

# The Business, Entrepreneurship & Tax Law Review

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Volume 6 | Issue 1

Article 5

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2022

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### Recommended Citation

Chad G. Marzen, *The Actions of Crop Insurance Bad Faith*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 17 (2022).

Available at: <https://scholarship.law.missouri.edu/betr/vol6/iss1/5>

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# **The Actions of Crop Insurance Bad Faith**

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## I. INTRODUCTION

The federal crop insurance program is a critical risk management tool for agricultural producers<sup>1</sup> which also provides an important safety net for farmers.<sup>2</sup> Crop insurance seeks to protect against risks posed by adverse weather, drought, disease,<sup>3</sup> and especially assists newer farmers who face the risk of potentially being pushed out of agriculture due to catastrophic events.<sup>4</sup> In an era where bipartisanship is difficult to achieve, crop insurance has traditionally retained strong bipartisan support from Democratic, as well as Republican, lawmakers.<sup>5</sup> This point was recently reaffirmed through Congress' strong support of Farm Bills in 2014<sup>6</sup> and 2018.<sup>7</sup>

Established in 1938 through the enactment of the Federal Crop Insurance Act,<sup>8</sup> the federal crop insurance program provides multi-peril crop insurance which is sold and serviced through private insurance companies and reinsured by the federal government.<sup>9</sup> Multi-peril crop insurance policies cover a variety of risks ranging from excessive wind to drought and frost.<sup>10</sup> Coverage is available for well over 100 crops, including a variety of fruits and vegetables found at grocery stores and farmers markets, such, oranges, tomatoes, grapefruits, and apples among many others.<sup>11</sup> By contrast, "crop hail" insurance policies cover risk posed by only hail, which is considered a particularly localized risk. These types of specialized policies are sold and serviced by private insurance companies and therefore do not fall under the umbrella of the federal crop insurance program.<sup>12</sup>

Arguably, the federal crop insurance program has been a vital in ensuring adequate and affordable food supply in the United States. As former Congressman

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1. See Jeremy Forrett, *Crop Insurance: An Important Risk Management Tool*, FARM CREDIT EAST (Mar. 10, 2020), available at <https://www.farmcrediteast.com/knowledge-exchange/Blog/todays-harvest/crop-insurance-an-important-risk-management-tool> (last visited Jan. 24, 2022).

2. See *Proven Safety Net for Growers – Success in Crop Insurance*, Western Growers Magazine (Sept. 2016), available at <https://www.wga.com/magazine/2016/09/02/proven-safety-net-growers-%E2%80%94-success-crop-insurance> (last visited Jan. 24, 2022).

3. See *Understanding Crop Insurance*, Insurance Information Institute (2022), available at <https://www.iii.org/article/understanding-crop-insurance> (last visited Jan. 28, 2022) (hereinafter "Insurance Information Institute").

4. See Jason Alexander, *A Strong Safety Net is Critical for All Farmers*, FARM CREDIT MID-AMERICA (June 15, 2017), available at <https://e-farmcredit.com/insights/business-of-farming/strong-safety-net-critical-for-all-farmers> (last visited Jan. 24, 2022).

5. See Erica Hunzinger, *Which Side Are You On? When It Comes To Farm Bill Politics, The Lines Blur*, HARVEST PUBLIC MEDIA (Jan. 31, 2018), available at <https://www.harvestpublicmedia.org/post/which-side-are-you-when-it-comes-farm-bill-politics-lines-blur> (last accessed Jan. 24, 2022).

6. See generally Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion*, 19 DRAKE J. AGRIC. L. 1 (2014).

7. See generally Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30 FORDHAM ENVTL. L. REV. 49 (2019).

8. See 7 U.S.C. § 1501 et. seq. (2022).

9. See Marion Nestle, *The Exceedingly Strange World of Federal Crop Insurance Subsidies*, THE ATLANTIC (Apr. 16, 2012), available at <https://www.theatlantic.com/health/archive/2012/04/the-exceedingly-strange-world-of-federal-crop-insurance-subsidies/255989/> (last accessed Jan. 28, 2022).

10. See Insurance Information Institute, *supra* note 4.

11. See *Specialty Crops*, United States Department of Agriculture Risk Management Agency (2022), available at <https://www.rma.usda.gov/en/Topics/Specialty-Crops> (last accessed Jan. 28, 2022).

12. See Insurance Information Institute, *supra* note 4.

Luke Messer of Indiana stated in his remarks on the floor of the United States House of Representatives on June 7, 2017:

Through the crop insurance program, insurers can extend coverage to crops of all kind, providing farmers with the protections they need to do what they do best: grow food. This program is an example of the government partnering with industry to offer an exceptionally valuable service while maintaining a carefully limited Federal Government role. Frankly, it should be used as a model for other Federal reinsurance programs. It is a success story, and even if you are not a farmer, you have benefited from its existence. It has helped you receive more affordable food and helped America maintain its agricultural preeminence. That is a great result for virtually every American.<sup>13</sup>

There are several instances in which an agricultural producer will face an adverse event, such as a frost or drought, which will necessitate the filing of an insurance claim. While many crop insurance claims are resolved without any major incident and without litigation, there are some cases where litigation will ensue. In rare cases, an allegation will arise where a crop insurance claim is handled not only improperly, but also recklessly and/or intentionally in disregard with the agricultural producer's rights. Claims based upon insurance bad faith, which remain common in the realm of underinsured motorists coverage and automobile insurance,<sup>14</sup> life insurance,<sup>15</sup> as well as health insurance,<sup>16</sup> may also appear within the crop insurance industry.

This Article comprehensively analyzes the claims of, and insurer defenses to, crop insurance bad faith claims. Section II of this Article provides a brief overview of insurance bad faith liability. Section III discusses a taxonomy of crop insurance bad faith claims and the types of fact patterns in which a crop insurance bad faith claim may arise. Section IV examines possible defenses of insurers with crop insurance bad faith claims.

By analyzing state and federal caselaw which have addressed crop insurance bad faith claims, the United States Department of Agriculture Risk Management Agency's Loss Adjustment Manual (LAM) Standards Handbook, and general legal principles regarding insurance bad faith, policymakers, insurers, and producers can better understand the complexity of crop insurance bad faith and the situations in which it may arise.

## II. A BRIEF OVERVIEW OF INSURANCE BAD FAITH LIABILITY

In order to better understand bad faith in the context of crop insurance, one must be familiar with insurance bad faith in general. A policy underpinning insurance contracts is that an insurer owes a duty of good faith and fair dealing to its

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13. See 163 CONG. REC. H4656 (daily ed. June 7, 2017) (speech of Rep. Messer).

14. See *e.g.*, *In re State Farm Mutual Automobile Insurance Company*, 614 S.W.3d 316 (Tex. Ct. App. 2020).

15. See *e.g.*, *Folsom v. Century Life Assurance Company*, Case No. 118,920, 2021 WL 5822785 (Okla. Ct. Civ. App. Dec. 8, 2021).

16. See *e.g.*, *Ex parte Simmons*, 791 So.2d 371 (Ala. 2000).

insured with regard to claims handling.<sup>17</sup> Historically, one of the first courts to adopt a cause of action for first party insurance bad faith was the California Supreme Court in 1973 in the case of *Gruenberg v. Aetna Insurance Company*.<sup>18</sup> In *Gruenberg*, the Court held an insurer who “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.”<sup>19</sup>

Following the landmark decision made in *Gruenberg*, a number of jurisdictions chose to adopt causes of action for insurance bad faith. It is important to note the standard of proof for recovery on a bad faith claim varies from jurisdiction to jurisdiction. Some jurisdictions, including Pennsylvania, hold an action for bad faith requires “(1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim.”<sup>20</sup> Other jurisdictions, including Missouri, require a “vexatious” refusal to pay.<sup>21</sup>

In a number of jurisdictions, first party bad faith claims sound in tort law. In others, bad faith claims are statutory in nature.<sup>22</sup> For example, Missouri has a statute which provides for recovery by an insured against an insurer in case of a vexatious refusal to pay.<sup>23</sup> The statute provides: “If, the insurer has failed or refused for a period of thirty days after due demand therefor prior to the institution of the action, suit or proceeding, to make payment under and in accordance with the terms and provisions of the contract of insurance, and it shall appear from the evidence that the refusal was vexatious and without reasonable cause, the court or jury may, in addition to the amount due under the provisions of the contract of insurance and interest thereon, allow the plaintiff damages for vexatious refusal to pay and attorney’s fees.”<sup>24</sup>

A question thus arises as to what specific actions of an insurer may constitute indicia of bad faith in claims handling. Florida has a first party insurance bad faith statute which states bad faith is present in cases where an insurer acts in such a way as to not attempt “in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.”<sup>25</sup>

The following actions are listed as unfair claims settlement practices and thus are actions constituting insurance bad faith:

- Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other

17. See *Burgess v. Allstate Fire and Casualty Insurance Company*, Case No. 03-20-00088-CV, 2021 WL 5498758 at \*1 (Tex. Ct. App. Nov. 24, 2021) (“Under the common law, an insurance company owes a duty of good faith and fair dealing to its insured in its handling and processing of a claim for benefits”).

18. See *Gruenberg v. Aetna Insurance Company*, 510 P.2d 1032 (Cal. 1973).

19. *Id.* at 1037.

20. See *Rancosky v. Washington National Insurance Company*, 170 A.3d 364 (Pa. 2017).

21. See *Hensley v. Shelter Mutual Insurance Company*, 210 S.W.3d 455, 465-466 (Mo. Ct. App. S.D. 2007).

22. See generally Chad G. Marzen, *Crop Insurance Bad Faith: Protection for America’s Farmers*, 46 CREIGHTON L. REV. 619, 631.

23. See Mo. Rev. Stat. § 375.296 (2022).

24. *Id.*

25. See Fla. Rev. Stat. 624.155(b)(1) (2022).

material document which was altered without notice to, or knowledge or consent of, the insured.<sup>26</sup>

A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy.<sup>27</sup>

In addition, any of these following actions encompass bad faith conduct if they indicate a “general business practice”<sup>28</sup> on the part of the insurer:

Failing to adopt and implement standards for the proper investigation of claims.<sup>29</sup>

Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.<sup>30</sup>

Failing to acknowledge and act promptly upon communications with respect to claims.<sup>31</sup>

Denying claims without conducting reasonable investigations based upon available information.<sup>32</sup>

Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of an insured within 30 days after proof-of-loss statements have been completed.<sup>33</sup>

Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement.<sup>34</sup>

Failing to promptly notify the insured of any additional information necessary for the processing of a claim.<sup>35</sup>

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26. See Fla. Rev. Stat. 626.9541(1)(i)(1) (2022).

27. See Fla. Rev. Stat. 626.9541(1)(i)(2) (2022).

28. See Fla. Rev. Stat. 626.9541(1)(i)(3) (2022).

29. See Fla. Rev. Stat. 626.9541(1)(i)(3)(a) (2022).

30. See Fla. Rev. Stat. 626.9541(1)(i)(3)(b) (2022).

31. See Fla. Rev. Stat. 626.9541(1)(i)(3)(c) (2022).

32. See Fla. Rev. Stat. 626.9541(1)(i)(3)(d) (2022).

33. See Fla. Rev. Stat. 626.9541(1)(i)(3)(e) (2022).

34. See Fla. Rev. Stat. 626.9541(1)(i)(3)(f) (2022).

35. See Fla. Rev. Stat. 626.9541(1)(i)(3)(g) (2022).

- Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.<sup>36</sup>

A number of these specific practices have appeared within the context of crop insurance claims as well.

### III. A TAXONOMY OF CROP INSURANCE BAD FAITH CLAIMS

There are several ways in which a typical crop insurance bad faith claim may arise. In some cases, there are problems with the adjusting process itself regarding the claim. With this type of case, an insurer may be accused of recklessness or intentional misconduct with the methods of adjusting a claim. In other cases, an insurer and its representatives may face allegations of misrepresentations made to agricultural producers as to the insurability of a crop. Insurers may also face claims the insurer or its representatives committed errors in the crop insurance application process. Finally, in at least one case, an insurer faced claims they failed to properly inspect a nursery for cold protection equipment prior to the insurance coverage taking effect.

#### A. *Bad Faith in the Adjusting Process*

The lack of interest in a fair and reasonable inspection of potential crop damage during the loss adjustment process can certainly lead to the question of bad faith liability. An excellent example of this took place in *Moss v. American Alternative Insurance Company*.<sup>37</sup> Cotton crops of the insured were covered by a crop hail policy which covered hail damage, but not that of rain, wind, or other weather events.<sup>38</sup> On September 24, 2005, a storm passed through the area of the cotton crops and the insured submitted an insurance claim for hail damage.<sup>39</sup> Less than two weeks later, on October 4, 2005, an insurance adjuster inspected the cotton fields on behalf of the insurer.<sup>40</sup> The key in the case was the insured's testimony the adjuster allegedly told him "I see no hail damage" without examining any of the cotton plants.<sup>41</sup> In addition, the managing agent of the insurer apparently notified the producer the arbitration process was mandatory and binding, when the crop hail policy at issue actually did not have such a term.<sup>42</sup> Particularly in favor of the producer was the testimony of two independent crop adjusters who formerly worked on behalf of the insurer who testified in essence there was pressure by management to underestimate losses in hail claims to minimize payments.<sup>43</sup> With these facts, the United States District Court for the Eastern District of Arkansas found that a reasonable jury could find the insurer acted in bad faith, noting the testimony suggested "the adjusting process was a sham designed to cover the fact that [insurer] never intended to pay

36. See Fla. Rev. Stat. 626.9541(1)(i)(3)(h) (2022).

37. See *Moss v. American Alternative Insurance Corporation*, Case No. 5:06CV00010 JLH, 2006 WL 3147438 (E.D. Ark. Nov. 1, 2006).

38. *Id.* at \*1.

39. *Id.* at \*2.

40. *Id.*

41. *Id.*

42. *Id.* at \*5.

43. *Id.* at \*7.

[the insured's] claim for hail damage regardless of whether the claim was meritorious."<sup>44</sup>

Some crop insurance bad faith claims involving adjusting issues concern the actual adjusting methods utilized by the insurer. In *Boyd v. United Farm Mutual Reinsurance Company*, the individuals who were insured suffered damage to an apple crop as a result of a hailstorm.<sup>45</sup> The apple crop was covered by a crop hail policy.<sup>46</sup> The insureds asked the insurer's adjuster to utilize a ladder to obtain samples from the tops of the trees, as well as the side of the trees.<sup>47</sup> However, the adjuster only examined apples which could be reached from the ground, an adjusting technique which may possibly overlook where hail damage may be heavier (the top of the tree).<sup>48</sup> The insurer's adjuster calculated a loss of \$40,782.50.<sup>49</sup> The insureds hired their own independent adjuster who examined damage from the top and sides of the trees, calculating a loss of \$98,708.<sup>50</sup>

The jury in the case found in favor of the insureds.<sup>51</sup> On appeal, the Illinois Court of Appeals stated the "plaintiffs were genuinely concerned with the proper method to be used in determining loss and not simply with the end result."<sup>52</sup> The Illinois Court of Appeals also held the manifest weight of the evidence supported the jury's finding that the insurer acted vexatiously and unreasonably in the case.<sup>53</sup>

Delays by the insurer in the adjusting of a claim can also lead to bad faith liability. In the case of *Bruhn Farms Joint Venture v. Fireman's Fund Insurance Company*, the insured incurred a significant hail loss on September 11, 2012.<sup>54</sup> The adjustment process was not completed in the case until nearly two months later, on November 5, 2012.<sup>55</sup> The insured contended the delay from the date of loss (September 11, 2012) to the date the losses were adjusted (October 29, 2012) was unreasonable.<sup>56</sup> In addition, the insured also contended the insurer's failure to undertake negotiations regarding the amount of loss was unreasonable as well.<sup>57</sup> Despite the insured's arguments, the United States District Court for the Northern District of Iowa held the insurer was entitled to summary judgment on the bad faith claim.<sup>58</sup>

The Eighth Circuit Court of Appeals in *Bruhn Farms Joint Venture* overturned the summary judgment on appeal.<sup>59</sup> The Eight Circuit Court of Appeals' review of the evidence yielded a different result, and the Court noted several instances of conduct raised jury questions of bad faith. "Most specifically the delay in adjusting the fields and then, for the next several months, leading [insured] to believe that the

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44. *Id.*

45. See *Boyd v. United Farm Mutual Reinsurance Company*, 596 N.E.2d 1344 (Ill. Ct. App. 5th Dist. 1992).

46. *Id.* at 1345.

47. *Id.* at 1346.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1349.

52. *Id.*

53. *Id.*

54. See *Bruhn Farms Joint Venture v. Fireman's Fund Insurance Company*, 103 F.Supp.3d 968, 972 (N.D. Iowa 2015).

55. *Id.* at 978.

56. *Id.*

57. *Id.*

58. *Id.* at 978-979.

59. See 823 F.3d 1161 (8th Cir. 2016).



claim would be favorably settled without having to go through the hassle of a joint appraisal.”<sup>60</sup> *Bruhn Farms Joint Venture* illustrates that prolonged time delays in the adjustment of a claim is a marker of potential bad faith.

Outside the *Moss*, *Boyd* and *Bruhn Farms Joint Venture* cases, the provisions of the United States Department of Agriculture Risk Management Agency’s Loss Adjustment Manual Standards Handbook outline adjusting standards which, if violated, could constitute indicia of a bad faith claim. The Loss Adjustment Manual Standards Handbook (LAM) outlines the standards for claims involving multi-peril crop insurance.<sup>61</sup> One of the primary duties of the insurer is to “ensure that the adjuster has necessary equipment, is trained in its operation, and that such equipment is in proper working order to perform loss adjustment duties.”<sup>62</sup> This duty requires a crop insurance adjuster be properly trained to adjust claims. This duty is especially significant in a time when the federal crop insurance program has expanded beyond covering traditional cash crops into organic agriculture.<sup>63</sup> Thus, adjusters must be familiar with organic crops and be aware of the many differences between a traditional crop and organic crop.

Specific to loss adjusting, a crop insurance adjuster has the obligation to “visit farms for the purpose of inspecting damaged or destroyed crops during the growing season or following harvest.”<sup>64</sup> In addition, the insurer must “determine and/or verify any insured and uninsured causes of loss.”<sup>65</sup> These standards require adjusters to actually visit the damaged crops at issue, actually inspect them, and determine if an insured cause of loss is present. In the event that an adjuster doesn’t actually visit the farm or visually inspect a loss, this failure certainly would constitute evidence of bad faith conduct on the part of an insurer.

### B. Bad Faith and Misrepresentations as to Crop Insurability

Allegations of misrepresentations with regard to insurability of a crop for multi-peril crop insurance may also appear prominently in a potential bad faith claim. As the Florida statute regarding unfair claims settlement practices specifically notes, misrepresentations as to “pertinent facts or insurance policy provisions relating to coverages at issue” can indicate bad faith misconduct on the part of an insurer.

Allegations of negligent misrepresentation and intentional misrepresentation arose in the case of *Dixon v. Producers Agriculture Insurance Company*.<sup>66</sup> In the *Dixon* case, a group of farmers were concerned about a requirement that for their burley tobacco crops to be insurable through multi-peril crop insurance, they must

60. *Id.* at 1167.

61. See *Loss Adjustment Manual Standards Handbook, 2021 and Succeeding Crop Years*, United States Department of Agriculture, Federal Crop Insurance Corporation, FCIC-25010-1 (Mar. 15, 2021) (hereinafter “Loss Adjustment Manual”).

62. *Id.* at pg. 7.

63. See *Organic Crops*, United States Department of Agriculture Risk Management Agency (2022), available at <https://www.rma.usda.gov/en/Topics/Organic-Crops> (last accessed Jan. 31, 2022).

64. See Loss Adjustment Manual, *supra* note 62 at p. 9.

65. *Id.*

66. See *Dixon v. Producers Agriculture Insurance Company*, 198 F.Supp.3d 832, 835 (M.D. Tenn. 2016).

have planted an insurable crop on the land for one of the past three years prior to obtaining insurance.<sup>67</sup> The burley tobacco farmers attended a presentation by the underwriting supervisor of the insurer who confirmed this requirement but also noted that if the requirement wasn't met the producers must obtain a written agreement from the Risk Management Agency to be eligible for multi-peril crop insurance.<sup>68</sup>

Later, that underwriting supervisor allegedly told two insurance agents that if the burley tobacco farmers had raised a hay crop within the past three years, that crop would be considered "insurable."<sup>69</sup> This was also confirmed in writing in an email from the underwriting supervisor to the insurance agents.<sup>70</sup> The insurance agents communicated this information to the burley tobacco farmers, who obtained multi-peril crop insurance for the burley tobacco crop.<sup>71</sup>

The burley tobacco crop incurred a crop loss during the 2010 crop year.<sup>72</sup> The claims were originally paid by the insurer, but later the indemnity was requested back after it was determined that the hay crop which had been planted on the land within the past three years was actually not an insurable crop.<sup>73</sup>

Under these facts, the United States District Court for the Middle District of Tennessee denied the insurer's motion for summary judgment on the negligent misrepresentation and fraudulent misrepresentation claims, noting there was sufficient evidence of a jury question that the insurer "knowingly misrepresented to the farmers that they could plant their tobacco crop and obtain coverage from [insurer] on that crop without procuring a written agreement from the RMA."<sup>74</sup>

Similarly, allegations of misrepresentations as to the insurability of a crop appeared in the case of *Pelzer v. ARMtech Insurance Services, Inc.*<sup>75</sup> In *Pelzer*, two groups of farmers planted non-irrigated corn behind winter wheat in two Arkansas counties.<sup>76</sup> This occurred following a representation made by their crop insurance agent that double-cropping would be insurable.<sup>77</sup> The crop insurance agent allegedly received this representation from the national claims manager of the insurer.<sup>78</sup>

Multi-peril crop insurance policies require farmers to follow "good farming practices," otherwise a claim is subject to denial.<sup>79</sup> In the *Pelzer* case, after the producers filed a crop loss claim, the insurer later denied the claim on the basis that double-cropping was not a good farming practice.<sup>80</sup> The RMA upheld the good farming practices determination of the insurer on appeal.<sup>81</sup>

The agricultural producers brought claims of negligence, deceit, constructive fraud and deceptive trade practices against the insurer.<sup>82</sup> Similar to the fact issue in

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67. *Id.* at 834.

68. *Id.* at 834-835.

69. *Id.* at 835.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 838.

75. See *Pelzer v. ARMtech Insurance Services, Inc.*, 928 F.Supp.2d 1071 (E.D. Ark. 2013).

76. *Id.* at 1074.

77. *Id.*

78. *Id.*

79. See 7 C.F.R. § 457.8 para. (1).

80. See *Pelzer v. ARMtech Insurance Services, Inc.*, 928 F.Supp.2d at 1075.

81. *Id.*

82. *Id.*

the *Dixon* case, the United States District Court for the Eastern District of Arkansas found genuine questions of material fact could potentially be presented on the producers' claims of negligence, deceit, constructive fraud and deceptive trade practices.<sup>83</sup>

While the *Dixon* and *Pelzer* cases primarily centered around allegations of negligent and/or fraudulent misrepresentation by the insurer, such misrepresentations can constitute evidence of bad faith misconduct of an insurer generally on an insurance bad faith claim. Just like errors with insurability, an insurer's errors with regard to involvement in a crop insurance application process can also lead to potential liability for bad faith.

### C. *Bad Faith and Errors in the Crop Insurance Application Process*

Such errors in the crop insurance application process arose in the case of *Dailey v. American Growers Insurance*.<sup>84</sup> In the *Dailey* case, a tobacco farmer had procured a multi-peril crop insurance policy through an insurance agent who also happened to be an employee of a tobacco warehouse that provided financing for the tobacco farm's operation.<sup>85</sup> Thus, the warehouse had an interest in the crop that was harvested each season, as the financing for the operation of the farm was paid for by the tobacco harvest.<sup>86</sup>

The insurance agent in the *Dailey* case procured a higher level of insurance coverage (75%) than the producer had under the prior year's multi-peril crop insurance policy (55%).<sup>87</sup> However, the insurance agent placed the insurance on the 75% indemnity policy under the name of an uninsurable, unincorporated business entity rather than the name of the insured.<sup>88</sup> After a loss was incurred, the insurer provided coverage only under the 55% indemnity policy and not the 75% indemnity policy.<sup>89</sup>

The insured alleged violations of Kentucky's Unfair Claims Settlement Practices Act and generally contended that the claim was not adjusted in a fair, prompt and reasonable manner.<sup>90</sup> After summary judgment was granted to the insurer on these claims, the Kentucky Supreme Court held that the claims under the Kentucky's Unfair Claims Settlement Practices Act were not preempted by federal law and thus the case was remanded back to the trial court.<sup>91</sup>

### D. *Failure to Inspect a Nursery Properly Prior to Crop Insurance Coverage Taking Effect*

Finally, in at least one case, *Moon Mountain Farms, LLC v. Rural Community Insurance Services*, an insurer was allegedly failed to properly inspect two nurseries

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83. *Id.* at 1084.

84. *See* *Dailey v. American Growers Insurance*, 103 S.W.3d 60 (Ky. 2003).

85. *Id.* at 67.

86. *Id.*

87. *Id.* at 62.

88. *Id.*

89. *Id.*

90. *Id.* at 63.

91. *Id.* at 66.

(one in California, another in Arizona) prior to a multi-peril crop insurance policy taking effect.<sup>92</sup> The plant nursery policies excluded crop insurance coverage for cold temperature loss in the event adequate cold weather protection equipment was not installed and in adequate condition.<sup>93</sup> The underwriting regulations for nursery crops require an inspection prior to insurance taking effect and, if there are deficiencies in the cold weather equipment, the insurer is required to notify the insured that a cold weather temperature claim may be denied.<sup>94</sup>

While an inspection was conducted by the insurer of both the Arizona and California nurseries, the inspection report for the Arizona nursery incorrectly reported the insurer had adequate cold weather protection and in the case of the California nursery, the insurer did not provide the report in writing to the insured pursuant to the regulations.<sup>95</sup>

After claims for losses in the plant nurseries were denied, the insured filed a demand for arbitration and was awarded \$2,797,369.00 by the arbitrator.<sup>96</sup> Following the arbitration, the insured brought forward a number of claims in judicial review, including bad faith.<sup>97</sup> The United States District Court for the District of Arizona denied the insurer's motion for summary judgment.<sup>98</sup> The *Moon Mountain Farms* case illustrates an insurer's failure to conduct an adequate inspection for insurability, and failure to fully comply with regulations relating to the inspection, can result in fact questions as to bad faith misconduct.

#### IV. A TAXONOMY OF CROP INSURANCE BAD FAITH DEFENSES

In bad faith cases where crop insurance claims are unsuccessful, three major general defenses appear. One of the best defenses to bad faith is that the insurer faced a "fairly debatable" claim and its actions with respect to an insurance claim were not unreasonable.<sup>99</sup> Another defense that has been present with multi-peril crop insurance claims is the failure of an insured to comply with the arbitration requirements of the common crop insurance policy. In addition, with respect to crop insurance cases involving multi-peril crop insurance policies that are reinsured by the federal government, preemption of state law claims by the Federal Crop Insurance Act is a defense that is asserted in a growing number of courts which have found in favor of preemption. Finally, the provisions of the LAM Standards Handbook are analyzed, which provide potential arguments for insurers to make to defend crop insurance bad faith claims.

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92. See *Moon Mountain Farms v. Rural Community Insurance Company*, Case No. CV-13-00349-PHX-DJH, 2015 WL 12661935 (D. Ariz. May 8, 2015).

93. *Id.* at \*2.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at \*3.

98. *Id.* at \*10.

99. See *Gardner v. Hartford Insurance Accident & Indemnity Company*, 659 N.W.2d 198, 206 (Iowa 2003) ("[The insurer] had the right to contest a claim for benefits that is "fairly debatable" without being subject to a bad faith tort claim").

### A. *The Actions of the Insurer Are Not Unreasonable*

In some cases, courts have found that an insurer's actions relating to the handling of a claim are not unreasonable or oppressive. In *Meyer v. Conlon*, a dispute arose between an agricultural producer and a multi-peril crop insurer regarding the extent of damage to a bean crop after a hailstorm.<sup>100</sup> The parties in the case dispute whether the crop damage was a total loss and whether a representative of the insurer made representations to the insured to believe that the insured had no insurance coverage.<sup>101</sup> The insured proceeded to salvage the crop and expended approximately \$68,000 in his own funds to do so.<sup>102</sup> Later that same year, the insured did not remit payment of the premium for the policy and the insurer filed suit for the premium in a trial court in Iowa.<sup>103</sup> A default judgment was eventually entered against him by the trial court in Iowa.<sup>104</sup>

The insured filed a lawsuit in federal court in Wyoming which included an insurance bad faith claim in it.<sup>105</sup> The trial court held that the circumstances of the claim were "fairly debatable" and thus no bad faith was present.<sup>106</sup> With its review on appeal, the United States Court of Appeals for the Tenth Circuit focused on the point that the insured's harvest actually was in excess of the production guarantee under the crop insurance policy and thus no covered loss occurred.<sup>107</sup> As to the factual circumstances surrounding the handling of the claim, the United States Court of Appeals for the Tenth Circuit noted that although the insurer's "handling of this matter was hardly ideal, and contributed to the acrimony between the parties, deviation from "best practices" or "industry standards" does not equate with the type of reckless or intentional oppressive conduct required for this tort."<sup>108</sup> Thus, the Tenth Circuit found there was no evidence to support a jury question on insurance bad faith.<sup>109</sup>

Similarly, the United States District Court for the Northern District of Florida did not find a crop insurer's handling of a claim unreasonable in *Vaughn v. Producers Agriculture Insurance Company*.<sup>110</sup> In the *Vaughn* case, the producers suffered a freeze loss to cabbage crops in Florida.<sup>111</sup> Fresh cabbage was insurable through a multi-peril crop insurance policy, but not processing cabbage.<sup>112</sup> After the claims from the freeze loss were paid by the insurer, the insurer denied the claims after identifying a document which outlined a contract for processing cabbage.<sup>113</sup> The insurer then reported the insureds to the Risk Management Agency for suspected misrepresentations, and eventually the indemnities were requested back by the

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100. See *Meyer v. Conlon*, 162 F.3d 1264, 1266 (10th Cir. 1998).

101. *Id.* at 1267.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1273.

106. *Id.*

107. *Id.*

108. *Id.* at 1274.

109. *Id.*

110. See *Vaughn v. Producers Agriculture Insurance Company*, 111 F.Supp.3d 1251 (N.D. Fla. 2015).

111. *Id.* at 1256.

112. *Id.*

113. *Id.* at 1258.

insurer.<sup>114</sup> Eventually the insureds were placed on RMA’s “Ineligible Tracking System” list<sup>115</sup> after the indemnities were not repaid.<sup>116</sup>

Following the denial of the claims, the producers pursued arbitration and were successful at arbitration as the arbitrator concluded the intention of the producers was to plant fresh market cabbage.<sup>117</sup>

A claim based upon insurance bad faith was eventually filed in federal court by the insureds.<sup>118</sup> With regard to the bad faith claim, the Court focused heavily on the fact that a contract for processing cabbage raised questions as to the insurability of the cabbage.<sup>119</sup> In addition, with regard to the insureds being placed on the Ineligible Tracking System list, the Court observed that federal crop insurance is highly regulated and “the terms of the policy make it clear that the parties’ rights and obligations are subject to the FCIC’s policies and procedures.”<sup>120</sup> Under these regulations, the Court noted that the insurer had an obligation to report the insureds to RMA.<sup>121</sup> Under the circumstances, the Court found that a reasonable juror could not find bad faith in the case and thus summary judgment on the bad faith claim was granted for the insurer.<sup>122</sup>

### *B. Failure of an Insured to Comply with Arbitration Requirement*

In some cases, a producer’s bad faith claim in the crop insurance context may not proceed if the producer fails to adhere to the multi-peril crop insurance’s requirement for a producer to demand arbitration within one year of the date of claim denial.<sup>123</sup> A key takeaway from crop insurance litigation is there are many potential procedural hurdles to pursue a claim and these hurdles, if not navigated correctly, can result in a claim being denied.<sup>124</sup>

The procedural complexity of a crop insurance claim and bad faith defense appeared in *Sunset Ranches, Inc. v. NAU Country Insurance Company*.<sup>125</sup> In the *Sunset Ranches* case, the producer’s claim for a loss to a cherry crop was denied on July 17, 2014 due to the crop being destroyed without the consent of the insurer.<sup>126</sup>

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114. *Id.* at 1259.

115. See *Frequently Asked Questions – Ineligible Tracking System*, USDA Risk Management Agency (2022), available at <https://legacy.rma.usda.gov/help/faq/its.html> (last accessed Feb. 7, 2022) (“The Ineligible Tracking System (ITS) is a database that contains records of producers who are not eligible to participate in any crop insurance programs insured or reinsured by the Federal Crop Insurance Corporation (FCIC). When a producer applies for crop insurance, the insurance company automatically checks the ITS for the producer’s eligibility. If it is determined that the producer is ineligible, the producer will be notified and crop insurance coverage will not attach”).

116. See *Vaughn v. Producers Agriculture Insurance Company*, 111 F.Supp.3d at 1259.

117. *Id.*

118. *Id.* at 1259-1260.

119. *Id.* at 1261.

120. *Id.*

121. *Id.* at 1262.

122. *Id.* at 1262-1263.

123. See 7 C.F.R. § 457.8.

124. See generally J. Grant Ballard, *A Practitioner’s Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. AGRIC. L. 531 (2012).

125. See *Sunset Ranches, Inc. v. NAU Country Insurance Company*, Case No. F078916, 2021 WL 3614417 (Cal. Ct. App. 5th Dist. Aug. 16, 2021).

126. *Id.* at \*3.

The producer filed a lawsuit in California state court on March 27, 2015, including claims based upon unfair trade practices.<sup>127</sup>

The insurer filed a motion to compel arbitration, which was granted by the trial court on September 14, 2015.<sup>128</sup> Less than one month later, on October 9, 2015, the producer requested an arbitration.<sup>129</sup> The arbitrator found that the producer failed to leave the crop intact prior to the insurer's inspection and appraisal.<sup>130</sup> Since the policy was not complied with as the crop was destroyed without the insurer's consent, the claim was properly denied.<sup>131</sup>

With regard to the producer's request to vacate the arbitration decision in favor of the insurer, the California Court of Appeals found that the producer clearly did not comply with the arbitration requirement in the multi-peril crop insurance policy.<sup>132</sup> The insurance policy clearly required the producer to request an arbitration within one year of the claim denial.<sup>133</sup> Since this did not occur, the producer could not petition a state court to overturn the award.<sup>134</sup> The dismissal of the unfair trade practices act claims were upheld by the California Court of Appeals on preemption grounds.<sup>135</sup>

The *Sunset Ranches* case illustrates that a failure to comply with the arbitration requirement in the multi-peril crop insurance policy can potentially prove devastating to a bad faith claim. Had the producer in *Sunset Ranches* filed for arbitration from the outset of the case, the right to appeal the arbitration decision could have been potentially preserved. Although the bad faith claims would have likely been dismissed anyway due to preemption grounds in this particular case, in the event the Court in *Sunset Ranches* would have decided differently on the preemption issue, the arbitration decision would be much more relevant to the merits of a bad faith claim.

### C. Preemption Defense

Although a comprehensive discussion of preemption issues relating to crop insurance bad faith claims and the Federal Crop Insurance Act is beyond the scope of this Article, in recent years federal preemption has been asserted in a number of bad faith cases as a defense to liability. An early doctrinal rule developed which limited preemption defenses in cases involving multi-peril crop insurance policies.<sup>136</sup> Typical among these cases was *Williams Farms of Homestead, Inc. v. Rain and Hail Insurance Services, Inc.*, a seminal decision of the United States Court of Appeals for the Eleventh Circuit.<sup>137</sup> In the *Williams Farms* case, three corporate potato farmers in south Florida brought a breach of contract claim against their multi-peril crop insurer after receiving claim denials following losses to their potato crops in the

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127. *Id.* at \*5-6.

128. *Id.* at \*6.

129. *Id.*

130. *Id.* at \*7.

131. *Id.*

132. *Id.* at \*10-11.

133. *Id.*

134. *Id.* at \*11.

135. *Id.* at \*12.

136. Marzen, *supra* note 23, at 641-643.

137. See *Williams Farms of Homestead, Inc. v. Rain and Hail Insurance Services, Inc.*, 121 F.3d 630 (11th Cir. 1997).

wake of Tropical Storm Gordon.<sup>138</sup> The Eleventh Circuit Court of Appeals in *Williams Farms* held that the Federal Crop Insurance Act did not preempt state law claims, specifically breach of contract claims, as “Congress did not draft the FCIA to expressly preempt state law claims, nor does the wording of the statute or its legislative history evince an intent to preempt state law claims.”<sup>139</sup> Decisions of the United States Court of Appeals for the Ninth Circuit,<sup>140</sup> United States Court of Appeals for the Eighth Circuit,<sup>141</sup> United States Court of Appeals for the Fifth Circuit,<sup>142</sup> United States Court of Appeals for the Tenth Circuit,<sup>143</sup> Kentucky Supreme Court,<sup>144</sup> United States District Court for the Eastern District of Texas,<sup>145</sup> United States District Court for the Northern District of Texas,<sup>146</sup> United States District Court for the Eastern District of Tennessee,<sup>147</sup> United States District Court for the Eastern District of Michigan,<sup>148</sup> United States District Court for the District of Minnesota,<sup>149</sup> United States District Court for the District of North Dakota,<sup>150</sup> United States District Court for the District of South Carolina<sup>151</sup> and United States District Court for the Middle District of Alabama<sup>152</sup> have also held that the Federal Crop Insurance Act does not preempt state law claims.

However, this doctrinal rule rejecting preemption of bad faith claims is eroding. For example, in *J.O.C. Farms, LLC v. Fireman’s Fund*, the United States Court of Appeals for the Fourth Circuit held that claims for breach of contract, bad faith refusal to settle, and unfair settlement claims practices were preempted by the Federal Crop Insurance Act.<sup>153</sup> The Fourth Circuit Court of Appeals in *J.O.C. Farms* relied largely upon<sup>154</sup> a provision in the common crop insurance policy that states that:

In judicial review only, you may recover attorneys fees or other expenses, or any punitive, compensatory or any other damages from us only if you obtain a determination from FCIC that we, our agent or loss adjuster failed to comply with the terms of this policy or procedures issued by FCIC and

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138. *Id.* at 632.

139. *Id.* at 634.

140. *See Holman v. Laulo-Rowe Agency*, 994 F.2d 666 (9th Cir. 1993).

141. *See Alliance Insurance Company v. Wilson*, 384 F.3d 547, 551-552 (8th Cir. 2004).

142. *See Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 687 (5th Cir. 2001).

143. *See Meyer v. Conlon*, 162 F.3d 1264, 1268-1270 (10th Cir. 1998).

144. *See Dailey v. American Growers Insurance*, 103 S.W.3d 60, 66 (Ky. 2003).

145. *See Bullard v. Southwest Crop Insurance Agency, Inc.*, 984 F.Supp. 531, 538 (E.D. Tex. 1997).

146. *See Halfmann v. USAG Insurance Services, Inc.*, 118 F.Supp.2d 714, 718 (N.D. Tex. 2000).

147. *See Wanamaker v. Lawson*, 871 F.Supp.2d 735, 742 (E.D. Tenn. 2012).

148. *See Hyzer v. Cigna Property Casualty Insurance Company*, 884 F.Supp. 1146, 1149 (E.D. Mich. 1995).

149. *See Agre v. Rain & Hail LLC*, 196 F.Supp.2d 905, 912 (D. Minn. 2002).

150. *See Bullinger v. Trebas*, 245 F.Supp.2d 1060 (D. N.D. 2003).

151. *See O’Neil v. Cigna Property Casualty Insurance Company*, 878 F.Supp. 848, 852 (D. S.C. 1995).

152. *See Horn v. Rural Community Insurance Services*, 903 F.Supp. 1502, 1504 (M.D. Ala. 1995).

153. *See J.O.C. Farms, L.L.C. v. Fireman’s Fund Insurance Company*, 737 Fed.Appx. 652, 656 (4th Cir. 2018) (“While the FCIA and FCIC regulations were not intended to completely foreclose state law claims against private insurers providing policies reinsured by the FCIC, we agree with the weight of recent authority recognizing that claims arising from an insurer’s determination under the policy are preempted”).

154. *Id.* at 655.



such failure resulted in you receiving a payment in an amount that is less than the amount to which you were entitled.<sup>155</sup>

The Fourth Circuit in *J.O.C. Farms* read this provision to require a plaintiff to first obtain an FCIC determination – in essence, the Fourth Circuit has read this provision as a condition precedent necessary for a bad faith claim to move forward.<sup>156</sup> In addition, recent decisions of the Tennessee Court of Appeals,<sup>157</sup> California Court of Appeals,<sup>158</sup> United States District Court for the Eastern District of Washington,<sup>159</sup> and the United States District Court for the Eastern District of Tennessee<sup>160</sup> have also found preemption by the Federal Crop Insurance Act of state law claims, exemplifying a growing recent trend finding preemption of state law claims.

As multi-peril crop insurers assess claims based upon state common law or state statutory bad faith mechanisms, the defense of preemption is one that may be available to dismiss bad faith claims. However, it is important to note that this defense is available only to multi-peril crop insurers and not private crop-hail crop insurance companies as the private crop-hail policies are not subject to the Federal Crop Insurance Act.

#### *D. Provisions of the Loss Adjustment Manual (LAM) Standards Handbook*

Finally, with respect to multi-peril crop insurance policies, the failure of an insured to comply with the responsibilities outlined in the LAM Standards Handbook could very well provide a defense to a crop insurer on a bad faith claim.

Recalling the situation which the insured encountered in the *Sunset Ranches* case, obtaining consent from the insurer prior to destroying an insured crop, abandoning it, or placing the acreage to another use is required by the LAM Standards Handbook.<sup>161</sup> In addition, just as in other situations which sometimes arise in the law generally, there is also a duty to mitigate damages.<sup>162</sup> The LAM Standards Handbook requires an insured to “protect the crop from further damage by providing sufficient care.”<sup>163</sup>

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155. See 7 C.F.R. § 457.8 para. 20(i).

156. See *J.O.C. Farms, L.L.C. v. Fireman’s Fund Insurance Company*, 737 Fed.Appx. at 655.

157. See *Plants, Inc. v. Fireman’s Fund Insurance Company*, Case No. M2011-02274-COA-R3-CV, 2012 WL 3326295 at \*8 (Tenn. Ct. App. Aug. 13, 2012).

158. See *Sunset Ranches, Inc. v. NAU Country Insurance Company*, Case No. F078916, 2021 WL 3614417 (Cal. Ct. App. 5th Dist. Aug. 16, 2021).

159. See *Farm Management Company, LLC v. Rural Community Insurance Agency, Inc.*, Case No. 14-CV-5024-EFS, 2015 WL 1809789 (E.D. Wash. Apr. 21, 2015).

160. See *Wanamaker Nursery, Inc. v. John Deere Risk Protection, Inc.*, 364 F.Supp.3d 839, 849 (E.D. Tenn. 2019).

161. See Loss Adjustment Manual, *supra* note 62.

162. See *Borley Storage and Transfer Co., Inc. v. Whitted*, 710 N.W.2d 71, 80 (Neb. 2006) (“Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury”).

163. See Loss Adjustment Manual, *supra* note 62.

Keeping detailed records is also a responsibility of the insured. Lack of record-keeping could also provide a potential avenue for a defense in a crop insurance bad faith claim. The LAM Standards Handbook specifically provides:

The insured must retain complete records of the planting, replanting, inputs, production, harvesting and disposition of the insured crop on each unit for three years after the end of the crop year. This requirement also applies to all such records for acreage that is not insured. The insured must also provide those records upon the AIP's request or the request of any employee of USDA authorized to investigate or review any matter relating to crop insurance.<sup>164</sup>

Finally, there is a duty of the insured to cooperate with the crop insurer regarding the claim investigation. Many insurance policies outside of the crop insurance context include a cooperation clause which requires an insured to cooperate with an insurer during the claims process.<sup>165</sup> The LAM Standards Handbook requires cooperation on the part of the insured with allowing the insurer to inspect the crops at issue, take samples of the crops, and provide documents and records requested by the insurer.<sup>166</sup> The breach of cooperation by an insured can constitute evidence that leads to a conclusion that an insurer acts reasonably with regard to claims handling and not in bad faith.

## V. CONCLUSION

As the future of food is considered not only by the distinguished scholars of this symposium but is ensured by hardworking agricultural producers, a critical public policy matter awaits the halls of Congress: the reauthorization of the federal crop insurance program and the 2023 farm bill. As congressional debates surrounding the 2023 farm bill commence, crop insurance likely will have strong bipartisan support.<sup>167</sup> And as crop insurance continues to evolve and innovate, such as the Risk Management Agency's recent rollout of a micro-farm policy for small farmers who typically sell their crops locally,<sup>168</sup> crop insurance appears poised to remain a key component of keeping food accessible, affordable and in abundance for humanity.

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164. *Id.*

165. *See e.g.*, *Continental Casualty Company v. City of Jacksonville*, 550 F.Supp.2d 1312 (M.D. Fla. 2007).

166. *See* Loss Adjustment Manual, *supra* note 62.

167. *See* Meredith Lee, *The latest tug-of-war: Billions in farm subsidies and rural aid*, POLITICO (Dec. 28, 2021), available at <https://www.politico.com/news/2021/12/28/climate-disaster-relief-farm-bill-democrats-526183> (last accessed Jan. 24, 2022).

168. *See* Chuck Abbott, *Micro-Farm Crop Insurance Policy Will Debut in 2022*, SUCCESSFUL FARMING (Dec. 1, 2021), available at <https://www.agriculture.com/news/business/micro-farm-crop-insurance-policy-will-debut-in-2022> (last accessed Jan. 24, 2022). (“Small farmers who sell their products locally are eligible for a new micro-farm policy, said the Risk Management Agency, which oversees the federally subsidized crop insurance system. The policy, which simplifies recordkeeping and covers post-production costs, is available for 2022 crops”).