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A Bibliography of Key Final Agency Determinations of the United States Department of Agriculture Risk Management Agency

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A BIBLIOGRAPHY OF KEY FINAL AGENCY DETERMINATIONS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE RISK MANAGEMENT AGENCY

Chad G. Marzen[†]

Abstract

This Article is the first law review article to comprehensively examine Final Agency Determinations (FADs) of the United States Department of Agriculture. A key part of the administrative process within the Risk Management Agency of USDA, FADs contribute to the interpretation and understanding of the Common Crop Insurance Policy, which is the federally-reinsured multi-peril insurance contract. This Article surveys ten of the most significant recent FADs and emphasizes the importance of FADs to litigated disputes between insurance providers and insureds with regard to the federal crop insurance program. Overall, understanding of FADs is critical for stakeholders with the multi-peril crop insurance program.

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I. INTRODUCTION

The federal crop insurance program is a vital risk management program that provides an important safety net for agricultural producers.¹ Multi-peril crop insurance (“MPCI”) sold and serviced by private insurance companies and administered by the Federal Crop Insurance Corporation (“FCIC”)² covers a diverse variety of potential perils.³ As a partnership between the federal government and private insurance companies, federal crop insurance claims potentially involve a number of areas in the law: federal statutes, federal administrative law, state statutes, and state common law rules (particularly contracts and torts). Given the labyrinth of federal and state caselaw as well as federal administrative rules and regulations, navigating the claims process with multi-peril crop insurance claims is a highly complex and technical one for producers, attorneys, and insurers.

The Risk Management Agency (“RMA”) of the United States Department of Agriculture manages the FCIC and, through the FCIC, manages the federal crop insurance program.⁴ Multi-peril crop insurance utilizes a Common Crop Insurance Policy, and particular crops have specific policy provisions as well.⁵ Questions of interpretation of the Common Crop

1. See Marc Heller, *Crop Insurance Comes to Grips with Climate Change*, E&E NEWS: GREENWIRE (Mar. 2, 2022, 01:31 PM), <https://www.eenews.net/articles/crop-insurance-comes-to-grips-with-climate-change/> [<https://perma.cc/PKK3-5VHA>].

2. *History of the Crop Insurance Program*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (2022), <https://legacy.rma.usda.gov/aboutrma/what/history.html> [<https://perma.cc/R258-EYKY>].

3. *Crop Insurance*, NAIC: CENTER FOR INSURANCE AND POLICY RESEARCH, https://content.naic.org/cipr_topics/topic_crop_insurance.htm [<https://perma.cc/3F22-RTYL>] (July 27, 2022) (“MPCI covers a broad range of perils (e.g., drought, excessive moisture, freeze, disease and other natural causes) and must be purchased before planting begins.”).

4. *About the Risk Management Agency*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY, <https://www.rma.usda.gov/About-RMA> [<https://perma.cc/SD9P-ML24>] (“The United States Department of Agriculture’s (USDA) Risk Management Agency (RMA), created in 1996, serves America’s agricultural producers through effective, market-based risk management tools to strengthen the economic stability of agricultural producers and rural communities. RMA is committed to increasing the availability and effectiveness of Federal crop insurance as a risk management tool. RMA manages the Federal Crop Insurance Corporation (FCIC) to provide innovative crop insurance products to America’s farmers and ranchers. Approved Insurance Providers (AIP) sell and service Federal crop insurance policies in every state and in Puerto Rico through a public-private partnership with RMA. RMA backs the AIPs who share the risks associated with catastrophic losses due to major weather events.”).

5. See *Common Crop Insurance Policy, Basic Provisions*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (2022), available at: <https://www.rma.usda.gov/Policy-and-Procedure/Insurance-Plans/Common-Crop-Insurance-Policy—Basic-Provisions>

Insurance Policy do arise among participants in the program, and a major function of RMA is to issue Final Agency Determinations (“FAD”) to help resolve these ambiguities.⁶ FADs are very important in the world of multi-peril crop insurance—these determinations have the force of law and are final and binding on all participants in the Federal Crop Insurance Program.⁷ FADs can be subject to judicial review but only if the Director of the National Appeals Division of the United States Department of Agriculture⁸ issues an administrative decision that the FAD is generally applicable.⁹

The purpose of this Article is to present and analyze ten of the most significant FADs issued by RMA in recent years. A number of the FADs discussed in this Article have even been assessed by state and federal judges in their opinions on litigated cases. Understanding FADs is critical for stakeholders with the multi-peril crop insurance program. This Article contributes to an expanding crop insurance literature by being the first law review article to comprehensively examine FADs.

II. KEY FINAL AGENCY DETERMINATIONS

The ten FADs included and discussed in this Article are key FADs producers, attorneys, and insurers should all have familiarity with. These FADs cover a variety of legal issues and doctrines—from preemption,¹⁰ to equitable estoppel,¹¹ and impossibility,¹²—which a legal practitioner

[<https://perma.cc/B4GR-VNPR>].

6. See *Final Agency Determinations*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (2022), <https://www.rma.usda.gov/Policy-and-Procedure/Final-Agency-Determinations> [hereinafter *Final Agency Determinations*] [<https://perma.cc/CR55-YT7F>].

7. *Id.*

8. See *About NAD*, U.S. DEP’T OF AGRIC. NAT’L APPEALS DIV. (2022), <https://www.nad.usda.gov/content/organization> [<https://perma.cc/4XZM-TXTE>].

9. See *Final Agency Determinations*, *supra* note 6.

10. See, e.g., *Woodard-Hall v. STP Nuclear Operating Co.*, 473 F. Supp. 3d 740, 745 (S.D. Tex. 2020) (“Three forms of preemption are frequently discussed in judicial decisions: express preemption, conflict preemption, and field preemption. These three, however, are forms of “ordinary preemption” that serve only as defenses to a state-law claim . . .”).

11. See, e.g., *Fitzgerald v. Spearhead Invs., LLC*, 493 P.3d 644, 650 (Utah 2021) (“The [equitable estoppel] doctrine operates to toll a statute of limitations if a plaintiff can establish three elements: (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party’s statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.”).

12. See, e.g., *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235, 236 (Fla. Dist. Ct.

may encounter in their law practice even outside of the crop insurance context as well.

A. FAD-288 – Timeliness of Notice and Ability of AIP to Adjust Loss

The Federal Crop Insurance Corporation (FCIC) agrees in part with the requestor’s interpretation of section 14 of the Basic Provisions. FCIC agrees a policyholder’s claim may be paid if the AIP can accurately adjust the loss, provided all other policy provisions are met, even though the notice of loss may not have been filed within time frames set forth in section 14(b) of the Basic Provisions. However, if timely notice was not filed, and an AIP determines the loss cannot be accurately adjusted, the loss will be considered due to uninsured causes.

This directly relates to the exception set forth in section 14(b)(5), “unless we determine that we have the ability to accurately adjust the loss.” This exception speaks directly to submission of claim requirements as it relates to delayed Notice of Loss. Policyholders must still meet all other policy provisions and AIPs must follow delayed Notice of Loss procedures. Indemnity payments will be limited as to what losses an AIP can determine accurately on a case-by-case basis.¹³

With a multi-peril crop insurance claim, a producer must give notice to the approved insurance provider (“AIP”) within 72 hours of the producer discovering the damage or loss of production.¹⁴ If the notice provision is not followed and proper notice is not given to the insurer, the Common Crop Insurance Policy considers the loss an “uninsured cause of loss.”¹⁵ However, there is a caveat with the defective notice rule, as the regulation reads:

If you fail to submit a notice of loss in accordance with these notice provisions, any loss or prevented planting claim will be considered solely due to an uninsured cause of loss for the acreage for which such failure occurred, unless we determine that we have the ability to accurately adjust the loss.¹⁶

App. 2016) (“Under the doctrine of impossibility of performance or frustration of purpose, a party is discharged from performing a contractual obligation which is impossible to perform and the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.”).

13. *Final Agency Determination: FAD-288*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Aug. 27, 2019), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-14-FAD-288> [hereinafter *FAD-288*] [<https://perma.cc/T7ZB-JRPZ>].

14. *See* 7 C.F.R. § 457.8(14)(b)(1) (2022).

15. § 457.8(14)(b)(5).

16. *Id.*

Thus, if an insurer can accurately adjust a crop loss, this section also provides that despite the lack of proper notice, the claim can be paid if it can be accurately adjusted.

This section raises the question—if an insurer can adjust a crop loss despite untimely notice, *must* the claim be paid, or *may* the claim be paid? The requestor of the FAD argued there was no underwriting justification for an insurer to deny a claim if the loss could be adjusted despite the untimely notice of loss since “the risk covered by the policy, the risk contemplated when the policy was issued, and the premium calculated, do not change when the notice of loss or the claim is made past a deadline granted the loss can be accurately adjusted.”¹⁷

RMA took the position in FAD-288 that an insurer *may* pay out an insured’s claim if the loss can be accurately adjusted irrespective of the untimely notice of loss, but not *must*. RMA noted in FAD-288 that any claim payments are limited only to the crop losses that can be accurately adjusted “on a case-by-case basis.”¹⁸

B. FAD-258 and Arbitration

FCIC agrees with the requestor’s interpretation. Section 20(b)(1) makes it clear that even if mediation is elected, the initiation of arbitration proceedings must occur within one year the date the approved insurance provider denies the claim or renders the determination with which the policyholder disagrees. FCIC also agrees that failure to initiate arbitration within the period prescribed by section 20(b)(1) precludes the policyholder from seeking judicial review.¹⁹

A significant requirement in any multi-peril crop insurance claim is that if the insured disagrees with an insurer’s determination or claim denial, the insured must initiate arbitration within one year of the dispute determination or denial.²⁰ The failure to timely initiate arbitration results in a claim denial. An example of this occurred in the California

17. See FAD-288, *supra* note 13.

18. *Id.*

19. *Final Agency Determination: FAD-258*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Mar. 1, 2016), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-20b-FAD-258> [hereinafter *FAD-258*] [<https://perma.cc/MB3D-9PGX>].

20. See 7 C.F.R. § 457.8(20)(b)(1) (2022) (“Regardless of whether mediation is elected: (1) You must initiate arbitration proceedings occur within 1 year of the date we denied your claim or rendered the determination with which you disagree, whichever is later.”).

Court of Appeals case *Sunset Ranches, Inc. v. NAU Country Insurance Company*.²¹ In the *Sunset Ranches* case, a crop insurance claim was denied in May 2014.²² Instead of requesting an arbitration within one year of the date of the claim denial, counsel for the insured filed a complaint in California state court in March 2015.²³ The insurer filed a motion to compel arbitration, which the trial court agreed to in September 2015.²⁴ The arbitrator ruled in favor of the insurer, holding that the insured failed to comply with the policy terms and that the claim was properly denied.²⁵ The insured then filed a motion to vacate the arbitration award, which the trial court denied.²⁶ The California Court of Appeals upheld the denial of the motion to vacate the arbitration award, noting that the insurer even notified the insured of the right to seek arbitration and, instead, the insured filed a lawsuit in state court.²⁷ The California Court of Appeals specifically cited the one-year arbitration requirement in section 20(b)(1) of the Common Crop Insurance Policy in upholding the denial.²⁸

FAD-258 directly addresses the situation in which the insured seeks *mediation* instead of arbitration and whether engaging in mediation tolls the one-year arbitration requirement.²⁹ FAD-258 takes the position that firm mediation does not change or toll this requirement and that “if the policyholder fails to commence arbitration within the one-year period, the policyholder waives the right to arbitration and judicial review.”³⁰

C. FAD-280 and Statute of Limitations

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

21. See *Sunset Ranches, Inc. v. NAU Country Ins. Co.*, No. F078916, 2021 WL 3614417 (Cal. Ct. App. 2021).

22. *Id.* at *5.

23. *Id.* at *4.

24. *Id.* at *6.

25. *Id.* at *7.

26. *Id.*

27. *Id.* at *10–11.

28. *Id.* at *11 (“Even assuming, arguendo, that [insured] somehow initiated arbitration on this date, this occurred more than a year after NAU rendered the challenged determination. Because [insured] did not comply with section 20(b) of the Basic Provisions, it could not petition the court for an order vacating the arbitration award.”).

29. FAD-258, *supra* note 19.

30. *Id.*

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.³¹

One of the requestors with FAD-280 interpreted this section to allow for tolling in the case where an insured's claim is incorrectly adjusted through no fault of their own, has relied upon an insurer's representation that the claim was properly adjusted, and then later discovers the errors.³² The requestor contended that the *Merrill* doctrine³³ in these situations would be inapplicable since the insured was not relying upon misrepresentations of policy provisions which they are charged knowledge of but rather the loss adjustment procedures which they are not deemed to have legal knowledge of.³⁴

Extending the rule of FAD-258, which reaffirmed the one-year requirement to file for arbitration despite the presence of mediation, FAD-280 keeps that one-year requirement even in cases where an insurer or their adjuster(s) make incorrect representations regarding the adjustment of the claim.³⁵

D. FAD-299 and Equitable Tolling

FCIC agrees with the second requestor that the one-year limitation provision in section 20(a)(1) 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. This is supported by FAD-280, published on RMA's website on September 18, 2018, which states that the one-year limitation provision prevents a policyholder from bringing an arbitration action or seeking judicial

31. *Final Agency Determination: FAD-280*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY (Sept. 18, 2018), <https://www.rma.usda.gov/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-20b-FAD-280> [hereinafter *FAD-280*] [<https://perma.cc/LJU5-5MSM>].

32. *Id.*

33. The *Merrill* doctrine is a doctrine which allows the government to disavow an agent's unauthorized representations relating to items an individual has been charged legal knowledge of. See Chad G. Marzen, *The Merrill Doctrine and Federally Reinsured Crop Insurers*, 89 N.D. L. REV. 585 (2013), for more information.

34. *FAD-280*, *supra* note 31.

35. *Id.*

review under the terms of the policy more than one year after the claim payment or the determination which is being challenged.

If arbitration proceedings include or are initiated based on extra-contractual claims and equitable estoppel principals are brought forth, this does not alter or add exceptions to the one-year period. FAD-258, published on RMA's website on November 19, 2019, states section 20(b)(1) makes it clear that even if mediation is elected, the initiation of arbitration proceedings must occur within one year of the date the approved insurance provider denies the claim or renders the determination with which the policyholder disagrees. FCIC also agrees that failure to initiate arbitration within the period prescribed by section 20(b)(1) precludes the policyholder from seeking judicial review.³⁶

FAD-299 addressed the issue of equitable estoppel to extend the one-year arbitration requirement for a multi-peril crop insurance claim. As the Florida Supreme Court remarked in *Major League Baseball v. Morsani*, "equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position."³⁷ The *Morsani* Court also defined equitable estoppel as a doctrine that is applied in "cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury."³⁸

In the multi-peril crop insurance context, this fact pattern is one to consider—imagine a producer who suffers a crop loss to corn due to a major windstorm. An adjuster inspects the fields and determines the loss, and the insurer pays out an indemnity. In this hypothetical example, an adjuster can even make an egregious error, misleading the producer and leading that producer to the belief the claim will be reviewed again (and then the adjuster keeps bringing up an excuse on the review of the claim). The excuses keep going until one year, and one day passes from the date the claim was determined. With FAD-299, not even equitable estoppel would toll the one-year arbitration requirement. In the apparent view of RMA, this one-year arbitration requirement, as outlined in the Common Crop Insurance Policy, is, in essence, an ironclad requirement.

36. See *Final Agency Determination: FAD-299*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY (Sept. 21, 2020), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-20b-FAD-299> [<https://perma.cc/ZZP7-PQUX>].

37. See *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001).

38. *Id.* (quoting *State ex rel. Watson v. Gray*, 48 So. 2d 84, 88 (Fla. 1950)).

E. FAD-305 and Fire Insurance

FCIC agrees with the second requestor. If the insured has other fire insurance and fire coverage under the CCIP Basic Provisions, the AIP will be liable only for the smaller of the amount of indemnity computed for loss due to fire, or by which the loss from fire exceeds the indemnity paid or payable under the other insurance. The amount of loss from fire is the difference between the total value of the production of the insured crop on the unit involved before and after the fire.³⁹

FAD-305 addresses a situation where a crop loss may occur due to fire and the insured has multiple insurance policies which cover the loss. The insured may have a multiple-peril crop insurance policy that covers the loss and a supplemental crop insurance fire insurance policy that may provide coverage.⁴⁰ In this scenario, the question arises—if a fire occurs and the multi-peril crop insurance policy has coverage that exceeds the supplemental crop insurance fire policy, can the insured recover both the limits of the supplemental crop insurance fire policy and the multi-peril crop insurance policy? Or is an insured limited to recovering only the smaller of the difference between the supplemental crop insurance fire policy limits and the multi-peril crop insurance policy or the full limits of the multi-peril crop insurance policy? Section 22 of the Common Crop Insurance Policy provides that an insurer is:

liable for loss due to fire caused by a naturally occurring event only for the smaller of: (1) The amount of indemnity determined pursuant to this policy without regard to such other insurance; or (2) The amount by which the loss from fire is determined to exceed the indemnity paid or payable under such other insurance.⁴¹

39. *Final Agency Determination: FAD-305*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY, (Sept. 2, 2021), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-22-FAD-305> [hereinafter *FAD-305*] [<https://perma.cc/E53R-WN4S>].

40. See *Don't Make Assumptions About Fire Insurance Coverage for Your Crops*, VOSS L. FIRM, P.C. (2022), <https://www.vosslawfirm.com/blog/major-differences-in-crop-fire-insurance-policies.cfm> ("Crop fire insurance coverage can be very different from policy to policy. Because farm insurance policies are so individual to the farms they cover, you can't necessarily rely on what happened to a friend – or even a neighbor across the street – when trying to predict what might happen to you after a crop fire. Some crop insurance policies will cover some types of fire damage, and some farms even have some coverage for crop fires under their umbrella policies. The only way to really know is to look at the coverage you carry.") [<https://perma.cc/2WYK-BL4S>].

41. 7 C.F.R. § 457.8(22)(b) (2022).

A requestor contended that the language of Section 22 requires an insurer to pay the full amount under the multi-peril crop insurance policy, and that the doctrine of "reasonable expectations" should apply so the insured's expectations regarding fire insurance coverage are met.⁴² The doctrine of "reasonable expectations" in insurance law provides that "if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy."⁴³

FAD-305 rejected the reasonable expectations doctrine with regard to the interpretation of Section 22. Thus, a multi-peril crop insurer on a fire insurance claim is either liable for the smaller of the full amount of the multi-peril crop insurance policy or the difference in indemnity between the value of the full amount of coverage multi-peril crop insurance policy and the other applicable crop insurance fire policy.

F. FAD-259 and Impossibility

The Federal Crop Insurance Corporation (FCIC) agrees with the requestor's Interpretation. FCIC agrees the policyholder must obtain written consent from the AIP prior to replanting. FCIC also agrees that under the preamble to the Basic Provisions no person may waive the terms of the policy. As stated in FAD 191, the policy only provides authority for a replanting payment when a specific sequence of events occurs: first, damage must occur; second, the AIP must be timely notified by the policyholder; third, the AIP must provide consent for replanting the damaged crop; and four, the replanting must occur. Provided, all four of the events occurred these provisions preclude an arbitration from rendering an award for a replanting payment where consent was not obtained prior to replanting.

FCIC agrees that under section 506(1) of the Federal Crop Insurance Act and section 31 of the Basic Provisions, any state or local law in conflict with any provision of the policy is preempted. FCIC agrees section 20 means that any issue or dispute relating to the interpretation or applicability of a policy provision must be submitted to FCIC, and the determination is binding on all participants in the crop insurance program and the arbitrator must abide by the determination. Failure to adhere to this requirement can result in nullification of an arbitrator's award.

However, FCIC does not agree that preemption is as complete as the requestor suggests. The Supreme Court has held that all parties are bound by the terms of the contract codified in regulation. See FCIC v.

42. FAD-305, *supra* note 39.

43. Max True Plastering Co. v. U.S. Fid. & Guar. Co., 912 P.2d 861, 864 (Okla. 1996).

Merrill, 332 U.S. 380 (1947). This is consistent with FAD-211. However, the courts have also held that Federal law does not preempt all state law causes of action in cases where the agent or AIP has failed to follow FCIC approved policy and procedure. See *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683 (5th Cir. 2001); *Meyer v. Conlon, et. al.*, 162 F.3d 1264 (10th Cir. 1998). Therefore, FCIC's interpretation of the binding effect of the policy provisions and its interpretations of statute and regulations and its preemption of state and local laws must be consistent with the law, and that includes judicial precedence.

Further, FCIC does not agree that the defense of impossibility is preempted by statute or regulation, or any interpretation rendered by FCIC. FCIC has historically recognized impossibility as a defense to performance under the policy. While FCIC does not have the authority to waive or alter any provision of the policy, it is recognized that impossibility may be a defense to non-performance of a provision of the contract in very limited and far-reaching situations. It is the policyholder's burden in such situations to prove that it was impossible to comply with the specific terms on the policy. See BULLETIN NO.: MGR-09-009; (Inability to complete harvest due to adverse weather before the date claims must be submitted excuses performance); MGR-05-017 (Inability to provide a notice of loss within 72 hours excuses performance because a hurricane has destroyed the means of communication); BULLETIN NO.: MGR-03-012 (Lack of sufficient production information by the sales closing date excuses the requirement to elect to substitute yields by the sales closing dates). In each of these cases, FCIC has only recognized the physical impossibility of performance due to circumstances beyond the policyholder's control. FCIC does not recognize other state or common law defenses of impossibility.⁴⁴

FAD-280 and FAD-299 essentially closed the doors for a policyholder's claims for equitable relief by tolling the one-year requirement for a policyholder to request arbitration. However, equitable relief is not foreclosed in all situations with crop insurance claims.

In some rare cases, it may be impossible for a policyholder to fully comply with the contractual provisions of the Common Crop Insurance Policy. "Impossibility of [contractual] performance" has traditionally been recognized as a defense in cases of "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."⁴⁵ Impossibility arose as an issue in a case

44. See *Final Agency Determination: FAD-259*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY (Aug. 17, 2016), <https://legacy.rma.usda.gov/regs/533/2016/fad-259.html> [hereinafter FAD-259] [<https://perma.cc/7ULD-6EMZ>].

45. *Maple Farms, Inc. v. City Sch. Dist. of the City of Elmira*, 352 N.Y.S.2d 784, 787 (N.Y. Sup. Ct. 1974) (quoting Restatement (Second) of Contracts § 454 (Am. L. Inst. 1981)).

involving the delivery of oranges in *Holly Hill Products Co. v. Bob Staton, Inc.*⁴⁶ In the *Holly Hill Products Co.* case, the Florida Second District Court of Appeals remarked that “impossibility of performance of agricultural contracts varies according to whether the seller contracts to sell his own produce, in which case an individual crop failure constitutes legal impossibility, or whether an obligation is assumed to furnish fruit regardless of source.”⁴⁷ The Florida Second District Court of Appeals upheld the finding of the Commissioner of Agriculture that an orange delivery contract between a producer and purchaser was legally impossible due to a freeze of orange groves, which affected the producer.⁴⁸

FAD-259 explicitly recognizes the defense of impossibility in cases of physical impossibility for situations that are outside of the control of the insured.⁴⁹ Thus, the defense of impossibility is available for a policyholder in multi-peril crop insurance claims.

G. FAD-286 and Causes of Loss

The Federal Crop Insurance Corporation (FCIC) agrees with the requestor’s interpretation. Section 12 of the Basic Provisions and section 8 of the Cotton Crop Provisions are specific as to the insurable causes of loss. FCIC agrees with the requestor that sections 14(4)(iii)(B) and (C) of the Basic Provisions place the burden on the policyholder to establish that the failure of the irrigation supply was a result of one of the stated causes of loss in the Cotton Crop Provisions.⁵⁰

The Common Crop Insurance Policy limits multi-peril crop insurance coverage for “unavoidable, naturally occurring events.”⁵¹ The specific provisions for cotton provide for coverage for “failure of the irrigation water supply” due to any of the following: adverse weather conditions, fire, insects, plant disease, wildlife, earthquake, and volcanic eruption.⁵²

46. *Holly Hill Fruit Products Co., Inc. v. Bob Staton, Inc.*, 275 So. 2d 583, 584 (Fla. Dist. Ct. App. 1973).

47. *Id.*

48. *Id.*

49. FAD-259, *supra* note 44.

50. *Final Agency Determination: FAD-286*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Feb. 7, 2019), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-12-14-FAD-286> [hereinafter *FAD-286*] [<https://perma.cc/RT8R-56M5>].

51. See 7 C.F.R. § 457.8(12) (2022).

52. FAD-286, *supra* note 50.

FAD-286 addresses the specific question of whether a failure to properly maintain irrigation canals or a supplier's refusal to sell irrigation water to the producer would constitute "failure of the irrigation water supply" per the cotton provisions.⁵³ FAD-286 affirms that it is the burden of the insured to prove that the failure of the irrigation water supply on a cotton crop claim was due to a covered cause of loss and that losses caused by human activity and/or negligence are not covered.⁵⁴

H. *FAD-302 and Abandonment*

The FCIC agrees that section 14(d)(1) of the 2018 Basic Provisions requires written consent from the AIP to destroy a crop.

The FCIC disagrees with the requestor's interpretation of the meaning of destroy, destruction or abandonment, because it cannot be applied to all crops covered by the Basic Provisions. Individual crop provisions should be relied upon for crop-specific inferences. For example, while section 14(d)(1) of the Basic Provisions specifies the insured's responsibility to obtain consent prior to destroying the crop, the Cranberry Crop Provisions provide a separate and distinct definition for "abandon." In addition, when determining if the crop has been destroyed by the insured, the AIP must consider the actions or inactions of the insured taken after the suspected loss was noticed; factors outside the insured's control such as weather, and Good Farming Practices for the crop.⁵⁵

FAD-302 addressed the meaning of "destroy" pursuant to the Common Crop Insurance Policy.⁵⁶ The Common Crop Insurance Policy requires the insured to obtain consent before the insured takes action to "destroy any of the insured crop that is not harvested."⁵⁷ The requestor of the FAD contended that to "destroy" a crop also includes situations where the producer allows a crop to deteriorate into a worse condition following crop damage.⁵⁸ RMA disagreed with this interpretation in FAD-302, noting that the cranberry crop provisions specifically define abandon as "failure to continue to care for the crop, providing care so insignificant as to provide no benefit to the crop" and do not include "destroy" in the definition of "abandon."⁵⁹ Ultimately, FAD-302 clarified

53. *Id.*

54. *Id.*

55. See *Final Agency Determination: FAD-302*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY (Apr. 28, 2021), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-14d1-FAD-302> [<https://perma.cc/7RKA-4JAP>].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

that the definition of “destroy” depends upon each individual crop and the individual crop provisions.⁶⁰

I. *FAD-287 and Indemnity Overpayments*

FCIC agrees with the first and second requester that section 21(b)(3) only addresses ramifications for the knowledgeable misreporting of information used to establish yields. FCIC also agrees with the first requester that this provision is only one instance where claim corrections or overpayments are discussed. Remedies to such errors are not addressed by this section alone. FCIC has issued determinations similar (FAD-106 and FAD-281) to the determination sought.

As FCIC explained in FAD-106, ‘there are numerous other provisions of the policy where non-compliance would affect the existence or amount of an indemnity paid. Non-compliance with any of these other provisions could entitle the AIP to collect any amounts that may have been overpaid as a result of such non-compliance . . . When overpayments are discovered as a result of non-compliance with any policy provision, the policyholder may be required to pay such overpaid amounts.’

FCIC does not agree with the second requester that only non-compliance by an insured can result in an AIP being able to reclaim alleged overpayments. The AIP has a duty to correct claims. As stated in FAD-281, 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. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by the 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).

In closing, FCIC agrees with the first requester that if an error recognized at any point it must be corrected. It is the AIP’s responsibility to audit and correct any claim that was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim.⁶¹

In some cases, an indemnity for a multi-peril crop insurance loss may result in an overpayment from the insurer to the producer. The Common Crop Insurance Policy permits the insurer and any employee of the United States Department of Agriculture “to investigate or review

60. *Id.*

61. See *Final Agency Determination: FAD-287*, U.S. DEP’T OF AGRIC. RISK MGMT AGENCY (Oct. 16, 2019), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Basic-Provisions-21-FAD-287> [hereinafter *FAD-287*] [<https://perma.cc/T7ZB-JRPZ>].

any matter relating to crop insurance” and “have the right to examine the insured crop and all records related to the insured crop” for a time period “during the record retention period.”⁶² This record retention is for a period of three years after the end of the crop year.⁶³

FAD-287 addresses the question of whether the recovery of indemnity overpayments is permitted only when the insured misrepresents information.⁶⁴ RMA takes the position in FAD-287 that not only can an indemnity overpayment be recovered when an insured misrepresents information, but in other situations as well, since the insurer has a duty to correct claims.⁶⁵ In essence, a multi-peril crop insurer has a time frame of three years to correct any indemnity overpayments.

An indemnity overpayment purportedly occurred in the case of *Farmers Mutual Hail Insurance Company of Iowa v. Miller*.⁶⁶ The producer in the *Miller* case grew corn and soybeans and had multi-peril crop insurance claims during the 2012 and 2013 crop years.⁶⁷ In 2014, the producer had a claim that was denied by the insurer due to alleged record-keeping practices.⁶⁸ Then, following the denial of the 2014 claim, the insurer made a claim for an alleged overpayment of indemnities for the 2012 and 2013 crop years.⁶⁹ The arbitrator ruled in favor of the insurer on both the denial of the 2014 claim and ordered the producer to reimburse the overpayments for 2012 and 2013.⁷⁰

The producer contended that the arbitrator exceeded its authority in ordering the reimbursements for the 2012 and 2013 crop years.⁷¹ In upholding the arbitrator’s award, the United States Court of Appeals for the Sixth Circuit in the *Miller* case cited FAD-287 and remarked that “the Insurance Corporation has now made clear that a crop insurer may reject a coverage claim based on poor recordkeeping alone and may obtain retroactive reimbursement for an overpaid claim on that basis.”⁷² While

62. See 7 C.F.R. § 457.8(21)(a) (2022) (“We, and any employee of USDA authorized to investigate or review any matter relating to crop insurance, have the right to examine the insured crop and all records related to the insured crop and any mediation, arbitration or litigation involving the insured crop as often as reasonably required during the record retention period.”).

63. See § 457.8(21)(b)(1).

64. See FAD-287, *supra* note 61.

65. *Id.*

66. See *Farmers Mut. Ins. Co. of Iowa v. Miller*, No. 20-1978, 2021 WL 3044275 (6th Cir. 2021).

67. *Id.* at *1.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at *2.

72. *Id.* at *3.

the Sixth Circuit in the *Miller* case noted that FAD-287 does not resolve who holds the burden of proof on a reimbursement claim, the court noted that it didn't matter to the resolution of the case since the regulations provide that the FCIC has the right to examine the insured crop and related records within the record retention period.⁷³

J. *FAD-240 (and FAD-251) and Preemption*

FCIC agrees with the requestor. Any claim, including a claim for extra-contractual damages solely arising from a condition related to policies of insurance issued pursuant to the Federal Crop Insurance Act (Act), may only be awarded if a determination was obtained from FCIC in accordance with section 20(i) of the Basic Provisions and § 400.176(b).

FCIC also agrees that 7 CFR § 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 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.

To the extent that State courts have awarded extra-contractual damages without first obtaining a determination from FCIC, such awards are not in accordance with the law.⁷⁴

Last but not least is the issue of preemption which has emerged in recent years in the field of crop insurance litigation. The longstanding general rule throughout the 1990s and early 2000s was that the Federal Crop Insurance Act does not preempt all state law causes of action with multi-peril crop insurance claims.⁷⁵ For example, in *Williams Farms of Homestead, Inc. v. Rain & Hail Insurance Services*, the United States Court of Appeals for the Eleventh Circuit held that breach of contract claims specifically were not preempted by the Federal Crop Insurance Act ("FCIA").⁷⁶

73. *Id.*

74. *Final Agency Determination: FAD-240*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY (Aug. 26, 2015), <https://www.rma.usda.gov/en/Policy-and-Procedure/Final-Agency-Determinations/Requesting-a-Final-Agency-Determination-FAD-240> [hereinafter *FAD-240*] [<https://perma.cc/ZQ3G-54MG>].

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

76. 121 F.3d 630, 634–35 (11th Cir. 1997).

At least one court has made a distinction between questions involving questions of policy interpretation and coverage under the Common Crop Insurance Policy and those questions that relate to issues outside of the policy. In *Plants, Inc. v. Fireman's Fund Insurance Company*, the agricultural producer, who owned a tree and shrub nursery in Tennessee, filed claims for breach of contract, negligence, breach of the duty of care, negligent misrepresentation, and statutory bad faith in a state court in Tennessee against the insurer and agent following a tornado loss.⁷⁷ In examining the preemption issue, the Tennessee Court of Appeals made a distinction between claims that arose out of policy interpretation and coverage and those claims relating to misrepresentations outside of the policy.⁷⁸ As the Tennessee Court of Appeals in the *Plants* case stated,

The current form of the regulations quoted above reveal no conflict with state law claims for negligence, misrepresentation, or fraud. The language of the arbitration provision refers to disagreements over 'determinations' made by the insurer presumably in accordance with FCIA and FCIC regulations; however, misrepresentations regarding the policy or the applicability of a policy to a crop are distinguishable from a determination regarding the policy language and coverage under the policy.⁷⁹

Thus, the negligent misrepresentation and negligence claims were not preempted, but the breach of contract, breach of the duty of care, and statutory bad faith claims were preempted since those particular claims arose out of "actions or inactions . . . authorized or required under the Federal Crop Insurance Act."⁸⁰

In FAD-240, issued on August 26, 2015, RMA has apparently taken the position more favorable to preemption of state law claims.⁸¹ Approximately four months after issuing FAD-240, RMA issued FAD-251 which further clarified its position on preemption.

FCIC agrees with the requestor's interpretation to the extent that any claim, including a claim for extra-contractual damages, that arises under or is related to a Federal crop insurance policy issued pursuant to 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 Common Crop Insurance Policy Basic Provisions and § 400.352.

77. *Plants, Inc. v. Fireman's Fund Ins. Co.*, No. M2011-02063-COA-R3CV, 2012 WL 3291805, at *1-2 (Tenn. Ct. App. Aug. 13, 2012).

78. *Id.* at *10.

79. *Id.*

80. *Id.* at *11 (quoting 7 C.F.R. § 400.352(b)(4) (2004)).

81. See FAD-240, *supra* note 74.

As previously provided in FAD-240, FCIC also agrees that 7 C.F.R. § 400.352 pre-empts any State law that would allow a claim for extra-contractual damages that conflicts with the provision in section 400.352 that any 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 FCIC. To the extent that State courts award extra-contractual damages without first obtaining a determination from FCIC, such awards are not in accordance with 7 C.F.R. § 400.352 and FCIC regulations.⁸²

FAD-240 and FAD-251 convey RMA's position that prior to an insured being able to recover extra-contractual damages against an insurer on an MPCIC claim, the insured must obtain a Section 20(i) determination as a condition precedent from RMA that the insurer, agent, or loss adjuster violated FCIC policies or procedures.⁸³ In essence, FAD-240 and FAD-251 purport to pronounce that the *Plants* decision was wrongly decided.

Significantly, both FAD-240 and FAD-251 refer to "State courts," not the decisions of federal courts on preemption.⁸⁴ Since the promulgation of FAD-240 and FAD-251, preemption continues to be a litigated issue.

At least two courts have analyzed RMA-240 or RMA-251. In *Dixon v. Producers Agriculture Insurance Company*, alleged misrepresentations were made by agents of a multi-peril crop insurer regarding the insurability of a burley tobacco crop.⁸⁵ On the preemption issue, the United States District Court for the Middle District of Tennessee held that the alleged misrepresentations regarding the insurability of the land and damages rooted in pecuniary loss at issue are not preempted.⁸⁶ On the other hand, the Minnesota Court of Appeals ruled the opposite way in *Zych v. Haugen* regarding preemption.⁸⁷ In *Zych*, the insured filed a negligence lawsuit against its insurance agent for alleged failure to timely submit its negligence claim on a multi-peril crop insurance claim.⁸⁸ In citing FAD-251 in dismissing the insured's negligence lawsuit on preemption grounds, the Minnesota Court of Appeals specifically stated that

82. *Final Agency Determination: FAD-251*, U.S. DEPT. OF AGRIC. RISK MGMT. AGENCY (Dec. 17, 2015), <https://legacy.rma.usda.gov/regs/533/2015/fad-251.html> [hereinafter *FAD-251*] [<https://perma.cc/89RM-T72V>].

83. See *FAD-240*, *supra* note 74; see also *FAD-251*, *supra* note 82.

84. See *FAD-240*, *supra* note 74; see also *FAD-251*, *supra* note 82.

85. See *Dixon v. Producers Agric. Ins. Co.*, 198 F. Supp. 3d 832, 834–35 (M.D. Tenn. 2016).

86. *Id.* at 841.

87. See *Zych v. Haugen*, No. A16-2082, 2017 WL 3222325, at *4 (Minn. Ct. App. July 31, 2017).

88. *Id.* at *1.

consistent with the goal of uniformity, a party must obtain a determination from the FCIC before that party may seek damages regarding a policy covered by the FCIA. The FCIC's regulations simply do not authorize a party to an FCIC-covered insurance policy to make that determination instead of the FCIC.⁸⁹

Since the insured in the *Zych* case apparently did not obtain a section 20(i) determination, the Minnesota Court of Appeals held the negligence claim was preempted.⁹⁰

III. CONCLUSION

A couple years into the Biden administration, there have been fourteen Final Agency Determinations issued by RMA as of the date of this Article during the administration.⁹¹ Not surprisingly, Final Agency Determinations continue to be a significant piece of fully understanding the complexity of crop insurance claims and are likely to be critical in creating clarity for producers, attorneys, and insurers involved with the federal crop insurance program in the future. As the debate around the 2023 Farm Bill approaches,⁹² some of the issues raised in the Final Agency Determinations analyzed in this Article can certainly be examined by Congress, particularly the issue of preemption and contract and tort remedies for producers in multi-peril crop insurance disputes and whether to move away from the harsh rule against equitable tolling with crop insurance claims. While Final Agency Determinations are very important, it is Congress, as reflected by the will of the voters, that can ultimately enact legislation to provide even more clarity in the sometimes mercurial and equivocal world of crop insurance.

89. *Id.* at *5–6.

90. *Id.* at *6.

91. See *Final Agency Determinations*, *supra* note 6.

92. See Sabrina Halvorson, *Rep. Scott: Work on 2023 Farm Bill On Track*, AGNET WEST (Mar. 23, 2022), <https://agnetwest.com/rep-scott-work-on-2023-farm-bill-on-track/> [<https://perma.cc/CJ7Q-6TES>].