

For: State and County Offices

Coronavirus Food Assistance Program (CFAP)

Approved by: Acting Deputy Administrator, Farm Programs



1 Overview

A Background

The Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136) was signed into law on March 27, 2020, to provide relief for individuals and businesses that have been negatively impacted by the COVID-19 pandemic.

CFAP:

- provides direct support to eligible farmers, ranchers, and dairy operations with eligible agricultural commodities and/or livestock that have suffered losses due to price and market declines and supply chains impacted by COVID-19
- assists producers with additional adjustment and marketing costs resulting from lost demand and short-term oversupply caused by COVID-19
- is authorized under the CARES Act and Commodity Credit Corporation Charter Act
- is being administered by FSA.

Disposal Date

January 1, 2021

5-20-20

Distribution

State Offices; State Offices relay to County Offices

Notice CFAP-4

1 Overview (Continued)

B Purpose

This notice provides State and County Offices with the following for CFAP:

- general policies and provisions
- eligibility requirements
- eligible commodities and payment rates
- producer reporting requirements
- payment calculations.

C Contact Information

State Offices that require additional information may contact the following.

IF the question is about CFAP...	THEN contact...
non-specialty crop and wool policy	Brent Orr by either of the following: <ul style="list-style-type: none"> • email to brent.orr@usda.gov • telephone at 202-720-0809.
specialty crop policy	either of the following: <ul style="list-style-type: none"> • Jenaé Prescott by the following: <ul style="list-style-type: none"> • email to jenaé.prescott@usda.gov • telephone at 202-720-7641 • Tona Huggins by either of the following: <ul style="list-style-type: none"> • email to tona.hugginsx@usda.gov • telephone at 202-205-9847.
livestock policy	Kelly Breinig by either of the following: <ul style="list-style-type: none"> • email to kelly.breinig@usda.gov • telephone at 202-720-1603.
dairy policy	Doug Kilgore by either of the following: <ul style="list-style-type: none"> • email to douglas.e.kilgore@usda.gov • telephone at 202-720-9011.
value loss crop policy	Tona Huggins by either of the following: <ul style="list-style-type: none"> • email to tona.huggins@usda.gov • telephone at 202-205-9847.
application	Brittany Ramsburg by either of the following: <ul style="list-style-type: none"> • email to brittany.ramsburg@usda.gov • telephone at 202-260-9303.

Notice CFAP-4

1 Overview (Continued)

C Contact Information (Continued)

IF the question is about CFAP...	THEN contact...
automation	Mario Plummer by either of the following: <ul style="list-style-type: none">• email to mario.plummer@usda.gov• telephone at 816-823-1027.
payments	Tina Nemecek by either of the following: <ul style="list-style-type: none">• email to tina.nemec@usda.gov• telephone at 202-690-4027.
producer eligibility and conservation compliance	<ul style="list-style-type: none">• Paul Hanson (producer eligibility policy) by either of the following:<ul style="list-style-type: none">• email to paul.hanson@usda.gov• telephone at 202-720-4189• Michele Davidson (automated Subsidiary system) by either of the following:<ul style="list-style-type: none">• email to michele.davidson@usda.gov• telephone at 816-823-1466• Joe Fuchtman (conservation compliance) by either of the following:<ul style="list-style-type: none">• email to joseph.fuchtman@usda.gov• telephone at 202-260-9146.

2 CFAP General Program Information and Eligibility

A CFAP Signup Period

Eligible producers who had an ownership share interest in 1 or more of the eligible CFAP commodities can file a CFAP application for all their farming and ranching interests nationwide by submitting a completed AD-3114, CFAP Application, to any USDA Service Center from May 26, 2020, through August 28, 2020. The producer's recording county will be responsible for acting on AD-3114. See Exhibit 1 for an example of AD-3114.

Notice CFAP-4

2 CFAP General Program Information and Eligibility (Continued)

B Application

Producers will submit 1 application for their entire operation nationwide using any of the following methods:

- in person, when available
- by mail
- electronically by:
 - FAX
 - e-mail with a scanned or photocopy of signed AD-3114 attached
 - other authorized method (provided by supplemental notice or other guidance) online through www.farmers.gov
- online, when available.

Notes: Submitting AD-3114 online requires an active Level 2 eAuthentication account. Individual producers can register for a Level 2 eAuthentication account at www.eauth.usda.gov.

A fillable version of AD-3114 will also be available for applicants to sign and submit by one of the above methods.

C Producer Eligibility

An eligible producer is a person or legal entity who shares in the risk of producing a crop or livestock and who is entitled to a share in the crop or livestock available for marketing or would have shared had the crop or livestock been produced and marketed.

The CFAP is available to persons and legal entities who had a share in the eligible commodity:

- on January 15, 2020, and/or between April 16 and May 14, 2020, for all commodities other than dairy
- for the months of January, February, and March 2020 for dairy.

Notice CFAP-4

2 CFAP General Program Information and Eligibility (Continued)

C Producer Eligibility (Continued)

To be eligible for a CFAP payment, a person or legal entity must be a:

- citizen of the United States
- resident alien (possessing a Resident Alien Card (I-551))
- partnership of citizens of the United States
- corporation, limited liability company (LLC), or other organizational structure organized under State law
- Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)
- foreign person or foreign entity who meets foreign person rules according to 5-PL.

D Ineligible Producer

The following persons or legal entities are **ineligible** for CFAP payments:

- Federal, State, and local governments, including public schools as defined in 5-PL
- persons or legal entities who did not have a reported ownership interest in any of the eligible commodities
- producers that have been suspended or debarred or otherwise excluded from participating in Federal programs

Note: Follow procedure in 1-CM (Rev. 3).

- persons and legal entities not meeting payment limitation, payment eligibility, AGI, and HELC/WC requirements for CFAP.

Notice CFAP-4

3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements

A Payment Limitation

The total amount of CFAP payments that a person or legal entity (excluding general partnerships and joint ventures) may receive is \$250,000, except as provided in subparagraph B.

Payments to a program applicant that is a joint operation, including a general partnership or joint venture, cannot exceed \$250,000 per person or legal entity that comprise first level ownership of the general partnership or legal entity, unless the first level member is another joint operation.

B Optional Increase in Limitation for Corporations, LLC, and Limited Partnership (LP)

For CFAP applicants that are a corporation, LLC or LP, an authorized representative of the legal entity may seek an increase in the \$250,000 payment limitation to either \$500,000, if 2 members, stockholders, or partners provide independently at least 400 hours or more of active personal labor or active personal management, or combination thereof; or \$750,000 if three members, stockholders, or partners provide independently at least 400 hours or more of active personal labor or active personal management, or a combination thereof (as defined in 5-PL).

The maximum limitation a corporation, LLC, or LP may receive is \$750,000.

C Attribution of Payments

CFAP payments to persons and legal entities will be limited according to the rules for attribution at 7 CFR 1400.105.

CFAP payments made directly or indirectly to a person or legal entity will be combined and limited to the per person or legal entity.

CFAP payments to a legal entity will be tracked through 4 levels of ownership and will be reduced for members, partners, or stockholders holding an ownership interest below the 4th level.

Rules for “common attribution” (i.e., minor children) do not apply to CFAP payments.

D AGI

To be eligible for payment, a person or legal entity (including members, stockholders, or partners of the legal entity) must have an average AGI for program year 2020 that does not exceed the \$900,000 limitation, unless at least 75 percent of the person’s or legal entity’s average AGI is derived from farming, ranching, or forestry operations.

Notice CFAP-4

3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements (Continued)

E Other Eligibility Provisions Applicable to CFAP

Other compliance provisions applicable to persons and legal entities requesting a CFAP payment include:

- controlled substance
- HELC/WC compliance, including AD-1026.

To be considered eligible for a CFAP payment, persons or legal entities must be “certified” with AD-1026 for the 2020 program year.

Part A, items 7A and 8 on the AD-3114 allows CFAP applicants (with either continuous certification on file or new filing) to certify with box 5B of AD-1026 if the producer:

- does not participate in any USDA benefits subject to HELC and WC compliance except Federal Crop Insurance or CFAP
- only has interest in land devoted to agriculture, which is exclusively used for perennial crops, except sugar cane, and,
- has not converted a wetland after **December 23, 1985**.

Livestock and honey applicants that do not have any interest in agricultural land (i.e., cropland, pastureland, rangeland, or forestland) certify to compliance by checking box 5A of AD-1026 (discussed in producer agreement of CFAP application Part A 7B and 8), as they do with other USDA benefits subject to conservation compliance.

Parts A and D of AD-1026 are required for producers certifying with box 5A or B. However, farm records for which a producer’s certification of compliance applies are not required.

All other producers who do not have continuous AD-1026 certification of compliance on file must file a complete AD-1026 according to 6-CP (including certification of Part B HELC/WC compliance questions). According to 6-CP, subparagraph 641 D these producers must establish farm records to which their certification of compliance applies before recording AD-1026 as “certified”. However, for CFAP record AD-1026 as “certified” when received. County Offices will keep these AD-1026s in a “needs to establish farm records folder” if information is not readily available to establish them. The producers will be contacted to do so as workload and time allows. Certification of AD-1026, recorded in subsidiary is still required for the CFAP payment to process.

Notice CFAP-4

3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements (Continued)

F Applicable Eligibility Forms for CFAP

The following forms must be on file for all persons and entities requesting CFAP benefits.

- **CCC-902 Automated** will be completed according to 5-PL and 3-PL (Rev. 2) by all CFAP applicants to collect:
 - names, addresses, taxpayer identification numbers for the person or legal entity (and its members)
 - member information for legal entities (including joint operations)
 - citizenship status for the person or legal entity (and its members)
 - contributions of foreign persons.

Notes: Manual forms CCC-902I (Parts A and B), CCC-902E (Parts A, B, and C) and CCC-901 (if applicable) may be used to collect the required information for CFAP. Information collected on manual forms **must** be loaded in Business File according to 3-PL (Rev. 2).

Applicants who are foreign persons or foreign entities as defined in 5-PL must complete CCC-902 to collect contributions of the foreign persons.

- **CCC-903** will be used to document COC payment limitation, producer eligibility, and foreign person eligibility determinations.
- **CCC-941** will be used to collect the certification of AGI for the CFAP applicant.
- **CCC-942** will be used to collect farm AGI certifications from the CFAP applicant and CPA or attorney, as applicable.

Failure to satisfy or comply with any of these provisions may result in a loss or reduction of payment eligibility.

G Timeframe for Filing Eligibility Documents

CFAP applicants **must** file all eligibility documents for CFAP within 60 calendar days from the date of signing a CFAP application.

Failure to timely provide all eligibility forms may result in no payment or a reduced payment.

Notice CFAP-4

4 CFAP Eligible Commodities and Payments

A CFAP Eligible Commodities

CFAP provides financial assistance to eligible producers with an ownership interest in the following eligible commodities that have been determined to have been impacted by the effects of the COVID-19 outbreak.

Commodity Category	Eligible Commodity
Dairy	<ul style="list-style-type: none"> • Dairy (milk)
Non-Specialty Crops and Wool	<ul style="list-style-type: none"> <li style="width: 50%;">• Barley – Malting only <li style="width: 50%;">• Sorghum <li style="width: 50%;">• Canola <li style="width: 50%;">• Soybeans <li style="width: 50%;">• Corn <li style="width: 50%;">• Sunflowers <li style="width: 50%;">• Cotton – Upland <li style="width: 50%;">• Wheat – Durum <li style="width: 50%;">• Millet <li style="width: 50%;">• Wheat - Hard Red Spring <li style="width: 50%;">• Oats <li style="width: 50%;">• Wool (graded/clean and non-graded/greasy)
Livestock	<ul style="list-style-type: none"> • Feeder Cattle: Less than 600 Pounds • Feeder Cattle: 600 Pounds or More • Slaughter Cattle: Fed Cattle • Slaughter Cattle: Mature Cattle • All Other Cattle • Pigs: Less than 120 Pounds • Hogs: 120 Pounds or More • Lambs and Yearlings
Value Loss Crops	<ul style="list-style-type: none"> • Eligible value loss commodities will be identified in the future.
Specialty Crops	<ul style="list-style-type: none"> <li style="width: 33%;">• Almonds <li style="width: 33%;">• Garlic <li style="width: 33%;">• Peppers – Other <li style="width: 33%;">• Apples <li style="width: 33%;">• Grapefruit <li style="width: 33%;">• Potatoes <li style="width: 33%;">• Artichokes <li style="width: 33%;">• Kiwifruit <li style="width: 33%;">• Raspberries (Caneberries) <li style="width: 33%;">• Asparagus <li style="width: 33%;">• Lemons <li style="width: 33%;">• Rhubarb <li style="width: 33%;">• Avocados <li style="width: 33%;">• Lettuce – Iceberg <li style="width: 33%;">• Spinach (Greens) <li style="width: 33%;">• Beans <li style="width: 33%;">• Lettuce - Romaine <li style="width: 33%;">• Squash <li style="width: 33%;">• Blueberries <li style="width: 33%;">• Mushrooms <li style="width: 33%;">• Strawberries <li style="width: 33%;">• Broccoli <li style="width: 33%;">• Onions – Dry <li style="width: 33%;">• Sweet Corn <li style="width: 33%;">• Cabbage <li style="width: 33%;">• Onions – Green <li style="width: 33%;">• Sweet Potatoes <li style="width: 33%;">• Cantaloupe <li style="width: 33%;">• Oranges <li style="width: 33%;">• Tangerines <li style="width: 33%;">• Carrots <li style="width: 33%;">• Papayas <li style="width: 33%;">• Taro <li style="width: 33%;">• Cauliflower <li style="width: 33%;">• Peaches <li style="width: 33%;">• Tomatoes <li style="width: 33%;">• Celery <li style="width: 33%;">• Pears <li style="width: 33%;">• Walnuts <li style="width: 33%;">• Cucumbers <li style="width: 33%;">• Pecans <li style="width: 33%;">• Watermelon <li style="width: 33%;">• Eggplant <li style="width: 33%;">• Peppers – Bell

Notice CFAP-4

4 CFAP Eligible Commodities and Payments (Continued)

B CFAP Payments

The CFAP payment is:

- available to eligible producers who had or still have an ownership interest in 1 or more of the eligible commodities
- **not** subject to sequestration
- not subject to offset.

The CFAP payment will be determined in 1, 2, and/or 3 payment parts, and a total payment will be calculated based on the combined parts. The total payment amount will be multiplied by a factor of 80 percent after applying payment limitation to determine the actual payment amount. FSA may issue a second payment if funds remain available.

Generally, the initial payment of 80 percent of the calculated total will be issued as a single payment for each producer nationwide; however, subsequent payments may be issued as more data is received from each producer.

Payments will be determined according to the following table.

Commodity Category	CARES Act Funds	CCC Funds
Dairy	For each eligible producer, a payment rate in pounds of milk production including dumped milk for the months of January, February, and March 2020.	For each eligible producer, a payment rate in pounds of milk production including dumped milk for the months of January, February, and March 2020 with an adjustment factor of 1.014.
Non-Specialty Crops and Wool	For each eligible producer and commodity, eligible production will be based on the unsold production on hand on January 15, 2020, not to exceed 50 percent of the total 2019 production for that producer nationwide.	Fifty percent of production determined above will be paid using CCC funds.
	Fifty percent of production determined above will be paid using CARES Act funds.	
Livestock	For each eligible producer, payment is calculated by multiplying the number of livestock sold between January 15 and April 15, 2020, by the payment rate per head. Note: Livestock must have been owned by the producer on January 15, 2020. Any offspring born from that same inventory are eligible.	For each eligible producer, payment is calculated by multiplying the highest livestock inventory between April 16 and May 14, 2020, by the payment rate per head.

Notice CFAP-4

4 CFAP Eligible Commodities and Payments (Continued)

B CFAP Payments (Continued)

Commodity Category	CARES Act Funds	CCC Funds
Value Loss Crops	To be determined.	
Specialty Crops	<p>There are 2 potential subparts to the payment:</p> <ul style="list-style-type: none"> • For specific specialty crops, a payment for each eligible producer will be based on the volume of production sold between January 15, 2020, and April 15, 2020. • A payment for each producer will be based on the volume of production shipped but not sold or for which no payment was received (unpaid) between January 15, 2020, and April 15, 2020. 	<p>For each eligible producer, a payment will be based on the number of acres for which production was destroyed or not harvested due to market between January 15, 2020, and April 15, 2020.</p>

Note: All production, sales, and inventory of eligible commodities and livestock **must be subject to price risk** as of January 15, 2020. Unpriced inventory or production subject to price risk means any production, sales, and inventory that is not subject to an agreed-upon price in the future through a forward contract, agreement, or similar binding document. The producer's eligible commodity and/or livestock must still be at risk of price fluctuations after January 15, 2020, to be eligible for payment.

Notice CFAP-4

5 CFAP Payment Rates and Reporting Requirements

A Dairy

The following table lists the payment rates for CFAP Dairy:

Commodity	Unit of Measure	CARES Act Payment Rate	CCC Payment Rate
Dairy (Milk)	pounds	\$0.0471	\$0.0147

Each dairy operation will certify to milk production for the month of January, February, and March 2020 according to:

- milk commercially marketed for the months of January, February, and March 2020
- dumped milk during the months of January, February, and March 2020
- milk subject to price risk for the months of January, February, and March 2020.

B Non-Specialty Crops and Wool

The following table lists eligible non-specialty commodities and payment rates for CFAP.

Commodity	Unit of Measure	CARES Act Payment Rate	CCC Payment Rate
Barley (malting barley only)	bushel	\$0.34	\$0.37
Canola	pound	\$0.01	\$0.01
Corn	bushel	\$0.32	\$0.35
Upland Cotton	pound	\$0.09	\$0.10
Millet	bushel	\$0.31	\$0.34
Oats	bushel	\$0.15	\$0.17
Sorghum	bushel	\$0.30	\$0.32
Soybeans	bushel	\$0.45	\$0.50
Sunflowers	pound	\$0.02	\$0.02
Wheat, Durum	bushel	\$0.19	\$0.20
Wheat, Hard Red Spring	bushel	\$0.18	\$0.20
Wool (graded, clean basis)	pound	\$0.71	\$0.78
Wool (non-graded, greasy basis)	pound	\$0.36	\$0.39

Each producer will be required to certify, for each eligible commodity, their:

- total production in 2019
- 2019 production subject to price risk and unsold production as of January 15, 2020.

The payment formula is the eligible production multiplied by the applicable payment rate.

Notice CFAP-4

5 CFAP Payment Rates and Reporting Requirements (Continued)

B Non-Specialty Crops and Wool (Continued)

The eligible production is each producer’s 2019 production subject to risk and not sold as of January 15, 2020, not to exceed 50 percent of each producer’s total 2019 production. Fifty percent of the eligible production will be paid using CARES Act funds. The remaining 50 percent of the eligible production will be paid using CCC funds.

Crops used for grazing are ineligible for CFAP. Other eligible crop types and intended uses will be listed in 1-CFAP.

C Livestock

The following table lists eligible livestock and payment rates for CFAP.

Livestock	Eligible Livestock	Unit of Measure	CARES Act Payment Rate	CCC Payment Rate
Cattle	Feeder Cattle: Less Than 600 Pounds	Head	\$102.00	\$33.00
	Feeder Cattle: 600 Pounds or More	Head	\$139.00	\$33.00
	Slaughter Cattle: Fed Cattle	Head	\$214.00	\$33.00
	Slaughter Cattle: Mature Cattle	Head	\$ 92.00	\$33.00
	All Other Cattle	Head	\$102.00	\$33.00
Hogs & Pigs	Pigs: Less Than 120 Pounds	Head	\$ 28.00	\$17.00
	Hogs: 120 Pounds or More	Head	\$ 18.00	\$17.00
Lambs & Yearlings	All Sheep Less Than 2 Years Old	Head	\$ 33.00	\$ 7.00

Each producer will be required to certify, for each eligible livestock, their:

- owned inventory subject to price risk as of January 15, 2020, and any offspring from that inventory, that were sold between January 15 and April 15, 2020, and/or
- highest owned inventory between April 16 and May 14, 2020.

The payment formula is the sum of:

- the number of head sold multiplied by the applicable payment rate (CARES Act funds)
- the number of head in inventory multiplied by the applicable payment rate (CCC funds).

Notice CFAP-4

5 CFAP Payment Rates and Reporting Requirements (Continued)

D Value Loss Crops

No value loss crops have been determined eligible at this time. If a specific type of value loss crop is determined eligible for CFAP, producers will be required to report the value of sales and/or the value of inventory.

E Specialty Crops

The following table lists eligible specialty crops and payment rates for CFAP.

Specialty Crop	CARES Act Payment Rate for Sales (\$/pound)	CARES Act Payment Rate for Delivered and Unpaid (\$/pound)	CCC Payment Rate for Not Delivered (\$/acre)
Almonds	\$0.26	\$0.57	\$237.60
Apples		\$0.18	\$1,125.00
Artichokes	\$0.66	\$0.49	\$1,300.00
Asparagus		\$0.38	\$254.80
Avocados		\$0.14	\$153.60
Beans	\$0.17	\$0.16	\$233.79
Blueberries		\$0.62	\$795.60
Broccoli	\$0.62	\$0.49	\$1,563.00
Cabbage	\$0.04	\$0.07	\$367.30
Cantaloupe		\$0.10	\$478.80
Carrots	\$0.02	\$0.11	\$1,251.40
Cauliflower	\$0.11	\$0.31	\$1,327.20
Celery		\$0.07	\$560.00
Cucumbers	\$0.13	\$0.15	\$444.90
Eggplant	\$0.07	\$0.15	\$412.71
Garlic		\$0.85	\$2,635.00
Grapefruit		\$0.11	\$496.76
Kiwifruit		\$0.32	\$1,404.00
Lemons	\$0.08	\$0.21	\$1,424.00
Lettuce, iceberg	\$0.20	\$0.15	\$1,128.00
Lettuce, romaine	\$0.07	\$0.12	\$623.60
Mushrooms		\$0.59	\$33,109.96
Onions, dry	\$0.01	\$0.05	\$540.10
Onions green		\$0.30	\$1,782.00
Oranges		\$0.14	\$634.83
Papaya		\$0.32	\$1,020.00
Peaches	\$0.08	\$0.32	\$1,099.20
Pears	\$0.08	\$0.18	\$966.00
Pecans	\$0.28	\$0.93	\$116.46

Notice CFAP-4

5 CFAP Payment Rates and Reporting Requirements (Continued)

E Specialty Crops (Continued)

Specialty Crop	CARES Act Payment Rate for Sales (\$/pound)	CARES Act Payment Rate for Delivered and Unpaid (\$/pound)	CCC Payment Rate for Not Delivered (\$/acre)
Peppers, bell type	\$0.14	\$0.22	\$1,267.20
Peppers, other	\$0.15	\$0.22	\$644.80
Potatoes		\$0.04	\$449.00
Raspberries		\$1.45	\$3,780.00
Rhubarb	\$0.15	\$1.03	\$395.83
Spinach	\$0.37	\$0.37	\$1,022.00
Squash	\$0.72	\$0.39	\$2,534.40
Strawberries	\$0.84	\$0.72	\$7,042.00
Sweet corn	\$0.09	\$0.13	\$483.60
Sweet potatoes		\$0.18	\$871.60
Tangerines		\$0.22	\$1,224.88
Taro		\$0.23	\$481.50
Tomatoes	\$0.64	\$0.38	\$6,122.90
Walnut		\$0.45	\$322.20
Watermelon		\$0.02	\$0.00

Each producer will be required to certify, for each eligible commodity, their:

- total volume of production subject to price risk sold between January 15, 2020, and April 15, 2020
- total volume of production subject to price risk shipped (delivered) but not sold (unpaid) between January 15, 2020, and April 15, 2020
- acres left in the field or harvested but not shipped (delivered) between January 15, 2020, and April 15, 2020.

The payment formula is the volume of production subject to price risk or acres multiplied by the applicable payment rate.

The portion of the CFAP payment based on:

- volume of sold or delivered and unpaid production (first two bullets) is paid through CARES Act funds
- acres not delivered are paid through CCC funds.

Notice CFAP-4

6 Outreach Responsibilities

A Monitoring Outreach Efforts

The SED, STC, and COC's will monitor State and county outreach efforts for CFAP in OTIS. Monitoring efforts will help ensure that program information and awareness is communicated to all producers, including underrepresented individuals, groups, and communities. Underrepresented groups and communities may include but are not limited to minority, beginning farmers, and specialty crop producers.

SOC's must:

- work with State Communications Coordinator (CC) and County Office Outreach Coordinators (COOC's) to ensure the availability to apply for CFAP is publicized through GovDelivery, the State's FSA website, radio, newspaper and other applicable broadcast mediums
- partner with stakeholders through the following ways:
 - provide awareness of program requirements, crops included in the program, and the opportunity to submit information through the Federal Register for consideration of commodities not included
 - discuss how stakeholders can help FSA prepare customers to apply for CFAP. Stakeholders can help producers understand:
 - how customers can set up an appointment
 - forms and documentation needed for program participation
 - expectations for the first FSA meeting
 - provide CFAP materials to partner organizations who work with local producers, including underserved producers which includes ethnic minorities, women, beginning and specialty crop producers.

Notice CFAP-4

6 Outreach Responsibilities (Continued)

A Monitoring Outreach Efforts (Continued)

- ensure County Offices have the Telephonic Language Interpretation Service to reach an interpreter when applicable:
 - Step 1. Dial 888-331-0185 – This service is available 24 hours a day.
 - Step 2. When the operator answers, the employee will provide the following information:
 - Language requested
 - Agency: (FSA)
 - State.
 - Once this information is provided, the operator will promptly connect you with an interpreter.
- to request Document Translation Service, employees should contact the agency's limited English proficiency (LEP) representative in the Farm Production and Conservation (FPAC) Business Center Charles A. Russell II by either of the following:
 - email to Charles.Russell@wdc.usda.gov
 - telephone at 202-720-9413.
- coordinate with COOC's to ensure informational calls and/or virtual meetings regarding the program are conducted and program information is disseminated.
- ensure all county and State outreach efforts are recorded in the Outreach Tracking Information System (OTIS) timely to monitor outreach efforts in real time. Outreach activities should be categorized as "Other", and "CFAP" should be manually entered.

Notice CFAP-4

6 Outreach Responsibilities (Continued)

B County Office Outreach Requirements

CED's and COOC's **must**:

- provide and educate producers with box client user guide to process applications
- provide CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, as an optional form for producers to complete for FSA's records to capture applicable information on new program participants
- educate local groups, associations, organizations, and cooperatives on program provisions by emailing or mailing CFAP materials
- educate local groups, associations, organizations, and cooperatives on program provisions by explaining CFAP program requirements during calls and or webinars with local groups and producers
- ensure outreach efforts are entered and recorded in OTIS timely. Outreach activities should be categorized as "Other", and "CFAP" should be manually entered.

7 Action

A State Office Action

State Offices **will**:

- ensure County Offices are aware of the contents of this notice
- complete outreach efforts according to subparagraph 6 A
- provide additional assistance and/or resources that County Offices may need to prepare for CFAP signup.

B County Office Action

County Offices **must**:

- review this notice in advance of CFAP sign-up
- complete outreach efforts according to subparagraph 6 B.

Example of AD-3114

The following is an example of AD-3114.

This form is available electronically. Form Approved - OMB No. 0560-0295
OMB Expiration Date: 11/30/2020

AD-3114 (05-19-20)	1. Recording State 2. Program Year
U.S. DEPARTMENT OF AGRICULTURE CORONAVIRUS FOOD ASSISTANCE PROGRAM (CFAP) APPLICATION	3. Recording County 4. Application Number

NOTE: The following statement is made in accordance with the Privacy Act of 1974 (5 USC 552a -- as amended). The authority for requesting the information identified on this form is 7 CFR Part 9, the CARES Act (Pub. L. 116-163), and 15 U.S.C. 714e and 714c. The information will be used to determine eligibility for program benefits. The information collected on this form may be disclosed to other Federal, State, and Local government agencies, Tribal agencies, and non-governmental entities that have been authorized access to the information by statute or regulation and/or as described in applicable Routine Uses identified in the System of Records Notice for USDA/FSA-2, Farm Records File (Automated). Providing the requested information is voluntary. However, failure to furnish the requested information will result in a determination of ineligibility for program benefits. Payments may be made under the program to which the form applies only to the extent permitted by applicable authorities.

Public Burden Statement (Paperwork Reduction Act): Public reporting burden for this collection is estimated to average 60 minutes per response, including reviewing instructions, gathering and maintaining the data needed, completing (providing the information), and reviewing the collection of information. You are not required to respond to the collection of information unless it displays a valid OMB control number. RETURN THIS COMPLETED FORM TO YOUR COUNTY FSA OFFICE.

PART A PRODUCER AGREEMENT

The Department of Agriculture (USDA) will make payments under the CFAP to producers who meet the requirements of the program. The following information is needed in order for USDA to make a determination that the applicant is eligible to receive a CFAP payment. By submitting this application, and upon approval by USDA, the applicant agrees:

- To comply with regulations set forth in 7 CFR Part 9 and any Notice of Funds Availability published by USDA. Copies of these documents may be found at www.regulations.gov/docId=FSA-2020-0004.
- That a CFAP payment will only be made with respect to a commodity produced in the United States and intended to be marketed for commercial production; Any production/sales/inventory eligible for payment must be subject to price risk.
- To provide to USDA all information that is necessary to verify that the information provided on this form is accurate and to allow USDA representative access to all documents and records of the producer, including those in the possession of a third-party such as a warehouse operator, processor or packer;
- To comply with maximum payment limitation and adjusted gross income provisions applicable to the CFAP by completing forms:
 - CCC-902, Farm Operating Plan for Payment Eligibility (NOTE: Only Parts A and B of the form are required).
 - CCC-901, Member Information for Legal Entities, if applicable
 - CCC-941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information
 - CCC-942, Certification of Income From Farming, Ranching and Forestry Operations, optional
- To provide to USDA all information required for program participation within 60 days from the date the applicant signs this application. Failure of an individual, entity, or member of an entity to timely submit all information required may result in no payment or a reduced payment.
- To comply with the provisions of the Food Security Act of 1985 that protect highly erodible land and wetlands. All applicants must complete and submit all portions of form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification unless:
 - The applicant does not participate in USDA benefits subject to HELC and WC compliance except Federal Crop Insurance or CFAP, and
 - The applicant only has an interest in land devoted to the production of agricultural commodities that are perennial crops, excluding sugar cane, such as tree fruits, tree nuts, grapes, olives, native pasture and perennial forage. If the applicant produces alfalfa, the applicant must contact the Natural Resources Conservation Service to determine if such production qualifies as the production of a perennial crop; and
 - The applicant has not converted a wetland after December 23, 1985; or
- The applicant does not own or rent land devoted to an agricultural activity including cropland, rangeland, pastureland or forestland;
 - The applicant is a producer of livestock, nursery crops, honey or similar commodity that is not produced from tillage of land
- If the applicant meets either the conditions in section 7A (certification with box 5 B on AD-1026) or 7B (certification with box 5 A on AD-1026), the applicant is only required to complete Parts A and D of form AD-1026.

PART B PRODUCER INFORMATION

5. Producer's Name and Address (City, State and Zip Code)

PART C DAIRY PRODUCTION INFORMATION				COC USE ONLY		
6. Unit of Measure	7. January 2020 Production	8. February 2020 Production	9. March 2020 Production	10. COC Adjusted Jan 2020 Production	11. COC Adjusted Feb 2020 Production	12. COC Adjusted March 2020 Production
LBS						

PART D NON SPECIALTY CROP AND WOOL INFORMATION				COC USE ONLY	
13. Commodity	14. Unit of Measure	15. 2019 Total Production	16. 2019 Production Not Sold (as of Jan 15, 2020)	17. COC Adjusted 2019 Total Production	18. COC Adjusted 2019 Production Not Sold (as of Jan 15, 2020)

Example of AD-3114 (Continued)

AD-3114 (05-19-20)					Page 2 of 2		
PART E LIVESTOCK INFORMATION					COC USE ONLY		
19. Livestock	20. Unit of Measure	21. Jan 15, 2020 - April 15, 2020 Sales of Owned Inventory as of Jan 15, 2020 & Any Offspring From Owned Inventory	22. Inventory (Highest Between April 16, 2020 - May 14, 2020)	23. COC Adjusted Jan 15, 2020 - April 15, 2020 Sales of Owned Inventory as of Jan 15, 2020 & Any Offspring From Owned Inventory	24. COC Adjusted Inventory		
PART F VALUE LOSS INFORMATION				COC USE ONLY			
25. Commodity	26. Value of Sales (Jan 15, 2020 - April 15, 2020)	27. Value of Inventory (as of April 15, 2020)	28. COC Adjusted Value of Sales (Jan 15, 2020 - April 15, 2020)	29. COC Adjusted Value of Inventory (as of April 15, 2020)			
PART G SPECIALTY CROP INFORMATION (COC DETERMINATION NOT REQUIRED)					AMS USE ONLY		
30. Crop	31. Unit of Measure	32. Volume of Production Sold (Jan 15, 2020 - April 15, 2020)	33. Volume of Production Shipped but Not Sold and Unpaid (Jan 15, 2020 - April 15, 2020)	34. Acres with Production Not Shipped or Sold (Jan 15, 2020 - April 15, 2020)	35. AMS Adjusted Volume of Production Sold (Jan 15, 2020 - April 15, 2020)	36. AMS Adjusted Volume of Production Shipped but Not Sold and Unpaid (Jan 15, 2020 - April 15, 2020)	37. AMS Adjusted Acres with Production Not Shipped or Sold (Jan 15, 2020 - April 15, 2020)
PART H INCREASED PAYMENT LIMITATION FOR CORPORATIONS, LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS							
38. Applicants who are Corporations, Limited Liability Companies, and Limited Partnerships may seek an increase in the per-person payment limitation from \$250,000 to either \$500,000, if such entity has two members, partners, or stockholders who each provided at least 400 hours or more of personal labor or active personal management, or combination thereof, to the farming operation as defined in 7 CFR Part 1400, or a maximum of \$750,000 if such entity has three members, partners, or stockholders who each provided at least 400 hours or more of personal labor or active personal management, or combination thereof, to the farming operation as defined in 7 CFR Part 1400. Identify the names of members, partners, or stockholders who provided at least 400 hours of active personal labor or active personal management, or combination thereof, to the farming operation identified in Part B Item 5:							
A.			B.			C.	
PART I PRODUCER CERTIFICATION							
<i>I hereby sign and acknowledge under penalty of perjury in accordance with 28 U.S.C. § 1746 and 18 U.S.C. § 1621 that the foregoing is true and correct.</i>							
39A. Signature (By)			39B. Title/Relationship of the Individual Signing in the Representative Capacity			39C. Date (MM/DD/YYYY)	
PART J COC DETERMINATION							
40. Payment Part	41. COC or Designee Signature			42. Date (MM/DD/YYYY)	43. Determination		
CARES					APPROVED	DISAPPROVED	
CCC					APPROVED	DISAPPROVED	
<small>In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its agencies, offices, and employees participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.</small>							
<small>Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.</small>							
<small>To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at http://www.asc.usda.gov/complaint_filing_cust.html and at any USDA office or write a letter addressed to USDA and provide all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9892. Submit your completed form or letter to USDA by (1) mail, U.S. Department of Agriculture Office of the Assistant Secretary for Civil Rights 1400 Independence Avenue, SW Washington, D.C. 20260-0410, (2) fax, (202) 690-7442; or (3) email, program.intake@usda.gov. USDA is an equal opportunity provider, employer, and lender.</small>							

Final Agency Determination: FAD-279

Subject: Two requests dated March 6, 2018, and March 21, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2018 crop year regarding the interpretation of section 20(a)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

Background:

Section 20 of the Basic Provisions states, in relevant part:

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(b) Regardless of whether mediation is elected:

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

7 C.F.R. § 400.765 states, in relevant part:

(b) Requesters may seek interpretations of those provisions of the Act and the regulations promulgated thereunder that are in effect for the crop year in which the request under this subpart is being made and the three previous crop years.

Interpretation Submitted

Two interpretations were submitted in this FAD request:

First requestor's interpretation:

The first requestor interprets section 20(a)(1) of the Basic Provisions as requiring an interpretation from FCIC if the dispute in any way involves a policy or procedure interpretation. 7 C.F.R. § 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. This creates a situation where an arbitrator is prohibited from ruling on a situation that requires a policy or procedure interpretation when the policy or procedure in question is outside of the scope of 7 C.F.R. § 400.765(b). If the arbitrator were to make an interpretation regarding the provisions in this situation, the award would be nullified pursuant to section 20(a)(1)(ii); however, the parties could not obtain an interpretation from the Federal Crop Insurance Corporation (FCIC) and the arbitration cannot proceed without an interpretation. Arbitration is thereby rendered impossible.

The first requestor states section 20(a)(1) of the Basic Provisions and 7 C.F.R. § 400.765(b) as prohibiting arbitration in the situation above. The arbitrator lacks authority to interpret the policy pursuant to section 20(a)(1) of the Basic Provisions. FCIC lacks the authority to interpret the policy pursuant to 7 C.F.R. § 400.765(b). Because neither the arbitrator nor FCIC is allowed to interpret the policy, arbitration is impossible, and thus ceases to be an option. The sole remaining avenue for resolving the dispute is judicial review pursuant to section 20(b)(2) of the Basic Provisions.

Second requestor's interpretation:

The second requestor seeks an interpretation of the policy language discussing when a final agency determination is necessary. The second requestor states that if an interpretation is over three years prior to the current crop year, no interpretation from FCIC can be sought.

In the event that an interpretation can be given, the second requestor states section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented.

Final Agency Determination

The Federal Crop Insurance Corporation (FCIC) agrees with both requesters that section 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. If the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b), FCIC cannot provide an interpretation of this policy provision.

However, to the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, the arbitrator can look through the archives to see whether an interpretation was previously provided. If not, any party can request an interpretation of the provision in the current year and that same interpretation can be applied to such other crop year provided that the language of the provisions is identical. Therefore, to the extent that policy language is the same, interpretations made for one year may apply to numerous years, regardless of whether or not this falls outside of the three-year period. For example, in 2018, a person can request an interpretation for policy language in effect for the 2018, 2017, 2016, or 2015 year. If the policy language was unchanged from 2013 through 2015, an interpretation could be requested for the 2015 year and the interpretation would apply for the 2013 year.

If there is a dispute of an interpretation over any policy or procedural provision, the parties are required to seek a Final Agency Determination or interpretation of procedure from FCIC. FCIC agrees with the first requestor that failure to obtain the required interpretation from FCIC, or an arbitrator disregarding an interpretation provided by FCIC, will result in nullification of any award.

In the event of a dispute, section 20(b)(3) of the Basic Provisions requires filing of a request for mediation, arbitration or litigation within one year of the determination by the approved insurance provider. The current time limit is set to allow an additional two years to pass before an interpretation must be requested to permit time for the appeals process to proceed. Most proceedings initiated within one-year of a determination that is in dispute would be readily able to request an interpretation within the timeframes established by this regulation. FCIC has yet to find the situation to exist where a Final Agency Determination or interpretation of procedure from FCIC has not been able to be requested nor a determination be given because the request of the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b). Therefore, given the timeline for timely mediation, arbitration, or litigation, the current crop year and three previous crop years is sufficient.

FCIC does not agree with the first requestor that if the parties are unable to resolve a disagreement through arbitration, the dispute may be resolved through judicial review pursuant to section 20(b)(2) of the Basic Provisions. As supported by FAD-193, published on RMA's website on October 21, 2013, an approved insurance provider or policyholder must complete the arbitration process before seeking resolution of a dispute through judicial

review. Therefore, if arbitration has not been completed, judicial review may not be sought. Because previously published FADs are generally applicable and may be used in an arbitration, completion of an arbitration hearing is not based solely on whether an interpretation from FCIC may be sought and received for a particular arbitration. In the case that an interpretation from FCIC may not be sought as it is outside of the time frame for which an interpretation may be requested (current crop year in effect on the date the request is submitted and the three previous crop years) the filing of a request for the particular arbitration must be examined to see if the filing requirements have been met in accordance with section 20(b)(3) of the Basic Provisions.

FCIC agrees in part with the second requestor's interpretation that section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or Federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented. FAD-225, published on RMA's website on February 4, 2015, explains if there is a dispute over any policy provision or procedure, the parties are required to seek an interpretation from FCIC in accordance with section 20(a)(1)(i) of the Basic Provisions. Claims and damages outside of the crop insurance contract between the approved insurance provider and the policyholder are not necessarily a dispute over any policy provision or procedure, but it is possible that even in an extra-contractual claim there is a dispute over an interpretation of provision of a Federal crop insurance policy or FCIC issued procedures. In these cases, an interpretation from FCIC must be obtained.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

Date of Issue: June 5, 2018

Final Agency Determination: FAD-280

Subject: Two requests dated June 28, 2018, and July 17, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2015 crop year regarding the interpretation of section 20(b)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

Background:

Section 20 of the Basic Provisions states, in relevant part:

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

Interpretations Submitted

Two interpretations were submitted in this FAD request:

First requestor's interpretation:

The first requestor interprets section 20(b)(1) to permit equitable tolling, until the time of discovery of the claim, where the policyholder's claim has been improperly and erroneously adjusted without fault of the policyholder, the policyholder has relied on the loss adjuster's (false) representation that the claim was adjusted properly and correctly, and subsequently the policyholder discovers that the claim was improperly and incorrectly adjusted. The arbitration period would not be tolled as to every aspect of the policyholder's claim, but only as to the improper and incorrect adjustment, falsely represented by the adjuster as proper and correct.

Under these circumstances—improper and incorrect claims adjustment based on the loss adjuster's failure to comply with the LAM or LASH, the policyholder's reliance on the loss adjuster's false representation that the claim had been adjusted properly and correctly, and discovery by the policyholder of the improper and incorrect claim adjustment more than one year after payment of the incorrect indemnity—compliance with the one-year limitations period is impossible unless the period is equitably tolled until the policyholder's discovery.

The first requestor is aware of the Merrill line of cases, which stand for the

proposition that a policyholder may not rely on an agent's representations about the explicit terms of the insurance policy, when those representations directly contradict the explicit terms of the policy. This is so because the policyholder is charged with the knowledge of the policy provisions; therefore, equitable estoppel does not apply. The facts of this request are fundamentally different because the false representations of the claims adjuster were based upon claims adjusting procedures—the LAM and the LASH—which the policyholder is not deemed to know. Producers are not loss adjusters, and they are not held legally responsible for knowing the particulars of loss adjustment procedures. Thus, if a loss adjuster represents that, in his professional judgment, a policyholder's claim has been adjusted properly and accurately, the policyholder is entitled to rely on that representation. If the policyholder subsequently learns that the loss adjuster's representation was false, whether intentionally so or not, the policyholder is entitled to initiate arbitration, but only if that arbitration is initiated within one year of the policyholder's learning that the loss adjuster's representation was erroneous. Furthermore, the scope of that arbitration is limited to the claims adjustment. The one-year arbitration period is tolled for the period during which the falsity of the approved insurance provider's misrepresentation was concealed from, or was otherwise unknown to, the policyholder.

If section 20(b)(1) were to be interpreted otherwise, the policyholder, by no fault of his own, would be barred from his sole remedy, given that the approved insurance provider asserts that it is under no obligation to correct erroneously adjusted claims when an underpayment has resulted. If the arbitration period may not be tolled in situations like this, then policyholders would be strongly disincentivized from ever reviewing past claims, even when they have actual knowledge that policyholders have been defrauded. Even if such reviews were conducted, and an underpayment was identified, approved insurance providers would have every incentive not to notify the policyholder of that underpayment until over one year had passed since the incorrect payment. If the approved insurance provider waited to inform the policyholder, it would be certain that the policyholder would have no remedy to recover the proper amount of indemnity owed under the policy. The policyholder would be completely at the mercy of the approved insurance provider.

Second requestor's interpretation:

The second requestor seeks interpretation of the policy language setting the period of time within which a policyholder can initiate an arbitration action to challenge a determination made by an approved insurance provider. The plain language of the policy provides for a period of one year from the date of the payment or determination challenged to initiate arbitration proceedings.

The first requestor proposes an interpretation that equitable principals such as laches, waiver, or estoppel can be used to limit or modify the terms of the insurance policy such that the limitations provision does not apply if the policyholder can establish by a preponderance of evidence that it did not know an error was made in the adjustment process due to an act of

misrepresentation of active concealment by a loss adjuster while adjusting a claim.

The second requestor contends that all information needed to verify the accuracy of the claim is available to a policyholder, such as the yield, the guarantee, and the number of acres, such that the policyholder can verify the amount of indemnity owed by the approved insurance provider, either independently or by consulting the policyholder's agent, at the time the payment is made and the policyholder must act to protect his or her interests and to verify the amount of the claim at the time the payment or determination is made. Further, the one-year limitations period is meaningless if the policyholder can defeat its application by alleging misrepresentation or other equitable claims to formulate a basis to toll the limitations period.

The second requestor further contends the RMA has already determined in FAD-211 that:

The policy is codified in the Code of Federal Regulations and has the force of law. Therefore, no one has the authority to waive or modify the provisions except as authorized in the regulations themselves. In accordance with section 506(l) of the Federal Crop Insurance Act (Act) (7 U.S.C. §1506(l)) state and local laws are preempted to the extent that they are in conflict with the Act, regulations or contracts of FCIC. A vast majority of the policy provisions, including the preamble to the policy, are codified in regulation so they preempt state and local laws.

FAD-211 prevents modification of the terms of the policy by equitable principals. Its precedential relevance should be acknowledged in this instance and the first requestor's interpretation should be rejected.

The second requestor also notes that the policyholder may not be without remedy under the proposed interpretation because case law acknowledges that state law-based claims may exist against the approved insurance provider outside of the insurance contract. While the limitations provision found in the Basic Provisions may require dismissal of the contractual indemnity claims brought in an arbitration proceeding, state law claims may proceed in the judicial system if there is sufficient factual basis to support the claims as required by the individual states.

Based upon the language of the policy, the second requestor proposes the following interpretation:

The one-year limitations provision prevents a policyholder from bringing a claim based upon the policy more than one year after the claim payment or the determination which is being challenged. The policyholder cannot defeat the application of the limitations provision by pleading equitable claims or defenses to its application because the policy terms cannot be waived or modified through the application of equitable principals. The policy provision itself provides no exception to its application and none can be created by equitable principals. This interpretation does not prevent the pursuit of state law-based claims in courts; however, an arbitration proceeding for

contractual damages brought more than one year after final claim payment or the determination challenged must be dismissed by the arbitrator as untimely.

Final Agency Determination

The Federal Crop Insurance Corporation (FCIC) agrees with the second requestor that the one-year limitations provision prevents a policyholder from bringing an arbitration action or seek judicial review under the terms of the policy more than one year after the claim payment or the determination which is being challenged. The determination of the amount of indemnity due is a determination for the purposes of section 20(a) of the Basic Provisions. This means that the policyholder is required to file for arbitration to resolve any disputes regarding the indemnity payment prior to seeking judicial review. Under section 20(b) of the Basic Provisions, the policyholder must file for arbitration within the one-year time period for appeal. If the one-year term has expired, the producer is precluded from seeking arbitration or judicial review of any contract claims.

FCIC agrees in part with the second requestor's interpretation regarding the availability of non-contractual claims under state law. As previously provided in FAD-240, any claim for extra-contractual damages relating to a policy authorized under the Federal Crop Insurance Act (Act) may only be awarded if a determination is obtained from FCIC in accordance with section 20(i) of the Basic Provisions and 7 C.F.R. § 400.176(b). The provisions contained in 7 C.F.R. § 400.176(b), and the equivalent language in section 20(i) of the Basic Provisions, preempts any state law claims that are in conflict. That means that to 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 that is less than the amount to which the insured was entitled. Therefore, this means that state law claims may be possible but recovery of extra-contractual damages is limited and the determination from FCIC must first be obtained.

In accordance with 7 C.F.R. § 400.765 (c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

Date of Issue: September 18, 2018

Final Agency Determination: FAD-281

Subject: Two requests dated June 28, 2018, and July 17, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2015 crop year regarding the interpretation of section 3(g)(4) and section 14 of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

Background:

Section 3(g)(4) of the Basic Provisions states, in relevant part:

3. Insurance Guarantees, Coverage Levels, and Prices.

(g) It is your responsibility to accurately report all information that is used to determine your approved yield.

(4) At any time we discover you have misreported any material information used to determine your approved yield or your approved yield is not correct, the following actions will be taken, as applicable:

- (i) We will correct your approved yield for the crop year such information is not correct, and all subsequent crop years;
- (ii) We will correct the unit structure, if necessary;
- (iii) Any overpaid or underpaid indemnity or premium must be repaid; and
- (iv) You will be subject to the provisions regarding misreporting contained in section 6(g)(1), unless the incorrect information was the result of our error or the error of someone from USDA.

14. Section 14 Duties in the Event of Damage, Loss, Abandonment, Destruction, or Alternative Use of Crop or Acreage.

Our Duties:

(i) We recognize and apply the loss adjustment procedures established or approved by the Federal Crop Insurance Corporation.

Interpretations Submitted

Two interpretations were submitted in this FAD request:

First requestor's interpretation:

The first requestor interprets sections 3(g)(4) and 14(i) of the Basic Provisions, along with Para. 1262 of the 2014 Crop Insurance Handbook (CIH), as creating a duty on the part of the Approved Insurance Provider (AIP) to correct claims that the AIP discovers were incorrectly adjusted. This correction may be made "[a]t any time," including a subsequent crop year. The first requestor believes that the policy provisions and procedures also impose a duty on the AIP to repay an underpaid indemnity or to refund an overpaid premium.

First requestor believes FCIC addressed a similar issue in FAD-140 and provides the following excerpts from that FAD:

Any time there has been a non-compliance with approved policy and procedure, the situation must be corrected to comply with approved policy and procedure.

Since incorrect application of approved policy or procedure must be corrected, this means the AIP may issue a new summary of coverage to the policyholder and base premiums charged and any loss payments on the corrected information.

The first requestor believes that FAD-140 interpreted the policy as placing a duty on the AIP to correct errors when non-compliance with approved policy and procedure occurred and that this also encompasses correction of erroneous claims adjustment.

Second requestor's interpretation:

The second requestor interprets Section 3(g)(4) of the Basic Provisions as providing the requirements for an AIP to correct policy information when an insured misstates information used to calculate the insured's approved yield. Additionally, that this policy provision does not discuss an insurer's obligation, or ability, to correct an error made in the adjustment of a claim.

The second requestor believes there is a process employed by AIPs to correct errors made in the adjustment of claims. If the insured wishes to avoid arbitration, it has one year within which to bring the error to the attention of the AIP and to request an AIP to change any determination made. If the error is not willingly and voluntarily corrected, the insured may initiate arbitration proceedings within one year of the determination being made. If the insured fails to do so, further claims are barred by the limitations provision in Section 20 of the Basic Provisions and must be dismissed by the arbitrator as untimely under the policy.

Final Agency Determination

The Federal Crop Insurance Corporation (FCIC) agrees with second requestor and agrees in part with the first requestor. FCIC does not agree with first requestor that Section 3(g)(4) and 14(i) of the Basic Provisions along with Para. 1262 of the 2014 CIH creates a duty on part of the AIP to correct claims that the AIP discovers were incorrectly adjusted. Section 3(g)(4) of the Basic Provisions and Para. 1262 of the CIH are specific to an error in the insured's approved yield the AIP has identified and must be

corrected. Section 3(g)(4) and CIH Para. 1262 do not address errors made in adjusting a claim.

However, that does not mean that the AIP does not have a duty to correct claims. The Federal crop insurance program uses taxpayer dollars and FCIC and AIPs have a duty to ensure those taxpayer dollars are paid in accordance with policy and procedures. As a result, FCIC agrees in part with the second requestor. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Circuit 1991).

However, regardless of when a claim was first paid or denied, if the AIP later revises the claim because it discovered that policy and procedures were not followed, then this becomes a new determination and the producer has one year to seek arbitration from the date of such determination if the producer does not agree with the changes. Arbitration must be sought within this deadline before any judicial review may be sought.

FCIC agrees with the first requestor that in FAD-140 AIPs must correct errors when non-compliance with approved policy and procedure have occurred. If the AIP determines a claim has not been adjusted according to loss adjustment procedures established or approved by FCIC the claim must be corrected.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

Date of Issue: September 20, 2018

943 F.3d 1134

United States Court of Appeals, Eighth Circuit.

Terry R. BALVIN Plaintiff - Appellee

v.

RAIN AND HAIL, LLC Defendant - Appellant

Terry R. Balvin Plaintiff - Appellant

v.

Rain and Hail, LLC Defendant - Appellee

No. 18-3018, No. 18-3061

|

Submitted: October 16, 2019

|

Filed: December 2, 2019

|

Rehearing and Rehearing En

Banc Denied February 6, 2020 *

Synopsis

Background: Insured farmer moved to vacate arbitration award denying his claim for losses on his corn crop under multiple peril crop insurance policy, federally reinsured pursuant to the Federal Crop Insurance Act (FCIA). The United States District Court for the District of South Dakota, Lawrence L. Piersol, Senior District Judge, 336 F.Supp.3d 1008, granted the motion, in part, and denied the motion, in part. Parties filed cross appeals.

[Holding:] The Court of Appeals, Gruender, Circuit Judge, held that arbitrator did not exceed his authority by denying claim for losses on corn crop.

Affirmed in part, reversed in part, and remanded with instructions.

Procedural Posture(s): On Appeal; Application to Vacate Arbitration Award.

West Headnotes (10)

[1] Insurance - Federal Agencies and Regulation

Insurance - Government Sponsored Programs

The Federal Crop Insurance Corporation (FCIC) reinsures crop insurance policies and is supervised by the Risk Management Agency (RMA) of the United States Department of Agriculture. 7 U.S.C.A. § 6933.

[2] Insurance - Government Sponsored Programs

To qualify for crop reinsurance, crop insurers must comply with the Federal Crop Insurance Act (FCIA) and Federal Crop Insurance Corporation (FCIC) regulations. 7 U.S.C.A. § 6933; 7 C.F.R. § 457.8.

[3] Insurance - Government Sponsored Programs

Insurance - Formal Requisites

Though a crop insurance policy is a contract between a farmer and an insurance provider, the Federal Crop Insurance Corporation (FCIC) determines the terms and conditions of federal crop insurance policies. 7 U.S.C.A. § 6933; 7 C.F.R. § 457.8.

[4] Alternative Dispute Resolution - Questions of law or fact

The Court of Appeals reviews de novo the district court's legal conclusions on a motion to vacate an arbitration award, and reviews the district court's findings of fact for clear error.

[5] Alternative Dispute Resolution - Scope of inquiry in general

A court deciding a motion to vacate an arbitration award accords an extraordinary level of deference to the underlying award.

[6] Alternative Dispute Resolution - Consistency and reasonableness; lack of evidence

It is only when an arbitrator strays from interpretation and application of the arbitration agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. [9 U.S.C.A. § 10\(a\)\(4\)](#).


[7] Alternative Dispute Resolution  Error of judgment or mistake of law

Alternative Dispute Resolution  Mistake of fact and miscalculation


An arbitrator does not exceed his powers, as may support vacatur of the arbitration award, by making an error of law or fact, even a serious one.

[9 U.S.C.A. § 10\(a\)\(4\)](#).

[8] Alternative Dispute Resolution  Actions exceeding arbitrator's authority

Alternative Dispute Resolution  Consistency and reasonableness; lack of evidence

So long as the arbitrator is even arguably construing or applying the relevant contract and acting within the scope of his authority, the arbitration award should be confirmed.

[9] Insurance  Subjects and scope of determination, in general

Arbitrator did not exceed his authority by denying insured farmer's claim for losses on his corn crop, under multiple peril crop insurance policy, federally reinsured pursuant to the Federal Crop Insurance Act (FCIA), based on finding that the appraised value of his crops exceeded policy's guaranteed minimum crop production; although the policy provided that interpretations of the policy terms had to be obtained from Federal Crop Insurance Corporation (FCIC) and arbitrator did not seek determination from FCIC as to meaning of "appraised value" in the policy, arbitrator did not interpret meaning of "appraised value" in making denial determination, and neither party argued during arbitration that arbitrator was required to make that interpretation. [7 U.S.C.A.](#)

[§ 6933](#); [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 400.766\(b\)\(4\), 457.8](#).

[10] Alternative Dispute Resolution  Arbitrability of dispute

When an arbitration agreement incorporates American Arbitration Association (AAA) rules, the parties agree to allow the arbitrator to determine threshold questions of arbitrability.

***1135** Appeal from United States District Court for the District of South Dakota - Sioux Falls

Attorneys and Law Firms

[J. Grant Ballard](#), ARK AG LAW, Little Rock, AR, for Plaintiff-Appellee.

[William Fuller](#), [Derek A. Nelsen](#), FULLER & WILLIAMSON, Sioux Falls, SD, for Defendant-Appellant.

Before [SMITH](#), Chief Judge, [GRUENDER](#) and [BENTON](#), Circuit Judges.

Opinion

[GRUENDER](#), Circuit Judge.

Rain and Hail, LLC appeals the district court's order vacating an arbitration award, arguing that the district court did not properly defer to the arbitrator's decision. Claiming that the district court should have vacated the arbitration award for additional reasons, Terry Balvin cross appeals. We affirm in part, reverse in part, and remand to the district court to enter an order confirming the arbitration award.

[1] [2] [3] Rain and Hail issues federal crop insurance policies through a Standard Reinsurance Agreement with the Federal Crop Insurance Corporation ("FCIC"). The FCIC reinsures crop insurance policies and is supervised by the Risk Management Agency ("RMA") of the United States Department of Agriculture. See ***1136** *Davis v. Producers Agric. Ins. Co.*, 762 F.3d 1276, 1284-85 (11th Cir. 2014); [7 U.S.C. § 6933](#). To qualify for the reinsurance, insurers must comply with the Federal Crop Insurance Act ("FCIA") and FCIC regulations. *Davis*, 762 F.3d at 1284. Though the policy

is a contract between a farmer and an insurance provider, the FCIC determines the terms and conditions of federal crop insurance policies. See *id.* at 1284-85; 7 C.F.R. § 457.8.

Rain and Hail issued a crop insurance policy to Balvin, a South Dakota farmer, in 2015. Balvin filed a claim under the policy later that year. He claimed he could not timely harvest his crop due to moisture, a severe blizzard, and large snowfall. Rain and Hail determined that the appraised value of Balvin's crop exceeded his policy's guaranteed minimum crop production and denied his claim as a "non-loss."

Balvin initiated arbitration proceedings in accordance with the terms of the policy, and the arbitrator denied his claim. Balvin filed a motion to vacate the arbitration award in the United States District Court for the District of South Dakota. Rain and Hail filed a motion to confirm the arbitration award. The district court denied in part and granted in part Balvin's motion and denied in part and granted in part Rain and Hail's motion. Rain and Hail appeals, arguing that the arbitrator did not exceed his powers by interpreting a policy or procedure. Balvin cross appeals, arguing that the arbitration decision should be vacated for an additional reason—the arbitrator exceeded his powers by determining Balvin abandoned his crop.

[4] [5] We review *de novo* the district court's legal conclusions, and we review its findings of fact for clear error. See *Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 897 (8th Cir. 2018); *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001). We "accord an extraordinary level of deference to the underlying award." *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6*, 794 F.3d 1020, 1027 (8th Cir. 2015) (internal quotation marks omitted).


[6] [7] [8] The Federal Arbitration Act specifies when a district court may vacate an arbitration award. As relevant here, a district court may vacate the award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (brackets and internal quotation marks omitted). "An

arbitrator does not 'exceed his powers' by making an error of law or fact, even a serious one." *Beumer Corp. v. ProEnergy Servs., LLC*, 899 F.3d 564, 565 (8th Cir. 2018). "[S]o long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the award should be confirmed." *Id.* (internal quotation marks omitted).

Rain and Hail argues that, contrary to the district court's decision, the arbitrator did not exceed his powers by interpreting a policy or procedure when he concluded that the appraised value of Balvin's crop should be used to determine whether Balvin had an insured loss, resulting in a denial of Balvin's claim. The crop insurance policy states that the arbitrator cannot interpret the policy or FCIC procedures: "[I]f the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any *1137 policy provision or procedure, either [Balvin] or [Rain and Hail] must obtain an interpretation from FCIC" It further provides that "[f]ailure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award."


Balvin claims, and Rain and Hail agrees, that FCIC handbooks require a production worksheet and a signed appraisal worksheet when an appraisal is performed and that Rain and Hail did not complete a production worksheet nor was the appraisal worksheet signed when Rain and Hail appraised Balvin's crop. Balvin thus argued before the district court that the arbitrator "exceeded his authority" because the arbitrator's determination required that he interpret the policy term "appraised value." The district court agreed, observing that the parties do not point to an "applicable procedure for determining appraised value when a Production Worksheet is not done and Appraisal Worksheets are not signed." It therefore concluded that the arbitrator exceeded his powers because Balvin's argument about appraised value "is precisely the type of dispute regarding the application of policy and procedure that needed to be submitted to the FCIC for interpretation."

[9] [10] On appeal, Rain and Hail argues that the arbitrator did not exceed his authority because he "reasonably concluded that the dispute over the corn appraisals completed by Rain and Hail was an evidentiary or factual dispute within his authority to resolve." Balvin, on the other hand, argues that whether the appraisal dispute involves an interpretation is a threshold arbitrability question for a court to decide. But 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.”  [Green v. SuperShuttle Int’l, Inc.](#), 653 F.3d 766, 769 (8th Cir. 2011). Thus, the arbitrator was free to determine any threshold arbitrability questions to the extent they were at issue.

After reviewing Balvin’s briefing and the arbitrator’s decision, we conclude that the arbitrator did not exceed his powers because the dispute about the interpretation of “appraised value” was not even before the arbitrator. Balvin argued to the arbitrator that the appraisals were irrelevant and inaccurate. Though Balvin did point out that the appraisals were not signed and were incomplete, he did not argue that this required the arbitrator to interpret the policy term “appraised value,” and Balvin acknowledged that “[t]he hearing officer in [his] arbitration [would] need to decide whether to allow the appraisals to dictate the adjustment of the loss.”

The arbitrator addressed Balvin’s arguments, saying, “Claimant implied in his testimony and argued in his post-hearing brief that the January and March appraisals are ‘irrelevant,’ ‘questionable,’ or that the numbers may have been ‘fudged.’ There is no evidence of a motive to falsify that might support such inferences.” Based on this language and the arguments before the arbitrator, the arbitrator was at least “arguably construing or applying the contract and acting within the scope of his authority” because he was making a credibility determination about the appraisals, rather than interpreting a policy or procedure. *See Beumer Corp.*, 899 F.3d at 565.

It was not until after the arbitration decision that Balvin first raised the argument that the arbitrator impermissibly interpreted a term of the policy.¹ An arbitrator *1138 has not exceeded his powers where neither party suggested that a term of the policy was subject to interpretation, but the interpretation dispute instead arose after the arbitration proceedings. We emphasize that we “accord an extraordinary level of deference” to the arbitrator’s decision.  [SBC Advanced Sols.](#), 794 F.3d at 1027 (internal quotation marks omitted). The arbitrator thus did not exceed his authority by denying Balvin’s claim based on the appraised value of his crops.


The arbitrator’s findings also support denial of Balvin’s claim on a different ground—that he abandoned his crop


—despite Balvin’s argument to the contrary in his cross appeal. “To receive any indemnity,” Balvin’s policy requires “[t]hat the loss was caused by one or more of the insured causes.” His policy provided coverage for “unavoidable, naturally occurring events” and did not provide coverage for “[a]ll other causes of loss.” The arbitrator found that “[f]or unexplained reasons, [Balvin] abandoned his ... crop by failing to harvest the crop in a timely manner,” a cause of loss not covered under the policy. The arbitrator noted that Balvin’s neighbor was able to harvest his entire crop and that no other farmer in Balvin’s county submitted a claim for loss because they were not able to harvest their crops due to excess moisture.

Balvin responds that the arbitrator could not properly make an abandonment finding because such a finding involved a “good farming practices” determination.² The crop insurance policy defines “abandon” to include the “failure to harvest in a timely manner.” According to Balvin, an FCIC manual states that failure to timely harvest cannot be considered abandonment unless the crop is in a condition where “harvest would be considered as a good farming practice.” Balvin thus claims that the arbitrator’s abandonment finding necessarily involved a good farming practices determination. He additionally notes that the policy allows arbitration of disputes about decisions Rain and Hail makes, but it excepts those decisions with respect to good farming practices. Instead, the policy provides Balvin the right to request a determination from the FCIC if he disagrees with Rain and Hail’s good farming practices determination.

Balvin argues that the arbitrator did not have the authority to make a good farming practices determination in the first instance under the terms of the policy because Rain and Hail should have made the determination first, thereby giving Balvin the option to appeal the determination to the FCIC. He urges us to vacate the arbitration award on this ground.³ Although *1139 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. *See CenterPoint Energy Res. Corp. v. Gas Workers Union, Local No. 340*, 920 F.3d 1163, 1167 (8th Cir. 2019) (“The arbitrator’s disregard of the contract must be clear: that an opinion includes an ambiguity that permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award.” (internal quotation marks omitted)).

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. “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *Great Am. Ins. Co. v. Russell*, 914 F.3d 1147, 1150 (8th Cir. 2019) (alteration in original).

But even if the arbitrator did exceed his powers by making a good farming practices determination, the error is harmless because he did not exceed his powers in denying Balvin’s claim based on the appraised value of Balvin’s crop. See  9 U.S.C. § 10(a) (providing that courts “may” vacate an arbitration award where the arbitrator exceeded his powers (emphasis added)); cf. *Coutee v. Barington Capital Grp.*,


L.P., 336 F.3d 1128, 1134 (9th Cir. 2003) (“Arbitrators act beyond their authority if they fail to adhere to a valid, enforceable choice of law clause agreed upon by the parties. If such error is harmless, however, it is not grounds for vacatur.” (citation omitted));  *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005) (“[T]he arbitrator’s error was harmless, since he would have arrived at the conclusion he reached here, even absent the discussion of the aberrant language.”). In other words, the abandonment finding was not necessary to the arbitrator’s denial of Balvin’s claim.

For the foregoing reasons, we reverse in part, affirm in part, and remand to the district court to enter an order confirming the arbitration award.

All Citations

943 F.3d 1134

Footnotes

- * Judge Kelly did not participate in the consideration or decision of this matter.
- 1 The RMA has contemplated such a scenario. It issued a Final Agency Decision in 2015 recognizing that a dispute about the interpretation of a policy or procedure “may arise after the arbitration award has been rendered.” RMA Final Agency Determination 230 (U.S.D.A. 2015). And according to a new FCIC regulation, if either party to an arbitration “believes an award or decision was rendered by ... [an] arbitrator ... based on a disputed provision in which there was a failure to request a final agency determination or FCIC interpretation ... the party may request FCIC review the matter to determine if a final agency determination or FCIC interpretation should have been sought.” 7 C.F.R. § 400.766(b)(4).
- 2 It is less than clear that the arbitrator in fact made a good farming practices determination. An RMA and FCIC handbook lists “What Does Not Qualify for GFP [good farming practices] Determination,” which includes “identifying or determining that an insured cause of loss was present.” U.S. Dep’t of Agric., FCIC 14060-1, *Good Farming Practice Determination Standards Handbook* 11-12 (2018). For the purposes of this appeal, we assume the arbitrator made a good farming practices determination.
- 3 At times in his briefs Balvin appears to raise arguments about which sections of an FCIC manual the arbitrator should have applied. The district court did not address these arguments, and it is not clear they were raised before the district court. See  *Local 2, Int’l Bhd. Of Elec. Workers, AFL-CIO v. Anderson Underground Constr., Inc.*, 907 F.2d 74, 76 (8th Cir. 1990) (declining to consider a challenge to an arbitration award that was raised “for the first time on appeal”). To the extent the arbitrator applied the wrong sections of the manual, “[t]he parties bargained for the arbitrator’s decision; if the arbitrator got it wrong, then that was part of the bargain.” *Beumer Corp.*, 899 F.3d at 566.

914 F.3d 1147

United States Court of Appeals, Eighth Circuit.

GREAT AMERICAN INSURANCE
COMPANY, Plaintiff - Appellee

v.

Jonathan L. RUSSELL, Defendant - Appellant

No. 17-2441

Submitted: November 13, 2018

Filed: January 31, 2019

Synopsis

Background: Insurer brought action to vacate arbitration award in favor of insured for wrongfully denying his claim under crop insurance policy for damage to his corn crop. The United States District Court for the Western District of Missouri, Dean Whipple, J., [2017 WL 4750630](#), vacated arbitration award. Insured appealed.

[Holding:] The Court of Appeals, Kelly, Circuit Judge, held that arbitration panel's failure to break down award by each county where insured had corn crop did not mean panel imperfectly executed its powers such that it rendered no mutual, final, and definite award.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Arbitration Award.

West Headnotes (7)

[1] Insurance Authority**Insurance** Award**Insurance** Alternative dispute resolution

Although federal regulations impose certain limitations on the powers of arbitrators assessing federally-reinsured crop insurance claims, arbitral awards are still governed by the Federal Arbitration Act. [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 457.8, 457.113](#).

[2] Insurance Trial de novo

Court of Appeals would review de novo district court's vacatur of arbitration award in favor of insured and against insurer for wrongfully denying insured's claim under crop insurance policy for damage to his corn crop, where district court's order dealt entirely with questions of law as to whether federal regulations required arbitration award to be broken down into separate awards for each county where insured had acreage of insured crop. [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 457.8, 457.113](#).

[3] Alternative Dispute**Resolution** Constitutional and statutory provisions and rules of court

Federal Arbitration Act is a congressional declaration of a liberal federal policy favoring arbitration agreements. [9 U.S.C.A. § 10\(a\)\(4\)](#).

1 Cases that cite this headnote

[4] Alternative Dispute Resolution Scope and Standards of Review

Court's review of an arbitration award is very limited under the Federal Arbitration Act.

1 Cases that cite this headnote

[5] Alternative Dispute Resolution Mistake or Error


As long as arbitrator is even arguably construing or applying contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision under Federal Arbitration Act. [9 U.S.C.A. § 10\(a\)\(4\)](#).

1 Cases that cite this headnote


[6] Insurance Making and formal requisites

Arbitration panel's failure to break down award by each county where insured had corn crop

did not mean panel imperfectly executed its powers such that it rendered no mutual, final, and definite award in favor of insured and against insurer for wrongfully denying claim under crop insurance policy for damage to corn crop, as would require vacatur of award under Federal Arbitration Act; federal regulation required that award describe “breakdown by claim for any award” and defined “claim for indemnity” as “claim made on [the insurer’s] form,” insured submitted single claim covering his corn crop, insurer assigned single claim number, panel accepted insurer’s decision to treat claim as singular, and no regulation required panel to segregate claim into multiple separate claims.

 9 U.S.C.A. § 10(a)(4); 7 C.F.R. §§ 457.8, 457.113.

[7] **Alternative Dispute Resolution**  Findings, conclusions, and reasons for decision

There is no requirement under the Federal Arbitration Act that the arbitrator’s decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld.  9 U.S.C.A. § 10(a)(4).

[1 Cases that cite this headnote](#)

***1148** Appeal from United States District Court for the Western District of Missouri - St. Joseph

Attorneys and Law Firms

[John L. Hayob](#), BROWN & RUPRECHT, Kansas City, MO, [Thomas C. James, Jr.](#), SANDERS & ASSOCIATES, Cincinnati, OH, for Plaintiff - Appellee.

Michael Brett Ryan, III, WATSON & RYAN, Council Bluffs, IA, for Defendant - Appellant.

Before [GRUENDER](#), [KELLY](#), and [GRASZ](#), Circuit Judges.

Opinion

[KELLY](#), Circuit Judge.

Jonathan Russell appeals the district court’s vacatur of the arbitration award he received against his insurer, Great American Insurance Company, for wrongfully denying his claim for damage to his 2013 corn crop. Because the arbitrators rendered a sufficiently mutual, final, and definite award, vacatur was improper. We accordingly vacate the district court’s judgment and remand for further proceedings.

I

[1] Russell submitted claims to Great American for damage to his 2013 corn and soybean crops in Atchison, Holt, and Nodaway counties in Missouri. Russell’s crop insurance policy is governed by federal regulations; 7 C.F.R. §§ 457.8 and *1149 457.113 (2013) form the policy’s essential terms. After Great American denied his claims, Russell invoked the arbitration provision in § 457.8 ¶ 20. Although the regulations impose certain limitations on the powers of arbitrators assessing federally-reinsured crop insurance claims like Russell’s, arbitral awards are still governed by the Federal Arbitration Act. See, e.g., [J.O.C. Farms, L.L.C. v. Fireman’s Fund Ins. Co.](#), 737 F. App’x 652, 655 (4th Cir. 2018) (per curiam); [Davis v. Producers Agric. Ins. Co.](#), 762 F.3d 1276, 1283–85 (11th Cir. 2014).

Following an evidentiary hearing, the three-arbitrator panel awarded Russell \$1,433,008 for damage to his corn crop in the three counties but denied his soybean claim. The panel found that Great American’s denial of Russell’s corn claim—based on (1) Great American’s inability to substantiate an insurable cause of loss and (2) Russell’s failure to provide adequate records to establish production “by unit”—was erroneous. After reviewing the evidence, the panel concluded that Russell’s accounts of insurable crop damage were independently verified but that Great American had failed to conduct a timely on-site inspection until after harvest was completed. The arbitrators credited testimony of witnesses that the crops in question experienced significant damage from drought, rootworm, and heavy winds. As to the second ground for denial, the panel noted that Great American had “collaps[ed] all acres farmed by Russell into a single unit pursuant to policy provisions.” The panel accepted the analysis of Russell’s damages expert, who calculated the total damage to the corn crop as \$1,433,008. Great American did not challenge this calculation or offer a different calculation.

On May 25, 2016, Great American moved to vacate or modify the award. The panel denied the motion as untimely

because the award issued on February 23, 2016, and the arbitration association's rules require that any motion to correct computational errors be filed within 20 days of the award. Great American then appealed the award under 9 U.S.C. § 10(a)(4), which permits a district court to vacate an arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Great American argued that the arbitrators "imperfectly executed" their powers because they failed to comply with the regulations governing the arbitration proceeding. The applicable regulations required the panel to provide "a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award." 7 C.F.R. § 457.8 ¶ 20(a)(2). "Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator." *Id.* Great American posited that the panel (1) did not break down the award by county, which was required by the "breakdown by claim" language; (2) did not explain how the award amount was calculated; and (3) made impermissible interpretations of applicable regulations.

[2] The district court agreed that the panel had failed to properly break down the award "by claim," nullifying the entire award. The court based its decision on § 457.113 ¶ 11(a), which states in part that the insurer "will determine [the insured's] loss on a unit basis," and on § 457.8 ¶ 1, which defines an enterprise unit as "[a]ll insurable acreage of the same insured crop ... in the county in which you have a share on the date coverage begins for the crop year." Relying on this language, the district court concluded that the arbitration panel was required to break down the *1150 award into separate awards for each of the three counties to provide the required "breakdown by claim." It vacated the award and did not address Great American's argument that the panel made improper interpretations of the regulations. Because the district court's order deals entirely with questions of law, we review it de novo. [MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499](#), 345 F.3d 616, 619 (8th Cir. 2003).

II

[3] [4] [5] The Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration

agreements." [Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.](#), 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Accordingly, a court's review of an arbitration award is "very limited." [Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC](#), 319 F.3d 1060, 1064 (8th Cir. 2003). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." [United Paperworkers Int'l Union v. Misco, Inc.](#), 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

[6] We are not convinced that the arbitration panel's failure to break down the award by county means that it "so imperfectly executed" its powers such that it rendered no "mutual, final, and definite award." 9 U.S.C. § 10(a)(4). The award needed only to "describ[e] the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award." 7 C.F.R. § 457.8 ¶ 20(a)(2). "Claim for indemnity" is defined as "[a] claim made on [the insurer's] form that contains the information necessary to pay the indemnity." *Id.* ¶ 1. Russell submitted a single claim covering both his corn and soybean crops, and Great American assigned it a single claim number. Nothing in the regulations required the panel to segregate this claim into multiple separate claims.

Great American correctly notes that applicable regulations require the insurer to "determine [the] loss on a unit basis," § 457.113 ¶ 11(a), and units cannot cover more than one county, § 457.8 ¶ 1 (defining "enterprise unit"). But the arbitration panel was obligated to break down its award only by claim, not by unit, and Great American points to no regulation equating claims and units. Moreover, the arbitration panel concluded that Great American had "collaps[ed] all acres farmed by Russell into a single unit pursuant to policy provisions." There appears to be no reason why the arbitration panel could not accept Great American's decision to treat Russell's claim as singular when rendering its decision. Indeed, it appears that Great American raised no objection to this approach until its untimely motion to vacate or modify the award.

Although few cases analyze the applicable crop insurance regulations in depth, those that do support the panel's approach. In one case, the arbitrator combined its analysis for twenty-three farming units into three groups, and denied the claims for each group on different grounds. See [Farm](#)

[Mgmt. Co. v. Rural Cmty. Ins. Agency](#), No. 14-CV-5024-EFS, 2015 WL 1809789, at *2 (E.D. Wash. Apr. 21, 2015). The reviewing court found no error with this approach, even though the arbitrator did not break down its analysis unit-by-unit. See [id.](#) at *6.

[7] We also find that the panel's written explanation for the award amount was adequate. Although the panel simply adopted the calculation of Russell's expert, Great American failed to contest this calculation or provide its own alternative at the evidentiary hearing. Other courts have ***1151** affirmed arbitral awards issued under the same regulations even though the arbitrator did not provide any calculations supporting its award amount. See, e.g., [Great Am. Ins. Co. v. Doan](#), No. 5:11-CV-342-OC-34PRL, 2012 WL 13098715, at *13–14 (M.D. Fla. Sept. 25, 2012); [Garnett v. NAU Country Ins. Co.](#), No. 5:09-CV-00144-R, 2009 WL 3644762, at *3

(W.D. Ky. Oct. 27, 2009). There is no requirement that the arbitrator's decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld. See [Green v. Ameritech Corp.](#), 200 F.3d 967, 976 (6th Cir. 2000).

Accordingly, the district court's decision vacating the arbitration award is vacated. The case is remanded for further consideration of Great American's alternative argument that the arbitration panel's decision rests on improper interpretations of the applicable regulations, which the district court did not address in the first instance.

All Citations

914 F.3d 1147

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

OCCIDENTAL FIRE & CASUALTY)
COMPANY OF NORTH CAROLINA,)

Plaintiff,)

v.)

No. 2:19 CV 67 CDP

FRANKLIN BUSH,)

Defendant.)

MEMORANDUM AND ORDER

In January 2015, plaintiff Occidental Fire & Casualty Company of North Carolina determined that its insured, defendant Franklin Bush, owed \$278,069.51 in overpaid indemnities under federally reinsured crop insurance policies, and an overdue insurance premium in the amount of \$41,863.31. The insurance policies contain a provision mandating arbitration on all disputes involving determinations made by Occidental and requiring that arbitration proceedings be initiated within one year of the disputed determination. Neither party initiated arbitration proceedings on Occidental's January 2015 determination. Because judicial proceedings are unavailable to resolve the dispute in the first instance, I will dismiss Occidental's complaint and Bush's counterclaim, but without prejudice pending mandatory arbitration.

Background

Defendant Bush is a retired farmer whose crops were insured under federally reinsured crop insurance policies issued by Occidental through its administrative arm, Agrilogic. For Crop Years 2011, 2012, and 2013, Bush submitted historical production and acreage reports to Occidental from which Occidental determined that Bush suffered losses each year. Occidental paid indemnities to Bush for his reported losses. After an audit initiated by the U.S. Department of Agriculture's Risk Management Agency (RMA), Occidental reviewed the relevant policies and made changes to Bush's historical acreage and production reports for Crop Years 2011 through 2013. As a result of these changes, Occidental determined that it had overpaid indemnities to Bush. It informed Bush of this determination in a letter dated September 23, 2014.

In October 2014, Bush requested that Occidental review its September 2014 determination, stating that his records did not support some of Occidental's information. Upon further review, Occidental made additional changes, which reduced the amount of overpaid indemnities it claimed Bush owed. On January 13, 2015, Occidental notified Bush of its determination that he owed \$278,069.51 in overpaid indemnities and an overdue premium for Crop Year 2014 in the amount of \$41,863.31. Bush never repaid the alleged overpaid indemnities or the 2014 premium.

Invoking federal diversity jurisdiction, Occidental filed this judicial action on August 6, 2019, seeking a declaration that it is entitled to recover overpaid indemnities for Crop Years 2011, 2012, and 2013, as well as the unpaid premium for Crop Year 2014, totaling \$319,932.82. Occidental also seeks recovery of these monies under common law theories of “contractual reimbursement,” unjust enrichment, money had and received, and “account stated”; and it seeks to recover its attorney’s fees as provided by the insurance contract.

Bush filed a counterclaim, alleging that Occidental’s retroactive revisions to his reports were improper and illegal given that it lacked evidence that Bush knowingly misreported his actual production history, which is required under the insurance policies for Occidental to recover overpaid indemnities. Bush contends that the revised production reports were created at RMA’s behest when RMA reinsured all policies issued by Occidental and Agrilogic, and not on account of any alleged misinformation. Bush also asserts that the RMA directed in 2016 that insurance providers such as Occidental restore actual production histories of insureds such as himself, but that Occidental failed to do so. Bush brings claims of breach of contract, bad faith, and negligence, asserting that Occidental’s conduct caused him to suffer financial damage, lost crop insurance coverage, and continuous injury. He seeks punitive damages and attorney’s fees.

Federally Reinsured Crop Insurance

The Federal Crop Insurance Corporation (FCIC) is a federal agency established under the Federal Crop Insurance Act to administer the federal crop insurance program. 7 U.S.C. § 1503. The FCIC provides reinsurance to approved insurers of producers of agricultural commodities grown in the United States. 7 U.S.C. § 1508(k)(1). It regulates premiums, authors and approves policy terms, defines the rights and obligations of the insurer and insured, mandates the terms of dispute resolution procedures under subject policies, and reinsures FCIC created or approved policies issued by private insurers to farmers. *See William J. Mouren Farming, Inc. v. Great Am. Ins. Co.*, No. CV F 05-0031 AWI LJO, 2005 WL 2064129, at *2 (E.D. Cal. Aug. 24, 2005). The RMA acts on behalf of the FCIC to administer FCIC programs and to underwrite crop insurance policies that are sold and serviced by private insurance companies. USDA, Risk Management Agency, <https://legacy.rma.usda.gov/help/faq/basics.html> (last updated Aug. 14, 2008). “For all relevant and practical purposes, the RMA and the FCIC are one and the same.” *William J. Mouren Farming*, 2005 WL 2064129, at *2.

When the relevant policies here were in effect, Occidental and the FCIC were parties to a Standard Reinsurance Agreement (SRA), which is a cooperative financial assistance agreement establishing the terms under which the FCIC provides reinsurance and subsidies on eligible crop insurance contracts sold by the

insurance provider. USDA, Risk Management Agency, Reinsurance Agreements, <https://www.rma.usda.gov/en/Topics/Reinsurance-Agreements> (last viewed Apr. 21, 2020). The SRAs require the approved insurance provider (AIP) to bear a sufficient share of any potential loss under the agreement so as to ensure that the reinsured company will sell and service policies of insurance in a sound and prudent manner. 7 U.S.C. § 1508(k).

Under its rule-making authority, the FCIC promulgates rules and regulations setting the terms of crop-insurance contracts issued by private AIPs such as Occidental. *William J. Mouren Farming*, 2005 WL 2064129, at *2. Occidental sold insurance policies under these FCIC regulations. Unlike typical private insurance agreements, the federal government backs the policies sold subject to FCIC reinsurance. These policies must therefore adhere to governing regulations, which have the force of federal law. *Williamson Farm v. Diversified Crop Ins. Servs.*, No. 5:17-CV-513-D, 2018 WL 1474068, at *1 (E.D.N.C. Mar. 26, 2018) (citing *Felder v. FCIC*, 146 F.2d 638, 640 (4th Cir. 1944); *Byrne v. FCIC*, 289 F. Supp. 873, 874 (D. Minn. 1968)), *aff'd*, 917 F.3d 247 (4th Cir. 2019). *Cf. FCIC v. Merrill*, 332 U.S. 380, 385 (1947) (effect given to regulations is “as if they had been enacted by Congress directly”). The Federal Common Crop Insurance Policy Basic Provisions, codified at 7 C.F.R. § 457.8, apply to Bush’s policies at issue here. (*See* ECF 1-1 (“Policy”)). The terms and conditions of these Basic Provisions preempt

any contrary state laws that would apply to other insurance contracts normally issued by private insurance companies. *See William J. Mouren Farming*, 2005 WL 2064129, at *2.

In relevant part, § 20 of the Basic Provisions and Bush’s Policy with Occidental provides:

(a) If you and we fail to agree on any determination made by us . . . , the disagreement may be resolved through mediation If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA)[.]

(1) All disputes involving determinations made by us . . . are subject to mediation or arbitration. . . .

. . .

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered[.]

7 C.F.R. § 457.8 (Reinsurance Policies); Policy at pp. 31-32.¹ Regardless of whether the dispute is addressed in mediation, arbitration, or judicial review,

if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is

¹ For purposes of the Policy, “you” refers to the insured producer and “we” and “us” refer to the insurance company. (Policy at p.1., preamble.)

applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

7 C.F.R. § 457.8 (Reinsurance Policies); Policy at p. 32, § 20(b)(4); *see also* Policy at p. 32, § 20(a)(1). Any interpretation by the FCIC is binding. Policy at p. 32, § 20(a)(1)(i), (b)(4).

Discussion

Bush moves to dismiss Occidental's complaint in its entirety for failure to state a claim, arguing that Occidental's failure to timely initiate arbitration on its disputed determination of overpaid indemnities and for premium payment bars it from seeking judicial relief.² In a separate motion, Bush moves to dismiss Occidental's request for declaratory relief, arguing that the availability of a legal remedy bars this equitable claim. Occidental moves for judgment on the pleadings, arguing several bases for dismissal of Bush's counterclaim, including that the Policy bars Bush from seeking judicial relief because he failed to timely initiate arbitration.

I review a motion for judgment on the pleadings and Rule 12(b)(6) motions to dismiss under the same legal standard. *See Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). Therefore, when reviewing Bush's motions to dismiss, I consider the factual allegations of the complaint as true to determine if the complaint

² Within the body of his memorandum in support, Bush makes a passing reference to the appropriateness of possibly referring the case to arbitration. (ECF 10 at p. 2.)

states a “claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Likewise, on Occidental’s motion for judgment on the pleadings, I consider the factual allegations of the counterclaim as true and grant all reasonable inferences in favor of the nonmoving party. *Clemons*, 585 F.3d at 1124. I may not grant judgment on the pleadings unless “the moving party has clearly established that no material issue of fact remains and [it] is entitled to judgment as a matter of law.” *Waldron v. Boeing Co.*, 388 F.3d 591, 593 (8th Cir. 2004) (internal citation and quotation marks omitted).

The core issue in resolving the parties’ motions is whether either party can seek initial relief on their respective claims through judicial action given that neither party initiated mandatory arbitration proceedings on their dispute involving Occidental’s January 2015 determination. For the reasons that follow, I conclude that neither party can, and I will dismiss this action.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, applies here because a written agreement to arbitrate exists within a contract involving commerce. 9 U.S.C. § 2. *See also In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F.Supp.2d 992, 995 (D. Minn. 2002) (federal crop insurance policy is subject to FAA because “insurance policies are contracts ‘involving commerce’”) (citing *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491 (1993); *Allied–Bruce*

Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995)); *Wardlaw v. Rural Cmty. Ins. Servs.*, No. 1:10-CV-01004, 2010 WL 4259792, at *1 (W.D. Ark. Sept. 27, 2010), *R&R adopted*, No. 1:10-CV-01004, 2010 WL 4235662 (W.D. Ark. Oct. 21, 2010) (FAA applies to FCIC federal crop insurance policies). Accordingly, I must enforce the Policy's arbitration provisions according to their terms. See 9 U.S.C. § 2; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).

The FAA “reflects ‘a liberal federal policy favoring arbitration.’” *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015) (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). An arbitration agreement's scope is interpreted liberally, with any doubts resolved in favor of arbitration, “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); see also *MedCam, Inc. v. MCNC*, 414 F.3d 972, 975 (8th Cir. 2005).

Here, the parties agree that the Policy's arbitration provision is valid; and a dispute involving Occidental's January 2015 determination exists between them, thereby bringing the dispute within the provision's scope. The parties disagree, however, as to who bears the responsibility under the Policy to initiate arbitration proceedings on the dispute and thus whether that party's failure to do so bars their seeking judicial relief on related claims. Bush contends that Occidental cannot

seek judicial relief on its claims for overpaid indemnities and an overdue premium because arbitration proceedings were not initiated within one year of Occidental's January 2015 determination, and indeed were never initiated. In response, Occidental argues that the Policy's arbitration provision requires that the insured policyholder, and not the insurer, initiate arbitration proceedings and that therefore only Bush was required to seek arbitration to preserve his right to judicial relief.

Under the express terms of the Policy, if Bush and Occidental "fail to agree on *any* determination" made by Occidental, "the disagreement *must* be resolved through arbitration[.]" (Emphasis added.)³ This mandatory arbitration provision applies to "*all* disputes involving determinations made by" Occidental. (Emphasis added.) And "the initiation of arbitration proceedings must occur within one year" of the date Occidental rendered the disputed determination. As stated above, the question is whether the Policy's "initiation of arbitration" requirement applies only to Bush or to both Bush and Occidental to preserve their respective right to seek judicial relief.

An insurer's disputed claim to recover overpayment from its insured falls within the scope of the Policy's arbitration provision. *See William J. Mouren Farming*, 2005 WL 2064129, at *8. And § 20 requires that "any" and "all"

³ This is in the event mediation failed or was not pursued. It is unclear whether the parties participated in mediation on their dispute. *See* ECF 5 (seeking extension of time to answer complaint because parties agreed to mediation).

disagreements on the insurer's determinations must be resolved through arbitration in accordance with the rules of the American Arbitration Association. "Making the company's determinations conclusive [without arbitration] would conflict with those provisions." Common Crop Insurance Regulations; Basic Provisions; and Various Crop Insurance Provisions, 62 FR 65130-01, at *65138, 1997 WL 756435 (Dec. 10, 1997). Section 20 does not state that the disagreement *may* be resolved by arbitration; nor does it say that it will be resolved by arbitration only if the *insured* so chooses. *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1296 (M.D. Ala. 2000). "It says it will be arbitrated." *Id.* The arbitration is therefore mandatory without regard to the identity of the initiating party. Accordingly, the mandate to arbitrate disputes relating to determinations made by Occidental applies with equal force to Occidental, and nothing precluded Occidental from initiating arbitration on its January 2015 determination wherein it claimed that Bush owed it monies under the Policy.⁴

Section 20 also unequivocally provides that arbitration proceedings must be initiated within one year of the disputed determination. Policy at p. 32, § 20(b)(1). Section 20(b)(1) does not limit its application to only those arbitration proceedings initiated by an insured. Its plain language is broad and applies to all arbitration

⁴ I agree with Bush that this distinction is significant, that is, that Bush had no claim against Occidental during the period in question and that Occidental is the party who seeks a binding and enforceable monetary judgment against him as an individual. (See ECF 20 at pp. 4, 5.)

proceedings involving determinations made by the insurer, regardless of who initiates the proceedings. Notably, another arbitration section of 7 C.F. R. § 457.8 and the Policy expressly assigns the burden of seeking arbitration to the insured. See Policy at p. 31, § 18(k)(4). If the FCIC intended for the insured – and only the insured – to bear the same burden under § 20, it could have said so. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983).

It is undisputed that over one year has passed since the January 2015 determination giving rise to Occidental's claims in this action. Bush argues that Occidental's failure to initiate arbitration on its claims within that one-year period forever bars it from seeking judicial relief. But whether arbitration is timely initiated is a question to be resolved by an arbitrator, not the Court. *J.O.C. Farms, L.L.C. v. Fireman's Fund Ins. Co.*, 737 F. App'x 652, 656 (4th Cir. 2018) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002)). “[I]ssues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.” *Howsam*, 537 U.S. at 85 (internal quotation marks and citation omitted) (emphasis in *Howsam*). See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Automotive, Petroleum & Allied Indus. Emps. Union, Local No. 618 v. Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983). Without this threshold determination properly made by an arbitrator, I am unable to

conclude that Occidental is forever barred from seeking judicial relief on its claims.

I reach the same conclusion with Bush's counterclaim. Because Bush's claims involve a dispute between him and Occidental on one or more determinations made by Occidental, they are subject to mandatory arbitration under § 20.

Although Bush argues that his claims fall outside the parameters of the Policy provisions and thus may be brought under state common law theories of recovery, I cannot conclusively determine this to be so – especially given the liberal scope given to arbitration provisions as well as the Policy's preemptive effect over state law.

Without the parties having participated in arbitration, I cannot decide here whether or which terms of the Policy and/or whether or which of an arbitrator's findings might have preclusive effect in a judicial proceeding. *See Nobles*, 122 F. Supp. 2d at 1301. Because the issues are not properly before the Court at this time, I will not opine on whether Bush may recover on his claims in this forum. *Id.* The parties must first comply with the relevant contractual provisions before litigating their claims here. *Id.*

Nor does Bush's argument that his claims did not ripen until Occidental filed its judicial complaint in August 2019 relieve him from mandatory arbitration on the claims. Whether initiating arbitration now on claims first raised in August 2019 involving a determination made in January 2015 would be timely under the terms of the Policy is a matter for an arbitrator to decide. And, indeed, Bush alludes to that

possibility. (See ECF 20 at p. 9.) It is not my role to determine whether initiation of arbitration proceedings today – by either party – would be untimely under the Policy.

I also reject Occidental’s argument that Bush waived his right to have this dispute arbitrated by failing to initiate arbitration proceedings within one year of January 13, 2015. I may find waiver if Bush 1) knew of an existing right to arbitration, 2) acted inconsistently with that right, and 3) prejudiced Occidental by his inconsistent acts. *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (8th Cir. 2011); *Ritzel Commc’ns, Inc. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993). See also *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 997. Although Bush knew of the right to arbitrate given that it was clearly set out in the Policy, I cannot conclusively find that he acted inconsistently with that right or that Occidental was prejudiced. As noted above, the onus was not on Bush alone to pursue arbitration – especially in the circumstances here where it was Occidental, and not Bush, that sought and continues to seek affirmative monetary relief on its January 2015 determination. I cannot say that Bush engaged in acts inconsistent with the right to arbitrate if he had no claim and sought no affirmative relief against Occidental within the one-year period after Occidental issued its determination. I also cannot find that Occidental was prejudiced by Bush’s failure to initiate arbitration proceedings within that year. Nothing

precluded Occidental from initiating arbitration proceedings on its claims for affirmative relief, and it would be difficult at best to show prejudice when Occidental itself waited over four years to pursue any action on the January 2015 determination.⁵ That resolution of a dispute might be complicated is not grounds for me to find prejudice or waiver of arbitration. *See In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 998. Given the strong federal policy favoring arbitration, courts are encouraged to resolve any doubts concerning waiver of arbitrability in favor of arbitration. *Ritzel Commc'ns*, 989 F.2d at 968-69. I will do so here.

Finally, Occidental avers that it has requested an interpretation from the FCIC on whether § 20's burden to initiate arbitration proceedings lies with the insurer, the insured, or both, and it asks that I delay my ruling on Bush's first motion to dismiss until FCIC's response given that its interpretation will be binding. But under the terms of the Policy, an FCIC interpretation is likewise binding on the arbitrator. *See Policy* at p. 32, § 20(a)(1)(i). Given that the disputes in this action are subject to mandatory arbitration, that the timeliness of initiating arbitration proceedings is an issue for the arbitrator to resolve, and that FCIC interpretations are binding on the arbitrator, there is no compelling reason for me to delay my ruling.

Under the terms of the federal code and the Policy, any and all disputes

⁵ Notably, under the terms of the Policy, Occidental cannot waive § 20's arbitration provisions. *See Policy* at p. 1, preamble.

involving a determination by Occidental must be resolved through arbitration unless they are successfully mediated. “[N]ot even the temptations of a hard case can elude the clear meaning of the regulation.” *Merrill*, 332 U.S. at 386. The parties are therefore required to follow the administrative scheme for resolution of their claims, which they have failed to do in this case. If this dispute is to be resolved at all, it must be through mediation or arbitration and not by judicial action in the first instance. I am not persuaded that the parties need not exhaust the administrative avenue in this case. *See Buschkoetter v. Johanns*, No. 8:05CV115, 2006 WL 1479165, at *4 (D. Neb. May 24, 2006).

I will therefore dismiss Occidental’s complaint and Bush’s counterclaim, but without prejudice. Given this disposition, I need not decide the remaining issues raised by the parties in this case.

Accordingly,


IT IS HEREBY ORDERED that defendant Franklin Bush’s First Motion to Dismiss Based on Plaintiff’s Failure to Comply with Arbitration Provision [9] is granted.

IT IS FURTHER ORDERED that plaintiff Occidental Fire & Casualty Company of North Carolina’s Motion for Judgment on the Pleadings as to Defendant Bush’s Counterclaim [22] is granted to the extent Occidental seeks dismissal of Bush’s counterclaim for lack of arbitration. In all other respects, the

motion is denied without prejudice.

IT IS FURTHER ORDERED that plaintiff Occidental Fire & Casualty Company of North Carolina's complaint and defendant Franklin Bush's counterclaim are dismissed without prejudice.

All remaining motions are denied as moot without prejudice.



CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 26th day of May, 2020.