

A PRACTITIONER’S GUIDE TO THE LITIGATION OF
FEDERALLY REINSURED CROP INSURANCE
CLAIMS

*J. Grant Ballard**

I.	Introduction.....	532
II.	Background and Overview of Federally Reinsured Crop Insurance ...	533
	A. Role of the Federal Crop Insurance Corporation	534
	B. What Is Reinsurance?.....	536
	C. The Common Crop Insurance Policy	537
	D. Overview of Federal Crop Insurance	537
III.	Resolving Crop Insurance Disputes.....	538
	A. Mandatory Arbitration of Crop Insurance Disputes.....	539
	1. Procedural Notes on Arbitration Pursuant to the CCIP	541
	2. Mediation Prior to Arbitration	542
	3. Arbitration of Policy and Procedural Disputes Between the Insured and the Private Insurance Provider	543
	B. Potential FCIC Involvement in the Resolution of a Crop Insurance Dispute.....	544
	1. Good Farming Practices Determinations	545
	2. Claims Involving Direct or Indirect FCIC Involvement.....	547
	3. Procedures for FCIC Agency Determinations, Good Farming Practices Reconsideration Requests, Administrative Review of FCIC Determinations, and Administrative Appeals Through the National Appeals Division of USDA	548
	a. FCIC Final Agency Determinations.....	548
	b. Director’s Review of FCIC Final Agency Determinations	550
	c. The Good Farming Practices Reconsideration Process....	550
	d. Administrative Review of FCIC Agency Determinations	551
	e. Appeals Through the National Appeals Division of USDA	551
	C. Litigation of Crop Insurance Claims in State and Federal Courts.	553
	1. Judicial Review of Arbitration Awards	553
	2. Suit Against the FCIC in Federal Court.....	556
	3. Judicial Review of a FCIC Determination.....	558

4.	Claims Based Upon State Law	559
	a. Notes on CCIP Limitations of State Law Claims.....	561
	b. Preclusive Effect of Arbitration on State Law Claims	561
IV.	Conclusion	563

I. INTRODUCTION

The landscape of American agriculture and farm risk management is quickly moving in directions that will present a fresh set of challenges for today's farmers and the attorneys who represent them. Severe regional droughts, as well as the regularly volatile nature of weather patterns, have resulted in a push by many in government and agricultural industry to encourage producers to sign up for crop insurance protection.¹ In 2011, crop insurance indemnities to farmers exceeded ten billion dollars for the first time in history.² While the inherent risk associated with farming enterprises remains steady, congressional leaders have explicitly stated that direct payments, which are made regardless of production conditions, will likely not be provided as a means of farm risk protection in the future.³ Crop insurance appears to have emerged as a "mainstay" of farm risk management and future farm legislation.⁴ Producers have increased their reliance

* Grant Ballard is an attorney with the Banks Law Firm in Little Rock, Arkansas. Ballard practices in the area of agricultural law, with a significant portion of his practice centered on representation of agricultural producers in crop insurance disputes. He can be contacted at (501) 280-0100 or by email at gballard@bankslawfirm.us.

1. *E.g.*, Press Release, Minn. Dep't of Commerce, As Drought Continues, Commissioners Rothman and Frederickson Urge Farmers to Review Crop Insurance Needs (Feb. 16, 2012), available at <http://mn.gov/commerce/insurance/media/newsdetail.jsp?id=209-36017>; Steve Karnowski, *Midwest Farmers Urged to Buy Crop Insurance Due to Dry Weather*, MYNEWMARKETS.COM (Feb. 23, 2012), <http://www.mynewmarkets.com/articles/181006/midwest-farmers-urged-to-buy-crop-insurance-due-to-dry-weather>.

2. Fed. Crop Ins. Corp., *Crop Year Statistics for 2011, Nationwide Summary – By State*, RISK MGMT. AGENCY, USDA, 22 (Oct. 29, 2012), http://www3.rma.usda.gov/apps/sob/current_week/state2011.pdf; Nat'l Crop Ins. Servs., *Crop Insurance Claims Break \$10 Billion*, DELTA FARM PRESS (Mar. 3, 2012), <http://deltafarmpress.com/management/crop-insurance-claims-break-10-billion>.

3. Keith Good, *FarmPolicy.com "Q and A" Senate Agriculture Committee Chairwoman Debbie Stabenow (D., Mich.)*, FARMPOLICY.COM (Feb. 2012), <http://farmpolicy.com/wp-content/uploads/2012/02/FarmPolicyQandAChairwomanStabenow12Feb.pdf>.

4. Jerry Hagstrom, *Vilsack Touts Need for Disaster Program and Crop Insurance*, AGWEEK (May 30, 2011), <http://www.agweek.com/event/article/id/18519/>.

on crop insurance as a tool in their risk management portfolio.⁵ As such, the legal practitioners who represent American farmers must be prepared to address the potential legal issues that arise in the American production agricultural system, which relies increasingly on crop insurance.

Potential issues relating to the implementation of federally reinsured crop insurance policies are immense. This Article will focus on procedural issues that arise when a producer believes that his crop insurance claim has been unfairly denied. Because agricultural attorneys must understand the intricacies of federal crop insurance in order to best represent their clients, basic background information on the structure of U.S. crop insurance is also provided. Section II of this Article is dedicated to the background and overview of the federal crop insurance program, including an explanation of the role of private insurance companies and the federal government in administering crop insurance. Section III, on the other hand, provides a practical outline of the process and particularities involved in the litigation and resolution of crop insurance disputes.

II. BACKGROUND AND OVERVIEW OF FEDERALLY REINSURED CROP INSURANCE

To understand the nature of crop insurance in the United States, an attorney must not only understand the central tenants of insurance law, but also understand the federal government's role and responsibility under the federal crop insurance system. Crop insurance offers financial protection for agricultural producers against natural losses to their crops.⁶ Congress enacted a federal crop insurance program "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and [by] providing the means for the research and experience helpful in devising and establishing such insurance."⁷ The current federal crop insurance program is authorized by the Federal Crop Insurance Act (FCIA).⁸

Crop insurance is often considered confusing to those who have not devoted significant time to studying the implementation of the federal crop insurance program. Crop insurance is much more complex than other types of insurance. This results, in part, from the fact that the majority of crop insurance policies are reinsured by the federal government.⁹ The standard crop insurance

5. *See Crop Policies and Pilots*, RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/policies/> (last modified Nov. 7, 2012).

6. 7 U.S.C. § 1508(a)(1) (2006).

7. *Id.* § 1502(a) (Supp. IV 2010).

8. Federal Crop Insurance Act, 7 U.S.C. §§ 1501–1524 (2006 & Supp. IV 2010).

9. *A History of the Crop Insurance Program*, RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/aboutrma/what/history.html> (last modified Aug. 2, 2012).

agreement may appear to be a normal contract between a farmer and an insurance provider, but the USDA, through the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency (RMA), sets the basic policy terms, conditions, and rates.¹⁰ Crop insurance is further complicated by the fact that there are a wide variety of available policies with distinct terms and conditions. Policies are currently available for over 100 crops and will vary between counties and states.¹¹ Moreover, in the event of a dispute as to coverage, the federal government may have the authority to make final determinations as to certain provisions and procedures in crop insurance agreements originally entered into between a farmer and an insurance agent.¹²

A. *Role of the Federal Crop Insurance Corporation*

The Federal Crop Insurance Act authorized the federal crop insurance program and provided for the creation of a Federal Crop Insurance Corporation.¹³ The FCIC is a corporation, within the USDA, created to “carry out the purposes” of the Act.¹⁴ The FCIC is authorized to “insure, or provide reinsurance” to approved, private insurance providers who insure the producers of agricultural commodities in the United States.¹⁵ The federal government is involved in subsidizing and limiting the risk of private crop insurance providers so the FCIC may ensure that crop insurance is available to farmers at affordable rates throughout the country. Congress has made the determination that the inherent risk involved in production agriculture, including the variability of weather patterns and the high correlation of crop losses, mandate federal involvement in crop insurance.¹⁶ The theory is that, without federal subsidization and reinsurance of private crop insurers, crop insurance would not be available at affordable rates to many farmers.¹⁷

10. RISK MGMT. AGENCY, USDA, PA-1667-02, ABOUT THE RISK MANAGEMENT AGENCY 1 (Nov. 2010) [hereinafter RMA FACT SHEET], available at <http://www.rma.usda.gov/pubs/rme/aboutrma.pdf>; see also *Federal Crop Insurance Corporation*, RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/fcic/> (last modified Nov. 1, 2012).

11. *Crop Policies and Pilots*, *supra* note 5.

12. See Common Crop Ins. Policy 7 C.F.R. § 457.8(f)(3) para. 20 (2012) (setting forth the guidelines for dispute resolution and review of FCIC decisions). The section is split into two tracks to address the differing procedures for FCIC Policies and Reinsured Policies. *Id.*

13. 7 U.S.C. §§ 1503, 1508(a)(1) (2006 & Supp. IV 2010).

14. *Id.* § 1503 (Supp. IV 2010).

15. *Id.* § 1508(a)(1) (2006).

16. Stephen Frerichs, *Crop Insurance: Some Basics*, AGRICULTURELAW.COM, <http://www.agriculturelaw.com/links/cropins/101.htm> (last visited Dec. 21, 2012).

17. *Id.*

The FCIC is managed by a Board of Directors that is subject to the supervision of the Secretary of Agriculture.¹⁸ The Board is composed of USDA officials, as well as an individual “experienced in the crop insurance business,” an individual “experienced in reinsurance or the regulation of insurance,” and “four active producers who are policy holders.”¹⁹ The FCIC has been granted the power to “adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted,”²⁰ and “[t]he Secretary and the Corporation are each authorized to issue such regulations as are necessary” to carry out their statutory duties.²¹

The FCIC is managed and operated through the USDA’s RMA.²² In 1996, as part of the reorganization of the USDA, the RMA was created to carry out the administrative responsibilities of the FCIC.²³ As a result, certain activities statutorily designated to the FCIC are actually carried out by the RMA. For example, RMA administers the Federal Crop Insurance Program by developing crop insurance policies, “administer[ing] premium and expense subsidies, approv[ing] and support[ing] products, and reinsur[ing]” the private insurance companies that sell and service these federal crop insurance policies.²⁴ In the 2010 crop year alone, the “RMA managed nearly \$78 billion worth of insurance liability.”²⁵ The FCIC, on the other hand, establishes the prices, terms, and conditions for federal crop insurance contracts while directing the delivery of these crop insurance policies to producers.²⁶ Crop insurance policies are published in the Code of Federal Regulations, after being proposed and finalized by the FCIC.²⁷ The RMA also publishes “handbooks” on its website, which outline the procedures relating to the administration of crop insurance programs.²⁸ In addition, private insurance providers may develop their own crop insurance products for proposal to the Board of the FCIC.²⁹ These privately developed policies must

18. 7 U.S.C. § 1505(a)(1).

19. *Id.* § 1505(a)(2).

20. *Id.* § 1506(e).

21. *Id.* § 1506(o) (Supp. IV 2010).

22. RMA FACT SHEET, *supra* note 10.

23. *A History of the Crop Insurance Program*, *supra* note 9.

24. RMA FACT SHEET, *supra* note 10.

25. *Id.*

26. *A History of the Crop Insurance Program*, *supra* note 9.

27. *Id.*

28. *Bulletins and Handbooks*, RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/handbooks/> (last modified Jan. 13, 2012).

29. *A History of the Crop Insurance Program*, *supra* note 9.

be approved by the FCIC before a private insurer may enter a reinsurance agreement with the FCIC, and these policies are not published as regulations.³⁰

B. *What Is Reinsurance?*

Reinsurance of crop insurance policies is a major function of the FCIC. Reinsurance is a risk management tool for the private insurance providers who sell federal crop insurance policies to producers.³¹ It is a contractual arrangement where an insurer transfers a portion of the risk it underwrites to another insurer.³² “Reinsurance arrangements are often favored by insurers because they reduce their reserve requirements and enhance their profitability.”³³ The reinsurance agreement between the FCIC and private insurers is governed by the Standard Reinsurance Agreement (SRA),³⁴ and in accordance with this agreement the FCIC pays a certain percentage of the policy premium as well as a portion of the company’s insurance costs,³⁵ thereby subsidizing the provision of crop insurance.

The SRA is a “cooperative financial assistance agreement[] between the Federal Crop Insurance Corporation (FCIC) and an insurance company.”³⁶ It provides “the terms under which FCIC provides reinsurance and subsidies on eligible crop insurance contracts sold” by approved insurance companies,³⁷ while incorporating the FCIA and FCIC regulations.³⁸ In turn, the SRA obligates the private insurance providers to sell and service crop insurance policies pursuant to the regulations and procedures established by the FCIC.³⁹

30. 7 C.F.R. § 400.166(a) (2012); *A History of the Crop Insurance Program*, *supra* note 9.

31. Frerichs, *supra* note 16.

32. *Id.*; see also *Colonial Am. Life Ins. Co. v. Comm’r*, 491 U.S. 244, 244 (1989).

33. Scott Fancher, *FCIC’s Standard Reinsurance Agreement*, NAT’L AGRIC. L. CTR., 2 (Mar. 2002), http://nationalaglawcenter.org/assets/articles/fancher_reinsurance.pdf [hereinafter Fancher, *FCIC’s SRA*] (citing *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77, 82 (S.D.N.Y. 1989)).

34. SRA regulations are set forth in Title 7 of the Code of Federal Regulations. 7 C.F.R. §§ 400.161–176.

35. *Id.* § 400.166(b); Fancher, *FCIC’s SRA*, *supra* note 33, at 2–3, 8.

36. *Reinsurance Agreements*, RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/pubs/ra/> (last modified July 2, 2012).

37. *Id.*

38. 7 C.F.R. § 400.164; Fancher, *FCIC’s SRA*, *supra* note 33, at 3.

39. 7 C.F.R. § 400.168(a); Fancher, *FCIC’s SRA*, *supra* note 33, at 3. The current SRA and appendices can be found at *Reinsurance Agreements*, *supra* note 36.

C. *The Common Crop Insurance Policy*

The FCIC also publishes a Common Crop Insurance Policy (CCIP), codified in the Code of Federal Regulations.⁴⁰ The Common Crop Insurance Policy contains terms and conditions for private insurance policies reinsured by the FCIC.⁴¹ The terms and conditions found in the CCIP cannot be altered by private insurance providers or individual employees of the USDA unless a modification is authorized under the terms of the CCIP.⁴² The federally reinsured Crop Insurance Policy is to be administered by the Risk Management Agency of the USDA, pursuant to procedures issued by the USDA and published on the Risk Management Agency's website "or a successor Web site."⁴³

D. *Overview of Federal Crop Insurance*

The involvement of the federal government in crop insurance contracts under the array of statutes, regulations, and guidelines applicable to the implementation of the Federal Crop Insurance Act may cause concern to attorneys when they first deal with a client's crop insurance dispute. A crop insurance contract is, however, in its simplest description, an agreement between agricultural producers and private insurance providers to insure an eligible crop.⁴⁴ The obligation of the private insurance provider is to indemnify the insured producer against covered losses that occur to the crop.⁴⁵ Crop losses incurred due to a producer's "neglect or malfeasance," failure "to reseed . . . under such circumstances as it is customary to reseed," or "the failure of the producer to follow good farming practices" will not be covered.⁴⁶

Crop insurance is complicated due to the federal involvement in regulation and administration of the insurance coverage. The legal priority of statutes, regulations, and guidelines applicable to reinsured crop insurance can be confusing, particularly if there are inconsistencies. Federally reinsured crop insurance is governed by the United States Code, implemented by federal regulations, and administered under informal procedures issued by the FCIC, through the RMA.⁴⁷

40. 7 C.F.R. § 457.8(f)(3).

41. *Id.* § 457.8(f)(3) pmbl.

42. *Id.*

43. *Id.* The RMA website may be found at RISK MGMT. AGENCY, USDA, <http://www.rma.usda.gov/> (last modified Oct. 1, 2012).

44. *A History of the Crop Insurance Program*, *supra* note 9.

45. *Id.*

46. 7 U.S.C. § 1508(a)(3)(A) (2006).

47. *Id.* § 1508 (2006 & Supp. 2010); 7 C.F.R. §§ 457.1–173 (2012); RMA FACT SHEET, *supra* note 10.

As a result, practitioners must be aware of the order of their priority. If there is any conflict between the authorizing statute, agency rules, and agency guidelines and procedures, the order of priority is stated as the following: (1) The Federal Crop Insurance Act; (2) the Federal Regulations; and (3) the procedures as issued by FCIC/RMA, with (1) controlling (2).⁴⁸ If the federal regulations conflict with FCIC issued procedures as outlined in Risk Management Agency crop insurance handbooks, the federal regulations will control with all regulations and procedures remaining subject to the Federal Crop Insurance Act found at 7 U.S.C. sections 1501–1524.⁴⁹ Loss adjustment procedures and practices located in RMA handbooks are not codified in the federal regulations but are published on the agency website, instead.⁵⁰

III. RESOLVING CROP INSURANCE DISPUTES

When a farmer experiences a crop loss, submits a claim for coverage, and that claim is denied, the farmer may wish to challenge the denial. Conflicts can certainly arise between the insured farmer and the private insurance provider, but the FCIC's role as a reinsurer creates the potential for a three-way disagreement. The FCIC, the private insurer, or both may have instigated the denial of an insured's claim. The proper process under which an insured farmer may contest that denial will often be dependent on whether the private insurer or instead the RMA chose to deny the claim.⁵¹

The relevant federal regulations and the USDA RMA Handbooks prescribe a detailed and complex process for contesting the denial of a loss claim under a federally reinsured crop insurance policy.⁵² The CCIP outlines the basic procedures for review, appeal, mediation, arbitration, and litigation of a crop insurance claim.⁵³ Tools that may be available to a producer include mediation, arbitration, appeal, reconsideration, administrative review, judicial review, and suit.⁵⁴ Regardless of which method is employed to reach resolution of a crop insurance claim, the Federal Crop Insurance Act, the terms of the common insur-

48. 7 C.F.R. § 457.8(f)(3) pmb1.

49. *Id.*

50. *See id.*

51. *See id.* § 457.8(f)(3) para. 20. There are two paragraphs numbered 20 in section 457.8, "For FCIC Policies" and "For Reinsured Policies." All subsequent citations to this subsection refer to the "For Reinsured Policies" paragraph.

52. *See id.*; FED. CROP INS. CORP., USDA, FCIC-14040, LARGE CLAIMS HANDBOOK: 2010 AND SUCCEEDING CROP YEARS 25–28 (2010) [hereinafter LARGE CLAIMS HANDBOOK], available at <http://www.rma.usda.gov/handbooks/14000/2010/14040.pdf>.

53. 7 C.F.R. § 457.8(f)(3) para. 20.

54. *Id.*

ance policy, and the relevant federal regulations are binding.⁵⁵ Agricultural producers who purchase federally reinsured crop insurance agreements are held to have notice of all relevant terms and conditions within the CCIP along with applicable regulations promulgated by the FCIC.⁵⁶ Moreover, federal courts have charged policy holders with notice of the content of their policy and the relevant federal regulations.⁵⁷

A. *Mandatory Arbitration of Crop Insurance Disputes*

Arbitration is often required by the terms of the Common Crop Insurance Policy, under an arbitration clause pertaining to disputes between an insured and the private insurance provider.⁵⁸ The current arbitration provision found within the CCIP provides that, when a disagreement arises between an insured producer and the insurance provider that cannot be resolved by mediation, as to “any determination” made by the insurance provider, “the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association.”⁵⁹

As crop insurance contracts have been held to involve interstate commerce, the Federal Arbitration Act is applicable to the CCIP and underlying disputes.⁶⁰ Federal courts have found arbitration to be mandatory, and have upheld the enforceability of the arbitration provision contained in the Common Crop Insurance Policy, citing the Federal Arbitration Act⁶¹ and “a federal policy favoring arbitration.”⁶² As a result, arbitration is likely mandatory in all crop insur-

55. *Id.* § 457.8(f)(3) para. 20(f).

56. *Nobles v. Rural Cmty. Ins. Servs.*, 303 F. Supp. 2d 1292, 1303 (M.D. Ala. 2004), *aff'd*, 116 Fed. Appx. 253 (11th Cir. 2004); *Walpole v. Great Am. Ins. Cos.*, 914 F. Supp. 1283, 1290–91, n.12 (D. S.C. 1994) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)), *aff'd*, 56 F.3d 63 (4th Cir. 1995).

57. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); *Nobles*, 303 F. Supp. 2d at 1303.

58. 7 C.F.R. § 457.8(f)(3) para. 20(a), (b). The statutory authority for the arbitration clause found in the FCIC regulations is based upon the Federal Crop Insurance Act, which provides the FCIC the authority to promulgate “such regulations as are necessary to carry out” the purposes of the Act. 7 U.S.C. § 1506(o) (Supp. IV 2010); Scott Fancher, *Scope of the Federal Crop Insurance Arbitration Clause*, NAT'L AGRIC. L. CTR., 3 (Aug. 2002), http://www.nationalaglawcenter.org/assets/articles/fancher_arbitration.pdf [hereinafter Fancher, *Scope of the FCIC Arbitration Clause*].

59. 7 C.F.R. § 457.8(f)(3) para. 20(a).

60. *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1295, 1299 (M.D. Ala. 2000), *motion granted in part, and denied in part*, 303 F. Supp. 2d 1292 (M.D. Ala. 2004), *aff'd*, 116 Fed. Appx. 253 (11th Cir. 2004).

61. 9 U.S.C. §§ 1–16 (2006); *Nobles*, 122 F. Supp. 2d at 1295–96.

62. *Nobles*, 122 F. Supp. 2d at 1295 (citing 9 U.S.C. §§ 1–16).

ance disputes between the insured and the private insurance provider. Numerous attempts by insured parties to get around the arbitration clause found in the CCIP have failed, and, as such, it now appears well settled that the parties to a crop insurance agreement are bound by the CCIP arbitration clause.⁶³ While arbitration decisions are binding, the findings of an arbitrator may be subject to judicial review in certain circumstances.⁶⁴

An arbitrator's authority to resolve disagreements is limited by the CCIP.⁶⁵ Damages awarded by an arbitrator may not "exceed the amount of liability established . . . under the policy."⁶⁶ Recovery for any damages, aside from the covered policy amounts, "will likely require separate litigation beyond arbitration."⁶⁷ Federal courts have also made clear that arbitrators do not have the authority to make equitable awards.⁶⁸ At least one federal court, however, has held that an arbitrator could award recovery for losses not covered under a crop insurance policy where the insured "relied in good faith upon a misrepresentation of an insurance agent."⁶⁹ The court in *Nobles v. Rural Community Insurance Services* observed that an arbitrator had the authority to grant damages where the claimant relied on the misrepresentation of an agent.⁷⁰ The court cited the CCIP, which specifically provided an insured with a claim against the FCIC based upon misrepresentations, and the proposition found in the Federal Register that the "FCIC has a long standing policy of honoring the misinformation provided by its agents to insured . . ."⁷¹ This reasoning can no longer be used in support of an arbitrator's award of damages resulting from good faith reliance on a misrepresentation. The FCIC has since made revisions to the Federal Regulations to "reduce program vulnerabilities and clarify existing policy provisions to better meet the needs of the insured."⁷² One of these revisions was the elimination of the

63. See, e.g., *Nobles*, 122 F. Supp. 2d 1290; *IGF Ins. Co. v. Hat Creek P'ship*, 76 S.W.3d 859 (Ark. 2002).

64. 7 C.F.R. § 457.8(f)(3) para. 20(c); see also 9 U.S.C. §§ 9–11 (describing the process and requirements for judicial review under the Federal Arbitration Act).

65. See 7 C.F.R. § 400.166(d); Fancher, *Scope of the FCIC Arbitration Clause*, *supra* note 58, at 13–14.

66. 7 C.F.R. § 457.8(f)(3) para. 20(h).

67. Fancher, *Scope of the FCIC Arbitration Clause*, *supra* note 58, at 15–16.

68. *Nobles*, 122 F. Supp. 2d at 1297; see also 7 C.F.R. § 457.8(f)(3) para. 20(h), (i) (limiting recovery to "the amount of liability established . . . under the policy" absent a showing of non-compliance with FCIC policies, regulations, or procedures).

69. *Nobles*, 122 F. Supp. 2d at 1297.

70. *Id.*

71. *Id.* (quoting 56 Fed. Reg. 1345, 1347 (Jan. 14, 1991)).

72. 69 Fed. Reg. 48,652, 48,656 (Aug. 10, 2004).

regulatory provision allowing recovery for good faith reliance on misrepresentations.⁷³

1. *Procedural Notes on Arbitration Pursuant to the CCIP*

The common crop insurance policy mandates that arbitration proceedings must be initiated within one year of either the denial of the crop insurance claim or the date on which a disputed determination was issued.⁷⁴ Arbitration is initiated when a “Demand for Arbitration” is filed with the insurance provider.⁷⁵ This one-year time frame stands, regardless of whether the parties choose to initiate a mediation process.⁷⁶ The failure to initiate arbitration within the one-year time period may bar proceedings against a crop insurance company and will consequently bar any later attempt to resolve the dispute through a judicial review.⁷⁷ The CCIP also mandates that arbitration be conducted in accordance with the rules of the American Arbitration Association (AAA), but there is no requirement that an AAA arbitrator conduct the arbitration.⁷⁸

For an award given at arbitration to be enforceable, the arbitrator must provide both the insurer and the insured a written statement that describes the disputed issues, contains the findings of fact, includes the determinations of the arbitrator, and gives the amount, basis, and “breakdown by claim” for the awards.⁷⁹ When an award has been granted at arbitration, a party to the arbitration has the right to petition a federal court for a confirmation or entry of said award, within a year of the date upon which the award was made.⁸⁰

This subsection highlights only a few of the basic procedural elements involved in arbitrating a crop insurance claim. As the AAA arbitration rules govern arbitration proceedings from the initial filing through the rendering of the arbitration award, the AAA arbitration rules should be consulted by practitioners before proceeding towards arbitration.⁸¹

73. 69 Fed. Reg. at 48,656.

74. 7 C.F.R. § 457.8(f)(3) para. 20(b)(1) (2012).

75. Fancher, *Scope of the FCIC Arbitration Clause*, *supra* note 58, at 5.

76. 7 C.F.R. § 457.8(f)(3) para. 20(b).

77. *Id.* § 457.8(f)(3) para. 20(b)(2).

78. *Id.* § 457.8(f)(3) para. 20(a).

79. *Id.* § 457.8(f)(3) para. 20(a)(2).

80. 9 U.S.C. § 9 (2006).

81. Fancher, *Scope of the FCIC Arbitration Clause*, *supra* note 58, at 4. See AM. ARB. ASSOC., <http://www.adr.org/> (last visited Dec. 21, 2012), for AAA rules and more information about the arbitration process.

2. Mediation Prior to Arbitration

The CCIP provides the opportunity for parties to settle a dispute without resorting to arbitration.⁸² For a settlement to be enforceable, the CCIP requires that the settlement agreement reached between the parties (with or without the aid of mediation) be written, and include a statement of disputed issues along with the amount of the settlement.⁸³

Mediation is a potential dispute resolution tool when the insured and the private insurance provider can both agree to mediate the disputed issues and agree on a mediator.⁸⁴

Mediation may be a preferred course of action in certain circumstances as it can offer an opportunity for the quick resolution of the dispute. Before seeking mediation, however, attorneys should remember that private insurance providers are reinsured by the FCIC.⁸⁵ This could be an important detail as there may be circumstances where a private insurance provider is hesitant to settle a case without a binding determination from an arbitrator, due to a fear that the FCIC may not approve payment of the reinsured portion of the claim to the private insurer. The RMA requires private insurance providers to provide RMA with “all settlement agreements” as well as “all briefs or other evidence.”⁸⁶ The failure of the private insurance provider to provide this information can lead to the RMA’s denial of FCIC reinsurance.⁸⁷ Practitioners must take into consideration that, although the mediation or arbitration may only concern a disagreement between the insured and the private insurance provider, the private insurance provider has a significant interest in ensuring that the FCIC will pay a portion of any settlement amount. Additionally, attorneys representing insured claimants should be certain that the party representing a private insurance provider at mediation has the actual authority to settle the dispute in mediation. If that is not the case, mediation may not be an effective tool for resolution of the dispute.

82. 7 C.F.R. § 457.8(f)(3) para. 20(a).

83. *Id.* § 457.8(f)(3) para. 20(a)(2).

84. *Id.* § 457.8(f)(3) para. 20(g).

85. *Id.* § 400.164.

86. RISK MGMT. AGENCY, USDA, FCIC 18010, 2012 CROP INSURANCE HANDBOOK (CIH) 120 (2012) [hereinafter 2012 CROP INSURANCE HANDBOOK], available at http://www.rma.usda.gov/handbooks/18000/2012/12_18010-2.pdf.

87. *Id.*

3. *Arbitration of Policy and Procedural Disputes Between the Insured and the Private Insurance Provider*

Where a dispute arises as to “a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure,” mediation and arbitration will remain available for the resolution of a crop insurance dispute, but the CCIP contains an additional hurdle for the insured, prior to the desired arbitration or mediation.⁸⁸ Arbitration or mediation of disputes involving “a policy or procedure interpretation” cannot proceed until the insured or insurer has received an interpretation of the disputed policy provision or procedure from the FCIC.⁸⁹ In short, arbitration or mediation of policy or procedures can only be used by the insured after the FCIC has handed down its own interpretation,⁹⁰ and the FCIC’s interpretation is binding on any subsequent arbitration or mediation.⁹¹ The proper manner for requesting and obtaining an interpretation of a policy provision or procedure is contained in the CCIP.⁹² The process of requesting an interpretation is a step that should not be overlooked as “failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.”⁹³

The applicability of this nullification provision may not always be clear. At least one federal court has addressed the question of whether a determination made by an arbitrator is a factual interpretation or a policy interpretation invoking the nullification provision in paragraph 20.⁹⁴ In *Great American Insurance Co. v. Moye*, the court dealt with a dispute as to whether an insured producer had “properly treated” the soil on his farm, and held that the arbitrator’s determination was not an interpretation of a policy provision.⁹⁵ The court did note, however, that “in order to decide *if* the land was properly treated, a person must first know or decide what it *means* to be properly treated.”⁹⁶ The court then found that the arbitrator made a factual determination as to the issue, due to the fact that comments in the Federal Register indicated that “properly treated” meant treating

88. 7 C.F.R. § 457.8(f)(3) para. 20(a)(1).

89. *Id.*

90. *Id.*

91. *Id.* § 457.8(f)(3) para. 20(a)(1)(i).

92. *Id.* § 457.8(f)(3) para. 20(a)(1). The process for obtaining a determination is set forth in 7 C.F.R. §§ 400.765–.768.

93. *Id.* § 457.8(f)(3) para. 20(a)(1)(ii).

94. *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1305 (M.D. Fla. 2010).

95. *Id.*

96. *Id.*

the soil to defend against nematodes.⁹⁷ The court went on to explain that to apply nullification to the dispute would require a “nonsensical” reading of the policy terms that “would wholly strip arbitrations of any importance when they concern a factual dispute over soil preparation” as the requirement that the land be “properly treated” would “have to be interpreted as requiring that the land be ‘fumigated or treated in a manner approved by the FCIC.’”⁹⁸ *Moye* serves as a warning that whether a dispute involves a policy or procedural issue may not always be a quick or easy determination. Practitioners would be wise to exercise caution when deciding whether a FCIC interpretation is necessary due to the harsh realities presented under the nullification provision of paragraph 20 of the CCIP.

While the FCIC’s interpretation of a procedure is binding, the interpretation is appealable to the USDA National Appeals Division (NAD).⁹⁹ The rules outlining the appeals process for the National Appeals Division are discussed in further detail in 7 C.F.R. section 11.6(b).¹⁰⁰ FCIC interpretations of policy provisions, however, are considered to be “determinations that [are] a matter of general applicability”¹⁰¹ and are not appealable to NAD.¹⁰² FCIC determinations as to matters of general applicability may, however, be subject to judicial review. Prior to seeking judicial review as to a FCIC determination on a matter of general applicability, an insured is required to request “an administratively final determination from the Director of the National Appeals division on the issue of whether the final agency determination is a matter of general applicability.”¹⁰³ The process for obtaining a final determination of non-appealability from the Director is located at 7 C.F.R. section 11.6 and is discussed in detail in subsection (a).¹⁰⁴

B. *Potential FCIC Involvement in the Resolution of a Crop Insurance Dispute*

All federally reinsured crop insurance policies include clauses which specify arbitration as a method for dispute resolution.¹⁰⁵ The CCIP, however, provides for multiple exceptions where the arbitration requirement is not applicable, and the FCIC has established alternative procedures for the resolution of

97. *Id.* (citing 62 Fed. Reg. 14,775, 14,776 (Mar. 28, 1997)).

98. *Id.* at 1306.

99. 7 C.F.R. § 457.8(f)(3) (2012) para. 20(a)(1)(iv).

100. *Id.* § 11.6(b).

101. *Id.* § 457.8(f)(3) para. 20(a)(1)(iii).

102. *Id.* § 400.768(g).

103. *Id.*

104. *Id.* § 11.6(a).

105. *Id.* § 457.8(f)(3) para. 20(a).

disputes arising from crop insurance agreements. These instances include situations where disputes relate to the applicability or meaning of an insurance policy or procedure¹⁰⁶ determination made by the FCIC, claims where the “FCIC is directly involved in the claims process,” and where the FCIC “directs” the insurance provider’s “resolution of the claim.”¹⁰⁷ In addition, “good farming practices” disputes are completely exempted from the arbitration requirement.¹⁰⁸ The procedural guidelines for the administrative resolution of crop insurance disputes outside of arbitration are discussed further below.

1. *Good Farming Practices Determinations*

The failure of an insured to use good farming practices may lead to a determination that crop losses are uninsured.¹⁰⁹ Disagreements between the insured producer and the insurer regarding the use of good farming practices by the insured demand special attention by the attorney, as “good farming practices” disputes are not treated, under the CCIP, as typical disputes between the insured and the insurance provider.¹¹⁰ Instead, these disputes require a different approach where the insured must seek the FCIC’s opinion of what constitutes a “good farming practice,” prior to filing suit against the FCIC.¹¹¹ Furthermore, a private insurance company may make decisions regarding good farming practices when assessing a producer’s claim,¹¹² but these private insurance providers may not be sued based upon their determinations of good farming practices with respect to the insured crop.¹¹³ Farmers who have an insurance claim denied by a private insurance provider on the basis of the producer’s alleged failure to use good farming practices do have some notice of the unique nature of good farming practices determinations. The insurance providers are required by FCIC to provide the insured with a written good farming practices decision, stating the basis for such a denial and informing the insured of the right to request a Risk Management Agency determination of good farming practices.¹¹⁴

106. *Id.* § 457.8(f)(3) para. 20(a)(1).

107. *Id.* § 457.8(f)(3) para. 20(e).

108. 2012 CROP INSURANCE HANDBOOK, *supra* note 86, at 123.

109. 7 U.S.C. § 1508(3)(A)(iii) (2006).

110. *See* 7 C.F.R. § 457.8(f)(3) para. 20(d).

111. *Id.* § 457.8(f)(3) para. 20(d)(1)(i).

112. RISK MGMT. AGENCY, USDA, BULL. NO. MGR-05-010, GOOD FARMING PRACTICE (GFP) DECISIONS, DETERMINATIONS, AND RECONSIDERATIONS 1 (2005) [hereinafter GOOD FARMING PRACTICES], available at <http://www.rma.usda.gov/news/managers/2005/PDF/mgr-05-010.pdf>.

113. 7 C.F.R. § 457.8(f)(3) para. 20(d)(1)(iii).

114. *See* GOOD FARMING PRACTICES, *supra* note 112, at 6.

An insured may not use the arbitration process to argue a good farming practices determination. The FCIC has been given the authority to make determinations regarding the use of good farming practices by an agricultural producer.¹¹⁵ An insured who disagrees with a finding that “good farming practice[s]” were not followed, “may request reconsideration by FCIC of this determination” or may “file suit against FCIC.”¹¹⁶ The procedure for obtaining this Final Agency Determination is found at 7 C.F.R. part 400, subpart X, and is described thoroughly in Part III.A of this Article. The FCIC will then make a finding of what “constitutes a good farming practice.”¹¹⁷ Under the provisions of the common crop insurance policy, FCIC good farming practices determinations are not appealable to the National Appeals Division.¹¹⁸ The insured “may request reconsideration by FCIC,”¹¹⁹ however, in the event that she disagrees with the FCIC’s determination. The process for requesting reconsideration of a FCIC determination as to good farming practices has been published at 7 C.F.R. part 400, subpart J, and is discussed in detail at 7 C.F.R. section 400.98.¹²⁰

The insured is not required to request reconsideration, and, in the alternative, the insured has the option of filing suit against the FCIC.¹²¹ Suits against the FCIC must be brought “in the United States District Court for the district in which the insured acreage is located.”¹²² The time frame for filing a suit against the FCIC is limited to one year from the date of the determination that good farming practices were not followed or the date that the reconsideration was completed.¹²³ The case law relating to “good farming practices” disputes is limited, but at least one court has found that an over-extended farmer who did not have sufficient time to care for his crop at the level expected by the FCIC could not recover under his crop insurance policies due to his failure to follow good farming practices.¹²⁴ Other case law upholds the provision that a failure to follow *recognized* good farming practices will result in a loss of coverage to the in-

115. 7 C.F.R. § 457.8(f)(3) para. 20(d)(2).

116. *Id.*

117. *Id.*

118. *See id.* § 457.8(f)(3) para. 20(d). Instead, the CCIP provides for resolution of such disputes through requests for determination, arbitration or mediation procedures, requests for reconsideration, and the filing of suit. *Id.*

119. *Id.* § 457.8(f)(3) para. 20(d)(2)(i).

120. *Id.* § 400.98.

121. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii).

122. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii)(B).

123. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii)(C)(1)–(2).

124. *Royalty v. Fed. Crop Ins. Corp.*, 618 F. Supp. 650, 652 (W.D. Ky. 1985) (describing farmer who raised more tobacco than he could properly prepare the land for and plant).

sured.¹²⁵ In principle, the requirement that a producer follow good farming practices seems to be a simple concept, but practitioners should be aware that opinions, among producers, as to good farming practices relating to crop production and farming techniques vary significantly and are likely to be a source of disagreement in the future.¹²⁶

2. *Claims Involving Direct or Indirect FCIC Involvement*

Attorneys who represent farmers in crop insurance disputes must be knowledgeable of the role that the FCIC, through RMA, may play in the denial of a crop insurance claim. When the FCIC, through RMA, becomes involved in an insured producer's claim for an indemnity from a private insurer, the path towards resolution of the dispute will take a detour from the arbitration track that is often required for indemnity disputes between the insured and the private insurance provider.¹²⁷ The opportunity for FCIC involvement in the denial or adjustment of a claim is immense. A prime example of a situation where the FCIC will participate in the claims process is the RMA large claims process, which requires private insurance providers give the RMA an opportunity to participate in the claims process when the claim total exceeds \$500,000.¹²⁸ The FCIC, "[a]s a Federal regulator of the crop insurance program," can assert its authority to take actions regarding the adjustment of large insurance claims "to ensure the program is administered in accordance with the [Federal Crop Insurance] Act, applicable regulations, policy provisions, and procedures."¹²⁹

Crop insurance disputes where the FCIC is "directly involved in the claims process or directs [a private insurer] in the resolution of the claim" require an administrative approach to the resolution of the disagreement.¹³⁰ This language requires that these claims, denied either directly by the FCIC or an approved insurance provider, may not proceed to arbitration.¹³¹ The CCIP mandates an administrative review or appeal when the FCIC "elects to participate" in the claims adjustment process or "modifies, revises, or corrects" a claim prior to

125. See *Hill v. Fed. Crop Ins. Corp.*, 669 F. Supp. 928, 930 (E.D. Ark. 1987) (failing to flush rice fields violates good farming practices).

126. See generally *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 904–05 (Iowa 1981) (Reynoldson, C.J., dissenting in part) (describing differing opinions as to what constitutes good farming practices).

127. 7 C.F.R. § 457.8(f)(3) para. 20(a)(1).

128. See LARGE CLAIMS HANDBOOK, *supra* note 52, at 3.

129. *Id.* exhibit 7, at 2.

130. 7 C.F.R. § 457.8(f)(3) para. 20(e).

131. *Id.* § 457.8(f)(3) para. 20(j).

payment.¹³² This restriction, however, should not preempt state law causes of action.¹³³ As the preemption issue appears to be settled, paragraph 20(j) may not bar the arbitration and litigation of state law claims outside of the administrative review and appeal process.¹³⁴

The process for pursuing an administrative review is outlined in 7 C.F.R. part 400, subpart J, and detailed fully in section 400.93.¹³⁵ An appeal through the National Appeals Division is to be conducted pursuant to 7 C.F.R. sections 11.1 through 11.15.¹³⁶ After the completion of a National Appeals Division administrative appeal, an insured producer does have the right to bring suit, subject to 7 C.F.R. part 400, subpart P.¹³⁷

3. *Procedures for FCIC Agency Determinations, Good Farming Practices Reconsideration Requests, Administrative Review of FCIC Determinations, and Administrative Appeals Through the National Appeals Division of USDA*

a. *FCIC Final Agency Determinations*

As mentioned earlier, a FCIC interpretation is required before the mediation or arbitration of a disagreement as to “a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure.”¹³⁸ The CCIP specifies that interpretations are to be obtained in accordance with 7 C.F.R. sections 400.765–.768, which outline the procedure for obtaining a “final agency determination.”¹³⁹ Thus, final agency determinations interpreting a policy or procedure, in issue, are required prior to the arbitration or mediation of a crop insurance claim. Furthermore, a failure to request a final agency determination, before proceeding with arbitration will lead to the nullification of any award granted in arbitration.¹⁴⁰ FCIC determinations are also required when an insured disputes a “good farming practices” determination.¹⁴¹ It is important to

132. *Id.*

133. *See Meyer v. Conlon*, 162 F.3d 1264, 1268–70 (10th Cir. 1998); *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs. Inc.*, 121 F.3d 630, 634 (11th Cir. 1997); *Nobles v. Rural Cmty. Ins. Servs.*, 490 F. Supp. 2d 1196, 1202 (M.D. Ala. 2007).

134. 7 C.F.R. § 457.8(f)(3) para. 20(j).

135. *Id.* § 400.93.

136. *Id.* §§ 11.1–.15.

137. *Id.* §§ 400.351–.352, 457.8(f)(3) para. 20(e)(1).

138. *Id.* § 457.8(f)(3) para. 20(a)(1).

139. *Id.* § 400.765–.768.

140. *Id.* § 457.8(f)(3) para. 20(a)(1)(ii); e.g., *Garnett v. NAU Country Ins. Co.*, No. 5:09-CV-00144-R, 2009 WL 3644726, at *3–4 (W.D. Ky. Oct. 27, 2009).

141. 7 C.F.R. § 457.8(f)(3) para. 20(d)(2).

note that, while the FCIC determination may be an interpretation of a policy or procedure, the FCIC will not make a determination as to the merits of a case, the actions of an insured, or specific factual situations.¹⁴²

An insured may request a FCIC determination by: 1) mail to the Associate Administrator of the Risk Management Agency; 2) facsimile; 3) email; or 4) by overnight delivery to the Associate Administrator of the Risk Management Agency.¹⁴³ The regulations also require that all requests specify the “name, address, and telephone number of a contact person affiliated with the request,” and state that the request is being submitted under section 506(s) of the Federal Crop Insurance Act.¹⁴⁴ The request must also state the crop year for which the interpretation is sought and “[i]dentify and quote the specific provision in the Act or regulations for which [the] final agency determination is requested.”¹⁴⁵ The individual who seeks a FCIC interpretation or determination is further required to advise the FCIC if the determination “will be used in a lawsuit or the settlement of a claim,” and the requesting party must include his or her “detailed interpretation of the regulation.”¹⁴⁶ Moreover, each request for a final agency determination must include only one request for an agency interpretation.¹⁴⁷

The applicable regulations demonstrate the FCIC’s desire for specificity in the request, and the FCIC may determine that a request is unclear, ambiguous, or incomplete.¹⁴⁸ If the FCIC makes such a judgment, it will not attempt an interpretation.¹⁴⁹ Instead, the FCIC will notify the requesting party of his or her error within thirty days of the request.¹⁵⁰ The requesting party maintains the opportunity to resubmit a request.¹⁵¹ A request deemed clear, unambiguous, and complete will, according to the regulations, be replied to within ninety days of receipt by the FCIC.¹⁵² The requesting party may assume the interpretation provided in the original request is correct if the FCIC fails to provide a response to the request within this ninety day time period.¹⁵³

142. *Id.* § 400.768(a).

143. *Id.* § 400.767(a)(1). Facsimiles may be sent to (202) 690-9911, emails to RMA.CCO@rma.usda.gov, and “overnight delivery to Associate Administrator, Risk Management Agency, United States Department of Agriculture, Stop 0801, Room 6092-S, 1400 Independence Ave, SW., Washington, DC 20250-0801.” *Id.*

144. *Id.* § 400.767(a)(2), (5).

145. *Id.* § 400.767(a)(3)–(4).

146. *Id.* § 400.767(a)(6), (b).

147. *Id.* § 400.767(c).

148. *Id.* § 400.768(b).

149. *Id.*

150. *Id.*

151. *See id.* § 400.768(d).

152. *Id.* § 400.768(c).

153. *Id.* § 400.768(e).

b. *Director's Review of FCIC Final Agency Determinations*

Final agency determinations are subject to judicial review, but, prior to seeking judicial review, a party “must obtain an administratively final determination from the Director of the National Appeals division on the issue of whether the final agency determination is a matter of general applicability.”¹⁵⁴ The procedure for requesting a Director’s determination as to the appealability of a FCIC agency determination and an insured’s right to a National Appeals Division hearing is found at 7 C.F.R. section 11.6 and is outlined below.¹⁵⁵

First, an insured only has thirty days from the time he or she receives a final agency determination to submit a written request for review to the Director of the National Appeals Division.¹⁵⁶ The Director, or an individual to whom the Director has delegated this authority, will then review the request to determine whether the determination is a matter of general applicability and, as a result, not appealable.¹⁵⁷ The Director may reverse the agency determination and hold that the decision is appealable, allowing the insured to proceed with an appeal in the National Appeals Division.¹⁵⁸

c. *The Good Farming Practices Reconsideration Process*

An insured producer who disagrees with a FCIC final agency determination as to “good farming practices” has the opportunity to request reconsideration from the FCIC.¹⁵⁹ The insured does not have an opportunity to appeal a FCIC good farming practices determination to the National Appeals Division.¹⁶⁰ The process for requesting reconsideration of a FCIC determination as to good farming practices has been published at 7 C.F.R. part 400, subpart J, and is described below. This reconsideration process is only available to final agency determinations regarding good farming practices.¹⁶¹

Reconsideration is requested by filing a written request for a reconsideration to the USDA/RMA/Deputy Administrator for Insurance Services.¹⁶² The

154. *Id.* § 400.768(g).

155. *Id.* § 11.6.

156. *Id.* § 11.6(a)(1).

157. *Id.* § 11.6(a)(2)–(3).

158. *Id.* § 11.6(a)(2).

159. *Id.* § 457.8(f)(3) para. 20(d)(2)(i).

160. *Id.* § 400.98(b).

161. *Id.* § 400.98(a).

162. *Id.* § 400.98(d). These requests should be sent to USDA/RMA/Deputy Administrator for Insurance Services, Stop 0805, at 1400 Independence Avenue SW., Washington, DC 20250–0801. *Id.*

reconsideration request has a time limitation and “must be filed within 30 days of receipt of written notice of the determination.”¹⁶³ Filing is accomplished when the request is “personally delivered” in writing to FCIC or when the request is postmarked.¹⁶⁴ The request must include a basis from which the insured plans to show that: “(i) The decision was not proper and not made in accordance with applicable program regulations and procedures; or (ii) All material facts were not properly considered in such decision.”¹⁶⁵

d. *Administrative Review of FCIC Agency Determinations*

An insured who disagrees with a determination of the FCIC may be able to seek an administrative review of the FCIC’s determinations and/or directions.¹⁶⁶ The insured is also allowed the opportunity to mediate a disagreement as to a FCIC determination with the agency, pursuant to section 400.94 of the C.F.R.¹⁶⁷ Administrative reviews of adverse determinations made by the FCIC are governed by the rules located in 7 C.F.R. part 400, subpart J. Requests for administrative review must be written and state the basis upon which the insured plans to show that: “(1) The decision was not proper and not made in accordance with applicable program regulations and procedures; or (2) All material facts were not properly considered in such decision.”¹⁶⁸ The deadline for filing a request for administrative review is within thirty days of receipt of the decision by written notice.¹⁶⁹ Filing is complete when personally delivered or postmarked.¹⁷⁰

e. *Appeals Through the National Appeals Division of USDA*

An insured who disagrees with an adverse decision of the FCIC may be afforded the opportunity for an administrative appeal of the FCIC’s determinations and/or directions, pursuant to 7 C.F.R. part 11.¹⁷¹ It must also be noted that, aside from good farming practice issues, an insured can appeal an adverse decision of FCIC directly to the National Appeals Division, instead of requesting an

163. *Id.* § 400.98(d)(1).

164. *Id.*

165. *Id.* § 400.98(d)(3).

166. *Id.* § 457.8(f)(3) para. 20(e).

167. *Id.* § 400.93(a).

168. *Id.* § 400.93(b)(1)–(2).

169. *Id.* § 400.95(a).

170. *Id.*

171. *Id.* § 457.8(f)(3) para. 20(e).

administrative review.¹⁷² NAD appeals may be conducted in a formal hearing process or by a record review, at the request of the appealing party.¹⁷³

There is a thirty-day time limitation on requesting a NAD hearing or record review, which runs from the later date of either when the insured received notice of an adverse decision or when the insured received notice that the Director's review determined the FCIC decision was appealable.¹⁷⁴ All requests must be written and signed personally by the insured, not the attorney representing the insured.¹⁷⁵ Generally, an appeal request must include a brief reasoning of why the insured believes that the agency decision was incorrect.¹⁷⁶ An insured has a right to a hearing by the NAD within forty-five days of the Division's receipt of the request for a hearing.¹⁷⁷ Included with the request should be "a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant's reasons for believing that the decision, or the agency's failure to act, was wrong."¹⁷⁸ Copies of this request are to be provided to the FCIC by the insured, but a failure to follow this procedure will not result in a dismissal of the subject appeal.¹⁷⁹ Practitioners should also note that, if the individual requesting an appeal is "represented by an authorized representative, the authorized representative must file a declaration with NAD, executed in accordance with 28 U.S.C. 1746."¹⁸⁰

In a NAD hearing, the burden of proof resides with the insured, who must demonstrate that the adverse decision made by the FCIC "was erroneous by a preponderance of the evidence."¹⁸¹ A hearing officer is required to issue the determination of the appeal within thirty days of the closing of the appeal record.¹⁸²

Once the determination of the appeal is finalized, either party to the appeal has the right to request a review of the Hearing Officer's appeal determination by the Director of the National Appeals Division.¹⁸³ An insured's request for the Director's review must be written, signed by the insured, contain specific reasoning why the insured believes the Hearing Officer's determination was in-

-
172. *Id.* § 400.92(a).
173. *Id.* § 11.6(b)(2).
174. *Id.* § 11.6(b)(1).
175. *Id.* § 11.6(b)(2).
176. *Id.*
177. *Id.* § 11.8(c)(1).
178. *Id.* § 11.6(b)(2).
179. *Id.*
180. *Id.* § 11.6(c).
181. *Id.* § 11.8(e).
182. *Id.* § 11.8(f).
183. *Id.* § 11.9(a)(1).

correct, and be submitted no later than thirty days after the insured received the determination of the Hearing Officer.¹⁸⁴ The Director's review will be based on "the agency record, the hearing record, the request for review," written responses of the opposing party to the request for the Director's review, and other information "as may be accepted by the Director."¹⁸⁵ The Director will either issue a determination or remand the determination within thirty days of a request for review made by the insured.¹⁸⁶ The Director's determination is not appealable within the USDA.¹⁸⁷

C. *Litigation of Crop Insurance Claims in State and Federal Courts*

Crop insurance claims do make their way into state and federal courts, despite the common applicability of dispute resolution mechanisms such as arbitration and administrative review. Attorneys who represent insured farmers must be prepared to litigate crop insurance claims in federal and state courts if they are to adequately represent the interests of their clients. For example, suit may be initiated against the FCIC after a mandatory agency determination in a good farming practices dispute.¹⁸⁸ Moreover, the decisions of arbitrators and rulings of the National Appeals Division are subject to federal judicial review in certain circumstances.¹⁸⁹ Various state law claims may also survive the arbitration proceeding,¹⁹⁰ possibly presenting the insured an opportunity to litigate these claims in state court. Regardless of the manner in which a crop insurance dispute is begun, there is the potential for a case to make its way to a judicial proceeding.

1. *Judicial Review of Arbitration Awards*

After arbitration, an insured producer has the right to petition for judicial review of the arbitrator's decision.¹⁹¹ The CCIP explicitly provides for the judicial review of arbitration awards,¹⁹² but, in reality, judicial review is a tool with

184. *Id.*
 185. *Id.* § 11.9(d)(1).
 186. *Id.* § 11.9(d)(2)(ii).
 187. *Id.* § 11.9(d)(1).
 188. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii).
 189. *Id.* § 457.8(f)(3) para. 20(c); *see also id.* § 11.13.
 190. *See Nobles v. Rural Cmty. Ins. Servs.*, 303 F. Supp. 2d 1292, 1298 (M.D. Ala. 2004), *aff'd*, 116 Fed. Appx. 253 (11th Cir. 2004) (state-law claims are not preempted); *IGF Ins. Co. v. Hat Creek P'ship*, 76 S.W.3d 859, 863–64 (Ark. 2002) (state-law claims for negligence and deceit survive).
 191. 7 C.F.R. § 457.8(f)(3) para. 20(c).
 192. *Id.*

significant limitations.¹⁹³ Crop insurance awards granted in arbitration are subject to the same standards of judicial review that are applied in other arbitration awards.¹⁹⁴ Judicial review of an arbitration award will not involve a *de novo* analysis of an arbitrator's factual determinations or the merits of a crop insurance claim.¹⁹⁵

The high level of deference granted to an arbitrator's decision is evidenced in the United States Supreme Court's decision in *United Paperworkers International Union v. Misco, Inc.*¹⁹⁶ In *United Paperworkers*, the Supreme Court stated that, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, [the fact] that a court is convinced the arbitrator committed serious error" will not be sufficient to vacate the award.¹⁹⁷ Put simply, a federal court cannot vacate an arbitration award because it decides the arbitrator erred in his or her findings,¹⁹⁸ and a court will not re-evaluate the merits of a case that has been arbitrated nor will it make factual determinations.¹⁹⁹ "[M]ere disagreement supported by objective evidence" will not provide a basis for a court to overturn an arbitrator's decision.²⁰⁰

Federal courts have held that the judicial review of an arbitration award in a crop insurance dispute is subject to the Federal Arbitration Act,²⁰¹ which limits the judicial review of arbitration awards by stating certain grounds for vacating an arbitration award.²⁰² The Federal Arbitration Act states that a court may only vacate an arbitration award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

193. See generally *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (11th Cir. 2009) (indicating that the FAA limits a court's power to vacate or modify arbitration awards).

194. See 9 U.S.C. §§ 10–11 (2006) (setting forth the grounds upon which a court may vacate, modify, or correct an arbitration award).

195. See *Farmer's Crop Ins. Alliance v. Laux*, 422 F. Supp. 2d 898, 902 (S.D. Ohio 2006), *summary judgment granted in part*, 442 F. Supp. 2d. 488 (S.D. Ohio 2006).

196. 484 U.S. 29 (1987).

197. *Id.* at 38.

198. *Laux*, 422 F. Supp. 2d at 902.

199. *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1303 (M.D. Fla. 2010).

200. *Id.* at 1304.

201. *Id.* at 1301.

202. 9 U.S.C. § 10(a) (2006).

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²⁰³

The United States Supreme Court has also found that an arbitration award may be vacated when the award explicitly contradicts public policy.²⁰⁴

While the court's authority to vacate an arbitration award is very limited, federal courts also have the power to modify or correct an arbitration award, upon the petition of a party to the arbitration.²⁰⁵ Under the Federal Arbitration Act, arbitration awards can be corrected or modified in the following situations:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.²⁰⁶

Again, the courts will give significant deference to the decision of the arbitrator. While courts have entertained a significant amount of litigation over whether an arbitrator has "exceeded their powers" under 9 U.S.C. section 10(a)(4), interpretive errors on the part of an arbitrator do not necessarily constitute such an action.²⁰⁷ It now appears settled that if an arbitration award "draws from the essence of the agreement, and is not merely the application of the arbitrator's own brand of justice, an arbitrator has not exceeded his powers."²⁰⁸

Attorneys must be cognizant of the fact that, in a judicial review, costs may be taxed against their clients if they are not the prevailing party.²⁰⁹ Rule 54(d)(1) of the Federal Rules of Civil Procedure specifically provides that "costs—other than attorney's fees—should be allowed to the prevailing party."²¹⁰

203. *Id.*

204. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983).

205. 9 U.S.C. § 11.

206. *Id.* § 11(a)–(c).

207. *Id.* § 10(a)(4); *see United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38–39 (1987); *Mich. Family Res., Inc. v. Serv. Emp. Int'l Union Local 517M*, 475 F.3d 746, 752–54 (6th Cir. 2007) (citing *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509–10 (2001)).

208. *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1302 (M.D. Fla. 2010) (citing *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

209. FED. R. CIV. P. 54(d)(1).

210. *Id.*

The decision to award costs is within the discretion of the district court,²¹¹ but there is a presumption that the prevailing party is entitled to costs that may only be overcome by demonstrating that an assessment of costs to the non-prevailing party would be inequitable.²¹² Costs associated with the mandatory arbitration of crop insurance disputes, including arbitration transcripts and depositions, have been held as taxable costs after judicial review.²¹³

In a 2007 case, *Nobles v. Rural Community Services*, the court found that such arbitration costs were taxable upon judicial review due to the fact that “at the time the depositions were taken and at the time the transcripts were ordered, [a party] intended them for use in the court proceeding[s] as well as in the arbitration proceeding[s].”²¹⁴ The court based its reasoning on the finding that, at the time of the arbitration depositions and transcripts, the insured had already filed a lawsuit which had been stayed, pending conclusion of the ordered arbitration.²¹⁵ The court focused its attention on the fact that “the parties understood that after the arbitration proceeding Nobles and Hales could return to court to litigate the non-arbitrable claims.”²¹⁶ If suit on “non-arbitrable claims” had not already been filed, it would seem that intent to use arbitration transcripts and depositions in future litigation would be more difficult to demonstrate—making an award of costs less certain.²¹⁷ Practitioners might note that the lack of a pre-filed suit may make an award of costs less certain.

If judicial review is sought, the suit must be filed no later than one year after the date of the arbitration decision.²¹⁸ Of course, judicial review is appealable, and, if a district court enters an order modifying, correcting, or vacating an award, the order may be appealed to the United States court of appeals.²¹⁹

2. *Suit Against the FCIC in Federal Court*

The right of an insured to file suit against the FCIC is severely limited under the CCIP. Most crop insurance policies in the United States are reinsured by the FCIC, but the primary insurance agreement is typically a contract between

211. *Chapman v. AI Transp.*, 229 F.3d 1012, 1038–39 (11th Cir. 2000).

212. 10 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 54.101[1][a]–[b] (Daniel R. Coquillette et al. eds., 3d ed. 2012).

213. *Nobles v. Rural Cmty. Ins. Servs.*, 490 F. Supp. 2d 1196 (M.D. Ala. 2007).

214. *Id.* at 1201–02.

215. *Id.*

216. *Id.* at 1202.

217. *See id.*

218. 7 C.F.R. § 457.8(f)(3) (2012) para. 20(b)(3) (2012).

219. 9 U.S.C. § 16 (2006).

a producer and a private insurance provider.²²⁰ In limited situations, however, the insured may have a right to file suit against the FCIC or the Secretary of Agriculture. Specifically, suit against the FCIC in federal court is contemplated after an administrative review or appeal,²²¹ and in cases of an administrative “good farming practices” determination by the FCIC.²²² In these circumstances, an insured has the option to file a suit against the FCIC, but must file within one year after the date of the decision, and may not recover expenses or attorney’s fees incurred while pursuing the action.²²³

While the Federal Crop Insurance Act provides for suit against the FCIC,²²⁴ to be brought “in the United States district court for the district in which the insured acreage is located,”²²⁵ this provision of the Federal Crop Insurance Act has been held not to confer a general statutory consent to suit and, specifically, not to apply to tort matters.²²⁶ As a result, tort actions against the FCIC should be pursued in accordance with the Federal Tort Claims Act. In *Conover v. Crop Hail Management Corporation*, the court opined that the Federal Tort Claims Act²²⁷ would be the exclusive remedy for tort actions against the FCIC.²²⁸ Put simply, the FCIC cannot be sued in a crop insurance dispute unless there is a provision which allows for such suit.²²⁹

The Federal Tort Claims Act outlines an administrative procedure for submitting a tort claim against a federal agency, such as the FCIC.²³⁰ The filing of an administrative claim is a jurisdictional requirement and a prerequisite of filing a claim against an agency under the Federal Tort Claims Act.²³¹ When this step is not satisfied, a court will lack subject matter jurisdiction over the claim.²³² The Federal Tort Claims Act is a waiver of governmental immunity to suit under qualifying circumstances, however, exceptions to this waiver exist.²³³ These ex-

-
220. *A History of the Crop Insurance Program*, *supra* note 9.
 221. 7 C.F.R. § 457.8(f)(3) para. 20(e)(1)–(2).
 222. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii).
 223. *Id.* § 457.8(f)(3) para. 20(d)(2)(ii)(C), (e)(1), (3).
 224. 7 U.S.C. § 1506(d) (Supp. IV 2010).
 225. 7 C.F.R. § 457.8(f)(3) para. 20(d)(2)(ii)(B), (e)(2).
 226. *Conover v. Crop Hail Mgmt. Corp.*, CIV.A. No. 88-5495, 1989 WL 65614, at *6 (D. N.J. June 14, 1989) (citing *Peak v. Small Bus. Admin.*, 660 F.2d 375, 377 (8th Cir. 1981)).
 227. 28 U.S.C. §§ 2671–2680 (2006).
 228. 1989 WL 65614, at *6 (citing 28 U.S.C. § 2679(a); *Peak*, 660 F.2d at 377).
 229. *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., Inc.*, 121 F.3d 630, 633 (11th Cir. 1997).
 230. 28 U.S.C. §§ 2671–2680.
 231. *Id.* § 2675(a); *Bradley v. United States*, 856 F.2d 575, 578 (3d Cir. 1988), *vacated and remanded*, 490 U.S. 1002 (1989).
 232. *Conover*, 1989 WL 65614, at *3.
 233. *See* 28 U.S.C. § 2680.

ceptions include claims based on certain actions or omissions of government employees,²³⁴ as well as claims arising from misrepresentation.²³⁵ These exceptions from the federal government's waiver of immunity bar the filing of suit pursuant to the Federal Tort Claims Act.

3. *Judicial Review of a FCIC Determination*

The CCIP provides for suit against the FCIC after certain FCIC determinations²³⁶ or following the completion of a required administrative appeal.²³⁷ There is a time restriction, and where an action against the FCIC was not commenced within one year after the date of a claim denial, summary judgment in favor of the FCIC has been granted.²³⁸ A suit following an appeal of an adverse FCIC determination typically takes the form of a judicial review, which is governed by the Administrative Procedure Act.²³⁹ While the right to judicial review of a FCIC determination is available, an agency determination "may not be reversed or modified as the result of judicial review unless the determination is found to be arbitrary or capricious."²⁴⁰

An insured who seeks to initiate suit against the FCIC must always exhaust his or her administrative remedies, such as hearings in the National Appeals Division, prior to filing suit against the agency.²⁴¹ For example, before seeking judicial review of a FCIC determination, an insured must appeal the agency decision to the National Appeals Division.²⁴² The judicial review of a FCIC final agency determination is even more complicated in that an insured is required to "request a determination of non-appealability from the Director of the National Appeals Division" of the Department of Agriculture prior to filing suit.²⁴³ If the Director determines that the agency decision was, in fact, appeal-

234. *Id.* § 2680(a).

235. *Id.* § 2680(h).

236. 7 C.F.R. § 457.8(f)(3) para. 20(d)(2)(ii).

237. *Id.* § 457.8(f)(3) para. 20(e)(1), (k).

238. *E.g.*, *Godbold v. Fed. Crop Ins. Corp.*, 365 F. Supp. 836, 838–39 (N.D. Miss. 1973); *see also* 7 C.F.R. § 457.8(f)(3) para. 20(e)(1).

239. *See* 5 U.S.C. §§ 701–706 (2006 & Supp. IV 2010); *Stewart v. Fed. Crop Ins. Corp.*, No. 4:09-cv-101, 2010 WL 3341863, at *2 (E.D. Tenn. Aug. 25, 2010) (citing 7 U.S.C. § 6999); *Hammit v. Fed. Crop Ins. Corp.*, 712 F. Supp. 832, 833 (D. Colo. 1989) (citing 7 C.F.R. §§ 400.90–.98).

240. 7 U.S.C. § 1508(a)(3)(B)(iii)(II).

241. *Id.* § 6912(e); *Stewart*, 2010 WL 3341863, at *2; 7 C.F.R. § 400.96(a).

242. 7 C.F.R. § 400.96(a).

243. *Id.* § 457.8(f)(3) para. 20(k).

ble, the insured must then go through with a NAD appeal before filing for judicial review.²⁴⁴

In summary, the exhaustion of administrative remedies is a prerequisite to filing suit against the FCIC.²⁴⁵ Moreover, judicial review of National Appeals Division findings will not be *de novo*, but will be based solely on the administrative record.²⁴⁶ Following the outline of the Administrative Procedure Act, a decision of the National Appeals Division will be modified if its factual findings are arbitrary, capricious, or unsupported by substantial evidence.²⁴⁷

Interest may be obtained from an insurance provider when a court enters a judgment finding that an indemnity is owed to a claimant.²⁴⁸ The CCIP provides, however, that in suit against the FCIC, the insured may not recover expenses, attorney's fees, or "any punitive, compensatory or any other damages from FCIC."²⁴⁹ There is a limited exception to this rule of disallowing the collection of attorney's fees, expenses, and damages in a judicial review. A claimant may obtain fees, expenses, or damages if the claimant first obtains a FCIC determination that the insurance provider, insurance agent, or loss adjuster did not comply with the FCIC procedures or the terms of the common insurance policy and, as a result of that failure, the claimant received a payment less than that to which he or she was entitled.²⁵⁰ In accordance with the CCIP, a request for this FCIC determination should be addressed to the USDA-RMA Deputy Administrator of Compliance.²⁵¹

4. Claims Based Upon State Law

While federal courts have previously determined that the FCIA does not create a federal cause of action against private insurance providers,²⁵² most courts that have addressed the issue have held that the FCIA does not preempt actions against private insurance providers brought in state court on the basis of tradi-

244. *Id.* § 400.96(b). The process for obtaining a determination of non-appealability is located at 7 C.F.R. § 11.6.

245. *See Stewart*, 2010 WL 3341863, at *2.

246. *Id.* (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)).

247. 5 U.S.C. § 706(2)(A), (E) (2006).

248. 7 C.F.R. § 457.8(f)(3) para. 26.

249. *Id.* § 457.8(f)(3) para. 20(e)(3).

250. *Id.* § 457.8(f)(3) para. 20(i).

251. *Id.* Requests should be sent to "USDA/RMA/Deputy Administrator of Compliance/Stop 0806, 1400 Independence Avenue, SW., Washington, DC 20250-0806." *Id.*

252. *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 686 (5th Cir. 2001); *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., Inc.*, 121 F.3d 630, 633 (11th Cir. 1997).

tional state law contract and tort theories.²⁵³ At the same time, attorneys need always be mindful of the arbitration provisions within the CCIP. Initiation of a state-law suit prior to arbitration will likely result in a court order compelling arbitration and staying the litigation.²⁵⁴

Courts that have addressed the preemption issue have opined that the FCIC and Congress, in enacting and effecting the Federal Crop Insurance Act, did not intend to extinguish state law claims arising from the tortious conduct of private insurance providers selling federally reinsured crop insurance policies.²⁵⁵ For example, misrepresentations of a private crop insurance company or agent may supply an insured grounds for proceeding against the insurance company with a state law cause of action.²⁵⁶ As such, an insured producer may be able to pursue state law claims in court after the mandatory arbitration has been completed.²⁵⁷ One federal court specified that the arbitration clause contained in the CCIP did not prohibit suit but instead was a condition precedent.²⁵⁸ In *Ledford Farms Inc. v. Fireman's Fund Insurance Co.*, the court went on to say that an insured cannot bring legal action against a private insurance provider, "unless it complies with all of the policy provisions, including the arbitration."²⁵⁹

Federal courts have further held that the terms and provisions of crop insurance contracts preempt "any contrary state laws that would apply to other insurance contracts normally issued by private insurance companies."²⁶⁰ As a result, a state law barring mandatory arbitration clauses, within insurance contracts, will not be applicable to crop insurance contracts. Before initiating state law causes of action based on a private insurer's failure to inform an insured as to provisions in a crop insurance policy, attorneys must resign themselves to the

253. See, e.g., *Meyer v. Conlon*, 162 F.3d 1264, 1269–70 (10th Cir. 1998); *Williams Farms of Homestead, Inc.*, 121 F.3d at 634–35; *Farmers Crop Ins. Alliance v. Laux*, 442 F. Supp. 2d 488, 498–99 (S.D. Ohio 2006); *Agre v. Rain & Hail L.L.C.*, 196 F. Supp. 2d 905, 911–12 (D. Minn. 2002).

254. See, e.g., *Hays v. Rural Cmty. Ins. Servs.*, No. 1:10-cv-01020, 2010 WL 4269413, at *3 (W.D. Ark. Oct. 7, 2010); *Wardlaw v. Rural Cmty. Ins. Servs.*, No. 1:10-cv-01004, 2010 WL 4259792, at *3 (W.D. Ark. Sept. 27, 2010); *Ledford Farms, Inc. v. Fireman's Fund Ins. Co.*, 184 F. Supp. 2d 1242, 1245 (S.D. Fla. 2001).

255. *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1294 (M.D. Ala. 2000) (citations omitted), *motion granted in part, and denied in part*, 303 F. Supp. 2d 1292 (M.D. Ala. 2004), *aff'd*, 116 Fed. Appx. 253 (11th Cir. 2004); see also *Williams Farms of Homestead, Inc.*, 121 F.3d at 634.

256. See *Nu-Air Mfg. Co. v. Frank B. Hall & Co.*, 822 F.2d 987, 994–95 (11th Cir. 1987); *Laux*, 442 F. Supp. 2d at 491 (citing *Nobles*, 122 F. Supp. 2d at 1292).

257. *Nobles*, 122 F. Supp. 2d at 1301; *IGF Ins. Co. v Hat Creek P'ship*, 76 S.W.3d 859, 868 (Ark. 2002).

258. *Ledford Farms Inc.*, 184 F. Supp. 2d at 1245.

259. *Id.*

260. *Nobles*, 122 F. Supp. 2d at 1294 (citations omitted).

fact that insured producers are charged with notice of the content of their policy and the relevant federal regulations.²⁶¹ Federal regulations are binding, as the requisite legal notice of crop insurance policy provisions is satisfied by the appearance of rules and regulations in the Federal Register.²⁶² The failure of an insurance provider or agent to provide this information will likely not give rise to a justifiable state law action.²⁶³

a. *Notes on CCIP Limitations of State Law Claims*

Paragraph 20(j) of the CCIP deserves attention as it may exceed the statutory authority of the FCIC under the Federal Crop Insurance Act.²⁶⁴ Federal courts have repeatedly held that the FCIA did not preempt state law claims against a private insurance provider, yet this provision dictates that an insured may not bring “arbitration, mediation, or litigation” against the insurance provider when the FCIC is involved in the adjustment, modification, revision, or correction of a claim.²⁶⁵ As such, this provision may be interpreted as an impermissible attempt at the preemption of state law claims. It should also be noted that at least one court has found the twelve month limitation period in the FCIA, for the filing of claims, to not bar state law claims against insurers.²⁶⁶ The court held that this limitation is permissive rather than mandatory, and will not bar state law claims against private insurers.²⁶⁷

b. *Preclusive Effect of Arbitration on State Law Claims*

The decision of an arbitrator can have an impact on later filed state law claims under the theories of res judicata or collateral estoppel.²⁶⁸ These theories are even more important to the claimant than in years past, as the CCIP now contains a requirement that “[a]ll disputes involving determinations made by us” are subject to arbitration.²⁶⁹ Most of the reported cases dealing with the arbitration requirement and issues relating to preemption of state law claims were decided

261. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947); Nobles v. Rural Cmty. Ins. Servs., 303 F. Supp. 2d 1292, 1303 (M.D. Ala. 2004), *aff'd*, 116 Fed. Appx. 253 (11th Cir. 2004).

262. Nobles, 303 F. Supp. 2d at 1303.

263. See, e.g., *id.* at 1304.

264. See 7 C.F.R. § 457.8(f)(3) para. 20(j) (2012).

265. *Id.*; see also discussion *supra* Part III.C.4.

266. Bullinger v. Trebas, 245 F. Supp. 2d 1060, 1067 (D. N.D. 2003).

267. *Id.*

268. See, e.g., Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1359–60 (11th Cir. 1985).

269. 7 C.F.R. § 457.8(f)(3) para. 20(a)(1).

pursuant to the former version of the CCIP, which only required arbitration as to “factual” determinations made by private insurance providers.²⁷⁰ If arbitration is now effectively required for state law tort claims,²⁷¹ the ability of an insured to file these state law claims after the arbitration would appear to be severely limited due to the increased requirements.

Under the current CCIP, collateral estoppel may not be of vital concern in the crop insurance dispute as “[a]ll disputes” are to be arbitrated.²⁷² The former version of the CCIP did not require arbitration of all disputes, just “factual” determinations.²⁷³ Concerns of collateral estoppel’s effect of issue preclusion may have become obsolete now that all issues appear to be subject to arbitration. Moreover, the incentive to preserve issues for later litigation in state court would seem to be lessened, as state law tort claims will likely be arbitrated in accordance with the CCIP. The doctrine of res judicata may also, realistically, preclude the litigation of state law tort claims against private insurance providers in state courts. There are currently no reported cases that address the effect of res judicata on state law tort claims against private crop insurance providers, but the broad scope of the arbitration provision found in the CCIP suggests that tort claims are not outside the scope of the arbitration clause. The arbitration of tort claims, in the crop insurance context, has not yet been the source of reported litigation.

Res judicata (claim preclusion) is a doctrine which bars the re-litigation of claims that have been, “previously tried and decided,” while collateral estoppel (issue preclusion) bars re-litigation of issues previously adjudicated in litigation between the same parties.²⁷⁴ These doctrines are potentially significant in any arbitration, as federal courts have previously held that determinations made by an arbitrator “should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.”²⁷⁵ As a result, practitioners should be aware that the doctrine of res judicata may bar the re-litigation of tort claims in state court.

270. *Id.* § 457.8(b) para. 20(a) (2004); e.g., *IGF Ins. Co. v. Hat Creek P’ship*, 76 S.W.3d 859, 861 (Ark. 2002); *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1293 (M.D. Ala. 2000), *motion granted in part, and denied in part*, 303 F. Supp. 2d 1292 (M.D. Ala. 2004), *aff’d*, 116 Fed. Appx. 253 (11th Cir. 2004).

271. *See* discussion *supra* Part III.C.4 (discussing likely need to pass through arbitration before state claim will be permitted).

272. 7 C.F.R. § 457.8(f)(3) para. 20(a)(1) (2012).

273. *See id.* § 457.8(b) para. 20(a) (2004).

274. *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992) (citing 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4402 (1981)).

275. *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) (citing *RESTATEMENT (SECOND) OF JUDGMENTS* § 84(3) cmt. c (1982)).

For collateral estoppel to preclude the litigation of issues determined in an arbitration, the following requirements must be satisfied:

- (1) the issue to be concluded must be identical to that involved in the prior action;
- (2) in the prior action the issue must have been “actually litigated”; and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.²⁷⁶

Additionally, “the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.”²⁷⁷ In the 2004 decision, *Nobles v. Rural Community Insurance Services (Nobles II)*, the court found that collateral estoppel prevented the later litigation of insurability after the arbitrator had made the factual determination that certain crop land was insurable but did not bar the re-litigation of the issue that the insured relied in good faith on misrepresentations by the insurance provider.²⁷⁸ The court found that the issue of misrepresentation was not a critical part of the arbitration panel’s judgment as the arbitration award was not granted on the basis of good faith reliance on “misrepresentations” by the insurance provider.²⁷⁹ As a result, all of the requirements for collateral estoppel were not met, and the issue of reliance on misrepresentation could be litigated in court.²⁸⁰

As such, the implications arising from this situation present interesting questions which remain unanswered in the present. The reported case law suggests that an insured is free to pursue state law claims after arbitration,²⁸¹ but, in reality, there may be no claims or issues left for resolution once an arbitration proceeding has ended.

IV. CONCLUSION

Federally reinsured crop insurance is an important risk management tool for today’s farmer. This is unlikely to change and crop insurance will likely become more widely used in the near future as it replaces the traditional “safety

276. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 458–59 (5th Cir. 1971) (citations omitted).

277. *Greenblatt*, 763 F.2d at 1360 (citing *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984)).

278. 303 F. Supp. 2d 1292, 1300 (M.D. Ala. 2004), *aff’d*, 116 Fed. Appx. 253 (11th Cir. 2004).

279. *Id.*

280. *Id.* at 1301.

281. *See Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1301 (M.D. Ala. 2000), *motion granted in part, and denied in part*, 303 F. Supp. 2d 1292, 1300 (M.D. Ala. 2004), *aff’d*, 116 Fed. Appx. 253 (11th Cir. 2004); *IGF Ins. Co. v Hat Creek P’ship*, 76 S.W.3d 859, 868 (Ark. 2002).

net” farm programs of the past. The federal crop insurance programs are complex, and attorneys who represent farmers in crop insurance matters must be adequately prepared. Hopefully, this Article presented the procedural framework for the resolution of a crop insurance claim as clearly as is possible.

In addition, the previous discussion in this Article often referenced federal cases where the proper procedure and forum for a crop insurance dispute was litigated. These cases have failed to answer all of the questions that might arise in future disputes, and applicable federal regulations have been modified by the FCIC since most of these cases were reported. As a result, there certainly remains the potential for additional litigation in this arena. The scope of the current CCIP arbitration clause, the proper forum for litigation of state law tort claims against private insurance providers, and the FCIC’s attempted preemption of state law claims where the FCIC was involved in the denial of a claim are all good examples of circumstances that present issues which have not been settled. Attorneys who represent farmers in crop insurance disputes have a professional duty to remain informed as to developments in these areas. With crop insurance at the forefront of the debate as to the future of national agricultural policy, fully understanding crop insurance rules and procedures is more important than ever.