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Full circle

A lawyer's story of returning to the family farm

MARY STEICHEN

Five years ago after my father died, I moved back to the family farm to transition it to the next generation while my mother was still alive. I quickly learned that there is a big difference between growing up on a farm and actually managing a diversified, 3,500-acre family farming operation. Aside from the usual issues dealing with family dynamics, I found that farming has become a very sophisticated and complex business since my childhood. Having 15 years experience in banking and over 10 years in law, I thought I was well equipped to tackle any issues that might come my way. However, my perceptions did not match reality, and the broad range of issues I faced left me with a profound respect for the agriculture industry, the farmers who sustain it, and the service providers who support them, including McAfee & Taft, our legal counsel.

IMAGE COURTESY OF DANETTE VOLKMER PHOTOGRAPHY

My experiences were vast and diverse. We learned how to bail crew members out of jail; studied employment, tax, workers' compensation and unemployment insurance rules; and completed various tax filings at the state and federal level. We were blindsided by a shooting range relocating beside our property and successfully worked to negotiate relocation of the shooting range to a more acceptable location for the community as a whole. We faced trespass concerns regarding meth labs and other criminal activities, including pilfering of hay, livestock and tools. We became aware of biosecurity and waste management issues, particularly with terrorism concerns and animal rights groups becoming more active. We added a five-acre vineyard, so we had to address drift issues with area farmers and commercial spray operations, as well as file for water permits. We became licensed private applicators to be able to use certain chemicals in our operation.

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We had to learn what to do with cows jumping fences and roaming the countryside. We managed livestock operations, including medical and feed needs while developing direct-to-consumer products to improve profitability. We spent many hours in our local Farm Service Agency learning the government programs available for crop insurance, disasters, direct payments, loan options and land conservation. We spent many more hours preparing crop insurance documentation.

Following proposed legislation and administrative rules both at the state and federal level became a necessity to ensure that legislation did not adversely affect everyday operations, including animal rights versus welfare, child labor laws and dust levels. Our local cooperative system ran into challenges, so we learned about cooperative oversight to ensure proper representation. Likewise, we learned to utilize Farm Bureau and Farmers Union for agriculture policy issues at the state and federal levels and ensure support for rural fire departments so that the land is protected.

IMAGE COURTESY OF DANETTE VOLKMER PHOTOGRAPHY

The pipeline companies came knocking on our door, and we negotiated easements and agreements with some and went through condemnation proceedings with others. We developed working relationships with the Bureau of Indian Affairs related to leases, minerals and general operations. We welcomed oil and gas drillers with lease agreements, surface damages, water wells and tank battery locations for both vertical wells and horizontal wells. We explored wind energy development possibilities. As the markets fluctuated, we saw the need to manage commodities, particularly as we structured and restructured financing to match the cyclical nature of farming. We sought expertise in accounting and estate planning, legal entity creation, conservatorships and power of attorney options. Crop insurance coverage, particularly when disaster kept striking, was of critical importance to us and our banker. Cash flow management led us to develop agritourism, which brought landowner liability issues such as waivers for participants. We also explored the use of the Internet and social media for our agritourism and general operations, particularly

IMAGE COURTESY OF DANETTE VOLKMER PHOTOGRAPHY

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IMAGE COURTESY OF DANETTE VOLKMER PHOTOGRAPHY

for monitoring weather conditions. We learned the ins and outs of our farm insurance policies when our equipment ended up in the creek or on fire in our field.

One of our favorite activities was to attend retirement or estate auctions to see if we could pick up a few good deals since such auctions were generally "guaranteed to be sold" auctions. As I have watched each family deal with the issues of passing the family farm to the next generation (or not), I became troubled by families who had developed a farm operation for over 60 plus years ending up with just the asset value of their farming business. Having been involved in business for many years, I was troubled that a profitable farm plan, goodwill, intellectual property and methodologies developed over a lifetime just evaporated into a farm auction. The challenge is to move hardened self-employed farmers into the "developing a farming business" mentality, with the goal of facilitating a smoother and possibly more lucrative transition for a family farming operation. For us, utilizing legal resources became a necessity to ensure proper business and succession planning, developing workable entities for long term success, proper drafting of easements, leases, waivers, and contracts, and broad networking.

I'm extremely pleased to be a part of McAfee & Taft not only because the firm assisted me and our farm through its transition phase, but also because its Agriculture & Equine Industry Group allows the firm to provide full-service assistance to this industry. It is a pleasure to help other farming businesses solve the same problems that I encountered and still encounter with my family's farm operation.

Mary Steichen is an employee benefits lawyer with McAfee & Taft and co-owner of Silvertop Farm & Vineyards, a 3,500-acre agricultural enterprise in Ponca City, Oklahoma, which was named 2010 Outstanding Agritourism Attraction by the Oklahoma Tourism Department and Oklahoma Travel Association.

Silvertop Farm was established in 1945 by Joe and Ruth Steichen. Both Joe and Ruth were raised on farms in nearby Perry, Oklahoma. The Steichen farm in Perry was established at the turn of the century by Joe's grandfather, Nicholas Steichen. Joe and Ruth's ancestors settled in Oklahoma territory shortly after the Cherokee Strip Land Run in 1893.

Silvertop Farm is only part of the Steichen family's three-generation business and umbrella organization for several diversified agri-businesses called The Silvertop, which also includes Silvertop Ranch (livestock), Silvertop Lamb and Silvertop Vineayrds and Winery

Silvertop works cooperatively with the Big V Ranch and Blubaugh Angus Ranch in a joint venture called Salt Fork River Valley Ranch and Farm Tours. Additional information regarding Silvertop Farm, Ranch, Vineyard & Winery, or Salt Fork River Valley Ranch and Farm Tours is available on the Silvertop website at ***www.thesilvertop.com.***

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When livestock stray

Landowner rights under Oklahoma's fencing law

JEFF TODD

Oklahoma is a "fenced in state."

Title 4, Section 155 of Oklahoma Statutes provides that an owner of livestock is liable for "all damages done by animals breaking through or over lawful fences and trespassing upon the enclosed lands of another." In addition, "the animals so breaking through or over such fence may be seized as trespassing animals." This statutory language has been construed to make the owners of straying livestock strictly liable (i.e. liable without fault) for "agriculture damage" caused by their animals.

For years, I have fielded calls regarding Oklahoma's fence laws. Typically, the questions center around potential liability if an animal causes a car accident (in which case a negligence standard applies). However, because of the widespread drought of 2011, the recent inquiries have focused on what to do about a neighbor's animals straying onto adjoining pastureland or into haystacks. Unfortunately, it appears that some livestock producers have run so short on forage and hay that they have turned a blind eye on their livestock venturing onto neighboring properties. There have been some reports of gates being intentionally left open.

Oklahoma law provides a remedy for the landowner who encounters this disturbing situation. If livestock trespass on another's land they can be "distrained." Distraint is "the seizure of someone's property in order to obtain payment of rent or other money owed." 4 Okla. Stat. § 156 provides that a distrainer has lien rights in the trespassing livestock: "In all cases where the plaintiff may recover judgment for damages caused by the trespassing of animals of another the judgment shall be a lien upon the stock so trespassing and the plaintiff may have special execution for the sale of such stock to satisfy the judgment and costs or general execution as he may elect."

4 Okla. Stat. §§ 132-135 provide a process for when livestock are distrained. While the procedure is somewhat complicated, the end result is this: if a livestock owner fails to keep his animals fenced in and the straying animals venture onto your property and do damage to your crops, grass, hay etc., you may pen up the livestock. You must then follow notify the owner and try to work out payment for the damage. If that does not relieve the situation, you must notify the sheriff who is required to act as an arbiter of the dispute. If the owner does not pay the amount of damages determined by the sheriff, the sheriff can sell the livestock.

During the process, the distrainer has a possessory lien on the livestock and may maintain possession of the animals, but must provide adequate care. The distrainer should be entitled to reimbursement for the cost of boarding the livestock.

Finally, if straying livestock have caused damage, but the animals were not able to be distrained, you may also file suit against the livestock owner and recover damages (remember: strict liability if the damages are to agriculture land). You should also be able to recover attorney fees under 12 Okla. Stat. § 940, which provides for the recovery of attorney fees in cases involving the negligent or willful damage to property.

What every farmer needs to know about the crop insurance appraisal process

Jeremiah Buettner

Given the difficult weather events being experienced throughout the heartland, it is important that farmers understand their duties and those of the adjuster during the crop insurance appraisal process. The appraisal process consists primarily of an on-farm inspection of the damaged or destroyed crops during the growing season or following the harvest, as applicable. During this inspection, it is the insured's duty to fully cooperate with the adjuster, including showing the adjuster the damaged crop, allowing the adjuster to remove samples, and providing requested crop records.

While it is the duty of the adjuster to be "thoroughly familiar" with an insured's insurance contract and coverage, it is important to talk with the adjuster to ensure he has an accurate understanding of the insured's operation and insurance. Similarly, **it is the adjuster's duty to explain the insured's responsibilities, filing procedures, and what will be done during the inspection.** Take advantage of this opportunity to fully discuss these topics.

As part of the inspection process, the adjuster may grant consent to destroy or abandon the insured acreage, put insured acreage to another use, or replant the acreage. While it is not uncommon for an adjuster to provide this consent verbally (for example, by phone call after the inspection), **crop insurance policies expressly require that the insured obtain written consent before destroying insured crops.** One of the most common issues that we see raised in crop insurance disputes is the lack of written consent and whether consent was actually given. To avoid such issues, producers should not take any action without first obtaining written consent from the adjuster.

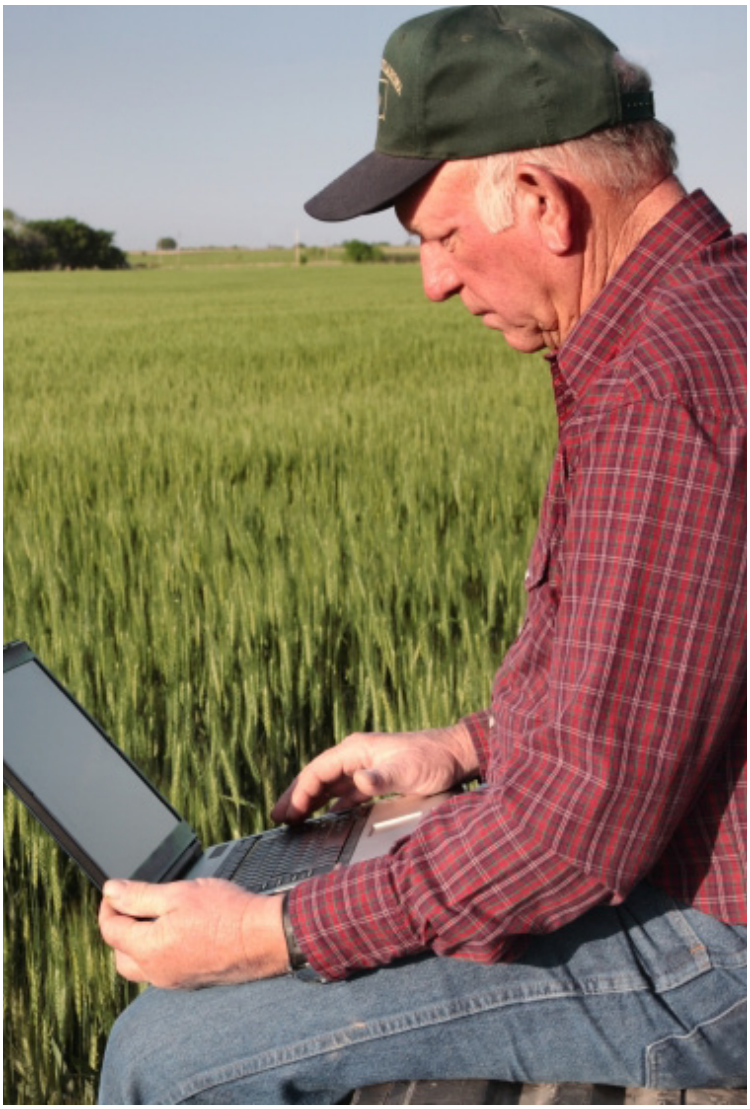
After the inspection, the adjuster will request the insured's signature on the claim form. The adjuster is required to

1. Review all entries on appraisal worksheets and claim forms with the insured,
2. Explain any circumstances that may affect the indemnity, and
3. Explain the Certification Statement on the claim form, which represents the insured's certification that the information on the claim form is complete and accurate.

Take this final opportunity to discuss each aspect of the claim with the adjuster, as a signature on this form may waive arguments that it contains incomplete or incorrect information.

Finally, the most important thing that the insured can do throughout the crop year is to retain and organize thorough records relating to the crop. It is the farmer's duty to retain (and provide upon request) complete records of the planting, replanting, inputs, production, harvesting and disposition of the insured crop on each unit for three years after the end of the crop year. Not only is this required, a thorough and well-organized record system can often be the insured's key to avoiding – or winning – disputes that could delay or decrease an indemnity.

As always, should disputes arise, be sure to review the timelines to challenge an insurer's or the government's determinations, which can be found in our frequently asked questions section listed on the following page, or online at **http://www.mcafeetaft.com/Federal-Crop-Insurance-Disputes-FAQs.aspx.**



FREQUENTLY ASKED QUESTIONS ABOUT FEDERAL CROP INSURANCE DISPUTES

I just received a determination from my crop insurance provider, and I don't agree with their findings. What are my next steps?

Your federal crop insurance policy contains a dispute resolution provision (section 20 in the common crop provisions or section 16 in GRIP basic provisions) that outlines your rights. The entire provision is lengthy and complicated, but generally any dispute that you have with your insurance company (or AIP) must be resolved through mediation or arbitration.

If you choose to arbitrate, the dispute resolution provision requires that arbitration be conducted in accordance with the rules of the American Arbitration Association ("AAA"), a neutral body that acts as an administrator of arbitrations. While the AAA is a well recognized and fair arbitration association, it can be very costly to arbitrate within the AAA as you must pay AAA fees plus the fees of the arbitrator(s). It has been previously determined that while arbitrations must be conducted pursuant to the AAA rules, actually using the AAA to administer the arbitration is not required. Thus, in most circumstance we have reached an agreement with insurance companies to select and use an independent arbitrator who is not affiliated with the AAA to conduct the proceedings as long as the arbitrator follows the rules of the AAA.

What's the difference between mediation and arbitration?

Mediation is a non-binding dispute resolution method where a neutral is hired to assist the parties in reaching a mutually agreeable resolution of the dispute. Because mediation is non-binding, both parties must agree to settle in order for the mediation to be successful. Arbitration is a dispute resolution method where the arbitrator hears evidence from both sides and renders a determination that is binding on the parties. In arbitration there is a winner and a loser. In either case, you will want to be represented by a lawyer who has proven experience handling crop insurance disputes and aggressively negotiating with AIPs.

Are there any drawbacks to mediation?

While mediation is a useful tool in resolving disputes, we generally do not encourage mediation in crop insurance cases. Although you are guaranteed to incur costs associated with mediation, you are not guaranteed of reaching a resolution in mediation. In most cases, before mediation is even suggested, your crop insurance company will voluntarily resolve issues that it has the ability to settle. Because insurance company actions are constantly monitored or subject to audits by the RMA, insurance companies will not or cannot settle more difficult disputes without the blessing of the RMA. Settlements without such approval can result in the AIP being denied reinsurance for the amount paid. In these difficult disputes, the insurance company actually needs a binding determination by an arbitrator so that it can make the payment that you believe is due. In such instances, mediation is generally a waste of time and resources.

How long do I have to begin arbitration proceedings?

Arbitration proceedings must begin within one year of the determination or denial of claim, whichever is later. If you miss the deadline, you lose your opportunity to dispute the determination. In a recent decision, the FCIC interpreted the one year rule to mean that arbitration must actually be initiated by the AAA (or substitute arbitration service) and that simply sending a demand for arbitration to the insurance company within the one-year period is not sufficient.

Are arbitration determinations appealable?

The dispute resolution provisions of your federal crop insurance policy provide for judicial review of arbitration awards. The lawsuit for judicial review must be filed in the judicial district where the insured crop is located and within one year of the decision.

RMA has made a decision that adversely impacts my rights under my crop insurance policy. What should I do?

If RMA has gotten involved in your claim or modifies, revises or corrects the claim prior to payment for reasons other than good farming practices, then the dispute resolution provisions in your crop insurance policy provide that you must pursue the matter through a NAD administrative appeal against the RMA. You are not allowed to pursue mediation or arbitration against your crop insurance company.

As the administrator of the federal crop insurance program, RMA often makes rules that impact your policy. If these rules are questioned, the RMA will often advise producers that their actions are matters of general applicability which are not appealable. However, RMA's liberal view of matters of general applicability are often successfully challenged. To initiate the challenge, you must seek an appealability determination from the Director of the NAD. RMA determinations and actions are appealable if they constitute an "adverse determination." An "adverse decision" is defined by the FCIC regulations as "a decision by an employee or Director of the [RMA or FCIC] that results in the participant receiving less funds than the participant believes should have been paid or not receiving a benefit to which the participant believes he or she was entitled." 7 CFR § 400.90.

What is the deadline for filing a NAD appeal or seeking an appealability determination?

When an adverse decision is received from the RMA, you have 30 days to file an appeal with the NAD. Likewise, if RMA advises you that actions that it took are generally applicable and not appealable, you must seek an appealability determination from the NAD within 30 days.

How are NAD administrative appeals conducted?

NAD appeals are conducted pursuant to federal regulations. After an appeal is filed, the NAD Director appoints a hearing officer who schedules a telephonic preliminary hearing to determine the issue or issues in dispute. You are entitled to select between the following hearing methods: (i) record review, (ii) telephonic hearing, or (iii) in person

hearing. In a record review, the parties submit written statements to the hearing officer for consideration. This is a useful and cost effective method when the dispute is centered on legal arguments rather than disputed factual issues. Telephonic and in person hearings are conducted much like an arbitration or bench trial. Each party is entitled to a brief opening statement followed by presentation of evidence and closing argument. In any case, the hearing officer will make a written determination as to whether or not RMA erred in its determination.

What if I do not agree with the hearing officer's determination?

Within 30 days of an adverse hearing officer decision, you may request review by the Director of the NAD. It is not unusual for the NAD Director to change or modify hearing officer determinations.

What if I don't agree with the final determination resulting from the NAD Appeal?

You have the right to file a lawsuit in federal court within one year of the date of the decision in order to obtain a judicial review of the decision.

If I win my arbitration or NAD appeal, can I recover my attorneys fees and costs?

In most cases, attorneys fees and costs are not recoverable in federal crop insurance arbitrations. In NAD appeals, the Equal Access to Justice Act ("EAJA") provides for the recovery of attorney fees – up to pre-established limits – under certain circumstances. In order to be eligible for an EAJA attorney fee award: (1) you must be the prevailing party, (2) you must meet the "net worth test" (meaning that if you are an individual you must have a net worth of less than $2 million, if the insured is an entity it must have a net worth of $7 million), and (3) RMA must not have been "substantially justified" in its position.

What happens after I win an arbitration or NAD appeal?

Because overturning arbitration awards by judicial review are extremely difficult, you can generally expect to receive prompt payment from your insurance company after receiving a successful arbitration award. In NAD appeals, federal regulations require RMA to implement the final administrative determination within 30 days after the decision becomes final. If RMA fails or refuses to implement the decision, a federal court lawsuit may be necessary to enforce the decision.

What do I do if I disagree with my crop insurance company regarding the interpretation of a provision in my crop insurance policy?

If a 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, you or the crop insurance company must obtain a binding interpretation from RMA pursuant to federal regulation. Failure to obtain the necessary interpretation will nullify an arbitration award.

I received a letter saying my claim was denied because I did not use good farming practices. What are my options for challenging this?

Even if the good farming practice (GFP) determination was made by your crop insurance company, you may not challenge the decision through arbitration. Likewise, you may not challenge a GFP decision via a NAD appeal. Rather, your crop insurance policy outlines a process for challenging a good farming practice (GFP) decision by requesting reconsideration through the FCIC/RMA. RMA has published a memorandum that governs GFP request for reconsideration. This can be a lengthy process that takes months to complete.

Am I required to seek reconsideration before challenging the GFP determination in court?

No. Reconsideration is not required. While your crop insurance policy states that you must request reconsideration of a GFP determination before filing a lawsuit, this provision is in conflict with FCIA § 508(a)(3), which does not require an insured to use all administrative remedies before bringing suit. Despite a final agency determination that recognizes this conflict, the policy language has not been revised and crop insurance company letters often advise that seeking reconsideration is required.

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Ag fertilizer sales to be subject to Homeland Security monitoring

VICKIE BUCHANAN

In 2008, Congress directed the Department of Homeland Security (DHS) to "regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility … to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." Ammonium nitrate is a chemical manufactured in varying concentrations and is primarily used as a component part of agricultural fertilizer, in some first aid products (such as cold packs), and in explosives often used in mining and construction industries. Ammonium nitrate was the primary explosive used by Timothy McVeigh in the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995.

In October, 2008, DHS issued an Advance Notice of Proposed Rulemaking introducing the Ammonium Nitrate Security Program (ANSP). On August 3, 2011, DHS published the Notice of Proposed Rulemaking regarding the ANSP. The ANSP was proposed with the mission of reducing the likelihood of a terrorist attack through the misuse of ammonium nitrate. Once approved, the ANSP will:

- **Create a registration program for purchasers and sellers of ammonium nitrate.** Once created, purchasers and sellers will be required to register with DHS and be evaluated against the Terrorist Screening Database (TSDB). After clearance through the TSDB, purchasers and sellers will be issued a registration number which will allow them to participate in the purchase, sale or transfer of ammonium nitrate.
- **Establish procedures for reporting a theft or loss of ammonium nitrate.**
- **Require businesses to keep records of all ammonium nitrate transactions for two years.** To ensure compliance with the ANSP, DHS may conduct inspections of records maintained by purchasers and sellers.

We anticipate that the final rule on the ANSP will be issued by mid-year. For more information on the Ammonium Nitrate Security Program, visit **www.dhs.gov/ammoniumnitratesecurity**.

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