

Federal Crop Insurance: What It Means and How It Works.¹

The drought of 2012 will, inevitably, produce an extraordinary number of crop insurance claims. Nearly all will be associated with, or operated under the regulations of, the Risk Management Agency's Federal Crop Insurance Corporation.

FCIC was founded in 1938 as an independent, but wholly federally owned, corporation. It was designed to protect farmers against losses like the FDIC, its contemporary, which protects bank depositors. FDIC and FCIC are two (2) of a handful of independent corporations wholly owned by the United States Government.²

FCIC is authorized by the *Federal Crop Insurance Act*.³ Regulations, promulgated by the Department of Agriculture, are binding within the Department, and they apply to insurance policies issued by private insurers under the authority of the Act⁴.

The Risk Management Agency is small—500 people in offices around the country. Its administrative budget was \$80 million in 2010. The insurance program is huge. In 2010, RMA managed 1.14 million policies. It insured 256 million acres with a crop value of \$77.9 billion. The premium volume was about one-tenth of the insured risk—\$7.57 billion for 2010.⁵

RMA/FCIC Role

The Risk Management Agency and the Federal Crop Insurance Corporation generally do not provide direct coverage to producers. However, in some instances, where no private insurer occupies the area and serves to administer the FCIC's insurance program, the insuring activity is undertaken directly.

RMA and FCIC occupy these roles:

- Determine what crops are insurable and establish premiums;
- Approve insurance companies to be providers;
- Approve and publish policy types offered;

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² USDA, RMA Program Aid 1667-02 (November 2010).

³ 7 *USC* §§ 1501-1524.

⁴ 7 *USC* § 1506(l)(p); 7 *CFR* part 400, General Administrative Regs., including definitions.

⁵ <http://www.rma.usda.gov/pubs/rme/aboutrma.pdf>.

- Establish program regulations and procedures;
- Subsidize producer premiums;
- Pay producer administrative and operating expenses; and
- Provide reinsurance.

Role of Private Insurance Providers

Private insurance providers or companies approved by FCIC to offer the coverage have specific duties. They must, when approved:

- Sell approved policies;
- Service policies by collecting premiums and fees, investigate loss claims, appraise and calculate benefits due;
- Administer, and refuse to waive or alter, policy terms except as permitted by program regulations; and
- Develop new products, but not offer them unless they are first submitted to, and approved by, FCIC.

Overall Producer Role

Overall, the producer's role, also defined by the statute, is relatively specific. The producer must:

- Apply for coverage by the closing date;
- Pay the premium and administrative fee timely;
- Report acreage as planted promptly;
- Use good farming practices;
- Maintain all required records;
- Comply with policy requirements; and
- Promptly report losses and cooperate.

The producer bears the burden of establishing that all reports required and all loss claims submitted are complete and accurate. Even if an agent fills out the form, the producer cannot rely on this alone.

Risks are broad. They range from crop failures, to microscopic organisms such as aflatoxin⁶, to revenue protection. The latter literally protects against the risks of excessive market volatility by allowing a minimum price for crop value to be insured.⁷

These changes have made terms, perhaps not previously used much, important to lawyers. Included among the important definitions are:

Acronym	Phrase	Meaning
AGR	Adjusted Gross Revenue	Insures revenue of entire farm, not simply individual crop. Relies on producer's Schedule F from his tax return.
APH	Actual Production History	Ten (10) year average per insured acreage. Insures against production loss only if selected as only option. Producer selects amount of average yield to insure—up to 85% in some areas, and capped lower in others.
ARH	Actual Revenue History	Like APH, but instead of insuring historical yields, it insures historical revenues.
CEPP	Commodity Exchange Price Provisions	A series of options (dollar plan, group risk plan), to protect against damage that causes a yield shortfall. The group plan uses a county-wide average to determine loss.
CRC	Crop Revenue Coverage	Provides revenue protection based on price and yield expectations by paying for losses below the guarantee at the higher of an early-season price or the harvest price—this plan of insurance is no longer available.
GRIP	Group Risk Income Plan	Uses county revenue index to determine loss.
RA	Revenue Assurance	Provides coverage to protect against loss

⁶ USDA, RMA Program Aid 1979.

⁷ USDA, RMA Agency Fact Sheet September 2011.

		of revenue caused by low prices or low yields or a combination of both—this plan of insurance is no longer available.
RPP	Revenue Protection Plan	Protects against revenue loss due to production loss, price decline or increase, or combination. If harvest price exclusion is chosen, coverage does not protect against revenue loss due to price increase. Insures against natural causes like drought, hail, wind, frost, insects, and disease.
RPPHPE	Revenue Protection Plan with Harvest Price Exclusion	Protects against production loss, price decline, or a combination, but accommodates harvest price.
YPP	Yield Protection Plan	Protects against production loss for which revenue protection is available but not selected by the producer.

Producer Obligations

The insurance is not without exclusions. They include producer’s duties to complete planting by an ending date, report acreage timely, notify of loss within seventy-two (72) hours, and farm in conformity with generally accepted and approved farming practices and cropping plans. In other words, coverage is not available for experimental operations or losses caused by producer neglect.

Most producer claims will originate with a report by the producer to a private insurer or a federal office. It is important that this report be made in writing. The writing may buttress a telephone call. Though the Act does not require preservation of evidence, the producer must respect his obligation to meet the burden of proof. At a minimum, when a loss is suspected, the producer should obtain and maintain a comprehensive crop record by field. It should be chronological and contain all critical dates and critical information including:

- Pre-planting application dates and products;
- Pre-planting ground preparation events;
- Planting dates describing planter, operator, population, hybrid, fertilizers, and chemicals;
- Post-planting chemical and fertilizer application dates, types, and rates;

- Field inspection reports documenting periodic inspections of the field;
- Irrigation log identifying dates and amounts;
- Suspected crop loss observation date;
- Suspected crop loss report date identifying person to whom reported;
- Intermittent field photographs from emergence through damage; and
- Damage survey procedures, personnel, dates and observations (stand counts, production levels, plant height and vigor observations, and plant damage observations supported by photographs).

What Happens When a Claim is Denied?

If all goes well, the producer's claim will be approved, payment will be made, and life will go on. But inevitably, issues will arise. They will require involvement by lawyers. Grounds for appeal could include:

- Determinations that good farming practices were not met;
- Timeliness determinations;
- Yield loss determinations;
- Alternate causation determinations, eliminating the causative risk from coverage; and
- Qualifications of participant.⁸

An adverse decision can be reviewed in either of two ways.

Appeal to NAD. The decision can be appealed directly to the head of the U.S. National Appeals Division (NAD).⁹ The National Appeals Division is, generally, staffed by administrative law judges who conduct hearings relatively nearby the location of the producer.¹⁰

⁸ 7 *CFR* § 11.1.

⁹ 7 *CFR* § 11.6(a).

¹⁰ 7 *CFR* part 11.

Administrative Review. A producer may seek administrative review¹¹, or mediation which delays the need for a NAD appeal or administrative review.¹² If administrative review is sought, the request must be written and the writing must “state the basis upon which appellant relies to show that (1) the decision was not proper and not made in accord with applicable program regulations and procedures; or (2) all material facts were not properly considered in such decision.”¹³

The request for administrative review must be filed within thirty (30) days of written notice of an adverse decision. It is “filed” when personally delivered to the appropriate decision maker or properly addressed, postage prepaid, when postmarked.¹⁴

How Mediation Works

Adverse decisions can be mediated and other forms of alternative dispute resolution can also be used. Requests for mediation must be made after an adverse decision and before an NAD hearing.¹⁵ A mediation request must be made not later than thirty (30) calendar days after written notice of an adverse decision. The “filing” procedure for a mediation request is the same as for administrative review. Arbitration is also provided for and is generally mandatory.¹⁶

Mediation bears a danger. If mediation occurs, but is unsuccessful, only the remainder of the thirty (30) day period is available to appeal to the National Appeals Division.¹⁷ The producer “is responsible for contacting the Certified State Mediation Program if one exists.” The state program then makes the mediation arrangements.¹⁸ Only one mediation is permitted.¹⁹ If mediation produces a partial settlement, the modified decision becomes the new adverse decision for appeal to the NAD.²⁰

If the administrative review process or the appeal to the NAD is unsuccessful, the producer’s remedy is to proceed to court. Judicial review is permissible after administrative remedies have been exhausted through an appeal to, and through, NAD.²¹

¹¹ 7 CFR § 400.93.

¹² 7 CFR § 400.94.

¹³ 7 CFR § 400.93(b).

¹⁴ 7 CFR § 400.95(a).

¹⁵ 7 CFR § 400.94.

¹⁶ 7 C.F.R. § 457.8 para. 20(a). This Regulation invokes the Federal Arbitration Act, 9 USC § 2. Alternatives to American Arbitration Ass’n procedures can be used if AAA rules are applied. This mean the onerous AAA costs can be avoided by agreement if an agreement can be reached. See USDA-RMA Final Agency Determination: FAD-007 (May 18, 2001), available at <http://www.rma.usda.gov/regs>.

¹⁷ 7 CFR § 400.94(d).

¹⁸ 7 CFR § 400.94(e).

¹⁹ 7 CFR § 400.94(g).

²⁰ 7 CFR § 400.94(i).

²¹ 7 CFR § 400.96.

The NAD procedure must comply with 7 *CFR* Part 11. Noncompliance, or incomplete compliance, prevents judicial review.

Throughout the process, RMA and FCIC representatives may correct errors in entering data on contracts or other program documents, and in the results of calculations.²² If the dispute is about the quality of the farmer's farming practices, a separate reconsideration process exists.

What are Good Farming Practices?

The phrase "good farming practices" is defined.²³ Disputes about good farming practices are not appealed to NAD. Reconsideration is the only available remedy for adverse good farming practices determinations. Mediation is not available for such determinations.

Requests for reconsideration under § 400.98 must be made to Washington, not a local office.²⁴ Reconsideration requests must be filed within thirty (30) days after a written notice of a good farming practices determination.²⁵ The request must state the basis upon which the insured relies.

Administrative remedies need *not* be exhausted before suit against FCIC is brought. Suit must be filed in a United States District Court. However, reconsideration under the regulations²⁶ must be brought before bringing suit against FCIC. The reinsured company may not be sued for adverse good farming practices determinations.²⁷ Judicial review is only available to determine whether the agency decision was arbitrary or capricious.²⁸

Good Farming Practices

Decisions about coverage are made under a preponderance of evidence standard. Preponderance of evidence means:

Proof by information that, when compared with the opposing evidence, leads to the conclusion that the fact at issue is probably more true than not.²⁹

²² 7 *CFR* § 400.97.

²³ *CFR* § 400.91(a).

²⁴ "If the insured seeks reconsideration, the insured must file a written request for reconsideration to the following: USDA/RMA/Deputy Administrator for Insurance Services/Stop 0805, 1400 Independence Ave. SW, Washington D.C., 20250-0801.

²⁵ 7 *CFR* § 400.98(d)(1).

²⁶ 7 *CFR* § 400.98.

²⁷ 7 *CFR* § 400.98(e).

²⁸ 7 *CFR* § 400.98(f).

²⁹ 7 *CFR* § 400.52.

Appeals must be made by “participants.” These include producers, i.e. persons engaged in producing an agricultural commodity for a share of the insured crop or its proceeds. But “participant” also includes “agents, loss adjusters, agencies, managing general agencies, approved insurance providers, and any person associated with the approved insurance provider through employment, contract or agreement”.³⁰

Since historical production records can be an issue, it is important to know that FCIC, or the private insurance provider, must retain all records of policy holders for a period of not less than three (3) years from the date of a final action on a policy for the crop year, unless further maintenance of specific records is requested by FCIC. “Final actions” on policies include conclusion of insurance events, policy termination, completion of loss adjustment, or satisfaction of a claim.³¹

The Federal Crop Insurance Program is entirely exempt from state and local laws. The regulations³² provide:

No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or other actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.

The regulation provides us examples of actions prohibited by state or local governmental entities:

- Impose or enforce liens, garnishments, or other actions against proceeds obtained, or payments issued in accordance with the Federal Crop Insurance Act, or its regulation.
- Tax premiums associated with policies under the Act.
- Exercising of approval authority over policies issued under the Act.

In addition, state and local authorities cannot tax premiums for the policies, or exercise approval authority over them. State and local entities may not levy fines, judgments, punitive damages, etc. They also may not assess any tax fee or amount for funding or maintenance of a state or local insolvency pool or similar fund.

This list³³ does not limit the scope or meaning of paragraph (a) of this section.

³⁰ *Id.*

³¹ 7 *CFR* § 400.412.

³² 7 *CFR* § 400.352.

³³ Found at 7 *CFR* § 400.352.

Producer Responsibilities

As noted previously, the producer or policyholder faces specific and stiff obligations. These include implementation of “a system of records for obtaining, using, and storing documents containing SSN or EIAN data before they accept or receive any applications for insurance. Thereafter, the policyholder or applicant for coverage must comply with program requirements including good farming practices criteria.

The definition of good farming practices varies from crop to crop and region to region. Generally, it requires a producer to follow all practices considered prudent and responsible by local extension agents and certified crop consultants.

The “good farming practices” criteria is simply expressed and explained as follows:

(3) Exclusion of losses due to certain actions of producer.

(A) Exclusions.

Insurance provided under this subsection shall not cover losses due to –

- (i)** Neglect or maleficence of the producer;
- (ii)** The failure of the producer to reseed the same crop in such areas under such circumstances as it is customary to reseed; or
- (iii)** The failure of the producer to follow good farming practices, including scientifically sound sustainable and organic farming practices.³⁴

The Regulations’ Standard Policy Contract Terms define “good farming practices” as:

Production methods utilized to produce the insured crop and allow it to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance, including any adjustments for late planted acreage, which are (1) conventional or sustainable farming practices, those generally recognized by agricultural

³⁴ 7 USC § 1508(a).

experts for the area; or (2) for organic farming practices, those generally recognized by the organic agricultural industry for the area or contained in the organic plan.³⁵

This definition's most important feature may be the phrase "generally recognized." It, too, is defined in the policy:

Generally recognized practices exist when agricultural experts or the organic agricultural industry, as applicable, are aware of the production method or practice and there is no genuine dispute regarding whether the production method or practice allows the crop to make normal progress toward maturity and produce at least the yield used to determine the production guarantees or the amount of insurance.³⁶

When is Crop Insurance Required?

Participation in some USDA programs requires crop insurance. The requirements are "linked." Linked programs include:

- Conservation Reserve Program;
- FSA loans; and
- New disaster assistance programs.³⁷

Producer Eligibility

Generally, a producer is eligible for participation if: (1) the producer has an insurable interest in the crop, (2) the acreage is insurable, (3) an application is timely, (4) timely planting occurs, (5) the administrative fee is paid, (6) historical records are provided, and (7) acreage reports are made timely.³⁸

Important Crop Insurance Dates

Sales closing dates must be satisfied. This means coverage must be applied for before the closing date. These dates are:

- February 28 or March 15 for spring-planted crops;

³⁵ 5 *CFR* § 457.8, Common Crop Insurance Policy, 1. Definitions.

³⁶ 7 *CFR* § 457.8 Definitions.

³⁷ 7 *USC* § 1508(b)(7).

³⁸ 7 *CFR* § 670.101 *et seq.*

- September 30 for fall-planted crops; and
- November 20 for perennials and horticultural crops.

Several types of insurance coverage are available as noted above.³⁹

Procedure upon Claiming Benefits

Producers are responsible for actions required when a loss is suspected. They must take place in strict accord with the regulations. The Regulations are mirrored in an insurance contract. The insurer's duties are found in the section headed "Duties in the Event of Damage, Loss, Abandonment, Destruction, or Alternative Use of Crop or Acreage".

Essentially, these steps are required:⁴⁰

- Protect the crop against further damage by providing sufficient care for it.
- Give notice as soon as possible that is generally within seventy-two (72) hours. Do it in writing so this cannot be questioned.
- Leave representative samples. Samples from the crop should be left intact in each insured field.
- Allow the insurer to examine the crop. Cooperate with the insurer. Do not accept that the insurer will act solely and do not encourage the producer to rely strictly on the insurer to be as cooperative in return.
- Cooperate with investigation and settlement. Cooperation is required. Requests must be reasonable. They may allow inspection of the damaged crop, removal of samples, and requirements that records and documents be provided and kept by the insurer.
- Avoid actions without consent. The producer should be told to obtain written consent from the insurance provider before doing any of these things:
 - Destroying any of the insured crop that is not harvested.
 - Putting the insured crop to an alternate use.

³⁹ See www.flaginc.org/topics/pubs/arts/IndCrpIns.pdf for a valuable paper reviewing the subject.

⁴⁰ See 7 CFR § 457.8, Common Crop Insurance Policy, §§ 14 & 15.

- Putting the acreage to a different use.
 - Abandoning any portion of the insured crop.
 - In addition, the producer must inform the insurer, in writing, after any of these actions are taken. In most instances, the producer will not be given permission to take these actions if replanting is practical. These steps generally will not be permitted until the provider of insurance has made an appraisal of the potential production.
- Submit a written claim. In the written claim, the producer must declare the amount of crop loss, measured in volume and dollars. Generally this must be done no later than sixty (60) days after the end of the insurance period. In some instances, this sixty (60) day period can be extended by the agency for extenuating circumstances.
 - Provide requested additional information. If asked, provide data. This data will include harvesting and marketing records of each insured crop by unit. It may also require that the producer submit to an examination under oath.

What the Producer Must Establish to Prove a Claim

The producer must prove, by a preponderance of evidence as noted above, these things:

- Total production or value received for the insured crop;
- That a crop loss occurred during the insurance period;
- That the crop loss was directly caused by an insured cause; and
- The amount of the loss.

Records Retention Required

Historical records may be used to adjust a loss. They must be preserved. This includes:

- Harvest and sale records for three (3) years.⁴¹
- Production records for three (3) years.

⁴¹ 7 CFR § 457.8.

If proper records are not retained, claims can be denied, or penalties imposed.

What Must the Insurance Provider Do for the Producer?

The regulations are specific about what an insurance provider must do, just as they are specific about requirements imposed upon the producer.⁴² These duties include:

- Payment within thirty (30) days of claim resolution;
- Written notice if unable to pay in time; and
- Use of FCIC loss procedures.

Conclusion

Federal crop insurance is a basic part of row crop farming. Nebraska producers, lenders, and lawyers must have a basic understanding of the program. Lawyers must be diligent at review of Regulations and policy terms to understand program demands.

■ David A Domina September 2012

⁴² 7 *CFR* § 457.8.