UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RULING ON FCIC MOTION AS TO DISTRICT COURT RULINGS:

March 5, 2009

CBCA 117-FCIC, 1248-FCIC

In the Matter of ACE PROPERTY & CASUALTY INSURANCE COMPANY(f/k/a CIGNA PROPERTY & CASUALTY INSURANCE COMPANY); THE ALLIANCE INSURANCE COMPANIES; AMERICAN AGRICULTURAL INSURANCE COMPANY; AMERICAN GROWERS INSURANCE COMPANY IN REHABILITATION; COUNTRY MUTUAL INSURANCE COMPANY; FARM BUREAU MUTUAL INSURANCE COMPANY OF IOWA; FARMERS ALLIANCE MUTUAL INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; HARTFORD FIRE INSURANCE COMPANY; NAU COUNTRY INSURANCE COMPANY; PRODUCERS LLOYDS INSURANCE COMPANY; RURAL COMMUNITY INSURANCE COMPANY; and FARMERS MUTUAL HAIL INSURANCE COMPANY OF IOWA

Michael E. Tucci of Stinson Morrison Hecker LLP, Washington, DC, counsel for Appellants.

Kimberley E. Arrigo, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Federal Crop Insurance Corporation.

POLLACK, Board Judge.

CBCA 117-FCIC was initially filed on June 23, 2004, at the Department of Agriculture Board of Contract Appeals (AGBCA or board) by Ace Property & Casualty Insurance Company (Ace) and eleven other similarly situated insurers. The appeal was docketed as AGBCA Nos. 2004-173-F through 2004-184-F. Farmers Mutual Hail Insurance Company of Iowa, another insurer, was later added to the proceedings as the result of it filing a separate appeal, CBCA 1298-FCIC. The underlying appeals arise out of Standard Reinsurance Agreements (SRAs or Agreements) between the Federal Crop Insurance Corporation (FCIC) and various agricultural insurance providers (appellants or insurers).

The appellants claim that the FCIC breached the 1998 SRA, through imposition of new contract requirements (alterations) dictated by Congressional legislation. The claimed breach covers SRA years 1999, 2000, 2001, and 2002.

The 1998 SRA and its reinsurance year covered July 1, 1997 to June 30, 1998. Subsequent reinsurance years in issue followed the same pattern, running from July 1 to June 30. Appellants have contended that the terms of the 1998 SRA control for all subsequent SRA years in dispute, and particularly control as to the time requirements and regulations associated with perfecting a claim. Appellants have asserted that the SRAs covering 1998 through 2002 are one continuous contract. FCIC (and as will be addressed below, the AGBCA and United States District Court for the District of Columbia) have issued rulings finding that the SRAs covering 1998 through 2000 are not one continuous contract, but rather, that each SRA contract year is separate.

The legislative alterations implicated, in the dispute before us, involve changes in the formulas for loss adjustment expenses and administrative fees. The legislation changed the SRA provisions as to these matters from what had initially been set forth in the 1998 SRA. The first legislative change, the Agriculture Research, Extension and Educational Reform Act (AREER), was signed by the President on June 23, 1998, and modified the formula starting with the 1999 SRA year. The second legislative change, the Agriculture Risk Protection Act (ARPA) was signed by the President on June 20, 2000, and provided a different formula starting with the 2001 SRA year. In the appeals, appellants seek compensation for costs due to the changes connected to the legislation. FCIC defends on the basis that appellants have failed to timely perfect their required administrative claims and as such the claims are time barred.

On June 23, 2004, appellants first filed an appeal and complaint with the AGBCA seeking payment for costs incurred because of the legislative alterations. Appellants described that filing as a protective appeal, following FCIC's refusal to issue to appellants a final administrative determination (part of the administrative requirement for perfecting a claim) regarding appellants' claims for breach of the 1998 SRA and damages for the ensuing SRA years. At the time appellants filed at the board, they were simultaneously pursuing relief in the United States District Court for the Southern District of Iowa, *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp*., 357 F. Supp. 2d 1140 (S.D. Iowa 2005), and also at the United States Court of Federal Claims (later appealed to the Federal Circuit), *Ace Prop. & Cas. Ins. Co. v. United States*, 60 Fed. Cl. 175 (2004).[1]

[1] Ace was joined in the district court case by twelve other insurance companies and in the claims court by eleven other insurance companies.

In their complaint at the AGBCA, appellants asserted the board lacked jurisdiction over the appeals and asked the AGBCA to issue a jurisdictional ruling, prior to proceeding further. Most relevant to the current posture of the appeals was the contention that the administrative remedies referenced in Section V.L of the 1998 SRA and also set out in 7 CFR 400.169 (1997) (language later modified in 2000) did not apply to the claims addressed in appellants' complaint. FCIC, however, argued otherwise, asserting that the claims were subject to the administrative procedures, but that here, although the AGBCA had the authority to exercise jurisdiction over the SRA claims, the board could not move forward, because appellants had failed to timely act as required by regulations and the Agreements. Basically FCIC's position was that if appellants sought a remedy it had to be at the board, but because appellants did not act in time, they were time barred. We need not set out here the language of the respective versions of 7 CFR 400.169, as those have been addressed in earlier rulings. Given the parties' competing positions as to board jurisdiction and the fact that the other court proceedings were still ongoing, the board directed the parties to file briefs as to the jurisdictional issues.

While the matter was pending before the AGBCA, the United States District Court for the Southern District of Iowa issued a decision in which it dismissed appellants' suit in that forum on the basis that the court lacked jurisdiction. *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 357 F. Supp. 2d 1140 (S.D. Iowa 2005). The court found that appellants (there plaintiffs) had not exhausted their administrative remedies as required by 7 U.S.C. § 6912(e). The insurers appealed that decision to the United States Court of Appeals for the Eighth Circuit, which upheld the district court as to the failure of appellants to exhaust their administrative remedies. *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp*., 440 F. 3d 992 (8th Cir. 2006). Similarly, during that time frame, the United States Court of Federal Claims also concluded that it did not have jurisdiction over the appeals. Appellants then appealed that decision to the United States Court of Appeals for the Federal Circuit, which upheld the lower court. *Ace Prop. & Cas. Ins. Co. v. United States*, 138 F. App'x 308 (Fed. Cir. 2005). The Federal Circuit decision preceded the AGBCA decision on jurisdiction.

On December 21, 2005, after receiving briefing by both parties, the AGBCA ruled on the parties' motions as to jurisdiction. *Ace Prop. & Cas. Ins. Co.*, AGBCA No. 2004-173-F, et. al., 06-1 BCA ¶ 33,159 (2005). A majority held that the board had jurisdiction to hear appellants' claims for the 1999 (starting July 1, 1998) and 2000 SRA years, but that the claims as to the 2001 and 2002 SRA years were time-barred. In ruling, the board rejected FCIC's argument that the 1999 and 2000 claims were time-barred by the language of 7 CFR 400.169(a) (1997). The board found that FCIC had not shown that the language of the referenced 1997 regulation imposed a mandatory forty-five-day deadline for an insurer to bring an administrative claim. The board focused on the use of the permissive word "may" as part of the 1997 regulation, and the board explained that while FCIC might

be able to establish through course of dealing, prior interpretation, or some other evidence that the language in the 1997 regulation was mandatory, the board could not reach that conclusion in the context of a ruling on jurisdiction. In the same ruling, the panel concluded differently as to the language of 7 CFR 400.169(a) (2000), and found the 2000 wording did mandate a forty-five-day period for bringing an administrative claim. Based on undisputed facts before it, the board concluded that appellants had not filed their claims within that time frame. Accordingly, the board ruled that the claims associated with the 2001 and 2002 SRA years were time-barred.

Appellants sought reconsideration of the ruling as to the 2001 and 2002 SRA years and argued that they were not contractually bound to follow 7 CFR 400.169 (2000) in those contracts, first because the language was not mandatory, and alternatively, because even if the language of the 2000 regulation was mandatory, the Board should have applied the requirements of the 1997 regulation (not the 2000 regulation) to the 2001 and 2002 SRA years. According to appellants, the 1998 SRA (the initial signed Agreement) was a continuous contract that included (in Section V.L) the regulations in effect in 1997. Because the 1998 contract was continuous, all of the ensuing reinsurance years were subject to provisions of the 1998 Agreement and 1997 regulation, not the later 2000 change. The AGBCA had earlier rejected FCIC's argument that the 1997 language was mandatory and had advised the parties that determination on that issue would require further factual development before the board could finally decide that matter. In addition, the AGBCA had addressed appellants' contention that the 1998 SRA was a continuous contract which covered the ensuing SRA years. The AGBCA ruled that the SRAs were single-year contracts and, therefore, when changes were made to the regulations in 2000, those changes were applicable to the SRA years that followed. Reconsideration was denied. AGBCA 2006-120-R, et. al., 06-2 BCA ¶ 33,329.

In response to the AGBCA decision on jurisdiction, appellants filed an action at the United States District Court for the District of Columbia, filing an eight-count complaint which challenged the board decision as to the 2001 and 2002 SRA years and challenged board jurisdiction in general over all of the affected SRAs. On January 25, 2007, appellants and FCIC each filed cross-motions for partial summary judgment at the district court, with FCIC also asking for partial dismissal. On September 27, 2007, the district court issued an order, and thereafter a memorandum opinion, *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 517 F. Supp. 2d 391 (D.D.C. 2007), granting in part FCIC's motion and specifically finding in FCIC's favor as to Counts I, IV, V, VI, VII, and VIII of appellants' complaint at that forum. In its ruling on Count VIII, the court determined that the SRAs were not continuous. The court denied appellants' cross- motion in full. Additionally, the court remanded Counts II and III to this Board for further proceedings, thereby returning to the Board the 2001 and 2002 SRA claims that the AGBCA had earlier found time-barred.

In remanding Count II, the court directed the Board to address the meaning and effect of the six-year statute of limitations set out in the contract at Section V.H and how that limitation related to the forty-five-day period set out in the regulations for filing an administrative claim. Section V.H reads, "The Company should be aware that the statute of limitations for bringing suit for any breach of this Agreement is 6 years."

In remanding Count III, the court put before the Board the matter of whether the amendment to the contract promulgated by FCIC in January 2000 or the Bulletin FCIC issued in June 2000 (implementing the legislative alterations), constituted "actions" under 7 CFR 400.169 (2000) so as to trigger the forty-five-day period for pursuing an administrative action. That language, with the court's emphasis in bold, provides:

> If the company believes that the Corporation **has taken an action** that is not in accordance with provisions of the Standard Reinsurance Agreement or any reinsurance agreement with FCIC, except compliance issues, it may request the Deputy Administrator of Insurance Services to make a final determination addressing the disputed action. The Deputy Administrator of Insurance Services will render the final administrative determination of the Corporation with respect to the applicable actions. **All requests for final administrative determination must be in writing and submitted within 45 days after receipt after the disputed action**.

517 F. Supp. 2d at 404-05.

Although the remand did not specifically address the 1999 and 2000 SRAs, the issues remanded as to the 2001 and 2002 SRA years are applicable to 1999 and 2000 SRA years and, accordingly, how the Board decides the remand may affect all four SRA years. Even if the Board concludes (after a full hearing) that the 1997 language was mandatory, the Board still must resolve the questions posed by the court surrounding the meaning of "action" and the harmonization of the six-year statute of limitations language.

At the direction of the Board, the parties have proceeded with discovery and a hearing has been planned for May 2009. On October 30, 2008, FCIC filed the motion now being addressed, styling it as "Summary Judgment on those Issues Decided by the District Court." FCIC has asked that we grant summary judgment as to a number of issues, essentially asserting that the district court's ruling as to various matters is now the controlling law of the case. It asserts that the Board should not take testimony or consider matters already resolved by the court, particularly relating to the issues of the continuous contract and the meaning and operation of the regulations. In general, the motion does not ask the Board to

address disputed matters, but instead simply wants the Board to accept in a ruling on summary judgment what the district court has already said and held.

In the motion, FCIC lists its understanding as to what the district court held as to seven specific matters. The first four are not disputed. However, there is a difference of understanding as to the posture of the last three issues addressed by FCIC. FCIC identifies its understanding of those three issues as follows: (1) the SRA is not continuous, each reinsurance year created a new SRA, and the SRA may be altered and incorporate amended regulations at the time of renewal; (2) appellants were required to comply with requirements of section V.L of the SRA and appeal actions of the FCIC in accordance with 7 CFR 400.169; and (3) the forty-five-day limitation period was part of the SRA after the amendment to 7 CFR 400.169 in 2000.

Before addressing the above matters, it is useful to set forth some background facts. At the time the earlier motions were filed at the AGBCA and at the district court, the record had not moved beyond the summary judgment phase. There had not been an evidentiary hearing on the merits, and it was only after matters were remanded back to the Board that discovery began. The Board is unclear as to what documents were before the district court under the court's Administrative Procedure Act (APA) review of the AGBCA decision; however, documents were referenced in both the court decision and motions filed with us. We further have been advised that additional documents have now come to light through discovery. Finally, because the disputes as to the 2001 and 2002 SRA years have been remanded to the Board, the claims for all of the disputed SRA years remain alive.

There are three matters addressed by FCIC which we believe merit clarification. The first concerns FCIC's request that we issue a ruling that the SRAs were a series of single contracts and not a continuous contract. FCIC contends that such a ruling is mandated by the law of the case doctrine, as it reflects the conclusion of the district court. Appellants argue that whether the SRAs are a continuous contract is appropriate for further amplification at the Board and should not be closed, notwithstanding the court decision. They assert that the district court decision failed to take into account a number of facts relating to the status of the SRA as a continuous contract and, further, now that appellants have had an opportunity to engage in discovery, they have discovered new and additional facts which show that the intent of the parties was to enter into a continuous contract. Appellants argue that fairness dictates they be given a chance to develop the record and be permitted to produce evidence at trial as to the parties' intentions. They further argue that the doctrine of law of the case is both discretionary and predicated on fairness, and as such should not be applied in the case before us.

In granting FCIC's motion as to Count VIII, the district court ruled that the SRAs were not a continuous contract. Nevertheless, appellants seek to re-open the matter. Appellants explain that, like *res judicata* and collateral estoppel, the law of the case doctrine presumes and requires that a party has been given a full and fair opportunity to litigate, and additionally requires that the matters *sub judice* have been fully and finally determined. Appellants say neither has occurred in this case. They emphasize that the matter has never gone to a trial on the merits, and it would be unfair for the Board to apply the law of the case, when the district court decision was rendered on summary judgment, based on inadequate data and reached prior to discovery. Appellants cite cases which they say support their legal position. Given the facts before us and the status of the proceedings, we do not find those cases applicable or appellants' arguments persuasive.

Appellants emphasize two principal cases, *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950) (for the proposition that law of the case only applies where a final judgment has been rendered in a proceeding) and *United States v. Hatter*, 532 U.S. 557 (2001) (where it ties the law of the case doctrine to the presumption of a hearing on the merits). The appellees in *Smelting* contended that a district court judgment should be affirmed in their favor, because the Government had not appealed from the district court judgment and from court mandates that had sent a case back to the Interstate Commerce Commission for resolution. *Smelting*, 339 U.S. at 198. In initially sending the matter back to the Commission, the lower court had concluded that there was no evidence at the Commission to sustain an earlier Commission finding that the rates in dispute were not compensatory for the services rendered. Essentially, the lower court sent the matter back to the Commission to start all over. When the Commission revisited the dispute, it resolved matters in favor of the Government. Not satisfied with that result, the appellees appealed that new decision and argued that the law of the case doctrine applied to the first district court decision, where that court had found a lack of evidence before the Commission. In rejecting the binding nature of that initial district court ruling, the Supreme Court said:

> The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152; *Insurance Group Committee v. Denver & R .G. W. R. Co.*, 329 U.S. 607, 612, 67 S. Ct. 583, 585, 91 L. Ed. 547. It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 374-375, 59 S. Ct. 301, 307, 308, 83 L. Ed. 221. When finally decided, all questions were still open and could be presented.

Id.

The facts surrounding the appeal before us differ significantly from the situation in *Smelting*. There, nothing had been decided at the district court. Here, a number of issues have been fully resolved by the court, particularly that the SRAs were not a continuous contract. It is correct that the court determination as to the continuous contract issue is interlocutory, due to the fact that it, along with other court determinations, did not finally dispose of any of the SRA claims. Unlike *Smelting*, however, where the reviewing court had made no conclusions and had sent back a clean slate to the Commission, here, the district court decided and settled a number of specific issues and only remanded limited, unresolved issues to the Board. As to the issues resolved by the court, the law of the case doctrine applies.

Turning now to *Hatter*, that case involved a dispute over compensation for federal judges and specifically over Congress's extension of Medicare and Social Security taxes to federal employees, including the sitting judges. Under the Congressional action, judges who had not previously been covered now had to pay Medicare and Social Security taxes. A number of federal judges filed suit, arguing that the imposition of the charges violated the Compensation Clause of the United States Constitution, which guarantees federal judges "a compensation that should not be diminished during their continuance in office." U. S. Const. art. III, § 1. *Hatter* was initially filed at the United States Court of Federal Claims. That tribunal ruled against the judges. That decision was reversed by the United States Court of Appeals for the Federal Circuit and proceeded to the Supreme Court on *certiorari*. The Supreme Court failed to find a quorum (some justices were disqualified, as they were affected by the outcome) and accordingly, because the Court did not have a quorum, the Federal Circuit judgment, overruling the Court of Federal Claims, was affirmed, "with the same effect as upon affirmance by an equally divided court." *Hatter*, 519 U.S. 801.

On remand from the Federal Circuit, the Court of Federal Claims found that the judges' claims were time barred and that a judicial salary increase in 1984 had cured any violation. On return to the Federal Circuit, that court reversed and returned to its earlier holding that the Compensation Clause prevented the Government from collecting the Medicare and Social Security taxes from the judges. The matter then returned to the Supreme Court, which on return, granted *certiorari* (at that point having available a quorum of non-affected justices to hear the case). At the Court, the plaintiff judges argued that the "affirmance" of the earlier Supreme Court action removed the Compensation Clause issues from play, arguing that under the law of the case doctrine, the affirming of the case on the first trip to the Court ended consideration of the Compensation Clause as an issue. The Supreme Court disagreed and concluded that its earlier affirmation was not binding on it and did not properly constitute a situation in which to apply the law of the case doctrine.

In its discussion of the law of the case doctrine, the Supreme Court stated that the doctrine presumes a hearing on the merits, citing *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). Appellants in the matter before us have latched on to that premise. However, appellants ignore the context of the *Hatter* decision and ignore the fact that in explaining why it would not apply the doctrine, the Court focused on the fact that in the case's earlier trip to the Court, there was no quorum and as such, no consideration of the case on the merits. Given the unique situation that had been presented to it in *Hatter*, the Court elected to reexamine the Compensation Clause and not bind itself to its earlier affirmance of the Federal Circuit decision. Just as we concluded as to *Smelting*, we similarly find the circumstances in *Hatter* not to be applicable or comparable to the situation before us. To the extent the Supreme Court initially affirmed *Hatter*, the tribunal did not consider the arguments on the merits. The decision was dictated by other than review and consideration of the issues presented. In the appeals before us, the question whether the contracts were continuous or single year was not decided on a procedural basis by the district court. Rather, the parties had a full opportunity to present their positions and the court decided the issue on the merits by independently applying whatever facts it had gleaned from the record to the law.

Appellants' challenge to applying the law of the case doctrine to the district court decision in the case before us here appears to stand on the premise that a decision on summary judgment is somehow not a decision on the merits. That, of course, is incorrect. Summary judgment, just as a decision after a hearing, is a determination on the merits. It is rendered without a hearing, because the tribunal has determined that there is no disputed material question of fact left to be resolved which can affect the legal outcome. In a proceeding on summary judgment, it is incumbent upon the non-moving party to show that summary judgment is not appropriate because material facts remain in dispute. As to the issue of the continuous contract, if there were missing or disputed material facts, appellants had to make that showing at the district court. Absent direction from that court to the contrary, now is simply too late.

In its motion before us, appellants assert that the district court and AGBCA had erred in not finding the SRAs to be a continuous contract. They argue that several matters were viewed improperly or ignored by the court and the board, and had the tribunals viewed them properly, that would have changed or affected their respective decisions as to the status of the Agreements. Appellants further argue that they have only recently learned of new information, through discovery, which shows that both they and FCIC intended to have a continuous contract. All that being said, we note that regardless of what happened at the AGBCA, when appellants brought the matter to the district court, they specifically asked in Count VIII of their complaint for the court to rule that the 1998 SRA was continuous and therefore that the 2000 regulation did not apply to any of the SRA years. The court rejected

that position and, more importantly, granted FCIC's motion otherwise. We cannot ignore that. This is not a situation where appellants are asking us to revisit (in light of new evidence) or simply change our earlier board ruling. Rather, appellants are directly challenging the district court's decision, a decision that is appellate to us in these cases and, as such, is binding. Appellants had the opportunity to argue the case before the district court. If appellants believe the court erred by ruling prematurely and before discovery, that is a matter that appellants need to resolve with that tribunal.

Because of the interlocutory nature of the proceeding and the fact that claims as to each SRA year are still before the Board, appellants contend that they cannot yet appeal that portion of the district court ruling. They may ultimately convince an appellate court to rule in their favor that the Agreements were continuous. With that in mind, appellants make a case for the Board taking evidence now, so that if appellants ultimately prevail on appeal, the record will be made. While we see the logic of taking evidence, the fact remains that the district court has spoken on the issue of a continuous contract. We have no basis to treat that decision as if it had not been rendered. If appellant is unable to prevail at the Board on the remaining issues, it can ultimately appeal the district court decision on continuous contract and any other currently interlocutory matters. If such an appeal is successful, then the matter can ultimately be remanded to the Board for the Board to take evidence.

Although we will not re-litigate whether the 1998 SRA was a continuous contract, the issue remains whether the 1998 SRA was intended to be continuous. In appellants' response to FCIC's motion, they assert that they should be permitted to pursue a remedy of reformation, based on the Agreements failing to express the intent of the parties. As they present it, even if one accepts as a fact that the contract as written is not continuous, appellants still have the right to present argument and supporting evidence as to the intent of the parties, and have the right to reform the contract to meet what the parties intended, rather than what the written words reflect. Appellants cite us to *Howmedica Osteonics Corp. v. Wright Medical Technology, Inc.* 540 F.3d 1337 (Fed. Cir. 2008), a patent case, which includes the following instructive language:

> The undisputed facts show that reformation would be available even if we were to reject the contract interpretation analysis of the district court as being in reality a modification of the contract. When a written contract "fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement." *Restatement (Second) of Contracts* §155 (1981). The purpose of reformation, therefore, is to correct a mistake that occurred in reducing the parties' actual, negotiated agreement to writing.

Id. at 1348.

Clearly, the proof needed to support reformation will be substantial. We do not expect FCIC to agree that there was any mistake or confusion on its part as to the contract meaning. That said, there is nothing in the district court decision which would preclude appellants from pursuing the theory and presenting evidence to support it. The district court decision has interpreted the contract; it has not addressed reformation. It is important to reiterate, however, that allowing appellant to pursue the reformation theory does not change the fact that the interpretation of the contract as separate or continuous is a closed matter. Further, the parties are reminded that allowing in the evidence is a procedural decision of the presiding judge, and that ultimately all aspects of the appeal will be decided by a full panel.

The other two issues raised in FCIC's motion and addressed by appellants deal with FCIC's understanding of the court ruling as to Section V.L of the SRA and the application of 7 CFR 400.169 (2000) to the submission of claims. FCIC wants the Board to rule "that the appellants were required to comply with the requirements of section V.L of the SRA and appeal actions of FCIC in accordance with 7 CFR 400.169 (2000); and that the forty-five-day period was part of the SRA." In response, appellants say that FCIC's argument ignores the central holding of the district court's remand, which is to direct the Board to fully address whether the forty-five-day period in 7 CFR 400.169 (2000) is controlling for the claims in issue. The district court in its ruling concluded that 7 CFR 400.169 (2000) was valid, was part of the SRA, and as such was enforceable. However, the court questioned whether the forty-five-day period was applicable to the disputed matter in this case and directed the Board to explain how the forty-five-day provision and six-year statute of limitations can be harmonized. Thus, while FCIC accurately identifies portions of the court's holding, those matters do not answer or resolve the basic questions before us on remand, which is whether those provisions control in this case. There is no reason for us here to reiterate for FCIC what the court has already said.

To the extent appellants' testimony is aimed at the interplay of the limitations and regulation, and aimed at defining what constitutes an action so as to trigger the need for a final determination, appellants will be allowed to develop their case and the record. Further, this in no way should be taken to limit the appellants' opportunity to present evidence showing that the language of the 1997 regulation (affecting the 1999 and 2000 SRA years) was not mandatory, nor limit FCIC's opportunity to show otherwise.

Ruling

While this matter has come before the Board in a motion styled as one for summary judgment, we do not treat it in that manner. The motion is more a request for affirmation of what has already been decided by the district court. The district court's determinations are already binding on us in this case. As such, we do not here render a decision on summary judgment on matters that have already been decided.

The motion, however, has raised several issues which merit clarification as to the continuing proceedings before the Board. First, the Board will not re-litigate whether or not 7 CFR 400.169 (1997) and (2000) were authorized, which they were; or whether those regulations are an enforceable part of the contract, again, which they are. The Board will, however, litigate and take evidence as to whether, as part of the contract, the regulation is enforceable and applicable to the situation in issue in these disputes, and also whether this dispute is covered by the six-year statute or subject to the forty-five-day limitation set out in the contract and regulations. The Board will also take evidence as to the meaning and application of the term "action" as used in 7 CFR 400.169 for both 1997 and the 2000 regulations. Finally, the issue of whether the 1998 SRA was a continuous contract has been decided by the district court. Therefore, we will not take evidence which argues otherwise. We will, however, for purposes of developing a full record, take evidence as to reformation relating to the intent of the parties as to a continuous contract when they entered into the Agreements.

HOWARD A. POLLACK
Board Judge