HOW SAFE IS THE SAFETY NET?: THE IMPLICATIONS OF *WILEY v. GLICKMAN*

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I. INTRODUCTION

On February 10, 1999, the USDA's Risk Management Agency[1] issued a bulletin containing amended terms for a previously approved crop insurance policy.[2] The bulletin, which imposed a recalculation of the price guarantee for 1999 crop year durum wheat, was never published in the Federal Register.[3] Basically, it required certain policyholders to acquiesce to the changed provisions or have their contracts cancelled.[4] The result was *Wiley v. Glickman*,[5] an action by affected farmers to enjoin the Federal Crop Insurance Corporation ("FCIC") from implementing the amended terms contained in the subject bulletin.[6] When the farmers prevailed below, the Government appealed to the Eighth Circuit Court of Appeals.[7]

Owing to an express provision of the Agricultural Risk Protection Act of 2000 ("ARPA"),[8] we will never know how the Eighth Circuit would have ruled. ARPA specifically rescinded the controversial bulletin.[9] Consequently, the particular questions presented by *Wiley* were mooted by legislative fiat. Nevertheless, the positions of the parties and their respective arguments offer valuable context for examining the relationships between the FCIC, the private insurers,

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1. 7 C.F.R. § 2.44 (2002). The Risk Management Agency manages the Federal Crop Insurance Corporation and is responsible for administering the federal crop insurance program.

2. Wiley v. Glickman, No. A3-99-32, 1999 U.S. Dist. LEXIS 20278, at *24 (D.N.D. Sept. 3, 1999). RMA's bulletin MGR-99-004 stated: "Due to the excessive risks associated with artificially high prices generated under the current CRC Durum Wheat Policy, the Federal Crop Insurance Corporation (FCIC) has determined that it cannot provide reinsurance, producer premium subsidy, and administrative and operating subsidy unless the policy is revised." *Id.*

3. *Id.* at *28-29.

4. *Id.* at *24.

5. *Id*.

6. *Id.* at *3.

7. Brief for Appellant-Cross-Appellees at 2, *appeal of* Wiley v. Glickman, 1999 U.S. Dist. LEXIS 20278 (D.N.D. 1999) (Nos. 00-1064, 00-1067) (8th Cir. 1999), *available at* http://www.ca8.uscourts.gov/ (available under "One Stop Searching" link, using case number 00-1064) [hereinafter Brief for Appellant] (indicating that defendants filed a notice of appeal on Nov. 2, 1999).

8. Agriculture Risk Protection Act of 2000, Pub. L. No. 106-224, § 163(d), 2000 U.S.C.C.A.N. (114 Stat.) 358, 395.

9. *Id.* (providing that "bulletin MGR-99-004, issued by the Administrator of the Risk Management Agency of the Department of Agriculture, is void."). Unfortunately, ARPA's legislative history provides little insight into Congress' motivation for speaking to the issue. *See* H.R. 2559, 106th Cong. (2000) (enacted). The House Conference Report, while fairly exhaustive otherwise, makes no reference whatsoever to the provision dealing with the bulletin. *See* H.R. CONF. REP. NO. 106-639, at 104-59 (2000), *reprinted in* 2000 U.S.C.C.A.N. 375, 375-430.

and the insured farmers. It is important to understand the nature of these relationships because crop insurance has become the Government's preferred mechanism for providing disaster assistance to agriculture.[10] However, the Government's position in *Wiley* raises questions about the reliability of privately delivered crop insurance as the centerpiece of the farm safety net of the future.[11]

This article begins with a summary treatment of the evolution and historic performance of federal crop insurance. This is followed by a brief examination of the contractual relationship between the Government and the reinsured insurance companies that provide crop insurance coverage for farmers. Next, it reviews the arguments and outcomes of the *Wiley* case. Finally, it concludes with an attempt to explain the implications of *Wiley* on the expanded role for crop insurance as envisioned by ARPA.

II. BACKGROUND

The concept of crop insurance is nothing new.[12] Several failed attempts by the private sector to provide multi-peril coverage occurred between 1899 and 1920.[13] The FCIC was created in 1938 with passage of the Federal Crop Insurance Act ("FCIA").[14] As originally conceived, crop insurance was supposed to protect farmers against price risks.[15] FCIC initially operated as a hedger, buying wheat with premium dollars and then selling it to pay indemnities when due.[16]

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10. Steffen N. Johnson, *A Regulatory "Waste Land": Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505, 507 (1996).

11. *See* UNIV. OF ARK. DIV. OF AGRIC., GLOSSARY OF AGRICULTURAL PRODUCTION, PROGRAMS AND POLICY 400 (3d ed. 2001) (defining safety net as "protection from fluctuating crop prices through *marketing assistant loans, crop insurance,* and *revenue assurance/insurance."*).

12. *See* BARRY K. GOODWIN & VINCENT H. SMITH, THE ECONOMICS OF CROP INSURANCE AND DISASTER AID 34 (AEI Press 1995). "The history of all-risk or multiple-peril crop insurance in the United States began in 1899 when the Realty Revenue Company of Minnesota offered a contract that guaranteed insured wheat farmers a minimum of five dollars per acre for their crop, regardless of the cause of loss." *Id.*

13. *Id*. Privately underwritten, limited-risk crop insurance, typically fire and/or hail, was offered during this early period and remains available still. *See, e.g., Agriculture Risk Protection Act of 2000: Hearing on the Federal Crop Insurance Program,* 106th Cong. 1 (2000) (statement of Steven C. Rutledge, Senior Vice-President, Farmers Mutual Hail Insurance Co. of Iowa) (stating that "Farmers Mutual has been providing private crop hail insurance to many of our nations [sic] farmers since 1893…."). *See also* GOODWIN & SMITH, *supra* note 12, at 34 (stating that privately underwritten limited risk crop insurance was offered during this early period).

14. Federal Crop Insurance Act, ch. 30, 52 Stat. 72 (1938) (codified as amended at 7 U.S.C. §§ 1501-1524 (2000)).

15. *See* Johnson, *supra* note 10, at 511 (stating that "FCIC's obligations were all determined on a bushel basis--in order to insulate farmers from price risks.").

16. *Id.* The FCIC originally insured wheat only, but by 1945 coverage had been extended to include cotton, flax, corn, and tobacco also. *Id.*

From the outset, FCIC performed poorly and its operations were completely suspended in 1944.[17]

The average loss ratio for FCIC operations between 1939 and 1943 was 1.65.[18] This means that the FCIC paid out $1.65 for every dollar in premiums it collected.[19] This early poor performance has been blamed on several factors, including the following: administration by local committees that resulted in excessive moral hazards,[20] use of countywide yield data for setting premiums,[21] and after-planting contracting.[22]

In 1945, FCIC returned to the wheat insurance business and was also authorized to provide coverage for other crops on an experimental basis.[23] As had been its experience with earlier and more limited operations, the FCIC's expanded operations proved costly.[24] Congress responded with amendments in 1947 that restricted the rate of expansion of coverage for new crops.[25] It also limited the amount of coverage available to a farmer for any covered crop.[26] These restrictions significantly lowered average annual loss ratios and subsidy outlays between 1947 and 1973.[27] This conservative approach, however, also resulted in modest participation by farmers in areas where coverage was available.[28] Moreover, crops in many areas were not even eligible for protection.[29]

In response to this lack of protection, the 1974 and 1977 farm bills authorized a separate crop disaster program.[30] While the disaster program was ex-

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17. *Id.*

18. GOODWIN & SMITH, *supra* note 12, at 41.

19. *Id.*

20. Johnson, *supra* note 10, at 529. In the insurance context, "moral hazard" is a term of art which relates to risk-increasing behavior on the part of an insured owing to the existence of the insurance. *Id.*

21. GOODWIN & SMITH, *supra* note 12, at 41-42 (stating that the use of area yields as opposed to individual farm yields resulted in premium rates being set too low to cover losses).

22. *Id.* at 42 (indicating that this after-the-fact contracting resulted in an unacceptably high risk pool of insured farmers because only the ones with poor crop prospects signed contracts).

23. *Id.* Experimental programs, even though limited in scope to no more than twenty counties, were authorized for nearly all major crops and for minor crops with sufficient actuarial data. *Id.*

24. *Id.* The average loss ratio for 1945-1946 was 1.95 and the premium subsidy averaged $21 million. *Id.*

25. *Id.; see also* Johnson, *supra* note 10, at 512.

26. Johnson, *supra* note 10, at 512.

27. GOODWIN & SMITH, *supra* note 12, at 43-44. During the period from 1947-1955, FCIC experienced average annual loss ratios and premium subsidies of 1.16 and $3.4 million. *Id.* at 43. From 1956-1973, FCIC's annual loss ratio was 0.86. *Id.* at 40.

28. *Id.* at 42-44.

29. *Id.* at 43; *see also* Johnson, *supra* note 10, at 513 (stating that "[a]s of 1980, the FCIC offered coverage for only 30 crops in one-half of U.S. counties.").

30. GOODWIN & SMITH, *supra* note 12, at 44 (discussing the Agricultural and Consumer Protection Act of 1974 and the Food and Agriculture Act of 1977).

tremely popular with producers, it was criticized by many as being too expensive.[31] This dynamic led to enactment of the Federal Crop Insurance Act of 1980 and a radical overhaul of the FCIC.[32] The stated purpose of this legislation was to expand crop insurance coverage to all geographic regions of the country.[33] To make participation more attractive to farmers, it offered a subsidy of thirty percent of the premium associated with insuring sixty-five percent of the average farm yield.[34] The 1980 Act also removed the restrictions on the FCIC's expansion into new crops or counties that had been imposed in 1947.[35] Finally, the 1980 Act fundamentally changed the way FCIC products were sold and serviced.[36]

Prior to 1981, most FCIC contracts were sold and serviced by government employees.[37] By 1983, however, federal crop insurance contracts were sold exclusively under master marketing contracts or private reinsured contracts.[38] The master marketing contracts authorized by the 1980 Act allowed private insurance agents to sell FCIC contracts for a percentage of the premiums.[39] Under a master marketing contract, FCIC remained responsible for service and loss adjustment on the policy after the sale.[40] Under reinsured contracts, the private insurance company sells, services, and adjusts losses.[41] Reinsured companies gradually dominated FCIC policy sales and the once-popular master marketing contracts are now obsolete.[42]

The 1980 amendments were dramatically successful in one sense. The number of counties with at least one crop program nearly doubled between 1980 and 1993.[43] During this same period, the total number of county crop programs

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31. *Id.* at 45-46.

32. *Id.* (citing Act of Sept. 26, 1980, Pub. L. No. 96-365, 94 Stat. 1312). There has been chronic tension between the disaster program and crop insurance as the appropriate model for delivering disaster relief to farmers. *See generally* Johnson, *supra* note 10, at 534-35. "The real test of congressional determination, however, will come with the countries next natural disaster of catastrophic proportions. Then, and only then, will it be clear whether Congress has abandoned this *internal conflict* for good." *Id.* (emphasis added).

33. GOODWIN & SMITH, *supra* note 12, at 46.

34. *Id.* at 46-47.

35. *Id.* at 47.

36. *Id.*

37. *Id.* at 52 (indicating that FCIC policies were sold by part-time FCIC employees and also by local ASCS offices).

38. *Id.* at 52-53.

39. *Id.* at 53.

40. *Id.*

41. Johnson, *supra* note 10, at 524.

42. *Id.* (explaining that reinsured companies accounted for 3% of policies in 1981 and almost 89% in 1990). *Cf.* GOODWIN & SMITH, *supra* note 12, at 55 (noting that in 1983 50% of sales were made by master marketers but that had fallen to less than 10% by 1993).

43. GOODWIN & SMITH, *supra* note 12, at 50-51 (noting that the number of counties

increased from 4,651 to 24,587, and the total number of covered crops increased from twenty-eight to fifty-one.[44] Despite the explosion of program availability and premium subsidies, overall participation remained disappointing.[45] Between 1980 and 1992, the maximum participation rate was forty percent in 1989 and 1990 when insurance was required for other USDA program eligibility.[46]

The next significant reform of the crop insurance program came in 1990. The Bush administration had wanted to do away with crop insurance in favor of a standing disaster program.[47] Congress, however, refused to terminate the program and it survived with a mandate to reduce loss ratios and lower its costs.[48]

Another round of major reforms to crop insurance was made in the USDA Reorganization and Crop Insurance Reform Act of 1994.[49] This Act merged FCIC operations into a newly created Office of Risk Assessment and Cost Benefit Analysis within the Farm Service Agency ("FSA").[50] It also required development and delivery of Catastrophic Risk Insurance ("CAT").[51]

The Act established a dual delivery system for CAT.[52] Certified FSA employees were allowed to sell and service CAT policies for any rated crops in counties designated by the Secretary of Agriculture as being traditionally underserved.[53] At the same time, the private companies were authorized to sell and service CAT as well as other traditional Multi-Peril Crop Insurance ("MPCI") policies.[54] Because a crop insurance requirement was linked to other farm program eligibility under the Act, program participation skyrocketed after the 1994 reforms.[55]

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offering at least one program increased from 1,676 in 1980 to 3,026 by 1993).

44. *Id.*

45. *Id.* at 47-48 & tbl.3-2 (noting that the 1980 act had established a target goal of 50% participation).

46. *Id.* at 48 n.13.

47. *Id.* at 55.

48. *Id.* at 56.

49. Federal Crop Insurance Reform Act of 1994, Pub. L. No. 103-354, Title I, § 101, 108 Stat. 3179 (codified as amended at 7 U.S.C. §§ 1501-1524).

50. Johnson, *supra* note 10, at 524 (explaining that the Act "authorizes the Secretary to assign to the [FSA] the general supervision of the FCIC" and requires the Secretary to establish the Office of Risk Assessment and Cost Benefit Analysis within the FSA).

51. *Id.* at 518. The author describes CAT coverage as the "centerpiece" of the 1994 reforms. *Id.* CAT provided payment on yield losses "greater than 50%, indemnified at 60% of expected market price." *Id.*

52. *Id.* at 520.

53. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-70, CROP INSURANCE: OPPORTUNITIES EXIST TO REDUCE GOVERNMENT COSTS FOR PRIVATE-SECTOR DELIVERY 19 (1997), *available at* http://www.gao.gov/archive/1997/rc97070.pdf [hereinafter GAO, OPPORTUNITIES].

54. *Id.*

55. *See* Johnson, *supra* note 10, at 525.

The dual delivery system did not last long.[56] The 1996 farm bill required the transfer of all FSA's CAT policies to the private sector where there was a sufficient private sector presence to adequately service producers.[57] This would have been a tremendous windfall for the reinsured companies if the linkage requirements had been retained. However, Congress allowed farmers to drop their insurance in exchange for waiving eligibility for future disaster benefits.[58] Crop insurance imposed substantial paperwork and reporting requirements that were generally unpopular with farmers.[59] Consequently, it is not surprising that participation rates fell again when the mandatory linkage requirement was removed.[60]

Historically low commodity prices during the late 1990's resulted in record ad hoc disaster appropriations for agriculture.[61] In what has become a familiar pattern, the disaster programs refocused congressional attention on crop insurance.[62] It is generally agreed that crop insurance fell short of its billing during the 1996 farm bill debates as the farm safety net of the future.[63] Congress responded to its perceived shortcomings in the Agricultural Risk Protection Act of 2000.[64] ARPA's goals were eerily reminiscent of previous amendments: improve actuarial performance, increase participation, eliminate the need for ad hoc disaster relief, and further involve the private sector.[65] While time alone will tell if ARPA can live up to the rhetoric attending its passage,[66] experience suggests that some of these goals are mutually exclusive.[67]

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56. *Id.* at 521.

57. *Id.* The determination as to whether private insurance was sufficiently available was left to the discretion of the Secretary of Agriculture. *See* 7 U.S.C. § 1508(b)(4) (2000).

58. *See* Johnson, *supra* note 10, 521.

59. *Id.*

60. *Id.* at 535.

61. THE COMM'N ON 21ST CENTURY PROD. AGRIC., DIRECTIONS FOR FUTURE FARM POLICY: THE ROLE OF GOVERNMENT IN SUPPORT OF PRODUCTION AGRICULTURE: REPORT TO THE PRESIDENT AND CONGRESS 6 (2001), *available at* http://www.usda.gov/oce/21st-century/report.pdf.

62. *Id.* at 31-33.

63. *See id.* at 32 (discussing the evolution of Agricultural Risk Protection Act of 2000).

64. *Id.*

65. *See* GOODWIN & SMITH, *supra* note 12, at 40-41 (stating that "[t]hroughout its history, periods of relatively high loss ratios have been followed by substantial changes in the crop insurance program.").

66. *See, e.g.*, 146 CONG. REC. H3816, H3823 (daily ed. May 25, 2000) (statement of Rep. Bishop). The remarks of Rep. Bishop from Georgia captured nicely the optimism of Congress toward ARPA:

> We need a risk protection tool to repair the safety net that our farmers have had torn away from them. We have been working on this bill for some time, and I am just delighted that finally we are able to get to the point where we can go home and tell our farmers that we have accomplished our work.

Id.

67. U.S GEN. ACCOUNTING OFFICE GAO/RCED-93-98, CROP INSURANCE: FEDERAL PROGRAM FACES INSURABILITY AND DESIGN PROBLEMS 5 (1993), *available at* http://www.gao.gov

III. THE STANDARD REINSURANCE AGREEMENT

The relationship between the FCIC and the companies providing federally subsidized crop insurance is governed by a Standard Reinsurance Agreement ("SRA").[68] FCIC reinsurance agreements were first authorized in 1947 but saw little use until the 1980 amendments to the FCIA.[69] Reinsurance reduces the financial risks assumed by an insurer because the risks of catastrophic losses are spread among a pool of insurers.[70] Reinsurance arrangements are often favored by insurers because they reduce their reserve requirements and enhance their profitability.[71]

The SRA incorporates the FCIA and FCIC regulations by reference.[72] Under the SRA, the FCIC reinsures approved policies written by private insurance companies.[73] FCIC obligates itself to pay a predetermined portion of the policy premium as set out in the FCIA.[74] FCIC also agrees to pay losses on policies where the reinsured company is unable to pay because of orders or directives from a regulatory agency or court with competent jurisdiction.[75] FCIC's liability, however, is not limitless. FCIC can refuse to accept additional policies from the

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(available under "GAO Reports" link) (noting that legislative efforts to increase participation through liberal rules and limited premium rate increases often undermine actuarial soundness).

68. *See* 7 C.F.R §§ 400.161-400.176 (2002). "Reinsurance is a contractual arrangement whereby one insurer (the ceding insurer) transfers all or a portion of the risk it underwrites pursuant to a policy or group of policies to another insurer (the reinsurer)." Barry R. Ostrager & Thomas R. Newman, *Overview of Reinsurance*, *in* 454 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 339, 342 (1993) [hereinafter Ostrager & Newman, *Overview*] (citing Colonial Am. Life Ins. Co. v. Comm'r, 491 U.S. 244 (1989)); *see also* BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 15.01 (9th ed. 1998) [hereinafter OSTRAGER & NEWMAN, HANDBOOK].

69. Johnson, *supra* note 10, at 512.

70. *See* Ostrager & Newman, *Overview, supra* note 68, at 342-43.

71. *Id.* at 343 (citing Corcoran v. Universal Reinsurance Corp., 713 F. Supp. 77, 82 (S.D.N.Y. 1989)).

72. *See* 7 C.F.R. § 400.164 (2002).

73. *Id.* § 400.164

74. *Id.* § 400.166(b). ARPA significantly increased the subsidized share of MPCI policy premiums beginning with the 2001 reinsurance year. *See* Agriculture Risk Protection Act of 2000, Pub. L. No. 106-244, § 101, 114 Stat. 358, 361-63 (codified as amended at 7 U.S.C. § 1508(e)).

75. 7 C.F.R. § 400.166(c). *See also* RISK MGMT. AGENCY, USDA, STANDARD REINSURANCE AGREEMENT § V ¶ P(1) (July 1, 1997), *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf [hereinafter RMA, SRA] (providing "all eligible crop insurance contracts affected by such directive or order that are in force and subject to this Agreement as of the date of such inability or failure to perform will be immediately transferred to FCIC without further action of the Company by the terms of this Agreement.").

reinsured companies with written notice.[76] More importantly, any liability assumed by FCIC under the terms of the SRA is subject to adequate appropriations.[77]

The SRA obligates the reinsured companies to sell and service federal crop insurance according to FCIC procedures.[78] Reinsured companies must file a plan with the FCIC which designates the counties and states where it proposes to operate.[79] Once the plan of operations is approved by FCIC, a reinsured company must offer its insurance products to all eligible producers in those areas.[80] A company is also required to offer CAT and traditional buy-up insurance in its approved area of operations where those products are not offered by local USDA offices.[81] The SRA further requires that reinsured companies use only those forms and loss adjustment procedures that are approved by the FCIC.[82] Reinsured policies can only be sold through licensed agents or brokers that are FCIC certified.[83]

FCIC's SRA has evolved over time to reflect and incorporate various amendments to the FCIA.[84] The current version of the SRA was authorized in 1998 and implemented in 1999.[85] The SRA may change again soon because ARPA specifically authorized FCIC to change its terms once between 2001 and

76. 7 C.F.R. § 400.167(a).

77. *Id.* § 400.167(b). *See also* RMA, SRA, *supra* note 75, § V ¶ N, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

> Notwithstanding any other provision of this Agreement, FCIC's ability to sustain the Agreement depends upon the FCIC's appropriation. If FCIC's appropriation is insufficient to pay the obligations under this Agreement, and FCIC has no other source of funds for such payments, FCIC will reduce its payments to the Company on a *pro rata* basis or on such other method as determined by FCIC to be fair and equitable.

RMA, SRA, *supra* note 75, at §V ¶N, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

78. 7 C.F.R. § 400.168(a).

79. *Id.* § 400.168(b).

80. *Id.*

81. *Id.*

82. *See id.* § 400.168(c).

83. *Id.* § 400.168(a) & (e).

84. Johnson, *supra* note 10, at 517-18. "The 1990 Farm Bill mandated a revision of the [SRA] to ensure that reinsured companies would take greater responsibility for loss thereunder…. FCIC responded by revising the [SRA] to require greater risk retention by reinsured companies and to decrease the level of stop-loss insurance offered." *Id.*

85. *See* Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, § 536, 112 Stat. 523, 584 (codified as amended at 7 U.S.C. § 1506) ("For each of the 1999 and subsequent reinsurance years, the Corporation shall ensure that each Standard Reinsurance Agreement between an approved insurance provider and the Corporation reflects the amendments to the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1521) that are made by this subtitle ….").

2005.[86] Under the existing SRA, FCIC provides both proportional and non-proportional reinsurance.[87] Insurers are allowed to commercially reinsure any retained portion of their liability not ceded to FCIC provided they fully disclose the details in their plan of operations.[88]

A. *Proportional Reinsurance*

Under the SRA proportional reinsurance provisions, private insurers may designate eligible contracts into assigned risk, developmental, or commercial funds.[89] Any eligible contracts, including CAT and revenue policies, can be designated to the assigned risk fund but maximum cession rates per state are imposed.[90] All contracts designated into the assigned risk fund are combined in a single fund within each state.[91] Except in limited circumstances, the insurer must retain twenty percent of the net book premium and associated liability for contracts designated into the assigned risk fund.[92] Any liability not retained is ceded to FCIC in return for a corresponding percentage of the premiums.[93]

There are three developmental funds: fund C for CAT policies, fund R for revenue policies, and fund B for all other policies.[94] Insurers must retain at least thirty-five percent of the net book premium and liability for contracts designated into these funds, but may increase that amount in five percent increments for any state, provided they specify that intention in their plan of operations.[95] Insurers are allowed to vary retention percentages among the three developmen-

86. Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, § 148, 2000 U.S.C.C.A.N. (114 Stat.) 358, 394 (codified as amended at 7 U.S.C. § 1506). "Notwithstanding section 536 of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. § 1506 note; Public Law 105-85), the Federal Crop Insurance Corporation may renegotiate the Standard Reinsurance Agreement once during the 2001 through 2005 reinsurance years." *Id.*

87. *See* RMA, SRA, *supra* note 75, § II, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf. Proportional or pro-rata reinsurance refers to a contractual arrangement in which "the reinsurer agrees to indemnify the ceding insurer for a percentage of any losses from the original risk in return for a corresponding portion of the premium for the original risk." OSTRAGER & NEWMAN, HANDBOOK, *supra* note 68, § 15.02(a) (citing Cent. Nat'l Ins. Co. v. Devonshire Coverage Corp., 426 F. Supp. 7, 11 n.5, 21 (D. Neb. 1976)).

88. RMA, SRA, *supra* note 75, § II ¶ E, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

89. *Id*. § II ¶ E.

90. *Id.* § II ¶ B(1)(e).

91. *Id*.

92. *Id.* § II ¶ B(1)(a).

93. *Id*.

94. *Id.* § II ¶ B(2)(a).

95. *Id.* § II ¶ B(2)(d).

tal funds within a state.[96] As with the assigned risk fund, the non-retained portion of the risk and premium is ceded to FCIC.[97]

The options for insurers with respect to the commercial funds are similar to those for the developmental funds. A reinsured company must retain at least fifty percent of the net book premium and liability on contracts designated to these funds.[98] The retention percentages can differ among the three funds (CAT, Revenue, Other) and can be greater than fifty percent if specified in the reinsured company's plan of operations.[99] Any contracts that are not designated into the assigned risk or developmental funds default into the appropriate commercial fund.[100] As with the non-retained portion of the other funds, liability for loss and a corresponding percentage of the associated premium are ceded to FCIC.[101]

Companies must retain a minimum of thirty-five percent of their entire book of crop insurance business under the current SRA unless: (1) more than fifty percent of their book of business is in the assigned risk fund; or (2) all of their contracts are designated into the assigned risk or developmental funds.[102] Where either condition is satisfied, the minimum retention requirement is lowered to 22.5%.[103] If an insurer does not meet the overall retention requirement, FCIC increases their minimum twenty percent retention requirement for the assigned risk fund on a pro-rata basis sufficient to bring them into compliance.[104]

B. *Stop-Loss Reinsurance*

The non-proportional reinsurance provided under the SRA limits the liability exposure for insurers on their retained book of business.[105] The share of loss on an insurer's retained book of business assumed by FCIC varies by fund and depends on the insurer's loss ratio.[106] Loss ratios are calculated separately

96. *Id*.
97. *Id*.
98. *Id.* § II ¶ B(3)(b).
99. *Id*.
100. *Id.* § II ¶ B(3)(a).
101. *Id.* § II ¶ B(3)(b).
102. *Id.* § II ¶ B(4)(a).
103. *Id.*
104. *Id*.
105. OSTRAGER & NEWMAN, HANDBOOK, *supra* note 68, § 15.02(b) (explaining that non-proportional or "Stop Loss" reinsurance is a form of "Excess of Loss" reinsurance which "indemnifies the ceding insurer, subject to specified limits, for all or a portion of loss in excess of a stated retention.").
106. RMA, SRA, *supra* note 75, § I ¶ R, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf. The definition section of the SRA provides: "'Retained' as applied to . . . book of business, means the remaining liability for ultimate net losses and the right to associated net book premiums after all reinsurance cessions to FCIC under this Agreement." *Id*.

for each fund and state. FCIC uses a graduated system under which an insurer is responsible for decreasing percentages of ultimate net losses as its loss ratios increase.[107] For example, an insurer with a loss ratio of 150% on the portion of its revenue plans not ceded to FCIC and designated to the commercial fund would be responsible for 57% of the ultimate net loss.[108] However, if that same insurer had a 200% loss ratio, then it would be responsible for 57% of the first 160% of its losses and for 43% of the remaining loss.[109] FCIC assumes 100% of the liability for losses in excess of 500%.[110]

C. *Underwriting Gains and Losses*

The SRA also specifies how much of any underwriting gains an insurer gets to keep. This amount is calculated on a graduated basis with the percentage of gains retained decreasing as loss experience improves.[111] For example, an insurer with a loss ratio of greater than or equal to sixty-five percent but less than one hundred percent, gets to retain ninety-four percent of the gain from revenue plans designated into the commercial fund.[112] Where the loss ratio is greater than or equal to fifty percent but less than sixty-five percent, the insurer gets to keep seventy percent of the gain from contracts similarly designated.[113] And where the loss ratio is less than fifty percent for revenue plans designated into the commercial fund, the insurer retains eleven percent of the gain.[114]

Underwriting gains and losses for each fund are calculated separately by state and then totaled for all states to determine an insurer's net operating gain or loss for annual settlement purposes.[115] At annual settlement, FCIC will retain 60% of any net gains exceeding 17.5% in a reinsurance account.[116] Conversely, FCIC will charge an insurer's reinsurance account the amount necessary to realize a gain of 17.5% where it has a loss or a net gain of less than 17.5%.[117]

Annual settlement funds maintained in the reinsurance account are normally held for two years before being returned to the insurer on a first in-first out basis.[118] The settlement procedures at termination or non-renewal of the SRA differ depending upon which party cancels. If the insurer cancels, it is entitled to

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107. *Id.* § II ¶ C.
108. *Id.* § II ¶ C(1)(a).
109. *Id.* § II ¶ C(1)(b).
110. *Id.* § II ¶ C(1)(d).
111. *Id.* § II ¶ D.
112. *Id.* § II ¶ D(1)(a).
113. *Id.* § II ¶ D(1)(b).
114. *Id.* § II ¶ D(1)(c).
115. *Id.* § II ¶ D(1)(c)(1)-(2).
116. *Id.* § II ¶ D(1)(c)(3)(b).
117. *Id.* § II ¶ D(1)(c)(3)(c).
118. *Id.* § II ¶ D(1)(c)(3)(d).

fifty percent of its reinsurance account balance at the annual settlement date with the balance due one year later.[119] Where FCIC cancels, the entire account balance is payable to the insured one year after the first annual settlement following cancellation.[120]

D. *Risk Subsidy, Administrative and Overhead Expenses, and Loss Adjustment*

The SRA provides that FCIC will subsidize crop insurance premiums as authorized by Congress.[121] These subsidy amounts have increased steadily over time and now FCIC pays the lion's share of premiums on most policies.[122] The SRA further provides that FCIC will pay an Administrative and Operating ("A&O") expense subsidy to the reinsured company for certain policies.[123]

The amount of A&O subsidy is a function of the type of policy underwritten and its associated premium.[124] Under the current SRA, the reinsured company receives an A&O subsidy equal to twenty-five percent of the net book premium for Group Risk Protection ("GRP") policies.[125] Reinsured companies receive 23.25% of the net book premium for eligible revenue insurance policies keyed to the higher of market price at planting or harvest and 27% for those keyed only to market price at planting.[126] The reinsured company receives twenty-seven percent of the net book premium on all other policies except CAT.[127] There is no A&O subsidy for CAT policies,[128] however, the reinsured companies

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119. *Id.* § II ¶ D(1)(c)(3)(e)(i).
120. *Id.*
121. *Id.* § III ¶ A(1).
122. *See* 7 U.S.C. § 1508(e)(2)(a) (2000). Beginning with the 2001 crop year, FCIC subsidized buy-up policy premiums as follows (first number represents the percent of yield and the second the percent of the established market price insured): 50/100 = 67%; 55/100 = 64%; 60/100 = 64%; 65/100 = 59%; 70/100 = 59%; 75/100 = 55%; 80/100 = 48%; 85/100 = 38%. *See* 7 U.S.C. §§ 1508(e)(2)(B)—(G) (2000).
123. RMA, SRA, *supra* note 75, § III ¶ A(2), *available at*, http://www.rma.usda.gov/pubs/ra/98SRA.pdf.
124. *Id.* § III ¶ A(2)(e). "A&O subsidy for eligible crop insurance contracts . . . will be paid to the Company on the monthly summary report after the Company submits, and FCIC accepts, the information needed to accurately establish the premium for such . . . contracts." *Id.* A&O subsidies are paid on a "net book premium" basis which is defined by the SRA as "[t]he total premium calculated for all eligible crop insurance contracts, less A&O subsidy, cancellations, and adjustments." *Id.* § I ¶ N.
125. *Id.* § III ¶ A(2)(b). GRP policies key coverage to expected county yields based on National Agricultural Statistics Service (NASS) data rather than individual yields. *See* RISK MGMT. AGENCY, USDA, GROUP RISK PLAN, *available at* http://www.rma.usda.gov/pubs/rme/fsh_4.html (last visited Nov. 19, 2002).
126. RMA, SRA, *supra* note 75, § III ¶¶ A(2)(c)-(d), *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.
127. *Id.* § III ¶ A(2)(e).
128. *Id.* § III ¶ A(2)(a).

do receive loss adjustment expenses based on net book premium for eligible CAT contracts.[129]

The SRA requires the reinsured companies to remit any administrative fees collected from policyholders.[130] It also requires the reinsured companies to disclose the amount of risk (premium) and A&O subsidy borne by FCIC to the policyholders.[131] FCIC will reduce A&O subsidies where the reinsured company does not provide and process all the necessary data by an agreed upon transaction cut-off date.[132]

E. *General Provisions*

Section V of the SRA contains the general provisions applicable to the reinsurance arrangement between FCIC and the private insurance companies. It imposes, *inter alia*, record keeping and reporting requirements which the reinsured company must comply with. It also sets out the provisions for corrective action, including suspension and termination, where a review establishes that the company is not complying with the terms of the SRA.[133] If the reinsured company is otherwise in compliance, the SRA is automatically renewed July 1st of each following year unless FCIC provides notice at least six months in advance in writing that the contract will not be renewed.[134] The general provisions further provide that FCIC is not responsible for the errors or omissions of the reinsured's sales agents or loss adjusters.[135]

The reinsured companies can challenge any "actions, finding, or decision of FCIC" arising under the SRA.[136] The applicable procedure is different depending upon the nature of the determination being challenged. For non-compliance issues, the company must request review by the Deputy Administrator of Insur-

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129. *Id.* § IV. ARPA reduced the CAT loss adjustment expense from 11% to 8% effective with the 2001 crop year. Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, § 103, 2000 U.S.C.C.A.N. (114 Stat.) 358, 366 (codified as amended at 7 U.S.C. § 1508(b)(11)).

130. 7 U.S.C. § 1508(c)(10)(A) (2000).

131. RMA, SRA, *supra* note 75, § III ¶ F, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

132. *Id.* § III ¶ G. FCIC reduces A&O subsidies in 1.5% increments up to a maximum of 4.5% for data received more than twelve weeks after the final acreage reporting date for the crop where the delay is the fault of the reinsurer. *Id.*

133. *Id.* § IV ¶ J. A company has forty-five days from its date of notification to correct deficiencies or the SRA automatically terminates at the end of the reinsurance year. *Id.* While suspended, a company may not sell new policies. However, FCIC may require that it continue to service existing policies. *See id.* § IV ¶¶ J(1)-J(3).

134. *Id.* § V ¶ M.

135. *Id.* § V ¶ W (stating liability incurred, to the extent it is caused by agent or loss adjuster error or omission, or failure to follow FCIC approved policy or procedure, is the sole responsibility of the Company).

136. *Id.* § V ¶ L. The relevant appeal procedure is set out at 7 C.F.R. § 400.169 (2002).

ance Services.[137] By contrast, the Compliance Field Offices allow the reinsured company to respond to an initial determination before issuing a final determination.[138] If the company disagrees with a final determination, it may request a final administrative determination from the Deputy Administrator of Compliance.[139]

Irrespective of the nature of the dispute, the reinsured company must submit a written request for review within forty-five days of receipt of the disputed determination.[140] The SRA requires FCIC to issue a "fully documented" decision within ninety days after receiving notice of the dispute.[141] If FCIC cannot meet the ninety-day deadline, then it must notify the reinsured company within that ninety days why it cannot and when its decision will be made.[142] Generally, final administrative determinations by the responsible Deputy Administrator may be further appealed to the Board of Contract Appeals.[143] Certain FCIC determinations, however, are final and may not be further appealed by the reinsured company.[144] Final administrative determinations by FCIC must be appealed in writing to the USDA's Board of Contract Appeals within ninety days.[145] Reinsured companies may seek judicial review of the Board's findings in federal district court.[146]

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137. 7 C.F.R. § 400.169(a) (2002).

138. *Id.* § 400.169(b).

139. *Id.*

140. *Id.* § 400.169(a)—(c).

141. RMA, SRA, *supra* note 75, § V ¶ L, *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf.

142. *Id.*

143. *See* 7 C.F.R. § 400.169(d) (2002). The Board of Contract Appeals is an agency within the USDA composed of licensed attorneys who are designated to act as administrative judges. *Id*. §§ 24.1-24.2. Generally, Board decisions constitute a majority decision of a three judge panel. *Id.* § 24.2.

144. *Id.* § 400.169(c).

> A company may also request reconsideration by the Deputy Administrator of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not interpret, explain or restrict the terms of the reinsurance agreement. . . . The determinations of the Deputy Administrator will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.

Id.

145. *Id.* § 24.5.

146. 7 U.S.C. § 6912(e) (2000). *See also* Farmers Alliance Mut. Ins. Co. v. Fed. Crop Ins. Corp., 2001 WL 30443 (D. Kan. Jan. 3, 2001) (dismissing action brought in district court against FCIC because reinsured had not appealed to USDA's Board of Contract Appeals).

F. *The Current Landscape*

Curiously, there are considerably fewer companies with reinsurance agreements in place with FCIC now than there were twenty years ago.[147] It is curious because the volume of business has increased dramatically during that same period.[148] In the mid 1980s, over fifty companies contracted with FCIC to deliver federal crop insurance.[149] However, by 1997, only sixteen companies had reinsurance agreements with FCIC.[150] This decline may be partly explained by mergers and acquisitions within the insurance industry in general.[151] It should be understood that many crop insurance policies are sold and serviced by managing general agents ("MGAs") for the holders, rather than by signatories themselves.[152] Companies using MGAs must fully disclose that fact in their annual plan of operations and certify to their compliance with certain laws and regulations.[153]

Crop insurance is experiencing the same sort of concentration common to other agricultural sectors in recent years. Farm Bureau, through its interlocking Boards of Directors, reportedly owns or controls one-third of the fourteen companies which entered into the 1999 SRA with FCIC.[154] The exact relationship of the stakeholders in federal crop insurance is hard to determine because of prohibitions against revealing corporate business strategies.[155]

The stakes in crop insurance are enormous. It is a huge industry generating billions of dollars in revenue.[156] The relatively few corporate players are well

147. *See* GAO, OPPORTUNITIES, *supra* note 53, at 137, *available at* http://www.gao.gov/archive/1997/rc97070.pdf.

148. *Id.* at 25 (stating that "[i]nsurance premiums written by participating companies during this same period increased from $747 million in 1990 to $1.6 billion in 1996."); GOODWIN & SMITH, *supra* note 12, at 40 tbl.3-1.

149. GAO, OPPORTUNITIES, *supra* note 53, at 137 app. IX ¶ L, *available at* http://www.gao.gov/archive/1997/rc97070.pdf.

150. *Id.*

151. *Id.* at 23. ("The number of companies selling and servicing crop insurance for FCIC has decreased from 27 in 1990 to 16 in 1996 because of business acquisitions and changing business relations.").

152. *Id.* at 68-69. Appendix II of GAO's report reflects that in 1994-95, American Agrisurance was the managing general agency for SRA holder Redland Insurance Company and that Blakely Crop Hail, Inc. was the managing general agency for SRA holder Farmers Alliance Mutual Insurance Company. *Id.*

153. RMA, SRA, *supra* note 75, § V ¶ G(3), *available at* http://www.rma.usda.gov/pubs/ra/98SRA.pdf. The SRA holder must certify that managing general agents are "in full compliance with the laws and regulations of the State" where incorporated. *Id.*

154. FEDERAL CROP INSURANCE – INSURING THE FARM BUREAU'S FUTURE, RURAL COMMUNITY UPDATES (Sept. 2, 1999), *available at* http://www.familyfarmer.org/updates/sep2.html.

155. *See* 5 U.S.C. § 552b(c)(4) (2000).

156. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-266, CROP INSURANCE: USDA

organized and have a powerful and influential national lobby.[157] The legion of sales agents representing the reinsured companies at the state and local levels compliment and increase that influence considerably.[158] This may help explain why, despite a litany of failure and criticism, crop insurance has emerged as the dominant policy element of the post-Agricultural Market Transition Act ("AMTA") farm safety net. The preeminent role of privately delivered federal crop insurance was institutionalized with the recent passage of ARPA.[159]

NEEDS A BETTER ESTIMATE OF IMPROPER PAYMENTS TO STRENGTHEN CONTROLS OVER CLAIMS 3 (1999), *available at* http://www.gao.gov/archive/1999/rc99266.pdf. "From 1981 through 1998, FCIC paid farmers $14.1 billion for insured crop losses, and in 1998 alone, FCIC paid $1.7 billion." *Id.*

157. *See* GAO, OPPORTUNITIES, *supra* note 53, at 96, *available at* http://www.gao.gov/archive/1997/rc97070.pdf (stating that "[National Crop Insurance Services] is an association composed, among others, of all of the current holders of Standard Reinsurance Agreements."

158. *Id.* at 34. (stating that "[d]espite [a] prohibition [on reporting lobbying expense as crop insurance delivery expense], we found in our sample of company transactions that the companies included a total of $418,400 for lobbying and related expenses in their expense reporting for 1994 and 1995.").

159. *See generally* Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, 2000 U.S.C.C.A.N. (114 Stat.) 358.

IV. *WILEY V. GLICKMAN*: A LESSON IN RISK

A. *Background*

The *Wiley v. Glickman* controversy arose before ARPA was enacted and involved one of the specific types of risk management tools that it advanced. Consequently, it offers a unique insight on the wisdom of our increased reliance on privately delivered crop insurance as the mainstay of the farm safety net for the future. This section examines the *Wiley* decision and the arguments forwarded by the parties.

FCIC revenue insurance plans were first authorized for sale in 1996.[160] Revenue insurance plans differ from traditional multi-peril plans in that they insure price as well as yield.[161] Otherwise, revenue plans operate much the same as the more traditional FCIC products with the Government subsidizing premiums, reinsuring the risk, and paying the private companies for selling and servicing the policies.[162] Three different revenue plans were available in 1997: Crop Revenue Coverage ("CRC"), Revenue Assurance ("RA"), and Income Protection ("IP").[163] CRC and RA plans were developed by private insurance companies while IP was developed by FCIC.[164] RA and IP plans are keyed to crop prices at planting.[165] In contrast, CRC guarantees are keyed to the higher of the crop's price at planting or at harvest.[166]

Of the three, CRC was the most popular.[167] The CRC plan of insurance was endorsed by American Agrisurance, Inc. ("AmAg").[168] CRC plans establish a minimum guarantee before planting by first multiplying a base price by the approved yield.[169] This result is then multiplied by the level of coverage selected

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160. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-98-111, CROP REVENUE INSURANCE: PROBLEMS WITH NEW PLANS NEED TO BE ADDRESSED 6 (1998), *available at* http://www.gao.gov/archive/1998/rc98111.pdf [hereinafter GAO, NEW PLANS].

161. *Id.* at 18.

162. *Id.* at 19.

163. *Id.* at 18.

164. *Id.*

165. *See id.* at 22 (explaining formulas for Income Protection and Revenue Assurance).

166. *See id.* (explaining formula for Crop Revenue Coverage).

167. *See id.* at 6 (noting that in the areas where it was available, CRC plans accounted for 32% of all reinsured policies sold from 1997-1998 compared with 6% for RA and 3% for IP plans).

168. *See* Wiley v. Glickman, No. A3-99-32, 1999 U.S. Dist. LEXIS 20278, at *11 (D.N.D. Sept. 3, 1999). AmAg functions as a managing general agency for Redland Insurance Company. *Id.* at *13.

169. *Id.* at *10. The formula for establishing base price incorporates a five year historical average of the futures contract trading price for a crop during specified months. *Id.* at *20.

by the producer.[170] After harvest, another calculation is made using average daily settlement prices for the harvest year instead of the historical price.[171] The final guarantee is the higher of these two calculations.[172]

A Commodity Exchange Endorsement to the CRC policy sets out the procedures for establishing the minimum and final guarantees.[173] The durum wheat endorsement to the CRC policy at issue in *Wiley* was proposed to FCIC by AmAg in February of 1998.[174] FCIC's Board of Directors approved it and a notice of eligibility for the 1999 crop year was published in the Federal Register on July 14, 1998.[175] After approval, private companies began selling CRC policies for durum wheat to eligible farmers in approved counties. Sometime in late January of 1999, AmAg alerted FCIC that the formula used to establish the base

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170. *Id.* at *11.

171. *Id.*

172. *Id.* The CRC policy provides the following definitions:

> Base Price. The initial price determined in accordance with the Commodity Exchange Endorsement and used to calculate your premium and Minimum Guarantee.
>
> Harvest Price. The final price determined in accordance with the Commodity Exchange Endorsement and used to calculate your Calculated Revenue (as defined in the Crop Provisions) and the Harvest Guarantee.
>
> Final Guarantee. The number of dollars guaranteed per acre determined to be the higher of the Minimum Guarantee or the Harvest Guarantee, where:
> (1) Minimum Guarantee - The approved yield per acre multiplied by the Base Price multiplied by the coverage level percentage you elect.
> (2) Harvest Guarantee - The approved yield per acre multiplied by the Harvest Price multiplied by the coverage level percentage you elect.

Id. at *14-15.

173. *Id.* at *18. "(II) This endorsement specifies how, where, and when commodity prices for your CRC wheat policy are determined." *Id.* at *19.

174. *Id.* at *11.

175. *Id.* at *37. The original commodity exchange endorsement provided for establishing the base price for durum wheat for those counties with a March 15th cancellation date using Minneapolis Grain Exchange ("MGE") prices as follows:

> Base Price (MGE) – The Northern Durum Price multiplied times the selected Price Percentage and rounded to the nearest whole cent. The Northern Durum Price equals the February harvest year's average daily settlement price for the harvest year's MGE September hard red spring wheat futures contract (rounded to the nearest whole cent) plus an adjustment equal to the current five-year average difference between the August average daily settlement price for top milling durum wheat, as reported by the MGE (rounded to the nearest whole cent) and the August average daily settlement price for the nearby MGE September hard red spring futures contract (rounded to the nearest whole cent).

Federal Crop Insurance Corporation Crop Revenue Coverage, 63 Fed. Reg. 37,829, 37,847 (July 14, 1998).

price for durum wheat was flawed.[176] It subsequently requested a convoluted modification of the base price formula from FCIC's Board of Directors.[177] The net effect of the amended formula was to lower the adjustment for the difference between the five-year average futures price and the harvest year cash price. This would have reduced the base price (and thus the minimum guarantee) from $5.45 to $4.68 per bushel for affected 1999 durum wheat policyholders.[178] AmAg's request was approved and RMA issued a bulletin on February 10, 1999 with the revised terms of CRC insurance for 1999 durum wheat.[179] For some unexplained reason, the revised terms did not apply to all 1999 CRC durum wheat policy holders.[180] Where applicable, however, the bulletin provided that existing or sub-

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176. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *22.

177. *Id.* at *23. The requested modifications provided the following base price formula:

> Base Price (MGE) — The Northern Durum Price multiplied times the selected Price Percentage and rounded to the nearest whole cent. The Northern Durum Price equals the February harvest years' average daily settlement price for the harvest year's MGE September hard red spring wheat futures contract (rounded to the nearest whole cent) plus an adjustment equal to the average of the current year nearby basis and the current 5-year harvest basis. The current year nearby basis is the October, November, December, and January of the current crop year and is the difference between the average daily settlement price for top milling durum wheat, as reported by the MGE for such months (rounded to the nearest whole cent) and average daily settlement price for nearby hard red spring wheat futures contract (rounded to the nearest whole cent). During the months of October and November the nearby futures contract used to determine the current year nearby basis for top milling durum wheat will be the December contract. During the months of December and January the nearby futures contract used to determine the current year nearby basis for top milling durum wheat will be the March contract. The current 5-year harvest basis is the average difference between the August average daily settlement price for top milling durum wheat, as reported by the MGE (rounded to the nearest whole cent) and the August average daily settlement price for the nearby MGE hard red spring wheat futures contract (rounded to the nearest whole cent).

RISK MGMT. AGENCY, USDA, BULLETIN NO. MGR-99-004 (1999), *available at* http://www.rma.usda.gov/news/managers/1999/html/mgr1999-004.html [hereinafter RMA, MGR-99-004].

178. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *28.

179. *Id.* at *23. MGR-99-004 explained that due to an "unforseen market anomaly the CRC Durum Wheat Base Price would be substantially higher than the actual market price for durum wheat." *Id.* at *24.

180. *See id.* at *24-25.

> This action applies to all 1999 crop year CRC Durum Wheat policies in Arizona, California, Montana, North Dakota, and South Dakota, except those CRC Durum Wheat policies in Arizona and California written or applied for by the producer on or before October 31, 1998. Policies in Arizona and California written or applied for by October 31, 1998, will remain insured under the Commodity Exchange endorsement in effect at the time of sale.

Id. at *24-25 (quoting RMA, MGR-99-004, *supra* note 177, *available at* sequently sold policies were bound by the amended terms.[181] A group of affected farmers quickly brought an action to enjoin FCIC from enforcing the amended policy terms in federal district court under the judicial review procedures of the Administrative Procedure Act ("APA").[182]

B. *Summary of the Arguments*

Plaintiffs asserted three claims in support of their request for injunctive relief. First, they argued that promulgation of the amended policy without Federal Register publication violated an express requirement in the authorizing act.[183] Second, they argued that the change violated a controlling provision contained in the original policy.[184] And third, they argued that the amended terms denied them a property right without due process.[185]

In response, the Government asserted that the actual notice provided to plaintiffs satisfied the statutory requirement,[186] that it had no contractual liability

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http://www.rma.usda.gov/news/managers/1999/html/mgr1999-004.html). This disparate treatment may be partly explained by the statement of AmAg's CEO in support of the modification request that its "initial price methodology was based on a procedure that has worked very well for northwest wheat." *Id.* at *29 n.4.

181. *Id.* at *28 (stating, "I realize that if I do not accept the terms and conditions in this amendment, my application will be rejected or my policy will be cancelled.").

182. *Id.* at *30 (citing 5 U.S.C. §§ 702—706 (1994)). The right to seek judicial review is set out in the APA which provides in pertinent part that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning or a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000).

Plaintiff's were represented by veteran attorney and farmer-advocate Sarah Vogel of the Wheeler Wolf firm in Bismarck, North Dakota. Plaintiff's filed for a temporary restraining order on March 10, 1999 and a preliminary injunction was entered on April 7, 1999. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *30-32. A hearing for the permanent injunction and cross-motions for summary judgment was held on June 24, 1999. *Id.* at *32.

183. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *30. Plaintiffs claimed that FCIC violated 7 U.S.C. § 1508(h)(5) which provides:

> Any policy, provision of a policy, or rate approved under this subsection shall be published as a notice in the Federal Register and made available to all persons contracting with or reinsured by the Corporation under the terms and conditions of the contract between the Corporation and the person originally submitting the policy or material.

7 U.S.C. §1508(h)(5) (1994).

184. *See Wiley*, 1999 U.S. Dist. LEXIS 20278, at *30. The wheat crop provisions to the CRC policy provided: "In accordance with section 5 in the Basic Provisions, the contact change date is December 31 preceding the cancellation date for counties with a March 15 cancellation date." *Id.* at *18.

185. *Id.* at *30.

186. *Id.* at *33. Defendants maintained that 7 U.S.C. § 1508(h)(5) was a notice requirement rather than a strict Federal Register publication requirement and so was satisfied by the actual

as a reinsurer,[187] and that plaintiffs had no property rights in the CRC policies under proper construction of general principles of contract law.[188] The Government also argued that the district court lacked subject matter jurisdiction because the plaintiffs had not exhausted their administrative remedies.[189]

C. *The Court's Analysis*

Plaintiffs brought their action in the United States District Court for the District of North Dakota, Southeastern Division.[190] In rather unusual fashion for an administrative law case, the court began its analysis by examining the contract theories advanced by the Government before addressing the standard of review applicable to the court's review of RMA's actions.[191]

While it may be unorthodox, this section is perhaps the most insightful on the nature of the relationship between FCIC and the insured farmers – what the court describes as a "confusing interstice."[192] The opinion, while chock-full of legal and regulatory reference, is riddled with equitable undercurrents. The desire for a just outcome may have motivated the court to buttress its review with a peremptory treatment of the contract issues. Or maybe, like the plaintiffs themselves, the court was simply so outraged at the Government's refusal to honor the original policy that it could not let the opportunity pass without comment. Whatever the reasons, the court made the contractual relationship between FCIC and the plaintiffs a central theme of the opinion and took exception to the Government's assertion that FCIC is not liable in contract.[193]

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notice given plaintiffs by the reinsured companies prior to the sales closing date. *Id.* at *30.

187. *Id.* at *33 (stating, "defendants contend that FCIC can bear no contractual liability, since, as reinsurer, it is not in privity with plaintiffs.").

188. *Id.* at *33-34. The defendants argued that those plaintiffs with existing policies had no vested right since the same could be cancelled by either party after the first year and that pending applications merely represented offers to contract. *Id.*

189. *Id.* at *34 n.8 (explaining that the court would not revisit defendant's exhaustion argument which it had rejected at the preliminary hearing).

190. *See generally id.*

191. *See id.* at *35-40.

192. *Id.* at *35. "The parties' preoccupation with contract theories has certainly been understandable. Indeed, the court struggled along with the parties to find the law applicable to the confusing interstice between private insurance principles and federal farm policy." *Id.* at *35 n.9.

193. *Id.* at *35-36 (stating that "[t]he court notes it may have viewed favorably a contract action against FCIC had plaintiffs chosen to posture their suit in that fashion.").

1. *The Contractual Relationship*

The Court first rejected the Government's argument that the July 14, 1999 notice of availability of CRC insurance for durum wheat was merely a solicitation and not an offer.[194] It noted that, absent a waiver, producers were required to purchase at least the minimum level of crop insurance in order to remain eligible for other USDA programs.[195] It also noted that the FCIA required FCIC to insure those eligible producers who properly apply for insurance.[196] The opinion cites *Blumberg v. Paul Revere Life Insurance Co.*[197] for the proposition that the circumstances in *Wiley* satisfy an exception to the general rule that an application for insurance is not binding on the insurer.[198] That exception operates where a solicitation, when considered as a whole, invests the prospective insured with a reasonable expectation that the promised coverage will be provided.[199]

The opinion next challenged the defendant's argument that FCIC bore no contractual liability to the plaintiffs because it was acting solely as a reinsurer.[200] It first cited *Williams Farms of Homestead, Inc. v. Rain and Hail Insurance Services, Inc.*[201] for the proposition that reinsurers are not liable to the original insured.[202] The court also acknowledged that courts have applied this "liability-

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194. *Id.* (stating that "[t]he court is by no means certain that the technicalities of offer and acceptance unique to insurance law would preclude liability for FCIC.").

195. *Id.* at *37 (citing 7 U.S.C. § 1508(f)(1) and 7 C.F.R. § 457.7).

196. *Id.* at *36 (citing 7 U.S.C. §§ 1506(n), 1521 and 7 C.F.R. § 400.47).

197. 677 N.Y.S.2d 412, 416 (N.Y. Sup. Ct. 1998) (holding insurance company liable to plaintiff who had submitted application and premium to insurance company in response to a guaranteed issue solicitation).

198. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *37 (citing *Blumberg*, 677 N.Y.S.2d at 414). "The general rule is that an insurance application constitutes nothing more than an offer to the insurer, which it may accept or reject after determining whether an applicant is a desirable risk." *Blumberg*, 677 N.Y.S.2d at 413 (citing Prudential Ins. Co. v. Snyder, 254 N.Y.S. 732, 739 (N.Y. Sup. Ct. 1928), *aff'd* 243 N.Y.S. 800 (1930).

199. *Blumberg*, 677 N.Y.S.2d at 414. "Such a situation arises where the soliciting literature spelled out the terms of the insurance, the scope of the insurance coverage, the intention of the insurer to accept applicants irrespective of their age or health, and nothing was left open to negotiations." *Id.* (citing Klos v. Mobil Oil Co., 259 A.2d 889, 892 (N.J. 1969)). To support its position that the plaintiffs had a reasonable expectation of the coverage promised in the July 14th solicitation, the court pointed out that the Government not only knew, it encouraged both farmers and lenders to rely on crop insurance protections to collateralize farm operating loans. *See Wiley*, 1999 U.S. Dist. LEXIS 20278, at *37-38.

200. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *38. "The court is similarly far from certain that FCIC's status as reinsurer insulates it from contractual liability." *Id.*

201. 121 F.3d 630 (11th Cir. 1997).

202. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *38-39. "To be sure, in true reinsurance arrangements . . . any liability on behalf of the reinsurer is solely to the reinsured and not the original insured." *Id.* at *38.

limiting" principle to FCIC reinsurance agreements.[203] As the court noted, however, there is an exception to the general rule which might be applicable to the facts in *Wiley*.[204]

To support its assertion that the exception might apply, the court pointed out that provisions in the Standard Reinsurance Agreement between FCIC and the private insurance companies and the incorporated regulations "inure directly to the benefit of policyholders."[205] In particular, the court noted that the agreement contained a "cut-through" clause which left FCIC directly responsible for indemnifying policyholders in certain circumstances.[206] The court further observed that FCIC's potential liability was clearly evident from the terms of the CRC policy itself.[207]

The contract section of the opinion concluded with a terse rebuke of the Government's argument that the United States Supreme Court decision in *Federal Crop Insurance Corp. v. Merrill*[208] relieved it of any contractual obligation to the plaintiff farmers.[209] With undisguised contempt, the court opines that the estoppel doctrine articulated in *Merrill* did not immunize FCIC from the "principles of good faith and fairness."[210] The section ended with a long quote from *A.W.G. Farms, Inc. v. Federal Crop Insurance Corp.*,[211] which established that there were limits to the protections afforded the Federal Government even under *Merrill*.[212] With this done, the court turned its attention to the more narrow legal

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203. *Id.* at *39 (citing Old Republic Ins. Co. v. Fed. Crop Ins. Corp., 947 F.2d 269, 276 (7th Cir. 1991)).

204. *Id.* "Equally well-settled . . . is the exception to this rule where a reinsurance contract is 'drawn in such form and with such provisions so as to create a liability on the part of the reinsurer directly to the original insured.'" *Id.* (quoting Ainsworth v. Gen. Reinsurance Corp., 751 F.2d 962, 965 (8th Cir. 1985)).

205. *Id.* at *40-41 (citing 7 C.F.R. §§ 400.166, 400.168 (1998)).

206. *Id.* at *40. "The SRA also contains a 'cut-through' clause, so named because it 'cuts through' the usual route of claim payment from reinsurer-to-reinsured and substitutes instead reinsurer to original insured in certain situations." *Id.* The cut-through clause in the SRA here provided that policies would be transferred to FCIC and it would "assume all obligations for unpaid losses" when the private company was unable to fulfill its obligation. *See id.* at *40 n.10.

207. *Id.* at *41. "In the event the company cannot pay a loss, the claim will be settled in accordance with the provisions of the policy and paid by FCIC." *Id.* (citing 63 Fed. Reg. 37,829 (July 14, 1998)).

208. 332 U.S. 380 (1947).

209. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *41-42.

210. *Id.* at *42 (stating that "neither the rules of law applicable to insurance contracts, nor the Supreme Court's conclusion that they do not apply, render FCIC (or defendants for that matter) immune from the principles of good faith and fairness.").

211. 757 F.2d 720, 728-29 (8th Cir. 1985).

212. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *42-43. The quote provided:

> The record [reflects] that the FCIC, in its transactions with the growers throughout this ordeal, have succeeded in leading the growers down a primrose path . . . . While we do not hold the government liable under an estoppel

issue actually presented in *Wiley* of whether the amended durum wheat policy violated the arbitrary, capricious, abuse of discretion, or otherwise contrary to law standard under the APA.[213]

2. *Chevron Analysis*

The court began this section by observing that the proper standard of review was established in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[214] In that case, the United States Supreme Court developed the test to be used for court review of an agency's construction of statutes that it administers.[215] Under *Chevron*, the threshold question is whether Congress spoke directly to the issue.[216] If so, the matter ends because both the agency and the court "must give effect to the unambiguously expressed intent of Congress."[217] If, on the other hand, the statute is silent or ambiguous on the specific issue, then the court must look to see whether the agency's construction of the statute is permissible.[218] The court observed that the judiciary had final say on matters of statutory construction and were required to "reject administrative constructions which are contrary to clear congressional intent."[219] Under the *Chevron* standard, reasonable agency constructions of ambiguous terms are entitled to deference from the reviewing court.[220] However, an agency enjoys no deference where a court finds that its construction is "contrary to congressional intent as revealed by the plain language of the statute or its legislative history."[221]

> theory, . . . the factual background regarding FCIC's course of dealing with these growers must be considered under basic principles of good faith and fairness. One may have to turn "square corners" when dealing with a government entity, . . . but this does not mean the government may operate so recklessly so as to put the parties dealing with it entirely at its mercy.

Id. (quoting A.W.G. Farms, Inc. v. FCIC, 757 F.2d 720, 728-29 (8th Cir. 1985))

213. *Id.* The APA instructs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994).

214. 467 U.S. 837, 842-43 (1984).

215. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *43 (citing *Chevron*, 467 U.S. at 842-43 & n.9).

216. *Id.* (citing *Chevron*, 467 U.S. at 842-43 & n.9).

217. *Id.* at *44 (citing *Chevron*, 467 U.S. at 842-43 & n.9).

218. *Id.* (citing *Chevron*, 467 U.S. at 842-43 & n.9).

219. *Id.* (citing *Chevron*, 467 U.S. at 842-43 & n.9).

220. *Id.* at *45 (citing *Chevron*, 467 U.S. at 842-43 & n.9). *See also* Pelofsky v. Wallace, 102 F.3d 350, 353 (8th Cir. 1996).

221. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *45 (citing *Chevron*, 467 U.S. at 842-43 & n.9); Shakopee Mdewakanton Sioux Cmty. v. Hope, 16 F.3d 261, 264 (8th Cir. 1994) (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).

The court identified two main issues that had to be resolved under the *Chevron* analysis: (1) whether the FCIC had authority to withdraw and replace reinsurance coverage that had been published in the Federal Register; and (2) whether the methods used by FCIC were "based on a permissible construction of the statutes and in compliance with congressional intent."[222] The agency argued that its mandate to operate in an actuarially sound manner invested it with the authority to amend the terms of coverage and that its methods were consistent with statutory language in the FCIA.[223]

According to the court, however, the plain language of the statute and its legislative history directed that actuarial soundness be accomplished through adjustment of premium rates rather than coverage levels.[224] It opined that "even if [he] were to find the actuarial soundness requirement ambiguous, and accept [the FCIC's] construction … as reasonable," the way the policy amendment had been promulgated failed the first step of *Chevron*.[225] The court's opinion pointed out that the overarching goal of the FCIA was to establish the "federal crop insurance program as the farmers' primary means of risk management."[226] It cited the publication requirement in the U.S. Code and the contract change date contained in the policy itself to support his finding that the FCIC had clearly violated the express intent of Congress.[227]

The opinion also asserted that the FCIC's reaction to a perceived market anomaly contravened "Congress' companion goal of ridding American agriculture of its reliance on ad hoc assistance."[228] In support of this, the court cited

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222. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *46.

223. *Id.* The FCIA instructed the FCIC to take necessary actions, including establishing adequate premiums, to achieve an overall projected loss ratio of 1.075 by October 1, 1998. *Id.* at *47 (citing 7 U.S.C. §§ 1506(o)(2), 1508(d) (1994)). The FCIC maintained that its cancellation and reissue of the durum wheat CRC provisions by bulletin was authorized under a provision giving its Board discretionary authority to limit additional coverage on the basis of the risk involved. 7 U.S.C. § 1508(c)(9).

224. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *49.

225. *Id.* at *50.

226. *Id.*

227. *Id.* Prior to the passage of ARPA, this code section provided:

> Any policy, provision of a policy, or rate approved under this subsection shall be published as a notice in the Federal Register and made available to all persons contracting with or reinsured by the Corporation under the terms and conditions of the contract between the Corporation and the person originally submitting the policy or other material.

7 U.S.C. § 1508(h)(5) (1994); *but see Wiley*, 1999 U.S. Dist. LEXIS 20278, at *50 n.14 ((citing Brock v. Pierce County, 476 U.S. 253, 260 (1986)) (stating that the publication requirement did not attach to every action by the FCIC) and (citing Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp., 506 F.2d 467 (9th Cir. 1974)) (stating that the publication requirement did not impose a formal rule making requirement on FCIC)).

228. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *51.

congressional testimony by FCIC's manager extolling the need for crop insurance because of the inequities of ad hoc disaster relief.[229] The court opined that excepting certain policies in Arizona and California from the amended terms was "eerily similar to the inequitable distribution of ad hoc relief defendant Ackerman decried."[230]

The court held that FCIC's actions were arbitrary, capricious, and an abuse of discretion under the *Chevron* standard.[231] After finding that the plaintiffs had prevailed on the merits, the court applied a balancing test to determine whether a permanent injunction should be issued.[232] The court found that failing to grant the requested injunction would subject the farmers to immediate harm which outweighed any harm to the FCIC that might result under the original terms of the policy.[233] Having done so, the court declared Bulletin MGR-99-004 void and ordered that the terms of the durum wheat CRC policy as originally published in the Federal Register controlled.[234]

D. *The Government's Arguments on Appeal*

The Government characterized the questions presented on appeal as: (1) whether the amended terms "breached any contract" with any subgroup of the putative class; and (2) whether FCIC's actions were authorized "under statutory provisions allowing it to limit coverage on the basis of the insurance risk and to protect actuarial soundness of the crop insurance program."[235]

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229. *Id.* at *51-52. In pertinent part, FCIC manager Ken Ackerman had testified before the Subcommittee on Environment, Credit and Rural Development and the Subcommittee on Specialty Crops and Natural Resources as follows:

> In a crisis, farmers without crop insurance, who depend on disaster relief, have no way of knowing in advance what their protection will be. . . . An examination of history reveals that victims of local disasters often get less aid than those of wider disasters, even though the individual farmers may suffer similar losses.

Id. at *51 (citing H.R. REP. NO. 103-649, at 49 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2516, 2548-49).

230. *Id.* at *52; *see also* RMA, MGR-99-004, *supra* note 177, *available at* http://www.rma.usda.gov/news/managers/1999/html/mgr1999-004.html (exempting those CRC Durum Wheat policies in Arizona and California written or applied for before October 31, 1998).

231. *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *43.

232. *See id.* at *53-54 (citing Nat'l Credit Union Admin. Bd. v. Johnson, 133 F.3d 1097, 1101 (8th Cir. 1998)). "[T]his court must consider (1) the threat of irreparable harm to the moving party; (2) the balance between that harm and any harm that granting the injunction might do to other parties to the litigation; and (3) the public interest." *Id.* (citing Nat'l Credit Union Admin Bd. v. Johnson, 133 F.3d 1097, 1101 (8th Cir. 1998)).

233. *Id.* at *54.

234. *Id.* at *54-55.

235. Brief for Appellant, *supra* note 7, at 4, *available at* http://www.ca8.uscourts.gov/ (available under "One Stop Searching" link, using case number 00-1064). Owing to a potential for

1. *Contract Theories*

As to the first subgroup, those farmers with 1998 durum wheat policies that would have automatically rolled over, FCIC argued that under the original terms, either party had a right to cancel until March 15, 1999. Consequently, FCIC's February 10, 1999 decision to withdraw its approval of the original terms and approve new terms fell within the published cancellation date.[236] Therefore, the companies were simply giving policyholders who insisted on the original terms timely notice of cancellation.[237]

FCIC asserted that general principles of contract law allowed contracts to be modified by the parties at any time.[238] It also posited that a party's agreement not to exercise a right to cancel was adequate consideration for the modified terms.[239] Under FCIC's construction, timely notice by an insurance company that a policy would be cancelled unless the policyholder agreed to the new terms constituted an effective amendment.[240] According to the FCIC, the contract change date contained in the original policy (December 31, 1998) applied only to unilateral changes made by the insurance company and did not preclude a mutually agreed upon contract modification.[241] Therefore, the Bulletin effected a mutual modification because the policyholders were asked to agree to different terms in exchange for the insurance company not exercising its right to cancel the policy altogether.[242]

FCIC's position as to those farmers with applications filed but not approved as of February 10, 1999, was that they had no contract rights in the original terms because none had been accepted prior to issuance of the amended terms.[243] Under this reasoning, FCIC was free to withdraw the original terms and substitute terms that allowed the companies to disapprove any applicant who did not agree to the amended terms.[244] The FCIC argued that applications for coverage under the original terms were "merely offers" which the companies had not

remand of Plaintiff's motion for class certification, FCIC identified three separate subgroups: "(a) those policyholders with policies from prior years that automatically carried over, subject to the right of either party to cancel, (b) applicants for new policies, or (c) individuals who had not yet applied for a new policy but still had time to do so." *Id.*

236. *Id.* at 25-26.
237. *Id.* at 26-29.
238. *Id.* at 26.
239. *Id.*
240. *Id.* at 27.
241. *Id.*
242. *Id.* at 27-29.
243. *Id.* at 28-29.
244. *Id.* at 29-30.

accepted.[245] Moreover, according to FCIC, no applicant had any reason to expect automatic approval.[246]

The FCIC's brief strongly attacked the proposition that applicants who had not filed prior to February 10, 1999 enjoyed any contractual rights in the original policy.[247] It argued that any applicant in this subgroup was on notice that the amended terms containing the new base price calculation formula controlled.[248] Moreover, since FCIC had withdrawn its authorization of the July 14, 1998 version of the policy before application was made, the companies lacked the authority to entertain contracts under the original terms.[249]

FCIC's brief asserted that the district court had improperly construed prior case law.[250] First, it argued that the district court had effectively entertained an equitable estoppel theory in direct contravention of the United States Supreme Court's holding in *FCIC v. Merrill*.[251] According to FCIC, *Merrill* did not "cut both ways."[252] Instead, it stood for the singular proposition that equitable estoppel could not be used to impose liability on the FCIC.[253]

Next, FCIC charged that the district court improperly relied on concepts of "good faith and fairness" as articulated by the Eighth Circuit in *A.W.G. Farms*.[254] That decision, according to the FCIC, relied on private cases to impose contractual liability. It pointed out that the *A.W.G. Farms* court had qualified its holding by observing that it did "not hold the government liable under an estop-

245. *See id.* at 32.

246. *Id.* at 30-31. "It is well established under general principles of insurance law that the mere publication of an available insurance policy and the submission of an application for insurance does not create a binding contract." *Id.* at 31 (citing Allstate Ins. Co. v. Russo, 829 F. Supp. 24, 30 (D.R.I. 1993); Indep. Fire Ins. Co. v. Lea, 782 F. Supp. 1144, 1154 (E.D. La. 1992); Ulledalen v. U.S. Fire Ins. Co., 23 N.W.2d 856, 868 (N.D. 1946)).

247. *Id.* at 32-33.

248. *Id.* at 32.

249. *Id.* at 33 (citing RESTATEMENT (SECOND) OF CONTRACTS § 42) (stating that "[a]n offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.").

250. *Id.* at 34.

251. *Id.* at 34-35 (citing FCIC v. Merrill, 332 U.S. 380 (1947) (holding that the United States could not be liable on an estoppel theory because same would create obligations not authorized by Congress)).

252. *Id.* at 34-35. Analyzing *Merrill*, the *Wiley* court opined: "Just as FCIC may not be estopped by representations that subsequently prove inaccurate, it surely cannot seek refuge behind the technicalities of offer and acceptance unique to insurance law, nor the rules of liability governing common law reinsurance arrangements, in order to escape its obligations." *Wiley*, 1999 U.S. Dist. LEXIS 20278, at *42.

253. Brief for Appellant, *supra* note 7, at 35-36, *available at* http://www.ca8.uscourts.gov/ (available under "One Stop Searching" link, using case number 00-1064).

254. *Id.* at 36 (citing A.W.G. Farms, Inc. v. FCIC, 757 F.2d 720, 726 (8th Cir. 1985)).

pel theory."[255] The FCIC concluded its contract theories section by asserting that the normal rules of insurance law should have governed the outcome of this case and that the FCIC could not be held liable where a private insurance company would not.[256]

The FCIC's arguments as to the contract issues are circular. After first making the case that it cannot be equitably estopped in the same manner as a private insurance company, it then argues that principles of private insurance should control.[257] That dynamic, were it accepted by the courts, would forever insulate the FCIC from any adverse contract-styled actions. In short, FCIC appears to want the best of both worlds: no liability owing to its status as a government agency and no accountability for the reinsured policies because they are private sector contracts. This construct completely ignores FCIC's role in developing, approving, promoting, and subsidizing crop insurance policies.

2. *FCIC's Statutory Authority*

The FCIC posited that its amendment of the 1999 durum wheat CRC policy was not arbitrary, capricious, or otherwise unlawful.[258] It asserted that the FCIA provided it authority to amend coverage levels as well as premium rates.[259] Moreover, the court was obligated under the *Chevron* standard to defer to its permissible interpretation of 7 U.S.C. §1508(c)(9) as requiring that any policy it approved meet "acceptable standards of economic soundness."[260] This authority allowed it to act to amend the terms of the original policy once it was notified by AmAg that the base price formula was flawed.[261] While FCIC conceded that the insurance risk provisions would not permit it to amend the terms of a policy once a contract actually existed, it asserted that it was statutorily empowered to act as it had in this instance because there was no contract.[262] The FCIC also asserted that the requirement that FCIC achieve an overall loss ratio not greater than 1.075 by October 1, 1998, supported its actions.[263] It argued that the use of the word

255. *Id.* (citing *Merrill*, 332 U.S. at 383-84).
256. *Id*.
257. *Id.*
258. *Id.* at 38.
259. *Id.*
260. *Id.* at 37 (citing Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). In pertinent part, that provision provides: "The Board may limit the availability of additional coverage under this subsection in any county or area, or on any farm, on the basis of the insurance risk involved." 7 U.S.C. § 1508 (c)(9) (1994).
261. Brief for Appellant, *supra* note 7, at 38, *available at* http://www.ca8.uscourts.gov/ (available under "One Stop Searching" link, using case number 00-1064).
262. *Id.* at 36.
263. *Id.* at 41 (citing 7 U.S.C. § 1506(o)(2)).

"shall" in the provision required FCIC to act to alter the terms of the policy in order to meet the mandated loss ratio.[264]

FCIC next attacked the lower court's finding that Congress had "directly addressed the issue."[265] It asserted that Congress had not even spoken indirectly to the issue and that the district court's reliance on legislative history was misplaced.[266] Nothing, according to FCIC, either in the plain language of the statute or its legislative history, supported the court's findings.[267] Its brief pointed out that 7 U.S.C. § 1506(o)(2) directs FCIC to "take such actions, *including* the establishment of adequate premiums, as are necessary . . ..''[268] FCIC argued that this wording necessarily implied that Congress did not intend to limit it to adjusting premium rates as its only means of managing risk. According to FCIC, it followed that adjusting coverage levels was a necessary action within contemplation of the statute.[269] Therefore, its construction of the statute was reasonable and the court was obliged to defer to it under the *Chevron* standard.[270]

Finally, the FCIC criticized the district court for impermissibly relying on policy arguments in its opinion.[271] It charged that the goals of the FCIA and the farmer's reliance on the contract change date in the published policy did not support the court's finding that Congress directly provided that FCIC could not adjust coverage terms.[272] Nor, according to the FCIC, did the broad policy arguments somehow demonstrate that FCIC's interpretation was unreasonable.[273] Consequently, it followed that the court was required to defer to its interpretation.[274]

As with its contract arguments, FCIC's position as to its statutory authority presents some problems. FCIC's failure to put forward any data whatsoever as to what effect the original base price calculation provision would have had on its overall loss ratio alone is disturbing. When coupled with its failure to even attempt to explain why certain Arizona and California CRC policies were ex-

264. *Id.* "The FCIC 'shall take such actions, including the establishment of adequate premiums, as are necessary to improve the actuarial soundness of Federal multiperil crop insurance . . . to achieve, on or after October 1, 1998, an overall projected loss ratio of not greater than 1.075.'" *Id.* (citing 7 U.S.C. § 1506(o)(2)).

265. *Id.* at 43.

266. *Id*.

267. Wiley v. Glickman, No. A3-99-32, 1999 U.S. Dist. LEXIS 20278, at *49-52 (D. N.D. Sept. 3, 1999).

268. Brief for Appellant, *supra* note 7, at 41, *available at* http://www.ca8.uscourts.gov/ (available under "One Stop Searching" link, using case number 00-1064) (citing 7 U.S.C. § 1506(o)(2)).

269. *Id.*

270. *Id.* at 37.

271. *Id.* at 44.

272. *Id*.

273. *Id*.

274. *Id.*

empted from the amended terms, it becomes almost impossible to take its "insurance risk" argument seriously. FCIC also failed initially to explain why the court should ignore the publication requirement.[275] Notwithstanding its failure to even brief that express provision, it nevertheless boldly asserts that the court should regard its implied powers expansively.[276]

V. THE AGRICULTURAL RISK PROTECTION ACT OF 2000

The Agricultural Risk Protection Act of 2000 ("ARPA") made fundamental changes to the federal crop insurance program.[277] It could be fairly argued that *Wiley* would have been decided differently under the new statutory scheme because ARPA removed the publication requirement.[278] This section makes no attempt to comprehensively catalog changes to the FCIA under ARPA. Rather, it questions certain policy assumptions underlying ARPA in light of *Wiley* and its lessons.

ARPA's passage clearly signaled an expanded role for the private sector in federal crop insurance. Most notably, it removed the FCIC's authority to research and develop new policies.[279] FCIC's responsibility for new product development is now limited to contracting and underwriting research and development by private actors.[280] This shift is at odds with our experience in *Wiley*. Recall that the policy at issue there was developed by the private provider and not FCIC.[281] Nor is *Wiley* an isolated instance of a failed revenue plan developed by

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275. *See id.* at 36.

276. *See generally id.* at 16-44 (discussing the FCIC's broad range of powers).

277. *See generally* Christopher R. Kelley, *The Agricultural Risk Protection Act of 2000: Federal Crop Insurance, the Non-Insured Crop Disaster Assistance Program, and the Domestic Commodity and Other Farm Programs*, 6 DRAKE J. AGRIC. L. 141, 144 n.11 (2001).

278. *See* Agricultural Risk Protection Act of 2000, Pub. L. 106-224, § 102(a)(2), 2000 U.S.C.C.A.N. (114 Stat.) 358, 363 (codified as amended at 7 U.S.C. §1508(h)(5)) (striking the paragraph which read "[a]ny policy, provision of a policy, or rate approved under this subsection shall be published as a notice in the Federal Register . . . ."). FCIC's failure to publish the revised durum wheat CRC policy terms in the Federal Register, while not necessarily controlling, was central to the district court's reasoning in *Wiley*. *See* Wiley v. Glickman, No. A3-99-32, 1999 U.S. Dist. LEXIS 20278, at *44 (D.N.D. Sept. 3, 1999) (citing Chevron USA v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 & n.9 (1984)).

279. *See* Agricultural Risk Protection Act § 131(e)(4)(A) (codified as amended at 7 U.S.C. § 1522(e)(4)(A)) (terminating FCIC's role in policy research and development as of October 1, 2000).

280. *See id.* (codified as amended at 7 U.S.C. § 1522(c)) (authorizing FCIC to contract for policy research and development with private sector).

281. GAO, NEW PLANS, *supra* note 160, at 22, *available at* http://www.gao.gov/archive/1998/rc98111.pdf (providing an explanation for crop revenue coverage).

a private provider.[282] This experience should, at the very least, question our reliance on a purely privatized system of research and development.

Revenue styled plans of insurance figure centrally in ARPA's policy directives. ARPA allows revenue insurance for everything other than livestock to be subsidized at the same levels as traditional multi-peril crop insurance plans.[283] Consequently, those plans should become more attractive to farmers.[284] *Wiley* at least suggests that we should approach revenue plans of insurance cautiously. Moreover, both Congress and the FCIC were on notice that poorly piloted revenue plans expose FCIC to significant actuarial risk prior to both *Wiley* and ARPA.[285] What happens to FCIC's actuarial soundness if, instead of one, multiple market anomalies occur in a given insurance year; will the FCIC intervene to protect the profits of the reinsured companies at the sake of farmers and their lenders as it did in *Wiley*? More importantly, will Congress be willing or inclined to come to the farmers rescue again by mandating that the FCIC honor its commitments?

The ARPA also made significant changes to the crop insurance compliance landscape. Specifically, it requires the FCIC to develop an informal administrative review process relative to producers denied coverage for failing to follow "good farming practices."[286] Oddly, it removes that determination from the purview of adverse determinations contemplated by the USDA's National Appeals Division ("NAD") process.[287] Compliance in general, and "good farm-

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282. *See, e.g.*, Wallace v. Am. Agrisurance, Inc., Civ. No. 99-264, Plaintiff's Class Action Complaint ¶ 1 (Ark. Cir. Ct. of Lonoke County filed Sept.16, 1999) (reneging on price guarantee advertised for privately developed supplemental payment policy for 1999 rice known as CRC Plus).

283. *See* Agricultural Risk Protection Act §102 (codified as amended at 7 U.S.C. § 1508(h)(5)); *see also* Kelley, *supra* note 277, at 150 (stating that "[ARPA] removes a limitation on the percentage of the premium to be paid by the FCIC for approved policies providing coverage other than multiple peril coverage, such as revenue insurance.").

284. Alternatively, the increased administrative fees should make CAT coverage less attractive. *See* Agricultural Risk Protection Act § 103 (codified as amended at 7 U.S.C. § 1508(b)(5)) (raising the administrative fee from $50 to $100). It is also reasonable to expect that ARPA's reduction of the CAT reimbursement rate will operate as a disincentive for private insurance companies to aggressively sell and service CAT policies. *See id.* (codified as amended at 7 U.S.C. § 1508(b)(11))(changing the reimbursement rate paid to private insurers for CAT policies from 11% to 8%).

285. *See generally*, GAO, NEW PLANS, *supra* note 160, at 5, *available at* http://www.gao.gov/archive/1998/rc98111.pdf ("Crop Revenue Coverage is likely to be more costly to the government than multiple-peril crop insurance and the other revenue insurance plans because of its higher reimbursements for administrative expenses and higher potential for underwriting losses.").

286. Agricultural Risk Protection Act § 123 (codified as amended at 7 U.S.C. § 1508(a)(3)(B)(i)).

287. *See id.* § 123 (codified as amended at 7 U.S.C. § 1508(a)(3)(B)(ii)(I)). "The determination shall not be considered an adverse determination for purposes of subtitle H of the De-

ing practices" in particular, were not issues in *Wiley*. However, FCIC argued initially that the district court lacked subject matter jurisdiction because plaintiffs had not exhausted their administrative remedies.[288] It remains to be seen exactly what form this informal review process will take. NAD hearings are evidentiary in nature which very likely provided the insured a better chance to prevail.[289] Consequently, it seems reasonable to speculate that the FCIC has lessened the chance that its decisions on this issue will be overturned on review.[290]

Also noteworthy for compliance purposes is the reintroduction of the Farm Service Agency ("FSA") into the crop insurance dynamic. The ARPA mandates FSA's participation in improving FCIC program integrity.[291] Under the Act, FCIC and FSA are required to reconcile producer's production records.[292] It also requires that FSA state and county offices assist FCIC and the reinsured companies with program audits and investigations.[293] Moreover, FSA is obligated under the act to report suspected instances of program fraud or abuse to FCIC.[294] While the act does not relieve a reinsured company of its compliance obligations,[295] it does shift much of the responsibility for the ongoing integrity of the crop insurance program to FSA.[296]

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partment of Agriculture Reorganization Act of 1994 (7 U.S.C. [§§] 6991 et seq.)" *Id.* An insured is entitled to judicial review of a failure to follow good farming practices determination without first exhausting an administrative appeals process. *See id.*

288. Wiley v. Glickman, No. A3-99-32, 1999 U.S. Dist. LEXIS 20278, at *34 n.8 (D.N.D. Sept. 3, 1999).

289. 7 U.S.C. §§ 6996, 6997 (2000).

290. Unlike most informal reviewers, NAD hearing officers can subpoena witnesses. *See* 7 C.F.R § 11.8(a)(2) (2002). NAD participants also have the right to request that a witness be subpoenaed if necessary to their case. *See id.* § 11.8(h)(2)(ii).

291. *See generally* Agricultural Risk Protection Act § 121 (codified as amended at 7 U.S.C. §§ 1515 (a)-(g)).

292. *Id.* § 121 (codified as amended at 7 U.S.C. § 1515(c)).

293. *Id.* (codified as amended at 7 U.S.C. § 1515(d)(1)).

294. *Id.*

295. *Id.* (codified as amended at 7 U.S.C. § 1515(d)(4)(A)) (stating, "[t]he activities of the Farm Service Agency under this subsection do not affect the responsibility of approved insurance providers to conduct any audits of claims or other program reviews required by the Corporation.").

296. *Id.* (codified as amended at 7 U.S.C. § 1515(d)(1)) (requiring development of a coordinated plan for FSA to assist FCIC with ongoing monitoring of the crop insurance program). The act mandates that FSA will assist FCIC and the reinsured companies in "auditing a statistically appropriate number of claims made under any policy or plan of insurance." *Id.* (codified as amended at 7 U.S.C. § 1515(d)(1)(C)). ARPA also authorizes the reinsured companies to enlist FSA's assistance directly with any investigation where FCIC fails to respond in writing within 90 days to a report of suspected fraud or abuse. *Id.* (codified as amended at § 1515(d)(5)).

Crop insurance fraud and abuse is legend in every farmer-frequented coffee shop and FSA office in America.[297] Congress was aware of the need for compliance oversight of the crop insurance system and reasonably assigned the job to FSA.[298] What is mystifying is why it chose to so dramatically expand a privatized system with a demonstrated inability to police itself. This begs the question: why not just have FSA deliver crop insurance? In turn, responsible policy makers should question whether crop insurance, a standing disaster program, or some hybrid combination of the two, is best suited to the realities of twenty-first century agriculture.[299]

Finally, ARPA enlisted academia's participation in developing new risk management tools and products.[300] Not surprisingly, it has spawned a feeding frenzy of grant writing efforts by educational institutions anxious for a piece of the ARPA pie.[301] This is especially disturbing since experience suggests that privatized delivery is more costly and less actuarially sound than public delivery.[302] In spite of this, academia apparently supports the idea that an expanded role for the private sector will improve the crop insurance program.[303] At the risk of alienating some in the academic community, I must wonder whether it really believes in this vision or promotes it solely for its promise as a new source of funding.[304] I believe that our educational institutions have an obligation to engage in an honest debate and examination of the subject before blindly accepting

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297. The author worked as a critical loss crop insurance claims adjuster during his tenure as an FSA County Executive Director in Arkansas.

298. OFFICE OF INSPECTOR GEN., USDA, REPORT TO THE SECRETARY ON FEDERAL CROP INSURANCE REFORM, No. 05801-2-At, at 34 (April 19, 1999), *available at* http://www.usda.gov/oig/webdocs/cropsins.pdf [hereinafter USDA, REPORT TO THE SECRETARY].

299. The essential difference between ad hoc disaster and crop insurance programs was that payments under the former were based on county average yields while the latter used actual production histories ("APH") or assigned yields. *See generally* Johnson, *supra* note 10, at 515-22, 533-36 (describing the role of APH in crop insurance programs).

300. *See* Agricultural Risk Protection Act § 131 (codified as amended at 7 U.S.C. § 1522(c)). "The Corporation may enter into contracts to carry out research and development with…a person with experience in crop insurance or farm and ranch risk management (*including a college or university,* an approved insurance provider, and a trade or research organization), as determined by the Corporation, shall be eligible to enter into a contract with the Corporation under this subsection." *Id.* (emphasis added).

301. *Id.*

302. GAO, OPPORTUNITIES, *supra* note 53, at 7, *available at* http://www.gao.gov/archive/1997/rc97070.pdf (stating that "[i]n 1995, the government's costs to deliver catastrophic insurance were higher through private companies than through USDA.").

303. *See, e.g.,* Johnson, *supra* note 10, at 546 (stating, "[t]he abolition of direct USDA delivery of crop insurance would have several advantages").

304. ARPA authorized up to $10 million for 2001-2002 and up to $15 million for 2003 and beyond for research and development of new policies. *See* Agricultural Risk Protection Act § 131 (codified as amended at 7 U.S.C. § 1522(e)(1)).

the policies advanced by ARPA. Sadly, I can find no evidence that this has occurred.

VI. CONCLUSION

I believe that *Wiley* stands for the proposition that the Federal Government is a party to the crop insurance contract. It also demonstrates that the FCIC will do whatever it must to protect the interests of the crop insurance industry. Unfortunately, its cozy relationship with the private insurance companies directly conflicts with its oversight responsibilities to the disadvantage of our farm community and the tax paying public.[305]

In my opinion, equity demands that FCIC be forced to honor the terms of the policies that it promotes and subsidizes with public funds. I also believe that ARPA has made it harder for that case to be made. The plethora of pilot programs authorized by ARPA should present an opportunity at some point for the courts to more narrowly define the exact nature of the Government's liability as a reinsurer.[306] Irrespective of that outcome, ARPA guarantees that the reinsured companies will continue to enjoy obscene profits with little or no risk.[307]

ARPA's passage required that Congress ignore the relatively recent lessons of *Wiley* and a legacy of failed attempts to fashion crop insurance into a workable safety net. It represents irresponsible public policy that further insulates both the FCIC and the reinsured companies from accountability to policyholders and taxpayers alike. Federal crop insurance, if it operates as a safety net at all, does so only for the FCIC and the insurance industry it serves.

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305. USDA, REPORT TO THE SECRETARY, *supra* note 298, at 1, *available at* http://www.usda.gov/oig/webdocs/cropsins.pdf. "By assigning low overall risk to the companies, the Government has given company managers little incentive to administer the insurance policies in accordance with the Government's best interests." *Id.*

306. Kelley, *supra* note 277, at 159 (citing Agricultural Risk Protection Act § 132 (codified as amended at 7 U.S.C. § 1523)) (stating that "the range of permissible and required pilot programs is remarkable, for it extends from the destruction of bees due to pesticides to coverage for wild salmon losses.").

307. *See* Agricultural Risk Protection Act § 132 (codified as amended at 7 U.S.C. § 1523). Reinsured companies will actually bear little risk for these new age policies since their underwriting costs are reimbursed for up to four years after which they can elect to transfer ongoing responsibility to FCIC if it's a loser. *See id.* § 131 (codified as amended at 7 U.S.C. § 1522(b)(4)(A)-(C)). *See also* USDA, REPORT TO THE SECRETARY, *supra* note 298, at 7, *available at* http://www.usda.gov/oig/webdocs/cropsins.pdf (stating that "[a]s a result of RMA's current risk-sharing policies, more Federal dollars are going to the reinsured companies than are helping producers recover from insurable losses.").