CROP INSURANCE BAD FAITH: PROTECTION FOR AMERICA’S FARMERS

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“Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bands.”

—President Thomas Jefferson

I. INTRODUCTION

The Great Depression, one of the most tumultuous times in American history, still evokes many vivid memories and images. The 1929 stock market collapse, the collapse of the banking system, bread lines, “Hoovervilles,” and the devastation of crops during the “Dust Bowl”

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3. T.H. Watkins, The Great Depression: America in the 1930s, at 11 (Little, Brown and Company, 1st ed. 1993). Watkins described some of the images of the Great Depression as follows:

Farmland ravaged by erosion and baked by the sun; Hoovervilles, those mappie villages strewn with litter and disappointment; dust storms boiling up in the mountainous black clouds over helpless little towns and lonely, hurrying automobiles; homesteads buried in sand; corn dead on its stalks; cattle bawling helplessly for water, each starkly outlined set of ribs forming a cage of misery;
are only memories to today's older generation. However, these are not-so-distant memories still shared with successive generations. In particular, the Depression devastated agricultural interests. The combination of the worst drought in American history and poor agricultural practices led to disaster among America's farmers; in 1934, at the height of the drought, virtually thirty percent of all Americans lived on farms. With the devastation of crops throughout the South and Midwest, unemployment rates in the Plains States skyrocketed in the early 1930s and farm families moved to the western states, such as Oregon, Washington, and California. Just as bank failures during the Great Depression led to the loss of millions of dollars in uninsured bank deposits, the disaster in agriculture was unchecked because a

ragged, hungry Anglo children drinking from filthy roadside puddles, black children huddled with their cotton sacks in the big lonely fields of the Delta, Hispanic children making adobe bricks in the mountain villages of New Mexico; men sitting on park benches, eyes downcast, standing in dull, uncomplaining ranks in breadlines, piled into the dim recesses of employment offices, waiting, always waiting...

4. Id. at 190.

The speculative dance of the war years and the twenties had abused millions of acres of farmland in the South and Midwest, as farmers plowed, planted, and harvested as much as they could as often as they could. Much of the topsoil was left so exhausted it could barely support the most undemanding ground cover, much less productive crops. Careless plowing had rutted the fields, leaving the land open to gullying from erosion.

5. Id. at 189.

6. Id. at 194.

However many, there was not much in the way of employment the affected states could offer these suddenly landless and workless thousands; in Arkansas, for example, the unemployment rate was 39 percent in 1933, and in Missouri, Oklahoma and Texas it ranged from 29 to 32 percent. People began to leave their home states in growing numbers after the terrible summer of 1934. Oklahoma had a net loss of more than 440,000 people in the 1930s. Kansas lost 227,000. Throughout the Plains states, 2.5 million people ultimately would leave for other parts.

7. Id. at 194-95.

8. Id. at 54-55.

The bulk of the American population may not have suffered the loss of stock investments, but there were plenty of other ways to calculate loss, and by the end of 1929, with unemployment rising, with shops and factories suddenly ornamented by Closed or Out of Business signs, and, perhaps most terrifying of all, with scores of banks failing and taking with them millions of dollars in deposits (which were at that time uninsured), the "general public's" confidence in the financial health of the country and the wisdom of its leaders was shaky at best. Confidence fell even further when 256 banks failed in the single month of November, 1930, and further yet on December 11, when the United States Bank, with deposits of more than $200 million, went under. It was the largest single bank failure in American history up to that time...

Id.
federal crop insurance program did not exist prior to 1938 to protect American farmers from catastrophic losses. 9

The United States government’s response to the economic and social devastation of the Great Depression in the 1930s was bold and aggressive. Amidst President Franklin Delano Roosevelt’s New Deal programs like the Works Project Administration (“WPA”) and the Civilian Conservation Corps (“CCC”) that sought to reduce high unemployment, 10 the creation of the Federal Deposit Insurance Corporation (“FDIC”) to counter the risk of irrational runs on banks 11 and systemic risk 12 allowed the implementation of insurance for monetary bank deposits. Congress also enacted federal protections for farmers’ crops. In 1938, Congress enacted the Federal Crop Insurance Act 13 (“FCIA”); the FCIA created the Federal Crop Insurance Corporation (“FCIC”) with the original purpose to issue crop insurance policies for farmers and to handle claims of loss. 14 Since 1938, many American farmers have avoided catastrophic losses in droughts and inclement weather by procuring crop insurance, either directly through the FCIC or through private insurance companies that sell and service policies that are reinsured by the FCIC.


Congress established the FDIC after the Great Depression as a protective measure against two types of risk considered important factors in the collapse of banking early in the Depression era. Irrational runs on banks constitute the first risk. As a matter of business practice, banks retain only a small portion of all deposits on hand for immediate withdrawal. The largest share of deposits is used to fund bank loans. Because banks normally cannot collect outstanding loans immediately, they generally do not have the capacity to meet a large demand for deposit withdrawals. If banks turn away depositors without their requested withdrawals, the depositors may panic and attempt to close accounts even with healthy banks. Deposit insurance and Federal Reserve loans exist to quell potential panics by reassuring depositors of the security of their funds irrespective of the bank’s financial status.

Id.

12. Id. at 738.

The second risk directly addressed by the FDIC is systemic risk. Systemic risk considers the possibility that one bank failure will lead to other bank failures, thus disturbing large segments of the banking system. The FDIC regulates the general safety and soundness of banks. Its regulatory role encompasses functions such as the monitoring of bank balance sheets, lending practices, and investment strategies for signs of financial distress that lead to bank failure.

Id.

This past year, echoes of the Dust Bowl of the 1930s emerged when large portions of Midwest experienced drought conditions. The worst drought in the United States since 1956 slammed a significant portion of the United States during the spring, summer, and fall of 2012. In September 2012, just over sixty-three percent of the United States experienced “moderate to exceptional” drought conditions. The United States Department of Agriculture estimated that this drought affected approximately eighty percent of agricultural land in the country, with severe effects such as prairie fires, withering crops, and livestock left without adequate water throughout America’s heartland.

Unlike during the Great Depression, crop insurance is available for many farmers to protect against the most catastrophic agricultural losses in the wake of this past year’s drought. On an annual basis, crop insurance covers over eighty percent of the nation’s corn crop. With the historic drought, crop insurers anticipate that farmers will file a record number of claims. One major crop insurer, ACE Limited Rain and Hail, anticipates taking a nineteen-cent-per-share earnings reduction in the second quarter due to crop insurance payments and taking its first underwriting loss in years. Out of the anticipated claims against crop insurers throughout the United States this year, it is possible that litigation will ensue in some cases where an insured policyholder and a crop insurer dispute the extent of coverage under a policy. Among these claims, allegations of crop insurer bad faith may arise.

Although there is sparse legal scholarship that comprehensively addresses the legal issues surrounding crop insurance, a key issue

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16. See id.
17. Id.
20. Id.
21. Id.
remains unexplored in the literature that potentially can affect any farmer with a crop insurance policy claim. When considering this past year’s drought, or any drought that causes major agricultural loss, the question is this: can an insured policyholder with a crop insurance policy bring a bad faith claim under state law if the crop insurer and/or its agents and representatives act recklessly in disregard of the contractual rights of the insured? Many states today permit an insured policyholder to bring a state statutory or common law insurance bad faith claim generally.\(^{22}\) However, not all courts have permitted an insured policyholder to bring a first-party insurance bad faith claim concerning a crop insurance policy because of federal preemption of the state law cause of action. Two early courts, the United States District Court for the Southern District of Texas in Brown v. Crop Hail Management\(^{23}\) in 1993, and the United States District Court for the Western District of Missouri in Owen v. Crop Hail Management\(^{24}\) in 1994 both held that the FCIA preempted state law crop insurance bad faith claims. However, for nearly two decades after these decisions, a number of courts throughout the United States held that the FCIA did not preempt a crop insurance bad faith claim under state law—allowing farmers the opportunity to keep crop insurers who recklessly or intentionally mishandle claims in check through the recovery of bad faith damages.


22. RANDY J. MANILOFF & JEFFREY W. STEMPPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 534 (2d ed. 2012) (“While many do, not all states recognize a cause of action for first-party bad faith.”).


Despite these court decisions showing an emerging general rule that allows state law bad faith claims to proceed, in August of 2012 the Tennessee Court of Appeals in the Plants, Inc. v. Fireman's Fund Insurance Co. decision went against the emerging general rule. In its interpretation of federal regulations, the Tennessee Court of Appeals' decision casts a heavy cloud over the future of crop insurance bad faith claims. A farmer who lost his or her agricultural crop due to drought is already at a significant loss; the loss of a bad faith remedy for crop insurance claims harms farmers throughout the United States even further.

In the wake of this past year's historic drought, the availability of a crop insurance bad faith claim is a critical issue for America's farmers facing the courts. This Article offers a comprehensive examination of the issues surrounding crop insurance bad faith liability. Part II provides an overview of the history, scope, and availability of the FCIC and the federal crop insurance program that helps protect America's farmers. Part III explores the availability of a first-party insurance bad faith liability remedy generally, as essentially all crop insurance bad faith claims arise in the first-party context. Part IV discusses reported cases that involve allegations of crop insurance bad faith misconduct and the situations where courts have allowed crop insurance bad faith claims as a remedy for insurer misconduct. Part V examines case law to date on the issue of federal preemption by the FCIA of crop insurance bad faith claims under state law and the development of a general rule that the FCIA does not preempt crop insurance bad faith claims. Part VI discusses the critical recent decision of the Tennessee Court of Appeals in Plants v. Fireman's Fund Insurance Company, which places the future availability of the crop insurance bad faith remedy in doubt.

The first-party insurance bad faith remedy is designed as a check against egregious, intentional, and reckless misconduct of an insurer in the handling of a claim. In states that have recognized first-party insurance bad faith claims, crop insurers who sell private insurance policies should be subject to the same legal standards as insurers in other fields. No federal statutes or regulations explicitly prohibit insured policyholders from pursuing bad faith claims against private crop insurers. Many insured policyholders receive protection against the most egregious insurer failings in an age of generally expanding

bad faith liability. In the absence of clear congressional intent to the contrary, America’s farmers should be protected as well.

II. THE FEDERAL CROP INSURANCE CORPORATION AND THE FEDERAL CROP INSURANCE PROGRAM

Unlike the era of the Great Depression, most farmers today have federal crop insurance to cover catastrophic weather-related losses. This year’s historic drought is expected to have a negative effect on the farm economy27 as well as the general economy because of higher food prices.28 But this drought, standing alone, is not anticipated to lead to the thousands of bankruptcies and farm closures that were endemic throughout the heartland of America throughout the 1930s. Although some people see the federal crop insurance program of today as imperfect and in need of reform,29 a significant movement to abolish the program has not materialized into a congressional majority. If changes do occur in the near future, it would not be atypical for the history of the program. Since the program’s beginnings, the scope of crop insurance and the types of insurance policies offered have undergone a number of notable changes.

A. A BRIEF HISTORY OF THE FEDERAL CROP INSURANCE PROGRAM

One of the particularly harsh realities of the Great Depression and the Dust Bowl for American farmers was the lack of a private multi-peril crop insurance market or a government-sponsored insurance program that provided crop insurance. Prior to the Great De-

28. Id.

Federal crop insurance plays an important role in protecting farmers from losses caused by natural disasters and price declines, and it has become one of the most important programs in the safety net for farmers. As we have discussed, unlike other farm programs, the crop insurance program does not limit the subsidies that a farmer can receive. Without subsidy limits, a small number of farmers receive relatively large premium subsidies. . . . In addition, premium subsidies for all farmers, which averaged 62 percent of premiums in 2011, have increased substantially since 2000. With increasing pressure to reduce the federal budget deficit and with record farm income in recent years, it is critical that taxpayer-provided funds for the farm safety net are spent as economically as possible. Limits on premium subsidies to individual farmers or reductions in the amount of premium subsidies for all farmers participating in the crop insurance program, or both limits and reductions, present an opportunity to save hundreds of millions of dollars per year for taxpayers without compromising this safety net.

Id.
pression, private insurers avoided writing crop insurance policies because of the inherent risks in insuring agricultural crops. However, in 1938, Congress passed the Agricultural Adjustment Act to implement the first federally-sponsored insurance program of crop insurance for America's farmers. Significantly, the Agricultural Adjustment Act created the Federal Crop Insurance Corporation ("FCIC") to perform the task of providing crop insurance to farmers.

In the early years of the federal crop insurance program, federal assistance was typically only available in main crop production areas that produced large crops. The United States government has acknowledged that the beginning years of the program were "an experiment." Prior to 1980, the FCIC was the only entity that issued crop insurance policies and it handled all claims from insured policyholders.

In 1980, Congress passed the Federal Crop Insurance Act of 1980 and dramatically expanded the federal crop insurance program. Through passage of the Federal Crop Insurance Act of 1980, Congress permitted private insurers to provide crop insurance policies alongside the FCIC. The number of farmers participating in the program vastly expanded after a series of droughts that affected the United States in the late 1980s and early 1990s. In one decade, from 1988 to 1998, the total amount of farmland insured under the federal crop insurance program tripled to approximately 180 million acres covered. In 1996, Congress created the Risk Management Agency ("RMA") to administer FCIC programs because of the expansion of the crop insurance program.

Today, sixteen different private insurance companies sell and service crop insurance policies. Independent insurance agents are paid commissions for the sale of crop insurance policies to insured farm-

35. Id.
38. A History of the Crop Insurance Program, supra note 34.
40. A History of the Crop Insurance Program, supra note 34.
41. Id.
42. Id.
43. DENNIS SHIELDS, CONG. RESEARCH SERV., R40532, FEDERAL CROP INSURANCE: BACKGROUND AND ISSUES, at Summary (2010).
ers and the FCIC reinsures private companies that provide crop insurance. The inclusion of private insurers in the field of crop insurance, and the vast expansion of the reach of the program in the past twenty years, has led banks to require the procurement of crop insurance as a condition for a farmer to receive operating loans. Approximately ninety-one percent of the annual cotton crop in the United States today is covered by crop insurance, in addition to eighty-four percent of soybeans, eighty-six percent of wheat, and eighty-three percent of corn. However, coverage is not limited to these four commodities.

B. AN OVERVIEW OF CROP INSURANCE POLICIES AND THE CLAIMS PROCESS

Crop insurance covers over 100 crops, including apples, avocados, peaches, walnuts, and sweet potatoes. Just as there are multiple types of crops that may be covered by crop insurance policies, there are multiple types of crop insurance available to farmers. There are two general types of insurance coverage available to a farmer under a crop insurance policy. The first type of coverage, catastrophic ("CAT") coverage, pays a farmer fifty-five percent of the established price of a commodity crop on any loss in excess of fifty percent of the entire crop. While the federal government pays the premium for this type of policy, the farmer must pay a $300 administrative fee for each commodity crop insured in each county.

The second type of coverage, which provides coverage in higher amounts than CAT, is known as "buy up" coverage. The two different types of policies that contain "buy up" coverage are yield-based policies and revenue-based policies. Yield-based policies provide a farmer with an indemnity when a commodity crop yield falls below a production guarantee level due to damage from a covered cause of loss. By comparison, revenue-based policies provide a farmer an indemnity when the actual revenue of the commodity crop falls below a

44. Id. at 2.
47. Id. at 2.
48. Id.
51. Id.
54. Id. at 5.
production guarantee level. In recent years, federal crop insurance has even expanded into the area of livestock, as livestock policies are available for farmers in some areas to insure against the risk of declining market prices for livestock such as swine, cattle, and lambs.

A number of natural causes are considered covered losses under most crop insurance policies, including losses due to "drought, excessive moisture, hail, wind, frost, insects, and disease." However, the fact that crop insurance covers many natural causes of loss does not excuse the farmer from responsibility of care of an insured commodity crop. If a farmer does not follow "good farming practices," then a claim will be excluded from coverage. "Good farming practices" is defined in the Code of Federal Regulations as follows:

The 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) For conventional or sustainable farming practices, those generally recognized by agricultural 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.

In essence, an insured policyholder must follow agricultural practices that local Risk Management Agency agents and certified crop consultants consider prudent, or the insured policyholder runs the risk of claim denial.

If the FCIC wrote the crop insurance policy, then a claim must be filed with the FCIC within 60 days. If the claim is denied, the policyholder can either appeal the decision to the head of the U.S. National Appeals Division or request review under administrative review.

55. Id.
56. Id. at 6.
57. Id.
59. 7 C.F.R. § 457.8 (2013).
60. Dominia, supra note 58, at 15.
63. Id. at 13. "The decision can be appealed directly to the head of the U.S. National Appeals Division (NAD). The National Appeals Division is, generally, staffed by administrative law judges who conduct hearings relatively nearby the location of the producer." Id.
64. Id.

A producer may seek administrative review, or mediation which delays the need for a NAD appeal or administrative review. If administrative review is
Many other crop insurance policies are sold and serviced by private companies, and those policies are reinsured by the FCIC. The extent of state law remedies available to an insured policyholder of a crop insurance policy sold and serviced by a private insurer following a claim denial varies today. In the most egregious instances where a private insurer mishandles a claim, crop insurance bad faith may be a remedy.

III. A BRIEF OVERVIEW OF FIRST-PARTY INSURANCE BAD FAITH LIABILITY

In the context of crop insurance bad faith, only one type of insurance bad faith—first-party insurance bad faith—is applicable. It is a generally accepted rule of contract law that every contract imposes upon each party a duty to act in “good faith and fair dealing in its performance and its enforcement.”65 Within contract law, the contours of the duty of good faith are amorphous,66 although case law is “emphatic about its existence.”67 The duty of good faith and fair dealing is applicable irrespective of whether the parties are in an arm's-length transaction or a party has entered into a contract of adhesion.68

In the insurance context, an even stronger policy argument exists for a duty of good faith and fair dealing to be imposed upon an insurer with regard to its performance and duties under the contract because of the asymmetrical bargaining positions of the relationship between an insurer and insured and the fact the insurance contract is a contract of adhesion.69 In addition, as professor Marc Mayerson notes, insurance companies sell protection to their insured policyholders and the idea that an insurance carrier’s performance will be immediate.70

When an insured policyholder is not fairly compensated for his or her

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66. Id. at 415.
67. Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 593 (7th Cir. 1991). Judge Richard Posner stated, “So we must consider the meaning of the contract duty of ‘good faith.’ The Wisconsin cases are cryptic as to its meaning though emphatic about its existence.” Market, 941 F.2d at 593.
69. See id. at 5.
loss, a derogation of the insurer's promise of prompt protection occurs.\textsuperscript{71}

By the 1970s, the courts began recognizing the policy rationale for a duty of good faith and fair dealing in the insurance context. In 1973 in the landmark case of \textit{Gruenberg v. Aetna Insurance Company},\textsuperscript{72} the California Supreme Court held that if an insurer failed to act in good faith and fair dealing with regard to its contractual duties, the failure to fairly compensate an insured for a loss would create insurer tort liability.\textsuperscript{73} Thus, in the 1970s the era of first-party insurance bad faith liability was born in the California courts.

For the most part, first-party insurance bad faith liability court decisions revolve around issues concerning the activities of first-party insurers with claims handling and settlement.\textsuperscript{74} On the one hand, if an insurance claim is "fairly debatable" and reasonable minds could differ concerning coverage, the insurer can utilize this as a defense and be found immune from liability.\textsuperscript{75} However, if an insurer acts recklessly and/or intentionally in disregard of the rights of an insured policyholder, or completely lacks a reasonable basis for denying a claim, then states that recognize first-party insurance bad faith claims

\begin{quote}
and an essential element of the value of the insurance contract is lost if the carrier's performance is anything but immediate.
\end{quote}

\textit{Id.}

71. \textit{Id.} at 865-66.

Insurance companies inculcate the image of coming to the insured's rescue in the time of need, a standard of performance that in the minds of purchasers of insurance forms a material part of the insurance company's consideration. When an insurance company wrongly fails to perform, whether that failure is due to the claims person's error, negligence, or malice, the policyholder is deprived of the benefit of the insurer's core promise of prompt protection that in fact was owed.

\textit{Id.}


73. \textit{Gruenberg v. Aetna Ins. Co.}, 510 P.2d 1032, 1037 (Cal. 1973). The California Supreme Court stated:

\begin{quote}
[In the case before us we consider the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. These are merely two different aspects of the same duty. That responsibility is not the requirement mandated by the terms of the policy itself - to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where it so doing, it fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.]
\end{quote}

\textit{Id.} at 1038.


75. Mayerson, \textit{supra} note 70, at 869.
may find an insurer liable in tort. The standard outlined by the Wisconsin Supreme Court in Anderson v. Continental Insurance Co. is common; for a plaintiff to prove first-party insurance bad faith, the plaintiff "must show the absence of a reasonable basis for denying benefits of the [insurance] policy and the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one.”

A number of jurisdictions have adopted the Anderson test requiring an insurer’s lack of a reasonable basis for claim denial in addition to intentional actions. Notwithstanding a fair acceptance among courts of the Anderson test or tests similar to Anderson in first-party insurance bad faith actions, a minority of jurisdictions still have not adopted a tort action for first-party insurance bad faith. In a few jurisdictions, a state’s unfair trade practices or claims settlement statute is the exclusive remedy for insurer bad faith, which provides a statutory bad faith remedy.

76. Keeton & Widiss, supra note 74, at 911-12.
77. 271 N.W.2d 368 (Wis. 1978).


80. Manillof & Stempel, supra note 22, at 534-35.
81. Keeton & Widiss, supra note 74, at 908-09.

In some states, the courts have concluded that state legislation on unfair trade practices or claims settlement constitutes the exclusive remedy for bad faith conduct by an insurer in regard to the rejection or delay in the payment of an insurance claim – that is, the statutes preempt a court from recognizing a common law action and remedy.

Id. States that have a statutory remedy addressing insurer bad faith practices consist of Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri,
Despite the variations among jurisdictions concerning first-party insurance bad faith, it is an overall trend that courts are increasingly expanding the contours of insurance bad faith liability. In states where courts have adopted a common law tort or the legislature has created a statutory cause of action for first-party insurance bad faith, a farmer whose crop insurance claim is unreasonably denied has the potential remedy of a crop insurance bad faith claim. It is anticipated that this past year’s drought will produce a significant number of crop insurance claims, and it is an unfortunate reality that some claims may be denied. Just as crop insurance bad faith is a possible remedy for farmers whose claims are unreasonably denied today, past courts that have examined cases of crop insurance bad faith liability have imposed liability against insurers in situations where the adjusting or settlement of claims is performed with an intentional and/or reckless disregard of the rights of an insured.

IV. FIRST-PARTY INSURANCE BAD FAITH LIABILITY: A REMEDY FOR CROP INSURANCE MISCONDUCT?

The advent of the first-party insurance bad faith remedy has seen bad faith claims arise in the areas of disability, health, fire, and uninsured motorist insurance. Although the insurance law literature has not extensively examined the legal issues relating to crop insurance and bad faith claims, the bad faith remedy has historically also been extended to farmers with crop insurance claims. For farmers, the first-party crop insurance bad faith action, whether sounding in tort or as a statutory action, has existed among reported cases since at least the early 1990s.

One of the earliest decisions imposing liability upon a crop insurer for bad faith practices was the Fifth District Appellate Court of Illinois’s decision in Boyd v. United Farm Mutual Reinsurance Co. in 1992. The Boyd case concerned allegations about an insurer’s methods of adjusting and assessing a loss on a portion of the insured’s apple crop (red and yellow apples) due to a hailstorm. The insurer’s adjuster in Boyd allegedly picked only apples from trees that he could reach from the ground when he was determining the crop loss adjust-

83. Domina, supra note 58, at 11.
84. Keeton & Widdiss, supra note 74, at 908.
ment.\textsuperscript{87} He also allegedly refused to utilize a ladder to obtain apples from the tops of the trees.\textsuperscript{88} The insured apple orchard growers immediately disputed the adjusting methods because damage to the apples at the top of the trees was likely to be more significant from the hailstorm.\textsuperscript{89} The insurer’s adjuster estimated that the apple orchard growers’ losses were approximately $40,782.50; the apple orchard growers’ own adjuster, who included apples from the tops of trees in his sample, estimated a loss of $98,708.\textsuperscript{90}

Illinois is a jurisdiction that allows statutory bad faith damages.\textsuperscript{91} The apple orchard growers alleged statutory damages for the insurer’s alleged bad faith failure to settle the claim.\textsuperscript{92} A trial jury found for the apple orchard growers, awarding them $88,834 in compensatory damages, $22,208 in statutory bad faith damages, $15,426.12 in statutory attorney’s fees, and $17,766 in statutory prejudgment interest.\textsuperscript{93}

In upholding the jury verdict, the Fifth District Court of Appeals held that under the totality of the circumstances, a factual finding that the insurer acted vexatiously and unreasonably was not an abuse of discretion on the part of the jury.\textsuperscript{94} The court of appeals found in particular that the apple orchard growers were genuinely concerned about the methodology in calculating the loss from the hailstorm and not wholly preoccupied with the “end result.”\textsuperscript{95} This finding, as well as the insurer’s refusal to negotiate with the apple orchard growers, led the court of appeals to uphold the finding that the insurer acted vexatiously, unreasonably and, in essence, in bad faith.\textsuperscript{96}

One year later, in 1993, the Montana Supreme Court examined allegations of crop insurance bad faith in the loss adjustment process. In \textit{Dees v. American National Fire Insurance Co.}\textsuperscript{97} the court considered a claim under a hail policy arising out of a July 10, 1989 hailstorm. The crop hail insurance policy at issue provided coverage for hail,\textsuperscript{98} but did not cover damage due to wind.\textsuperscript{99}

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\item \textsuperscript{87} \textit{Boyd}, 596 N.E.2d at 1346.
\item \textsuperscript{88} \textit{Id}.
\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} \textit{Id}.
\item \textsuperscript{91} \textit{Title Insurance Act, 215 ILL. COMP. STAT. 5/155} (2012).
\item \textsuperscript{92} \textit{Boyd}, 596 N.E.2d at 1345-46.
\item \textsuperscript{93} \textit{Id.} at 1346-47.
\item \textsuperscript{94} \textit{Id.} at 1349.
\item \textsuperscript{95} \textit{Id}.
\item \textsuperscript{96} \textit{Id}.
\item \textsuperscript{97} \textit{861 P.2d} 141 (Mont. 1993).
\item \textsuperscript{99} Press Release, Ohio Dep't of Ins., Ohio Department of Insurance Encourages Farmers to Review Crop Insurance Needs (Apr. 26, 2012), \textit{available at} http://www.insurance.ohio.gov/Newsroom/Pages/042612CropInsurance.aspx (discussing that crop hail insurance policies include hail coverage, but only wind damage through an endorsement).
\end{itemize}
The wheat fields at issue contained a special type of wheat known as "Newana," which was a semi-dwarf variety of spring wheat with very strong stems that resist falling over.\textsuperscript{100} Both the insured wheat farmer and representatives of the crop insurer disputed whether the cause of the crop damage was by wind or hail.\textsuperscript{101} Hail damage would trigger coverage under the policy, but wind damage would be excluded.\textsuperscript{102} After the denial of the insured wheat farmer's claim, the insured wheat farmer alleged that the insurer violated Montana's Unfair Trade Practices Act,\textsuperscript{103} which provides for the recovery of actual and exemplary damages in the event an insurer refuses "to pay claims without conducting a reasonable investigation based upon all available information[]."\textsuperscript{104}

The particular facts in \textit{Dees} heavily leaned toward a finding of crop insurance bad faith. Two adjusters of the insurer examined the crop loss, but apparently only after an approximately three-week delay.\textsuperscript{105} In addition, the insured wheat farmer had notified the insurer of the availability of the fields' custom cutter as a witness who had observed the effects of the hailstorm before the wheat was cut.\textsuperscript{106} However, at no point during the adjusting process did the insurer contact the custom cutter as a witness.\textsuperscript{107} The testimony in the underlying trial also revealed that after the second adjuster inspected the wheat fields, he asked the insured wheat farmer to sign a "withdrawal of claim" form that would have essentially operated as a release of his insurance claims.\textsuperscript{108}

At trial, the jury awarded the insured the sum of $12,679 in actual damages, $300,000 in punitive damages, and $32,643.90 in prejudgment interest.\textsuperscript{109} On appeal, not only did the Montana Supreme Court find that the insurer's actions in the case arose to a finding of bad faith, but the jury made a finding by clear and convincing evidence\textsuperscript{110} that the crop insurer was guilty of actual malice pursuant to the Unfair Trade Practices Act.\textsuperscript{111}

\begin{itemize}
  \item \textsuperscript{100} \textit{Dees}, 861 P.2d at 144.
  \item \textsuperscript{101} \textit{Id.} at 144-45.
  \item \textsuperscript{102} \textit{Id.}
  \item \textsuperscript{103} MONT. CODE ANN. §§ 33-18-101 to -1006 (2011).
  \item \textsuperscript{104} See MONT. CODE ANN. § 33-18-201(4) (2011).
  \item \textsuperscript{105} \textit{Dees}, 861 P.2d at 144.
  \item \textsuperscript{106} \textit{Id.} at 147.
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} \textit{Id.} at 145.
  \item \textsuperscript{109} \textit{Id.} at 146.
  \item \textsuperscript{110} Clear and convincing evidence (emphasis added) is "evidence indicating that the thing to be proved is highly probable or reasonably certain." \textsc{Black's Law Dictionary} 596 (8th ed. 2004).
  \item \textsuperscript{111} \textit{Dees}, 861 P.2d at 150. "Actual malice," a finding of which imposes civil punitive damages upon a defendant in Montana, is defined as follows:
\end{itemize}
The *Dees* case is useful as a case in which a crop insurer was found liable for bad faith conduct when the insurer allegedly neglected to fully investigate a crop insurance claim. Similar to *Dees*, in the *Moss v. American Alternative Insurance Corp.* case, a federal district court found that a jury could possibly find evidence of bad faith conduct based on the purported shortcomings on the part of a crop insurer’s managing general agent to investigate a claim.

While *Boyd* and *Dees* were cases decided by courts in the 1990s, the *Moss* case is one that illustrates that crop insurance bad faith still remains a viable remedy for farmers with crop insurance disputes. In *Moss*, a cotton farmer was covered by three crop hail insurance policies: one policy of insurance was issued directly to the farmer individually, and the other two policies were issued to the farmer’s corporate entity. Among other claims, the cotton farmer brought forth state tort law bad faith claims against an insurer and its managing general agent arising out of the managing agent’s and the insurer’s handling of a hail damage claim from Arkansas. Just as in *Dees*, the extent of coverage was a critical issue in *Moss*. While the farmland was covered by crop hail policies, there was no coverage for losses due to rain or wind damage.

In the *Moss* case, the insurer’s adjuster who inspected the cotton farms that received hail damage allegedly failed to measure any percentage of loss during the inspection because he believed there was no hail loss. In addition, the adjuster allegedly mistakenly misrepresented the policies’ terms to the policyholder and stated that arbitration of a disputed claim was mandatory and binding. But just as in *Dees*, the cotton farmer was able to not only make a showing of negligent conduct, but he also made a showing of actual intentional misconduct. The testimony of two former adjusters revealed that the crop insurer pressured adjusters in training sessions to underestimate hail loss percentages. Given these facts, the United States District

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(2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.


115. *Id. at *2.*

116. *Id. at *2-5.*

117. *Id. at *6.* The court stated:

Linnert and Byrd, who contracted with Agriserve during the summer of 2003, testified that they were hired to appraise crops for hail damage and that
Court for the Eastern District of Arkansas denied a motion for partial summary judgment filed by the insurer and held that a fact issue existed on the issue of bad faith.\textsuperscript{118}

The \textit{Boyd, Dees,} and \textit{Moss} cases illustrate that crop insurance bad faith has historically been a viable remedy for policyholders who allege crop insurer misconduct. However, the availability of this remedy to policyholders does not exculpate all crop insurance policyholders from any type of responsibility to diligently pursue their claims. In fact, evidence of the neglect of a crop insurance policyholder is a key factor that leads courts to determine that there is a lack of any evidence of bad faith.\textsuperscript{119}

While the crop insurance bad faith remedy exists in many jurisdictions, either as a common law tort or a statutory claim, the specter of federal preemption of state law bad faith claims through the Federal Crop Insurance Act\textsuperscript{120} ("FCIA") remains present today. The preemption question has been litigated for approximately the past two decades. An examination of case law directly on point on this issue reveals that two federal courts held in the early 1990s that the FCIA preempted state law insurance bad faith claims: \textit{Brown v. Crop Hail}

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they attended a training session on this topic conducted by Agriserve. At this training, Mahon gave a presentation on hail damage. According to Linnert, Mahon concluded his presentation by saying, "Everybody knows that you are doing hail insurance, the percentages are usually very low. And when you present it to the farmer, you better have your motor running and be ready to jump in your truck and get gone because the man is not going to be happy."

\textit{Id. at} 49.

\textsuperscript{118} \textit{Id.} at 49.


The Court finds as a matter of law that Florists' Mutual in no way impaired the right of Tattersoll to receive the benefit of the insurance policy insofar as the claim for damage to his buildings was concerned. The duty to pay did not arise until subsequent to sixty days after proof of loss, and then, and only then, after the amount of loss was fixed. Tattersoll never submitted an estimate, never made any appraisal, never did anything but object to the amounts offered. He never suggested what amount would have been adequate, neither then nor now in this case. There was no evidence of what would have been an adequate amount. He merely stated that defendant's offers were inadequate. The money advanced may have been inadequate, but the contract of insurance did not call for any payments until sixty days after the proof of loss and after certain conditions were complied with.


Rather than acting in bad faith, FUMutual maintained contact after its first meeting with Seifert. Seifert testified that he never contacted FUMutual's adjuster between the first couple of days in August and the date of repair. If the irrigated crop was in such extreme danger of stress, Seifert needed to communicate to his insurer the urgency of repair before he can complain that it knew of problems and acted in bad faith. There is no evidence of bad faith.

\textit{Seifert}, 497 N.W.2d at 699.

\textsuperscript{120} \textit{7 U.S.C.} §§ 1501-1531 (2012).
Management in the United States District Court for the Southern District of Texas and Owen v. Crop Hail Management in the United States District Court for the Western District of Missouri. However, this rule did not last and the courts developed a general doctrinal rule that the FCIA does not preempt state law claims. The road to this doctrinal rule has moved through a number of courts, judges, and judicial opinions.

V. FEDERAL PREEMPTION—THE THREAT TO CROP INSURANCE BAD FAITH

While the crop insurance bad faith remedy has been an active one in the courts, the cloud of federal preemption of state law claims looms over the future potential vitality of insurance bad faith. In Altria Group Inc. v. Good, the United States Supreme Court reaffirmed the principle that Congress may indicate preemptive intent over state law in two ways: first, through the express language of a statute or second, through a federal statute’s structure and purpose. In recent years, preemption has covered a vast area of state statutes, from products liability to financial regulation. For example, the National Bank Act essentially neutralized the protections of a state usury statute. FDA regulations preempted tort claims under state law, and the Death on the High Seas Act (“DOHSA”) serves as the exclusive remedy over state law tort claims of family members of victims of terrorism. Numerous scholars continue to address the legal issues concerning preemption in legal scholarship. Not surprisingly, preemption has also crept into the area of state law claims and the FCIA.

125. See Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 309-12 (1978) (stating that under the National Bank Act, a national bank based in one state was allowed to charge out-of-state credit card customers a higher rate of interest than out-of-state customers would be charged by another national bank in their own state on credit card balances that were unpaid).


The issue of federal preemption of state law insurance bad faith claims by the Federal Crop Insurance Act129 ("FCIA") arose largely in the early 1990s. In one of the first major cases addressing preemption, the United States District Court for the Southern District of Texas concluded in Brown v. Crop Hail Management Inc.130 that the FCIA completely preempted state law claims.131 In Brown, the plaintiff proffered claims of a breach of the duty of good faith and fair dealing arising under the Texas Deceptive Trade Practices – Consumer Protection Act132 and the Texas Insurance Code following the denial of a claim for coverage after damage to a rice crop.133

The Brown court determined that the insured policyholder’s statutory state law bad faith claims were completely preempted.134 In its holding, the court focused on two particular provisions. First, the Brown court cited 7 U.S.C. § 1506(k), which stated that:

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.135

It should be noted that this provision only refers to the Federal Crop Insurance Corporation ("FCIC"), not private crop insurers, a fact that the Brown court mentioned.136 However, the Brown court cited federal regulations that it contended preempted state actions against FCIC reinsured parties. 7 C.F.R. § 400.352(a) states:

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 actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.137

Interpreting both provisions together, the Brown court held that the FCIA completely preempted state law claims for bad faith and in

134. Id. at 528.
135. Id. at 525.
136. Id.
137. 7 C.F.R. § 400.352(a) (2012).
more sweeping terms held that the FCIC and FCIC reinsured entities are immune from all state law claims.\textsuperscript{138}

The United States District Court for the Western District of Missouri endorsed the blanket immunity approach of \textit{Brown} in the \textit{Owen v. Crop Hail Management}\textsuperscript{139} decision.\textsuperscript{140} In \textit{Owen}, the insured policyholder brought Missouri state law claims against the insurer following an alleged vexatious and unreasonable claim denial after the loss of part of a soybean crop.\textsuperscript{141} Following the lead of \textit{Brown}, the \textit{Owen} court also cited the former 7 U.S.C. § 1506(k) in its analysis and focused on this statutory provision.\textsuperscript{142} In holding that Congress intended the FCIC to completely preempt state law,\textsuperscript{143} the \textit{Owen} court gave deference to the FCIC’s interpretation of the regulations. The court noted that the FCIC interpreted § 1506(k) “to allow FCIC to preempt any state insurance rules or regulations regarding crop insurance that may apply to FCIC or to any insurance company with which FCIC has an agreement.”\textsuperscript{144} In addition, the \textit{Owen} court looked to history in its preemption analysis. The \textit{Owen} court mentioned that historically, individual states imposed obstacles to the establishment of a national, uniform crop insurance program, and that to give the FCIC authority to completely preempt state law was a “reasonable construction” given this historical background.\textsuperscript{145}

Although the \textit{Brown} and \textit{Owen} decisions endorsed federal preemption in the crop insurance arena in the early 1990s, the early era of preemption soon found itself eclipsed by a new era that led to the development of a doctrinal rule that largely rejected preemption of state law claims by the FCIA. This new era, which preserves state law claims including state law claims for insurance bad faith, has lasted nearly two decades.

\begin{itemize}
  \item \textsuperscript{138} \textit{Brown}, 813 F. Supp. at 526.
  \item \textsuperscript{139} 841 F. Supp. 297 (W.D. Mo. 1994).
  \item \textsuperscript{140} \textit{Owen v. Crop Hail Management}, 841 F. Supp. 297, 304 (W.D. Mo. 1994).
  \item \textsuperscript{141} \textit{Id.} at 298.
  \item \textsuperscript{142} \textit{Id.} at 302.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 302-03 (alteration in original) (quoting General Administrative Regulations; Crop Insurance; Preemption of State Laws and Regulations, 55 Fed. Reg. 23,066, 23,067 (June 6, 1990) (codified at 7 C.F.R. pt. 400)).
  \item \textsuperscript{145} See \textit{id.} at 304 (“Given the history of states imposing obstacles to the establishment of uniform crop insurance, the FCIC’s interpretation of § 1506(k) as giving the FCIC authority to completely preempt state law is a reasonable construction.”).
\end{itemize}
B. PREEMPTION REJECTED—THE DEVELOPMENT OF A NEW DOCTRINAL RULE

The early era of the Brown v. Crop Hail Management\textsuperscript{146} and Owen v. Crop Hail Management\textsuperscript{147} decisions was challenged by a group of judicial decisions in the early-to-mid 1990s. The Holman v. Laulo-Rowe Agency\textsuperscript{148} case, decided by the United States Court of Appeals for the Ninth Circuit in 1993, was the first major court that rejected preemption.\textsuperscript{149} The insured policyholders in Holman brought forth claims of negligence, breach of contract, and insurance bad faith under Montana law after the policyholders were allegedly assured they had insurance coverage to cover their wheat and barley crops when apparently no insurance coverage existed.\textsuperscript{150}

The Ninth Circuit in Holman remarked that nothing in the legislative history of the FCIA revealed express congressional intent that claims against crop insurance agents created federal question jurisdiction,\textsuperscript{151} a fact that even the court in Owen admitted.\textsuperscript{152} The Holman court closely examined legislative intent in finding that state law claims, including claims for bad faith, were not preempted by the FCIA. The Holman court noted that the original text of the FCIA allowed suits to be brought against the FCIC in state courts, but that amendments in 1980 placed exclusive jurisdiction in the federal courts to resolve suits against the FCIC.\textsuperscript{153} However, the Holman court noted that nothing in the amendments expressly required suits against non-FCIC entities to be brought in federal courts, and that the omission concerning suits against non-FCIC entities was “telling.”\textsuperscript{154} Thus, the Holman court held that the FCIA did not preempt state law claims involving federally reinsured crop insurance policies.\textsuperscript{155}

As the 1990s progressed, more courts held that the FCIA did not preempt state law claims for insurance bad faith. Two years after Holman, the United States District Court for the District of South Carolina followed suit in rejecting federal preemption of the FCIA over state law in the O'Neal v. CIGNA Property and Casualty Insurance Co.\textsuperscript{156} case.\textsuperscript{157} Just as the court in Holman cited that Congress

\begin{footnotes}
\footnote{146}{813 F. Supp. 519 (S.D. Tex. 1993).}
\footnote{147}{841 F. Supp. 297. (W.D. Mo. 1994).}
\footnote{148}{994 F.2d 666 (9th Cir. 1993).}
\footnote{149}{Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669 (9th Cir. 1993).}
\footnote{150}{Holman, 994 F.2d at 667.}
\footnote{151}{Id. at 669.}
\footnote{152}{Owen v. Crop Hail Mgmt., 841 F. Supp. 297, 303 (W.D. Mo. 1994).}
\footnote{153}{Holman, 994 F.2d at 669.}
\footnote{154}{Id. at 669.}
\footnote{155}{See id. ("We therefore find that the FCIA does not have the extraordinary preemptive force necessary for the application of the doctrine of complete preemption.").}
\footnote{156}{878 F. Supp. 848 (D.S.C. 1995).}
\end{footnotes}
expressly did not create an exclusive remedy against crop insurers under the FCIA, the O'Neal court cited this point in its analysis. The O'Neal court emphasized that crop insurers that were not federally reinsured could still issue policies, but at their own underwriting risk. As a private crop insurer could technically issue its own crop insurance policies that were not federally reinsured, the O'Neal court stated that it was impossible for federal law “to have occupied the field” of crop insurance.

Following the lead of Holman and O'Neal, numerous other courts in the 1990s rejected federal preemption of state law claims. The United States District Court for the Eastern District of Michigan, the United States District Court for the Middle District of Alabama, the United States District Court for the Eastern District of Texas, the United States Court of Appeals for the Eleventh Circuit, and the United States Court of Appeals for the Tenth Circuit all determined that the FCIA did not preempt state law claims for insurance bad faith.

A general majority rule developed and solidified during the 1990s; state law claims for insurance bad faith conduct were viable and not preempted by the FCIA. The trend continued into the next decade. Instead of finding that FCIC regulations encouraged preemption, the United States District of Minnesota in Agré v. Rain & Hail, LLC contended that the FCIC regulations actually suggested a willingness to allow for state court actions. The Agré court cited to the following language:

Nothing (sic) herein is intended to preclude any action of (sic) the part of any authorized . . . state court or any other authorized entity concerning . . . the regulations, any contract or agreement authorized by the Federal Crop Insurance Act or by (the) the regulations or procedures issued by the Corporation.
In finding that FCIC regulations did not preempt state law claims based upon violations of the Minnesota Prevention of Consumer Fraud Act, the Agre court stated that "Congress knew how to preempt state claims; this Court is convinced it chose not to do so here." While this provision shows intent that state court proceedings involving FCIC reinsured crop insurance policies are to be allowed, it should be noted that the provision is not currently in place as part of this federal regulation today.

Numerous other courts followed the lead of Agre in the early 2000s, reaffirming the doctrinal rule that FCIA preemption is inapplicable to crop insurance bad faith claims based upon state law. The United States District Court for the District of North Dakota, the United States Court of Appeals for the Fifth Circuit, the Louisiana Court of Appeals, and the Kentucky Supreme Court all followed suit between 2001 and 2003. From 1995 to 2003, it appears that essentially every major case determined that the FCIA did not preempt state law crop insurance bad faith claims, leaving crop insurance bad faith as a remedy for America's farmers.

But despite the fact that Congress has never formally adopted legislation endorsing the preemption of state law claims by the FCIA, changes in federal regulations involving crop insurance in 2004 quietly produced this effect. For example, the language the Agre court relied upon in 7 C.F.R. section 400.352(b)(4) is not a part of federal regulation today. The recent decision of the Tennessee Court of Appeals in Plants, Inc. v. Fireman’s Fund Insurance Co., and its interpretation of the new FCIA regulations, further places the future of the crop insurance bad faith remedy in question.

171. Two decisions held that state law claims involving alleged insurance bad faith misconduct were not preempted by the FCIA. See Bullinger v. Trebas, 245 F. Supp. 2d 1060 (D.N.D. 2003); Reimers v. Farm Credit Servs. AgCOUNTRY, ACA, No. CIV. A5-00-168, 2001 WL 1820379 (D.N.D. 2001).
VI. PLANTS, INC. V. FIREMAN'S FUND, FEDERAL REGULATIONS AND THE FUTURE OF CROP INSURANCE BAD FAITH LIABILITY

A. THE PLANTS, INC. V. FIREMAN'S FUND DECISION

The Plants, Inc. v. Fireman's Fund Insurance Co. decision is in direct contrast to nearly two decades of judicial opinions from various jurisdictions throughout the country because it renewed the holdings of the Brown v. Crop Hail Management Inc. and Owen v. Crop Hail Management decisions. However, the Plants decision does not go as far as the Brown and Owen decisions, which both held that the Federal Crop Insurance Act ("FCIA") completely preempts state law.

In Plants, an insured nursery in Tennessee suffered a devastating loss of trees and shrubs as the result of a tornado. In total, the nursery claimed a loss in excess of one million dollars. However, the insurer's independent adjuster determined that due to a claimed "under-reporting of inventory," the nursery was entitled only to recover the much lower sum of $195,225. Following this determination, the nursery submitted the claim to arbitration, and the arbitrator ruled in favor of the crop insurer. After the arbitrator's decision, the nursery proffered claims of breach of contract, negligence, breach of the duty of care, negligent misrepresentation and statutory bad faith under Tennessee law against the insurer, the insurer's independent adjustment firm, and the independent insurance agency that solicited the crop insurance policy.

While the Plants court did not go as far as the complete preemption holdings of Brown and Owen, the court declined to adopt the reasoning of the various courts from other jurisdictions - that had adopted the doctrinal rule that the FCIA does not preempt state law claims for insurance bad faith. In distinguishing these prior hold-
ings of the majority rule, the Plants court focused largely on two Federal Crop Insurance Corporation ("FCIC") regulations that were quietly amended in 2004: 7 C.F.R. section 400.352(b)(4) and 7 C.F.R. section 400.176(b).

The revised 7 C.F.R. section 400.352(b)(4) prohibits a state or local government body or nongovernmental body from doing the following:

(4) Levy fines, judgments, punitive damages, compensatory damages, or judgments for attorney fees or other costs against companies, employees of companies including agents and loss adjustors, or Federal employees arising out of actions or inactions on the part of such individuals and entities authorized or required under the Federal Crop Insurance Act, the regulations, any contract or agreement authorized by the Federal Crop Insurance Act or by the regulations, or procedures issued by the Corporation. Nothing herein precludes such damages being imposed against the company if a determination is obtained from FCIC that the company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled.

Also, 7 C.F.R. section 400.176(b) is entitled "State action preemptions." This section states:

No policy of insurance reinsured by the Corporation and no claim, settlement, or adjustment action with respect to any such policy shall provide a basis for a claim of punitive or compensatory damages or an award of attorney fees or other costs against the Company issuing such policy, unless a determination is obtained from the Corporation that the Company, its employee, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled.

Interpreting these two provisions together, the Plants court found that the fact that the regulations referred to "state action preemptions" would indicate that some actions against private crop insurers could still be brought in state court. In analyzing 7 C.F.R. section 400.176(b), the Plants court found that the regulation barred state law

188. 7 C.F.R. § 400.176(b) (2013).
claims arising from the policy itself.\textsuperscript{190} Therefore, claims involving bad faith under Tennessee law were preempted because the action for bad faith refusal to honor a policy "is derivative of a determination regarding the policy."\textsuperscript{191} In addition, the court determined that the state law claims for breach of contract and breach of the duty of care were preempted by the FCIC regulations.\textsuperscript{192} Despite these holdings, the Tennessee Court of Appeals also determined that "state tort claims for negligence, misrepresentation, and fraud do not arise from the policy of insurance itself but from alleged tortious actions taken prior to the agreement being made or that occur outside the scope of the policy,"\textsuperscript{193} and were therefore not preempted. Thus, the \textit{Plants} decision leaves the crop insurance bad faith remedy in murky waters alongside claims based on common torts, such as negligence, misrepresentation and fraud. But the court did not directly answer the question of whether a tort claim for insurance bad faith would be preempted by the regulations.

\textbf{B. The Future of the Crop Insurance Bad Faith Remedy}

In analyzing the future of the crop insurance bad faith remedy, it is helpful to look at provisions elsewhere in the FCIA that appear to contemplate that state law tort claims would proceed against federally reinsured private crop insurers. In addition, the National Flood Insurance Program, another federally-sponsored insurance program, provides a useful comparison with the FCIA. This comparison also suggests that the FCIA's intent is not to completely preempt state law claims, particularly insurance bad faith claims based upon state tort law.

\textit{1. Indemnification Provision in the Federal Crop Insurance Act}

An indemnification provision, or the promise to reimburse or compensate another individual or entity who suffers a loss,\textsuperscript{194} is a typical provision in many contracts today.\textsuperscript{195} One of the most overlooked provisions in the FCIA is an indemnification provision. This provision states that the Board of Directors of the FCIC shall provide indemnification to federally reinsured crop insurers, agents and brokers in the event they incur liability for the errors or omissions on the part of the

\textsuperscript{190} Id. at *11.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at *13.
\textsuperscript{193} Id. at *11.
\textsuperscript{194} "Indemnification" is defined in Black's Law Dictionary as "The action of compensating for loss or damage sustained." \textit{Black's Law Dictionary} 783 (8th ed. 2004).
FCIC or FCIC brokers.  At least five different courts have cited indemnification as a rationale for rejecting preemption under the FCIA.  One provision, 7 U.S.C. § 1507(c)(3), states as follows:

The Board [of Directors of the FCIC] shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission.

The presence of this provision, passed by Congress, contemplates the possibility that federally reinsured private crop insurers could face a situation where they incur liability in a state court if a judgment is entered.  As the Tenth Circuit Court of Appeals noted in Meyer v. Conlon, a 1998 case that rejected federal preemption of state claims in the context of the FCIA, the indemnification provision would be “meaningless” if Congress anticipated state law claims against private crop insurers being permitted.  Indemnification provisions typically exist to apportion losses in the cases of a tort judgment being entered, and the presence of indemnification in the statutory arrangement of the FCIA anticipates that federally reinsured private crop insurers would face tort claims, including tort claims for insurance bad faith.

2. A Comparison with the National Flood Insurance Act

Support for the existence of the crop insurance bad faith remedy for American farmers can also be found in comparisons between the FCIA and the National Flood Insurance Program.  The decisions of at least two federal courts explicitly compared the FCIA and the Na-

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196. 7 U.S.C. § 1507(c) (2012).
198. 7 U.S.C. § 1507(c)(3).
199. Meyer, 162 F.3d at 1268-69.
200. 162 F.3d 1264 (10th Cir. 1998).
201. Id. at 1269.
Therefore, were we to accept the defendant’s argument, we would make § 1507(c) meaningless because indemnification would never be necessary: No plaintiff could sue because the FCIA preempts state law causes of action but does not create federal causes of action to replace them. This is not the intent of Congress, as the statute’s plain language shows.


tional Flood Insurance Act ("NFIA") in rejecting preemption. Similar to the case of crop insurance and the FCIA, the lack of a large private insurance market and the recognition of the altruistic obligation of the government to compensate those who have suffered catastrophic property losses led to the development of a federally-sponsored flood insurance program. Today, most standard homeowner's policies do not insure against losses due to flooding.

In 1968, the NFIA enabled private insurers to write flood insurance policies for property owners, and the federal government would reinsure these policies one hundred percent. It should be noted that a majority of courts have held that the NFIA preempts state law

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205. Keeton & Widiss, supra note 74, at 979.

Recognition of a humanitarian obligation of the government to provide relief to flood victims would justify a subsidized program of flood insurance on the theory that little if any more funds would be expended by the government on such a program than on direct relief, and that the net cost of direct and indirect relief measures would be reduced because the insurance fund accumulated from premiums paid by those exposed to the flood risk would pay part of the loss that is borne by the community generally in the absence of insurance.

Id.


207. See id.
claims alleging bad faith. However, as the United States District Court for the Eastern District of Texas in *Bullard v. Southwest Crop Insurance Agency, Inc.* noted, at the time of the enactment of the NFIA Congress provided a federal statutory cause of action if a federally reinsured flood insurer denied a claim. The relevant provision, 42 U.S.C. § 4053, states as follows:

The insurance companies and other insurers which form, associate, or otherwise join together in the pool under this part may adjust and pay all claims for proved and approved losses covered by flood insurance in accordance with the provisions of this chapter and, upon the disallowance by any such company or other insurer of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance of the claim, may institute an action on such claim against such company or other insurer in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

However, as the Eleventh Circuit Court of Appeals has noted, no such federal cause of action exists in the case of the FCIA. In fact, Congress has never explicitly stated in a statute that state law claims are preempted under the FCIA. If an insured has a flood insurance claim, and the insurer unreasonably delays and denies the claim with intentional or reckless disregard of the insured’s rights, then there is a remedy in federal court pursuant to 42 U.S.C. § 4053. But if a private crop insurer intentionally or recklessly disregards the rights of a farmer who protects his or her crops under a multi-peril crop insur-

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208. See C.E.R. 1988, Inc. v. The Aetna Cas. & Sur. Co., 386 F.3d 263, 272 n.12 (3rd Cir. 2004) ("The vast majority of courts have found that the NFIA preempts state law.").
211. *Williams Farms of Homestead, Inc.*, 121 F.3d at 635.

*The FCIA does not contain a similar provision concerning suits against participating private insurance companies. We thus infer that Congress intended to leave insureds with their traditional contract remedies against their insurance companies. Such remedies include a state law breach of contract claim. This inference is strengthened by other provisions of the FCIA and FCIC regulations that presume an action against private insurance companies. Id.; see also *Bullard*, 984 F. Supp. at 536.*

Unlike the NFIA, the FCIA does not include a provision which so clearly and explicitly grants a cause of action to insured claimants against private insurance companies. Absent such a provision, the court has no choice but to infer that "Congress intended to leave insureds with their traditional contract remedies against their insurance companies."

*Id.*
ance policy, not only does the farmer not have a remedy in federal court, but the farmer does not have a remedy in state court either if state law claims are preempted! It is difficult to believe Congress would have ever intended such a divergent result to occur between a property owner and a farmer with a crop insurance policy. Future courts examining preemption under the FCIA and the remedy of crop insurance bad faith under state tort law should, as a part of analysis, consider this inequality and follow the lead of the courts in Bullard and Williams.

VII. CONCLUSION

Crop insurance bad faith is a critical and significant legal remedy that protects American farmers. The remedy of first-party insurance bad faith essentially enables insurance policyholders to be protected if an insurer acts with reckless or intentional disregard for the farmer’s rights. In casinos, the proverbial “eye in the sky,” the omnipresent watchguard for gambling misconduct, “not necessarily is always meant to catch the cheaters, but it keeps the honest gamblers honest.”212 First-party insurance bad faith claims operate much like the “eye in the sky” does in casinos—insurance bad faith keeps insurers cognizant of their legal obligations and encourages responsive claims and settlement handling practices. The specter of a crop insurance bad faith claim keeps crop insurers honest and responsible.

The recent Plants, Inc. v. Fireman’s Fund Insurance Co.213 decision questions a nearly two-decade doctrinal rule that has developed to reject preemption of state law bad faith claims by the FCIA. In light of federal preemption in other areas, the Plants decision could mark the beginning of the decline of the crop insurance bad faith remedy. The future resolution of the preemption issue by the courts is one of the most significant issues facing America’s farmers in the courts today.

Crop insurers have protection because the policies they sell and service are federally reinsured. The protections for crop insurance policyholders, like insurance bad faith, are imposed by contractual obligations and those of the common law. If crop insurance bad faith is eliminated as a protection for American farmers, the level playing field for crop insurers and policyholders is removed. American farmers are placed at a disadvantage and are left without a bad faith remedy, while in other situations involving a first-party insurance claim

212. This quotation is paraphrased from a conversation I had in October 2011 with my colleague at the Florida State University in the College of Business, Darren Prum.
such as in health insurance or disability insurance, a policyholder would have a remedy. If a crop insurer acts intentionally or recklessly in disregard of a farmer's rights, that farmer, left without a crop if a covered cause of loss causes significant damage, could also face another loss with the absence of a bad faith remedy.

Country music artist Willie Nelson has long supported the idea that family farmers are the backbone of the nation.\textsuperscript{214} For farmers to remain the backbone of America, a level playing field must be preserved for farmers who hold crop insurance policies with federally reinsured private crop insurers. Among fields of opportunities,\textsuperscript{215} America's farmers deserve protection.

\textsuperscript{214} Rebuilding America's Economy with Family Farm-Centered Food Systems, FARM Aid, http://www.farmaid.org/site/c.qI5hNVJsE/b.6061617/k.7DEC/Making_the_Case.htm (last visited May 24, 2013).

\textsuperscript{215} Iowa Department of Transportation's registered trademarks and service marks, and unregistered marks owned by the Iowa DOT, IOWA DEPT TRANSP., 9 (2012), http://www.iowadot.gov/pdf_files/DOT_trademarks_servicemarks_external_policy.pdf (showing that the State of Iowa's state slogan is, "Iowa: Fields of Opportunities").