

<b>RAIN AND HAIL INSURANCE SERVICE,</b>	)	<b>AGBCA No. 99-122-F</b>
<b>INC., AND RAIN AND HAIL L.L.C.</b>	)	
<b>(John E. Kates, Jr.),</b>	)	
	)	
Appellants	)	
	)	
<b>Representing the Appellants:</b>	)	
	)	
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**DECISION OF THE BOARD OF CONTRACT APPEALS**

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June 13, 2000  
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**Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK.**

On January 5, 1999, the Board received an appeal from Rain and Hail Insurance Service, Inc. (RHIS), and Rain and Hail L.L.C. (RHLLC). The appeal arises out of a Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC) and Cigna Property and Casualty Insurance Company (Cigna) and RHIS, for the 1995 crop year. Exhibit A to the Notice of Appeal indicates that RHLLC and RHIS are collectively the managing general agent for Cigna. The Complaint alleges that pursuant to a plan of reorganization, effective May 1, 1996, RHLLC replaced RHIS as the operational entity responsible for issuing, delivering, and administering the federal crop insurance program for RHIS. No objection has been interposed to the conduct of this litigation in the names of RHIS and RHLLC (collectively Rain and Hail (RH)).

FCIC is an agency of the U. S. Department of Agriculture (USDA). Under the SRA, RH sold and administered Multi-Peril Crop Insurance (MPCI) contracts in furtherance of the Government's crop insurance program. The appeal also arises out of FCIC Manager's Bulletin MGR 93-020 (MGR 93-020) which, under certain conditions, permits FCIC to reimburse reinsured companies for litigation expenses.

Appellants appealed the deemed denial of their February 26, 1998 request for a final agency determination on the issue of financial assistance for litigation expenses in the amount of \$22,050.

The Board has jurisdiction to decide the appeal under 7 C.F.R. §§ 24.4(b) and 400.169(d).

### FINDINGS OF FACT

1. This appeal arises out of the crop year 1995 SRA (Supplemental Appeal File (SAF) 131-162).
2. MGR 93-020 established criteria for providing financial assistance to insurance companies for certain litigation expenses and outlined procedures for requesting financial assistance for litigation expenses. Cases submitted for consideration by FCIC under MGR 93-020 must meet two criteria. First, the litigation must involve an attack on FCIC-approved program procedures, regulations and/or crop policies. Second, the litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program. MGR 93-020 also provides that FCIC will make final determination regarding amount of settlements, paying of judgments, the awarding of attorney's fees and other court costs, only after the court has rendered a decision or formal settlement has been presented by the parties involved. (SAF 124-25.)
3. The request for financial assistance for litigation expense in this case involved litigation between a Florida hibiscus grower, John E. Kates, Jr. (Kates), and R. H. Kates, doing business as Four J Groves (Four J), which was the insured under MPCI Policy No. MP-267496 issued by Cigna and RHIS. The indicated crop was nursery crops. (SAF 55-63.)
4. The policy insured against unavoidable damage to the insured nursery crops resulting from hail, wind and other adverse weather conditions (including winter damage caused by changes in temperature). The insured's duties after loss included providing prompt written notice and establishing the total value of the insured nursery crop on the growing unit and establishing that the loss has been directly caused by one or more of the insured causes during the insurance period. The policy also required the insured to submit a signed statement in proof of loss declaring the insured's loss and interest in the crop within 60 days after the loss or 60 days after the calendar date for the end of the annual insurance period, whichever is earlier, unless the insurer extends the time in writing. (SAF 57.)
5. During January 1995, Kates cut back all but one block of its hibiscus plants to encourage full growth. The crop experienced three cold spells in February 1995. After the first two cold spells,

new growth appeared, but after the third and during late February and early March, Kates observed no indication of new budding and that some plants were dying. (Appeal File (AF) 14.) On or about March 6, 1995, he informed his insurance agent that he had experienced cold weather damage and requested inspection of his crop (AF 8). The inspector found it difficult or impossible to confirm the cause of loss (AF 10). RH determined that no indemnity was due, and despite further argument from Kates, did not reverse that decision (AF 12-31).

6. In August 1996, Kates sued RHIS in state court in Florida (AF 32-44). Kates' amended complaint alleged that Kates' nursery crop suffered substantial losses due to winter damage caused by changes in temperature. It also alleged that Kates, doing business as Four J, had performed all conditions precedent to recover under the policy. (AF 51-53.) In its amended answer, RHIS denied the allegations regarding cause of loss and performance of all conditions precedent to recovery. RHIS also presented affirmative defenses related to: burden of proof of cause of loss; failures of proof; late reporting of the loss; that USDA had determined that RHIS's determination to deny coverage was in accordance with FCIC-approved policy and procedures; the lawsuit being time barred; negligence in handling the crop; and lack of subject matter jurisdiction. (AF 82-85.) RHIS had the state court litigation removed to federal district court (SAF 172-175), but the judge remanded to state court (SAF 198-200).

7. Concurrent with those proceedings, by letter dated November 21, 1996, RH requested that the case be accepted for payment of litigation expense under MGR 93-020 (AF 69-89).

8. After remand, the parties undertook mediation. Prior to the mediation, Appellants' local counsel wrote the mediator and described the legal issues in terms of: the insured's having filed his notice of loss in an untimely manner; his failure to make Appellants aware of potential for loss until the plants were completely dead after the third cold snap; the plants having been behind market schedule in the growth cycle; the insured's lack of ability to recognize plant damage; and the insured's lack of knowledge of proper techniques to insure plant survival. He did not mention arguments constituting an attack by Appellants on program, procedures, regulations or crop policies. (SAF 252-54.)

9. During the course of the litigation and mediation, Appellants' local counsel described depositions and other proceedings in letters. These describe the issues in factual terms, such as cause of loss and extent of damage (SAF 257-58); cold weather as cause of loss (259-60); chemical burn as possible cause of loss (267); lack of claims for cold weather loss from other growers in the area and lack of basis for lab reports that cold weather was the cause of loss (268-70).

10. While ultimately unsuccessful, the mediation narrowed the gap between the parties' monetary positions (SAF 261-62). Thereafter, as a result of Kates having filed a proposal for settlement and judgment under Florida Statutes and Rules of Civil Procedure, the parties settled for \$20,000 paid by Appellants to Kates (AF 263-64, 275-76).

11. By letter dated December 29, 1997, FCIC denied Appellants' November 21, 1996, request for litigation expense reimbursement, concluding that the case simply involved a factual dispute with respect to when the insured's crop was damaged requiring him to file a notice of loss (AF 100-01).

12. Appellants filed a request for reconsideration in a letter dated February 12, 1998.<sup>1</sup> Appellants followed up with a letter of February 26, 1998, enclosing invoices and summaries of litigation expenses which had not been available when the earlier letter was sent. The total request was for \$22,050. (SAF 281.) FCIC did not respond and Appellants filed this "deemed denial" appeal which was received at the Board on January 5, 1999.

### DISCUSSION

Under MGR 93-020, FCIC may provide financial assistance for reasonable attorney's fees and litigation expenses in cases meeting two criteria. The litigation must involve an attack on FCIC-approved program procedures, regulations and/or crop policies. It must also involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program. Nothing in the record indicates that the underlying litigation in this case constituted an attack on FCIC-approved program procedures, regulations and/or crop policies. The pleadings and deposition summaries reveal that the issues revolved around what caused the loss and whether the period of time which elapsed between loss and reporting hindered making that determination. The MPCCI requires prompt reporting. However, the record does not indicate that the insured argued that the requirement for prompt reporting to be invalid or that it should be abolished. MGR 93-020 has set fairly specific criteria which must be met before FCIC will consider a case appropriate for payment of litigation expense. The facts here do not meet those criteria.

### DECISION

The appeal is denied.

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**ANNE W. WESTBROOK**  
Administrative Judge

**Concurring:**

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**EDWARD HOURY**  
Administrative Judge

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**JOSEPH A. VERGILIO**  
Administrative Judge

**Issued in Washington, D.C.**  
**June 13, 2000**

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<sup>1</sup> Neither the Appeal File nor the Supplemental Appeal File contains a copy of this letter.