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Recovering Attorney Fees in Crop Insurance Disputes with the Risk Management Agency: The Equal Access to Justice Act in NAD Appeals

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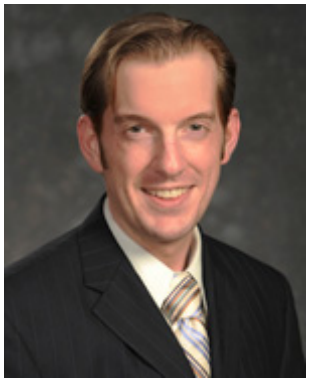

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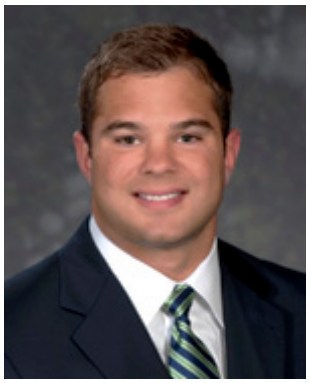
Purchasers of federally reinsured crop insurance policies often find themselves at odds with the actions of the Risk Management Agency (the "RMA"), the arm of the USDA in charge of administering the federal crop insurance program. As most producers well know, the role of the RMA is not limited to promulgating general regulations concerning crop insurance program and drafting policies, but includes issuing memoranda and bulletins that affect the administration of certain policies, reviewing an insured's reported yields, calculating county yields for area-based policies, and occasionally even electing to participate in the adjustment of an insured's claim.



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Crop insurance policies provide that disputes over RMA's actions (as opposed to those done solely by the insurance provider) must be pursued through the National Appeals Division ("NAD"), which is a separate and nominally independent branch of the USDA tasked with resolving disputes against the USDA's various agencies, such as RMA or the Farm Service agency. The NAD appeal process provides several options for a producer to contest RMA's actions, including a written record review or a telephone or in-person hearing conducted by an NAD Hearing Officer.

The NAD appeal process does not require that a producer retain an attorney to conduct the appeal, but many producers have found that doing so is helpful, as often complex issues of federal statutory and regulatory law and contract construction will be at issue. In such cases, the crop insurance policies provide that "[u]nder no circumstances can [the insured] recover any attorney fees or other expenses" from RMA. (See Common Crop Insurance Provisions, Section 20; Group Risk Income Protection Plan, Section 16.) However, a federal statute called the Equal Access to Justice Act ("EAJA") can trump this language, and allow insureds to recover a large portion of attorney fees incurred in connection with a successful EAJA appeal.

Recovering Fees and Costs under EAJA

Broadly, EAJA provides that a federal agency that conducts an adversary adjudication (such as an NAD appeal) shall award to a prevailing party "fees and other expenses incurred by that party in connection with that proceeding." 5 U.S.C.§ 504(a)(1). However, there are several technical requirements that the insured must establish before being entitled to an EAJA award.

The threshold requirement for an EAJA award is that the insured "prevailed." An insured will not be entitled to any fees or costs until after they succeed in convincing the NAD Hearing Officer that RMA's action was erroneous. To be entitled to an EAJA award, however, the insured must also establish that RMA's position was not "substantially justified." In other words, the insured must show that RMA's position did not have a reasonable basis in law or fact.

Once a prevailing insured shows that RMA's position was not substantially justified, it will be entitled to an award of fees and costs if (1) it meets certain net worth requirements (the "Net Worth Test"), and (2) the fees are reasonable. An individual insured meets the Net Worth Test if he or she has a net worth of less than $2 million. An insured that is a corporation, partnership or some other sort of entity meets the Net Worth Test if its net worth is less than $7 million and it has fewer than 500 employees. To establish that the attorney's fees are reasonable, the insured's attorney will typically provide an itemized

statement of the actual time expended on the NAD appeal and that attorney's rates. The attorney's rate is statutorily capped at $125 per hour. While this set rate may often be less than the attorney's actual rate, it will usually cover a substantial portion of the overall bill.

A Recent Example: Colorado GRIP Corn Appeal

A recent example of the EAJA process was established in a NAD case worked on by one of the authors, Jeremiah Buettner, along with his partner Jeff Todd, in 2010. The NAD appeal was brought by a large group of corn producers in Colorado with respect to their 2008 Group Risk Income Protection ("GRIP") policies. Unlike traditional crop insurance policies, GRIP policies are based on county-wide yields and revenues as opposed to the producer's own yields and revenues. RMA will publish expected county yields and revenues at the beginning of the crop year, and if the final county revenue is lower than that at the end of the crop year (whether due to low yields, price or both), the producer will be entitled to an indemnity.

The key element in computing an indemnity under a GRIP policy is the determination of the final county revenue, which is done by RMA in accordance with specific instructions within the GRIP policy. Essentially, calculating the GRIP final county revenue merely requires multiplying the final county yield (which is based on the official county yield published by the National Agriculture Statistics Service ("NASS")) by the harvest price. For the 2008 crop year, however, RMA deviated from this formula to set the final county yield for the Colorado

producers much higher than the one published by NASS. This artificially inflated the county yield and resulted in indemnity payments that were much lower per insured acre.

The Colorado GRIP insured retained counsel to contest RMA's action before the NAD. In the course of the appeal, the group learned that RMA had calculated the new final county yield by arbitrarily deleting nearly 10,000 acres of planted corn from the figures published by NASS. The group's attorneys argued that because the GFP determinations were not final, and because there was no evidence that there were any losses "due to" the alleged poor farming practice (which is a requirement under the Federal Crop Insurance Act), the deletion was improper. After an in-person hearing, the NAD Hearing Officer agreed and reversed RMA's action because it was arbitrary and capricious." (The Hearing Officer Determination can be found at the NAD website by going to http://www.nad.usda.gov/public_search.html, and searching for Case No. 2009W000708).

After prevailing in their NAD appeal, the producers filed an application for the recovery of attorney fees and costs. The Hearing Officer's determination focused largely on whether RMA's position was substantially justified. Having previously held that RMA's actions were "arbitrary and capricious," it had little trouble holding that it was also not substantially justified. After reviewing the supporting documents and fees statement provided by the group's counsel, the Hearing Officer entered an award of $32,000 in fees and $2,876.95 in expenses, which constituted a substantial portion of the group's overall fees. (The EAJA Award is also available at the NAD website by conducting the same search as described above.)

Conclusion

As the Colorado GRIP corn case illustrates, insureds may be entitled to recover attorney fees and costs incurred in connection with an NAD appeal despite the policy's language to the contrary. By filing a timely application after prevailing in an NAD appeal (and adhering to other specific statutory requirements), insureds can recover attorney fees and costs.

LINKS

- Jeremiah Buettner's bio
- Jared Boyer's bio
- McAfee & Taft's Agriculture and Equine Industry Group

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