Final Agency Determination: FAD-299

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Subject: A joint request dated July 8, 2020, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2017 crop year regarding the interpretation of the preamble and section 20(b)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

Background:
Referenced policy related to the request:
Section 20 of the Basic Provisions states, in relevant part:

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.
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(b) Regardless of whether mediation is elected:
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(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;
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Interpretation Submitted

First requestor's interpretation:

The first requestor interprets section 20(b)(1) to permit equitable tolling, until the time of discovery of a claim, where a policyholder's claim is not adjusted according to loss adjustment procedures established or approved by FCIC, the policyholder relies on an adjuster's false representation that the claim was adjusted according to loss adjustment procedures established or approved by the FCIC, and subsequently

the policyholder discovers that the claim was not adjusted according to loss adjustment procedures established or approved by the FCIC, and the insurer refuses to correct the erroneously adjusted claim. The requestor interprets section 20(b)(1) to permit equitable tolling only as to the improper and incorrect adjustment, not the entirety of the claim.

Under these circumstances: improper and incorrect claims adjustment based on a claims adjuster's failure to adjust a claim in accordance with loss adjustment procedures established or approved by the FCIC, an policyholder's reliance on the adjuster's false representation that the claim had been adjusted properly and correctly, discovery by the policyholder of the improper and incorrect claim adjustment more than one year after payment of the incorrect indemnity, and the insurer's refusal to correct the erroneously adjusted claim, compliance with the one-year limitations period is impossible unless the period is equitably tolled until the policyholder's discovery.

The requestor is aware of the *Merrill* line of cases, which stand for the proposition that a policyholder may not rely on an agent's representations regarding the explicit terms of the insurance policy when those representations directly contradict the explicit terms of the policy. This is because the policyholder is charged with knowledge of the policy provisions; therefore, equitable estoppel does not apply. The request here is fundamentally different because the false representations of the claims adjuster were based upon claims adjusting procedures — the Loss Adjustment Manual (LAM) and the Loss Adjustment Standards Handbook (LASH) — which the policyholder is not deemed to know. Farmers are not claims adjusters, and they are not held legally responsible for knowing the particulars of loss adjustment procedures. Thus, if an adjuster represents that, in his professional judgment, a policyholder's claim has been adjusted in accordance with loss adjustment procedures established or approved by the FCIC, the policyholder is entitled to rely on that representation. If the policyholder subsequently learns that the adjuster's representation was false, whether intentionally or not, the policyholder is entitled to initiate arbitration, but only if arbitration is initiated within one-year of the policyholder's learning that the claims adjuster's representation was erroneous. Furthermore, the scope of that arbitration is limited to the claims adjustment. The one-year arbitration period is tolled for the period during which the falsity of the Approved Insurance Provider’s (AIP) misrepresentation was concealed from, or was otherwise unknown to, the policyholder.

If section 20(b)(1) were to be interpreted otherwise, the policyholder, by no fault of his own, would be barred from his sole remedy. If the arbitration period may never be tolled, then an AIP would be strongly disincentivized from ever reviewing past claims, even if it had actual knowledge that a policyholder has been defrauded. Even if such reviews were conducted, and an underpayment was identified, AIPs would have every incentive not to notify the policyholder of that underpayment until over one year had passed since the incorrect payment. If the AIP waited to inform the policyholder, it would be certain that the policyholder would have no remedy to recover the proper amount of indemnity owed under the policy. The policyholder would be completely at the mercy of the insurer.

The requestor notes that FAD-281, issued September 20, 2018, explicitly recognized that: "If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim." The requestor believes the interpretation requested would provide a remedy in the event that the AIP discovers that a claim was not adjusted according to loss adjustment procedures established or approved by FCIC, but neither corrects the claim nor informs the policyholder of the AIP's error within one year of the AIP's discovery.

The requestor is aware of FAD-280, and notes that while the issue posed here is similar to the issue posed there, FAD-280 did not address whether the one-year limitations period would be equitably tolled. The requestor states, that certainly FCIC allows equitable relief to those policyholders under crop insurance policies. See, e.g., FAD-259, published on RMA's website on, August 17, 2016, ("FCIC has historically recognized impossibility as a defense to performance under the policy"); Manager's Bulletin No. MGR-03-012, published on RMA's website on September 29, 2003, (finding equitable remedy necessary where policy provisions proved "unworkable"); Manager's Bulletin No. MGR-09-004, published on RMA's website on June 12, 2009, (establishing a "fair and equitable [market] price" where no market price could be established using solely the policy's pricing formula); Manager's Bulletin No. MGR-05-021, published on RMA's website on, November 15, 2005, (allowing post-deadline revisions to acreage report for leased land where without revisions the result would have been "inequitable because the determination of whether the producer can lease the land is outside the control of the producer").

For these reasons, the requestor proposes the following interpretation:

The one-year limitations period is equitably tolled until discovery by the policyholder of improper and erroneous adjustment of his claim, where:

1. The policyholder's claim has been improperly and erroneously adjusted without fault of the policyholder;
2. The policyholder has reasonably relied on the adjuster's false representation that the claim was adjusted correctly;
3. The policyholder discovers the adjustment error more than one year after payment of an improper and erroneous indemnity; and
4. The AIP refuses to correct the improper and erroneous indemnity payment, despite its duty to do so.

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

The first requestor proposes an interpretation that equitable principals, specifically equitable estoppel, can be used to limit or modify the terms of the insurance policy such that the limitation provision does not apply if the policyholder can establish by a preponderance of evidence that it did not know an error was made in the adjustment process due to an act of misrepresentation or active concealment by a claims adjuster while adjusting a claim.

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

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

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

The second requestor contends that FAD-280 considered this specific fact pattern in relation to other equitable principals and RMA stated therein there is no basis for modification of the terms of the policy by equitable principals.

The second requestor states that the first requester seeks a final agency determination which essentially overturns FAD-211 and FAD-280 to allow equitable estoppel to prevent the application of the one-year limitation provision until such time as the policyholder becomes aware of the claim. Such a change would overturn years of precedent in the industry and would essentially open up claims to be brought indefinitely as long as the policyholder was able to state he or she did not realize they were entitled to indemnity under the insurance policy. Both FAD-211 and FAD-280 reject the application of equitable principals to extend the limitations. RMA should not add exceptions to the rule created by a federal regulation. This result is fair to all parties since the policyholder already has access to all the information required to allow him or her to calculate the indemnity owed under the policy at the time the initial determination is made. If the policyholder were to make a basic effort to calculate the loss he or she claims to have sustained, then he or she would know whether or not the indemnity paid was correct at the time it was paid. No action or inaction on the part of the AIP or its adjuster changes the simple fact that the policyholder could make the same calculation at the same time the AIP did. The policyholder has access to all marketing and disposition records, as well as production records, and can verify the calculations of the AIP at any time the policyholder chooses to do so.

The second requester also states the FCIC conclusion in FAD-281. While the RMA notes that if the AIP determines a claim was not adjusted in accordance with procedures established or approved by the FCIC, the AIP is required to correct the claim; however, that would create a new determination from which the policyholder could pursue arbitration if it disagreed. FAD 281 does not address the situation

where an AIP does not determine that the adjustment process was not followed. The simple question before the RMA at this time is whether or not arbitration may be commenced more than one year after the determination the policyholder seeks to challenge.

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

> The one-year limitations provision prevents a policyholder from bringing a claim based upon the policy more than one year after the claim payment or the determination which is being challenged. The policyholder cannot defeat the application of the limitations provision by pleading equitable claims or defenses to its application, including but not limited to equitable estoppel, because the policy terms cannot be waived or modified through the application of equitable principals. The policy provision itself provides no exception to its application and none can be created by equitable principals. An arbitration proceeding for contractual damages brought more than one year after final claim payment or the determination challenged must be dismissed by the arbitrator as untimely.

Final Agency Determination

FCIC agrees with the second requestor that the one-year limitation provision in section 20(a)(1) prevents a policyholder from bringing a claim based upon the policy more than one year after the claim payment or the determination which is being challenged. This is supported by FAD-280, published on RMA's website on September 18, 2018, which states that the one-year limitation provision prevents a policyholder from bringing an arbitration action or seeking judicial review under the terms of the policy more than one year after the claim payment or the determination which is being challenged.

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

arbitration within the period prescribed by section 20(b)(1) precludes the policyholder from seeking judicial review.

To the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, the same interpretation can be applied to such other crop year. It is the responsibility of the person seeking to use the published interpretation for a different crop year to ensure that the language of the provisions is identical. Even minor language changes can affect the interpretation.

In accordance with 7 C.F.R. § 400.766(b)(2), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.766(b)(5).

Date of Issue: Sept 21, 2020