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ADR

Advice from the Experts

Presented by the ADR Practice Group

Wednesday, November 7

ADR: ADVICE FROM THE EXPERTS
NOVEMBER 7, 2018

12 p.m.	**Ethical Questions Arising in Mediations and Arbitrations**	**TAB A**
Moderator:	Stephen L. Richey, Esq., *Thompson Hine LLP*	
Panelists:	John J. Cruze, Esq., *Hamilton County Common Pleas ADR*	
	Thomas L. Egan, Jr., Esq., *Egan & Wykoff Co. LPA*	
	Bruce McIntosh, Esq., *McIntosh & McIntosh* PLLC	
	Carl Stich, Jr., Esq., *White Getgey & Meyer*	
1 p.m.	**Mediation in the Courts**	**TAB B**
Panelists:	Paul Calico, Esq., *U.S. Court of Appeals, Sixth Circuit*	
	John J. Cruze, Esq., *Hamilton County Common Pleas Court*	
	Judge Karen Litkovitz, U.S. District Court, *S.D. Ohio*	
	Magistrate Rosalind Florez, Es-q., *Hamilton County Domestic Relations Court*	
2 p.m.	**Break**	
2:15 p.m.	**Ethical Faux Pas to Avoid in Mediation**	**TAB C**
	Stephen L. Richey, Esq., *Thompson Hine LLP*	
2:45 p.m.	**Crop Insurance ADR**	**TAB D**
	Thomas C. James, Esq., *Sanders & Associates*	
3:15 p.m.	**Adjourn**	

TAB
A

ETHICAL QUESTIONS ARISING IN MEDIATIONS AND ARBITRATIONS

November 7, 2018

Topics Covered:

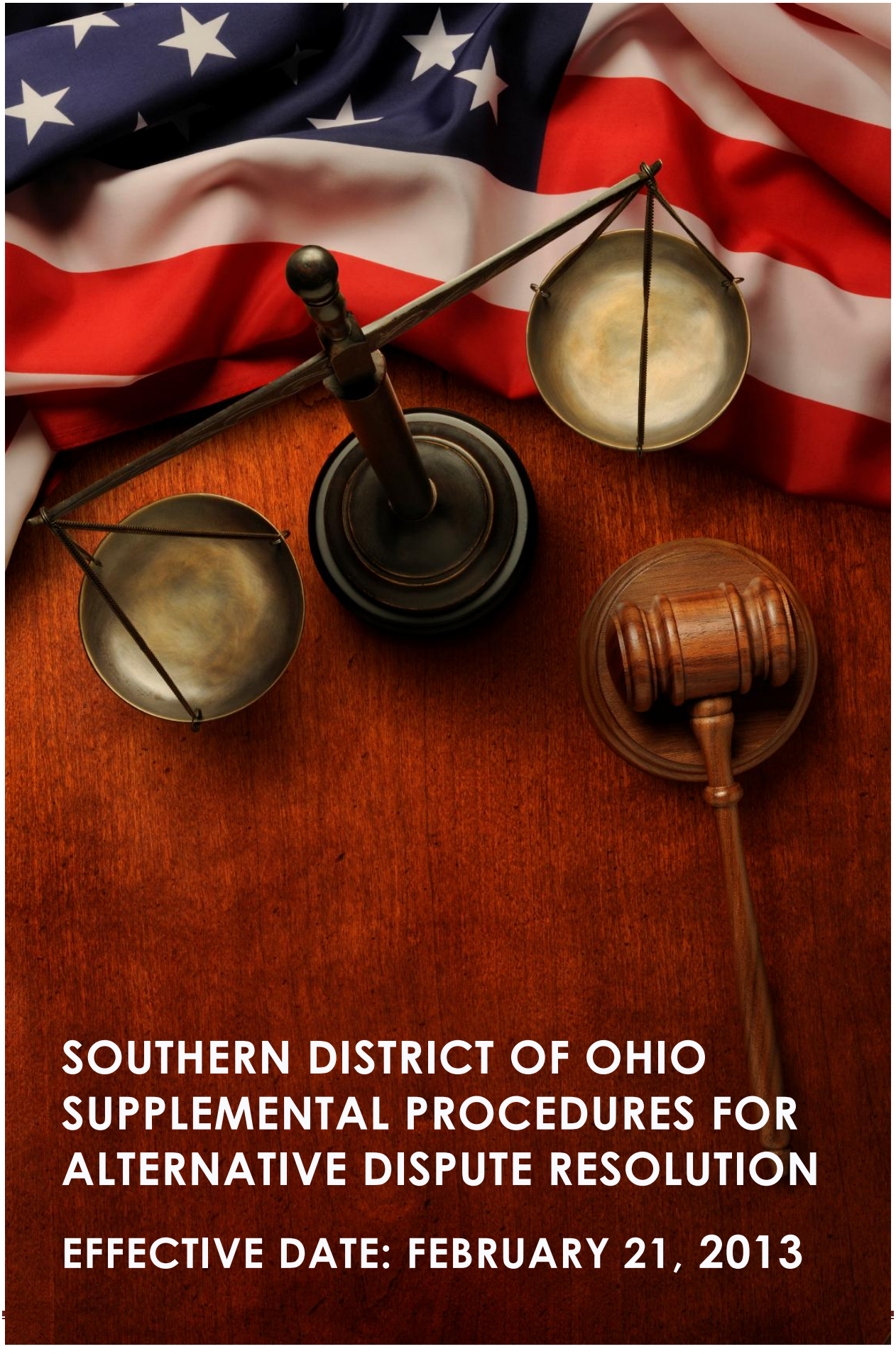
1. What rules of professional responsibility apply to arbitrators and mediators?
2. Is mediation or arbitration the practice of law?
3. Are there any limits on the mediator's duty of confidentiality?
4. What issues arise when an attorney/ mediator/arbitrator practices in a jurisdiction in which she/he is not licensed?
5. What are the ethical duties of an attorney/mediator who realizes that the parties are mistaken regarding applicable law?
6. Does a mediator have an obligation to the parties or the bar if an attorney violates obligations to the client or rules of professional conduct?
7. Suppose a party asks the mediator a question the mediator doesn't want to answer (e.g., "Do you know the plaintiff's bottom line?"). How should the mediator respond?
8. Should a mediator ever directly discuss the dispute with a party without the attorney's knowledge?
9. Is it permissible for a mediator to discuss a case with third parties aware of or interested in the dispute, but not directly involved in the mediation? Does it matter whether the discussion is before, during, or after the mediation session?
10. What advertising rules apply to mediators/arbitrators?
11. What recourse does a party have if they believe that their arbitrator has acted unethically?
12. What recourse does a party have if they believe that their mediator has acted unethically?
13. Questions from audience.

TAB
B

MEDIATION IN THE COURTS

Topics Covered: In your court:

1. Briefly provide an overview of mediation in your court.
2. What cases are selected for mediation?
3. How are they selected and by whom?
4. Who conducts the mediations?
5. How are mediations assigned?
6. Approximately what percentage of pending cases are mediated?
7. Approximately what percentage of cases settle at mediation?
8. At what point in the litigation does mediation typically take place?
9. What if a party indicates that they are unwilling to mediate?
10. What if a party announces that they have no desire to settle?
11. Questions from the audience.



SOUTHERN DISTRICT OF OHIO SUPPLEMENTAL PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

EFFECTIVE DATE: FEBRUARY 21, 2013

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Supplemental Procedures for Alternative Dispute Resolution	**Effective: 02/21/2013** **Issued By:** Clerk of Court **Original Publication Date: 02/21/2013**

These Supplemental Procedures for Alternative Dispute Resolution are written pursuant to, and authorized by, S.D. Ohio Civ. R. 16.3(e)(1).

1.0 General Policy.

Alternative Dispute Resolution (ADR) is a process designed to achieve the early, cost-effective, and fair resolution of civil cases. ADR provides litigants with a more informal, non-adversarial alternative to case resolution than traditional litigation. The Court's ADR Program is authorized under the Alternative Dispute Resolution Act, 28 U.S.C. § 651 *et seq*., S.D. Ohio Civ. R. 16.3, and General Order 13-01. The ADR Program includes the following court-administered ADR processes for civil cases: settlement week mediation, attorney-based mediation, judicial-based mediation, and summary jury trial. At the initial scheduling conference and throughout the pendency of the civil action, the presiding district judge or magistrate judge will evaluate the case to determine the ADR process that will best facilitate the resolution of the case, and may refer the case, with or without party consent, to one of the Court's ADR processes.

2.0 Definitions.

2.1 ADR Administrator

ADR Administrators are deputy clerks from each location of the Court who are responsible for coordinating the timely scheduling of mediations between parties and mediators for attorney-based and settlement week mediations. ADR Administrators facilitate the assignment of mediators to particular cases. ADR Administrators are also responsible for ensuring that mediators have no conflicts of interest in the case to be mediated; maintaining the roster of volunteer mediators to assure current address and contact information; scheduling rooms for mediations; and other duties as required by the Chief Judge or ADR Coordinator.

2.2 ADR Coordinator

ADR Coordinators are magistrate judges from each location of the Court who are responsible for directing, managing, and evaluating the Court's ADR programs at that location. ADR Coordinators are responsible for recruiting, screening, and training attorneys to serve as volunteer attorney mediators. ADR Coordinators are also responsible for reviewing annually the volunteer attorney mediator roster to ensure a sufficient number of volunteer mediators for the Court's ADR programs.

2.3 Attorney-Based Mediation

Attorney-Based mediation is a mediation conducted by a volunteer lawyer pursuant to S.D. Ohio Civ. R. 16.3(d). Cases may be referred to attorney-based mediation with or without party consent.

2.4 Judicial-Based Mediation

Judicial-Based mediation is a mediation conducted by a judicial officer other than the district judge or magistrate judge assigned to the case. Cases may be referred to judicial-based mediation with or without party consent.

2.5 Mediation

Mediation is a dispute resolution method involving a neutral third party who assists the disputing parties in reaching a mutually agreeable solution by facilitating a productive exchange of issues and views. Mediation is non-binding unless a settlement is reached.

2.6 Mediators

Mediators are neutral third parties who meet with litigants to facilitate settlement negotiations. Mediators have no authority to rule on issues or determine a settlement.

2.7 Settlement Week Mediation

Settlement week mediation is a week set aside by the Court for the mediation of selected cases by volunteer attorneys. Cases may be referred to settlement week with or without party consent.

2.8 Summary Jury Trial

A summary jury trial is an abbreviated trial held before a judicial officer and an advisory jury where the parties use the advisory jury verdict as a basis for settlement discussions. The verdict is non-binding and the parties may proceed to a regular jury trial if the case is not resolved through settlement. The summary jury trial is held close to the scheduled trial date.

3.0 General Provisions

3.1 Eligibility

Unless otherwise ordered by the Court, all civil cases filed in this district are eligible for referral to a court-administered ADR process except the following categories of cases:

- A forfeiture action *in rem* arising from a federal statute;
- A petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
- An action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
- An action by the United States to collect on a student loan guaranteed by the United States; and
- A proceeding ancillary to a proceeding in another court

3.2 Referral Method

With the exception of summary jury trials, the district judge or magistrate judge assigned to a case may refer the case to a court-administered ADR process with or without party consent. Referral is made on a case-by-case basis after discussion with the parties and at the discretion of the district judge or magistrate judge. Mandatory referral is authorized if the judicial officer believes mediation may result in the fair, cost-effective resolution of the lawsuit. Parties may request a referral to a court-administered ADR process at the preliminary conference or by motion at a later date.

3.3 Obligations of Counsel

Counsel must be prepared to discuss ADR and settlement with the assigned judge or magistrate judge at every case conference. Unless otherwise ordered, trial counsel must be present at any scheduled ADR process.

3.4 Party Roles and Sanctions

Unless excused by the mediator, all parties of record and corporate representatives are required to attend the ADR process with counsel. If the defense of an action is provided by

a liability insurance company, a settlement-empowered insurer representative must also attend in person unless otherwise agreed upon by the parties or ordered by the Court. Sanctions may be imposed for failure to participate or proceed in good faith.

3.5 Confidentiality

To promote candor and protect the integrity of the Court's ADR processes, the communications made by the participants in the ADR processes are confidential. The parties, counsel, and the mediator may not disclose information regarding the process, including settlement discussion or terms of any agreed upon settlement, to the assigned district judge, magistrate judge, or third persons unless all parties otherwise agree in writing or as provided in S.D. Ohio Civ. R. 16.3. Parties, counsel, and mediators may, however, respond to confidential inquiries or surveys by persons authorized by the Court to evaluate the ADR process or program. Information provided in such inquiries or surveys shall remain confidential and shall not be identified with any particular case.

3.6 Deadlines, Discovery, and Motions

All other case activities, including discovery and motion practice, shall go forward during the mediation process. Unless otherwise ordered by the Court, the scheduling of a court-administered ADR process does not stay any established case deadlines imposed by an existing Court Order, the Federal Rules of Civil Procedure, or the Southern District of Ohio Local Rules.

4.0 Settlement Week Mediation

4.1 Description

As part of the Southern District of Ohio ADR Plan, the Court offers settlement week mediation. In settlement week mediation, cases are scheduled for mediation with volunteer attorney mediators during a special week set aside by the court. The assigned District Judge or Magistrate Judges may refer any case to settlement week mediation.

Settlement week mediation may be established and held at any time at the discretion of the judicial officers in the Columbus, Cincinnati, and Dayton locations of the Court.

4.2 Order of Referral to Mediation

An order of referral to mediation is issued via the Court's electronic filing system to all counsel, parties, and the ADR Administrator. The order of referral will include the settlement week selected for the mediation.

4.3 Mediator Selection Process

Approximately sixty (60) days before the scheduled settlement week mediation, the ADR Coordinator, with the assistance of the ADR Administrator or other Clerk's Office staff, will contact the panel of volunteer mediators to inquire about their availability and known conflicts, and to confirm their contact information.

Approximately forty-five (45) days before the scheduled settlement week mediation, the ADR Administrator or other Clerk's Office staff will:

- Review and select the next available mediator from the Court's roster of volunteer mediators if no conflict exists. If a conflict exists, the next mediator on the roster will be reviewed until a mediator is found with no known conflicts;
- Notify the volunteer attorney of his or her appointment as a mediator and provide information on no-cost electronic access to the case to be mediated.
- Electronically file a notice setting the date, time, and location of the mediation and the name of the mediator appointed.
- The ADR Administrator or other Clerk's Office staff shall secure appropriate rooms for the mediation and shall post the information in a public area at the beginning of each day.

4.4 Mediation Session

Mediations may be held at the courthouse or at another location as determined by the mediator with the consent of the assigned district judge or magistrate judge.

Once scheduled, the mediation may only be canceled by order of the Court.

If the parties or their attorneys are unavailable during settlement week, the mediation may be rescheduled for another date and time outside of settlement week with the consent of the assigned district judge or magistrate judge. The parties shall confer on an agreed date, time, and location. The parties may contact the Court's ADR Administrator for assistance in locating rooms at the courthouse for the mediation.

4.5 Written Submissions

Unless otherwise ordered, the parties shall exchange, and serve on the assigned mediator, fully-documented settlement demands and offers prior to the conference, with the demand being due at least two weeks before the date selected for the conference, and the response not less than one week before that date.

No written mediation memoranda are to be electronically filed on the Court's docket or provided to the Court or presiding judicial officer. If the Clerk's Office receives any written submission, it will be forwarded to the ADR Administrator for processing.

4.6 Number of Sessions

More than one session may be held. The Court's ADR Administrator may be utilized to facilitate the scheduling of additional mediation or settlement conferences. The mediator shall keep the judicial officer assigned to the case advised of any continuation of the scheduled mediation.

4.7 Continuance

A settlement week mediation may be continued or vacated only by the Court. A request to continue or to vacate must be made to the Court either in a written motion or during a conference with the Court. A request to continue or to vacate must be supported by a statement that the requesting party has conferred with opposing counsel and a statement of reasons for the request. If the request is based on a need for discovery, the requesting party shall specify the discovery needed, the time necessary to complete that discovery and the reason that such discovery has not been completed. A request to continue shall

also propose a date for rescheduling the mediation. The CM/ECF system shall notify the ADR Administrator that such motion has been filed.

4.8 Settlement

The mediator shall notify the ADR Administrator or judicial officer's Courtroom Deputy that a settlement has been reached. The ADR Coordinator, the ADR Administrator or Courtroom Deputy shall electronically notify the presiding judge that the case has settled.

4.9 Continued in Progress

If no agreement is reached, but the mediator and the parties believe that further settlement efforts would be productive, the mediation will be docketed as continued in progress with the parties agreeing to take specific steps that will move them closer to settlement.

4.10 No Settlement

If an impasse is declared, within five (5) days of conclusion of the mediation, the mediator shall notify the ADR Coordinator, the ADR Administrator or Courtroom Deputy that no settlement has been reached and advise whether the parties have complied with the requirements of the mediation. The ADR Coordinator, the ADR Administrator or Courtroom Deputy shall electronically notify the presiding judge that the case was not settled and the mediation has been terminated.

4.11 Mediator Qualifications and Training

The Court shall select qualified mediators for appointment to the Court's roster of volunteer mediators. The Court may provide training for the neutrals as provided in S.D. Ohio Civ. R. 16.3(d).

4.12 Disqualification

Mediators may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action that would require disqualification if they were a justice, judge, or magistrate judge under 28 U.S.C. § 455.

4.13 Immunity

Mediators have immunity to the extent provided by law.

4.14 Fees

Court appointed mediators serve without compensation.

5.0 Attorney-Based Mediation

5.1 Description

As part of the Southern District of Ohio ADR Plan, the Court offers attorney-based mediation. Attorney-based mediations are conducted by volunteer lawyers pursuant to S.D. Ohio Civ. R. 16.3(d). The presiding judicial officer is authorized to refer any case to attorney-based mediation.

Attorney-based mediation sessions are generally held within a time frame set by the presiding judge at the preliminary pretrial conference. In general, mediation sessions must be scheduled within forty-five (45) days of the Court's referral unless otherwise ordered.

5.2 Order of Referral to Mediation

An order of referral to mediation is issued via the Court's electronic filing system to all counsel, parties, and the ADR Administrator. The Order of referral will include a deadline for completion of the mediation process.

5.3 Mediator Selection Process

- The ADR Administrators shall send to counsel sixty (60) days before the mediation deadline:

    1. A notice of the Court requiring the attorneys to confer and determine if the case is ready for the selected ADR process; and

    2. The roster of available mediators.

- The parties have ten (10) days to:

    1. Respond to the ADR Administrator on the readiness of the case; and

    2. Agree to a mediator.

    If the parties cannot agree, the ADR Administrator shall assign a volunteer mediator who has subject matter expertise and no conflict of interest.

The ADR Administrator or other Clerk's Office staff shall electronically file the Notice of Designation of Mediator.

If the parties agree to use a mediator outside of the Court's volunteer mediator roster and there is a cost associated with the mediation, the parties shall agree, in writing, as to each party's respective share of the cost.

5.4 Mediation Session

The mediator or the ADR Administrator shall electronically file a notice of the date, time, and location of the mediation session via the Court's CM/ECF system. Such notice shall be filed approximately forty-five (45) days before the conference. Mediations may be held at the courthouse or at another location as determined by the mediator with the consent of the assigned district judge or magistrate judge. If the mediation will be held at the courthouse, the mediator shall contact the ADR Administrator for assistance with obtaining suitable space within the courthouse.

Once scheduled, the attorney-based mediation session may only be canceled by order of the Court for good cause shown.

5.5 Written Submissions

No later than fourteen (14) days before the mediation, each plaintiff must submit to counsel for all opposing parties a fully documented, written settlement demand; and no later than ten (10) days before the mediation, each opposing party must respond, in writing, to each settlement demand fully documenting that party's position.

Seven (7) days before the mediation, each party must submit a brief **confidential statement**, not to exceed five (5) pages, of the factual and legal issues; a description of previous settlement discussions, offers and demands; an analysis of all parties' interests in the dispute and settlement; and the names and positions of all persons who will attend the mediation. **These statements shall be emailed to the mediator only.** They shall **NOT** be served on the other parties and shall **NOT** be filed with the Court. Mediation statements are not legal briefs or arguments. They are an opportunity for counsel to share with the mediator information and insights that will be useful in acquainting the mediator with the dispute and the factors that might lead to settlement. The mediator shall have access to the case docket; therefore, it is not necessary to include filings from the Court's docket.

No written mediation memoranda are to be electronically filed on the Court's docket or provided to the Court or presiding judicial officer. If the Clerk's Office receives any written submission, it will be forwarded to the ADR Administrator for processing.

5.6 Number of Sessions

More than one session may be held. The Court's ADR Administrator may be utilized to facilitate the scheduling of additional mediation or settlement conferences. The mediator shall keep the judicial officer assigned to the case advised of any continuation of the scheduled mediation.

5.7 Continuance

A continuance beyond the deadline set by the Court may only be granted by the Court.

5.8 Settlement

The mediator shall notify the ADR Administrator that a settlement has been reached. The ADR Administrator shall electronically notify the presiding judge that the case has settled. An order will be placed on the docket directing the parties to file an entry of dismissal within thirty (30) days.

5.9 Continued in Progress

If no agreement is reached, but the mediator and the parties believe that further settlement efforts would be productive, the mediation will be docketed as continued in progress with the parties agreeing to take specific steps that will move them closer to settlement.

5.10 No Settlement

If an impasse is declared, within ten (10) days of the conclusion of the conference, the mediator must submit a written statement to the ADR Administrator indicating that no settlement was reached and advising whether the parties complied with the requirements of attorney-based mediation. The ADR Administrator shall electronically notify the presiding judge that the case was not settled and the mediation has been terminated.

5.11 Mediator Qualifications and Training

The Court shall select qualified mediators for appointment to the Court's roster of volunteer mediators. The Court may provide training for the neutrals as provided in S.D. Ohio Civ. R. 16.3(d).

5.12 Disqualification

Mediators may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action that would require disqualification if they were a justice, judge, or magistrate judge under 28 U.S.C. § 455.

5.13 Immunity

Mediators have immunity to the extent provided by law.

5.14 Fees

Court appointed mediators serve without compensation.

6.0 Judicial-Based Mediation

6.1 Description

As part of the Southern District of Ohio ADR Plan, the Court offers judicial-based mediation. Judicial-based mediations are mediations conducted by a judicial officer other than the district judge or magistrate judge assigned to the case. Cases may be referred to judicial-based mediation with or without party consent. Parties may be excused from participating in judicial-based mediation, for good cause shown, upon motion made to the presiding district judge or magistrate judge. Sessions for judicial-based mediation are generally held within forty-five (45) days of the referral unless otherwise ordered by the Court.

6.2 Order of Referral to Mediation

An order of referral to judicial-based mediation is issued via the Court's electronic filing system to all counsel, parties, and the ADR Administrator.

6.3 Mediator Selection Process

The district judge or magistrate judge may directly assign the case to another district judge or magistrate judge for purposes of judicial-based mediation or order that the Clerk's Office randomly assign the case through CM/ECF. If the CM/ECF system will be utilized, the selection process shall include only those judicial officers who have indicated a willingness to participate in judicial-based mediations. The ADR Administrator or other designated Clerk's Office staff shall electronically file the Notice of Designation of Mediator. The mediator shall schedule the mediation conference within forty-five (45) days of receipt of the Notice of Designation, unless otherwise ordered by the judicial mediator or referral judge.

6.4 Mediation Session

The judicial officer selected to mediate the case shall electronically file a notice through the CM/ECF system setting forth the date, time, and location of the mediation. The judicial officer may also issue Orders setting forth the manner in which the mediation shall proceed, and address related issues in such Orders, as permitted by S.D. Ohio Civ. R.16(3)(e).

6.5 Written Submissions

Unless the parties are ordered otherwise, no later than fourteen (14) days before the mediation, each plaintiff must submit to counsel for all opposing parties a fully documented, written settlement demand; and no later than ten (10) days before the mediation, each opposing party must respond, in writing, to each settlement demand fully documenting that party's position.

Seven (7) days before the mediation, each party must submit a brief confidential statement, not to exceed five (5) pages, of the factual and legal issues; a description of previous settlement discussions, offers and demands; an analysis of all parties' interests in the dispute and settlement; and the names and positions of all persons who will attend the mediation. These statements shall be emailed to the mediator only. They shall **NOT** be served on the other parties and shall **NOT** be filed with the Court. Mediation statements are not legal briefs or arguments. They are an opportunity for counsel to share with the mediator information and insights that will be useful in acquainting the mediator with the dispute and the factors that might lead to settlement. The judicial mediator will have access to the case docket; therefore, it is not necessary to include filings from the Court's docket.

No written mediation memoranda are to be electronically filed or shown to the Court or judicial officer. If the Clerk's Office receives any written submission, it will be forwarded to the ADR Administrator for processing.

6.6 Number of Sessions

More than one session may be held. The Court's ADR Administrator may be utilized to facilitate the scheduling of additional mediation or settlement conferences.

6.7 Continuance

A continuance beyond any deadlines set by the Court may only be granted by the presiding or referral judge.

6.8 Settlement

Unless otherwise ordered, the judicial mediator shall electronically file an order directing the parties to file an entry of dismissal within thirty (30) days. The presiding judge and ADR Administrator shall receive electronic notification of such order.

6.9 Continued in Progress

If no agreement is reached, but the mediator and the parties believe that further settlement efforts would be productive, the mediation will be docketed as continued in progress, generally with the parties agreeing to take specific steps that will move them closer to agreement.

6.10 No Settlement

If an impasse is declared, the mediator shall notify the presiding judge and ADR Administrator that a settlement was not reached.

6.11 Disqualification

Judges may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and must disqualify themselves in any action in which they would be required under 28 U.S.C. § 455.

6.12 Immunity

Mediators have immunity to the extent provided by law.

7.0 Summary Jury Trials

7.1 Description

As part of the Southern District of Ohio ADR plan, the Court offers summary jury trials. A summary jury trial is an abbreviated trial held before a judicial officer and an advisory jury. The jury is empanelled in the same manner as a regular trial; however, the jurors will not be told, until after the trial, that their decision will have no binding effect. The attorneys will present summaries of witness testimony as well as their own arguments. No live witnesses are called. The parties may not contradict any previously stipulated facts. The jury is charged and returns a verdict as in any jury trial. The advisory verdict then serves as a basis for settlement discussions. The verdict is non-binding and is intended to facilitate settlement discussions by giving the parties and counsel an insight into the jury's evaluation of their respective cases. If the case is not resolved through settlement, the case proceeds to a regular jury trial. A summary jury trial is best suited for complex cases.

7.2 Referral Method

The judge may conduct a summary jury trial only with the consent of all parties.

7.3 Order Setting Summary Jury Trial

An order setting the case for summary jury trial shall be entered by the presiding judge. The order shall include a date for the final pretrial/charging conference and the summary jury trial.

- **Rules Regarding Summary Jury Trial**

1. If the parties jointly request that a detailed jury questionnaire be sent to prospective jurors and the results made available to counsel prior to the summary jury trial, they shall submit to the Court one week before the final pretrial/charging conference for its review, an agreed-upon proposed jury questionnaire.

2. Unless excused by the Court, the parties shall submit proposed voir dire questions, jury instructions, jury interrogatories, and a brief detailing any issues of law one week before the final pretrial/charging conference.

3. Prior to trial, counsel shall confer concerning physical exhibits, including documents and reports, and reach such agreement as is possible as to the use of such exhibits.

4. Two weeks prior to a summary jury trial, plaintiff's counsel shall provide defense counsel with itemization of the documents, witness depositions, interrogatories, requests for admissions, and affidavits they intend to refer to in the summary jury proceedings. One week before trial, defense counsel shall provide plaintiff's counsel with like itemization. The parties shall specifically identify the portions of such evidence upon which they plan to rely.

5. The action shall be heard before a six-member jury. Counsel for plaintiff and counsel for defendant will be permitted two challenges each to the venire (two for ALL plaintiff(s) and two for ALL defendant(s)), and will be assisted in the exercise of such challenges by a brief voir dire examination to be conducted by the Court and by juror profile forms. There will be no alternate jurors.

6. Unless excused by Order of the Court, individual clients shall be in attendance at the summary jury trial. Corporate clients shall be represented at all the summary jury trial by top echelon officers or by someone with immediate access to the corporate decision-making mechanism.

7. Counsel will make a brief opening statement.

8. Following opening statements, all evidence shall be presented through the attorneys for the parties. Both plaintiff's counsel and defense counsel will be afforded an opportunity to present an entirely descriptive summary of the evidence. During such descriptive summaries, counsel may summarize and present the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence, and sworn statements of potential witnesses. However, no witness's testimony may be mentioned unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness's proposed testimony by the witness. Furthermore, counsel will not be permitted to characterize or interpret the evidence during this phase of the summary jury trial proceedings.

9. Following the descriptive summaries of the evidence by both sides, each side will have the opportunity to present closing arguments. At this point counsel may characterize the evidence and proffer inferences that they feel flow from the evidence.

10. Objections will be entertained if, in the course of a presentation, counsel exceeds the limits of propriety in presenting statements as to the evidence.

11. After counsels' closing arguments, the jury will be given an abbreviated charge on the applicable law.

12. The jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and damages (each known as the jury's advisory opinion). The jury will be asked to consider the issue of damages regardless of its findings on liability. The jury will be encouraged to return a consensus verdict. The jury findings will not be admissible as evidence should the case proceed to trial.

13. No statement of counsel or any party during the course of the summary jury trial will be construed as judicial admissions.

14. Unless specifically ordered by the Court, the proceedings will not be recorded. Counsel may, if so desired, arrange for a court reporter for their own benefit and at their own expense; however, no transcript shall be filed with the Court.

15. Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the Court, or may stipulate to any other use of the verdict that will aid in the resolution of the case.

8.0 Program Administration

8.1 The Chief Judge shall appoint a magistrate judge in each city to serve as ADR Coordinator. The ADR Coordinator shall:

- Work with the local judicial officers to create and maintain a judge mediation assignment deck;
- Solicit and modify the attorney mediator roster as necessary;
- Arrange for necessary training of volunteer attorney mediators;
- Review statistics and make necessary adjustments to the processes;
- Review the frequency of motions to continue mediation and make necessary adjustments to the process to ensure that best practices are maintained;
- Work with their local judicial officers to maintain:

  1. The Rule 26(f) form;
  2. The Order of referral; and
  3. The ADR program.

8.2 The Clerk of Courts or operations management shall appoint a deputy clerk from each city to serve as ADR Administrator. The ADR Administrator shall:

- Maintain the attorney mediator roster, including verifying contact information, conflicts, and other information at least every three (3) years;
- Send to counsel in attorney-based mediations sixty (60) days before deadline the notice regarding readiness;
- Confer with attorney-based mediators concerning potential conflicts;

- File Notice of Designation, if applicable;
- Send mediator roster to counsel in referred cases, if applicable;
- Select attorney from mediator roster if counsel cannot agree; and
- Perform other duties as required by the Chief Judge or ADR Coordinator.

8.3 The Clerk of Courts or operations management shall appoint a lead ADR Administrator. The lead ADR Administrator shall:

- Provide monthly statistical reports to the ADR Coordinators, the Chief Judge, the Clerk of Court, the Chief Deputy of Operations, and Division Managers;
- Provide statistical information to the Administrative Office of the United States Courts as directed or required;
- Maintain the judge mediation assignment deck as directed by the Chief Judge or ADR Coordinators;
- Maintain statistics as required by the Chief Judge or ADR Coordinators.

TAB
C

Stephen Richey

Senior Counsel
ADR and Labor & Employment
Cincinnati Co-Chair, Diversity & Inclusion Initiative

Stephen.Richey@ThompsonHine.com

Overview

Steve started his career as a teacher. After graduation from night law school in 1993, he clerked for the Honorable S. Arthur Spiegel, U.S. District Court, Southern District of Ohio. Since 1995 he has practiced mediation and labor & employment law at Thompson Hine.

Experience

- Court ordered Mediator for the U.S. District Court, Southern District of Ohio.
- Court ordered Mediator for the Hamilton County, Ohio, Court of Common Pleas.
- Mediated litigation cases as a client representative before state and federal courts, the EEOC and the NLRB.
- Local Rules Committee, U.S. District Court, Southern District of Ohio.
- Chair, ADR Committee, Cincinnati Bar Association

Reported Cases

- *Gibbs v. Voith Industrial Services, Inc.,* 60 F. Supp. 3d 780 (E.D. Mi. 2014) (Partial summary judgment, followed by defense verdict at trial).
- *Muffley v. Voith Industrial Services, Inc.,* 906 F. Supp. 2d 667 (W.D. Ky, 2012) (Obtained dismissal of Section 10(j) action); affirmed No. 12-6628 (6th Cir., 2014).
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Contact Information

312 Walnut Street
14th Floor
Cincinnati, Ohio 45202-4089
Direct: 513.352.6768
Fax: 513.241.4771

Education

- Program on Mediation, Harvard Law School, 2017
- Salmon P. Chase College of Law, J.D., 1993, *summa cum laude*
- Xavier University, M.ED., 1979, *summa cum laude*
- Xavier University, B.A., 1969, *cum laude*

THOMPSON HINE

Ethical Faux Pas For Mediators to Avoid

Stephen Richey

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THOMPSON HINE

Ethical Faux Pas No. 1

Unauthorized Practice of the Law

SmartPath

Cincinnati Bar Assn. v. Jansen
138 Ohio St. 3d 212 (2014)

- Mr. Jansen is not an attorney.
- He created American Mediation & Alternative Resolution ("AMAR") as a vehicle for helping debtors negotiate settlements with creditors.
- Jansen sent solicitation letters to prospective clients, typically identified by searching the court index for named defendants in collection cases.

Cincinnati Bar Assn. v. Jansen
138 Ohio St. 3d 212 (2014)

- When a debtor responded to Jansen, he asked them to execute a Mediation Agreement.
- Jansen then sent a letter to the creditor, proposing resolution of the litigation.
- Jansen then attempted to facilitate a resolution of the collection case by transmitting settlement proposals between debtor and creditor.

Cincinnati Bar Assn. v. Jansen
138 Ohio St. 3d 212 (2014)

- Jansen was largely successful in negotiating settlements (434 cases).
- Jansen typically charged debtors $250.
- Jansen contended that his business practices did not constitute the unauthorized practice of law but, instead constituted conduct of a bona-fide mediation service.

Cincinnati Bar Assn. v. Jansen
138 Ohio St. 3d 212 (2014)

- The Supreme Court held that: "A mediator is 'a neutral person who tries to help disputing parties reach an agreement,'" and
- "[A]n arbitrator is '[a]neutral person who resolves disputes between parties.'"

Cincinnati Bar Assn. v. Jansen
138 Ohio St. 3d 212 (2014)

- The Supreme Court stated: "We have held that the practice of law includes 'making representations to creditors on behalf of third parties, and advising persons of their rights, and the terms and conditions of settlement."
- "It is no defense that respondents disclosed to their customers that they were not attorneys and could not give legal advice."

Ethical Faux Pas No. 2

Mediator as Predator

Gary Karpin, Esq.

As a Vermont Attorney Mr. Karpin:

- Advised clients to seek double recovery on new home-from builder and insurance. Client was charged with insurance fraud.
- Settled a case without his client's consent because he was unprepared for trial.
- Paid his legal assistant to forge a client's signature on an affidavit.

Gary Karpin, Esq.

- Shortly after being disbarred in Vermont, Mr. Karpin arrived in Phoenix and established himself as a divorce mediator.
- He spent the next several years swindling hundreds of thousands of dollars from his clients, before taking up residence in the Arizona penal system.

State v. Karpin
No. CR2006-031057 Arizona (Aug 14, 2008)

- Gina Niedzwiecki and her estranged husband contracted with Karpin to mediate their divorce for $975. They understood this to be the entire fee for the divorce.
- At end of their second mediation session, Karpin asked for $1,000. Mr. Niedzwiecki stormed out, but Gina paid it.
- Kaplin told Gina that her divorce would be "contested," and would require another $5,000.

State v. Karpin
No. CR2006-031057 Arizona(Aug 14, 2008)

- Gina met with Karpin bi-weekly for months, where she grew to trust him completely.
- He told her "Let's get you single so we can take this to the next level."
- In one meeting, Karpin reportedly had Niedzwiecki practice her "court testimony," which focused on intimated details of her sex life.
- No "court testimony" was ever required.

State v. Karpin
No. CR2006-031057 Arizona(Aug 14, 2008)

- When Karpin moved to Phoenix, the Vermont State Bar's Discipline Unit sent a letter to it Arizona counterpart enclosing a copy of his disbarment case.
- Over Karpin's eight year "practice" as a mediator, the Arizona State Bar received 34 complaints about him.
- Six Karpin clients complained to the Arizona Attorney General, but that office took no action.
- Finally, the State Bar sued Karpin, resulting in a settlement and refunding of some fees.

State v. Karpin
No. CR2006-031057 Arizona (Aug 14, 2008)

- Gina paid Karpin $87,767 in total. When her divorce arrived, he asked for another $25,000.
- She sought assistance from the Arizona State Bar, which referred her to the Maricopa County Attorney's office.
- Investigation revealed that Karpin pocketed $1m, from more than 300 victims.
- Kaplin is scheduled for release in November 2022.

Absence of Regulation

- Anyone in any state can hold his/herself out to the public as a mediator without any training or other demonstration of competence.
- No state regulatory authority acts as a gatekeeper to the mediation field.
- No state agency can keep a person from providing mediation services.
- No state regulator applies professional ethical standards across the mediation field.

A Short History of Mediation

- Mediation first appears in the late 19th Century, to quell disruptive labor strife, and has become a routine part of the bargaining process.
- The Civil Rights Act of 1965 created the Community Relations Service at DOJ to apply labor mediation concepts to racial and ethnic disputes.

A Short History of Mediation

- In the 1980s, a few state judiciaries like Florida and North Carolina institutionalized mediation in civil claims.
- California required mediation in family cases with child custody and visitation issues.
- By the 2000s mediation became a regular feature in the disputing culture.

Potential Civil Liability

- Breach of contract
- Fraud
- Intentional or negligent infliction of emotional distress
- Deceptive trade practices
- Professional negligence (mediator malpractice)

Immunity

- Modeled on judicial immunity
- Some states provide mediators with absolute immunity
  - Florida, Indiana, North Carolina
- Other states provide qualified immunity
  - Protection against negligence
  - But not intentional torts, bad faith and willful and wonton conduct

Standard of Care

- To prove mediator negligence, a litigant must establish a breach of a standard of care.
  - Mediators operate under a patchwork of standards, promulgated by range of practice associations, program administrators, and court systems that may or not apply.
  - There are few “generally accepted” practices

Causation and Damages

- Claimant would have to show that mediator's conduct caused the case not to settle, or
- Resulted in a settlement harmful to one party.
- Because mediated settlements require the consent of each party, these claims are very difficult to establish.

Unauthorized Practice of Law

- Predicting court outcomes;
- Advising that one settlement option appears to be more favorable that another;
- Drafting settlement agreements.

Ethical Faux Pas No. 3

Mediator As Imposter

Everett v. Morgan
2009 Tenn. App. LEXIS 9

- Deborah Gail Davis Morgan Everett ("Mother") filed a petition seeking to have Charles Scotty Morgan ("Father") held in contempt of court for failure to pay child support.
- Mother was contacted by George Raudenbush who told Mother that he was connected with the court system and that he had been contacted by Father to mediate Mother's claim.

Everett v. Morgan
2009 Tenn. App. LEXIS 9

- In fact, Raudenbush, was Father's friend, and was neither connected with the court, nor a mediator.
- Raudenbush represented to Mother that the most a court would award her in back child support was $8,750.
- Mother eventually agreed to this amount.

Everett v. Morgan
2009 Tenn. App. LEXIS 9

- An Agreed Decree was entered by the trial court.
- Mother filed a motion to set aside the Agreed Decree on the basis of fraudulent misrepresentations by Raudenbush.
- The trial court granted the motion and determined the amount was $17,375.
- On appeal, the court modified the amount to $26,125.

Ethical Faux Pas No. 4

Mediator

Confidentiality and Conflicts of Interest

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- In Case # 1, Chodish and his neighbors brought suit against their homeowner's association.
- The case was before Judge Stock.
- At Judge Strock's recommendation, the parties mediated.

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- According to Chodish, during an unsuccessful mediation with Justice Trotter, through Judicial Arbitration and Mediation Services (JAMS), Justice Trotter, stated that "the settlement . . . was a gift and that he would personally tell 'Judge Nancy [Stock] that Plaintiffs refused to settle . . . and were the reason why settlement was not reached.'"
- Justice Trotter is also alleged to have conveyed that Judge Strock had a heart attack, insinuating that she would be leaving the bench.

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- In January 2014, Judge Stock retired and the case was assigned to Judge Moss.
- In February, Chodish learned that Judge Stock had joined JAMS.
- Chodish moved to set aside Judge Stock's previous orders claiming conflict of interest through her association with JAMS, and to disqualify Judge Moss on the grounds that he communicated with Judge Stock and "might have . . . an interest in JAMS."

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- In May 2014, Chodish filed this second lawsuit against Justice Trotter and JAMS, claiming breach of contract, fraudulent concealment, negligence, intentional and negligent misrepresentation, IED, false advertising and unfair business practices.
- Justice Trotter and JAMS filed a Motion to Strike the Complaint, which was granted.

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- The Court of Appeals affirmed, holding:
  - The statements allegedly made by Justice Trotter were inadmissible because they are protected by the mediation privilege, under the California Evidence Code.
  - Section 1119 of the Code states that "no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible." (Even though this was a new and separate case.)

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- Appellant Chodish cited to comments of the drafters of Evidence Rule 1121: "The focus is on preventing coercion" and "a mediator should not be able to influence the result of a mediation . . . by reporting or threatening to report to the decisionmaker on the merits of the dispute or the reasons why mediation failed to resolve it."
- The Court of Appeals found this provision simply affirmed the need for confidentiality.

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

- The Court of Appeals further cited Evidence Code § 703.5 which states:

"No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in **any subsequent civil proceeding**, as to any statement, conduct, decision, or ruling, occurring at or in connection with the prior proceeding." (emphasis added)

Chodish v. Trotter and JAMS
Cal. Superior Ct. No. 30-2014-722371

Finally, the Court of Appeals held that Justice Trotter and JAMS were protected by **quasi-judicial immunity:**

"The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes."

Mediation Confidentiality

- Obviously California holds mediation confidentiality in high regard.
- On Sept. 13, 2018, California amended Ev. Code § 1122 to require attorneys representing clients in mediation to provide written disclosures to clients about mediation confidentiality, before client decides to participate.

Mediation Confidentiality

- What about:
  - Ohio?
  - Kentucky?
  - Indiana?

Confidentiality: Ohio

- Ohio and 10 other states have adopted the Uniform Mediation Act § 6(a)(6), which allows for testimony of a mediator or participant if "the mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation."

Confidentiality: Indiana

- In Indiana, mediator confidentiality is governed by Indiana Evidence Rule 408, excluding "conduct or statements made during compromise negotiations."
- Under ER 408, mediation statements are not admissible in the original action, "but would be admissible in 'separate or collateral matter.'" *Horner v. Carter,* 981 N.E.2d 1210 (Ind. 2013).

Confidentiality: Kentucky

"Mediators shall not be subject to process requiring the disclosure of any matter discussed during mediation. . . except on order of the Court for good cause shown." Kentucky Model Court Mediation Rules, Rule 12.

Questions?

Stephen Richey
Mediator
Thompson Hine LLP
312 Walnut St.
Cincinnati, Ohio 45202
513.352.6768
stephen.richey@thompsonhine.com
https://www.thompsonhine.com/professionals/richey-stephen

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Chapter 2710: UNIFORM MEDIATION ACT

2710.01 Definitions.

As used in sections 2710.01 to 2710.10 of the Revised Code:

(A) "Mediation" means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(B) "Mediation communication" means a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(C) "Mediator" means an individual who conducts a mediation.

(D) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(E) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(F) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, agency or instrumentality of the state or of any political subdivision of the state, public corporation, or any other legal or commercial entity.

(G) "Proceeding" means either of the following:

(1) A judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery;

(2) A legislative hearing or similar process.

(H) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(I) "Sign" means either of the following:

(1) To execute or adopt a tangible symbol with the present intent to authenticate a record;

(2) To attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Effective Date: 10-29-2005 .

2710.02 Application of chapter.

(A) Except as otherwise provided in division (B) or (C) of this section, sections 2710.01 to 2710.10 of the Revised Code apply to a mediation under any of the following circumstances:

(1) The mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator.

(2) The mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.

(3) The mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

(B) Sections 2710.01 to 2710.10 of the Revised Code do not apply to a mediation in which any of the following apply:

(1) The mediation relates to the establishment, negotiation, administration, or termination of a collective bargaining relationship.

(2) The mediation relates to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that sections 2710.01 to 2710.10 of the Revised Code apply to a mediation arising out of a dispute that has been filed with an administrative agency or court.

(3) The mediation is conducted by a judge or magistrate who might make a ruling on the case.

(4) The mediation is conducted under the auspices of either of the following:

(a) A primary or secondary school if all the parties are students;

(b) A correctional institution for youths if all the parties are residents of that institution.

(C) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under sections 2710.03, 2710.04, and 2710.05 of the Revised Code do not apply to the mediation or part agreed upon. However, sections 2710.03, 2710.04, and 2710.05 of the Revised Code do apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Effective Date: 10-29-2005 .

2710.03 Mediation communications privileged.

(A) Except as otherwise provided in section 2710.05 of the Revised Code, a mediation communication is privileged as provided in division (B) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section 2710.04 of the Revised Code.

(B) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication. A mediator may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(C) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Effective Date: 10-29-2005 .

2710.04 Waiver of privilege - privilege precluded.

(A) A privilege under section 2710.03 of the Revised Code may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and by whichever of the following is applicable:

(1) In the case of the privilege of a mediator, it is expressly waived by the mediator.

(2) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(B) A person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 2710.03 of the Revised Code, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(C) A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 2710.03 of the Revised Code.

Effective Date: 10-29-2005 .

2710.05 Exceptions to privilege - partial admission of nonprivileged communication.

(A) There is no privilege under section 2710.03 of the Revised Code for a mediation communication to which any of the following applies:

(1) The mediation communication is contained in a written agreement evidenced by a record signed by all parties to the agreement.

(2) The mediation communication is available to the public under section 149.43 of the Revised Code or made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) The mediation communication is an imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence.

(4) The mediation communication is intentionally used to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity.

(5) The mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

(6) Except as otherwise provided in division (C) of this section, the mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

(7) Except as provided in sections 2317.02 and 3109.052 of the Revised Code, the mediation communication is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates.

(8) The mediation communication is required to be disclosed pursuant to section 2921.22 of the Revised Code.

(9) The mediation communication is sought in connection with or offered in any criminal proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by the state or a child protection agency in which it is alleged that a child is an abused, neglected, or dependent child.

(B) There is no privilege under section 2710.03 of the Revised Code if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following:

(1) A court proceeding involving a misdemeanor;

(2) Except as otherwise provided in division (C) of this section, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(C) A mediator may not be compelled to provide evidence of a mediation communication referred to in division (A)(6) or (B)(2) of this section.

(D) If a mediation communication is not privileged under division (A) or (B) of this section, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under division (A) or (B) of this section does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Effective Date: 10-29-2005 .

2710.06 Communication or disclosure by mediator.

(A) Except as provided in division (B) of this section and section 3109.052 of the Revised Code, a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, department, agency, or officer of this state or its political subdivisions that may make a ruling on the dispute that is the subject of the mediation.

(B) A mediator may disclose any of the following:

(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) A mediation communication as permitted by section 2710.05 of the Revised Code;

(3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against abuse, neglect, abandonment, or exploitation.

(C) A communication made in violation of division (A) of this section shall not be considered by a court, administrative agency, or arbitrator.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 9/15/2014.

Effective Date: 10-29-2005 .

2710.07 Confidentiality of mediation communications.

Except as provided in sections 121.22 and 149.43 of the Revised Code, mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code.

Effective Date: 10-29-2005 .

2710.08 Inquiry by proposed mediator - disclosures - qualifications - impartiality.

(A) Before accepting a mediation, an individual who is requested to serve as a mediator shall do both of the following:

(1) Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation;

(2) Disclose any known fact described in division (A)(1) of this section to the mediation parties as soon as is practical before accepting a mediation.

(B) If a mediator learns any fact described in division (A)(1) of this section after accepting a mediation, the mediator shall disclose it to the mediation parties as soon as is practicable.

(C) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(D) A person that violates division (A), (B), (C), or (G) of this section is precluded from asserting a privilege under section 2710.03 of the Revised Code.

(E) Divisions (A), (B), (C), and (G) of this section do not apply when the mediation is conducted by a judge who might make a ruling on the case.

(F) Sections 2710.01 to 2710.10 of the Revised Code do not require that a mediator have a special qualification by background or profession.

(G) A mediator shall be impartial, unless after disclosure of the facts required to be disclosed by divisions (A) and (B) of this section the parties agree otherwise.

Effective Date: 10-29-2005 .

2710.09 Participation of party's attorney - withdrawal of mediator.

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded. A mediator may withdraw as mediator at any time.

Effective Date: 10-29-2005 .

2710.10 Preemption of federal electronic signatures statute.

Sections 2710.01 to 2710.10 of the Revised Code may modify, limit, or supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but

sections 2710.01 to 2710.10 of the Revised Code shall not modify, limit, or supersede section 101(c) of that act or authorize electronic delivery of any of the notices described in section 103(b) of that act.

Effective Date: 10-29-2005 .

TAB
D

Tom James, a native of Savannah, Georgia, has been an attorney since 1992 and an Ohio resident since 2000. He is admitted to practice law in the states of Ohio, Georgia, and North Dakota, and on the federal side, in the United States District Court for the Southern District of Ohio and the United States Courts of Appeals for the Fourth, Eighth, and Ninth Circuits. Mr. James also regularly represents clients in arbitration hearings in locations across the country.

His practice areas include civil litigation and arbitration, crop insurance, commercial transactions and disputes, estate planning, family business, federal appellate practice, and other areas. He has appeared in or assisted clients with suits, appeals, arbitrations, administrative hearings, and claim and coverage investigations in over 20 states.

Before moving to Ohio, Mr. James worked as general counsel to a regional customs brokerage and logistics provider, also serving in management and IT-related roles, and prior to that, as a commercial litigator in Atlanta. He graduated from Emory University School of Law in 1992.

Although an attorney by trade, Mr. James has sophisticated technical skills and a practical understanding of everyday business concerns. He is also a dad, a regular volunteer worker at his church and at a retirement community, and a founding member of the Sycamore Township Civic Association.

You can reach Mr. James by phone at (513) 229-8080 or by email at TomJames@SandersLPA.com. His law firm, Sanders & Associates, LPA, is located in Kenwood, at 8041 Hosbrook Road, Suite 315, Cincinnati, Ohio 45236.

Cincinnati Bar Association
ADR: Advice from the Experts – Crop Insurance ADR
Presented by Thomas C. James, Jr.
TomJames@SandersLPA.com

November 7, 2018

I. FEDERAL CROP INSURANCE VS. CROP-HAIL INSURANCE

II. THE FEDERAL CROP INSURANCE PROGRAM

A. Federal Crop Insurance Corporation

1. Congress established Federal Crop Insurance Corporation (FCIC)as a federal corporation under the Federal Crop Insurance Act to implement the Act. See 7 USC § 1501, et seq.

2. USDA Risk Management Agency ("RMA") administers FCIC (see 7 USC § 6933; as a practical matter, RMA and FCIC act as one and the same, though they remain legally separate).

B. Federal Regulations Dictate Policy Provisions and Rules.

1. FCIC has promulgated rules and regulations setting the terms and conditions of the crop insurance contracts that reinsured private companies issue to farmers. See, generally, 7 C.F.R. Part 400.

2. Those terms and conditions preempt any contrary state laws that would otherwise apply to insurance contracts. See 7 USC § 1506(l); see 7 CFR § 400.352(a); *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985).

3. The regulations dictating the form of crop insurance policies issued by FCIC have the force and effect of a federal statute. *Roberts v. Federal Crop Ins. Corp.*, 158 F.Supp. 688, 694-695 (E.D. Wash. 1958); *Nobles v. Rural Community Ins. Services*, 122 F.Supp.2d 1290, 1294 (M.D. Ala. 2000).

C. Common Crop Insurance Policy Provisions Apply to Most Federal Crop Insurance Policies.

1. FCIC promulgates the Common Crop Insurance Policy Basic Provisions ("Multiple Peril Crop Insurance Basic Provisions" or "MPCI Basic Provisions") and crop-specific provisions in 7 CFR Part 457.

a) Basic Provisions are found at 7 CFR §457.8. An excerpt of the Preamble and Sections 21 and 31 of the Basic Provisions is attached as Appendix A.

2. Other provisions are published in the Federal Register.

3. 7 U.S.C. §1506(l) makes the policy terms that FCIC issues equivalent to federal law, indicating that:

State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

D. Federal Law Preempts Conflicting State Law.

1. Conflicting state and local laws do not apply. 7 CFR § 457.8 ¶31 *("[s]tate and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.*")

2. "*The provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours or any employee of USDA[.]*" See 7 CFR §457.8 (MPCI Basic Provisions, Preamble).

3. No person or entity has the power to waive or expand the terms of a federally-reinsured crop insurance policy; nor can anyone extend the coverage beyond what Congress and FCIC have authorized. *Walpole v. Great American Insurance Companies,* 914 F.Supp. 1283, 1290-1291 (D. S.C., 1994).

III. MEDIATION OF A CROP INSURANCE POLICY CLAIM DISPUTE

A. Mediation is Available, but Limited by Policy Requirements.

1. Voluntary

a) Participation in mediation is voluntary. See 7 CFR § 457.8(20)(a) (MPCI Basic Provisions ¶20(a)).

b) Both parties must agree to mediate the case and agree to a mediator. See 7 CFR § 457.8(20)(g) (MPCI Basic Provisions ¶20(g)).

2. Policy Provisions and Related Rules and Regulations Are Binding.

a) Mediation settlements cannot change or alter provisions of the Common Crop Insurance Policy or crop provisions, or the procedures promulgated thereunder. See 7 CFR § 457.8(20)(f) (MPCI Basic Provisions ¶20(f)).

b) Insurance Company is not authorized to waive or vary the provisions of the policy unless the policy specifically authorizes a waiver or modification by written agreement. See 7 CFR § 457.8, Preamble (MPCI Basic Provisions, Preamble).

c) To receive an indemnity or other payment, the policyholder must establish that he has complied with all policy provisions. See 7 CFR § 457.8(14)(e)(4)(iii)(D) (MPCI Basic Provisions ¶ 14(e)(4)(iii)(D)).

3. Settlement Through Mediation

a) If an agreement is reached through mediation, the agreement must be in writing and "*contain at minimum a statement of the issues in dispute and the amount of the settlement.*" See 7 CFR § 457.8(20)(a)(2) (MPCI Basic Provisions ¶20 (a)(2)).

b) Since the insurer is not authorized to waive the policy terms, the universe of claim disputes subject to resolution through mediation is relatively small.

IV. ARBITRATION OF A CROP INSURANCE POLICY CLAIM DISPUTE

A. If mediation is not successful, or if a party does not agree to mediation, the dispute must be resolved through arbitration (with certain exceptions), in accordance with the rules of the American Arbitration Association. See 7 CFR § 457.8(20)(a) (MPCI Basic Provisions ¶20(a)).

B. Arbitration Must Be Initiated Within One Year.

1. Policyholder must initiate arbitration within one (1) year from the date of the denial of claim or rendered a determination that is in dispute, whichever is later. See 7 CFR § 457.8(20)(b) (MPCI Basic Provisions ¶20(b)).

2. If mediation is elected, the initiation of arbitration proceedings must occur within one year of the date the approved insurance provider denies the claim or renders the determination with which the policyholder disagrees. See FAD-258; also see 7 CFR § 20(b)(1) (MPCI Basic Provisions ¶20(b)(1)).

3. Appeal under AAA Rules

a) U.S.D.A. Risk Management Agency Bulletin provides the rules that the parties must follow if they want to arbitrate without AAA administering the proceeding. See Manager's Bulletin MGR-12-003.1.

b) Policy provisions control if there is a conflict between them and the AAA Rules. See 7 CFR § 457.8(20)(f) (MPCI Basic Provisions ¶20(f)).

C. Exceptions to Requirement to Arbitrate with Insurance Provider.

1. Determinations the insurer makes regarding whether a farmer used a Good Farming Practice (GFP) must be appealed by requesting reconsideration by FCIC using the procedures at 7 CFR Part 400, Subpart J.

2. Determinations that FCIC, RMA, or any other USDA agency made may be subject to appeal through procedures the government has established, but are not subject to appeal with the insurer.

3. Disputes concerning the meaning or applicability of the policy terms or of any procedure must be resolved through an interpretation obtained from FCIC.

D. Sample Dispute Resolution Procedures Notice.

1. See Appendix B for the notice form one crop insurer sends with all claim denials.

V. CONSTRAINTS ON ARBITRAL AUTHORITY IN A CROP INSURANCE POLICY ARBITRATION

A. Policy Specifies Award Requirements.

1. Policy specifies what an award must contain to be valid. See 7 CFR § 457.8 ¶ 20(a)(2) *("… the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. … Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator.*").

B. Arbitrator is Prohibited from Interpreting the Policy.

1. Only FCIC is authorized to interpret the policy or related procedure. See 7 CFR § 457.8 ¶20 (a)(1) (MPCI Basic Provisions ¶20(a)(1)). ("*if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC.*").

2. 7 CFR §400.765(c) states that a FAD binds all participants in the Federal Crop Insurance Program.

3. Awards that reflect unauthorized interpretations are automatically nullified and cannot be binding. See 7 CFR § 457.8 (MPCI Basic Provisions ¶20(a)(1)(ii)).

C. FCIC Issues Interpretations as Final Agency Determinations.

1. FCIC created a process to handle requests for interpretations of policy and procedure. See 7 CFR Part 400, Subpart X.

2. Subpart X provides procedures for responding to requests for "Final Agency Determinations" ("FADs") as to FCIC's interpretation of particular provisions of the FCIA or any regulation promulgated thereunder.

3. The Determinations are then published electronically by FCIC as specially-numbered documents on the RMA website in accord with 7 CFR §400.768(f).

4. Excerpts of selected ADR-related FADs are attached as Appendix C.

D. FCIC's FADs are Binding on All Program Participants.

1. The Arbitrator is charged with applying "*the Act and published regulations correctly when it renders an arbitration award*" and is "*required to apply the policy and procedural provisions in accordance with FCIC's interpretation*." See FAD-230.

2. FADs in effect at the time of the arbitration are binding on the parties and the arbitrator, including all determinations in which the policy language has not changed. See FAD-231.

E. Arbitrator Not Authorized to Waive the Policy Terms.

1. FAD-211 states that the policy terms are not waivable, and the Panel "*may not award an indemnity or damages under a theory of equitable estoppel.*" See FAD 211.

2. In FAD-236, FCIC confirmed that "*an arbitrator cannot use equitable estoppel to override or render inapplicable policy provisions that would otherwise apply in a given circumstance, since to do so would automatically nullify the arbitrator's award. The same principle of non -waiver applies to other forms of equitable relief.*" See FAD-236.

F. If an FCIC Interpretation Is Not Obtained, the Award Is Nullified.

1. If there is a dispute over any policy provision or procedure, the parties are required to seek an interpretation from FCIC. "*[I]f an arbitrator disregards an interpretation provided by FCIC, the award is nullified.*" See FAD-225.

2. "*The nullification provision prevents any type of forum shopping so all producers and AIPs are treated the same and the same standards apply to all.*" See FAD-232.

VI. FCIC SAYS FINAL AGENCY DETERMINATIONS MUST BE OBTAINED EVEN AFTER AN AWARD.

A. FCIC requires that a FAD must be obtained and incorporated into an award regardless of whether an award has already been issued. See FAD-230:

> *… if there is a material dispute regarding an interpretation of the policy or procedure, a FAD must be obtained from FCIC. FCIC agrees … that such a dispute may arise after the arbitration award has been rendered. In such case, either of the parties may seek a FAD for the provision at issue. Once the FAD is issued, the arbitration award must be reviewed to determine if it is consistent with the FAD. If it is not consistent, the arbitration award must be nullified if it is determined that the inconsistency materially affected the award. In that case a new award must be issued by the arbitrator applying the issued FAD.*

B. FCIC's Views of How this Process Works Are Probably in Conflict with the FAA, case law, and AAA Rules.

1. *Fuctus Officio* Doctrine: Absent an agreement to the contrary, the arbitrator's powers expire upon the issuance of a final award.

a) Arbitrator correctly determined he lacked jurisdiction to issue an additional award because he is rendered "functus officio" following issuance and confirmation of the initial award. Once an arbitrator issues a final award on the issues submitted to him, his authority ends. *City of Cleveland v. Laborers Int'l Union Local 1099*, 2018-Ohio-161, 104 N.E.3d 890 (Ct. App.).

b) AAA Commercial Arbitration Rule 50 limits arbitrator to correction of clerical, typographical, or computational errors.

c) The Eighth Circuit has commented that not applying the *functus officio* doctrine after a federal district court has issued a decision regarding an arbitration award would be absurd, since such a result would effectively grant an arbitration panel the authority to conduct appellate review of a federal district court decision. *Functus officio* doctrine prevents arbitrators from revisiting a final decision once it has been issued. *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 719 (8th Cir. 1999).

2. Federal Arbitration Act (FAA) Considerations

a) FAA §10 provides the procedure for applying to vacate an award. The FAA only permits vacation of an arbitral award under the following narrow grounds:

i. where the award was procured by corruption, fraud, or undue means;

ii. where there was evident partiality or corruption in the arbitrators, or either of them;

iii. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

iv. *where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made* (9 U.S.C. §10(a)(1-4)).

b) Grounds 1-3 above are very uncommon. Most appeals focus on §10(a)(4), but even then, courts are extremely reluctant to overturn arbitration awards.

c) FAA §11 allows a court to correct an award under the following circumstances:

i. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

ii. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

iii. *Where the award is imperfect in matter of form not affecting the merits of the controversy.* (9 U.S.C. §11(a-c)).

d) State Law

i. Ohio R.C. §2711.10 and §2711.11 parallel the FAA requirements.

VII. PRACTICAL CONSIDERATIONS FOR FEDERAL CROP INSURANCE ADR

A. Arbitrator Selection Process – Avoiding insurance litigation "baggage."

B. Motions –Limitations, Scope

C. Contractual Discovery Rights – EUO, Records, Third Parties, Etc.

D. Court Reporter – Make a record / Making an impression.

E. Interpretation Needs, Methods, and Timing

F. Hearing Logistics – Distant Experts, Government Witnesses

G. The Award – Sometimes Need Interim Award before a Final Award

VIII. CROP HAIL COVERAGE ADR: THE APPRAISAL PROCESS ("APPRAISEMENT")

A. Crop Hail Coverage is not federally subsidized and not federally regulated, so state law governs instead.

B. Standardized, NCIS-published policy terms still generally apply, with state-by-state variations (National Crop Insurance Services, or NCIS, is an industry association which works with insurers and state insurance commissioners to define standard policy terms).

C. The Appraisal Process in NCIS General Provisions Provision 6 governs dispute resolution concerning certain aspects of loss determination, but does not apply to coverage disputes, which are subject to litigation.

D. The policy requires the following appraisal framework when the insured and the company disagree about the "percentage of loss" (the percentage of loss is used to calculate an indemnity, assuming there are no coverage concerns):

- The policyholder and the company each must select a "competent" appraiser (there is no impartiality requirement in most states, but the appraiser shouldn't have any financial interest in the outcome of the claim).

- The two appraisers (or a court, if there is an impasse) must select a "competent, impartial" umpire who will remain idle unless the appraisers disagree about the percentage of loss. The umpire has no direct authority to decide the parties' disagreement, at least at this point in the process.

- The two appraisers, without the umpire, must attempt to determine and agree upon the percentage of loss. They must apply the policy-required loss adjustment procedures and then "set the percentage of loss in accordance with" those procedures.

- If the two appraisers agree upon the percentage of loss, their task is complete and their written decision regarding the percentage of loss is binding.

- If the two appraisers cannot agree on the percentage of loss, the umpire can act:

- The appraisers (not the parties) must submit "their difference" to the umpire.
- The umpire must then attempt to resolve the disagreement, again using and in accordance with the applicable loss adjustment procedures.
- Two of the three among the appraisers and umpire must then agree upon the percentage of loss, and their written agreement will be binding upon the insured and the company.

E. Crop-Hail insurance *coverage* disputes are still subject to litigation after the appraisal process concludes, unless the parties reach an agreement. However, unlike with federal coverage, the policy terms are subject to waiver, so negotiated settlements which require coverage compromises are possible.

IX. QUESTIONS AND COMMENTS

Still have questions after the presentation? You can reach the presenter, Tom James, by phone at (513) 229-8080 or by email at TomJames@SandersLPA.com. Sanders & Associates, LPA, is located in Kenwood, at 8041 Hosbrook Road, Suite 315, Cincinnati, Ohio 45236.

COMMON CROP INSURANCE POLICY
(This is a continuous policy. Refer to section 2.)

This insurance policy is reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act (Act) (7 U.S.C. 1501 et seq.). All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act. The provisions of the policy may not be waived or varied in any way by us, our insurance agent or any other contractor or employee of ours or any employee of USDA unless the policy specifically authorizes a waiver or modification by written agreement. We will use the procedures (handbooks, manuals, memoranda and bulletins), as issued by FCIC and published on RMA's Web site at http://www.rma.usda.gov/ or a successor Web site, in the administration of this policy, including the adjustment of any loss or claim submitted hereunder. In the event that we cannot pay your loss because we are insolvent or are otherwise unable to perform our duties under our reinsurance agreement with FCIC, your claim will be settled in accordance with the provisions of this policy and FCIC will be responsible for any amounts owed. No state guarantee fund will be liable for your loss.

Throughout this policy, "you" and "your" refer to the named insured shown on the accepted application and "we," "us," and "our" refer to the insurance company providing insurance. Unless the context indicates otherwise, use of the plural form of a word includes the singular and use of the singular form of the word includes the plural.

AGREEMENT TO INSURE: In return for the payment of the premium, and subject to all of the provisions of this policy, we agree with you to provide the insurance as stated in this policy. If there is a conflict between the Act, the regulations published at 7 CFR chapter IV, and the procedures as issued by FCIC, the order of priority is: (1) the Act; (2) the regulations; and (3) the procedures as issued by FCIC, with (1) controlling (2), etc. If there is a conflict between the policy provisions published at 7 CFR part 457 and the administrative regulations published at 7 CFR part 400, the policy provisions published at 7 CFR part 457 control. If a conflict exists among the policy provisions, the order of priority is: (1) the Catastrophic Risk Protection Endorsement, as applicable; (2) the Special Provisions; (3) the Commodity Exchange Price Provisions, as applicable; (4) the Crop Provisions; and (5) these Basic Provisions, with (1) controlling (2), etc.

…

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(4) In any suit, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

(d) With respect to good farming practices:
  (1) We will make decisions regarding what constitutes a good farming practice and determinations of assigned production for uninsured causes for your failure to use good farming practices.
    (i) If you disagree with our decision of what constitutes a good farming practice, you must request a determination from FCIC of what constitutes a good farming practice before filing any suit against FCIC.
    (ii) If you disagree with our determination of the amount of assigned production, you must use the arbitration or mediation process contained in this section.
    (iii) You may not sue us for our decisions regarding whether good farming practices were used by you.
  (2) FCIC will make determinations regarding what constitutes a good farming practice. If you do not agree with any determination made by FCIC:
    (i) You may request reconsideration by FCIC of this determination in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J; or
    (ii) You may file suit against FCIC.
      (A) You are not required to request reconsideration from FCIC before filing suit.
      (B) Any suit must be brought against FCIC in the United States district court for the district in which the insured acreage is located.
      (C) Suit must be filed against FCIC not later than one year after the date:
        (1) Of the determination; or
        (2) Reconsideration is completed, if reconsideration was requested under section 20(d)(2)(i).

(e) Except as provided in sections 18(n) or (o), or 20(d) or (k), if you disagree with any other determination made by FCIC or any claim where FCIC is directly involved in the claims process or directs us in the resolution of the claim, you may obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative review) or appeal in accordance with 7 CFR part 11 (appeal).
  (1) If you elect to bring suit after completion of any appeal, such suit must be filed against FCIC not later than one year after the date of the decision rendered in such appeal.
  (2) Such suit must be brought in the United States district court for the district in which the insured acreage is located.
  (3) Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC.

(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 31. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

(g) To resolve any dispute through mediation, you and we must both:
  (1) Agree to mediate the dispute;
  (2) Agree on a mediator; and
  (3) Be present, or have a designated representative who has authority to settle the case present, at the mediation.

(h) Except as provided in section 20(i), no award or settlement in mediation, arbitration, appeal, administrative review or reconsideration process or judicial review can exceed the amount of liability established or which should have been established under the policy, except for interest awarded in accordance with section 26.

(i) In a 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 such failure resulted in you receiving a payment in an amount that is less than the amount to which you were entitled. Requests for such a determination should be addressed to the following: USDA/RMA/Deputy Administrator of Compliance/ Stop 0806, 1400 Independence Avenue, SW., Washington, D.C. 20250-0806.

(j) If FCIC elects to participate in the adjustment of your claim, or modifies, revises or corrects your claim, prior to payment, you may not bring an arbitration, mediation or litigation action against us. You must request administrative review or appeal in accordance with section 20(e).

(k) Any determination made by FCIC that is a matter of general applicability is not subject to administrative review under 7 CFR part 400, subpart J or appeal under 7 CFR part 11. If you want to seek judicial review of any FCIC determination that is a matter of general applicability, you must request a determination of non-appealability from the Director of the National Appeals Division in accordance with 7 CFR 11.6 before seeking judicial review.

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31. Applicability of State and Local Statutes.

If the provisions of this policy conflict with statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.

Your Right to Resolve Crop Insurance Disputes

THIS DOCUMENT IS FOR INFORMATIONAL PURPOSES ONLY. IT DESCRIBES YOUR RIGHTS UNDER YOUR POLICY'S *MEDIATION, ARBITRATION, APPEAL, RECONSIDERATION, AND ADMINISTRATIVE AND JUDICIAL REVIEW* ("DISPUTE RESOLUTION") PROVISIONS, BUT IT DOES NOT AMEND OR REPLACE YOUR POLICY TERMS.

IF YOU DISPUTE ANY OF THE COMPANY'S DETERMINATIONS, you have the right to resolve your disagreement in accordance with your policy's provisions governing Dispute Resolution (referenced below as the "**DR Provisions**"). For most forms of crop insurance coverage, the applicable DR Provisions are in §20 of the Common Crop Insurance Policy ("**CCIP**") Basic Provisions. For Whole-Farm Revenue Protection Pilot Policy ("**WFRP**") coverage, see the DR Provisions in §33 of the WFRP Basic Provisions. The DR Provisions governing Multiple Peril Crop Insurance ("MPCI") and other coverages to which the CCIP or WFRP policy terms apply are reproduced on the next page for your convenience. That page also notes where to find the DR Provisions for most other coverages. However, always review your actual policy's DR Provisions to determine the specific rules which apply. Policy amendments or endorsements mandated by Federal Crop Insurance Corporation (FCIC) may also affect your dispute resolution rights. If you need a replacement copy of the terms specific to your policy and crop, you should ask your agent or us for a copy or visit the USDA Risk Management Agency (RMA) website at *https://www.rma.usda.gov/*. (Please also note that RMA's fall 2018 website update moved most of its older content to *https://legacy.rma.usda.gov/*.)

SPECIAL RULES FOR GOOD FARMING PRACTICE (GFP) AND FCIC/RMA DETERMINATIONS, AND FOR POLICY AND PROCEDURE INTERPRETATION: Special appeal rules apply to determinations we make about whether you used a Good Farming Practice (GFP). For those, you must request reconsideration by FCIC using the procedures at 7 CFR Part 400, Subpart J. Disputed determinations that FCIC, RMA, or any other USDA agency make about you or your policy, claim, coverage, or crop insurance eligibility may be subject to appeal through procedures the government has established, but are not subject to appeal with us. Disputes concerning the meaning or applicability of the policy terms or of any procedure must be resolved through an interpretation obtained from FCIC. See your policy's DR Provisions for further details (for CCIP & WFRP, see subsections (a)(1), (b)(4), (d), and (e)).

APPEAL OF OUR DETERMINATIONS: FCIC requires disagreements over any determinations we make other than those noted in the paragraph above to be resolved through mediation or arbitration, including any disagreement about the amount of production we assigned to uninsured causes if we make a GFP determination (but not any disagreement about *whether* you used a GFP).

MEDIATION: Disagreements may be resolvable through mediation. You and we must agree to pursue mediation for it to occur. Mediation requires our affirmative consent and this notice does NOT constitute our agreement to proceed with it. You may contact us at the address indicated on the determination with which you disagree if you wish to propose mediation to us. Requesting mediation will not delay or extend the deadline by which you must commence arbitration. See your policy's DR Provisions for further details (for CCIP & WFRP, see subsection (b)(1)).

ARBITRATION: Unless mediation completely resolves the dispute, the disagreement must be resolved using the rules of the American Arbitration Association (AAA), as modified by the DR Provisions applicable to your policy (for CCIP and WFRP, see subsections (c) and (f)). The AAA Commercial Arbitration Rules are available at *https://www.adr.org/Rules*. You must commence arbitration within one year from the later of the date we denied your claim or rendered the determination with which you disagree. Requesting reconsideration of our decision does not extend that deadline. You may file a Demand for Arbitration with AAA, or you may commence a privately-administered arbitration by following FCIC-established Arbitration Filing Process rules, in which case your complete Demand must be received by us (or postmarked) by the deadline (see RMA Manager's Bulletins *MGR-12-003.1* and *MGR-17-018*, available on the RMA website at *https://legacy.rma.usda.gov/bulletins/managers/*).

OTHER LEGAL ACTION: Your policy's DR Provisions describe the conditions under which you may take various other forms of legal action against us or FCIC, and the timing, subject-matter, and damages limitations that apply. You may not sue us over the dispute unless you first initiate arbitration in accordance with the DR Provisions applicable to your policy (for CCIP & WFRP, see subsection (b)(1)) and then complete that process.

Dispute Resolution Provisions – CCIP Basic Provisions §20 and WFRP §33:
Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review

CCIP = Common Crop Insurance Policy Basic Provisions ***WFRP*** = Whole-Farm Revenue Protection Pilot Policy

(a) If you and we fail to agree on any determination made by us except those specified in ...(d) or (e), the disagreement may be resolved through mediation in accordance with ...(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in ...(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any [***CCIP:*** *mediation or arbitration;* ***WFRP:*** *mediation, arbitration, or National Appeals Division*].

(ii) Failure to obtain [***WFRP:*** *or comply with*] any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. [***WFRP:*** *(i)*] The statement must also include any amounts awarded for interest. [***WFRP:*** *(ii)*] Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. [***WFRP:*** *(iii)*] All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with ...(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with ...(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(4) In any suit, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with ...(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

(d) With respect to good farming practices:

(1) We will make decisions regarding what constitutes a good farming practice and determinations of assigned [***CCIP:*** *production;* ***WFRP:*** *revenue*] for uninsured causes for your failure to use good farming practices.

(i) If you disagree with our decision of what constitutes a good farming practice, you must request a determination from FCIC of what constitutes a good farming practice [***CCIP:*** *before filing any suit against FCIC;* ***WFRP:*** *in accordance with paragraph (2)*].

(ii) If you disagree with our determination of the amount of assigned [***CCIP:*** *production;* ***WFRP:*** *revenue*], you must use the arbitration or mediation process contained in this section.

(iii) You may not sue us for our decisions regarding whether good farming practices were used by you.

(2) FCIC will make determinations regarding what constitutes a good farming practice. If you do not agree with any determination made by FCIC:

(i) You may request reconsideration by FCIC of this determination in accordance with the reconsideration process established for this purpose and published at 7 CFR part 400, subpart J; or

(ii) You may file suit against FCIC.

(A) You are not required to request reconsideration from FCIC before filing suit.

(B) Any suit must be brought against FCIC in the United States district court for the district in which the insured acreage is located.

(C) Suit must be filed against FCIC not later than one year after the date:

(1) Of the determination; or

(2) Reconsideration is completed, if reconsideration was requested under ...(d)(2)(i).

CCIP §20(e) *and* ***WFRP §33(e)*** *contain the same substance after their first sentence, but* ***WFRP*** *adds* ***§33(e)(1)(ii)*** *and has a slightly different structure. The* ***CCIP*** *version follows, except as noted:*

(e) Except as provided *[****CCIP:*** *in sections 18(n) or (o), or 20(d) or (k);* ***WFRP:*** *in section 33(d) or (i)]*, if you disagree with any other determination made by FCIC or any claim where FCIC is directly involved in the claims process or directs us in the resolution of the claim, you may obtain an administrative review in accordance with 7 CFR part 400, subpart J (administrative review) or appeal in accordance with 7 CFR part 11 (appeal).

(1) If you elect to bring suit after completion of any appeal, such suit must be filed against FCIC not later than one year after the date of the decision rendered in such appeal.

(2) Such suit must be brought in the United States district court for the district in which the insured acreage is located.

(3) Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC.

WFRP *also adds, in its Section 33(e)(1):*

(ii): "Under no circumstances can you recover any attorney fees or other expenses, or any punitive, compensatory or any other damages from FCIC."

(f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with [***CCIP:*** *section 31;* ***WFRP:*** *section 37*]. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

(g) To resolve any dispute through mediation, you and we must both:

(1) Agree to mediate the dispute;

(2) Agree on a mediator [***WFRP:*** *(Once mediation is agreed to, you cannot avoid mediation by failing to agree to a mediator)*]; and

(3) Be present, or have a designated representative who has authority to settle the case present, at the mediation.

(h) Except as provided in ...(i), no award or settlement in mediation, arbitration, appeal, administrative review or reconsideration process or judicial review can exceed the amount of [***CCIP:*** *liability;* ***WFRP:*** *insured revenue*] established or which should have been established under the policy, except for interest awarded in accordance with [***CCIP:*** *section 26;* ***WFRP:*** *section 34*].

Subsections (i) and (j) appear ONLY in ***CCIP §20****, not in* ***WFRP §33****.*

(i) In a 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 such failure resulted in you receiving a payment in an amount that is less than the amount to which you were entitled. Requests for such a determination should be addressed to the following: USDA/RMA/Deputy Administrator of Compliance/Stop 0806, 1400 Independence Avenue, S.W., Washington, D.C. 20250-0806.

(j) If FCIC elects to participate in the adjustment of your claim, or modifies, revises or corrects your claim, prior to payment, you may not bring an arbitration, mediation or litigation action against us. You must request administrative review or appeal in accordance with ...(e).

WFRP §33 *contains the same language as* ***CCIP §20(k)*** *below, but the subparagraph is numbered as* ***WFRP §33(i)*** *instead.*

(k) Any determination made by FCIC that is a matter of general applicability is not subject to administrative review under 7 CFR part 400, subpart J or appeal under 7 CFR part 11. If you want to seek judicial review of any FCIC determination that is a matter of general applicability, you must request a determination of non-appealability from the Director of the National Appeals Division in accordance with 7 CFR 11.6 before seeking judicial review.

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FOR OTHER COVERAGE TYPES, see these forms & sections for the specific Dispute Resolution Provisions which apply:

Area Risk Protection (**ARPI §23**); Dairy Revenue (**DRP §19**); Group Risk Plan Oysters (**GRP-Oysters §15**); Livestock Gross Margin (**LGM-Cattle §21**; **LGM-Dairy §20**; **LGM-Swine §20**); Livestock Risk Protection (**LRP §11**); Rainfall Index (**RIVI §15**).

APPENDIX C

ADR-RELATED FINAL AGENCY DETERMINATIONS

(FADs are published on the USDA Risk Management Agency website. FADs issued from 2015 and later are located at https://www.rma.usda.gov/regs/533/ and FADs from 2015 and earlier are located on https://legacy.rma.usda.gov/regs/533/)

FAD	Final Agency Determination (with excerpt of requestor's submission, where noted)
99	… The provisions specify that it is only in a judicial review that producers can recover attorneys fees or other expenses, or any punitive, compensatory or any other damages from insurance providers provided the producer obtains a determination from FCIC that the insurance provider, its agent or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC and such failure resulted in the producer receiving an indemnity, prevented planting payment or replant payment in an amount that is less than the amount to which the producer was entitled. FCIC is responsible for making these determinations to ensure the uniform application of the policies and procedures.
151	FCIC disagrees that the issuance of a policy is not a determination by the AIP. The AIP must determine whether the policy was acceptable based on the information known to the AIP at the time of application. However, FCIC agrees that acceptance of the application is not likely a determination for the purposes of section 20(a) of the Basic Provisions that starts the one year time period for appeal. The one year date starts from the date the policyholder receives a determination to which the policyholder disagrees. Since the producer elected to apply for insurance, the producer would not disagree with the acceptance of that application by the AIP. Therefore, acceptance of the application would not trigger the one year time period. Conversely, if the AIP rejects the application, and the producer disagrees with such rejection the one year time period starts to run on the date of such rejection. … Even though 7 C.P.R. part 400, subpart X states requesters may seek interpretations of those provisions of the Act and the regulations promulgated thereunder that are in effect for the crop year in which the request under this subpart is being made and the three previous crop years, to the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, the same interpretation can be applied to such other crop year.
193	The reference to "judicial review only" is to clarify that such damages can only be sought during an appeal to the courts, after an FCIC determination has been obtained, and cannot be awarded in arbitration. To obtain a determination that will enable the insured to recoup attorney's fees, expenses, or damages from the AIP, the insured must send a request for a determination to the RMA Deputy Administrator of Compliance after the insured has filed an appeal for judicial review. The procedural timing of when the insured must request the determination when they are seeking judicial review depends upon when the insured requests attorney's fees and the rules of the court for such requests. FCIC agrees with the second requestor's interpretation that in order to recoup attorney's fees, expenses, or damages from the AIP, section 20(i) of the Basic Provisions requires the insured to obtain a determination from the RMA Deputy Administrator of Compliance that the AIP, the AIP's agent, or the AIP's loss adjuster failed to comply with the terms of the insured's policy or the procedures issued by FCIC; and that failure of the AIP, the AIP's agent, or the AIP's loss adjuster resulted in the insured receiving less than the amount to which they were entitled.

195	FCIC disagrees with the requestor. Under section 506(r) of the Federal Crop Insurance Act, FCIC has established procedures to provide policy interpretations and ensure that such interpretations are binding in the program. The process assures consistent interpretation of the same policy provisions that may not otherwise occur in arbitration, litigation, and NAD appeals. This FAD process provides consistency in the program and ensures that all policyholders are treated alike. …. Persons within RMA who have direct responsibility for writing the policy provisions have been delegated the authority to provide official interpretations of policy provisions and procedures. When any question of policy interpretation arises, these persons are the only persons authorized to provide an interpretation.
211	**Interpretation Submitted** Two interpretations were submitted in this joint FAD request. First requestor's interpretation: The first requestor states the preamble of the Basic Provisions provides that no person may waive the terms of the policy. The requestor interprets that provision to mean that an arbitrator has no authority to order an approved insurance provider (AIP) to pay an indemnity that is not justified by the terms of the policy, regardless of any statements made to the policyholder by the employees or agents of the AIP. Because the policy terms are non-waivable, an arbitrator may not award an indemnity or damages under a theory of equitable estoppel, since doing so would amount to a waiver of the policy terms. The requestor believes the term "equitable estoppel" refers to a common law rule that if one person has induced another to take a certain course of action in reliance up on the representations or promises of the former, the former person will not be permitted to subsequently deny the truth of the representations, or revoke such promises, upon which such action has been taken. The requester interprets the non-waiver provision in the preamble of the Basic Provisions to defeat any claim for an indemnity or other damages under a Federal crop insurance policy based on a theory of equitable estoppel. The requestor further interprets the non-waiver provision to equally apply to arbitrators. Section 20(f) of the Basic Provisions provides that the Act, crop insurance regulations, and the policy terms are binding in any arbitration and supersede any conflicting state laws (including state common-law based theories of recovery such as equitable estoppel). Also, section 20(h) of the Basic Provisions limits any award in arbitration to the liability established or which should have been established under the policy, and any interest. Similarly, if an arbitrator were to apply equitable estoppel to override or render inapplicable certain policy provisions that FCIC had not previously interpreted in a way that supported such a conclusion, his award would automatically be nullified by section 20(a)(1)(ii), since section 20(a)(1) of the Basic Provisions prohibits an arbitrator from deciding, "whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure." The non-waiver provision and the limitations on arbitral authority in section 20 of the Basic Provisions therefore prohibit an arbitrator from issuing an award based on a theory of equitable estoppel, because such an award would waive or otherwise interpret the policy terms, which is not within the authority of the arbitrator. … **Final Agency Determination** FCIC agrees with the first requestor's interpretation. The policy is codified in the Code of Federal Regulations and has the force of law. Therefore, no one has the authority to waive or modify the provisions except as authorized in the regulations themselves. In accordance with section 506(l) of the Federal Crop Insurance Act (Act) (7 U.S.C. §1506(l)) state and locals laws are preempted to the extent that they are in conflict with the Act, regulations or contracts of FCIC. A vast majority of the policy provisions, including the preamble to the policy, are codified in regulation so they preempt state and local laws.

FINAL AGENCY DETERMINATIONS (EXCERPTS) (continued)

225	If there is a dispute over any policy provision or procedure, the parties are required to seek an interpretation from FCIC in accordance with section 20(a)(1)(i) of the Basic Provisions. Section 20(a)(i) references 7 C.F.R. part 400, subpart X and any other procedures established by FCIC. Such procedures include Manager's Bulletin MGR-05-018 and the regulations published at 7 C,F.R part 1, subpart H, regarding witness testimony. Any interpretation provided by FCIC, in writing or orally, will be binding in any mediation or arbitration. Subsequently, the failure to obtain the required interpretation from FCIC or if an arbitrator disregards an interpretation provided by FCIC, the award is nullified.
230	… the arbitrator is bound to apply the Act and published regulations correctly when it renders an arbitration award. Therefore, the arbitrator, in making a factual determination about a specific case, is required to apply the policy and procedural provisions in accordance with FCIC's interpretation. FCIC-issued FADs that are applied during a(n) mediation, arbitration, and litigation proceeding are not specific to any one case but rather are generally applicable to all program participants. Any factual application of a FAD to a policyholder's situation or case is the responsibility of the arbitrator during the arbitration hearing. … although the arbitrator may make a factual determination, it also must properly apply the policy or procedural provisions in granting the award. Further, if there is a material dispute regarding an interpretation of the policy or procedure, a FAD must be obtained from FCIC. FCIC agrees with the second requestor that such a dispute may arise after the arbitration award has been rendered. In such case, either of the parties may seek a FAD for the provision at issue. Once the FAD is issued, the arbitration award must be reviewed to determine if it is consistent with the FAD. If it is not consistent, the arbitration award must be nullified if it is determined that the inconsistency materially affected the award. In that case a new award must be issued by the arbitrator applying the issued FAD.
231	FCIC agrees with both requestors that FADs in effect at the time of the arbitration hearing are binding on the parties and the arbitrator. FCIC also agrees with the first requestor that FADs in effect include all determinations in which the policy language has not changed or the meaning has not changed. As supported by FAD-208, published on RMA's website on March 6, 2014, which states, "[t]o the extent the language in the provisions interpreted is identical to the language applicable for any other crop year; the same interpretation can be applied to such other crop year. It is the responsibility of the person seeking to use the published interpretation for a different crop year to ensure that the language of the provisions is identical. Even minor language changes can have an effect on the interpretation." … Additionally, FCIC agrees with the second requestor that if an interpretation of a statutory provision, policy provision or procedure is in dispute and has not been addressed by a previous FAD, a separate request for an independent FAD must be made in accordance with 7 C.F.R. § 400.765.
232	The purpose of nullification provision in the policy is to ensure that there is only one interpretation provided by FCIC. To allow arbitrators to make their own interpretations of policy or procedure could lead to disparate treatment based on the selection of an arbitrator. The nullification provision prevents any type of forum shopping so all producers and AIPs are treated the same and the same standards apply to all.
236	… in FAD-211, which addressed the issue of whether equitable estoppel could serve as a ground for an arbitration award, FCIC agreed that an arbitrator cannot use equitable estoppel to override or render inapplicable policy provisions that would otherwise apply in a given circumstance, since to do so would automatically nullify the arbitrator's award. The same principle of non-waiver applies to other forms of equitable relief. Therefore, the first requestor argues no arbitrator could grant a policyholder equitable relief in a situation where the policyholder argued that the deadline established under section 9 created a hardship. To do so would result in nullification of the award.

240	**Interpretation Submitted** The requester interprets the "claim... with respect to any such policy" language in 7 CFR § 400.176(b) to mean that any claim, including a claim for extra-contractual damages based on state law, for which the factual basis includes a Federal crop insurance policy or any act that an AIP undertook in relation to a policyholder's policy, including sales and providing advice to the applicant regarding coverage and the policy, is subject to the FCIC determination requirement contained in that regulation before any such damages may be awarded. The requester interprets 7 CFR § 400.176(b) (and the equivalent language in section 20(i) of the Basic Provisions to the extent that it contains a similar requirement) to preempt any state law claims for extra-contractual damages that FCIC has not approved, since any requests for such damages must include an FCIC determination. Alternatively, the requester interprets 7 CFR § 400.176(b) to require the Plaintiff in a state court proceeding to obtain a determination from FCIC before any claim for compensatory damages or therein can be awarded, even when those extra-contractual damages claims are based upon state law tort claims. In other words, if a policyholder asserts a tort claim that relates in any way to a Federally-reinsured crop insurance policy, such as misrepresentation regarding policy requirements, the policyholder must obtain an FCIC determination before he may recover any extra-contractual damages. The requester is aware that FAD-99 addressed a similar request, but recent case law from the Tennessee Court of Appeals (Plants, Inc. v. Fireman's Fund Ins. Co., 2012 Tenn. App. LEXIS 561 (Tenn. Ct. App. Aug. 13, 2012)), as well as another civil action between the same two parties, Plants, Inc. v. Fireman's Fund Ins. Co., 2012 Tenn. App. LEXIS 562 (Tenn. Ct. App. Aug. 13, 2012)) addressing similar issues have held that neither 7 C.F.R. § 400.176(b) nor Basic Provisions section 20(i) preempts state law claims for misrepresentation, finding that no FCIC determination is necessary for a Federal crop insurance program participant to seek extra-contractual damages for misrepresentation in state court. The requester believes that these court decisions are incorrect because they are counter to 7 CFR § 400.176 and the policy terms. **Final Agency Determination** FCIC agrees with the requestor. Any claim, including a claim for extra-contractual damages solely arising from a condition related to policies of insurance issued pursuant to the Federal Crop Insurance Act (Act), may only be awarded if a determination was obtained from FCIC in accordance with section 20(i) of the Basic Provisions and § 400.176(b). FCIC also agrees that 7 CFR § 400.176(b), and the equivalent language in section 20(i) of the Basic Provisions preempts any state law claims that are in conflict. That means that to the extent that State law would allow a claim for extra-contractual damages, such State law is pre-empted and extra-contractual damages can only be awarded if FCIC makes a determination that the AIP, 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. To the extent that State courts have awarded extra-contractual damages without first obtaining a determination from FCIC, such awards are not in accordance with the law.

251	**Interpretation Submitted** The requester interprets 7 CFR §400.352 to govern all forms of legal claims or lawsuits against approved insurance providers (AIPs) that are directly or indirectly related to coverage, to lack of coverage, or to representations or alleged misrepresentations that the AIP made about obtaining coverage, insurability, and the extent of coverage available under a federal crop insurance policy. … The requirements within §400.352 govern even where the communications or representations described above are inaccurate or false, including where the producer alleges there were negligent or intentional AIP misrepresentations upon which the producer relied to his detriment. In such circumstances, FCIC holds the exclusive authority to permit the aggrieved producer to seek damages against the AIP. But the only circumstance in which a State or local government authority, including any court, may award damages to a producer from an AIP in relation to such claims is where FCIC has issued a determination that the AIP or the AIP's 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 producer receiving a payment in an amount that is less than the amount to which the producer was entitled. Without such a determination, §400.352 forbids damages against an AIP for such claims and preempts state law to the contrary. The requester notes that recent case law from the Tennessee Court of Appeals (*Plants, Inc. v. Fireman's Fund Ins. Co.*, 2012 Tenn. App. LEXIS 561 (Tenn. Ct. App. Aug. 13, 2012), as well as another civil action between the same two parties, *Plants, Inc. v. Fireman's Fund Ins. Co.*, 2012 Tenn. App. LEXIS 562 (Tenn. Ct. App. Aug. 13, 2012)) found that 7 CFR §400.352(b)(4) did not apply when a policyholder seeks extra-contractual damages for alleged negligence or misrepresentations regarding the policy or the applicability of a policy to a crop. The requester believes that the court's interpretation of 7 CFR §400.352(b)(4) in the *Plants* cases is wrong, and that the requester's interpretation above is the correct one. FCIC recently agreed in FAD-240 that the *Plants* decisions were incorrect because they were counter to 7 CFR §400.176 and the policy terms. Those *Plants* decisions are also incorrect because they are counter to §400.352. In summary, all claims against an AIP by a producer in which the producer alleges that an AIP was negligent in providing advice or information about coverage for a producer's crop, or in which the producer alleges that the AIP negligently, intentionally, or fraudulently misrepresented facts regarding what a policy covers or what was necessary to obtain coverage for a crop, are claims that fall within the scope of §400.352. State and local governmental bodies, including courts, may not award damages for such claims unless FCIC has issued a determination granting permission. The *Plants* decisions are wrongly decided in that regard. **Final Agency Determination** FCIC agrees with the requestor's interpretation to the extent that any claim, including a claim for extra-contractual damages, that arises under or is related to a Federal crop insurance policy issued pursuant to the Federal Crop Insurance Act (Act) may only be awarded if a determination is obtained from FCIC in accordance with section 20(i) of the Common Crop Insurance Policy Basic Provisions and §400.352. As previously provided in FAD-240, FCIC also agrees that 7 C.F.R. § 400.352 pre-empts any State law that would allow a claim for extra-contractual damages that conflicts with the provision in section 400.352 that any extra-contractual damages can only be awarded if FCIC makes a determination that the AIP, agent, or loss adjuster failed to comply with the terms of the policy or procedures issued by FCIC. To the extent that State courts award extra-contractual damages without first obtaining a determination from FCIC, such awards are not in accordance with 7 C.F.R. § 400.352 and FCIC regulations. …. Therefore, this FAD interprets provisions in effect for the 2012 through 2015 crop years. To the extent the language in the provisions interpreted is identical to the language applicable for any other crop year; the same interpretation can be applied to such other crop year. It is the responsibility of the person seeking to use the published interpretation for a different crop year to ensure that the language of the provisions is identical. Even minor language changes can have an effect on the interpretation.