UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 3, 2014

CBCA 2876-FCIC, 3367-FCIC, 3956-FCIC

In the Matter of ACE AMERICAN INSURANCE COMPANY; AGRINATIONAL INSURANCE COMPANY, INC.; AMERICAN AGRI-BUSINESS INSURANCE COMPANY; COUNTRY MUTUAL INSURANCE COMPANY; GUIDEONE MUTUAL INSURANCE COMPANY; EVEREST REINSURANCE COMPANY; FARMERS MUTUAL HAIL INSURANCE COMPANY OF IOWA; GREAT AMERICAN INSURANCE COMPANY; HUDSON INSURANCE COMPANY; NAU COUNTRY INSURANCE COMPANY; OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA; PRODUCERS AGRICULTURE INSURANCE COMPANY; RURAL COMMUNITY INSURANCE COMPANY; and XL REINSURANCE COMPANY, INC.

Michael E. Tucci, Lawrence P. Block, and Robin K. Carlson of Stinson Leonard Street LLP, Washington, DC; and Charles D. Lee of National Crop Insurance Services, Inc., Overland Park, KS, counsel for Appellants.

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Grant Adams of Producers Agriculture Insurance Company, Amarillo, TX, counsel for Appellant Producers Agriculture Insurance Company.

Kimberley E. Arrigo, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Federal Crop Insurance Corporation.

Before Board Judges **GOODMAN**, **KULLBERG**, and **STEEL**.

STEEL, Board Judge.

The Department of Agriculture's Risk Management Agency (RMA), which supervises the Federal Crop Insurance Corporation (FCIC), has filed a motion for summary relief. In the motion, the RMA argues that the standard reinsurance agreement (SRA) that it entered into with the appellants, Ace American Insurance Company, et al., and the Federal Crop Insurance Act (FCIA) do not preclude the FCIC from changing its premium rate-making methodology at the end of each reinsurance year. Specifically, the RMA asserts that, as its rate-making authority is not limited by the SRA or by statute, modifying the rate-making methodology subsequent to entering into the 2011 SRA did not breach the SRA or violate section 1508(k)(8) of title 7 of the United States Code.

The appellants oppose the motion, asserting that the RMA's rate-making methodology is intrinsically tied to the terms of the SRA and that, once the negotiations for an SRA have been completed, the RMA no longer has any authority to change the methodology. The appellants allege that any change to the rate-making methodology violates section 1508(k)(8) of title 7 if implemented within five years after negotiating the SRA, and breaches the SRA. However, the appellants do not allege breach of any specific provision of the SRA.

For the reasons below, we grant the RMA's motion for summary relief. We hold that the FCIC did not breach the SRA when it modified the premium rate-making methodology after it entered into the agreement.

Background

Federal Crop Insurance Program and the Appellants

In 1938, Congress passed the original Federal Crop Insurance Act (FCIA), which is now codified, as amended, at sections 1501 through 1524 of title 7 of the United States Code. The FCIA is intended to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." 7 U.S.C. § 1502(a) (2012). The FCIC was created as an agency within the USDA to carry out the purposes of the FCIA. *Id.* § 1503.

Federal crop insurance is sold and serviced by private companies pursuant to the terms of a uniform contractual agreement with the FCIC. The agreement, which is negotiated and executed by the parties, is the SRA. It governs the relationship between the FCIC and each approved insurance provider (AIP), establishes the FCIC's obligation to provide federal reinsurance policies sold by the AIPs, and details the fees and expenses to be received by the AIPs for selling and servicing federal crop insurance.

Each appellant is an AIP, as defined by the FCIA, 7 U.S.C. § 1502(b)(2), and each writes federal crop insurance policies approved by the FCIC. The FCIC sets the premiums to be charged for crop insurance. The AIPs must offer coverage on the terms and conditions established by the FCIC. 7 U.S.C. § 1508(k)(1).

Standard Reinsurance Agreement Risk Allocation

Among other things, the SRA details the allocation of underwriting risks between the AIPs and the FCIC, including the percentage of collected premiums ceded to compensate the FCIC for its share of that risk, and the fees and expenses payable to the AIPs for selling and servicing federal crop insurance policies.

The AIPs earn income from their participation in the federal crop insurance program through two SRA provisions. One way that the AIPs earn income is through administrative and operating (A&O) expense reimbursements by the FCIC. The other provides for the AIPs to achieve an underwriting gain on the insurance policies they sell when they retain all or a portion of the premium paid on the insurance policies.

Section II of the SRA contains formulas for allocating risk between the AIPs and the FCIC. Section II is the framework for operating the crop insurance program. It states: "In exchange for premiums ceded by the Company to FCIC under this Agreement, FCIC will provide reinsurance to the Company with respect to such eligible crop insurance contracts." The SRA does not contain actual premium rates. Rather, in general, under specified formulas, the AIPs and the FCIC each bear a certain portion of the risk associated with the crop insurance policies.

While the gain/loss sharing formulas are somewhat complicated, the underlying premise is fairly straightforward. The AIPs achieve an underwriting gain by retaining more premiums than indemnities[1] paid. For example, if an AIP collected $100 in premiums and paid out $90 in indemnities, there would be a $10 underwriting gain. The gain/loss sharing provisions describe how the $10 gain is shared between the AIP and the FCIC.[2] The reverse is true for underwriting losses.

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[1] Crop insurance companies pay indemnities to compensate policy beneficiaries for their actual economic losses, up to the limiting amount of the insurance policy.

[2] For example, for the "Commercial Fund," which is a particular risk allocation pool under the SRA, "[t]he Company shall retain at least a 35 percent interest in premium . . . . The remainder shall be ceded to FCIC."

<u>Pertinent Federal Crop Insurance Act Provisions</u>

Section 1506(n) of title 7 states:

> (1) Projected loss ratio as of October 1, 1995. The Corporation shall take such actions as are necessary to improve the actuarial soundness[3] of Federal multiperil crop insurance coverage made available under [the FCIA].

Section 1508(d) of title 7 states:

> PREMIUMS REQUIRED.—The Corporation shall fix adequate premiums for all the plans of insurance of the Corporation at such rates as the Board determines are actuarially sufficient to attain an expected loss ratio of not greater than—
>
> a. 1.0 . . . .

Section 1508(i) of title 7 states:

> (i) ADOPTION OF RATES AND COVERAGES.—
> (1) IN GENERAL.—The Corporation shall adopt, as soon as practicable, rates and coverages that will improve the actuarial soundness of the insurance operations of the Corporation for those crops that are determined to be insured at rates that are not actuarially sound, except that no rate may be increased by an amount of more than 20 percent over the comparable rate of the preceding crop year.
> (2) REVIEW OF RATING METHODOLOGIES.—To maximize participation in the Federal crop insurance program and to ensure equity for producers, the Corporation shall periodically review the methodologies employed for rating plans of insurance under this subtitle consistent with section 507(c)(2).
> (3) ANALYSIS OF RATING AND LOSS HISTORY.—The Corporation shall analyze the rating and loss history of approved policies and plans of insurance for agricultural commodities by area.

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[3] The loss ratio of total premiums compared to total indemnities (claim payments) paid out each year indicates actuarial soundness. A program-wide loss ratio of no more than 1.0 would mean that the amount of premiums at least equals indemnities, and, therefore, is actuarially sound under the statute.

> (4) PREMIUM ADJUSTMENT.—If the Corporation makes a determination that premium rates are excessive for an agricultural commodity in an area relative to the requirements of subsection (d)(2) for that area, then, for the 2002 crop year (and as necessary thereafter), the Corporation shall make appropriate adjustments in the premium rates for that area for that agricultural commodity.

Section 1508(k)(8) of title 7 provides that the FCIC may renegotiate "the financial terms and conditions of each [SRA] . . . once during each period of 5 reinsurance years."

<u>2011 Standard Reinsurance Agreement Negotiation</u>

The FCIC began planning to negotiate the 2011 SRA in the spring of 2009. One of the FCIC's objectives for the SRA was to set a reasonable rate of return on retained premiums. The RMA negotiated the 2011 SRA with the appellants beginning in August 2009 and continuing until June 2010. This SRA became effective initially for the reinsurance year starting July 1, 2010, and ending June 30, 2011.[4]

On November 30, 2009, the FCIC/RMA published a study of its rate-making methodology (study 1) on its website in draft form for public comment. The draft study contained twelve recommendations. On April 25, 2010, the RMA posted the final version of study 1 on its website.

On May 24, 2010, the RMA commissioned a second study of its rate-making methodology based on the recommendations contained in study 1 regarding weighting historical data. In the summer of 2011, the RMA received a draft report of the second study (study 2).

On November 28, 2011, the FCIC announced that it would apply the recommendations from study 2 to corn and soybean premium rates beginning with the 2012 crop year. On November 27, 2012, the RMA adopted the recommendation from study 2 for other crops, including wheat, cotton, rice, and grain sorghum. In November 2013, the RMA applied some form of the recommendations from study 2 to other crops.

<u>Agency Determinations, Non-Response, and Appeals</u>

The appellants requested that the RMA's Deputy Administrator for Insurance Services determine whether the change of the rate-making methodology (changing

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[4] Each appellant except GuideOne Mutual Insurance Company executed the 2011 SRA. GuideOne became a party to the 2011 SRA when it entered into an assignment agreement with Austin Mutual Insurance Company. The FCIC approved the assignment.

premium rates) subsequent to entering into the 2011 SRA breached the SRA. The Deputy Administrator determined[5] that the RMA did not breach the SRA because the SRA does not set premium rates and statute allows premium rates to change in order to maintain an actuarially-sound crop insurance program. When the appellants sought a determination on the same issue for the 2013 reinsurance year, the Deputy Administrator did not respond.

The AIPs here appeal the agency determination and the non-response. The Board docketed the appeals as CBCA 2876-FCIC on July 6, 2012; CBCA 3367-FCIC on May 6, 2013; and CBCA 3956-FCIC on July 9, 2014. We consolidated them because they arise from the same transaction and present identical issues.

Discussion

Summary Relief Standard

In ruling upon the RMA's motion, we recognize the following:

> Summary relief is this "Board's analogous procedure to summary judgment in court . . . ." *GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306. It is well recognized that granting summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* In considering summary judgment, it is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id.* at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id.* at 255. The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party is then required to "go beyond the pleadings

[5] The Deputy Administrator for Insurance Services made these determinations on March 20, 2012, for the 2011 reinsurance year and on January 29, 2013, for the 2012 reinsurance year.

> and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

Navigant SatoTravel v. General Services Administration, CBCA 449, 08-1 BCA ¶ 33,821, at 167,403.

Changing the Premium Rate-Making Methodology Does Not Change the SRA

Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (*citing M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and the Board's task is to determine which party's interpretation should prevail. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151.

The appellants allege that "[p]remium rates and the underlying methodology used to determine them are the premise for each financial term and condition of the SRA." Complaint ¶ 88. The appellants claim that, "[a]s a result, a change in rate setting methodology results in a change to the financial terms and conditions of the SRA." *Id.* ¶ 89. The appellants assert that "[b]ecause the 2011 SRA became effective July 1, 2010, FCIC lacked authority to change the financial terms and conditions of the 2011 SRA until July 1, 2015 pursuant to 7 U.S.C. § 1508(k)(8)." *Id.* ¶ 90.

We find nothing in the SRA that precludes the RMA from revising the rate-making methodology or premium rates as necessary to comply with the Act. The financial terms of the SRA are contained in section II. That section does not fix premium rates at any specified level or prevent the RMA from revising the rates. The financial terms contained in section II of the SRA, i.e., the risk allocation mechanisms, remain unchanged as a result of the rate adjustments for any crop. Thus, the RMA is not precluded by the terms of the SRA from changing premiums rates or the rate-making methodology.

Moreover, even if there is an ambiguity in the SRA regarding the permissibility of changing premium rates, statute establishes that the FCIC has the power and duty to administer a crop insurance program that is actuarially sound. *See American Growers Insurance Co.*, AGBCA 98-200-F, 00-2 BCA ¶ 30,980, at 152,897 (Houry, J., concurring) ("Generally, with certain exceptions not relevant here, the Board is not empowered to reform the SRA by granting rights to Appellant, or ascribing obligations to FCIC, not addressed in the SRA.").

Changing the Premium Rate-Making Methodology Does Not Violate Statute

Section 1508(k)(8) provides that the FCIC may renegotiate "the financial terms and conditions of each Standard Reinsurance Agreement . . . once during each period of 5 reinsurance years." Therefore, the appellants assert that "[b]ecause the 2011 SRA became effective July 1, 2010, FCIC lacked authority to change [premium rates] until July 1, 2015 pursuant to 7 U.S.C. § 1508(k)(8)." Complaint ¶ 90.

Statutory interpretation is a question of law, beginning with the plain language of the statute. *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004) (citing *Williams v. Taylor*, 529 U.S. 420 (2000)). However, "[w]hether or not words of a statute are clear is itself not always clear." *Texas State Commission for the Blind v. United States*, 796 F.2d 400, 406 (Fed. Cir. 1986) (en banc). To determine whether a statute is clear, canons of construction are useful to extract the plain meaning from the statute. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Such canons "are designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Id.*

The plain meaning of a statute comes from its "text and structure." *Norfolk Dredging Co.*, 375 F.3d at 1110. This meaning "of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, *Inc.*,467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Therefore, we begin with the statutory provision's plain language. Section 1508(k)(8) provides that the FCIC may renegotiate "the financial terms and conditions of each Standard Reinsurance Agreement . . . once during each period of 5 reinsurance years." However, we do not read this provision in a vacuum. We read it within the context of the entire statute, *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there[,]" *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Thus, we interpret the other pertinent provisions surrounding section 1508(k)(8) of title 7. We provided the relevant text of each above. These sections require the RMA to (1) provide premium rates to achieve an overall projected loss ratio (in accordance with section 1506(n)); (2) fix premiums sufficient to cover anticipated losses and a reasonable reserve (in accordance with section 1508(d)); and (3) adjust premium rates if the RMA determines they are excessive (in accordance with section 1508(i)).

The appellants' interpretation of section 1508(k)(8) does not align with the FCIC's requirements in sections 1506(n), 1508(d), and 1508(i) to maintain an actuarially-sound federal crop insurance program. To accept the appellants' interpretation that section 1508(k)(8) precludes changing the rate-making methodology or premium rates after the SRA has been negotiated would render these provisions of the FCIA meaningless. This is because, under the appellants' interpretation, the RMA would not be able to change premium rates for the five years immediately subsequent to entering into the SRA. Thus, the RMA would not be able to make rate adjustments even if such changes would be necessary to increase premiums to cover losses to achieve actuarial soundness.

No statutory construction should be adopted that would render statutory words or phrases meaningless, redundant, or superfluous. *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 489 n.13 (2004) ("It is, moreover, 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991); *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (rejecting an interpretation that would violate "the canon that [courts] must 'give effect, if possible, to every clause and word of a statute' and should avoid rendering any of the statutory text meaningless or as mere surplusage"). Therefore, we must reconcile sections 1506(n), 1508(d), 1508(i), and 1508(k)(8) to give all provisions meaning.

The "financial terms and conditions" mentioned in section 1508(k)(8) are the negotiated terms for risk sharing, i.e., those provisions contained in section II of the SRA. Those risk sharing provisions are locked in for the five years subsequent to entering into the SRA. But the requirement to maintain a crop insurance program that is actuarially sound in sections 1506(n), 1508(d), and 1508(i) means that premium rates can be revised as necessary. Changing premium rates is a means to achieve the ends dictated by statute and encompassed in the SRA.

<u>The Appellants' Alternative Theories of Relief Lack Merit</u>

The appellants also raise, as theories of relief in their complaint, breach of the duty of good faith and fair dealing, promissory estoppel, and reformation based on mutual mistake. However, based on the analysis above, as well as the following, these theories fail.

Implied Duty of Good Faith and Fair Dealing

The covenant of good faith and fair dealing, implied in every contract, "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); *see also Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730, at 166,994 (2007) ("An implied covenant of good faith and fair dealing imposes an obligation on the part of each party to a contract to act reasonably."). However, the "implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). Based on their interpretation of the SRA and statute, the appellants argue that the RMA unreasonably adopted a new methodology for calculating premium rates and, thus, unlawfully changed premium rates after executing the SRA. Complaint ¶ 76. Because the FCIC, in modifying its rate-making methodology within the immediate five years subsequent to entering into the 2011 SRA, did what the contract allows based on the results of studies 1 and 2, there is no violation of the duty of good faith and fair dealing.

Promissory Estoppel

Promissory estoppel means that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Law Mathematics & Technology, Inc. v. United States*, 779 F.2d 675, 678 (Fed. Cir. 1985). Therefore, "[a] party claiming an estoppel of this nature must prove, first, that there was a promise or representation made, second, that the promise or representation was relied upon by the party asserting the estoppel in such a manner as to change his position for the worse, and, third, that the promisee's reliance was reasonable and should have been reasonably expected by the promisor." *Id.* (citing *Heckler v. Community Health Services of Crawford*, 467 U.S. 51 (1984)). However, when a contract already exists, this form of relief is not available because promissory estoppel "create[s] a contract in the furtherance of justice and fairness, when no such contract exists in fact." *See Burnett v. United States*, 40 Fed. Cl. 806, 810 (1998). Furthermore, promissory estoppel is not a theory upon which the Board may grant relief. *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553, at 166,172.

The appellants do not address the jurisdictional impediment to the Board granting relief on this theory. But, even if the Board could grant such relief, the appellants fail to establish that there is a genuine dispute as to whether any reliance they had on alleged representations that premium rates would remain stagnant for the five years immediately subsequent to entering into the SRA was reasonable. Because the SRA does not establish premium rates and statute allows for the RMA to change premium rates each reinsurance year to maintain an actuarially-sound crop insurance program, the appellants' thinking that premium rates would remain stagnant for five years is unreasonable. In addition, the SRA is a contract and relief based on promissory estoppel is not available when a contract exists. Holding the parties to their bargain, as enunciated in the contract, creates no injustice.

Reformation

The appellants would have to prove the following to allow for reformation of the SRA: "(1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation." *CH2M Hill Hanford Group v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666 (quoting *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994)). The appellants argue that the mutual mistake is the belief that the existing rating methodology would remain the basis for determining premium rates for the five-year period following entering into the 2011 SRA. However, there is no evidence in the record indicating that the RMA was at all mistaken about its ability, based on the SRA and statute, to change rate-making methodology and premium rates to maintain an actuarially-sound crop insurance program. Thus, the appellants fail to establish that there is a genuine issue of material fact that both parties were mistaken in their belief that premium rates would remain the same for the five years subsequent to entering into the SRA. The RMA never had this belief.

Decision

The RMA's motion for summary relief is granted. The appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

H. CHUCK KULLBERG
Board Judge