Federal Crop Insurance: Friend Or Foe?

INTRODUCTION

Farming has literally been a feast or famine proposition since the beginning of time. Modernly, crop insurance serves to carry farmers through the unpredictable peaks and valleys in production. However, crop insurance is not a panacea.

This comment instructs the potential insured (farmer) on the pitfalls and loopholes in the Federal Crop Insurance Program. Also, it enlightens private insurance companies that offer crop insurance through the federal reinsurance program. Perspectives include that of the insured farmer, the insurer, and the taxpayer.

The Federal Crop Insurance Program is the "only game in town" and while many find it a valuable friend when utilized properly, for an uninformed agribusiness person or a private reinsurance company, it can be a burdensome foe.

The purpose of this comment is to put the the farmer on notice that caveat emptor governs, and only with an efficient and properly run program can farmers, private insurance companies, and taxpayers maximize the benefits and minimize the costs.

I. OVERVIEW OF THE FEDERAL CROP INSURANCE ACT

The Federal Crop Insurance Act (FCIA or "Act") was enacted as Title V of the Agriculture Adjustment Act of 1938.[1] The program was designed to:

> promote the national welfare by alleviating the economic distress caused by wheat-crop failures due to drought and other causes, by maintaining the purchasing power of farmers, and by providing stable supplies of wheat for domestic consumption and the orderly flow thereof in interstate commerce.[2]

The primary beneficiary was the farming enterprise, with the con-

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[1] Pub. L. No. 430, 75th Cong., 52 Stat. 31 (1938).
[2] Pub. L. No. 502, 75th Cong., 52 Stat. 72 (1938).

sumer intended as a secondary beneficiary.[3]

The original Act provided coverage only for wheat[4] in limited geographical areas. It was amended in 1949,[5] 1953,[6] 1959,[7] and 1964,[8] extending the program to many other agricultural commodities throughout the nation. By 1948, protection was offered for wheat, cotton, flax, corn, and tobacco.[9] Counties were not eligible for inclusion in the program unless 200 farms, or one-third of the farms in the county, participated in the crop insurance program.[10] Greater participation leads to lower premiums for farmers and less government subsidy for the taxpayers. Consequently, there is a current push toward mandatory participation.

By 1977, the federal government was underwriting over $2 billion worth of insurance on 23 commodities in 1517 counties in 39 states.[11] The Secretary of Agriculture began a three year study of the possibility of an all-risk, all-crop plan to replace the federal disaster program.[12] Unfortunately, this was not incorporated into the program. The current debate centers on the role of the federal disaster program in reducing participation in the Federal Crop Insurance Program. Why pay for insurance when the federal government steps in and provides disaster relief for free?

The legislative history of FCIA shows that Congress and the President wished to protect the nation's food supply and provide economic stability for farmers.[13] In recognizing the need for a Federal Crop Insurance Program, Congress considered the concept of crop insurance

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[3] The crop insurance program was also to "protect consumers against shortages of food supplies and against extremes of prices." President's Comm. On Crop Insurance, Report And Recommendations, H.R. Doc. No. 150, 75th Cong., 1st Sess. III (1937).

[4] Pub. L. No. 430, 75th Cong., Sec. 501 (1938).

[5] Pub. L. No. 268, 81st Cong., 63 Stat. 665 (1949).

[6] Pub. L. No. 261, 83rd Cong., 67 Stat. 575 (1953).

[7] Pub. L. No. 131, 86th Cong., 73 Stat. 278 (1959).

[8] Pub. L. No. 589, 88th Cong., 79 Stat. 933 (1964).

[9] Pub. L. No. 320, 80th Cong., Secs. 1-8, 61 Stat. 719 (1947).

[10] *Id.*

[11] H.R. Rep. No. 95-772, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 3623.

[12] Pub. L. No. 95-181, Sec. 2, 91 Stat. 1373 (1977).

[13] H.R. Doc. No. 150, at p. 3, *see also* 7 U.S.C.S. § 1502 which states: "It is the purpose of this title [7 U.S.C.S. §§ 1501 *et seq.*] to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance."

for twenty years prior to its enactment.[14] The report of President Roosevelt's Committee on Crop Insurance[15] outlined the reasons why early attempts to insure crops by private companies were unsuccessful:
(1) The insurance was only offered in limited areas that did not sufficiently spread the risk if there was a major crop failure;
(2) The private companies tried to cover losses from price declines, as well as crop failures;
(3) The companies did not have the capability to properly determine the degree of risk, so premiums were not matched with the risk involved.[16]

The Act was intended to assist farmers in times of crop loss and stabilize the nation's food supply. Although it has been amended many times and improvements made, it is still changing and striving to live up to its original objectives.

A. *Federal Crop Insurance Corporation*

The 1938 Act also established the Federal Crop Insurance Corporation[17] (FCIC).[18] The FCIC is a wholly government-owned entity,[19] and attempts "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance."[20] The government pioneered this program in part because "private insurance companies deemed all-risk crop insurance too great a commercial hazard."[21] Today with the modern advances in the insurance industry, this argument has no merit.[22] Private companies could easily shoulder the burden of crop insurance.

The FCIC has authority to insure producers of agricultural commodities through the use of any plan that its board of directors determines to be adaptable to the agricultural commodity involved.[23] It must,

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[14] *Id.*

[15] *See supra* note 5.

[16] *Id.*

[17] Agricultural Adjustment Act of 1938, ch. 30, § 501, 52 Stat. 72.

[18] *See* 7 U.S.C.S. §§ 1501-1520 (Law Co-op. 1979 & Supp. 1993).

[19] 7 U.S.C.S. § 1503. (Law Co-op. 1979 & Supp. 1993) *See also* Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 381 (1947).

[20] 7 U.S.C.S. § 1502. (Law Co-op. 1979 & Supp. 1993).

[21] Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383 (1947).

[22] Insurance companies commonly use computer driven actuarial tables and worldwide electronic comunication systems to insure much more complicated items than crops.

[23] 7 U.S.C.S. § 1508(a) (Law Co-op. 1979 & Supp. 1993).

however, have sufficient actuarial data before proceeding.[24]

Although the FCIC was developed years ago with many features to insure cost-effectiveness, it has always burdened the federal budget.[25] Over the past eleven years, the FCIC cost taxpayers $2.6 billion, despite its design to be self-funded.[26] In response to its losses and proposed federal budget cuts, the FCIC's acting manager stated that the Federal Crop Insurance Program is placing a higher portion of risk with private insurers and that FCIC is working to decrease administration expense reimbursements.[27]

Congress has conferred on the FCIC all powers customary to corporations in general, including the ability to enter into and carry out contracts,[28] and the right to purchase, hold, and dispose of real or personal property.[29] Congress also granted FCIC the power to sue and be sued.[30]

B. *Federal Crop Insurance Program*

The FCIC controls and runs the Federal Crop Insurance Program.[31] It has the power and the authority to establish programs for different crops, in different amounts and for different geographical areas.[32]

The Act limits the amount of protection farmers may achieve from federal crop insurance to no more than 75 percent of the adjusted, recorded or appraised yield of the particular commodity.[33] FCIC must also make available levels of yield coverage below 75 percent, including a level of coverage of 50 percent of the recorded or appraised average yield, as adjusted.[34]

The following example demonstrates how the basic federal crop insurance program works.[35] Assume a farmer planted 100 acres of corn and that his policy guarantees an average yield of 70 bushels per acre. Also assume he has chosen to be paid three dollars for each bushel of

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[24] *Id.*

[25] Best's Review, Property-Casualty Insurance Edition, May, 1993.

[26] *Id.*

[27] JOURNAL OF COMMERCE, Section A; Page 9, Column 4, May 24, 1993.

[28] 7 U.S.C.S. § 1506(k) (Law Co-op. 1979 & Supp. 1993).

[29] 7 U.S.C.S. § 1506(c) (Law Co-op. 1979 & Supp. 1993).

[30] 7 U.S.C.S. § 1506(d) (Law Co-op. 1979 & Supp. 1993).

[31] 7 U.S.C.S. § 1506 (Law Co-op. 1979 & Supp. 1993).

[32] 7 U.S.C.S. § 1508(a) (Law Co-op. 1979 & Supp. 1993).

[33] *Id.*

[34] *Id.*

[35] FEDERAL CROP INSURANCE CORPORATION U.S. DEP'T OF AGRICULTURE, CORN BROCHURE, April, 1982.

loss. If drought, or some other insured cause of loss, reduced his total production to only 4,000 bushels (3,000 below his guarantee), his benefit would be calculated as follows:

TABLE 1

Guarantee:	70 bushels/acre x 100 acres =	7,000 bushels
Production:	The production on 100 acres =	4,000 bushels
Loss:		3,000 bushels
Insurance Benefit:	3,000 bushels X \$3.00/bushel =	\$9,000

Determining whether a loss is covered is difficult, given the ambiguity of the statutory language. For example, if a crop is destroyed early in the growing season and the farmer re-plants, it is hard to place a figure on the amount of loss. This problem increases when farming practices are questioned by FCIC.

The issue was addressed in *R&R Farm Enters., Inc. v. Federal Crop Ins. Corp.*[36] The plaintiff, a rice-growing firm, advised the FCIC of an impending crop failure and ultimately sued for coverage of a loss of nearly \$400,000. An inspector for the insurer concluded that most of the loss was due to poor farming practices. The United States District Court for the Western District of Louisiana sustained the claim on two grounds: want of evidence to show what part of the loss was caused by poor farming practices and FCIC's failure to inspect the crop promptly. Moreover, the court awarded the plaintiff prejudgment and postjudgment interest.[37] The Fifth Circuit Court of Appeal reversed, observing that the plaintiff was not insured against "losses attributable to man," and that Louisiana's law does not relieve a claimant under a "federal contract" of the burden of proof.[38]

Anyone contemplating the purchase of crop insurance must closely inspect the provisions of the policy first. Regardless of whether the policy is considered to be a valued[39] or an open[40] policy, the amount paya-

[36] R&R Farm Enterprises., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148 (5th Cir. 1986).

[37] On appeal, the court found that the interest award could not stand because Congress effects substantial transfer payments to farmers via the Federal Crop Insurance Corporation (though it was created and is operated as a commercial corporation).

[38] R&R Farm Enters., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148 (5th Cir. 1986).

[39] The court in *American Ins. Co. v. Gentile Bros. Co.* 109 F.2d 732 (5th Cir. 1940), *cert. denied* 310 U.S. 633, stated that the policy was a "valued" policy since the

ble on a loss is generally to be determined in accordance with the particular methods specified in the policy.[41] A policy, absent fraud or concealment, is a "valued" policy when the insurers retain control to establish policy limits.[42] As long as the amounts prescribed per acre are not excessive or impossible, and it appears from the terms of the policy that the insurance company intended to insure and receive the premium for the amount of insurance issued, the provision is enforceable.[43]

The generally recognized view is that in determining the amount of loss to a growing crop under an insurance policy, the method specified in the policy controls.[44] It has been held that if such method does not cover all situations, the trier of fact may nevertheless determine the amount payable on the situation not covered.[45]

The *R&R Farm* decision attempted neatly to put the issue of loss coverage into either losses attributable to man or acts of God.[46] Obviously, the distinction is not always easy to make.

There is national concern for situations where farmers, because of a disaster, cannot even get into their fields to plant.[47] Because the entire framework of the FCIC encompasses unavoidable losses to growing crops, as well as specific statutes dealing with planting periods for specific types of crops, these farmers are not covered.[48]

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subject matter was agreed upon beforehand.

[40] Examples of "open" policies are where the value of the policy was agreed upon by the parties at the time of loss. Lee v. National Liberty Ins. Co. 35 F. Supp. 898 (Tex. 1940).

[41] Billmayer v. Farmers Union Property & Casualty Co. 404 P.2d 322 (Mont. 1965).

[42] *Id.*

[43] *Id.*

[44] American Insurance Co. v. Gentile Bros. Co., 109 F.2d 732, 735 (5th Cir. 1940).

[45] In Fidelity-Phenix [sic] Fire Ins. Co. v. Henry, 60 S.W.2d 111, 113 (Ky. 1933), the jury was instructed in accordance with the method in the policy, except that the judge added that if the jury found the tobacco leaves had been damaged or destroyed differently than as described in the policy, it was authorized to compensate plaintiffs for such damage provided such damage was due to hail. On appeal, it was held that the trial court correctly charged the jury, since the added instruction provided for a situation not covered by the policy where it would be wholly impracticable to apply the policy method of computing the loss; *see also* American Eagle Fire Insurance Co. v. Van Denburgh 257 P.2d 856, 857 (Ariz. 1953).

[46] R&R Farm Enters., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148 (5th Cir. 1986).

[47] In the flood of July, 1993, losses suffered by farmers unable to plant their crops have already hit the $1 billion mark, according to the U.S. Agriculture Department. (THE ASSOCIATED PRESS, July 8, 1993, Section: Domestic News).

[48] For example, a provision in the policy for wheat at 2.(b) of 7 C.F.R.

The Federal Crop Insurance Program has been repeatedly modified,[49] but it has never achieved the importance sought by its early supporters. The Act was designed to insure farmers against loss from such unavoidable causes as weather, insects, and disease,[50] but not to insure profit for the farmer or to cover avoidable causes, such as neglect or poor farming practices.[51]

More recently, the FCIC added provisions relating to losses by fire and unavoidable failure of irrigation water.[52] The original philosophy of the Act remains unchanged—only unavoidable losses can be covered.[53] This allows man-made losses[54] to muddy the litigation waters and underlies the vague and ambiguous nature of the insurance policies.[55]

Determining if a loss is covered when caused by an act of man can create problems by the added component of avoidablity. For example, irrigation failures or fire losses that are caused by negligence or neglect are not covered.[56] An extremely difficult situation arises when the FCIC questions farming practices, as shown by the following case.

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§ 418.7(2b),(1985) states: "The acreage insured for each crop year shall be that acreage seeded to wheat on insurable acreage, as shown on the actuarial table and is reported by the insured or as determined by the Corporation whichever the Corporation shall elect, in which the insured has a share: Provided, that insurance shall not attach or be considered to have attached as determined by the Corporation to any acreage (1) where premium rates are established by farming practices on the actuarial table, and the farming practices carried out on any acreage are not among those for which a premium rate has been established, (2) not reported for insurance as provided in section 3 if such acreage is irrigated and an irrigated practice is not provided for such acreage on the actuarial table, (3) which is destroyed and after such destruction it was practical to reseed to wheat and such acreage was not reseeded, (4) *initially seeded after the date established by the Corporation and placed on file in the office for the county as being too late to initially seed and expect a normal crop to be produced*, (5) of volunteer wheat, (6) seeded to a type or variety of wheat not established as adapted to the area or shown as noninsurable on the actuarial table, or (7) seeded with another crop." (Emphasis added).

[49] *See supra* notes 5,6,7 and 8.

[50] Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31, 74 (1938).

[51] A loss on investment may be properly insured under the Act but lost profits may not. Parks v. Federal Crop Insurance Corporation 416 F.2d 833 (7th Cir. 1969).

[52] 7 C.F.R. § 401-457 (1985).

[53] *Id.*

[54] Damaged or shut down irrigation ditches that cause losses could be covered. 7 C.F.R. § 401 (1985).

[55] A decision by an irrigation district to reduce water allocations in the middle of the growing season creates a problem that would best be handled in the language of the policy.

[56] 7 U.S.C.S. § 1508(a) (Law Co-op. 1979 & Supp. 1993).

An insured's farming practices were challenged in *Bartmess v. FCIC* where the FCIC refused to pay a claim by a farmer who had insured his rice crop against loss by flooding.[57] The court held that the farmer failed to prove that the loss resulted from an unavoidable insured peril which would have brought it within the coverage of the policy. Therefore the FCIC was not required to pay the claim. The farmer was denied coverage for different reasons at different times, but the FCIC finally settled on the conclusion that the farmer in *Bartmess* had planted into flood waters, which triggered the policy's exclusion for failure to follow good farming practices.[58] This case turned on the fact that the farmer seeded his rice field only days after the court determined that he should have known of the impending flood.[59]

A farmer who contemplates Federal Crop Insurance must keep in mind that his farming practices *will* be challenged. He must give constant attention to detail, and a lapse in due diligence can jeopardize his claim.

II. The Present: Hazards in the Current System

A. *Sovereign Immunity:* Standard Oil *and* Merrill

The issue of sovereign immunity[60] arises for both the insured farmer and the private insurer as they relate to the FCIC. When Congressional authority is given to federal agencies to sue and be sued, it has invariably been construed as a waiver of immunity.[61] It is unsettled as to what extent sovereign immunity applies to the "sue and be sued" provision in section 1506(d) of FCIA.[62] The Supreme Court explained

[57] Bartmess v. FCIC, 845 F.2d 1258, 1259 (5th Cir. 1988).

[58] *Id.*

[59] *Id.* at 1260.

[60] A judicial doctrine which precludes bringing suit against the government without its consent. Black's Law Dictionary 1396 (6th ed. 1990).

[61] *See* Franchise Tax Bd. of Cal. v. U.S. Postal Serv., 467 U.S. 512, 516-20 (1984) (garnishment); Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U.S. 81, 83-86 (1941) (waiver extends to costs of suit); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388-89 (1939) (implied waiver of immunity).

[62] There is a conflict in applying the immunity theories. In Standard Oil Co. of New Jersey v. United States, 267 U.S. 76, 79 (1925), the Court stated, "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business." This is countered by United States v. Worley, 281 U.S. 339, 342 (1930), where the court distinguished *Standard Oil* as creating liability based upon a direct government incursion into a commercial venture, where the United States did not intend to "bear any part of the cost of the

that a "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy."[63]

Thirteen years before the FCIC was created, Justice Holmes addressed this very issue in *Standard Oil of New Jersey v. United States*:[64] "[W]hen the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."[65] In 1947, the Supreme Court of Idaho adopted Justice Holmes' reasoning in a case dealing with FCIC, but it was reversed by the United States Supreme Court in its landmark case of *FCIC v. Merrill*.[66]

Merrill demonstrated the problems of interpretation associated with the FCIC. The Court held that the FCIC is a subsidized agency of the government, so it is immune from liability.[67] As the Federal Crop Insurance Program becomes more efficient and possibly self-sufficient, it is unclear if the reasoning in *Standard Oil* will return and overrule

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insurance or . . . give pecuniary aid to the owners of . . . property insured."

FCIA was created as an experimental program to insure against crop losses in a market where commercial insurers had feared to tread. FCIC premiums were designed to cover only the claims made under policies, while the federal government, both through the subscription of capital stock and annual appropriations, funded the program's overhead. Accumulated loss reserves were not always sufficient to cover claims made under the policies. *See* S. Rep. No. 254, 96th Cong., 1st Sess. 10-12 (1979). The desire to expand participation in the program, combined with other policy goals, led Congress in 1980 to commence subsidizing 30 percent of the premiums "charged" to farmers carrying government insurance. *See* 7 U.S.C.A. § 1508(b)(3). *See also* H.R. Conf. Rep. No. 1272, 96th Cong., 2d Sess. 16 (1980), reprinted in 1980 U.S.C.C.A.N. 3082, 3086. Thus, while equipped with the trappings of a commercial corporation, FCIC relies only partly on premium revenues to cover its costs, and depends heavily upon capital infusions, borrowing from other branches of government. *See* 7 U.S.C.A. § 1516(c), (d), and congressional appropriations. The question of whether FCIC stands closer to the model identified in *Worley* than to that in *Standard Oil* would turn on whether intended or actual operation is analyzed. *See* R&R Farm Enters., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148 (5th Cir. 1986), which held that FCIC is immune on a theory that the government's unique venture into crop insurance "merely underscores the fact that the undertaking by the Government is not an ordinary commercial undertaking."

[63] *Franchise Tax Bd.*, 467 U.S. at 521.

[64] Standard Oil Co. of New Jersey v. United States, 267 U.S. 76 (1925).

[65] *Id.* at 79.

[66] *Merrill*, 332 U.S. at 386.

[67] *Id.* at 385.

Merrill and its progeny.[68]

The holding in *Merrill* has survived over the years, and a look at its reasoning can be very enlightening in predicting future applications of *Merrill* to a modern FCIC situation.

In *Merrill*, a farmer applied for insurance under the FCIA to cover his wheat crop.[69] An agent of the FCIC advised the farmer that his entire crop qualified for the insurance.[70] Armed with that assurance, he obtained a Federal Crop Insurance Policy. After the crop was lost, it was discovered that the FCIC agent had mistakenly represented to the farmer that he was covered. All benefits were denied. The Supreme Court acknowledged that the requirements for private estoppel were satisfied. Nevertheless, it held that the farmer was presumed to know the content of the FCIC regulations, regardless of the "hardship resulting from innocent ignorance."[71] The *Merrill* Court stated, "Crop Insurance regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance."[72] In addition, the Court said that estoppel against the government would violate "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[73]

The apparent harshness of *Merrill* has been tempered modernly by statute.[74] The board of directors or chairman of the FCIC may grant relief from the payment of additional premiums or the denial of a claim if such a denial would not be fair and equitable.[75] Such relief is limited to a maximum of $100,000 and is granted only if the insured failed to comply with a policy provision as a result of good faith reliance on a misrepresentation, erroneous action, or advice by an agent or employee of FCIC.[76] The legislature made a good attempt to remove the Draconian impact of *Merrill*. However, it falls short of complete relief.

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[68] The reasoning in Merrill has been cited, and followed in thousands of cases.

[69] *Id.* at 382.

[70] *Id.* at 382.

[71] *Id.* at 385.

[72] *Id.*

[73] *Id.*

[74] Equitable relief provisions are now found in the regulations for all insured commodities. *See*, e.g. 7 C.F.R. §§ 404.5 (1984) (Western U.S. apples); 427.5 (1984) (oats); 402.5 (1984) (raisins).

[75] 44 Fed. Reg. 67344 (November 26, 1979).

[76] The limitation of relief was raised from $20,000 to $100,000 by amendments to all crops covered by Federal Crop Insurance in 48 Fed. Reg. 48449 (Oct. 19, 1983).

B. Difficulty Determining Losses

Even if a farmer properly runs her operation, there can be difficulty in determining losses. Crop insurance generally covers losses due to unavoidable causes such as "drought, flood, hail, wind, frost, winterkill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and other unavoidable occurrences."[77]

The traditional method of selling crop insurance has been through the use of Multiple Peril Crop Insurance[78] (MPCI). Under a MPCI policy, each farmer's loss is calculated, and compensation paid according to that loss. The problem is how to compute the loss justly and efficiently.

Under MPCI, yield coverage is used to establish the basis for determining the loss.[79] Yield coverage must be calculated before the issuance of crop insurance.[80] It is based on the producer's farm program yield[81] (established by FCIA for an area), or actual production history for the five previous crops.[82]

The Federal Crop Insurance Program is moving toward the use of yield coverage. The current administration indicated a plan to phase in, over a period of years, an area yield concept for federal crop insurance, with the goal of reducing the cost of the program to taxpayers.[83] The phasing in will begin in fiscal year 1994. The programs losing the most money at the current time will be first in line for conversion to the new concept.[84] This will reduce the burden of the Federal Crop Insurance Program to the taxpayer and help eliminate some of the disagreements over loss determinations. The proposal is tied to massive reductions in FCIC staffing size and operating budgets.[85] The FCIC must operate with great care when down-sized because without the proper attention to the details of the day-to-day running of the Federal Crop Insurance Program, fraud and waste will run rampant.[86] A private crop insur-

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[77] 7 U.S.C.S. § 1508(a) (Law Co-op. 1979 & Supp. 1993).

[78] 7 U.S.C.S. § 1508a(a) (Law Co-op. 1979 & Supp. 1993).

[79] The average yield for a particular farm or geographical area is used in calculating the loss. 7 U.S.C.S. § 1508a (Law Co-op. 1979 & Supp. 1993).

[80] 7 U.S.C.S. § 1508a(b) (Law Co-op. 1979 & Supp. 1993).

[81] 7 U.S.C.S. § 1508a(b)(i) (Law Co-op. 1979 & Supp. 1993).

[82] 7 U.S.C.S. § 1508a(b)(ii) (Law Co-op. 1979 & Supp. 1993).

[83] *Agriculture Department Briefing On The Agency's Fiscal 1994 Budget Proposal By Secretary Of Agriculture Mike Espy*, THE REUTER TRANSCRIPT REPORT, April 8, 1993, *available in* LEXIS, Nexis Library, Omni file.

[84] *Id.*

[85] *Id.*

[86] Fewer FCIC personnel in the field would encourage fraudulent activity and

ance program would be driven by profit for the companies in a free market system, thus encouraging and rewarding efficiency.

C. Multiple Peril Crop Insurance vs. Group Risk Plan

Producers in thirteen midwestern states are testing a new Federal Crop Insurance Program for soybeans, called Group Risk Plan (GRP). GRP is being offered by the FCIC, as well as by private insurance companies.

Under the GRP program, producers may elect coverage based on up to 90 percent of the FCIC-established "expected county yield."[87] When a county's average yield drops below the trigger yield for the coverage level selected, all farmers enrolled in that GRP option would receive an indemnity payment.[88] The size of the payment will be based on the size of the decline in county yields and coverage level that the farmer purchased.[89]

For example, if the county yield is 100 bushels per acre, and a producer insures at a 75 percent level, the trigger yield would be 75 bushels (75% of 100 bushels). If the county yield falls below that level, every producer receives payment. The result would be fewer disagreements and less litigation.

The GRP must meet three criteria to be considered successful enough to go nationwide:[90] 1) show a lower level of losses than the current Multiple Peril Crop Insurance plan; 2) farmers must support the plan; and 3) within two years there must be a ten percent participation rate.[91] Even under this new plan, as well as under the existing program, the difficulty in measuring yield loss is inherent.

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under-reporting of yields. *See infra* section II(E).

[87] Expected county yield is an amount determined to be the average yield for a particular crop in a particular county. *New type of insurance tested for soybeans*, Purdue Ag News Service, Distributed by UPI Feb. 19, 1993, *available in* LEXIS, Nexis Library, UPI file.

[88] *New type of insurance tested for soybeans*, Purdue Ag News Service, Distributed by UPI February 19, 1993, *available in* LEXIS, Nexis Library, UPI file.

[89] *Id.*, (Remarks of Don Pershing, Purdue extension agricultural economist).

[90] *Id.*, (Remarks of Jerry R. Skees, professor in agricultural economics at the University of Kentucky, where research on GRP was conducted).

[91] *Id.*

D. *Litigation and Preemption of State Law by FCIA*

Claims may be brought against the FCIC in a United States District Court for the district in which the farm is located.[92] Such a claim must be brought within one year after the date when notice of denial of the claim is mailed to and received by the claimant.[93]

Many crop insurance actions are routinely brought in state courts. A defendant (usually the FCIC) can remove a state court action to federal court only if the action could have been originally filed in federal court.[94] The question is whether the federal court would have had jurisdiction over the action. Jurisdiction in a federal court requires either diversity of citizenship[95] or a federal question[96] for the action to have the possibility of removal.[97] Another method of achieving federal jurisdiction is on a theory that FCIA preempts claims based on state law.[98]

The complete preemption doctrine holds that federal law can so thoroughly preempt a field of state law that the plaintiff's complaint must be characterized as stating a federal cause of action, even if the complaint, on its face, contains only state law causes of action.[99] Under these circumstances, the federal transferee court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction.[100] The court can also find that complete preemption exists even if the plaintiff in good faith chooses not to plead a federal claim. For complete preemption to attach, the federal law must so completely preempt the field that any suit sounding in that area necessarily is a

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[92] 7 U.S.C.S. § 1508(f) (Law Co-op. 1979 & Supp. 1993).

[93] *Id.*

[94] 28 U.S.C.S. § 1441(a) (Law Co-op. 1979 & Supp. 1993); Caterpillar v. Williams, 482 U.S. 386, 391-92 (1987).

[95] A phrase used with reference to the jurisdiction of the federal courts, which, under U.S. Const. Art. III § 2, extends to cases between citizens of different states. BLACK'S LAW DICTIONARY 477 (6th ed. 1990).

[96] Cases arising under the Constitution of the United States, Acts of Congress, or treaties, and involving their interpretation and application and of which jurisdiction is given to federal courts. BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

[97] *Caterpillar*, 482 U.S. at 392.

[98] Federal preemption is where the U.S. Constitution and Acts of Congress have given to the federal government exclusive power over certain matters such as interstate commerce and sedition to the exclusion of state jurisdiction. BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

[99] Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 64 (1987); *Franchise Tax Board*, 463 U.S. at 23-24; Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 675 (1974).

[100] Wright, Miller & Cooper, Federal Practice and Procedure § 3722 at 243.

federal action.[101]

In the recent case of *Brown v. Crop Hail Management, Inc.*,[102] the Court relied on the strong language of section 506(k) of FCIA[103] in finding clear Congressional intent to preempt state law. Section 506(k) states:

> State and local laws or rules shall not apply to contracts or agreements of the corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts or agreements.[104]

As the *Brown* Court pointed out, the plain language of the statute expresses Congressional intent and is rebutted only in rare and exceptional circumstances.[105]

In *Brown*, the plaintiff purchased a Multi-Peril Crop Insurance policy from defendants.[106] By the terms of the contract, the FCIC agreed to reimburse the defendants' claims so long as the defendants paid them in accordance with applicable FCIC regulations, practices and procedures.[107]

The plaintiff in *Brown* planted approximately 200 acres of rice. The crop was lost and the plaintiff made a demand for coverage under his policy for $26,922.38. The defendants denied the plaintiff's claim, allegedly because he violated the FCIC's regulations.[108] (The nature of the FCIC violations is immaterial to this preemption and removal analysis of *Brown*.) An action was brought in a Texas state court. The plaintiff alleged that the defendants' refusal to honor his demand for coverage constituted breach of contract, negligence, breach of the duty of good faith and fair dealing, conspiracy, and violation of various provisions of the Texas Deceptive Trade Practices and Consumer Protection Act and the Texas Insurance Code.[109] The defendants sought to remove the action to federal court, asserting that the case contained a

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[101] Wallace v. Ryan-Walsh Stevedoring Co., 708 F. Supp. 144, 151 (E.D. Tex. 1989).

[102] 813 F. Supp. 519 (S.D. Tex. 1993).

[103] 7 U.S.C.S. § 1506(k) (Law Co-op. 1979 & Supp. 1993).

[104] *Id.*

[105] *Brown*, 813 F. Supp. at 519.

[106] The policy was issued by Defendant Landmark America through that company's general agent, Defendant Crop Hail Management, Inc., under the authority of a reinsurance contract that Landmark maintained with the Federal Crop Insurance Corporation.

[107] *Brown*, 813 F. Supp. at 519.

[108] *Id.* at 520.

[109] *Id.*

federal question. Although the complaint alleged no federal cause of action, the defendant maintained that a federal question nonetheless existed because federal law preempted all suits against the FCIC or a FCIC reinsured entity.[110] The plaintiff proffered that if federal law arises in a suit only as a defense to the plaintiff's causes of action, then the case is not within the Court's original or removal jurisdiction. The plaintiff contended that, in his case, federal law arose only from the defense, and not in the original cause of action.

The Court validated the plaintiff's theory but ruled in favor of removal based on a preemption theory.[111] The Court had to stretch the authority it relied on to reach this conclusion. It relied on *Metropolitan Life Insurance Co. v. Taylor,*[112] which compared the specific jurisdictional grant contained in section 501 of Employee Retirement Income Security Act[113] (ERISA) with the specific jurisdictional grant in section 301 of the Labor Management Relations Act[114] (LMRA). Up to that point LMRA was the only statute in which complete preemption was found. The Court noted that the ERISA provision was "closely parallel" to the LMRA provision.[115] The Supreme Court also examined the legislative history of ERISA and found explicit language indicating that section 501 had an identical effect as section 301.[116] The Supreme Court concluded that, therefore, section 501 of ERISA completely preempted the plaintiff's claims. The *Brown* Court also considered *Aaron v. National Union Fire Insurance Company,*[117] which analyzed the analogous Longshore and Harbor Workers' Compensation Act[118] (LHWCA). The Court found no jurisdictional grant similar to section 301 of the LMRA nor any legislative history similar to that found with respect to ERISA.[119] Consequently, the Court concluded Congress did not intend for the LHWCA, a similar statute to FCIA, to preempt

[110] *Id.*

[111] *Id.* at 527.

[112] Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987).

[113] Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 *et seq.* (Law Co-op. 1979 & Supp. 1993).

[114] Labor Management Relations Act of 1947, 29 U.S.C.S. § 185 (Law Co-op. 1979 & Supp. 1993).

[115] *Metropolitan Life Insurance Co.*, 481 U.S. at 65.

[116] *Id.* at 65-66 (citing H.R. Conf. Rep. No. 93-1280 p. 327 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5107).

[117] Aaron v. National Union Fire Insurance Company, 876 F.2d 1157 (5th Cir. 1989).

[118] Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. §§ 901-950 (Law Co-op. 1979 & Supp. 1993).

[119] *Aaron*, 876 F.2d at 1165.

state law actions as completely as LMRA and ERISA.[120] It distinguished *Aaron* because of a lack of specific preemption language in the statute before it, like that found in FCIA.[121]

The *Brown* Court also considered but ultimately rejected Justice Brennan's concurrence in *Metropolitan Life Insurance Co.*, in which he stated:

> Our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." . . . In future cases involving other statutes, the prudent course for a federal court that does not find clear congressional intent to create removal jurisdiction will be to remand the case to state court.[122]

The *Brown* Court pointed out that the FCIC was not a party to the instant action and therefore a preemption theory was inapplicable. In spite of this conclusion, the court stretched preemption to suits brought against FCIC reinsured companies, based on an extension of its analysis in finding that FCIA preempts state law.[123] Again, this conclusion was reached even though FCIC was not a party to the instant action.

The problem with extending the law to private (reinsurance) companies relates to the progression toward reinsurance in FCIA. Choice of forum is just the tip of the iceberg. The Act allows private insurance companies to issue "crop hail" and "crop fire" policies completely at their own risk and control but still under the cloak of the federal guidelines.[124] This gives federal preemption status to private companies who issue their own insurance policies. If more jurisdictions adopt the *Brown* reasoning that private reinsurance companies fall within federal preemption, then the future will be rife with controversy. The better solution is to completely sever the crop insurance program from the federal government and place it in the hands of the American free enterprise system.[125]

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[120] *Id.*

[121] *Brown*, 813 F. Supp. at 526.

[122] *Metropolitan Life Insurance Co.*, 481 U.S. at 67-68.

[123] *Brown*, 813 F. Supp. at 527.

[124] 46 Fed. Reg. 42,307 (1981), *See also* 7 U.S.C.S. § 1508(b)(2) (Law Co-op. 1979 & Supp. 1993).

[125] If this radical solution were adopted, the federal government could remain responsible for catastrophic losses.

E. Fraud and "The Safflower Fiasco"

There are many pitfalls for the unethical farmer or private insurance company, as well as the ethical, when dealing with the Federal Crop Insurance Program. In 1990, the FCIC allowed enterprising California farmers to insure non-irrigated safflower crops that had no chance to grow.[126] FCIC created a non-irrigated safflower policy for California farmers, even though they were in the fourth year of a drought.[127] The farmers collected $14.8 million for the losses, including one farm that collected over $1.5 million.[128]

The General Accounting Office (GAO) discovered the problems in the FCIC's safflower program during an investigation.[129] Weak internal controls and political pressure to expand crop insurance coverage led the FCIC to offer the coverage.[130] It is interesting that the farmers who participated were fully aware that there was no reasonable chance of producing a crop on their non-irrigated land.[131]

The FCIC's desire to expand the products and services it offers is very understandable in consideration of the great diversity of commodities covered by federal crop insurance.[132] FCIC insurance policies must be numerous and very specific to many geographical areas to be of value to farmers. Arguably, the FCIC, as a Washington D.C. based operation, cannot develop programs for the entire country.[133] This lends additional support to the notion of a completely private crop insurance program, with supply and demand determining the product mix.

The internal problems that allowed the safflower fiasco were quickly remedied by Congress in 1991, but other areas are ripe for misuse by both the insured and the FCIC. A California grape grower defrauded

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[126] *Briefly*: Other News, LOS ANGELES TIMES, August 6, 1991, Part D, page 2, Column 1.

[127] Senator Bob Kerrey announced the "safflower fiasco" in a report on the 1990 California safflower crop that was conducted by the General Accounting Office. LOS ANGELES TIMES, August 6, 1991, Part D, page 2, Column 1.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Interview with Robert W. Arkley, Area Claims Specialist, Federal Crop Insurance Corporation, in Fresno, California (April 21, 1993).

[132] FCIC went from offering policies on 29 crops in 39 states in 1979 to coverage of 51 crops in 50 states this year. Poor Controls Blamed For Safflower Fiasco, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, August 5, 1991, Financial section, *available in* LEXIS, Nexis Library, Omni file.

[133] *See supra* note 131.

the FCIC of $1 million by underreporting his crop yield.[134] He was charged with mail fraud, conversion of government property and interstate transportation of a check obtained by fraud.[135]

In another case, seventeen Louisiana farmers defrauded the FCIC of $1.5 million when they sold part of their soybeans, rice and wheat crops under false names.[136] After selling the crops, the farmers filed insurance claims for non-existent crop losses with the FCIC and with private reinsurance companies. Each defendant pleaded guilty to one count of mail fraud. A sentencing date has not been set, but the maximum penalty is a $250,000 fine and five years in prison.[137] This represented the largest number of defendants convicted of crop insurance fraud at one time.[138]

FCIC can deal a harsh blow to the unwary producer. A Kentucky farmer unintentionally failed to report his loss of part of his soybean crop to drought.[139] The FCIC agent was fully aware of the amount of the loss because "grain tickets"[140] showed the amount the farmer received when he sold his crop. The agent even testified that the late reporting did not prejudice his calculation of loss.[141] The Court held that the farmer violated the terms of the policy by failing to report a loss in a timely manner, and even though the FCIC could not show prejudice, the farmer could not collect.[142]

In another case, the FCIC appealed from a judgment declaring that it was liable under a crop insurance policy to the holder of a security interest in an insured's damaged crops when the insured made no assignment of his rights under the policy to the holder of the security interest.[143] The Ninth Circuit reversed even though the plaintiffs perfected their security interest[144] in accordance with the requirements of section 9303 of the California Commercial Code. The trial court held

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[134] *Valley briefs*, UPI, Jan. 30, 1988, *available in* LEXIS, Nexis Library, UPI file.

[135] *Id.*

[136] *Louisiana Farmers Defrauded U.S.*, MINNEAPOLIS STAR TRIBUNE, November 3, 1992, Metro Edition, at Page 3D.

[137] *Id.*

[138] *Id.*

[139] Shanklin v. FCIC, 805 F.2d 1036 (6th Cir. 1986).

[140] Grain tickets are receipts for the sale of a crop which identify all the details of the transaction.

[141] *Id.* at 1037.

[142] *Id.* at 1038.

[143] Buttonwillow Ginning Company v. FCIC, 767 F.2d 612 (9th Cir. 1985).

[144] Most jurisdictions establish by statute what is required to make a security interest, or lien valid and enforcable. *See* Buttonwillow Ginning Company v. FCIC, 767 F.2d 612 (9th Cir. 1985).

that the raisin crop policy involved was silent as to what was required for obtaining a security interest in the insurance proceeds.[145] On appeal, the court relied on the fact that a security interest is statutorily defined as a lien.[146] The plaintiff was required to have a secured interest based "upon approval of a form prescribed by the Corporation."[147] There was nothing in the policy that addressed this area, and only the plaintiff's knowledge of the contents of the Code of Federal Regulations could have prevented this harsh holding. The Federal law was held to supersede the plaintiff's attempt to perfect its security interest in accordance with the requirements of California law.[148]

The problem feared in *Buttonwillow* actually occurred in the safflower fiasco,[149] where California farmers were paid by reinsurance companies that based their coverage on the FCIC authorized safflower insurance program. The FCIC refused to indemnify the insurers; litigation is pending.[150]

III. The Future: Reinsurance - Problem or Solution?

The original criticisms of private insurance recently resurfaced in Congress during debate of the House Farm Bill.[151] Congress has yet to turn implementation of the Act over to the private sector, but it is clear that the crop insurance program is moving in that direction.[152]

Before 1980, FCIC sold crop insurance to producers directly through its own agents. In 1980, Congress amended the Act to authorize FCIC to enter into reinsurance agreements with private insurance companies.[153]

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[145] Attaching a lien on the proceeds of a policy is a common and recommended practice. This allows a farmer to purchase on credit, prior to planting, needed supplies and equipment more easily. This practice is even used as a selling tool for crop insurance.

[146] 7 C.F.R. § 402.4 (1985).

[147] *Buttonwillow Ginning Company*, 767 F.2d at 613. *See also* 7 C.F.R. § 402.7, Appendix, P8 (1985).

[148] CAL. COM. CODE § 9303 (West 1989).

[149] *See* note 120.

[150] Interview with Robert W. Arkley, Area Claims Specialist, Federal Crop Insurance Corporation, in Fresno, California (April 21, 1993).

[151] House Farm Bill HR 2493 passed the House of Representatives on June 29, 1993. The House passed an amendment which would target individual farmers and allow insurance companies to refuse policies to farmers in counties where particular crops have failed more than 70% of the time if insurance has been available. The House said the move would save approximately $57 million. 139 CONG. REC H4213, (daily ed. June 29, 1993).

[152] *Id.*

[153] The FCIC published the first notice of its offer to provide reinsurance on Jan. 5,

The Act authorizes reinsurance to be sold by private insurance companies, but they are still under the control of FCIA.[154] The program has been expanded over the years and now allows private insurance companies (or pools of companies) to actually sell the FCIC policies to farmers or, after approval, to create their own policies.[155]

The FCIC delivers crop insurance through three channels. Licensed private insurance agents and brokers can sell policies issued by the FCIC directly to the farmer.[156] The FCIC can also provide reinsurance to insurers which sell crop insurance policies issued in their own names.[157] County offices of the Agriculture Stabilization and Conservation Service can also directly provide insurance to farmers.[158]

Private companies operate under agreements with FCIC, which are known as Standard Reinsurance Agreements (SRA's).[159] However, the Act still requires the FCIC to subsidize both direct insurance and reinsurance provided by private companies.[160]

A potential problem for private insurance companies selling crop insurance under an SRA surfaced in *Old Republic Insurance Co. v. FCIC.*[161] The plaintiffs were insurers who operated under an SRA with the FCIC. The court held that the FCIC had the right to collect overpayments to farmers made by Old Republic four to six years earlier. The court rather cavalierly stated:

> Yet, it defies common sense to suppose, and the Insurers have offered no legislative history to suggest, that Congress intended to give a blank check to all private insurance companies in order to encourage participation in the program, regardless of whether claims are later discovered to have been paid based on wrongful or negligent adjustment by the reinsured companies.[162]

On the surface, the holding seems logical and prudent, but there is at least one serious pitfall. It is a given that a reinsurer who makes a loss payment based on its own negligence should not be indemnified. The

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1981, 46 Fed. Reg. 974 (1981).

[154] 7 U.S.C.S. § 1508(h) (Law Co-op. 1979 & Supp. 1993).

[155] *Id.*

[156] 7 U.S.C.S. § 1507(c)(3) (Law Co-op. 1979 & Supp. 1993).

[157] 7 U.S.C.S. §§ 1507(c), 1508 (Law Co-op. 1979 & Supp. 1993).

[158] 7 U.S.C.S. § 1508(a), *see also* Kansas *ex rel* Todd v. United States, 791 F. Supp. 1491, 1492 (D. Kan. 1992).

[159] Standard Reinsurance Agreement, § 1A, 46 Fed. Reg. 42306 (1981). *See also* 49 Fed. Reg. 127 (Jan. 3, 1984) for an example of an offer to provide reinsurance to private insurers of cranberries.

[160] *Id.*

[161] Old Republic Insurance Co. v. FCIC, 746 F. Supp. 767 (N.D. III. 1990).

[162] Old Republic Insurance Co. 746 F. Supp. at 770.

problem arises when the reinsurer relies on an FCIC program that is found to be in violation of the FCIA. A *Merrill v. FCIC* situation would seem to occur, only here, the private insurance company would be estopped from seeking relief against the FCIC.[163] Sovereign immunity would prevent the insurer from any recourse against the FCIC, and the statutory Band-Aid[164] offered to farmers does not apply to reinsurance companies. Even if it did, the $100,000 limit would not offer sufficient relief in most cases.

IV. Recommendations

The Federal Crop Insurance Program is subject to waste, fraud and low participation. In 1991, 915,000 policy holders insured over $12.8 billion in crops.[165] However, this accounts for only about one-fourth of the nation's eligible farmers who participated in the crop insurance program.[166]

To generate more participation, Congress should introduce both positive and negative incentives. Farmers could be rewarded by making crop insurance less costly, even if this entails federal subsidies at first, and by penalizing non-participants. To insure maximum participation, farmers who refuse to participate should be ineligible for disaster relief and for commodity price supports.

High-risk farms have traditionally been charged too little, while low-risk farms have been charged too much. As a result, a disproportionate number of high-risk policies are issued.[167]

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[163] 7 U.S.C.S. § 1508(a) (Law Co-op. 1979 & Supp. 1993).

[164] 7 CFR 423.5 (1985), which provides in part:

(a) A person entering into a contract of crop insurance under these regulations who, as a result of a misrepresentation or other erroneous action or advice by an agent or employee of the Corporation:

(2) Has suffered a loss to a crop which is not insured or for which the insured is not entitled to an indemnity because of failure to comply with the terms of the insurance contract, but which the insured believed to be insured, or believed the terms of the insurance contract to have been complied with or waived; and

(b) The Board of Directors of the Corporation, or the Manager in cases involving not more than $100,000.00, finds that:

(1) An agent or employee of the Corporation did in fact make such misrepresentation or take other erroneous action or give erroneous advice;

(2) Said insured relied thereon in good faith . . .

[165] *Federal Crop Insurance Corp.*, Government Computer News, April 12, 1993, Vol. 12, No. 8, Pg. 114, *available in* LEXIS, Nexis Library, Omni file.

[166] *No Free Ride For Farmers*, New York Times, Sept. 21, 1989, Sec. A, Page 30, Column 1.

[167] *Id.*

Mandatory participation in the Federal Crop Insurance Program could solve most of the bureaucratic problems. It would also ease the burden on the taxpayer and the federal budget. In its present state, a reduction in funding would compromise FCIC's ability to monitor misuse and abuse.

The unsettled position of the private insurance companies in terms of preemption and sovereign immunity poses a dilemma. Private insurers should either be eliminated from the program or be made to assume more risk along with the opportunity for more reward. The latter solution is better because our free enterprise system would encourage competition, provide lower cost to the farmer, and reduce the burden on the taxpayers. The federal government should, however, remain responsible for catastrophic losses.

The great flood of 1993 focused the country's attention on the farm belt in the Midwest and on the large losses to local farmers. Talk of revamping the Federal Crop Insurance Program surfaced,[168] as it always does during crisis. This wave of good intentions, however, fails to address the problem.

The 1993 flood illustrated two problem areas. Farmers who could not get into their fields to plant because of the flooding were not eligible to collect on their crop insurance, while the rush of the federal government to offer emergency relief discourages future participation. These concerns and emotional reactions do not address the real problems of the Federal Crop Insurance Program. Opportunities for fraud and waste must be eliminated and increased participation by the nation's farmers must be sought. It is difficult to make any proper long-term solutions in the face of a disaster.

Spreading the cost of the program among a large number of farmers would eliminate the need for federal relief to farmers during disasters like the 1993 flood and make the ongoing program less costly. The best answer is mandatory participation.

The debate does not legitimately include not being able to get a crop planted. The entire Federal Crop Insurance Program is designed to insure the *growing* crop from unavoidable losses. Pre-planting problems would be best left for some type of business interruption insurance. This could be accomplished through a federal spin-off of the crop insurance program, but a much better solution would be to encourage such a program completely through the private sector.

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[168] *Floods Illustrate Problems, According to Congressman*, CNN Transcripts, July 13, 1993, *available in* LEXIS, Nexis Library, Omni file.

CONCLUSION

Federal crop insurance can be an asset to both the modern farmer and the insurance industry. A proper analysis of the specific farmer's needs obviously must be made before purchasing crop insurance, but it is imperative that the workings of the Federal Crop Insurance Program be known before disagreements or litigation occur. Similarly, a private insurance company that contemplates entering the federal crop reinsurance market must be aware of the flaws in the system in order to capitalize on the benefits. Avoid the pitfalls, find the loopholes and federal crop insurance can be a very good friend.

POSTSCRIPT

The great flood of 1993 left in its path 20 million acres of farmland either flooded or too wet to plant.[169] Losses totalled more than $12 billion.[170] Although this disaster was one of the worst of its kind, such natural occurrences will always be with us. As is the case in many tragedies, some good can be reaped here.

In March of 1994, the Secretary of Agriculture announced a plan to revise the Federal Crop Insurance Program.[171] The proposal being considered would address the problem of crop insurance versus federal disaster payments.[172] The proposed system would mandate that all farmers purchase an insurance policy for each of their crops, at a cost of $50 to $100.[173] Although these insurance policies would cover only a limited amount of loss, they would replace the farmer's reliance on federal bail-outs after disasters. This system would replace existing ad hoc crop disaster relief plans and would improve federal budgeting for natural disasters.[174]

The silver lining from the great flood of 1993 may be the much needed crop insurance reform. Only now can the real problems be addressed, without the emotion that comes during a crisis.

DAVID F. RENDAHL

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[169] *The Great Flood of '93*, LIFE MAGAZINE, January, 1994, at 20.

[170] The 1993 midwestern flood ranks as the second-costliest natural disaster in U.S. history, after 1992's $17 billion Hurricane Andrew. *The Great Flood of '93*, LIFE MAGAZINE, January, 1994, at 20.

[171] Bill Lambrecht, *U.S. Plans To Reform Farm Aid; Disaster Plan Stresses Cheap Crop Insurance*, ST. LOUIS POST-DISPATCH, March 3, 1994, at 1A.

[172] *Id.*

[173] *Id.*

[174] *Text of Statement by President on Crop Insurance Reform*, U.S. NEWSWIRE, March 3, 1994, National Desk Section.