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CROP INSURANCE FRAUD AND MISREPRESENTATIONS: CONTEMPORARY ISSUES AND POSSIBLE REMEDIES

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Rather fail with honor than succeed by fraud.

–Sophocles[1]

INTRODUCTION

Fraud has been the proverbial thorn in the side of honest and trustworthy transactions and business for centuries. As demonstrated by the above quotation of the great Greek writer Sophocles, fraud has been a significant issue for hundreds of years. Whether motivated by financial greed, desire for success, or some other motivation, individuals from all backgrounds and walks of life have either actively misrepresented or purposefully omitted material facts in their transactions with other individuals or entities in order to receive some pecuniary or other gain. One need only watch an episode of "American Greed"[2] in order to identify the latest iteration on an all-too-common theme.

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[1] Quotation from RICHARD E. CASCARINO, CORPORATE FRAUD AND INTERNAL CONTROL: A FRAMEWORK FOR PREVENTION 33 (John Wiley & Sons, 2013).

[2] CNBC, *American Greed*, http://www.cnbc.com/id/18057119/CNBC039s_American_Greed_Scams_Schemes_and_Broken_Dreams (last visited Apr. 8, 2013).

Many types of fraud involve financial schemes. One, the infamous Ponzi scheme,[3] became infamous in the 1920s[4] and has reappeared in subsequent decades. Within the past decade, Ponzi schemes have seemingly increased in number and frequency in the wake of the crisis in the global financial system in the late 2000s and general economic downturn in the United States.[5] Other forms of financial fraud have become widely notorious in recent years, such as medical billing fraud,[6] tax fraud,[7] real estate

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[3] Samuel P. Rothschild, Note, *Bad Guys in Bankruptcy: Excluding Ponzi Schemes from the Stockbroker Safe Harbor*, 112 COLUM. L. REV. 1376, 1383 (2012) (defining a Ponzi scheme as "an investment scheme not actually supported by an underlying business venture. The scheme promises large returns and initial investors receive them, attracting further investors. But these initial returns are false profits . . .").

[4] R. Alexander Pilmer & Mark T. Cramer, *Swindlers' List*, L.A. LAW, June 2009, at 24 ("The Ponzi scheme's namesake, Carlo 'Charles' Ponzi, was an Italian immigrant who, in the 1920s, solicited other immigrants to invest their life savings with him. Ponzi falsely claimed that his investors' money would be used to buy international postal coupons that he could resell for a 100 percent profit. Ponzi convinced his investors that he was able to earn substantial profits by exploiting differences in international currency exchange rates. In fact, the only thing Ponzi exploited was his investors' trust because he was not actually using their money to purchase postal coupons and, therefore, would not earn any return on their investments. Instead, he used the money he received from new investors to pay the returns he had promised to earlier investors. Although Ponzi convinced more than 20,000 people to invest $10 million, an audit of Ponzi's assets after the scheme collapsed turned up less than $100 worth of postal coupons.").

[5] Rochschild, *supra* note 3, at 1384 (stating, "[i]ndeed, the economic downturn has exposed an increasing number of Ponzi schemes. Authorities uncovered nearly four times as many Ponzi schemes in 2009 as in 2008, and many remain undetected. One study estimates that in the first half of 2011 alone, authorities uncovered fifty-one Ponzi schemes accounting for $837 million in alleged damages. Startlingly, Ponzi schemes have generally grown in magnitude over time.").

[6] Pamela C. Enslen & Matthew F. Leitman, *Health Care Fraud Enforcement*, FED. LAW., June 2010, at 29 ("Another major area of focus is billing fraud, which could include any of the following: billing phantom patients or patients who are deceased; billing for services never provided; billing for old services as if they were new; billing for extra hours or unnecessary tests; billing for equipment that is medically unnecessary, whether or not it is provided; billing for personal expenses; overbilling or double-billing for services; or upcoding or unbundling of services").

[7] Marcus Schoenfeld, *A Critique of the Internal Revenue Service's Refusal to Disclose How it "Determined" a Tax Deficiency, and of the Tax Court's Acquiescence With This View*, 33 IND. L. REV. 517, 519 (2000) ("Federal income tax fraud consists of two types: criminal and civil. The elements of the two types of tax fraud are identical; only the degree of the required proof, and the possible consequences differ. The elements of fraud include: 1. wilfully making a knowing falsehood; 2. an underpayment; and; 3. an intent to evade.").

fraud—especially during the height of the real estate "bubble,"[8] commodities fraud[9]—and even alleged fraud by attorneys.[10]

The issues of fraud and misrepresentations have historically been, and currently are, no stranger to the field of insurance. In some extreme cases, individuals may resort to the crime of arson in order to fraudulently recover insurance proceeds.[11] In the area of automobile insurance, staged collisions and exaggerated injury claims also constitute fraudulent claims.[12] In the area of life insurance, cases of viatical settlement fraud[13] and of allegedly faking deaths in order to obtain life insurance proceeds have been reported.[14] In the application process generally, misrepresentations in applications and supporting documents in order to obtain insurance coverage are utilized by insurers in order to defend against recovery of benefits on claims.[15]

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[8] John E. Campbell & Oliver Beatty, Huch v. Charter Communications, Inc.*: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 VAL. U. L. REV. 501, 524 (2012) (describing the fraud in the real estate market during the late 2000s).

[9] Harry B. Borders, Note, Ernst & Ernst v. Hochfelder *as Applied to Commodities Fraud: No Intent Required*, 79 KY. L.J. 369, 370–71 (1990–1991) ("It has been well established that two of the elements of a commodities fraud claim are control by the broker over the customer's account excessive trading in light of the customer's investment objectives").

[10] Vic Walter & Marc Shone, *Scott Rothstein Gets 50 Years In $1.2 Billion Ponzi Scheme*, ABC NEWS (June 9, 2010), http://abcnews.go.com/Blotter/scott-rothstein-50-years-12-billion-ponzi-scheme/story?id=10868086 (discussing the case of former Fort Lauderdale, Florida attorney Scott Rothstein).

[11] David L. Nersessian, *Penalty by Proxy: Holding the Innocent Policyholder Liable for Fraud by Coinsureds, Claims Professionals, and Other Agents*, 38 TORT TRIAL & INS. PRAC. L.J. 907, 914 (2003) ("Insurers often face fraudulent claims arising out of the intentional destruction of insured property, where the insured deliberately destroys (or procures another to destroy) insured property to realize the economic benefit of the insurance coverage on that property. Arson best exemplifies this type of loss.").

[12] Edward J. Schrenk & Jonathon B. Palmquist, *Fraud and Its Effects on the Insurance Industry*, 64 DEF. COUNS. J. 23, 25 (1997) ("Staged vehicle collisions are becoming one of the top fraud schemes").

[13] Eli Martin Lazarus, Note, *Viatical and Life Settlement Securitization: Risks and Proposed Regulation*, 29 YALE L. & POL'Y REV. 253, 262 (2010) ("At different times, fraud has infected every stage of the viatication and life settlement process. Viators have hidden illnesses from insurers (sometimes with accomplices to stand in at physical examinations), and healthy policyholders have conspired with physicians to fake serious illnesses, inflating settlement proceeds.").

[14] Julia Greenberg, *N.Y. Man Charged, Accused of Faking Death in Insurance Scam*, CNN (Aug. 15, 2012), http://www.cnn.com/2012/08/15/justice/new-york-fake-death-insurance/index.html.

[15] ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 713–14 (1988) ("When an

The problems of fraud and misrepresentations are not foreign to the area of crop insurance and the federal crop insurance program. Although there is vast legal scholarship generally on insurance fraud,[16] the

application for insurance contains false answers, it often leads to the issue of whether the insured or third party beneficiaries should be able to recover benefits upon proof that the applicant gave truthful answers that were incorrectly recorded by an intermediary (agent or broker) or a medical examiner. Insurers have often defended claims in such cases on the theory that the applicant is responsible for whatever appears in the application. This defense is ordinarily supported by one or more of these arguments: (1) that the person recording the answers was, in doing so, acting as the applicant's agent and not as agent for the insurer; (2) that the applicant's opportunity to read the recorded answers before signing makes the applicant responsible for their content, even if the applicant failed to take advantage of that opportunity; and (3) if the application or a copy of it was attached to the policy (or otherwise delivered to the policyholder), that the opportunity to read the recorded answers at that subsequent time and to call the insurer's attention to any discrepancy makes the applicant responsible thereafter for the erroneous information provided to the insurer.").

[16] Articles which address insurance fraud include the following: 1988: Michael Sean Quinn, *Closing Arguments in Insurance Fraud Cases*, 23 TORT & INS. L.J. 744 (1988); 1992: Boyd Kimball Dyer, *Economic Analysis, Insider Trading, and Game Markets*, 1992 UTAH L. REV. 1 (1992); Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907 (1992); 1993: Robert W. Emerson, *Insurance Adjusters and Plaintiffs' Attorneys: From Claims Fraud Consensus to Settlement Reform*, 30 AM. BUS. L.J. 538 (1993); Frank E. Miller, *Reclaiming Attorneys' Fees Paid Out on Fraudulent Claims*, 60 DEF. COUNS. J. 97 (1993); 1994: Daniel T. Fitzpatrick, Comment, *Civil RICO and Antitrust Law: The Uneven Playing Field of the Workers' Compensation Fraud Game*, 25 PACE L.J. 311 (1994); 1996: Robert R. Googins, *Fraud and the Incontestable Clause: A Modest Proposal for A Change*, 2 CONN. INS. L.J. 51 (1996); Lesley A. Hunter, Comment, *The Legal Prevention of Equine Insurance Fraud—How We Can Stop the Killing Game*, 22 OHIO N.U. L. REV. 845 (1996); Cathryn M. Little, *Fighting Fire with Fire: "Reverse Bad Faith" in First-Party Litigation Involving Arson and Insurance Fraud*, 19 CAMPBELL L. REV. 43 (1996); Alan O. Sykes, *"Bad Faith" Breach of Contract by First-Party Insurers*, 25 J. LEGAL STUD. 405 (1996); 1999: Guy William McRoskey, Comment, *The Rule in a Contribution Action Between Third-Party Insurers Wherein the Plaintiff Insurer Seeks Reimbursement of Defense Costs from the Defendant Insurer After a Collusive Fraud on the Plaintiff Insurer Under California Law*, 36 SAN DIEGO L. REV. 797 (1999); 2000: Bruce R. Fox, *Technology: The New Weapon in the War on Insurance Fraud*, 67 DEF. COUNS. J. 237 (2000); 2001: Chad A. Hester, Note, *Are Forensic Locksmiths Really Qualified to Testify As Experts in Cases of Insurance Fraud?: An Examination of the Admissibility of Forensic Locksmith Opinions Under Rule 702*, 49 CLEV. ST. L. REV. 357 (2001); Louis J. Papa & Anthony Basile, *No-Fault Insurance Fraud: An Overview*, 17 TOURO L. REV. 611 (2001); 2002: Keith J. Crocker & Sharon Tennyson, *Insurance Fraud and Optimal Claims Settlement Strategies*, 45 J.L. & ECON. 469 (2002); Mark K. Delegal, *Florida No-Fault Insurance Reform: A Step in the Right Direction*, 29 FLA. ST. U. L. REV. 1031 (2002); Francis J. Mootz III, *The Sounds of Silence: Waiting for Courts to Acknowledge that Public Policy Justifies Awarding Damages to Third-Party Claimants When Liability Insurers Deal with Them in Bad Faith*, 2 NEV. L.J. 443 (2002); 2006: Curt A. Benson, *Persuading and Dissuading: The Degree of Proof in Insurance Fraud Cases*, 23 T.M.

specific issues of crop insurance fraud and misrepresentations remain largely unexplored among law review articles.[17] In an era of tough financial budgets and a delicate economic recovery in the United States, fraud in the federal crop insurance program has been estimated to cost taxpayers in the millions of dollars.[18] Despite efforts by both private crop insurers and the federal government to combat fraud associated with claims in the program, crop insurance fraud and misrepresentations associated with crop insurance policies remains a significant issue of national concern.[19]

This Article, as a follow up to an article examining the legal issues concerning crop insurance bad faith liability,[20] offers a comprehensive examination of contemporary legal issues concerning the issue of crop insurance fraud and misrepresentations. Part I provides an overview of the contemporary problem of fraud in crop insurance and discusses the responses of both private insurers and the federal government to curb and combat waste, fraud, and abuse in the program. Part II explores the variety of legal remedies to combat crop insurance fraud and misrepresentations among reported cases. In criminal law, the possibility of substantial criminal sentences, of up to 30 years in prison, and criminal prosecutions of crop insurance fraud serve as a deterrence to the commission of acts of fraud. However, remedies for crop insurance fraud are not limited to criminal prosecutions alone. Misrepresentations in applications for crop insurance, particularly the misrepresentations of actual interests in crops, have led to cases where insureds cannot recover for damages due to covered causes of losses. In addition to rescission and voidance of insurance policies

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COOLEY L. REV. 503 (2006); Robert E. Hoyt, David B. Mustard & Lawrence S. Powell, *The Effectiveness of State Legislation in Mitigating Moral Hazard: Evidence from Automobile Insurance*, 49 J.L. & ECON. 427 (2006); 2007: John W. Leardi, *Clarifying a Post-Payment Audit Fiction: Why Inadequate Clinical Records are Not a* Per Se *Violation of the New Jersey Insurance Fraud Prevention Act*, 31 SETON HALL LEGIS. J. 287 (2007); Johnny Parker, *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*, 2007 MICH. ST. L. REV. 683 (2007); 2009: Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477 (2009).

[17] *See, e.g.*, David F. Rendahl, Comment, *Federal Crop Insurance: Friend or Foe?*, 4 SAN JOAQUIN AGRIC. L. REV. 185 (1994); Christopher R. Kelley, *The Agricultural Risk Protection Act of 2000: Federal Crop Insurance, the Non-Insured Crop Disaster Assistance Program, and the Domestic Commodity and Other Farm Programs*, 6 DRAKE J. AGRIC. L. 141 (2001).

[18] Scott Cohn, *Crop Insurance Set to Expand Despite Growing Fraud Worries*, CNBC (June 21, 2012), http://www.cnbc.com/id/47903496/Crop_Insurance_Set_to_Expand_Despite_Growing_Fraud_Worries.

[19] *Id.*

[20] Chad G. Marzen, *Crop Insurance Bad Faith: Protection for America's Farmers*, 46 CREIGHTON L. REV. (forthcoming 2013).

as a civil remedy for crop insurance fraud and misrepresentations, in at least one case, alleged material misrepresentations concerning crops and crop insurance in balance sheets submitted to a judgment creditor in a bankruptcy proceeding excepted a claim from discharge in bankruptcy.[21]

Despite the presence of criminal and civil remedies for crop insurance fraud and misrepresentations, the current magnitude of fraud and abuse in the federal crop insurance program reflects the need for more aggressive action. This sort of action would further eliminate abuses to help ensure the federal crop insurance program remains a vital source of support for America's farmers. In light of the significant issues of fraud and misrepresentations in the federal crop insurance program, Part III proposes several additional measures which can be implemented by legislation and by judicial interpretation to further improve the integrity of the program.

I. CROP INSURANCE FRAUD: A CONTINUING DILEMMA

The federal crop insurance program, in place since the Federal Crop Insurance Act of 1938,[22] protects America's farmers by insuring crop losses which private insurers otherwise are unlikely to insure in the absence of reinsurance. The purpose of the Federal Crop Insurance Act is as follows:

> It is the purpose . . . [of the Federal Crop Insurance Act] to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.[23]

Although a comprehensive discussion of the history of the federal crop insurance program is beyond the scope of this Article,[24] issues concerning misrepresentations and fraud in the area of crop insurance have appeared in reported cases even before the passage of the FCIA.[25] Today,

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[21] *In re* Schnuelle, 441 B.R. 616, 624–25 (8th Cir. 2011).
[22] Agriculture Adjustment Act of 1938, Pub. L. No. 430, 52 Stat. 31 (1938).
[23] 7 U.S.C. § 1502 (2012).
[24] *See, e.g.*, Steve Cooper, Note, *Crop Insurance in the Age of Biotechnology: Should Federal Crop Insurance Endorse Biotechnology?*, 15 CONN. INS. L.J. 495 (2009); Steffen N. Johnson, *A Regulatory 'Waste Land': Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505 (1996).
[25] *See* Rumbolz v. American Alliance Ins. Co. of N.Y., 61 S.D. 334 (1933); Bauer v. National Union Fire Ins. Co. of Pittsburgh, Pa., 51 N.D. 1 (1924).

crop insurance fraud and misrepresentations continue to pose a significant hurdle to the integrity of the federal crop insurance program.

A. The Issue of Fraud in Crop Insurance

One of the biggest issues facing federal crop insurance today is fraud. One of the forms of fraud insurers have identified in numerous reported cases involves misrepresentations in applications for insurance.[26] Alleged misrepresentations in applications for crop insurance policies, often relating to the extent of interests in an insured crop, or the existence of the very crop itself, have appeared in reported cases.[27] In some cases, farmers have actually scattered foreign materials into fields in attempting to convey damage by covered causes of loss, or have reportedly claimed that certain crops are planted in an area when the crops do not actually exist. In one recent case, a North Carolina farmer collected more than $9 million in dubious claims for years, including one instance when he allegedly directed workers to scatter ice cubes and mothballs in a Tennessee tomato field in order to show the plants were damaged by a hailstorm.[28] In another, out of Texas, an individual was reportedly convicted of fraud and spent approximately one year in a federal penitentiary for filing a crop insurance claim for cotton never planted.[29]

An estimated rate for crop insurance fraud is approximately five percent,[30] but as a federal program, which currently costs approximately $7 billion per year, fraud and abuse could cost approximately in the hundreds of millions per year.[31] Faced with continued acts of abuse and fraud, the government has responded with action in attempting to curb acts of fraud.

B. Contemporary Responses to Crop Insurance Fraud

1. The Agricultural Risk Protection Act of 2000

In 2000, the Agricultural Risk Protection Act promulgated several measures intended to improve the integrity of the crop insurance

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[26] John Dwight Ingram, *Misrepresentations in Applications for Insurance*, 14 U. MIAMI BUS. L. REV. 103 (2005–2006) (discussing reported cases).
[27] *See infra* Part II.
[28] Cohn, *supra* note 18.
[29] John Burnett, *Crop Insurance Program Ripe for Fraud*, NPR (Nov. 15, 2005), http://www.npr.org/templates/story/story.php?storyId=5012400.
[30] Cohn, *supra* note 18.
[31] *Id.*

program.[32] Professor Christopher Kelly's excellent 2001 article in the Drake Journal of Agricultural Law summarized many of the law's key provisions. It noted that the Act established a mechanism by which federally reinsured crop insurance providers can report suspected fraud and abuse to the Federal Crop Insurance Corporation ("FCIC").[33] Professor Kelly also remarked that if a provider suspects fraud or wrongdoing, it can report the alleged misconduct to the FCIC and within ninety days, the FCIC must respond with a written report describing its intended actions.[34] If the FCIC declines to do so, the insurance provider can request the Farm Services Agency to investigate the alleged misconduct.[35]

One of the key tenets of the Act was the creation of an enhanced federal inspections regime to improve program compliance. A key issue in insurance fraud generally is the problem of collusion between an insurance agent or broker and an insured in attempts to defraud an insurer.[36] Crop insurance is no different from other types of insurance. If an agent or adjuster has claims which exceeds 150 percent of the average of claims by all other agents and adjusters in the same geographical area, the FCIC or Farm Service Agency can perform an audit of that agent or adjuster[37] in order to combat the problem of collusion in crop insurance.

Professor Kelley also remarked that the Agriculture Risk Protection Act provides for civil sanctions in the event a producer, agent, loss adjuster, approved insurance provider or other person intentionally furnishes "false or inaccurate information" to the FCIC or insurance provider which sells federally reinsured crop insurance policies.[38] As Professor Kelly notes, penalties include either the greater of the amount of the pecuniary gain received by the individual/entity as a direct result of the "false or inaccurate information" furnished or $10,000.[39] In addition, Professor Kelly also notes

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[32] Kelley, *supra* note 17, at 155.
[33] *Id.* at 157.
[34] *Id.*
[35] *Id.*
[36] Barbara Jo Call, *Third-Party Problems with Falsified Insurance Applications*, 24 TORT & INS. L.J. 671, 677 (1988–1989) ("[T]he misrepresentations of an insurance agent may be imputed to the insured by virtue of some conspiracy between the two. Although a collusion defense technically requires 'intentionally cooperative action' between the insured and the agent, the courts in many jurisdictions have found collusion without a common plan to mislead the insurer.").
[37] 7 U.S.C. § 1515(f)(1) (2012); *see also* H. Douglas Jose, *The Impact of The Agricultural Risk Protection Act of 2000 on Crop Insurance Programs*, CORNHUSKER ECONOMICS (Jan. 24, 2001), http://digitalcommons.unl.edu/agecon_cornhusker/22.
[38] Kelley, *supra* note 17, at 157; *see* 7 U.S.C. § 1515(h)(1) (2012).
[39] Kelley, *supra* note 17, at 157; *see* 7 U.S.C. § 1515(h)(3)(A)(I, ii) (2012).

that a producer who furnishes "false or inaccurate information" may be disqualified from participation in the federal crop insurance program and other agricultural programs for a period of up to five years.[40] In one recent decision, the United States District Court for the Western District of Virginia upheld an administrative law judges' decision to impose a civil fine of $5000 and disqualify an individual from certain federal programs for two years in a case involving allegations where that individual allegedly misrepresented ownership of tobacco and allegedly made a false claim for insurance in violation of 7 U.S.C. § 1515(h).[41]

2. USDA Risk Management Agency, Data Mining and Other Technology

In addition to the measures intended to fight fraud included within the Agricultural Risk Protection Act, crop insurers and the federal government have increased utilization of technology to combat fraud. Insurers, in general, utilize the technique of data mining to identify distinctive patterns and discrepancies among claims.[42] Data mining allows insurers to search[43] through databases in order to generate reports which can be of assistance in a fraud investigation if alleged instances of fraud appear in a repeated pattern or if there are multiple instances of suspected acts of collusion among claimants and insurance agents or brokers.[44]

In the past decade, the Risk Management Agency of the United States Department of Agriculture ("RMA") has utilized data mining to detect waste, fraud, and abuse in the federal crop insurance program.[45] If a farmer who has federally reinsured crop insurance policies receives

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[40] Kelley, *supra* note 17, at 157; *see* 7 U.S.C. § 1515(h)(3)(B) (2012).
[41] Porter v. United States, No. 1:10CV00026, 2011 WL 182108 (W.D. Va. 2011).
[42] Fox, *supra* note 16, at 240 ("Data mining involves searching the information stored in a database to reveal patterns, links and discrepancies that otherwise would have remained uncovered or would have been uncovered only through an outlay of substantial time and effort.").
[43] *Id.* at 240–41 ("Database programs provide for two types of searches: structured query language, called SQL, and interactive. SQL uses a set of defined commands, usually found with larger databases, and is relatively difficult to use. With interactive searches, the user selects a search screen that contains the various fields available in that particular database and types the search information, which is called a query, in the appropriate field on the search screen.").
[44] *Id.* at 241–42.
[45] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-256, CROP INSURANCE: SAVINGS WOULD RESULT FROM PROGRAM CHANGES AND GREATER USE OF DATA MINING 25 (2012).

"anomalous" payments on claims that are higher or more frequent than others in the same geographical area, the United States Department of Agriculture notifies the farmer via a warning letter that their fields are to undergo an inspection in the next growing season by the Farm Services Agency, who then notifies the results to the RMA.[46] Officials of the RMA have reported that the warning letters have reduced total claims by an estimated $838 million from 2001 to 2010, and that approximately two-thirds of farmers who receive a warning letter reduce or stop filing claims for at least two to three years following receipt of the letter.[47]

In addition, crop insurers utilize experts in the geographical sciences and satellite technology to identify fraudulent claims. Utilizing technology which blends GPS functions and imaging technology from medical technology, at least one independent contractor, who has assisted the USDA and private crop insurers for nearly twenty years in investigations, analyzes satellite imagery and imaging to detect fraud.[48] As GPS technology continues to become more refined and advanced with each passing year, a further expansion of the usage of satellite imaging to assist private crop insurers and the government is foreseeable.

As fraud continues to remain a critical problem in crop insurance, remedies currently exist under both criminal law and civil law to counter false or inaccurate information, misrepresentations, and outright acts of fraud.

II. LEGAL REMEDIES FOR CROP INSURANCE FRAUD

A. Criminal Remedies for Crop Insurance Fraud

A number of statutes make crop insurance fraud a federal crime. The criminal statute of the False Claims Act makes it a crime to "make or present" a false, fictitious, or fraudulent claim to any person in the civil service of the United States. 18 U.S.C. § 287 states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency

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[46] *Id.*
[47] *Id.* at 26.
[48] Cohn, *supra* note 18.

> thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.[49]

While a conviction under 18 U.S.C. § 287 may result in a defendant being imprisoned for up to five years, a conviction of the use of mail delivered by the U.S. Postal Service in commission of a fraud against the FCIC may result in a more stringent imprisonment.[50] For instance, if an insured under a federally reinsured crop insurance policy uses the U.S. Postal Service to deliver documents relating to the intentional submission of a false or fraudulent claim to the FCIC, then that individual may be guilty of mail fraud under 18 U.S.C. § 1341[51] and could be sentenced to imprisonment of up to twenty years.

Finally, the most stringent criminal penalties occur in the situation where an insured, or a potential insured, knowingly makes a false statement or report, or willfully overvalues any land property or security with the intention to influence an action of the FCIC. This situation typically occurs with loan and credit applications, but may result in up to a $1 million fine and imprisonment of up to thirty years.[52]

A 2006 case, *United States v. Kuehnemund,* involved a federal conviction of a potato producer for crop insurance fraud in the United States District Court of the Eastern District of Michigan.[53] The case is

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[49] 18 U.S.C. § 287 (2012).

[50] 18 U.S.C. § 287 (2012); 18 U.S.C. § 1341 (2012).

[51] 18 U.S.C. § 1341 (2012). The statute states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

[52] 18 U.S.C. § 1014 (2012).

[53] No. 05-1871, 2006 WL 3593436, at *1 (6th Cir. 2006).

significant as it involved all three of the above-mentioned statutes. In the *Kuehnemund* case, a Michigan potato producer was accused of making false statements to various federally reinsured crop insurers concerning the amount of potatoes he produced between 1994 and 1997.[54] These false statements were allegedly included in invoices, shipping orders, and billing statements, and were allegedly made with the intention to inflate his baseline potato crop in order to receive higher crop insurance indemnities for losses than he was entitled to receive.[55] The defendant was convicted and sentenced to eighty-seven months in federal prison.[56]

In appealing his conviction before the Sixth Circuit Court of Appeals, the defendant in *Kuehnemund* argued that his mail fraud conviction should have been overturned because his insurance agent testified at trial that he did not specifically inform his clients that he sent documents concerning federally reinsured crop insurance claims through the United States Postal Service, and thus insufficient evidence existed to uphold the convictions.[57]

In rejecting this argument, the Sixth Circuit Court of Appeals held that it is "reasonably foreseeable" that an insurance agent or broker would utilize the U.S. Postal Service to transmit the fraudulent documents of the insured to the crop insurer issuing federally reinsured crop insurance policies.[58] This holding affirmed decisions in the Tenth Circuit Court of Appeals[59] and Eleventh Circuit Court of Appeals[60] that it is foreseeable that an insurance company would utilize the U.S. Postal Service system in response to a fraudulent claim of an insured.

Kuehnemund is significant in conveying that, with regard to crop insurance fraud and the false submission of a claim, mail fraud may also be involved, resulting in the imposition of a more stringent criminal penalty. Standing alone, the False Claims Act only provides for a five-year sentence, but combined with mail fraud, there is more of a bite—one who is guilty of mail fraud in the false submission of a crop insurance claim may be sentenced for up to twenty years imprisonment. As criminal penalties provide stringent remedies for crop insurance fraud, civil remedies, including the civil remedies of the False Claims Act statute and

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at *2.
[58] *Id.* at *3.
[59] United States v. Markum, 4 F.3d 891 (10th Cir. 1993).
[60] United States v. Smith, 934 F.2d 270 (11th Cir. 1991).

the misrepresentation doctrine of insurance law, also currently provide deterrence to the commission of acts of misrepresentation or fraud.

B. Civil Remedies for Crop Insurance Misrepresentations and Fraud

1. False Claims Act

In addition to the civil penalties discussed earlier which were codified into law as part of the Agricultural Risk Protection Act, the False Claims Act also provides a civil remedy to the government against those who present, or cause to present, a false claim for payment or approval, or present or cause to present records or statements material to a false claim to an officer or employee of the government.[61] The False Claims Act provides for a significant civil remedy—a monetary fine of not less than $5000 and not more than $10,000—and treble damages of the amount of loss the government sustained as a result of the false claim.[62]

United States v. Hawley is an interesting case which involved collusion between an insurance agent and insureds to allegedly defraud the FCIC. In *Hawley*, an insurance agent allegedly signed and submitted crop insurance applications on behalf of at least two farmers which contained representations that the farmers held an insurable interest in the crops, when none actually existed.[63] The government brought forth claims against the insurance agent based upon the False Claims Act, among other claims, alleging that the agent knowingly caused farmers who were not entitled to receive multi-peril crop insurance coverage to receive not only coverage, but also payments from a federally reinsured crop insurer, which the FCIC reimbursed.[64] At least two of the farmers who had received payments were prosecuted for federal crop insurance fraud and entered pretrial diversion agreements.[65] At the trial court level, the United States District Court for the Northern District of Iowa granted summary judgment for the insurance agent on the 31 U.S.C. § 3729(a)(1) False Claims Act claim, reasoning that the plain language of the statute required a claim to be presented to an officer or employee of the *government,* not the federally reinsured crop insurer.[66] In the case, the government had only proffered evidence that

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[61] 31 U.S.C. § 3729(a)(1) (2012).
[62] *Id.*
[63] United States v. Hawley, 619 F.3d 886, 889 (8th Cir. 2010) [hereinafter *Hawley II*].
[64] *Id.* at 890.
[65] *Id.* at 889.
[66] United States v. Hawley, 544 F. Supp. 2d 787 (N.D. Iowa 2008).

the insurance agent presented false claims to the federally reinsured crop insurer, but not actually directly to the FCIC.[67]

On appeal before the Eighth Circuit Court of Appeals, the government contended that although the insurance agent did not physically present the false claims to the FCIC, the agent *caused* the claims to be presented.[68] The government argued the sequences of events below created a False Claims Act claim which should have been submitted to the jury:

> (1) [The insurance agent] signed and submitted crop insurance applications and acreage reports in the names of farmers who were not eligible for such policies; (2) [The private crop insurer] issued federally reinsured policies to those farmers on the basis of those documents; (3) the farmers filed claims with [the private crop insurer] for losses to the insured crops; (4) [The private crop insurer] paid the farmers for the claimed losses; and (5) [The private crop insurer], in turn, submitted electronic requests for reimbursements to the FCIC in the amounts that [the private crop insurer] paid to the farmers.[69]

In essence, the government contended that the claims presented to the FCIC for the purposes of the False Claims Act statute were the claims of reimbursements to the FCIC submitted by the private crop insurer.[70] In reversing the summary judgment decision at the trial court level and finding that an issue of fact existed as to the presenting of a claim, the Court of Appeals focused on the fact the government submitted the testimony of an official of the USDA that an electronic data communication from a private crop insurer to the FCIC triggers a release of funds from the FCIC to an escrow account at a bank where a farmer can obtain payment on a crop insurance claim.[71]

The *Hawley* decision is a key decision whose effect will likely lead to more 31 U.S.C. § 3729(a)(1) False Claims Act claims surviving early dispositive motions. By rejecting the standard that the government must proffer proof of a false communication directly to the FCIC, the Eighth Circuit's decision has the effect of retaining the False Claims Act as an

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[67] *Id.*
[68] *Hawley II*, *supra* note 63, at 892.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 893–94.

effective remedy at deterring crop insurance fraud and expanding civil liability into a broader range of cases, not only those that involve direct communications between an insured or insurance agent to the FCIC. In addition to the False Claims Act as a civil remedy against crop insurance fraud, the misrepresentation doctrine of insurance law also protects private crop insurers from acts of misrepresentation and fraud.

2. Misrepresentation Doctrine

The intentional, purposeful or knowing material misrepresentation in an application or supporting documents associated with the procurement of a policy of insurance is a fairly common occurrence in the area of insurance.[72] In the area of crop insurance, such misrepresentations are often associated with the misrepresentation of insurable interests in the crop to be insured and reinsured by the FCIC. In some instances, as the *Hawley* case above demonstrates, material misrepresentations may result in the imposition of criminal liability.[73] In addition, through the misrepresentation doctrine discussed below, such material misrepresentations often void a crop insurance policy.

Under the misrepresentation doctrine of insurance law generally, civil relief of the avoidance of the policy is available to an insurer who can prove that an insured intended a fraudulent misrepresentation of *material* fact which appears in an application or supporting documents of a policy or policies of insurance.[74] Professors Robert Keeton and Alan Widiss summarize the contemporary doctrinal rule concerning an insurer's right to relief under the misrepresentation doctrine of insurance law as follows:

> An insurer is entitled to relief on the basis that an insured provided incorrect information in an insurance application, when it is proved (1) that the information was not correct, (2) that the information received was important either to the insurer's decision to insure or to the terms of the insurance contract, (that is, the information was "material"), and (3) that the insurer in fact relied on the incorrect information.[75]

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[72] Ingram, *supra* note 26.
[73] *See supra* Part II.B.1.
[74] KEETON & WIDISS, *supra* note 15, at 569–70.
[75] *Id.* at 570.

However, among individual jurisdictions there are variations of the above-mentioned doctrinal rule. For instance, in some states a more restrictive standard for insurers to meet has been developed in that a misrepresentation is not "material" unless it increases the risk of loss for an insurer,[76] and in some states an insurer not only is required to prove that a misrepresentation is made knowingly false, but also that it was made with the intent to deceive.[77]

In the area of crop insurance, the misrepresentation doctrine has appeared in reported cases even prior to the advent of the Federal Crop Insurance Act in the 1930s and has been a longstanding civil remedy for private crop insurers. One of the early cases, *Berglund v. State Farmers' Mutual Hail Insurance Company of Waseca, Minnesota*, was decided by the Supreme Court of North Dakota in 1913.[78] *Berglund* involved a hail loss incurred on an insured crop in 1910 and the dispute at issue concerned the indemnity amount owed under the policy.[79] The plaintiff argued for the full amount, and the insurer contended the insured was only due the amount reflecting a one-half interest in the insured crop.[80]

Judgment was awarded for the plaintiff for the full amount under the policy at the trial court level on a motion for judgment on the pleadings.[81] However, on appeal the insurer raised the defense proferred in its answer to the motion for judgment on the pleadings that the insured allegedly misrepresented the extent of the interest under the insured crop.[82] Given the general rule that an answer to a motion for a judgment on the pleadings is to be construed liberally with all reasonable inferences in its favor, the Court reversed the judgment for the plaintiffs and the case was remanded for further proceedings.[83]

Another early case from the Supreme Court of South Dakota in 1933, *Rumbolz v. American Alliance Insurance Company of New York*,

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[76] Ingram, *supra* note 26, at 105 ("In some states a misrepresentation will not be deemed material unless it increases the risk of loss. This is a more restrictive standard for the insurer because a fact may be material to that insurer even though it does not demonstrably increase the risk of loss.").
[77] *Id.* at 105 ("In some states, an insurer wishing to rescind or deny a claim must meet a difficult standard. In addition to proving materiality, an insurer must also prove that the misrepresentation was knowingly false, and sometimes he or she must exceed the knowingly false standard and establish that it was made with intent to deceive.").
[78] 142 N.W. 941, 942 (N.D. 1913).
[79] *Id.* at 942.
[80] *Id.*
[81] *Id.* at 941–42.
[82] *Id.* at 942–43.
[83] *Id.* at 943.

involved the question of whether an insured misrepresented on an insurance application that crops which were to be insured against hail damage were not damaged by hail prior to the completion of the insurance application and issuance of the policy.[84] The trial court in the case had entered a judgment for the insured and denied the insurer's motion for new trial.[85] In reversing the judgment for the insured, the Supreme Court of South Dakota found that the issue of disclosure of any previous or actual damage by hail prior to the issuance of the policy was material.[86]

The question of whether or not a misrepresentation is "material" is one that has appeared in crop insurance litigation. If a misrepresentation involves a fact essential to a crop insurance company's determination of the assessment of the insurability of a risk, then courts are more likely to find a misrepresentation "material."[87] In *Parks v. Federal Crop Insurance Corporation,* six Indiana farmers were issued crop insurance policies directly by the Federal Crop Insurance Corporation to cover corn crops for the 1965 crop year.[88] The corn crops suffered damage during the crop year due to drought, and the farmers brought suit against the FCIC after it denied coverage on the basis of alleged material misrepresentations concerning the farmers' interests in the crop.[89]

In *Parks*, the plaintiff farmers apparently did not disclose to the FCIC during the underwriting process certain contracts made with an agricultural association which essentially provided the farmers with hybrid seed corn, compensation for production of certain levels, and labor in exchange for satisfactorily planting and harvesting the crop and keeping the seed and crop the property of the association at all times.[90]

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[84] 249 N.W. 316 (S.D. 1933).

[85] *Id.*

[86] *Id.* at 317 ("In an application for hail insurance made for the purpose of informing the insurer of facts pertaining to the crops sought to be insured and to furnish the insurer with information upon which to act in accepting or rejecting the risk, disclosure as to previous and actual damage by hail is material. It is apparent that the defendant company would not have issued the policy if it had been informed that plaintiff's crops had been materially damaged by hail.").

[87] Parks v. Fed. Crop Ins. Corp., 416 F.2d 833, 834 (7th Cir. 1969).

[88] *Id.*

[89] *Id.* at 384–85.

[90] *Id.* at 385. The Court stated as follows:

> The controversy involves plaintiff's individual, identical contracts with the DeKalb Agricultural Association, under which the Association, "desirous of engaging the land and services of the grower to raise corn suitable for feed," agreed to furnish: parent hybrid seed corn to be planted on plaintiffs' farms; a man to supervise the planting of the seed; and

On appeal, the United States Court of Appeals for the Seventh Circuit contended that even if the farmers' alleged nondisclosure of the contracts with the agricultural association constituted a legal misrepresentation, it was not "material" as the FCIC did not proffer any evidence showing that the contracts would have influenced decisions concerning issuance of the policies.[91] In fact, the court stated that since the contracts provided for a minimum compensation per acre for the farmers, any risk that was incurred by the FCIC would be a "more attractive" risk and to the FCIC's benefit.[92]

The misrepresentation doctrine also can come into conflict with other doctrines of contract law, such as an assignment. Such a fact pattern was presented in the 2005 Eighth Circuit decision in *Knoeplin Farms General Partnership v. Heartland Crop Insurance, Inc.*[93] In *Knoeplin Farms*, an individual had received a multi-peril crop insurance policy for a 2002 winter-wheat crop from a federally reinsured private crop insurer in September 2001.[94] However, in July 2002, this same individual faced allegations of a false claim from the government for underreporting a sunflower crop from approximately three years earlier, and entered into a settlement agreement in which guilt was not admitted, but provided for voluntary disbarment and disqualification from all FCIC programs during the 2002 crop year.[95]

Following the issuance of the multi-peril crop insurance policy for the 2002 wheat crop but prior to the entering into the settlement agreement, an assignment was apparently entered by the individual in February 2012 transferring all interests in both the wheat crop and insurance into another entity.[96]

> labor for detasseling the resulting "female" corn plants to prevent self-pollination. The Association also agreed to compensate the grower at the rate of $100 per acre plus a premium of $1.25 per bushel for each bushel of seed corn produced on the female acres in excess of 20 bushels per acre.
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> In return, the grower agreed to satisfactorily plant and harvest the crop, and not to allow any person to acquire or obtain "even as much as one kernel" of the seed corn. The contract provided that the seed furnished and the seed corn raised therefrom, as well as the corn produced from the male parent rows, remained at all times the property of the Association.

[91] *Id.* at 840.
[92] *Id.*
[93] 430 F.3d 906 (8th Cir. 2005).
[94] *Id.* at 908–09.
[95] *Id.* at 909.
[96] *Id.* at 909, 911.

On appeal, the United States Court of Appeals for the Eighth Circuit Court held that the crop insurance policy issued in the case was not void, but voidable at the option of the insurer.[97] However, the assignment from the individual to the other entity was held to be valid, and the court noted a fundamental rule of contract law is that "an assignee's right is subject to a defense that the contract was voidable or unenforceable before the assignment" but also that "an assignee is not subject to any defense by the obligor against the assignor that arises after notice of the assignment."[98]

Under the facts of the case, any defense the insurer had against the entity which accepted the assignment did not arise until July 2002, when the settlement agreement concerning voluntary disqualification and debarment was entered into.[99] However, the defense arose only after there was notice of the assignment, and thus any insurer defense would be unavailable.[100] Since there was no evidence of fraud with the assignment, it was valid, and thus, the misrepresentation doctrine or any other doctrine did not apply to void the assignment of indemnity.[101]

Despite the decisions in *Parks* and *Knoeplin Farms*, the misrepresentation doctrine has operated to bar the insurance claims of insureds who have allegedly misrepresented ownership interests in insured crops to private crop insurances and the FCIC in a number of cases in the past two decades. The Tenth Circuit Court of Appeals held in favor of the FCIC and upheld a claims denial in a case where the insured allegedly misrepresented ownership interest in a wheat crop in a 1993 decision.[102] Most recently, in *Skymont Farms v. Federal Crop Insurance Corporation*, the United States District Court for the Eastern District of Tennessee upheld the voidance of a crop insurance policy in a case where an insured allegedly had an insurable interest in a crop as an operator of a nursery business, but allegedly did not disclose a substantial beneficial interest of other family members in the insured crop.[103] In another decision, although the

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[97] *Id.* at 911.
[98] *Id.*
[99] *Knoeplin Farms General Partnership*, 430 F.3d at 912.
[100] *Id.*
[101] *Id.*
[102] Hermes v. Fed. Crop Ins. Corp., No. 92-3301, 1993 WL 26825 (10th Cir. 1993).
[103] No. 4:09-cv-65, 2012 WL 1193407, *10 (E.D. Tenn. 2012). The Court reasoned as follows:

> While it is true that the ownership of the crop would not have an impact on the existence or amount of the loss when operating under a catastrophic coverage policy, the adjustment of the loss would certainly be affected if the named insured was not truly the owner of the crop. The

United States District Court for the District of South Carolina denied an insurer's motion for summary judgment on a declaratory judgment claim concerning alleged misrepresentations as to the ownership interest in an insured's corn crops, it upheld the insurer's motion for summary judgment concerning the lack of an insurable interest in the crops at issue.[104]

For the past century, the misrepresentation doctrine has served as a civil remedy for the FCIC and crop insurers where an insured allegedly misrepresents ownership interest and other material facts in an application and supporting documents for insurance. While strong criminal and civil penalties exist under current law to deter crop insurance fraud, as discussed above, fraud still exists in the crop insurance program, and with the debate over a new farm bill[105] anticipated to occur in the forthcoming months, action can be taken in 2013 and beyond to further eradicate fraud.

III. POSSIBLE REMEDIES TO FURTHER COUNTER CROP INSURANCE FRAUD

A. Legislation and the 2013 Farm Bill

As the year 2012 came to a close, anxiety for many individuals within the United States was at higher levels due to the "fiscal cliff."[106] As a "fiscal cliff" package cleared Congress for approval as 2013 began, in the area of agriculture a deal was reached to extend most provisions of the 2008 farm bill and avert the "dairy cliff," which would have likely resulted in the doubling of the price of a gallon of milk for American consumers.[107] A key congressional debate concerning a new five-year farm bill looms to

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> insurance company has a legitimate interest in determining whether the amount of the claimed loss is accurate, which is informed by the reputation of the crop owner and any past claims made. Therefore, if the insured represented himself as the owner but the crops were instead owned by someone else, the facts involved could be very different, and the Court can conceive of ways in which this type of misrepresentation could increase the insurance company's risk of loss.

[104] Great Am. Ins. Co. v. Mills, No. 4:06-cv-01971-RBH, 2008 WL 2250256 (D. S.C. 2008).
[105] Erika Bolstad, *Old Farm Bill Extended as Special Interests Worry Anew about Future*, MCCLATCHY (Jan. 4, 2013), http://www.mcclatchydc.com/2013/01/04/179074/old-farm-extended-as-special.html.
[106] Galen Moore, *Fiscal Cliff Anxiety Blamed for Drop in Consumer Confidence*, BOSTON BUSINESS JOURNAL (Dec. 28, 2012), http://www.bizjournals.com/boston/blog/mass_roundup/2012/12/consumer-confidence-drop-fiscal-cliff.html.
[107] Bill Tomson, *Congress Averts 'Dairy Cliff,'* WALL ST. J. (Jan. 1, 2013), http://online.wsj.com/article/SB10001424127887323320404578215652575653978.html.

take place in 2013, which will determine the future of agricultural policy, and may include changes in the federal crop insurance program.[108]

With the continuing debate over a new five-year farm bill and the future of agriculture policy, a moment to improve the federal crop insurance program by combating fraud has appeared. However, it appears that no legislation was introduced in the 112th Congress or has been introduced in the 113th Congress intended to curtail crop insurance fraud.[109] Despite the lack of legislation, there are a number of areas Congress can examine to bolster the integrity of the program.

1. Civil Penalties

In 2000, Congress enacted stringent civil penalties for crop insurance fraud and the providing of "false or inaccurate" information to the FCIC or insurance provider which sells federally reinsured crop insurance policies through the enactment of the Agricultural Risk Protection Act.[110] As discussed earlier, Professor Kelley noted that two of the key provisions in the Act provided for the imposition of civil penalties either in the amount of the pecuniary gain made from the providing of false or inaccurate information or $10,000 (whichever is greater),[111] and possible disqualification from participation in the crop insurance program for up to five years.[112]

In the wake of continued fraud in the crop insurance program and changes in agriculture in the past decade, Congress can continue to combat fraud through a reassessment of current civil penalty provisions. Within the past decade, and for some time before that, commentators have noted the rise of agribusiness in agriculture[113] and the general decline of the

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[108] Mary Clare Jalonick, Associated Press, *Farm Bill Extension Frustrates Farm Interests, Evidence of Lost Congressional Clout*, WASH. POST (Jan. 3, 2013), http://news.yahoo.com/farm-bill-extension-evidence-lost-231747284.html.

[109] A search utilizing the terms "crop insurance" was completed by the author on January 5, 2013 using the search form at http://beta.congress.gov, which yielded no bills addressing crop insurance fraud.

[110] Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, 114 Stat. 358 (2000).

[111] Kelley, *supra* note 17, at 157; 7 U.S.C. § 1515(h)(3)(A)(I, ii) (2012).

[112] Kelley, *supra* note 17, at 157; 7 U.S.C. § 1515(h)(3)(B) (2012).

[113] *See* Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 620 (2010) (stating that "the face of farming in the United States has changed dramatically from the small family farmer of the early part of the twentieth century to the large corporate industrial producer of today. Between 1935 and 2002, the total number of U.S. farms declined by 70 percent while the total acreage of all farms remained the same. This trend was a consequence of larger farms buying out smaller farms."); Melanie J. Wender, Comment,

"family farm."[114] Today, a farmer must be, in many ways a "jack of all

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Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment, 22 VILL. ENVTL. L.J. 141 (2011); Frank Morris, *Administration Turns Eye Toward Big Agribusiness*, NPR (Mar. 12, 2010), http://www.npr.org/templates/story/story.php?storyId=124604147; Joseph Weber, *Will Agribusiness Plow Under the Family Farm?*, BLOOMBERG BUS. WK. (Oct. 22, 2000), http://www.businessweek.com/printer/articles/79114-will-agribusiness-plow-under-the-family-farm?type=old_article.

[114] Law review articles on the topic of the "family farm" include the following: Nicholas A. Fromherz, *The Case for a Global Treaty on Soil Conservation, Sustainable Farming, and the Preservation of American Culture*, 39 ECOLOGY L.Q. 57 (2012); A. Bryan Endres et al., *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, 71 MONT. L. REV. 135 (2010); Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935 (2010); Anthony B. Schutz, *Corporate-Farming Measures in a Post-*Jones *World*, 14 DRAKE J. AGRIC. L. 97 (2009); Anthony B. Schutz, *Nebraska's Corporate Farming Law and Discriminatory Effects Under the Dormant Commerce Clause*, 88 NEB. L. REV. 50 (2009); Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH L. REV. 345 (2006); David W. Deal, *Can an Unhappy Minority Shareholder Divide a Family Farm? Oklahoma's Good Cause Rule for Dissolution of a Family Farm Corporation*, 29 OKLA. CITY U. L. REV. 661 (2004); Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional—Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, 37 CREIGHTON L. REV. 285 (2004); Meredith Redlin & Brad Redlin, *Amendment E, Rural Communities and the Family Farm*, 49 S.D. L. REV. 787 (2004); Susan E. Stokes & Christy Anderson Brekken, *The Eighth Circuit Grants Corporate Interests a New Weapon Against State Regulation in* South Dakota Farm Bureau v. Hazeltine, 49 S.D. L. REV. 795 (2004); Robert A. Coulthard, *The Changing Landscape of America's Farmland: A Comparative Look at Policies Which Help Determine the Portrait of Our Land—Are There Lessons We Can Learn From the EU?*, 6 DRAKE J. AGRIC. L. 261 (2001); Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm,"* 5 DRAKE J. AGRIC. L. 3 (2000); Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 73 NEB. L. REV. 14 (1999); Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311 (1997); Jim Chen & Edward S. Abrams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361 (1997); Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 DRAKE L. REV. 289 (1997); Richard F. Prim, *Minnesota's Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431 (1995); Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 NEB. L. REV. 14 (1994); Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613 (1994); Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994); Susan A. Schneider, *Who Owns the Family Farm?*, 14 N. ILL. U. L. REV. 689 (1994); Carol Ann Eiden, *The Courts' Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FMHA Loans*, 11 LAW & INEQ. 417 (1993); J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763

trades"—the farmer must not only know how to plant and harvest crops, but must also understand the complexities of the commodities markets, agricultural contracts,[115] the principles of mechanics and engineering for the proper operation of farm equipment, and must be familiar with technology, particularly the latest advances in GPS technology.[116] Careers in

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(1993); Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203 (1993); Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679 (1991); and Keith Burgess-Jackson, *The Ethics and Economics of Right-to-Farm Statutes*, 9 HARV. J. L. & PUB. POL'Y 481 (1986).

[115] Law review articles discussing agricultural production contracts and grain contracts are vast and varied in scope. *See* Peter F. Karney & John F. Fatino, *The Surety Relationship in the Agricultural Commodity Storage Context and Grain Indemnity Funds: A Jurisdictional Survey*, 40 CREIGHTON L. REV. 41 (2006); Keith G. Meyer, *Kansas's Unique Treatment of Agricultural Liens*, 53 U. KAN. L. REV. 1141 (2005); Jayashree B. Gokhalé, *Hedge to Arrive Contracts: Futures or Forwards*, 53 DRAKE L. REV. 55 (2004); Joseph A. Miller, *Contracting in Agriculture: Potential Problems*, 8 DRAKE J. AGRIC. L. 57 (2003); J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177 (1999); Glenn L. Norris et al., *Hedge to Arrive Contracts and the Commodity Exchange Act: A Textual Alternative*, 47 DRAKE L. REV. 319 (1999); Edward M. Mansfield, *Textualism Gone Astray: A Reply to Norris, Davison, and May on Hedge to Arrive Contracts*, 47 DRAKE L. REV. 745 (1999); Glenn A. Hegar, Jr., *Adhesion Contracts, Debt, Low Returns and Frustration—Can America's Independent Contract Farmer Overcome the Odds?*, 22 HAMLINE L. REV. 213 (1998); Nicholas P. Iavacone, *Arbitration, Expediency, and the Demise of Justice in District Courts: Another Side of the Hedge-to-Arrive Controversy*, 3 DRAKE J. AGRIC. L. 319 (1998); Jennifer Durham King & James J. Moylan, *Hedge-to-Arrive Contracts: Jurisdictional Issues Under the Commodity Exchange Act*, 18 N. ILL. U. L. REV. 481 (1998); David C. Barnett, Jr., *Hedge-to-Arrive Contracts*, 2 DRAKE J. AGRIC. L. 153 (1997); Nicholas P. Iavarone, *Understanding the Hedge-to-Arrive Controversy*, 2 DRAKE J. AGRIC. L. 371 (1997); Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995); Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397 (1995); Neil D. Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protection of Grain Crops*, 73 NEB. L. REV. 48 (1994); Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393 (1992); David C. Bugg, *Crop Destruction and Forward Grain Contracts: Why Don't Sections 2-613 and 2-615 of the U.C.C. Provide More Relief?*, 12 HAMLINE L. REV. 669 (1989); L. Leon Geyer, *Farmers Who Sell Mortgaged Farm Products and Don't Tell; Buyers Who Buy Farm Products and Don't Pay—An Electrifying Solution*, 34 DRAKE L. REV. 429 (1985).

[116] This footnote is drawn from my personal knowledge of observation of family members who farmed in my childhood and to this day. These two individuals, Gerald Marzen (the author's grandfather) and Dennis Marzen (the author's father) introduced me to the workings of an agricultural operation, and to this day I am deeply grateful to both for inspiring an appreciation of agriculture. I also want to acknowledge my colleague at Florida State University, Professor Darren Prum, as we have had several conversations concerning agriculture and the complexity of agriculture in today's world.

agriculture are not "simple"—courts throughout the United States recognize this in the holdings where a farmer has been held to be a "merchant" in goods for the purposes of the Uniform Commercial Code.[117]

Despite recent struggles, and the many challenges posed by 2012's drought which enveloped most of America's heartland,[118] the national farm economy overall remains in stable shape. And there are many positives. Even despite the drought, net farm income from throughout the country rose to approximately $122 billion in 2012, up from $117 billion a year before.[119] In addition, the price of farmland continues to rise—in Iowa, the average price of an acre of farmland sits at approximately $6700 per acre.[120] In October 2012, an Iowa record was set as an 80-acre parcel of land sold for approximately $21,900 per acre in northwest Iowa.[121]

With the general rise in agricultural assets, Congress should reassess the civil penalties for crop insurance fraud included within the Agriculture Risk Protection Act in order to keep the penalties as an effective deterrent to fraud. One approach Congress can take to strengthen the monetary penalties for the providing of false or inaccurate information is to impose a monetary penalty that includes both the amount of the pecuniary gain made from the providing of false or inaccurate information in addition to a $25,000 penalty, rather than an either/or monetary penalty. Such a monetary penalty provision would be more equitable. Under the current penalties, for an individual who provides false or inaccurate information to the FCIC or a federally reinsured crop insurance provider which is in an amount over $10,000, then the monetary penalty would only be the amount of the pecuniary gain. If that individual returns the pecuniary gain, they end up at the same spot financially as if the misrepresentation was not made. However, if an individual provides false or inaccurate information which results in a loss under $10,000, then that individual may

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[117] *See* Jan W. Henkel & Peter J. Shedd, *Article 2 of the Uniform Commercial Code: Is a Farmer a "Merchant" or a "Tiller of the Soil"?*, 18 AM. BUS. L.J. 323 (1980) (discussing cases).
[118] David Ariosto & Melissa Abbey, *Historic Drought Puts over Half of U.S. Counties in Disaster Zones, USDA says*, CNN (Aug. 2, 2012), http://www.cnn.com/2012/08/01/us/us-usda-disaster-zones/index.html (reporting that in August 2012, over half of the counties in the United States were designated as disaster zones by the United States Department of Agriculture).
[119] Ron Nixon & John Eligon, *Across Corn Belt, Farmland Prices Keep Soaring*, N.Y. TIMES (Oct. 22, 2012), http://www.nytimes.com/2012/10/23/us/across-corn-belt-farmland-prices-keep-soaring.html?pagewanted=all&_r=0.
[120] *Id.*
[121] Dan Piller, *New Record Farm Sale: $21,900 Per Acre*, DES MOINES REGISTER (Oct. 25, 2012), http://blogs.desmoinesregister.com/dmr/index.php/2012/10/25/new-record-farm-sale-21900-per-acre/article.

be fined $10,000. Such a result is not equitable for the individual who provides false or inaccurate information which results in a loss under $10,000.

Another approach Congress can take to reduce fraud is to absolutely bar repeat offenders of the "false or inaccurate information" provision from any participation in the federal crop insurance program. In the area of criminal law, "three strikes" laws[122] were heralded by proponents

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[122] *See* David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strikes" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557 (2000) (stating, "Perhaps one of the most popular measures purposed during the early 1990s were 'three strike' laws under which a person convicted of three serious felonies would automatically be locked up for extended period of time including life without parole.").

Legal scholarship concerning "three strikes" laws in the area of criminal law is vast. *See* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581 (2012); Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. L. & POL'Y REV. 311 (2010); Anne Goldin, *The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition*, 15 SW. J. INT'L L. 327 (2009); Robert G. Lawson, *PFO Law Reform: A Crucial First Step Toward Sentencing Sanity in Kentucky*, 97 KY. L.J. 1 (2009); Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California's Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461 (2007); Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903 (2004); Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1 (2004); Michael Vitiello, *California's Three Strikes and We're Out: Was judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025 (2004); Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1 (2003); Edwin J. Erler & Brian P. Janiskee, *California's Three Strikes Law: Symbol and Substance*, 41 DUQ. L. REV. 173 (2002); Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483 (2002); Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion's Failure to Ameliorate Punishment Under California's Three Strikes Law*, 41 DUQ. L. REV. 1 (2002); Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two and Three Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002); Michael Vitiello, *Somewhat Frantic: A Brief Response to* Crime, Punishment and Romero, 40 DUQ. L. REV. 615 (2002); Franklin E. Zimring & Sam Kamin, *Facts, Fallacies and California's Three Strikes*, 40 DUQ. L. REV. 605 (2002); James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1 (2000); Brian P. Janiskee & Edward J. Erler, *Crime, Punishment and* Romero*: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000); Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577 (1999); Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23 (1999); Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65 (1999); Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July–December 1996*, 11 STAN. L. & POL'Y REV. 29 (1999); Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101

of tougher criminal laws nationwide to bar individuals who have committed three serious felonies from ever receiving the possibility of parole. While "three strikes" laws are controversial as to whether or not they actually have a statistical effect in reducing crime,[123] a rule of barring repeat offenders as a civil penalty from participation in the federal crop insurance program is nearly guaranteed to eliminate a barred individual from ever committing any further acts of fraud in the federal crop insurance program.

2. Inspections and Random Audits

With the advancement of technology in the overall fight against fraud, data mining has been a key tool in detecting anomalous claims payments and losses in the federal crop insurance program.[124] Since 2001, the RMA has contracted with the Center of Agribusiness Excellence, at Tarleton State University in Texas, to identify lists of farmers with anomalous claim payments and insurance agents and adjusters with anomalous losses.[125] If a farmer with anomalous claim payments is identified, then the RMA reports the name of the farmer on a list which is sent to the Farm Services Agency of the USDA, which conducts two inspections—postplanting and preharvest—for each crop insurance policy sold to the farmer.[126]

While it has been reported that the letters which are sent by the FSA to farmers with anomalous claims payments have substantially reduced total claims,[127] it is a troubling finding of the GAO that not all inspections called for by USDA guidelines are being completed. In 2009,

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(1998); Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1 (1998); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997); Nkecha Taifa, *"Three-Strikes-And-You're-Out"—Mandatory Life Imprisonment for Third Time Felons*, 20 U. DAYTON L. REV. 717 (1995).

[123] *See* Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES (May 21, 2010), http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?pagewanted=all7_r=0.

[124] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 11.

[125] *Id.*

[126] *Id.* The U.S. Government Accountability Office describes the inspections process as follows:

> Under USDA guidance, FSA county offices are to conduct two inspections (postplanting and preharvest) for each policy these farmers hold. FSA county offices are then to report to RMA on whether they inspected the crop and, if so, whether the inspection determined that (1) the inspected farmer's crop was in good condition; (2) the inspected farmer's crop was not in good condition, but other farmers' crops in the local area were in good condition; or (3) the inspected farmer's crop was not in good condition, and other farmers' crops in the local were also not in good condition.

[127] *Id.* at 26.

approximately 20 percent of all field inspections called for by the USDA guidelines concerning anomalous claims payments were not completed, and in 2010 that figure crept up to 28 percent of all field inspections not being completed.[128]

According to the GAO, one of the reasons for the high rate of noncompliance with the USDA guidelines is that FSA state offices are not required to monitor the completion of the field inspections, which are completed through county level FSA offices.[129] While policymakers can mandate the completion of all inspections, and provide for more funding to do so,[130] another possible approach policymakers can examine to combat fraud is to implement a random inspection program of submitted claims by both insureds and crop insurance agents and brokers, similar to what the IRS utilizes for random audits of filed tax returns.[131]

In addition, another approach policymakers can take to combat fraud is to implement regulations which require greater information sharing between the federal government and federally reinsured private crop insurers. Under current law, the RMA does not provide private insurers with the field inspection results for fields in good condition, but fraudulent or false claims may still possibly be submitted from fields with crops in good condition.[132] As the GAO recommends, facilitating the communication of

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[128] *Id*. The U.S. Government Accountability Office noted:

> In particular, in 2009 and 2010, RMA did not have field inspection results for 20 percent and 28 percent, respectively, of the fields for farmers listed as having anomalous claim payments. Four states—California, Colorado, Florida, and Texas—accounted for more than 40 percent of the missing data. For example, in Florida, FSA inspected a field for 8 of the 88 farmers with anomalous claim payments, according to our review of RMA records. If FSA does not complete all field inspections requested by RMA, not all farmers who have had anomalous claim payments will be subject to a review, increasing the likelihood that fraud, waste, or abuse may occur without detection.

[129] *Id*. at 27.

[130] *Id.* at 28 (One of the cited reasons for the relatively high rate of noncompliance with federal inspections in the GAO report is that insufficient resources have been allocated to FSA to complete the inspections, and that the general workload in these offices has increased.).

[131] Internal Revenue Service, *IRS Audits*, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/IRS-Audits (last updated Feb. 11, 2013).

[132] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 34–35. The Government Accountability Office has stated:

> RMA generally does not provide insurance companies with field inspection results for most FSA inspections—that is, those for fields in good condition—but provides them with the field inspection results for a small portion of the farmers—those with crops in worse condition than their

the field inspection results from the RMA to private crop insurers will undoubtedly bolster and assist the data mining activities of both the RMA and private crop insurers to identify false and fraudulent claims.[133]

3. Crop Insurance Unit Structure

One of the key questions an agricultural producer must answer when procuring crop insurance is determining what type of unit structure to select to insure the farming operation.[134] There are several basic types of structures—optional units, basic units, enterprise units, and whole farm units.

The first type, optional units, allows a farmer to insure each farm separately by either farm serial numbers or by section, township, or range.[135] In the basic unit structure, a producer can designate a basic unit for all farmland owned or cash rented within a particular county.[136] With

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> peers. However, inspection information on fields in good condition is important—particularly for inspections that occurred shortly before a claim was made. Past cases have revealed that some farmers may harvest a high-yielding crop, hide the sale of that crop, and report a loss to receive an insurance payment. USDA's Inspector General has reported on the need to use FSA field inspection information to identify potential fraud, waste, and abuse. For example, in 2009, the Inspector General reported on two farmers on the list of farmers with anomalous claim payments whose crops were in good condition, according to the FSA inspection; however, these farmers filed nearly $300,000 in claims a short time after an FSA inspection, and RMA did not notice the discrepancy. RMA's data mining contractor stated that it could, with a few days of effort, provide all the FSA field inspection data to the insurance companies, including those on crops in good condition, which represent the bulk of inspections.

[133] *Id.* at 36–37.

[134] LEANNE LUNDY & CORY G. WALTERS, UNIVERSITY OF KENTUCKY–COLLEGE OF AGRICULTURE UK COOPERATIVE EXTENSION SERVICE, UNDERSTANDING CROP INSURANCE: WHAT EVERY PRODUCER IN KENTUCKY NEEDS TO KNOW: AGRICULTURAL ECONOMICS EXTENSION SERIES—2009-26 (2009), *available at* http://www.ca.uky.edu/cmspubsclass/files/cgwalters/Understanding%20Crop%20Insurance.pdf.

[135] *Id.*

[136] William Edwards, Iowa State University Extension and Outreach, *Proven Yields and Insurance Units for Crop Insurance* (March 2012), http://www.extension.iastate.edu/agdm/crops/html/a1-55.html. Edwards describes the basic unit structure as follows:

> Producers can designate a basic unit for all tracts of land they own and/or cash rent within a county. They also receive one basic unit for all of the land they share rent with a different landlord. For example, if a crop is planted on land rented under a crop share lease with Mr. Smith, a

the enterprise unit structure, a farmer can insure all acres of a particular crop in a county as one policy unit.[137] Finally, with the whole farm unit, one policy insures all acres of all insured crops in a county.[138]

However, the optional unit structure, which is popular among farmers,[139] potentially invites the possibility of fraud.[140] Apparently as

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> crop share lease with Mrs. Jones, and a cash rent lease with Black, Inc., and the remaining crop land is owned, the acreage would qualify as three basic units . . . . There would be one basic unit with each crop share owner, and one basic unit for the cash rented and owned land combined. Each crop share landowner can also insure his/her own interest in the crop as a separate unit.
>
> Each different crop also creates a separate unit, and tracts of land in different counties must be insured as separate units. Each crop can have a different type of policy and level of coverage, and could receive an indemnity payment independent of the other units. Separate production records must be kept for each basic unit. Insuring all acres as basic units entitles producers to a 10 percent discount on their premiums.

[137] Lundy & Walters, *supra* note 134 (Lundy & Walters note that there are four requirements which must be met in order for a producer to have an enterprise unit structure: "[1)] 2 or more basic or optional units of same insured crop located in 2 Farm Serial Numbers or section/township/range; [2)] All acres must be on acreage report; [3)] The basic/optional units must each have insurable acreage of the same crop; [and 4)] Insured must comply with reporting provisions for enterprise unit.").

[138] *Id.*

[139] U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., NO. 05801-2-AT, REPORT TO THE SECRETARY ON FEDERAL CROP INSURANCE REFORM 6 (1999), *available* at http://www.usda.gov/oig/webdocs/cropsins.pdf (stating that "FCIC instructions allow land that would otherwise be one basic unit to be divided into optional units. For land to be eligible for unit division, (1) producers must have independently verifiable planting, production, and harvesting records necessary for determining the production guarantee for the optional units, and (2) a clear and discernible break must occur at the boundaries of the optional units. Optional units enable producers to separately insure various segments or portions of their overall operation and to receive indemnity payments if some of those units have losses even though others may have production equal to or greater than the guarantee. Generally, combining units on multiple unit policies will reduce the amount of indemnity paid, while separating the units will increase the possibility of an insurable loss.").

[140] Joseph A. Atwood et al., *Estimating the Prevalence of Yield-Switching Fraud in the Federal Crop Insurance Program*, 88 AMER. J. AGR. ECON. 365, 379–80 (2006) (concluding in a study that "multiple unit crop insurance provisions provide incentives for some producers to consider switching yields between separately insured tracts of land so as to generate larger insurance indemnifications . . . . the statistical procedures used are not intended by the authors to be viewed as proof of fraudulent conduct on the part of any individual or group of insurers. Proof of illicit conduct requires detailed and careful on-site investigation. However, we believe that the procedures presented in this article can provide a useful screening device by more efficiently focusing the efforts of crop adjustors

far back as 1999, the United States Department of Agriculture's Office of Inspector General utilized the strong terminology of "moral hazard risk"[141] to describe the optional unit policy.[142] Under the optional unit structure, the possibility exists that a farmer could "yield-switch" the crop production from one insured unit into another insured unit, or possibly even conceal the crop production from a unit in order to fraudulently receive a higher indemnity payment.[143] Such conduct has been strongly indicated by at least one audit conducted by the USDA Office of Inspector General[144] and the Inspector General recommended that the RMA should consider rescinding the optional unit policy.[145]

Despite this recommendation over a dozen years ago, the optional unit policy still continues to exist in the area of federally reinsured crop insurance. One option policymakers can take in this year's farm bill to reform the crop insurance program is to follow the recommendation of the USDA Office of Inspector General and eliminate the optional unit structure from federally reinsured crop insurance contracts, as well as the basic unit structure, and allow federally reinsured crop insurers only to utilize enterprise units or whole farm units as a unit structure. Although the utilization of the enterprise unit and whole farm unit likely will not eliminate all fraud concerning unit structures in the federal crop insurance program, it will help to reduce those potential situations in which a producer could "yield switch" and transfer crop production from one insured optional unit into another optional unit in the same county, and be yet another step in the restoring of the integrity of the program.

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and agency compliance personnel on the smaller subset of the population who are more likely to have participated in suspicious conduct.").

[141] Eric D. Beal, *Posner and Moral Hazard*, 7 CONN. INS. L.J. 81, 84 (2001) (Beal describes the history of the concept "moral hazard" as follows: "In its infancy, the word 'hazard' referred to a game of dice that survives today in a simplified version: craps. Early insurers identified two kinds of hazards—those that caused a loss, e.g., fires, and those that affected the likelihood or amount of a loss. Later, in an attempt to avoid underwriting poor risks, insurers used the phrase 'moral hazard' at shorthand to describe the undesirable traits in an insured that might increase the probability of a loss.").

[142] U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., *supra* note 139.

[143] *Id.*

[144] *Id.* at 26–27 (stating that in one audit of claims involving the optional unit structure, the Office of Inspector General "found that producers were paid indemnities on optional units that did not meet the criteria which allow basic units to be divided into optional units. Specifically, producers were not able to provide supporting documentation that showed from which optional units the production actually was harvested. As a result, the optional unit must be combined back into the basic unit structure and the loss computed on the basic unit.").

[145] *Id.* at 27.

4. Crop Insurance and an Insurer Defense for "Bad Faith" Claims

Just as insurance "bad faith" claims have appeared in the fields of auto insurance, disability insurance, and bodily injury claims, bad faith claims have arisen in the area of crop insurance where private crop insurers have allegedly acted with intentional or reckless disregard of the rights of an insured.[146] While a discussion of the presence and availability of the crop insurance bad faith remedy is beyond the scope of this article, academic research indicates that the presence of the insurance bad faith remedy may have an effect of leading insurers to immediately pay claims they otherwise would have investigated further if there was arguably a reasonable basis for investigation in order to avoid the possibility of incurring a multimillion dollar judgment for insurance bad faith.[147] For example, Professor Sharon Tennyson and Professor William J. Warfel have stated that insurance bad faith reduces the incentives for insurance companies to strategically delay or outright deny payment of claims otherwise valid and that it also places limitations on the usage of claim denial or underpayment as a strategy to deter insurance fraud.[148] This is likely to take place also in the context of private crop insurers and their investigations of suspected acts of fraud in the federal crop insurance program. In addition, despite the general rule that an insurer must generally further investigate an insurance applicant's representations if there are reasons to question the veracity of the representations,[149] private crop insurers may also be less likely to investigate potential fraud since the government reinsures many of the losses suffered by private crop insurers.[150]

To balance these incentives and conditions which possibly make it more likely that a private crop insurer will fully accept an otherwise legally questionable and possibly fraudulent claim, courts should be better cognizant of instances where insurers may be technically in violation of an unfair claims settlement practice statute, but otherwise act in good faith. Academic commentators have recognized the importance of "good faith" conduct. Victor Schwartz and Christopher Appel have contended that courts should only recognize insurance bad faith where an intentional or reckless act by an insurer occurs, but if any other violation—including

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[146] Marzen, *supra* note 20.
[147] Sharon Tennyson & William J. Warfel, *The Law and Economics of First-Party Insurance Bad Faith Liability*, 16 CONN. INS. L.J. 203, 240 (2009).
[148] *Id.* at 221.
[149] Ingram, *supra* note 26, at 114.
[150] Cohn, *supra* note 18.

technical violation—of an unfair claims settlement practice statute occurs, exclusive jurisdiction over such a claim should reside with a state insurance regulatory authority.[151]

In the crop insurance context, courts should certainly recognize the importance of good faith investigation of questionable claims by private crop insurers. In future cases involving crop insurance bad faith liability, the courts not only should adopt the Schwartz and Appel standard and recognize bad faith only where an intentional or reckless act of a private crop insurer occurs,[152] but also afford a defense to the claim if the claimant has received a "warning letter" from the USDA in the previous ten years for an "anomalous" claim payment. While "false positives" have been reported with the USDA warning letter program,[153] the receipt of such a letter by a claimant would reasonably place a private crop insurer on notice that potential fraud may have occurred. Thus, the private crop insurer should be afforded the opportunity to reasonably investigate the claim without the threat of a crop insurance bad faith claim barring the commission of an intentional or reckless act during the claims investigation process.[154] Such a rule would likely encourage private crop insurers to investigate

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[151] Victor E. Schwartz & Christopher E. Appel, *Common Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1530 (2009). Schwartz and Appel also noted:

> If bad-faith law continues on its present course, the implications are adverse to all parties' interests. Responsible and ethical insurers will find it harder to differentiate from one another and compete, claimants will be more susceptible to dishonest acts, and the system costs will continue to increase, harming all consumers. Also troubling, consumers may perceive an insurer's inundation of bad-faith claims and resulting high verdicts as an ordinary industry practice. They may become apathetic to an insurer's service reputations, severely inhibiting the market system's repudiation of bad insurers, and they may differentiate insurers only with regard to price. Worse, consumers might begin to tolerate bad faith as inherent to the insurance business, perpetuating the flow of improper litigation and exacerbating biases against insurers.

[152] *Id.*

[153] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 12 (stating that, "The RMA contractor's data mining reports identify individual farmers with anomalous claim payments or insurance agents and adjusters with anomalous losses, but these anomalies only indicate potential cases of fraud, waste, or abuse. These claims and losses may be legitimate, resulting from unusual weather or other conditions on a farm. As such, a portion of each list inevitably represents 'false positives'—farmers whose claims were valid. To determine if there is actual fraud, waste, or abuse, RMA or the insurance company must engage in additional review.").

[154] Schwartz & Appel, *supra* note 151.

potential fraud to better maintain the overall integrity of the crop insurance program.

CONCLUSION

The imperfect nature of the human condition unfortunately means that fraud in commercial transactions will likely never be fully eradicated. Crop insurance will probably not to be an exception. The historic drought of 2012,[155] the possible filing of a record number of crop insurance claims,[156] and the continued debate over a new farm bill[157] have brought the issues concerning crop insurance to the national spotlight in recent months. However, this moment in the national spotlight offers an opportunity to improve the federal crop insurance program for the better by discussing measures to further combat crop insurance fraud, and to ensure that this generation and future generations of farmers are able to count on a vibrant and healthy federal crop insurance program.

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[155] Ariosto & Abbey, *supra* note 118.
[156] Ben Berkowitz & Tom Polansek, *Record Number of Farmers Expected to File Crop Insurance Claims*, INS. J. (July 20, 2012), http://www.insurancejournal.com/news/national/2012/07/20/256578.htm.
[157] Charles Abbott, *Critics Call for More Cuts in Farm Bill, Crop Insurance*, INS. J. (Dec. 10, 2012), http://www.insurancejournal.com/news/national/2012/12/10/273412.htm.