 889.

96. Compare 37 F. Supp. 3d at 894 (citing KY. REV. STAT. ANN. § 304.14-370 (West 2013)) (discussing why the breach of contract claim was time barred), with *id.* at 897–98 (first citing *Tennant v. Allstate*, Civ. A. No. 04-54, 2006 U.S. Dist. LEXIS 8439, at \*1–3, \*6 (E.D. Ky. Feb. 10, 2006); and then citing § 304.14-370) (determining that the bad faith claim is not time barred).

97. *Id.* at 894 (citing § 304.14-370).

98. See *id.*

99. *Id.* at 898 (citing § 304.14-370).

100. See § 304.14-370.

when insurance benefits are wrongfully denied.<sup>101</sup> Since the insured was left with approximately five months to file suit following the denial of the claim, the insurance policy violated the statute as to bad faith claims and thus the bad faith claims were not time-barred.<sup>102</sup>

In the context of multi-peril crop insurance policies reinsured by the federal government, Final Agency Determination (FAD) 245 of the U.S. Department of Agriculture (USDA) RMA makes it clear that the statute of limitations to file for an arbitration challenging a crop insurer claim determination is one year.<sup>103</sup> FAD-245 requires filing an arbitration within one year “from the date of denial of the claim or [receipt of] any other determination with which the insured disagrees to file for arbitration.”<sup>104</sup> In *Biby v. U.S. Department of Agriculture*, the plaintiffs argued that FAD-245 conflicted with the plain language of 7 U.S.C. § 1508(j)(2)(B), which requires a suit on a federal crop insurance claim to be brought within one year of final notice of denial of the claim.<sup>105</sup> The District Court of North Dakota noted that the statute was not inconsistent with FAD-245 since FAD-245 referred to a deadline for initiation of arbitration and the statute referred to a statute of limitations for the initiation of a lawsuit.<sup>106</sup> Therefore, the *Biby* court held that FAD-245 was not arbitrary and capricious.<sup>107</sup>

All of these cases read together (*Bronsteatter*, *Price*, and *Biby*) share a common theme: one-year statutes of limitations typically apply in crop insurance cases, whether it is a case involving a farm owner’s insurance policy, a crop-hail policy, or a multi-peril crop insurance policy reinsured by the federal government.<sup>108</sup> Depending upon the policy, the statute of limitations may be one year from the date of a loss or one year from a

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101. See 37 F. Supp. 3d at 898.

102. *Id.* (citing § 304.14-370).

103. *Final Agency Determination: FAD-245*, USDA RMA (Nov. 15, 2015), <https://www.rma.usda.gov/en/About-RMA/Laws-and-Regulations/Final-Agency-Determinations/Basic-Provisions-20b-FAD-245>.

104. *Id.*

105. See No. 3:16-CV-87, 2017 WL 2991440, at \*9 (D. N.D. June 7, 2017) (citing 7 U.S.C. § 1508(j)(2)(B) (2012)).

106. *Id.* at \*10 (citing 7 U.S.C. § 1508 (j)).

107. *Id.*

108. See generally *Bronsteatter & Sons, Inc. v. Am. Growers Ins. Co.*, 703 N.W.2d 757 (Wisc. Ct. App. 2005) (analyzing a farm owner’s insurance policy to determine that the owner’s claim was not within the one-year statute of limitation); *Price v. AgriLogic Ins. Servs.*, 37 F. Supp. 3d 885 (E.D. Ky. 2014) (discussing how a crop-hail policy claim was not filed timely because the farmer did not sue within the one-year limitation provision set by the policy); *Biby*, 2017 WL 2991440, at \*1 (determining that a multi-peril crop insurance policy claim was not filed within the one-year statute of limitations).

claim denial.<sup>109</sup> In some cases, the facts may give rise to a situation where a statute of limitations may be tolled.<sup>110</sup>

### III. TOLLING AND EQUITABLE TOLLING OF STATUTES OF LIMITATIONS IN CROP INSURANCE CLAIMS

The courts generally view statutes of limitation as firm deadlines offering little opportunity for relief in the event of noncompliance.<sup>111</sup> However, equitable principles may offer relief in limited cases.<sup>112</sup> The doctrine of “equitable tolling” may toll the statute of limitations,<sup>113</sup> but it is utilized by the federal courts “only sparingly.”<sup>114</sup> The U.S. Supreme Court remarked in *Irwin v. Department of Veterans Affairs* that generally only two categories of cases will offer the opportunity for a litigant to have a statute of limitations equitably tolled in cases against the government: the first type of case is where a litigant files a defective pleading within the statute,<sup>115</sup> and the second type is where a litigant has been “induced or tricked” by a defendant’s misconduct.<sup>116</sup> With this high burden for a litigant, it is of no surprise that federal and state courts often decline to provide equitable relief to a litigant who does not file a claim within the statute of limitations.<sup>117</sup>

#### A. Courts Which Have Not Tolled a Statute of Limitations in a Crop Insurance Case

Several courts have declined to toll the statute of limitations in cases involving a crop insurance claim.<sup>118</sup> Where an unequivocal denial of a

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109. See generally *Price*, 37 F. Supp. 3d 885 (discussing how a crop-hail policy claim was not filed timely, but also accepting a bad faith claim because it required a claim denial in order to proceed).

110. See, e.g., *Irwin v. Dep’t of Veterans Aff.*, 498 U.S. 89, 96 (1990) (first citing *Glus v. Brooklyn*, 359 U.S. 231, 235 (1959); and then citing *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)).

111. See Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 534–35 (2017) (“Legislatures routinely pass similar deadlines in the form of statutes of limitations and statutes of repose that specify the time period in which a claim must be brought. If filed even a day beyond the specified time period, otherwise meritorious claims are rejected.”).

112. See *id.* at 575.

113. See Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 127 (2017) (“Equitable tolling allows a court to resuscitate untimely claims and proceed on the merits against a defendant despite a countervailing statute of limitations.”).

114. See *Irwin*, 498 U.S. at 96.

115. *Id.* (citing *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429 (1965)).

116. *Id.* (citing *Glus v. Brooklyn*, 359 U.S. 231, 235 (1959)).

117. *Id.* (citing *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)).

118. See *Mt. Oso Fruit Co. v. Am. Agrisurance, Inc.*, No. C045656, 2004 Cal. App. Unpub. LEXIS 8028, at \*19 (Cal. Ct. App. Aug. 31, 2004); *Looney v. Ga. Farm Bureau Mut. Ins.*

claim has occurred, the one-year statute of limitations under multi-peril crop insurance policies as outlined in 7 U.S.C. § 1508(j)(2)(B) applies.<sup>119</sup> In *Mt. Oso Fruit Co. v. American Agrisurance, Inc.*, the insured had a “prevented planting” claim since it was unable to plant a wheat crop due to heavy rains in California.<sup>120</sup> The insured received a letter from its insurer on July 13, 1999, which stated that the insured “is not entitled to prevented planting payment.”<sup>121</sup> Following this letter, in August 1999, the insured requested in writing that another adjuster be sent to review the claim.<sup>122</sup> In May 2000, the insured sent a follow-up request and stated in writing the “reason for denial was arbitrary and not based upon fact.”<sup>123</sup> In May 2000, the insurer responded and then a series of communications took place until July 2001.<sup>124</sup> In May 2002, the insured filed a breach of contract lawsuit.<sup>125</sup> The insurer raised a statute of limitations defense.<sup>126</sup>

On appeal, the insured contended the claim had not been “denied” in the insurer’s letters of July 1999 or May 2000.<sup>127</sup> In addition, the insured contended the claims were equitably tolled.<sup>128</sup>

The California Court of Appeals rejected the insured’s contention that the denial was equivocal since the insurer had never utilized the words “deny” or “denial” in its July 13, 1999, correspondence.<sup>129</sup> The *Mt. Oso Fruit Co.* court primarily noted that the letter had included language stating that the insured was “not entitled” to prevented planting payment and that the claim “cannot be paid,” thus the denial was unequivocal.<sup>130</sup> In addition, the California Court of Appeals found equitable tolling did not apply since the insured did not identify a “deceptive assurance” that induced the insured to delay filing the lawsuit.<sup>131</sup> Thus, the California Court of Appeals upheld the trial court decision dismissing the lawsuit

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Co., 233 S.E.2d 248, 249 (Ga. Ct. App. 1977); *Edmonds v. Fed. Crop Ins. Corp.*, 684 F. Supp. 656, 660 (N.D. Ala. 1988).

119. See 7 U.S.C. § 1508(j)(2)(B) (2012).

120. 2004 Cal. App. Unpub. LEXIS 8028, at \*1–2. A “prevented planting” claim is where an insured is unable to plant a crop prior to the guidelines established by the RMA which make a crop eligible for federal crop insurance coverage. See *id.*

121. *Id.* at \*3.

122. *Id.* at \*4.

123. *Id.*

124. See *Mt. Oso Fruit Co.*, 2004 Cal. App. Unpub. LEXIS 8028, at \*4–5.

125. *Id.* at \*5.

126. See *id.* at \*6.

127. *Id.*

128. *Id.* at \*7.

129. *Mt. Oso Fruit Co.*, 2004 Cal. App. Unpub. LEXIS 8028, at \*13 (citing *Milgore v. Mid-Century Ins. Co.*, 118 Cal. Rptr. 2d 548, 556 (Cal. Ct. App. 2002)).

130. *Id.* at \*12–13.

131. *Id.* at \*19.



due to the statute of limitations.<sup>132</sup>

Reviewing the facts of the *Mt. Oso Fruit Co.* decision, with denial of crop insurance claims it appears that it is not necessary for an insurer to definitively utilize the words “deny,” “denial,” or “denied” to definitively convey a denial in a claim denial letter.<sup>133</sup> All that appears to be necessary for an insurer is to clearly communicate that the claim cannot be paid and that the insured is not entitled to payment on the claim.<sup>134</sup> Further requests for reconsideration will generally not toll a claim after a definite denial has been made.<sup>135</sup>

Similarly, the Georgia Court of Appeals held that strict compliance with a contractual limitations period on a crop hail claim was required in the case of *Looney v. Georgia Farm Bureau Mutual Ins. Co.*<sup>136</sup> A twelve-month statute of limitations was part of the policy.<sup>137</sup> From June 1971, to March 1974, the Georgia Court of Appeals even noted that the negotiations between the insurer and insured tolled the claim.<sup>138</sup> In March 1974, the insurer denied the claim.<sup>139</sup> Suit on the policy was not filed until May 1975, in excess of twelve months following the denial of the claim.<sup>140</sup>

The *Looney* court upheld the dismissal of the lawsuit on the basis of the contractual limitations provision.<sup>141</sup> *Looney* illustrates that even when negotiations between an insurer and insured can toll a claim for a period of more than one year, the prior tolling will not continue to allow tolling following a clear denial of the claim.<sup>142</sup> The clear denial of a crop insurance claim begins the tolling period, irrespective of whether any prior tolling occurred.<sup>143</sup>

Finally, in some cases the filing of a defective pleading can equitably toll a statute of limitations.<sup>144</sup> But filing in the incorrect forum may not.<sup>145</sup> In *Edmonds v. Federal Crop Ins. Corp.*, a plaintiff filed a lawsuit

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132. *Id.* at \*20.

133. *See id.* at \*13 (citing *Milgore*, 118 Cal. Rptr. 2d at 556).

134. *Mt. Oso Fruit Co.*, 2004 Cal. App. Unpub. LEXIS 8028, at \*14–15.

135. *Id.* at \*17–18 (citing 7 U.S.C. § 1508(j)(2)(B) (2012)).

136. 233 S.E.2d 248, 249 (Ga. Ct. App. 1977).

137. *See id.* at 248.

138. *Id.* at 248–49 (citing *Peeples v. W. Fire Ins. Co.*, 99 S.E.2d 349, 351–52 (Ga. Ct. App. 1957)).

139. *Id.* at 248.

140. *Id.*

141. 233 S.E.2d at 249 (citing *Peeples*, 99 S.E.2d at 351–52).

142. *See id.*

143. *Id.*

144. *Irwin v. Dep’t of Veterans Aff.*, 498 U.S. 89, 96 (1990) (citing *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 429 (1965)).

145. *See Edmonds v. Fed. Crop Ins. Corp.*, 684 F. Supp. 656, 660 (N.D. Ala. 1988).

against the FCIC based upon breach of a crop insurance contract in Alabama state court instead of federal court.<sup>146</sup> It was filed essentially right on the deadline.<sup>147</sup> At the time of the litigation in 1988, the federal crop insurance statute provided that an action for a denial of indemnity by the FCIC “may be brought against the Corporation in the United States district court for the district in which the insured farm is located.”<sup>148</sup> The insurer removed the case to federal court.<sup>149</sup> The U.S. District Court for the Northern District of Alabama held that the filing of the action in state court did not toll the limitations period to file a breach of contract claim on a crop insurance contract in federal court.<sup>150</sup>

*Edmonds* makes the distinction in equitable tolling cases from the general rule that while a defective *pleading* may permit equitable tolling, filing in a “defective” *forum* will not.<sup>151</sup> *Edmonds* is also instructive to practitioners and provides a strong rationale for not delaying the filing of a lawsuit until the last few possible days or even month.<sup>152</sup> Under 28 U.S.C. § 1446(b), a defendant must file a notice of removal within thirty days of receipt of the complaint.<sup>153</sup> Had the plaintiff in *Edmonds* filed the suit in state court more than thirty days prior to the expiration of the statute of limitations, the FCIC would have removed the case to federal court within the expiration timeframe of the statute of limitations and the claims may not have been barred.

*B. Cases Which Have Permitted Tolling a Statute of Limitations in a Crop Insurance Case*

Tolling of the date of a “claim denial” on a crop insurance policy may occur if there is a question of fact as to whether a crop insurance

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146. *Id.* at 656–57.

147. *See id.* (citing 7 U.S.C. § 1508(c) (1982)).

148. *Id.* at 657 (citing 7 U.S.C. § 1508(c)).

149. *Id.*

150. *Edmonds*, 684 F. Supp. at 660 (citing 7 U.S.C. § 1508(c)).

151. *Compare id.* (holding that because the complaint was originally filed in the state court, rather than in federal court, the filing did not toll the running of the limitations period, and therefore, the action was time barred), *with* *Irwin v. Dep’t of Veterans Aff.*, 498 U.S. 89, 96 (1990) (holding that because the petitioner failed to file within thirty days of the Equal Employment Opportunity Commission’s decision, the claim was dismissed).

152. *See generally Edmonds*, 684 F. Supp. 656 (finding appellate court lacked jurisdiction to review where it determined plaintiff’s suit was brought outside the applicable statute of limitations after plaintiff misfiled the suit in state court three days before the expiration of the one-year statute of limitations).

153. 28 U.S.C. § 1446(b)(2)(B) (2012).

claim was actually properly denied.<sup>154</sup> While the Georgia Court of Appeals barred the plaintiff's claims in the *Looney* decision in 1977,<sup>155</sup> it did not bar claims on the basis of a contractual limitations period in the case of *Rain & Hail Ins. Services, Inc. v. Vickery* in 2005.<sup>156</sup> The facts of *Vickery* arose from a prevented planting claim for cotton in 2000.<sup>157</sup> The insurer denied the insured's claim on the basis of the insurability requirements in the policy—allegedly one farm was in the name of the insured as an individual, and the other in the name of an incorporated business entity.<sup>158</sup> The insured had multiple farms and multiple crops during the 2000 crop year.<sup>159</sup> On December 21, 2000, the insurer sent a letter to the insured rejecting the claim, and on July 24, 2002, the insured filed suit.<sup>160</sup> The insurer sought to bar the insured's claims due to the contractual limitations period which required legal action to be brought within twelve months of a claim denial.<sup>161</sup>

The *Vickery* court noted that the insurer's December 21, 2000, letter contained a number of errors.<sup>162</sup> The letter not only referred to two other farms and not the farm at issue in the case, but it referenced a different policy number than the one at issue and also a different crop (peanuts), instead of cotton.<sup>163</sup> Despite the fact that the record indicated that the insured had received a verbal denial of the claim, the *Vickery* court declined to dismiss the insured's lawsuit on the basis of the contractual limitations period since an ambiguity was present with the "date of denial."<sup>164</sup>

Approximately three years later, the Georgia Court of Appeals also rejected an insurer's assertion of a contractual limitations period in *Bullington v. Blakely Crop Hail, Inc.*<sup>165</sup> The insurer originally sent a rejection to the insured regarding a 2001 peanut claim on January 4, 2002, noting that "no coverage" existed for the claim.<sup>166</sup> The insured sent a fol-

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154. *See Rain & Hail Ins. Servs. v. Vickery*, 618 S.E.2d 111, 114 (Ga. Ct. App. 2005) (holding that where an issue of fact exists regarding whether the insurer properly denied the claim, the claim may have been timely).

155. *Looney v. Ga. Farm Bureau Mut. Ins. Co.*, 233 S.E.2d 248, 249 (Ga. Ct. App. 1977).

156. 618 S.E.2d at 114.

157. *Id.* at 113.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Vickery*, 618 S.E.2d at 113.

162. *Id.* at 114.

163. *Id.*

164. *Id.*

165. *See* 668 S.E.2d 732, 733 (Ga. Ct. App. 2008).

166. *Id.* at 734.

low-up letter with additional information for the insurer's consideration.<sup>167</sup> On January 31, 2002, a second letter was sent by the insurer to the insured noting that it had reviewed the insured's additional information but reaffirmed its coverage denial.<sup>168</sup> A demand for arbitration was filed by the insured on January 29, 2003, within one year of the January 31, 2002, letter by the insurer, but outside of twelve months of the January 4, 2002, letter.<sup>169</sup>

The *Bullington* court held that with the insurer's second letter, it demonstrated that the insurer reconsidered its denial with new information.<sup>170</sup> The Court then found that a question of fact existed as to whether the claim was not denied until January 31, 2002.<sup>171</sup> In addition, the court held that the filing of an arbitration constituted a "legal action" for purposes of the twelve month limitations period.<sup>172</sup>

Reading the *Vickery* and *Bullington* cases with the *Mt. Oso Fruit Co.* case reveals that certain facts can lead a court to find an ambiguity with regard to a claim denial.<sup>173</sup> If a denial is in writing, and uses terminology such as "claim cannot be paid," or "denied, denial, deny, etc.," such language will be found to be unequivocal.<sup>174</sup> Nevertheless, even if there is a denial, as *Bullington* illustrates that if an insurer begins reconsideration of additional evidence provided, this may present a question of fact as to whether a later claim denial constitutes the date of accrual for purposes of time limitations.<sup>175</sup> Furthermore, if the "denial" includes a number of factual errors, as was the case in *Vickery*, such errors may present an ambiguity with providing a firm date of denial.<sup>176</sup> Overall, however, it is fairly difficult for an insured to toll a statute of limitations or contractual

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167. *Id.*

168. *Id.* at 734–35.

169. *Id.* at 735.

170. 668 S.E.2d at 735.

171. *Id.* (first citing *Rain & Hail Ins. Servs. v. Vickery*, 618 S.E.2d 111, 117 (Ga. Ct. App. 2005); and then citing *Commercial Union Ins. Co. v. F. R. P. Co.*, 322 S.E.2d 915, 917–19 (1984)).

172. *Id.* at 736.

173. See generally *Vickery*, 618 S.E.2d 111 (finding ambiguity as to whether denial of claim was properly communicated to insured where letters to insured contained factual errors); *Bullington*, 668 S.E.2d 732 (holding that a question of whether insurer's ongoing communication with insured and insurer's research into complaint created ambiguity as to date of denial); *Mt. Oso Fruit Co. v. Am. Agrisurance, Inc.*, No. C045656, 2004 Cal. App. Unpub. LEXIS 8028, at \*1 (Cal. Ct. App. Aug. 31, 2004) (finding unequivocal denial of claim through letters to insured where letters were unambiguous even though they did not specifically use the words "deny" or "denial").

174. See *Mt. Oso Fruit Co.*, 2004 Cal. Ct. App. LEXIS 8028, at \*13 (citing *Milgore v. Mid-Century Ins. Co.*, 118 Cal. Rptr. 2d 548, 556 (Cal. Ct. App. 2002)).

175. 668 S.E.2d at 735.

176. 618 S.E.2d at 114.

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limitations period in the context of a crop insurance claim.<sup>177</sup>

#### IV. FEDERAL CROP INSURANCE ACT AND PREEMPTION ISSUES WITH STATUTES OF LIMITATIONS

An issue that is becoming more frequently litigated in the area of crop insurance is the question of whether the FCIA preempts state statutes in cases involving private insurers involved in the sale of multi-peril crop insurance policies through the federal crop insurance program. There are a number of cases that have addressed the issue of whether the FCIA preempts state law claims of insurance bad faith, for example.<sup>178</sup> On August 26, 2015, RMA issued FAD-240, which stated that:

[T]o the extent that State law would allow a claim for extra-contractual damages, such State law is pre-empted and extra-contractual damages can only be awarded if FCIC makes a determination that the AIP, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount less than the amount to which the insured was entitled.<sup>179</sup>

Following the promulgation of FAD-240, the United States District Court for the Middle District of Tennessee in *Dixon v. Producers Agriculture Ins. Co.* held that claims for punitive damages arising out of alleged negligent and/or intentional misrepresentations are not preempted by the FCIA.<sup>180</sup> With the decision in *Dixon*, this issue is likely to be presented before other federal courts in the next few years.

A rule has emerged that the FCIA does not preempt state statutes in the area of statutes of limitation. This rule is illustrated by two cases in crop insurance: the South Carolina Court of Appeals case of *Lyerly v. American National Fire Ins. Co.*<sup>181</sup> and the Kansas Court of Appeals case of *Great American Ins. Co. v. Wahl*.<sup>182</sup>

In the *Lyerly* case, the multi-peril crop insurance policy at issue pro-

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177. See, e.g., *Mt. Oso Fruit Co.*, 2004 Cal. Ct. App. LEXIS 8028, at \*13.

178. Marzen, *supra* note 20, at 636–37.

179. See *Final Agency Determination: FAD-240*, USDA RMA (Aug. 26, 2015), <https://www.rma.usda.gov/en/About-RMA/Laws-and-Regulations/Final-Agency-Determinations/Requesting-a-Final-Agency-Determination-FAD-240>.

180. See 198 F. Supp. 3d 832, 841 (M.D. Tenn. 2016).

181. See 540 S.E.2d 469, 473–74 (S.C. Ct. App. 2000) (first citing 7 C.F.R. § 400.351 (2018); and then citing 7 U.S.C. § 1508(j)(2)(B) (2012)).

182. See No. 117,176, 2017 Kan. App. Unpub. LEXIS 922, at \*7–9 (Kan. Ct. App. Nov. 3, 2017) (first quoting 7 U.S.C. § 1506(l) (2012); and then quoting 7 C.F.R. § 457.8 (2018)).

vided that an insured was required to file “within 12 months of the occurrence causing the loss or damage.”<sup>183</sup> The trial court granted summary judgment to the insurer on this issue.<sup>184</sup>

The insured contended that the provision was violative of section 15-3-140 of the South Carolina Code, which bars contractual limitations that are shorter than the state statute of limitations.<sup>185</sup> In addition, the South Carolina Court of Appeals agreed, holding that the FCIA does not preempt state statutes of limitation.<sup>186</sup> The *Lyerly* court also emphasized that the claim apparently had never been formally denied, so therefore the court noted that the insured should be allowed to proceed with breach of contract claims arising out of a tobacco crop loss.<sup>187</sup>

Similarly, the Kansas Court of Appeals held the FCIA did not preempt a statute of limitations in Kansas in the *Wahl* decision.<sup>188</sup> In the *Wahl* case, a crop insurer filed a lawsuit against an insured for an overpayment on a wheat claim.<sup>189</sup> The trial court dismissed the insurer’s lawsuit on the basis that the suit was barred by Kansas’s five-year statute of limitations for breach of contract claims.<sup>190</sup> On appeal, the insurer argued that the FCIA preempted the Kansas statute.<sup>191</sup> However, the insurer was not able to identify any federal statute within the FCIA or otherwise that provides a federal statute of limitations for an *insurer* to bring a lawsuit against an insured; therefore, the *Wahl* court found that no conflict existed and thus preemption would not apply.<sup>192</sup>

With both the *Lyerly* and the *Wahl* decisions, in the absence of any direct conflict through the FCIA with a state statute of limitations, future courts should hold that the FCIA does not preempt state statutes of limitation.

#### V. OTHER LEGAL ISSUES INVOLVING STATUTES OF LIMITATIONS AND CROP INSURANCE CLAIMS

Several other issues have been litigated in the courts relating to crop insurance and statutes of limitation. In some cases, terms of a contract or

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183. 540 S.E.2d at 470.

184. *Id.* at 471.

185. *Id.* at 470–71 (citing S.C. CODE ANN. § 15-3-140 (1976)).

186. *Id.* at 474.

187. *Id.* at 470, 474.

188. *See* Great Am. Ins. Co. v. Wahl, No. 117,176, 2017 Kan. App. Unpub. LEXIS 922, at \*10 (Kan. Ct. App. Nov. 3, 2017).

189. *Id.* at \*2.

190. *Id.*

191. *Id.* at \*5 (citing 7 U.S.C. §§ 1501–24 (2012)).

192. *Id.* at \*9–10 (citing Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676, 679–80 (2011)).

a statute may conflict.<sup>193</sup> In *Grant Family Farms, Inc. v. Colorado Farm Bureau Mutual Ins. Co.*, an organic spinach farmer filed a breach of contract lawsuit against an insurer for a loss while the crop was in transit to a distributor.<sup>194</sup> The insured argued that a two-year contractual limitation clause was in “conflict” with a three-year state statute of limitations in Colorado for breach of contract actions.<sup>195</sup> The Colorado Court of Appeals held, in a case of first impression, that only in cases where a state bars contractual limitations periods shorter than the state statute of limitations does a conflict exist.<sup>196</sup>

In the *Overboe v. Farm Credit Services of Fargo* case, the North Dakota Supreme Court was presented with the question of whether the breach of contract state statute of limitations or the state statute of limitations against licensed insurance adjusters applied in a case involving allegations of failure to procure insurance coverage.<sup>197</sup> The insured contended a licensed insurance agent agreed to provide multi-peril crop insurance for both sunflower and corn crops during the 1994 crop year, but the agent allegedly failed to procure the insurance, causing a loss of federal disaster assistance on a sunflower crop.<sup>198</sup> The insured filed a lawsuit with claims based on negligence and breach of contract.<sup>199</sup>

The North Dakota Supreme Court held that a newly-enacted two-year statute of limitations for actions against licensed insurance adjusters applied retroactively instead of the six-year statute of limitations in North Dakota for breach of contract actions.<sup>200</sup> It declined to address any potential due process issue with retroactivity of the statute since the due process issue had not been briefed and argued by the insured on appeal.<sup>201</sup>

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193. See generally *Grant Family Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co.*, 155 P.3d 537 (Colo. 2006) (resolving contractual limitations in conflict with state statute of limitation for breach of contract actions); *Overboe v. Farm Credit Servs.*, 623 N.W.2d 372 (N.D. 2001) (determining the applicable statute of limitation period for licensed insurance adjusters); *Wilder Farms, Inc. v. Rural Cmty. Ins. Servs.*, No. 2-11-CV-00123-J, 2011 U.S. Dist. LEXIS 142715, at \*1 (N.D. Tex. Dec. 12, 2011) (deciding the appropriate statute of limitation period for compulsory counterclaims), *aff'd*, 494 Fed. App'x 487 (5th Cir. 2012).

194. See 155 P.3d 537, 537–38 (Colo. Ct. App. 2006).

195. *Id.* at 538 (citing COLO. REV. STAT. § 13-80-101(1)(a) (2006)).

196. *Id.* (“If contractual shortening of the statute of limitations is prohibited, the contractual and statutory limitations periods are incompatible and are therefore in conflict. That is not the case here.”).

197. See 623 N.W.2d 372, 374 (first citing N.D. CENT. CODE § 26.1-26-51 (2001); and then citing N.D. CENT. CODE § 28-01-16 (2001)).

198. *Id.*

199. *Id.*

200. *Id.* at 375 (citing § 26.1-26-51).

201. *Id.* at 376 (citing § 26.1-26-51).

Finally, the issue of a statute of limitations on a compulsory counterclaim arose in *Wilder Farms, Inc. v. Rural Community Ins. Services*.<sup>202</sup> In the *Wilder Farms* case, an insured sought damages for claims from crops in Nebraska as well as Illinois and filed suit in state court in Texas against two different crop insurers.<sup>203</sup> During the course of the litigation, after a lengthy procedural history, a third amended complaint was filed.<sup>204</sup> Just over a year after the filing of the third amended complaint, the insured filed a declaratory judgment in state court in Texas seeking an order that it was not liable on any of the insurers' claims seeking unpaid premiums and/or fees on the basis of res judicata following the entry of an arbitration award generally in favor of the insured.<sup>205</sup> After the case was removed to federal court in Texas by one of the insurers and the insurer filed a counterclaim for recovery of unpaid premiums and/or fees, the insured filed a motion to dismiss the counterclaim on the basis that the statute of limitations expired on collecting any unpaid premiums and/or fees.<sup>206</sup>

The U.S. District Court for the Northern District of Texas held Texas's four-year statute of limitations for breach of contract actions applied since the claim was brought in Texas as a compulsory counterclaim.<sup>207</sup> Thus, the compulsory counterclaim of one of the insurers was dismissed.<sup>208</sup> Through the lengthy procedural history of the case, one of the insurers had timely filed a counterclaim, but it appeared the other insurance company had not.<sup>209</sup> *Wilder Farms* illustrates the imperative for counsel for each insurance company involved in litigation to timely file counterclaims for any unpaid premiums or fees if a case involves crop insurance litigation.

#### CONCLUSION

Judges throughout the country, from the U.S. District Court for the Western District of Missouri, to the U.S. District Court for the Middle District of Tennessee, to the U.S. Court of Appeals for the Fifth Circuit,

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202. See No. 2-11-CV-00123-J, 2011 U.S. Dist. LEXIS 142715, at \*11 (N.D. Tex. Dec. 12, 2011), *aff'd*, 494 Fed. App'x 487 (5th Cir. 2012).

203. *Id.* at \*1–2.

204. *Id.* at \*3.

205. *Id.* at \*3–4.

206. *Id.* at \*4.

207. *Wilder Farms*, 2011 U.S. Dist. LEXIS 142715, at \*12 (citing *Ziegler v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, No. 98-20583, 1999 U.S. App. LEXIS 40561, at \*2 (5th Cir. May 25, 1999)).

208. *Id.* at \*14.

209. *Id.* at \*2.



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continue to decide crop insurance cases.<sup>210</sup> Within the past two years, at least three courts have examined statutes of limitation issues in a crop insurance case.<sup>211</sup> With a reauthorization of the federal crop insurance program set to potentially take place with the “2018 Farm Bill,”<sup>212</sup> statute of limitations-related issues are likely to be the subject of continued litigation in federal and state courtrooms throughout the country. Insurers, farmers, attorneys and other stakeholders with crop insurance need to be aware of the latest cases involving statutes of limitations in order to be able to validly assert claims in court.

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210. *See* Great Am. Ins. Co. v. Russell, No. 16-09001-MC-SJ-DW, 2017 U.S. Dist. LEXIS 219776, at \*1 (W.D. Mo. Apr. 14, 2017); Dixon v. Producers Agric. Ins. Co., 198 F. Supp. 3d 832, 834 (M.D. Tenn. 2016); Greenwich Ins. Co. v. Miss. Windstorm Underwriting Ass’n, 808 F.3d 652, 654 (5th Cir. 2015).

211. *See* Myers v. AgriLogic Ins. Servs., 694 Fed. App’x 373, 375 (6th Cir. 2017) (addressing the construction and enforceability of statute of limitations on crop damage claims against an insurer); Biby v. U.S. Dep’t of Agric., No. 3:16-CV-87, 2017 WL 2991440, at \*1 (D. N.D. June 7, 2017) (discussing timeliness of arbitration proceedings for crop insurance prevented planning claims); Great Am. Ins. Co. v. Wahl, No. 117,176, 2017 Kan. App. Unpub. LEXIS 922, at \*5–6 (Kan. Ct. App. Nov. 3, 2017) at \*5–6 (finding that federal law does not preempt the Kansas statute of limitations in the area of Multi-Peril Crop Insurance).

212. *See* Agriculture Improvement Act of 2018, S. 3042, 115th Cong. (as introduced by S. Pat Roberts, June 11, 2018); *see also* Amanda Becker & Mark Weinraub, *Republican Farm Bill Calls for Changes to Food Stamps, Renewal of Crop Insurance*, INS. J. (Apr. 13, 2018), <https://www.insurancejournal.com/news/national/2018/04/13/486404.htm>.