

Final Agency Determination: FAD-230

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Subject: Two requests dated February 3, 2015, and February 20, 2015, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2012 crop year regarding the interpretation of section 20(a)(1) of the Common Crop Insurance 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:

The preamble of the Basic Provisions states, in relevant part:

We will use the procedures (handbooks, manuals, memoranda and bulletins), as issued by FCIC and published on RMA's Web site at www.rma.usda.gov or a successor Web site, in the administration of this policy, including the adjustment of any loss or claim submitted hereunder. In the event that we cannot pay your loss because we are insolvent or are otherwise unable to perform our duties under our reinsurance agreement with FCIC, your claim will be settled in accordance with the provisions of this policy and FCIC will be responsible for any amounts owed. No state guarantee fund will be liable for your loss.

Section 1 of the Basic Provisions states, in relevant part:

1. Definitions.

Prevented planting - Failure to plant the insured crop by the final planting date designated in the Special Provisions for the insured crop in the county, or within any applicable late planting period, due to an insured cause of loss that

is general to the surrounding area and that prevents other producers from planting acreage with similar characteristics. Failure to plant because of uninsured causes such as lack of proper equipment or labor to plant acreage, or use of a particular production method, is not considered prevented planting.

Section 17(a)(3) of the Basic Provisions states, in relevant part:

17. Prevented Planting.

(a) Unless limited by the policy provisions, a prevented planting payment may be made to you for eligible acreage if:

(3) You did not plant the insured crop during or after the late planting period. Acreage planted to the insured crop during or after the late planting period is covered under the late planting provisions.

Section 20(a)(1) 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.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us 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. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(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; and

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of

any decision rendered in arbitration.

(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 31. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

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

(a) The regulations contained in this subpart prescribe the rules and criteria for obtaining a final agency determination of the interpretation of any provision of the Act or the regulations promulgated thereunder.

(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.

(c) All final agency determinations issued by FCIC, and published in accordance with Sec. 400.768(f), will be binding on all participants in the Federal crop insurance program.

7 C.F.R. § 400.768 states, in relevant part:

(a) FCIC will not interpret any specific factual situation or case, such as actions of any participant under the terms of a policy or any reinsurance agreement.

Interpretation Submitted

Two interpretations were submitted in this FAD request.

First requestor's interpretation:

The first requestor states factual determinations rest solely with the arbitrator and do not require an FCIC interpretation.

The first requestor believes that the policy provisions requiring FCIC interpretation of policy and procedure apply only to required policy interpretations and places no limitations on the arbitrator's authority to make factual determinations regarded disputed facts, even when those factual determinations require application of the policy provisions and procedures. Section 20(f) of the Basic Provisions requires the arbitrator to be bound by the Federal Crop Insurance Act (Act) and the published regulations. Further, one of the requirements of section 20(a)(2) of the Basic Provisions is for the arbitrator to provide a written statement describing "the factual findings, the determinations and amount and basis for any award...". 7 C.F.R. §400.768(a) expressly prohibits FCIC from interpreting any factual situation or case. Accordingly, the requestor believes that all factual determinations rest solely within the purview of the arbitrator's authority, and do not require any FCIC interpretation of policy or procedure. The requestor further believes that the arbitrator must necessarily review and apply the applicable portions of the Act and published regulations, including policy provisions and applicable FADs in making those factual determinations and in rendering an award.

The requestor further believes that when an arbitrator makes factual determinations and renders an award applying the applicable provisions and regulations, that the provisions allowing nullification of an award for failure to obtain an FCIC interpretation may not be used by the parties to challenge the award. The nullification provision applies only when an arbitrator improperly interprets a policy or procedure term, not when the arbitrator uses those policy terms or procedures in making findings of fact and rendering an award. This exact issue was dealt with and resolved by a recent court decision in *Great American Insurance Co. v. Moye*, 733 F. Supp. 2d 1298 (MD Fla 2010) where the court held that where a term or definition in the insurance policy is in dispute and the term is defined in the policy or procedure, the arbitrator is given the authority to determine whether the facts of a given dispute fit that definition and that any such finding is a factual determination and not a policy interpretation. The requestor believes this same result would be true when an arbitrator makes a finding on whether or not a policyholder has met the requirements for prevented planting as the term has been defined by the policy and interpreted in applicable final agency determinations.

The first requestor states factual determinations of whether a policyholder satisfies the requirements for prevented planting rests solely with the arbitrator and do not require an FCIC interpretation.

Second requestor's interpretation:

The second requestor believes an arbitrator's determination must be based on the proper interpretation of a policy provision or procedure, the application of a specific policy provision or procedure, how it is applicable and the meaning of any policy provision or procedure. The second requestor does not believe factual determinations require an FCIC interpretation. However, the second requestor believes the arbitrator is required to properly interpret and apply the policy provisions and procedures to the factual determinations. The second requestor also believes a request for interpretation is necessary when the parties dispute the proper interpretation and application of a policy provision or procedure in supporting the arbitrator's decision. In sum, the second requestor believes an arbitrator's decision cannot stand on an improper interpretation or application of the policy provisions or procedures.

Section 20(f) of the Basic Provisions binds the arbitrator to the Federal Crop Insurance Act (Act) and the published regulations. Consequently, the second requestor believes the arbitrator is bound to interpret and apply the Act and the published regulations correctly. The second requestor does not believe the nullification provision allows challenging an award based on the arbitrator's factual determinations.

However, the second requestor believes the nullification provision allows challenging an award based on the improper interpretation and application of the policy provisions and procedures. While the arbitrator may make a factual determination, the second requestor believes the arbitrator is required to properly apply the policy provisions and procedures to the factual determinations made by the arbitrator. The second requestor believes the arbitrator's award can and must be nullified if and when an arbitrator's award is based on an improper interpretation or application of a policy provision or procedure.

As stated above, neither party may know whether there is a dispute regarding an interpretation of a policy provision or procedure until the arbitrator has applied the policy provision or procedure to the factual determinations. The second requestor

believes that section 20(a)(1)(ii) of the Basic Provisions was specifically created to handle situations where the parties originally agree on the policy provisions but later learn the arbitrator misinterpreted or inappropriately applied the policy provisions or procedures to the factual determinations.

The second requestor believes an arbitrator is required to properly interpret and apply the policy provisions and procedures for determining whether a policyholder satisfied the requirements for prevented planting coverage.

The second requestor believes the arbitrator is allowed to make factual determinations but also must properly interpret and apply the policy provisions and procedures when applying the factual determinations in making the award. A dispute as to interpretation and application exist where the arbitrator fails to properly interpret and apply the policy provisions and procedures and nullification is appropriate.

Final Agency Determination

FCIC agrees with both requestors that an arbitrator has the authority to make factual determinations in arbitration. In accordance with the Federal Crop Insurance Act, regulations and policy provisions, it is FCIC's responsibility to interpret statute, regulations, policy provisions or procedures. It is the responsibility of the arbitrator to apply those interpretations to the facts of the case. FCIC agrees with the first requestor that FCIC does not consider any factual situation, and will not do so here, when issuing a FAD. FCIC provides a neutral, unbiased interpretation of provisions of statute, regulation, policy or procedures.

FCIC also agrees with the second requestor that the arbitrator is bound to apply the Act and published regulations correctly when it renders an arbitration award. Therefore, the arbitrator, in making a factual determination about a specific case, is required to apply the policy and procedural provisions in accordance with FCIC's interpretation. FCIC-issued FADs that are applied during a(n) mediation, arbitration, and litigation proceeding are not specific to any one case but rather are generally applicable to all program participants. Any factual application of a FAD to a policyholder's situation or case is the responsibility of the arbitrator during the arbitration hearing.

FCIC also agrees with the second requestor that although the arbitrator may make a factual determination, it also must properly apply the policy or procedural provisions in granting the award. Further, if there is a material dispute regarding an interpretation of the policy or procedure, a FAD must be obtained from FCIC. FCIC agrees with the second requestor that such a dispute may arise after the arbitration award has been rendered. In such case, either of the parties may seek a FAD for the provision at issue. Once the FAD is issued, the arbitration award must be reviewed to determine if it is consistent with the FAD. If it is not consistent, the arbitration award must be nullified if it is determined that the inconsistency materially affected the award. In that case a new award must be issued by the arbitrator applying the issued FAD.

Under 7 CFR § 400.768 FCIC will not interpret any specific factual situation or case, such as the actions of the insured, AIP, agent, loss adjuster, arbitrator, mediator, judge, or magistrate under the provisions. Thus, this interpretation does not include any analysis of whether the policyholder, AIP, or arbitrator were in conformance with the statute, policy provisions, or procedures cited above.

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: April 10, 2015