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The Equal Access to Justice Act

A valuable tool for farmers in crop insurance disputes

BY JARED BOYER
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Many farmers are all too familiar with the Risk Management Agency's (RMA) role in administering the federal crop insurance program. In addition to promulgating regulations, drafting policies, and issuing bulletins affecting crop policies, RMA occasionally elects to participate in the adjustment of an insured's claim for indemnity. When disputes arise over RMA's actions (usually involving the calculation or outright denial of an indemnity), crop insurance policies require insureds to pursue their remedies through the National Appeals Division (NAD), a branch of the USDA responsible for resolving disputes involving the USDA's various agencies.

The NAD appeal process allows an insured to select one of several review options, including a review of the written record, a telephone hearing, or an in-person hearing. Many insureds have found that hiring an attorney to represent them in this process can be helpful, as often complex issues of federal and statutory law and contract construction are at issue. Given the language found in crop insurance policies – "*Under no circumstances can [the insured] recover any attorney fees or other expenses" from RMA - Common Crop Insurance Provisions, Section 20(e)* – insureds who choose to hire an attorney may be surprised to learn that a federal statute may provide an avenue to recover a substantial portion of the attorneys' fees incurred during an NAD appeal.

The Equal Access to Justice Act (EAJA), found at 5 U.S.C. § 504, provides that a federal agency that conducts an adversary adjudication (such as an NAD appeal) "shall award, to a prevailing party... fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the

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agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." The EAJA is not a "win and get reimbursed" statute, as insureds must meet specific requirements to be eligible for an award of fees and other expenses:

1. The insured must have "prevailed" in the NAD appeal, meaning that the NAD found that RMA's decision was erroneous in whole or in part.

2. The insured must show that RMA's position was not "substantially justified."

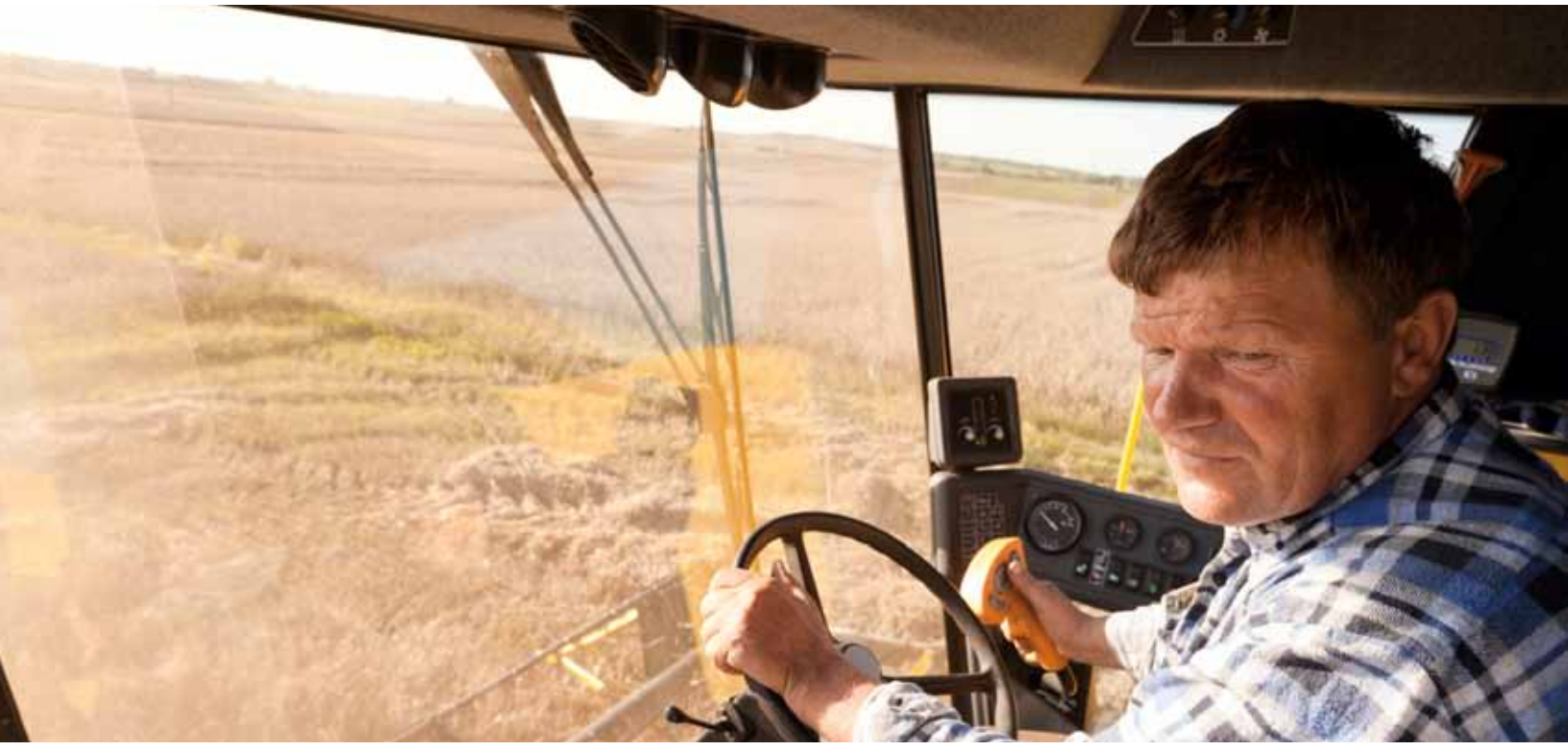
3. The insured must meet the "net worth test," meaning that an individual insured must have a net worth of less than $2 million, and a corporate or other entity insured must have a net worth of less than $7 million and have fewer than 500 employees.

While the first and third criteria are relatively straightforward, it is the second condition that presents the real hurdle for insureds. If RMA's position was "substantially justified," then an EAJA award will be denied regardless of the insured showing that RMA's actions were erroneous. A "substantially justified" position is one that is reasonable in both law and fact. In other words, the RMA's position must be justified to a degree that would satisfy a reasonable person. If reading these explanations still leaves you wondering what exactly 'substantially justified' means, you have identified why the majority of litigation over EAJA awards involves this requirement. In fact, it is possible to be denied an EAJA award because RMA's position was "substantially justified" even if the insured successfully showed that RMA's actions were "arbitrary and capricious" during the appeal. This elusive standard makes having an attorney experienced in crop insurance disputes particularly valuable in many cases.

The determination of whether an insured is entitled to an EAJA award is generally based on the application and any written response submitted by the agency. If the application shows the insured prevailed in the NAD appeal, meets the net worth test, and that RMA's position was not substantially justified, the insured will be entitled to an award. The amount of the award is based on rates customarily charged by attorneys in the community, and consideration will be given to the reasonableness of time actually spent on the NAD appeal in relation to the difficulty and complexity of the case. Typically, the insured's attorney will submit an itemized statement of the time spent on the appeal along with the attorney's customary rate, but federal regulations prohibit any fee award in excess of $150 per hour. Still, EAJA awards will often cover a substantial portion of a farmer's overall bill.

Like other aspects of crop insurance disputes, applications for an EAJA award are subject to specific regulations that govern such things as the timing and contents of the application. In the experience of attorneys at this firm, the Equal Access to Justice Act can be a valuable tool for lessening the burden on farmers who are forced to litigate disputes with RMA.

» **View the RMA's crop insurance policies overview online at http://www.rma.usda.gov/policies**



Avoiding hidden liabilities with employee housing agreements

BY NATHAN WHATLEY
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Farms and ranches of various sizes often provide their employees with some form of housing in addition to the wages they are paid. Little thought typically goes into the legal status of the housing arrangement. This is unfortunate because if employee housing is not handled properly, it can create real liability for agricultural and equine operators. A good way to protect your operation from liability is to have a written housing agreement. Some key considerations for employee housing agreements are addressed here.

Is your employee a tenant?

An initial decision to be made when it comes to employee housing is whether you want your employees to occupy your housing as a tenant, or under a license. A license means that the employee is there under the owner's permission, and housing is connected directly to his or her employment. It is easier to evict an employee if the employee occupies the housing under a license. However, there is a much greater risk for the housing to be treated as part of an employee's wages, which could drive up overtime pay. If the employee is treated as a tenant, it is easier to separate housing from an employee's wages. The downside to tenancy is that it is not as easy to evict the occupant after employment has been terminated. State law sets the legal minimum amount of notice that must be given prior to eviction of a residential tenant. The minimum is usually 30 or 60 days, depending upon the type of lease.

Whether the housing arrangement will be through a license or tenancy is your choice, but it needs to be established through a written agreement.

Who will be allowed to occupy the property?

An employee housing agreement should state who can and cannot live in the house. It is recommended that only the employee, spouse and minor children be allowed to live in the property. Any additional person or persons who wish to occupy the house must be approved by the owner in writing. Having a written housing agreement helps owners clearly communicate their expectations related to occupancy of the housing and maintain control of the housing property.

What are the rules for those occupying the property?

An employee housing agreement should include clear written rules. One issue that commonly arises is whether the employee may bring animals onto the property. Any kind of animal is a potential for liability so the agreement should require health records for pets, as well as require that an employee obtain written permission from the property owner before an animal is brought into the housing. The agreement should also prohibit employees from having animals that are banned by law.

Rules that prohibit children from playing in non-safe areas, such as traffic thoroughfares and animal pens, can also be written into a housing agreement. It should also be stated that employees cannot bring children to work with them. A written housing agreement can also prevent derelict cars on property, establish quiet hours, limit alcohol use, and make employees responsible for visitors.

Who will pay for utilities?

State in the written agreement who is responsible to pay for utilities. In many instances you may wish to establish utility services in the employee's name. Alternatively, the amount the property owner will pay for utilities can be capped in the agreement.

Should you charge the employee rent?

Some owners may choose to charge their employees rent. One benefit to charging rent is that if an employee goes out on workers' compensation leave, it simplifies the employee staying in the house. If the employee stops paying rent, he or she can be evicted. On the other hand, if rent is not charged, an employee who is evicted might claim that he or she was retaliated against for filing a workers' compensation claim.

Another issue to be wary of is paying rent on behalf of an employee. Such a cash payment will likely be construed as a wage, which can increase payroll taxes and overtime wages.

What rights do you have to inspect employee housing?

Your employee housing agreement should establish the right to conduct periodic inspections. Inspections should be performed at least once per year. After inspecting the property, perform any necessary repairs.

Additional issues to consider in your employee housing agreements include whether to require renter's insurance and whether the farm or ranch's liability insurance will cover losses associated with a leased or licensed property.

Employee housing is an issue that too many farmers and ranchers are not giving enough attention. There are many options for managing employee housing, but an owner can quickly lose control and open the door to significant liability if an appropriate agreement is not put in place.

H-2A workers

A solution to farm labor problems?

The U.S. Department of Labor's H-2A visa program, which is authorized under the Immigration and Nationality Act, allows an employer to hire foreign workers on a temporary basis to perform agricultural work when there are not sufficient U.S. workers available. Before a visa petition can be approved for H-2A workers, the employer must first receive a temporary labor certification from the Department of Labor. Utilizing H-2A labor may be a possible alternative to finding temporary or seasonal employees depending on the needs of the agricultural employer.

The general parameters for the program are outlined below. An employer may utilize an agent for handling the H-2A application process such as legal counsel or a certified H-2A processing agent.

Four key steps for H-2A labor requests

1. File a job order with the State Workforce Agency 60 to 75 days prior to the date of need.
2. File an H-2A application for temporary employment certification with the U.S. Department of Labor, Employment and Training Administration Chicago National Processing Center (NPC) 45 to 60 days prior to the date of need.
3. Conduct recruitment for U.S. workers within the guidelines provided by the NPC and clear up any deficiencies that may arise with the H-2A application.
4. Once the temporary certification is received from the NPC Office, the employer must seek approval from the U.S. Consulate at least 30 days prior to the date of need. All H-2A labor processing goes through the California consulate location. An employer must also coordinate with the applicable foreign country consulate to ensure port of entry approval.

Key requirements and specifications

- The employer must have its place of business physically located in the United States, possess a valid federal employer identification number (FEIN), and have the ability to hire, pay, fire, supervise or otherwise control the work of the workers employed.

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- The work to be performed must consist of agricultural labor or services, such as the planting, raising, cultivating, harvesting, or production of any agricultural or horticultural commodity.
- The work must be full-time, at least 35 hours (or more) per work week.
- The work must be seasonal or temporary in nature and tied to a certain time of the year by a recurring event or pattern, such as an annual growing cycle, normally lasting 10 months or less.
- The employer is required to provide workers' compensation or comparable medical insurance depending on state law requirements.
- The employer must provide housing, laundry facilities and basic transportation (e.g., to get the H-2A worker to and from work and the grocery store).
- The employer must provide guarantees regarding wages and the time period of work.
- The employer must comply with certain advertising requirements regarding recruitment efforts for U.S. workers.
- The H-2A program provides for using labor for up to 10 months each year depending on the qualifying circumstances.

» **View the U.S. Department of Labor's H-2A Employer Handbook (PDF) and the full-size version of the application process flowchart online at http://www.foreignlaborcert.doleta.gov/pdf/H-2A_Employer_Handbook.pdf**

Risks of distraint

BY JEFF TODD
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My article in the February 2012 *AgLINC* newsletter regarding the legal right to "distrain" straying animals ("When livestock stray: Landowner rights under Oklahoma's fencing law") did not address the additional risks of handling other's animals.

In September 1888, Leonard Harker's neighbor's sheep were habitually escaping their enclosure near Missouri Valley, Iowa. Leonard distrained the sheep so they would not damage his fields and his neighbor could retrieve them. Unfortunately, the neighbor accused Leonard of stealing the sheep and shot and killed him. Leonard died on September 9, 1888, at the age of 49 and left 7 children. He was my great, great, great grandfather.

Leonard Harker *(circa 1880)*

Proper communication with the authorities and the owner of straying livestock (if possible) is important in avoiding such calamity.

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General permit now available for pesticides applied to or around water

BY MARY ELLEN TERNES
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For decades, the Federal Insecticide, Fungicide and Rodenticide Act has provided regulation for the application of pesticides. However, in 2009, the Sixth Circuit Court of Appeals required the Environmental Protection Agency to develop a separate general permit to specifically address the application of aquatic pesticides as a result of its decision in *National Cotton Council, et al., v. EPA*. The EPA subsequently developed its pesticide general permit pursuant to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES), which regulates pesticide application on or near waters of the United States; however, its effective date was significantly delayed.

After two and a half years of extensions and continued attempts at legislative relief, this new general permit became effective on October 31, 2011, in Oklahoma and New Mexico, as well as other states where the EPA has permitting authority. The permit covers discharges to waters of the United States from the application of biological pesticides or chemical pesticides that leave a residue when the pesticide application is for: pest control of mosquitos or other flying insects, control of aquatic weeds or algae, control of aquatic nuisance animals, or control of forest canopy pests.

The general permit is not available for use with respect to discharges into waters designated as impaired by that pesticide or its products of degradation, waters designated as Tier 3 for antidegradation purposes, or with respect to discharges covered by another NPDES permit.

» **Review the pesticide general permit and its history online at http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm**