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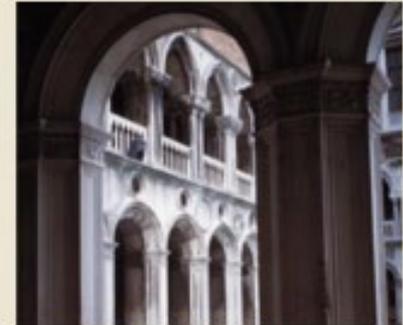
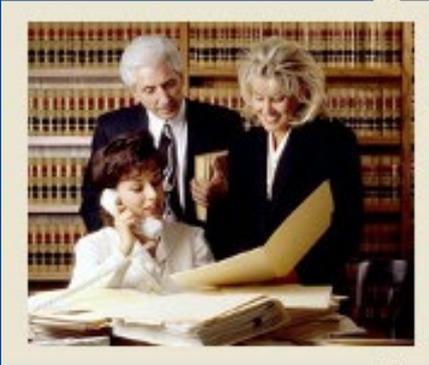
7th Annual Mid-South Agricultural & Environmental Law Conference

June 5, 2020





**ALLEN WELLMAN
MCNEW HARVEY, LLP**
ATTORNEYS AT LAW, ESTABLISHED 1918



Anatomy of a Historic NRCS Wetlands Dispute Victory:

Lessons Learned and Top Practice Pointers

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- Food and Security Act of 1985
 - Purpose
 - “Swampbuster”
 - Convert a “Wetland”, Lose USDA Benefits

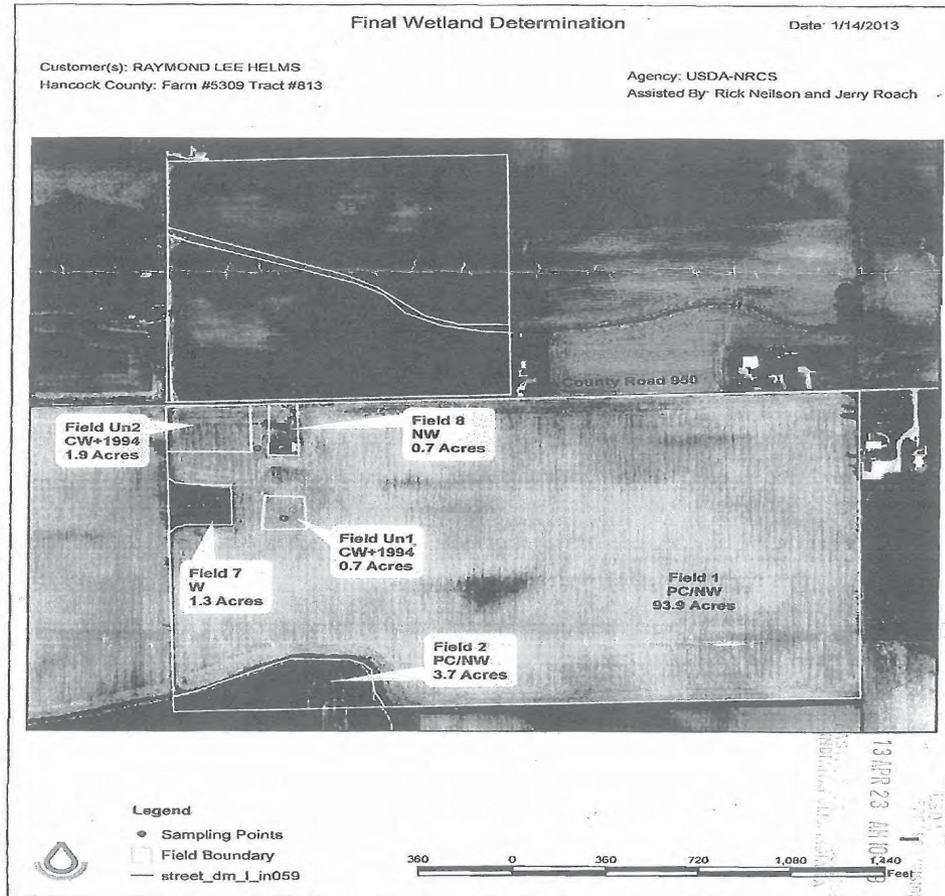


- “Wetland”
 - Hydric Soil
 - Hydrology
 - Hydrophytic Vegetation

- “Atypical Situation”

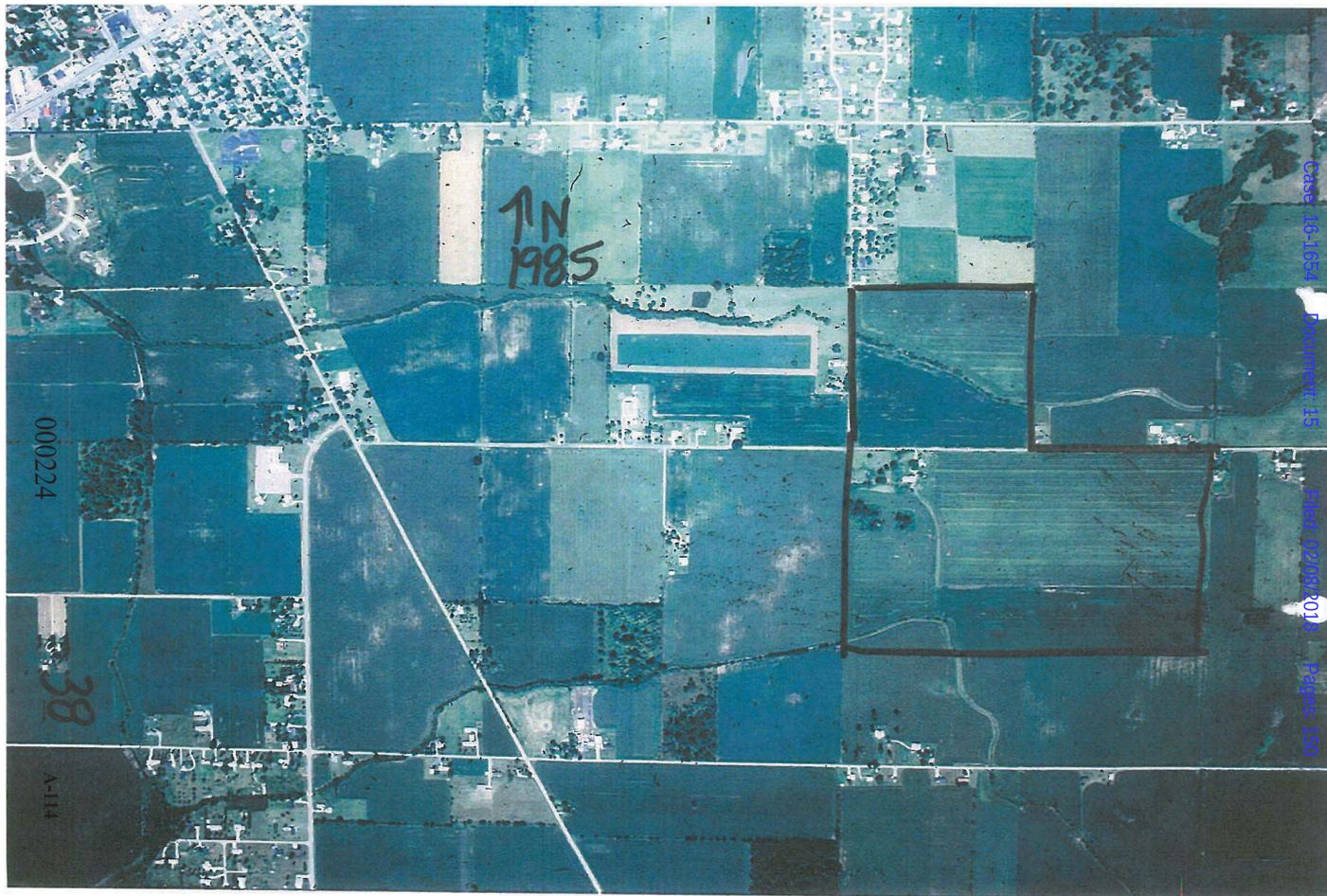


- *Boucher v. USDA*
 - Farm – 150 years old
 - Tree Removal
 - 9 Trees from 2.6 Acres
 - Whistleblower



000019

A- 50





- 2003 Determination
 - Fields Un1 and Un2

- Timely Appeal - No Response or Follow-Up

- 2012 – Form 1026 – Field 8
 - Oops – 2013 Determination on Fields Un1 and Un2
 - Made Final the 2013 Determination – *9 ½ years later*



- NRCS Findings
 - Drained – Hydrology Removed
 - Vegetation from Slides / Comparison Site
 - Water On Site – Site Visit Followed Significant Water Events
- Comparison Site
 - “Field 7”
 - Woods
 - Demonstrable Wetland Characteristics



- Boucher Investigation
 - Trenching – Low Water Table
 - Tiling - 1981/82
 - Laser GPS – Fields Are Flat



- Boucher Appeal Positions
 - No Tiling/No Hydrology
 - Tiling Predated Act
 - Vegetation Not Hydrophytic
 - No Justification for Use of Comparison Site
 - Field 7 Not a Proper Comparison
 - Due Process – Failure to Pursue 2003 Appeal



- USDA NAD Appeal
 - NRCS/USDA Positions
 - Tiled
 - Removal of “Woody Vegetation”
 - Circular position – Tree Removal both converted wetland and permitted NRCS to use comparison to establish wetland

- USDA National Appeals Division – Affirmed

- USDA Director – Affirmed

- US District Court – Affirmed



7th Circuit Arguments

- Boucher
 1. “Drained” Before 1985 or
 2. No Hydrology at all

- USDA
 1. NRCS followed protocol
 2. Fields Not Tiled
 3. Tree Removal Converted Wetland
 4. Waiver



- 7th Circuit Court of Appeals – Reversed

- Opinion
 - Boucher’s Evidence Repeatedly Ignored
 - USDA/NRCS Shifted Position
 - USDA/NRCS Conflated Statute



● Takeaways

- Wetland Must Have All 3 Separate Characteristics
- NRCS Must Evaluate Independently
- NRCS Must Address/Consider Evidence from Landowner/Operator
- 7th Circuit Willingness to Conduct Thorough Review of Record to Prevent Overreach



● Practice Pointers

- NRCS Predisposition – Where Vegetation Removed, Wetland Converted
- Look for Conflation of Characteristics
- Assess NRCS Application of Evidence Logically
- Independently Evaluate Characteristics at Issue
 - Primary vs. Secondary Indicators
- Research History of Land, including Agricultural Use and Rainfall
- Document Every Issue and Record for NAD Appeal



- Practice Pointers... Continued
 - Agency will take adversarial position
 - Beyond NAD Appeal
 - Secondary Sources – Army Corps Manual
 - Attack Logic of the Agency Decision / Equities
 - Relief – Back to Agency – Narrow Focus of Redetermination

Legal Ethics in Dealing with the Government: Lobbying, Gifts, and Related Considerations

Presented by:

Amanda Jones Tollison

Partner, Butler Snow, LLP

President of the

Mississippi Bar (2019-2020)





Lobbying Disclosure Act – Registration, Reporting and Other Considerations

Lobbying Disclosure Act – 2 USC § 1601

- § 1601. Findings: The Congress finds that-
 - (1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process in both the legislative and executive branches of the Federal Government;
 - (2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and
 - (3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

LDA adopted after these lobbyists were hired:

Is Larry a Lobbyist?

- Larry serves as the chair of the board of a non-profit organization that is watching some legislation that is moving through the process.
- While Larry is in DC visiting his daughter at American University, he wants to visit members of his congressional delegation and alert them to this bill and inform them of his organization's interest in seeing that his congressmen and senators support this bill because it will benefit the organization.
- **Does Larry need to register as a lobbyist on behalf of the organization?**
 - Yes
 - No

Is Larry a Lobbyist?

- Larry serves as the chair of the board of a non-profit organization that is watching some legislation that is moving through the process.
- While Larry is in DC visiting his daughter at American University, he wants to visit members of his congressional delegation and alert them to this bill and inform them of his organization's interest in seeing that his congressmen and senators support this bill because it will benefit the organization.
- **Does Larry need to register as a lobbyist on behalf of the organization? No, Larry does not have to register.**

Registration Requirements

- The registration requirement of potential registrants is triggered either:
 1. On the date their employee/lobbyist is employed or retained to make more than one lobbying contact on behalf of a client (and meets the 20% of time threshold), or
 2. On the date their employee/lobbyist (who meets the 20% of time threshold) in fact makes a second lobbying contact, whichever is earlier.
- In either case, registration is required within 45 days.

Is Larry a Lobbyist?

- What if Larry is making extensive contacts with lots of Senators and Representatives and their staff lobbying at the organization's direction during reported trips to DC?
- **Does Larry need to register as a lobbyist on behalf of the organization?**
 - A. Probably**
 - B. Probably Not**

Is Larry a Lobbyist?

- What if Larry is making extensive contacts with lots of Senators and Representatives and their staff lobbying at the organization's direction during reported trips to DC?
- **Does Larry need to register as a lobbyist on behalf of the organization? Probably if Larry meets the 20% of the time threshold.**

Registration Requirements

- Does it make a difference if the board directs Larry to contact the representative who represents the district where the organization is located about the legislation that affects the organization?
 - A. Yes.
 - B. No.
 - C. Not necessarily.
 - D. It depends.

Registration Requirements

- Does it make a difference if the board directs Larry to contact the representative who represents the district where the organization is located about the legislation that affects the organization?
 - **It depends on the purpose and frequency.** If Larry is trying to influence the representative, then Larry is making a “lobbying contact” but if he does not anticipate making any further lobbying contacts then even if he spends more than 20% of his time on the legislative issue, he is not required to register at this point.
 - But if Larry makes a second lobbying contact with that representative, then the organization will need to register – the effective date of the registration is the date of the second lobbying contact.

Registration Requirements

- What if Larry's organization employs in-house lobbyists?
Is there a different applicable threshold requiring registration of his organization?
 - Yes
 - No

Registration Requirements

- What if Larry's organization employs in-house lobbyists? Is there a different applicable threshold requiring registration of his organization?
- **Yes** – An organization employing in-house lobbyists is exempt from registration if its total expenses for lobbying activities does not exceed and is not expected to exceed \$13,000 during a quarterly period.
- The \$3000 income threshold for lobbying firms remains unchanged.

What constitutes a Lobbying Contact?

Are all contacts and communications with a covered official are “lobbying contacts”?

- A. Yes
- B. No
- C. Not necessarily

Lobbying Contacts

- **Not necessarily.** Not all contacts or communications with a covered official are necessarily “lobbying contacts.”
 - Exceptions: Under 2 U.S.C. § 1062(8)(B)(v), the term “lobbying contact” does not include “a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered Executive Branch official or a covered Legislative Branch official.”
 - However, a status request would constitute “lobbying activity” if it were in support of a subsequent lobbying contact.

A group of people in a meeting, overlaid with a green geometric pattern. The image shows a man and a woman in the foreground, with other people visible in the background. The overall tone is professional and collaborative.

Senate & House Ethics Rules

A group of people in a meeting, overlaid with a green geometric pattern. The image shows a man and a woman in the foreground, with other people visible in the background. The overall tone is professional and collaborative.

Gifts Rules of the Senate and House

True or False?

No member, officer or employee of the Senate or the House of Representatives shall knowingly accept a gift as provided by the Gifts Rule.

True or False?

True - No member, officer or employee shall knowingly accept a gift as provided by the Gifts Rule.

Senate Rule 35

House Rule 23.4

What qualifies as a gift under the Gifts Rule?

Gifts include:

- Gratuity
- Favor
- Discounts
- Entertainment
- Hospitality
- Loan
- Forbearance
- Services
- Training
- Transportation
- Lodging
- Meals
 - *Whether provided in kind, by purchase of tickets, payment in advance or reimbursed*

Is there a cash threshold?

A. Yes

B. No

Is there a cash threshold?

- **Yes.** Generally, a member, officer, or employee may accept a gift, *other than cash or cash equivalent*, having a value of less than \$50.
- There is also a cumulative value of gifts that may be accepted. Any one source in a calendar year cannot give more than \$100.
 - Generally, gifts having a value of less than \$10 do not count toward the annual limit.

What if I give an intern a \$25 gift card for taking me on a tour of the Capitol?

- A. Because she is an intern, she can accept it.
- B. Because the amount of the gift card is less than \$50, she can accept it.
- C. Because it's a gratuity for doing her job, she must decline it.

What if I give an intern a \$25 gift card for taking me on a tour of the Capitol?

- A. Because she is an intern, she can accept it.
- B. Because the amount of the gift card is less than \$50, she can accept it.
- C. Because it's a gratuity for doing her job, she must decline it.**
 - Plus, even though it's less than \$50, it's a cash equivalent, which is prohibited.

Does it make a difference who the giver of the gift is?

A. Yes

B. No

Does it make a difference who the giver of the gift is?

- **Yes.** Member, officer or employee may accept a gift of less than \$50, provided that the **source of the gift is not a registered lobbyist, foreign agent, or private entity that retains or employs such individuals.**
- Lobbyists are prohibited from giving gifts...unless an exception applies.

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Exceptions to the Gifts Rule

What if Larry is related to the Member?

If Larry the Lobbyist is Senator Cotton's uncle, can he give the senator a gift?

A. Yes

B. No

What if Larry is related to the Member?

- **Yes.** A Member may accept gifts from Larry the lobbyist (even if he is an in-law or a fiancé) regardless of value.
 - See [Senate Rule 35.1\(c\)\(3\)](#).

What if Senator Cotton is a personal friend?

If Larry is Senator Cotton's personal friend from serving together in the military, can he give the senator a gift?

A. Yes

B. No

What if Senator Cotton is a personal friend?

- **Yes.** A member may accept a gift given on the basis of personal friendship...
 - unless there is reason to believe that the gift was given because of the individual's official position and not because of the personal friendship.

What factors of “friendship” are considered?

- If Larry gives a gift to Senator Cotton, what factors will be considered for it to qualify as a gift given on the basis of personal friendship?
 - A. The history of the official’s relationship with the donor, including any previous exchange of gifts.
 - B. Whether, to the official’s actual knowledge the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift.
 - C. Whether, to the official’s actual knowledge, the donor at the same time gave the same or similar gifts to other Members of staff.
 - D. All of the Above.

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 - D. **All of the Above.**

Can I have Senator Blackburn over for dinner?

Can I invite Senator Blackburn over to my condo in D.C. for dinner and to watch the Mississippi State baseball game with fellow alumni?

- A. Yes
- B. No

Can I have Senator Blackburn over for dinner?

Can I invite Senator Blackburn over to my condo in D.C. for dinner and to watch the Mississippi State baseball game with fellow alumni?

A. Yes. As long as I am not a lobbyist and this is my personal residence.

- Senate Rule 35.1(c)(17). Plus this exception is exempt from both the limits of the Gifts Rule and the reporting requirements.

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Attendance at Events

What if your organization is sponsoring a dinner event in DC and you invite Senator Blunt – will he be able to attend?

A. Yes.

B. Probably not.

C. It depends.

What if your organization is sponsoring a dinner event in DC and you invite Senator Blunt – will he be able to attend?

- **It depends.**
 - If your organization employs lobbyists, then, no, Senator Blunt will not be able to attend ... unless an exception applies.
 - If it doesn't employ lobbyists, and the event is widely attended with free attendance – then Senator Blunt may accept the invitation, if ...

Member's Attendance at a Widely Attended Event Permitted if:

- Invited by the organizing event sponsor,
- At least 25 persons from outside Congress will be in attendance,
- Attendance at the event is open to members from throughout a given industry or profession, or to a range of persons interested in an issue; and
- It is connected to the official's Senate duties.

What if your organization employs lobbyists and sponsors a dinner event in Missouri? Can Senator Blunt attend?

A. Yes

B. No

C. It depends

What if your organization employs lobbyists and sponsors a dinner event in Missouri?

- **It depends.** If this is a “constituent event”, then yes he can.
 - Constituent Event Requirements:
 1. The event takes place in the Member’s home state;
 2. Has at least 5 constituents present;
 - 3. No lobbyists or foreign agents are present;**
 4. Participation is in connection with official duties; and
 5. The value of any meal that is provided is less than \$50.

Senate Rule 35.1(g)

- A Member, officer, or employee may accept an offer of “free attendance” in the Member’s home state at a “constituent event,” such as a conference, forum, panel discussion, dinner event, site visit, reception, etc.
- An official may accept if:
 - (1) the event takes place in the Member’s home state;
 - (2) has at least 5 constituents present;
 - (3) no lobbyists or foreign agents are present;
 - (4) participation is in connection with official duties; and
 - (5) the value of any meal that is provided is less than \$50.
- See [Senate Rule 35.1\(g\)](#).

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Charitable Events

Is attendance at all Charitable Events ok?

You serve on the Board for the Juvenile Diabetes Foundation that is sponsoring a golf tournament. If you sponsor a hole and invite Senator Alexander to play in your foursome, will he be able to join you?

- A. Yes
- B. No
- C. Probably not

Is attendance at all Charitable Events ok?

You serve on the Juvenile Diabetes Foundation Board that is sponsoring a golf tournament to raise money for the Foundation. If you sponsor a hole and invite Senator Alexander to play in your foursome, will he be able to join you?

- A. Yes
- B. No
- C. **Probably not – because you are not the overall, organizing sponsor of the event.**



Executive Branch Gifts Rules

The US Office of Government Ethics (OGE) Rules

There are also regulations in place governing the acceptance of gifts by members of the executive branch employees. The US Office of Government Ethics (OGE) promulgated rules that:

- Establish standards of conduct for the executive branch
- Ensure transparency in government through financial disclosure
- Educate executive branch employees
- Promote good governance

These OGE rules, which were amended in 2017, are important for federal employees as well as the companies and individuals who interact with them on a personal or professional basis.

The OGE Rules

- Like the Senate and House Rules, the executive branch rules prohibit employees from accepting gifts from a prohibited source unless the gift fits into one of the enumerated exceptions to the rule.
- The terms “gift” and “prohibited source” are also defined similarly; however, **the amended rules now contain a general admonition against executive branch employees accepting a gift if it would create an appearance of impropriety – even if the gift is otherwise allowed under the rules.**

The Amended OGE Rules

- Thus, the OGE directs White House and Agency employees to “consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.”
 - 5 CFR § 2635.201(b)(1).
- Although this is not mandatory language – rather “what you should do” – the effect is that federal employees you may interact with have additional reasons to decline a gift from you.

The OGE Rules: Factors to Consider

Under this new standard, what factors should the employee consider in deciding whether a gift is appropriate:

- A. The gift has a high market value
- B. The timing of the gift creates the appearance that the donor is seeking to influence an official action
- C. The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties
- D. Acceptance of the gift would provide the donor with significantly disproportionate access
- E. B, C and D
- F. A, B and C
- G. All of the above.

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Exceptions to the Gifts Rules

Exceptions to the Gifts Rule

5 C.F.R. Part 2635: Standards of ethical conduct for employees of the executive branch. Sub-Part B provides the Exceptions, which include:

- Unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any single source;
- Gifts motivated by a family relationship or personal friendship;
- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments, and entertainment at certain meetings or events while on duty in a foreign country.

Free Attendance at Widely Attended Events

How do the new rules change acceptance of this “gift”?

- A. The event must include ‘an opportunity to exchange views with a large and diverse number of persons.’
- B. The employee must get written authorization from the agency.
- C. The risk of creating an appearance of improper influence must be assessed.
- D. The agency must find that its interest in the employee’s attendance at the event outweighs the concern that the employee may be or may appear to be improperly influenced in the performance of official duties.
- E. Attendance at the widely attended gathering does not cover free travel to the event.
- F. All of the above.

Free Attendance at Widely Attended Events

How do the new rules change acceptance of this “gift”?

- A. The event must include ‘an opportunity to exchange views with a large and diverse number of persons.’ 5 CFR § 2635.204(g)(2).
- B. The employee must get written authorization from the agency.
- C. The risk of creating an appearance of improper influence must be assessed.
- D. The agency must find that its interest in the employee’s attendance at the event outweighs the concern that the employee may be or may appear to be improperly influenced in the performance of official duties.
- E. Attendance at the widely attended gathering does not cover free travel to the event.
- F. **All of the above.**

Free Attendance at Event – Employee is Speaker

- An exclusion from the definition of “gift” is the allowance of free attendance at an event where the executive agency employee will speak on behalf of his agency.
- There are limitations, however. What are they?
 - A. As a speaker, Employee can attend only the day of his speech.
 - B. As a speaker, Employee can bring his or her spouse.
 - C. As a speaker, Employee can take part in a speakers’ meal provided by the sponsor.
 - D. All of the above.

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 - D. All of the above.

Personal Friendship Gifts

- Like the legislative exception, a federal agency employee may accept gifts based on personal friendships and family relationships.
- The new rule codified a long-standing OGE interpretation that for a gift to fall within the exception, it must be given “by an individual” rather than a company or organization.



Social Invitations

True or False?

If a federal employee and a contractor who meet through official activities and become connected through personal social media, but do not interact regularly on a personal level, the employee cannot accept a dinner invitation from the contractor.

True of False?

True - If a federal employee and a contractor who meet through official activities and become connected through personal social media, but do not interact regularly on a personal level, the employee cannot accept a dinner invitation from the contractor.

- Why? The circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee.

Best Practice - Gifts

Although the gifts rules are directed at government employees, those in the private sector should avoid putting their government counterparts in compromising positions by offering anything of value that falls outside one of the recognized exceptions to the gift rules, or where the timing of the gift could raise questions about the government employee's impartiality in performing his or her duties.

Any private individual or organization with questions about the applicability of the gift rules to a particular circumstance should consult with counsel.

A group of business professionals in a meeting. A man in a striped shirt is pointing at a document on a table. A woman with long dark hair is looking at the document. Another woman with glasses is visible in the foreground. The background is a bright, modern office setting.

President Trump's Executive Order

Under President Trump's Executive Order, are executive branch appointees prohibited from accepting gifts from registered lobbyists?

A. Yes

B. No

Under President Trump's Executive Order, are executive branch appointees prohibited from accepting gifts from registered lobbyists?

- **Yes.** 2017-13770 prohibits executive branch appointees from accepting gifts from registered lobbyists and lobbyist employers.

How does the Executive Order affect former executive agency appointees' ability to lobby their respective agency after leaving their position? How long do they have to wait?

- A. 8 years
- B. 2 years
- C. 5 years
- D. 1 year

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- A. 8 years
- B. 2 years
- C. 5 years**
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How are former lobbyists appointed to executive office affected by the executive order if at all?

- A. Former lobbyist/executive agency appointees must not work on any matter on which they lobbied for the duration of their appointment.
- B. They must recuse themselves from working on any matter on which they lobbied for the first 2 years of their appointment.
- C. They must recuse themselves for the first 5 years of their appointment
- D. None of the above.

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- C. They must recuse themselves for the first 5 years of their appointment
- D. None of the above.



Arkansas

True or False?

Arkansas elected officials cannot solicit or accept a gift from a lobbyist.

True or False?

True – Arkansas elected officials cannot solicit or accept a gift from a lobbyist. Ark. Const. art. XIX, § 30.

- Gift means: Any payment, entertainment, service, or anything of value, unless consideration of equal or greater value has been given therefor; or any advance or loan. Ark. Const. art. XIX, § 30 & Ark. Code. Ann § 21-8-402.
- A lobbyist shall not offer or pay for food or drink at more than 1 planned activity in a 7 day period.
 - Items included with a conference registration are ok.
 - Food and drink at events provided to registrants are ok.



Missouri

True or False?

Missouri executive branch officials and employees are prohibited from accepting gifts from lobbyists.

True or False?

True – Missouri executive branch officials and employees are prohibited from accepting gifts from lobbyists.

Gov. Mike Parson Executive Order 18-10

Renewed the commitment to “upholding the highest ethical standards for executive branch employees,” set forth in EO-17-02. What does it prohibit?

- A. State employees from knowingly soliciting or accepting any gift from a lobbyist;
- B. Employees of the Governor’s office from acting as an executive lobbyist until the end of the administration in which he or she served.
- C. State employees of executive branch from participating in a proceeding or decision in which the state employee’s impartiality might reasonably be questioned due to his/her personal or financial relationship with a participant in the proceeding.
- D. State employees of the executive branch from entering into or deriving any benefit, directly or indirectly, from any contractual arrangement with the State if such arrangement is inconsistent with the conscientious performance of the employee’s official duties.
- E. All of the above.

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Mississippi

Lobbying Law Reform Act

In Mississippi, can I take a legislator out to lunch to lobby her on a pending piece of legislation?

- Yes
- No

Lobbying Law Reform Act

In Mississippi, can I take a legislator out to lunch to lobby her on a pending piece of legislation?

- Yes – The lunch would be a reportable expenditure... if I am a lobbyist. There is no prohibition against “gifts” to public officials; they just have to be reported by lobbyists.
- Miss. Code Ann. 5-8-1 et seq.

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- Miss. Code Ann. 5-8-1 et seq.

So, how do I know if I am a lobbyist?

Lobbying Law Reform Act

In Mississippi, how do I know if I am a lobbyist?

- Check the definitions – Miss. Code Ann. § 5-8-3
- Look to see if you are excluded from the definition of lobbyist and lobbyist's client – Miss. Code Ann. § 5-8-7
 - Excluded from the definition are the following:
 - Individual lobbying in his own business interest who pays public officials any thing of value aggregating in value to less than \$200 in a calendar year.

More Examples of Lobbying Exclusions:

Miss. Code Ann. § 5-8-7 examples:

- Individual lobbying on behalf of his employer's business interest where such lobbying is not a primary or regular function of his employment position if such individual pays public officials any thing of value aggregating in value to less than \$200 in a calendar year.
- Individual lobbying on behalf of an association where such lobbying is not a primary or regular function of his position in the association if such individual pays public officials any thing of value aggregating in value to less than \$200 in a calendar year.

More Examples of Lobbying Exclusions:

Miss. Code Ann. § 5-8-7 examples:

- Individual who is a licensed attorney representing a client by:
 - (i) Drafting bills, preparing arguments thereon, and advising the client or rendering opinions as to the construction and effect of proposed or pending legislation, where such services are usual and customary professional legal services which are not otherwise connected with legislative action; or
 - (ii) Providing information, on behalf of the client, to an executive or public official, a public employee, or an agency, board, commission, governing authority or other body of state or local government where such services are usual and customary professional legal services including or related to a particular nonlegislative matter, case or controversy.



Tennessee

True or False?

No lobbyist shall offer or make any campaign contribution, including any in-kind contribution, to or on behalf of the Tennessee governor or any member of the Tennessee general assembly or any candidate for the office of governor, state senator or state representative.

True or False?

True – No lobbyist shall offer or make any campaign contribution, including any in-kind contribution, to or on behalf of the Tennessee governor or any member of the Tennessee general assembly or any candidate for the office of governor, state senator or state representative.

Tenn. Code § 3-6-304

A group of people in a meeting, overlaid with a green geometric pattern. The image shows a woman on the left and a man on the right, both looking towards the center. The background is a light green color with a darker green geometric pattern on the right side.

COVID-19 Scenarios

Providing Help to Local Governments

- What if it's not really a “gift” but just a state or local government – supervisors, boards of aldermen, city councils, mayors – seeking help from the private sector to address the COVID-19 crisis – PPE, consulting services re interpretation of the CARES Act, Coronavirus Relief Fund in particular, etc.
- *Is it ok to donate that equipment or services given that we're in an emergency situation caused by the pandemic?*
 - Maybe.
 - Probably not.

Providing Help to Local Governments

- What if it's not really a “gift” but just a state or local government – supervisors, boards of aldermen, city councils, mayors – seeking help from the private sector to address the COVID-19 crisis – PPE, consulting services re interpretation of the CARES Act, Coronavirus Relief Fund in particular, etc.
- *Is it ok to donate that equipment or services given that we're in an emergency situation caused by the pandemic?*
 - **Maybe.** I would advise against providing that equipment or those services to a public official directly in case state or local rules define that as an illegal gift.

Providing Help to Local Governments

- Best practice would be to provide the “gift” to the governmental entity as part of an MOU or other written agreement acknowledging that the gift has been formally accepted by the governmental entity.
- In all cases when providing assistance, be sure there is no link between the gift and a particular government decision in violation of applicable honest services or bribery statutes.

RFPs

- Many of you may be responding to a state government RFP related to COVID-19.
- Although many state statutes allow for emergency procurement processes, generally rules ensuring fairness in that process and in awarding the bid, still apply.
- The process just may be expedited. But that does not mean such bids won't be subject to intense scrutiny once the "crisis" subsides.
- So if you've given supplies to local govts. and you're going to respond to the local government's RFP or RFQ for consulting services, then you should probably disclose any "gifts" in the bidding documents.



Conclusion

Best Practices

- Lobbying and offering gifts to Federal Officials:
 - Check the law, the rules and regulations as well as executive orders. And check with counsel!
 - What seems like southern hospitality may actually violate the law.
- State laws vary in what they permit and prohibit.
 - Check state ethics laws, lobbying laws and executive orders. And check with local counsel!

Sources

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- Senate Ethics Rules
 - <https://www.ethics.senate.gov/public/index.cfm/ethicsrules>
- The Senate Code of Official Conduct
 - https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf#page=11

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- The Senate Gifts Rule
 - <https://www.ethics.senate.gov/public/index.cfm?p=Gifts>
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- The House Ethics Manual
 - https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf

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 - House Rule 23 -- https://ethics.house.gov/gifts/house-gift-rule#gifts_fnote23
 - House Rule 25 -- <https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf>
- Executive Order
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- U.S. Office of Government Ethics
 - <https://www.oge.gov/web/oge.nsf/Laws+and+Regulations/>
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- <https://codes.findlaw.com/ar/arkansas-constitution-of-1874/ar-const-art-19-sect-30.html>

MISSOURI GOVERNOR PARSONS EXECUTIVE ORDER No. 18-10

- <https://www.sos.mo.gov/library/reference/orders/2018/eo10>

MISSISSIPPI LOBBYING GUIDE (WITH LAW)

- <https://www.sos.ms.gov/content/documents/elections/links/2020%20Lobbying%20Guide.pdf>

TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE

- <https://www.tn.gov/tec/tec-lobbyist/tec-lobbyist-ethics-training/tec-lobbyist-ethics-training-slide-3.html#:~:text=T.C.A%20%C2%A7%203%2D6%2D304,of%20an%20employer%20or%20lobbyist.&text=No%20lobbyist%20shall%20make%20a,to%20anyone%20on%20their%20behalf>

***LATEST AND GREATEST IN
FEDERAL CROP INSURANCE AND
FARM PROGRAMS***

Presentation for the
7th Annual Mid-South Agricultural & Environmental Law Conference

June 5, 2020

By Grant Ballard

Ark Ag Law, PLLC

INTRODUCTION

- This is a quick update on recent developments in crop insurance litigation as well as developments in the crop insurance regulations and new programs
- Course materials have been provided which include copies of recently published program rules, final agency determinations, and recent cases which are cited herein

OVERVIEW

- Updates Crop Insurance Litigation
- Developments In Crop Insurance
 - Whole Farm Revenue Protection (WFRP)
- Farm Program Update
 - CARES Act/ CFAP

CROP INSURANCE BACKGROUND

- Policies are sold through approved private insurance companies
- Companies' losses are reinsured by USDA, with administrative and operating costs reimbursed
- Companies and Producers are Audited and Regulated by the USDA Risk Management Agency(RMA)

CROP INSURANCE DISPUTE RESOLUTION

- The Crop Insurance Policy provides a unique dispute resolution process which includes an arbitration clause along with USDA administrative review requirements
- The party who makes the adverse determination decides the track on which the case will travel
- Generally:

Circuit	1)	Disputes with an AIP go to Arbitration (some tort claims may go to Court)
	2)	Disputes with an Agency of USDA go to Administrative Review
	3)	Agent Negligence cases may be taken to Circuit Court.

WHAT IS NEW IN CROP INSURANCE LITIGATION?

1. Continued Litigation concerning the authority of the arbitrator
2. Courts are readily enforcing the Arbitration Clause and District Court's do not seem hesitant to uphold the FAD/IOP Requirement of the Policy
3. Courts have narrowed the ability of insureds to seek damages outside of arbitration

DEVELOPMENTS IN CROP INSURANCE LITIGATION

- Continuing controversy regarding the scope of the arbitrator's authority and the role of the USDA Risk Management Agency in dispute resolution
 - A direct result of the FAD/IOP Process and the Federal Arbitration Act's provision for vacatur of an award if an arbitrator acts in excess of her authority. The Arbitrator's authority is defined by contract and the crop insurance policy severely limits that authority and reserves interpretation for the RMA/FCIC.
 - Both insureds and insurers are seeking vacatur.

CROP INSURANCE ARBITRATION

- Arbitration is required but there remain issues for the Court?
 - Who has the burden to initiate arbitration?
 - What issues can the arbitrator resolve?
 - What claims survive arbitration?

DISTRICT COURTS ARE READING AND ENFORCING THE POLICY

- Held that an insured was required to obtain authorization from the FCIC before making any bad-faith claim for damages and that the policy's relevant provision preempts state law. This decision resulted in the dismissal of a state law bad faith claim.
- *Wanamaker Nursery, Inc. v. John Deere Risk Prot., Inc.*, 364 F. Supp. 3d 839, 848–49 (E.D. Tenn. 2019).

SCOPE OF AN ARBITRATOR'S AUTHORITY

- It is well settled that crop insurance arbitrators may not construe or interpret the contract. The contract emphasizes that nullification is proper whenever the arbitrator exceeds his authority by failing to obtain an interpretation or Final Agency Determination (FAD) of interpretation of procedures (IOP) from USDA RMA/FCIC when one is required.
- When someone loses a case, the argument often becomes that the arbitrator, in excess of her authority, engaged in impermissible “interpretation.”

SCOPE OF ARBITRATION?

- **The Basic Provisions carve out from arbitration any “policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure.” 7 C.F.R. § 457.8 ¶ 20(a)(1).**
- **“Failure to obtain any required interpretation from [the Agency] will result in the nullification of any agreement or award.” ¶ 20(a)(1)(ii).**

ARBITRATION AND THE FAD

- Final Agency Determination (FAD)
- Interpretations of Procedures
- RMA makes determinations as to the meaning and application of the policy or administrative guidance
- These determinations are binding on the arbitrator
 - Is this fair? Constitutional?
- Exactly when must you obtain a FAD?

FAILURE TO OBTAIN A FAD

- Serves as a basis for vacatur
- About the only realistic way to obtain review of a crop insurance arbitration.
 - This can lead to a rehearing
- Courts have demonstrated a willingness to enforce the FAD Requirement
 - *Garnett v. NAU Country Ins.*, 2009 WL 3644762 (W.D. Kentucky 2009).
 - *Davis v. Pro Ag*, No. 5:12 CV -92 (MTT) (M.D. Ga. 2013). Reversed by the Eleventh Circuit in *Davis v. Pro Ag*, 762 F.3d 1276 (2014).

OVERVIEW OF FEDERAL COURT REVIEW OF “FAD DISPUTES”

- Multiple United States District Courts have vacated arbitration awards upon a finding that the Arbitrator rendered a policy or procedure interpretation without obtaining a FAD or IOP.
 - This attack remains relevant
- However, Appellate Courts have been hesitant to affirm such Orders of Vacatur.
 - It appears to the presenter that the Eighth and Eleventh Circuits have reversed vacatur based upon a policy preference that arbitration be final.

RMA HAS ALSO RESPONDED TO THE FAD CONTROVERSY

- By establishing a regulation allowing RMA/FCIC to determine whether a FAD or IOP should have been obtained for a dispute.
- Clearly demonstrates the desire of RMA to control the dispute resolution process.
- RMA has even taken the position that their determinations should be binding on Federal Courts.

CONSTITUTIONALITY OF THE FAD/IOP

- The constitutionality of a Federal Agency Regulation which purports to limit and “bind” the decision-making authority of a United States District Judge is highly suspect and should trigger separation of powers concerns.
- “Article III of the Constitution establishes an independent Judiciary with the “province and duty ... to say what the law is” in particular cases and controversies.” *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1315, 194 L. Ed. 2d 463 (2016). An executive branch agency such as the USDA RMA/FCIC, which derives its powers from Congress, may not “prescribe rules of decision to the Judicial Department ... in [pending] cases.” *Id.*

CHALLENGING THE FAD/IOP

- If RMA takes a position in contradiction of its own regulations, there may be an argument that this is an illegal or arbitrary agency action, possibly even a violation of the *Accardi Doctrine*.
- However, at the arbitration, the Defense will argue that pursuant to the arbitration clause the interpretation is binding.
- There may be avenues to attack specific determinations.

RECENT CASES REGARDING THE AUTHORITY OF THE ARBITRATOR

- The 4th Circuit Court of Appeals recently affirmed a vacatur in favor of a crop insurance provider on the partial basis that the arbitrator lacked authority to interpret potentially ambiguous policy provisions
 - Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247 (4th Cir. 2019)

-In this case, the insured attempted to confirm an arbitration victory in Federal Court and the District Court instead granted insurer's motion to vacate the award.

RECENT CASES REGARDING THE AUTHORITY OF THE ARBITRATOR

- The Fourth Circuit wrote that

“As the policy makes clear, the arbitrator was required to obtain and apply the FCIC’s interpretation of any ambiguous policy provision, and the arbitrator could not substitute her own interpretation for that of the FCIC.”

Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247, 255 (4th Cir. 2019)

“the unusual world of federal crop insurance does, in fact, appear to leave very little decision making authority to the arbitrator.” Id.

SCOPE OF THE ARBITRATOR'S AUTHORITY

- The Recurring Issue:
 - Whether failure of an arbitrator to obtain a Final Agency Determination or Interpretation of Procedures from the Risk Management Agency, in a dispute where the interpretation and application of crop insurance policy provisions and procedures is at issue, requires vacatur of an arbitration award ?
 - Was there even an question of interpretation? There is a plenty to argue about here.

THE 4TH CIRCUIT UPHELD THE PLAIN LANGUAGE OF THE POLICY AND LIMITATIONS ON THE ARBITRATOR'S AUTHORITY

- Not all Courts have followed this model, instead other Circuits have deferred to the Arbitrator's decision-making.
- The Eighth Circuit recently reversed a District Court decision vacating an arbitration award where argued the arbitrators allegedly failed to comply with the regulations governing the arbitration proceeding.
 - *Great American Ins. Co. v. Russell*, 914 F.3d 1147 (2019).

THEN CAME THE 8TH . . .

- The Eighth Circuit also recently reversed a vacatur of a crop insurance arbitration award in the case of *Terry Balvin vs. Rain and Hail*, 943 F.3d 1134 (2019).
- This is a case where one of Terry Balvin's primary arguments was that the arbitrator engaged in policy and procedure interpretation by allowing the insurance company to establish "appraised production," on acres that were not appraised and acres that were not appraised in conformance with the applicable procedure.
- The District Court agreed with Mr. Balvin and held that this dispute "is precisely the type of dispute regarding the application of policy and procedure that needed to be submitted to the FCIC for interpretation."

THEN CAME THE 8TH . . .

- And Held that the arbitrator did not exceed his powers because the dispute about the interpretation of “appraised value” was not even before the arbitrator.
- **The Court noted that** “Balvin argued to the arbitrator that the appraisals were irrelevant and inaccurate.” and “Balvin did point out that the appraisals were not signed and were incomplete”
- This is a departure from RMA Guidance which suggests a question of policy or procedure can arise at any time, even after a hearing.

THEN CAME THE 8TH...

- And noted the policy's arbitration clause incorporated the American Arbitration Association ("AAA") rules. "By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability." *Terry Balvin vs. Rain and Hail*, 943 F.3d 1134 (2019).
- "the arbitrator was free to determine any threshold arbitrability questions to the extent they were at issue." *Id.*
- Definite deference to the Arbitrator.

SCOPE OF ARBITRATOR'S AUTHORITY

- Per the terms of the crop insurance policy and applicable Federal Regulations, determinations as to the interpretation or application of the crop insurance policy and Federal guidance relating to crop insurance are reserved for the RMA, and the arbitration agreement within the policy specifically provides that an arbitrator lacks the authority to make such determinations.
- Whether a Federal Court will engage in meaningful review of an arbitration award is another question

SCOPE OF THE ARBITRATOR'S AUTHORITY

- Has also recently become an issue in the context of “good farming practices” disputes
- It has been previously recognized that “good farming practices” issues were outside the scope of the arbitrable issues found in the crop insurance policy’s arbitration clause.

GOOD FARMING PRACTICES

- What does the policy say about resolving good farming practices disputes?
 - “You may not sue us for our decisions regarding whether good farming practices were used by you”
 - “You must request a determination from FCIC of what constitutes a good farming practice before filing any suit against FCIC”
 - See Common Crop Insurance Policy Basic Provisions at Par. 20(d).

GOOD FARMING PRACTICES

- Congress specifically provided farmers with procedural due process rights regarding GFP determinations in its Federal Crop Insurance Act (FCIA) at 7 U.S.C. § 1508(a)(3)(B).
- “A producer shall have the right to a review of a determination regarding good farming practices made . . . in accordance with an informal administrative process to be established by the Corporation.” *Id.* Importantly, Congress provided for the “right to judicial review” and that this right applied “without exhausting” administrative review.

THEN CAME THE 8TH CIRCUIT . .

.

- Terry Balvin argued that the arbitrator did not have the authority to make a good farming practices determination under the terms of the policy, arguing that the matter was not arbitrable and that Federal Law required notice and an option to appeal a GFP determination to the FCIC.
- The Court held that “Although the policy provides that Rain and Hail initially would make any good farming practices determinations, it does not expressly prohibit the arbitrator from making a good farming practices determination for the first time in the event the need arises during an arbitration proceeding.”

CAN AN ARBITRATOR DECIDE A GFP DISPUTE?

- “While the fact that the arbitrator made the good farming practices determination in this case may be unusual given that the policy contemplates that Rain and Hail would make such a determination, that does not necessarily mean the arbitrator exceeded his powers.”
 - According to the Eighth Circuit in *Balvin v. Rain and Hail*.
 - The Court Appears to be ignoring the Policy.
- On January 8, 2019, the U.S. Supreme Court unanimously reaffirmed the principle that “[u]nder the [Federal Arbitration]Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, 2019 WL 122164, at *3 (U.S. Jan. 8, 2019).

EIGHTH CIRCUIT APPEARS TO ALLOW ARBITRATORS TO DETERMINE GFP DISPUTES

- What does the policy say about resolving good farming practices disputes?
 - “You may not sue us for our decisions regarding whether good farming practices were used by you”
 - “You must request a determination from FCIC of what constitutes a good farming practice before filing any suit against FCIC”
 - See Common Crop Insurance Policy Basic Provisions at Par. 20(d).

TAKE-AWAY

- The Eighth Circuit has apparently held that the arbitrator did not exceed the scope of the arbitration clause by rendering an award partly based on a good farming practices determination, even where the insured was not provided prior notice as required by 7 U.S.C. § 1508(a)(3)(B) and 7 CFR 457.8.
- The does not appear to square with the crop insurance policy, Federal Regulation, or the United States Code but indicates a desire of the Court not to become heavily engaged in the review of arbitration awards.

UPDATES ON REPAYMENT DEMAND CASES

- An insurer's claim to a repayment of an overpaid indemnity falls within the scope of the crop insurance policy's arbitration provision.
 - *Occidental Insurance vs. Franklin Bush*, District Court Case No. 2:19 CV 67 (E.D. Mo. 2020).
- Arbitration is mandatory without regard for the identity of the initiating party. Id.
 - Takeaway is that at least one District Court has not recognized that the arbitration requirement in the basic provisions of crop insurance applies to both the insurer and the insured
 - Whether Arbitration is timely is a question for the arbitrator

REPAYMENT LITIGATION

- Repayment Demands are not Uniform
 - Eligibility usually ensures compliance with an insurers demands
- It Does not Appear that AIP's often demand arbitration and it has even been argued that the arbitration clause is not binding on the insurer.
- The Policy, however, does not require blind compliance with the demands of an AIP.

REPAYMENT LITIGATION

- “if we or FCIC have evidence that you, or anyone else assisting you, knowingly misreported any information related to any yield you have certified, we or FCIC will replace all yields in your APH database determined to be incorrect with the lesser of an assigned yield determination in accordance with section 3 or the yield determined to be correct:
 - (i) If an overpayment has been made to you, you will be required to repay the overpaid amount....
- “But by its express terms, Section 21(b)(3) applies only where FMH or the FCIC have evidence of a knowing misrepresentation.”
 - *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, 366 F. Supp. 3d 974, 978–79 (W.D. Mich. 2018)

REPAYMENT LITIGATION

- The dispute over a retroactive redetermination over the 2012 and 2013 crop years squarely raises policy interpretation issues. There is nothing in the policy language that expressly permits a redetermination of previously settled crop years, let alone allocates a burden of proof in any such retroactive redetermination to the farmer.
- *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, 366 F. Supp. 3d 974, 978 (W.D. Mich. 2018).
- AIP's suggest all arbitration proceedings be initiated by the insured and that the insured bears the burden of proof.

WHOLE FARM REVENUE PROTECTION POLICY (WFRP)

- Began as a Pilot Program
- differs from traditional Multi-Peril crop insurance coverage as this insurance insures “approved revenue that you earn or expect to earn.”
- The WFRP Policy does not insure production and revenue, based on Actual Production History, as is used in more traditional plans of FCIC insurance.
- The WFRP policy insures the revenue that an individual or entity expects to earn from all commodities produced or purchased for resale during the insurance period.

APPEAL OF WFRP

- Revenue from the sale of livestock is insurable. The animals themselves are not insured, but the anticipated revenue from livestock expected to be sold within the upcoming year may be insured.
- The insurance “Guarantee” for crop revenue is based on an “expected yield” instead of Actual Production History.

WFRP

- The insurance “guarantee” is based on the lesser of “historic average revenue” (as reported in five years of Schedule F Tax Return which record “profit or loss from farming) or “total expected revenue” as reported on the insured’s “Farm Operation Report.”

WFRP PROBLEMS

- Records
- Supporting Documentation
- Allowable Income
- Expected Revenue

THE CARONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (CARES)

- In addition to direct payments to individuals of up to \$1,200, extended unemployment benefits and federal loan guarantees, the \$2 trillion CARES Act provided financial resources to offset the economic impacts of the Covid-19 virus.
- Signed into law on March 27, 2020

THE CARONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (CARES)

- Authorized the Caronavirus Food Assistance Program (CFAP)
 - Being administered by the Farm Service Administration
 - Provides direct support to farmers and ranchers for eligible commodities and/or livestock that have suffered losses due to price decline, market decline, and negative supply chain impact – resulting from COVID-19

CFAP PROGRAM

- Eligible producers must have an ownership interest in one or more of the eligible CFAP commodities and began filing CFAP applications on May 26, 2020.
- Signup ends on August 28, 2020.
- \$900,000 AGI limit unless at least 75 percent of the person or legal entity's average AGI is derived from farming/ranching/forestry

CFAP – WHO IS ELIGIBLE

- A person or legal entity (citizenship required) that shares in the risk of producing crops or livestock and is entitled to a share from the proceeds of such crop or livestock during the following time periods.
 - For all commodities other than dairy:
 - On January 15, 2020, and/or between April 16th and May 14th, 2020
 - For dairy:
 - For the months of January, February, and March 2020

CFAP – PAYMENT LIMITS

- \$250,000.00 per person or legal entity excluding general partnerships and joint ventures
 - For joint operations, \$250,000 per person or legal entity of first level ownership
- Corporation/LLC/LP-
 - May seek an increase of the \$250,000.00 limit if multiple members, stockholders, or partners independently provide at least 400 hours or more of labor, management, or a combination thereof- Maximum limit is \$750,000.00

CFAP- ELIGIBLE COMMODITIES

- Dairy
- Non-specialty crops including corn, soybeans, wheat, cotton, etc.
- Wool
- Livestock
- Value Loss Crops (not yet defined?)
- Specialty Crops including but not limited to fruits, vegetable, nuts

CFAP- PAYMENTS

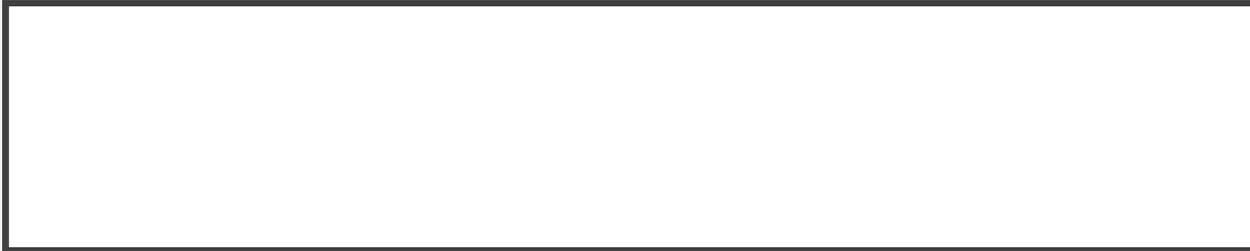
- Determined in Multiple Parts and total payments will be multiplied by a factor of 80 percent after applying payment limitations
- A second payment may be made if funds are available.
- The initial payment of 80 percent of the calculated total

CFAP- PAYMENTS

- The initial payment of 80 percent of the calculated total will be determined as follows:
- For Non-specialty Crops- Payment rates are established on either a bushel or pound unit of measure
 - Based on unsold production on hand on January 15, 2020, not to exceed 50 percent of the total 2019 production for that producer
 - Must be subject to price risk as of January 15, 2020

CFAP- PAYMENTS

- For Livestock- By Multiplying the number of livestock sold between January 15th and April 15th by a per head payment rate (CARES Act Funds) and by multiplying the highest livestock inventory between April 16th and May 15, 2020 by the payment rate per head (CCC Funds).
- Each producer must certify their owned inventory



- **Thank you**
- **Questions?**

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