

# THE MERRILL DOCTRINE AND FEDERALLY REINSURED CROP INSURERS

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## ABSTRACT

Since 1947, the *Federal Crop Insurance Corp. v. Merrill* decision has operated to bar claims of equitable estoppel against agents of the federal government. However, the applicability of the Merrill doctrine to the equitable estoppel and waiver claims of insureds against federally reinsured private crop insurers is unclear. There is a split of authority on this significant issue, and it remains largely unresolved in numerous jurisdictions.

An early trend developed where the courts applied the Merrill doctrine to alleged misrepresentations of agents of the Federal Crop Insurance Corporation (“FCIC”) as well as the agents of private insurers. In the early to mid-2000s, the decisions of three state courts—Kentucky, Georgia and Tennessee—declined to extend the shield of the Merrill doctrine to federally reinsured private crop insurers. Most recently, the United States District Court for the Eastern District of Tennessee, in the *Skymont Farms v. Federal Crop Insurance Corp.* decision, revived life into Merrill and held it applied involving a federally reinsured crop insurance policy.

This article recommends a rule that could balance both the interests of farmer insureds and federally reinsured private crop insurers in future cases involving the Merrill doctrine. It proposes that (1) a heavy presumption against the application of *Merrill* to federally reinsured private crop insurers be followed, and (2) that *Merrill* only apply when a federally reinsured private crop insurer makes a “clear and convincing” evidentiary showing that the farmer insured failed to adequately investigate the provisions concerning a crop insurance policy, or that *Merrill* only apply when there is a “clear and convincing” evidentiary showing that the insured made a fraudulent misrepresentation on an application for insurance.

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I. INTRODUCTION

Crop insurance continues to stand as a topic in the public spotlight. The federal crop insurance program, a vital source of support for the toil and efforts of America’s farmers since the Great Depression,<sup>1</sup> faces an uncertain future in the years ahead as a number of policymakers have proposed significant reforms to the program. Within the past year, several policymakers have proposed reforms to the program that would cap the amount of subsidies a farmer can receive from the program and bar subsidies to any farmer with an adjusted gross income above a certain

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1. For a more extensive discussion of the background, history and key elements of the federal crop insurance program, see Chad G. Marzen, *Crop Insurance Bad Faith: Protection for America’s Farmers*, 46 CREIGHTON L. REV. 619 (2013) (hereinafter “Marzen I”); Steffen N. Johnson, *A Regulatory ‘Waste Land’: Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505 (1996); David A. Domina, *Federal Crop Insurance: What It Means and How It Works*, NEBRASKA LAW. 2012.

level.<sup>2</sup> Occasional allegations of fraud within the program have also surfaced in recent months and years.<sup>3</sup> One major case within the past year in North Carolina allegedly involved potential fraud of nearly \$100 million, which purportedly involved a number of insurance brokers, adjusters, and farmers.<sup>4</sup> With the new farm bill still currently stalled in the halls of the United States Congress, the philosophical debate concerning the role of the federal government as a subsidizer of crop risks in agriculture will undoubtedly continue.

In North Dakota, sixteen different private insurance companies currently provide federally reinsured crop insurance policies to farmers throughout the state.<sup>5</sup> The North Dakota Supreme Court has confronted cases involving crop insurance for over one hundred years. One of the first reported cases concerning insurance on crops, *Berglund v. State Farmers' Mutual Hail Insurance Co. of Waseca, Minnesota* was decided by the North Dakota Supreme Court over a century ago in 1913.<sup>6</sup> The North Dakota Supreme Court reversed a trial court ruling for a plaintiff on a motion for judgment on the pleadings and remanded the case to determine fact issues concerning alleged misrepresentations concerning the plaintiff's purported insurable interest in the crop under the policy.<sup>7</sup> Since *Berglund*, courts in North Dakota have held that the Federal Crop Insurance Act does not completely preempt state law claims based upon breach of contract,

2. Brian Wingfield, *Crop Insurance Critics Make Push to Curb U.S. Subsidies*, BLOOMBERG NEWS, Sept. 12, 2013, <http://www.bloomberg.com/news/2013-09-12/crop-insurance-backers-step-up-lobbying-to-blunt-critics.html>.

3. David J. Lynch, *Fraud Stealing \$100 Million Shows Flaws in U.S. Crop Insurance*, BLOOMBERG NEWS, Sept. 11, 2013, <http://www.bloomberg.com/news/2013-09-11/fraud-stealing-100-million-shows-flaws-in-u-s-crop-insurance.html>. For more information concerning the legal issues concerning crop insurance fraud, see Chad G. Marzen, *Crop Insurance Fraud and Misrepresentations: Contemporary Issues and Possible Remedies*, 37 WM & MARY ENVTL. L. & POL'Y REV. 675 (2013) (hereinafter "Marzen II"); see also *U.S. v. Torlai*, 728 F.3d 932 (9th Cir. 2013) (upholding conviction of individual convicted by jury of sixteen counts of allegedly making false claims for agricultural benefits).

4. Lynch, *supra* note 3.

5. U.S. Dep't of Agriculture Risk Mgmt. Agency, *Crop Insurance Providers: North Dakota for 2013* (Jul. 25, 2013),

[http://www3.rma.usda.gov/tools/agents/companies/2013/north\\_dakotaCI.cfm](http://www3.rma.usda.gov/tools/agents/companies/2013/north_dakotaCI.cfm). The sixteen private insurance companies which provided federally reinsured crop insurance policies in North Dakota for 2013 include: ACE American Insurance Company; Agrinational Insurance Company, Inc.; American Agri-Business Insurance Company; American Agricultural Insurance Company; Everest Reinsurance Company; Farmers Mutual Hail Insurance Company of Iowa; Great American Insurance Company; GuideOne Mutual Insurance Company; Hudson Insurance Company; John Deere Insurance Company; NAU Country Insurance Company; Occidental Fire & Casualty Company of North Carolina; Producers Agriculture Insurance Company; Rural Community Insurance Company; Starr Indemnity & Liability Company; and XL Reinsurance America, Inc. *Id.*

6. 142 N.W. 941 (N.D. 1913); see also Marzen II, *supra* note 3, at 690.

7. *Berglund*, 142 N.W. at 943; see also Marzen II, *supra* note 3, at 690.

negligence, and misrepresentations,<sup>8</sup> that a two-year statute of limitations relating to claims against licensed insurance agents applies in a case involving allegations of negligence concerning handling of crop insurance claims,<sup>9</sup> and have examined bad faith in the context of a crop insurance claim.<sup>10</sup> North Dakota remains a national leader in the development of the law concerning crop insurance claims, and the state's national prominence in agriculture<sup>11</sup> portends a future of many more legal issues unique to crop insurance being resolved in state courts.

While the number of crop insurance claims inevitably vary from season to season, in September 2013, the United States Department of Agriculture released figures that indicated farmers in the United States filed claims on approximately six times more land than in the prior planting season.<sup>12</sup> The presence of an enlarged number of claims in more recent months has an increasing number of commentators taking note of the significant legal issues facing crop insurance litigation.<sup>13</sup> As eighteen different private crop insurance companies today provide federally reinsured crop insurance to farmers,<sup>14</sup> these companies all face potential liability exposures in the event of a dispute regarding the circumstances surrounding a federally reinsured crop insurance policy.

Amidst all of the issues in crop insurance litigation, a significant issue remains largely unresolved in many jurisdictions and is subject to a current split in authority: does the Merrill Doctrine<sup>15</sup> (the doctrine that allows the federal government to disavow a government agent's unauthorized acts)<sup>16</sup>

8. Bullinger v. Trebas, 245 F. Supp. 2d 1060, 1067 (D.N.D. 2003).

9. Overboe v. Farm Credit Serv. of Fargo, 2001 ND 58, ¶ 17, 623 N.W.2d 372, 377.

10. See Seifert v. Farmer's Union Mut. Ins. Co., 497 N.W.2d 694 (N.D. 1993).

11. See Dean J. Haas, *Falling Down on the Job: Workers' Compensation Shifts From a No-Fault to a Worker-Fault Paradigm*, 79 N.D. L. REV. 203, 208 (2003) (describing North Dakota as a "penultimate agriculture state"); Jennifer J. Mattson, *North Dakota Jumps on the Agricultural Disparagement Law Bandwagon By Enacting Legislation to Meet a Concern Already Actionable Under State Defamation Law and Failing to Heed Constitutionality Concerns*, 74 N.D. L. REV. 89, 89 (1998) (describing North Dakota as an "agricultural powerhouse").

12. Whitney McFerron & Jeff Wilson, *U.S. Crop-Insurance Claims Jump Amid Planting Delays, USDA Says*, BLOOMBERG NEWS, Sept. 17, 2013, <http://www.bloomberg.com/news/2013-09-17/u-s-crop-insurance-claims-jump-amid-planting-delays-usda-says.html>.

13. See J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. AGRIC. L. 531 (2013) (hereinafter "Ballard I"); Grant Ballard, *Representing Farmers in Crop Insurance Disputes: When Your Client is Denied the Farm Safety Net*, 48 ARKANSAS LAWYER, Summer 2013, at 26; Domina, *supra* note 1; Marzen I, *supra* note 1.

14. U.S. Dep't of Agriculture Risk Mgmt. Agency, *Crop Insurance Providers List for 2014* (Jul. 25, 2013), <http://www3.rma.usda.gov/tools/agents/companies/indexCI.cfm>.

15. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (hereinafter "Merrill").

16. David K. Thompson, Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 551 (1979) ("Traditionally, courts have not permitted estoppel of the government, no matter how compelling the circumstances.").

apply to bar the estoppel and waiver claims of insureds against federally reinsured crop insurance companies? Suppose, hypothetically, that a wheat farmer procures a crop insurance policy and the farmer is uncertain of the meaning of a provision in the policy. Justifiably relying upon the expertise of either an agent of a private crop insurer or an agent of the FCIC, the wheat farmer takes an action that ultimately results in a loss of coverage under the policy. Even despite the faulty advice of either the private crop insurer agent or FCIC agent, can the private crop insurer be insulated from liability by disavowing the agents' actions? The outcome of this question in courts throughout the country may have a significant effect on the claims of farmer insureds.

This article examines the issue of whether the Merrill doctrine should apply in cases involving federally reinsured crop insurance companies. Part I provides an overview of the United States Supreme Court's *Merrill* decision and an overview of the doctrines of waiver and equitable estoppel in insurance law. Part II discusses the reported cases to date that have ruled on the application of the Merrill doctrine in the context of federal crop insurance. Two early federal cases, the *Mann v. Federal Crop Insurance Corp.*<sup>17</sup> case in 1983 and *Walpole v. Great American Insurance Companies*<sup>18</sup> in 1994, led to the development of an early trend where courts applied the Merrill doctrine to alleged misrepresentations of FCIC agents as well as the agents of private insurers. In the early to mid-2000s, this trend reversed in an opposite direction. The Supreme Court of Kentucky in *Dailey v. American Growers Insurance*,<sup>19</sup> the Georgia Court of Appeals in *Rain & Hail Insurance Services, Inc. v. Vickery*,<sup>20</sup> and the Tennessee Court of Appeals in *Simms v. Insurance Co. of North America*<sup>21</sup> all declined to apply the Merrill doctrine. However, the application of the Merrill doctrine in the context of federal crop insurance is far from a settled issue. Most recently, the United States District Court for the Eastern District of Tennessee, in the *Skymont Farms v. Federal Crop Insurance Corp.* decision, revived life into *Merrill* and held that it applied in a case involving a federally reinsured crop insurance policy.<sup>22</sup>

Finally, Part III analyzes the policies and issues concerning application of the Merrill doctrine to federally reinsured private crop insurers. The article proposes that the courts adopt a heavy presumption against applying

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17. 710 F.2d 144 (4th Cir. 1983).

18. 914 F. Supp. 1283 (D.S.C. 1994).

19. 103 S.W.3d 60 (Ky. 2003).

20. 618 S.E.2d 111 (Ga. Ct. App. 2005).

21. No. E2005-00062-COA-R3-CV, 2005 WL 2604049 (Tenn. Ct. App. Oct. 14, 2005).

22. No. 4:09-cv-65, 2012 WL 1193407 (E.D. Tenn. Apr. 10, 2012).

the Merrill doctrine in cases involving federally reinsured crop insurers. It contends that the Merrill doctrine should only apply in cases where the FCIC or federally reinsured crop insurer make a “clear and convincing” evidentiary showing that a farmer insured failed to properly investigate the provisions concerning a crop insurance policy and/or the surrounding circumstances associated with a crop insurance claim. The adoption of a heavy presumption against the application of the Merrill doctrine by the courts will better allow farmer insureds to recover in cases where a farmer insured properly conducts due diligence surrounding a claim but is misled by the alleged misrepresentations, whether innocent or intentional, of either an FCIC agent or agent of a private crop insurer. As a policy matter, a heavy presumption against the application of the Merrill Doctrine should apply because claims arising under crop insurance policies in many cases implicate the very economic livelihood of farmers.

## II. *FEDERAL CROP INSURANCE CORP. V. MERRILL* AND THE WAIVER AND EQUITABLE ESTOPPEL DOCTRINES IN INSURANCE LAW

As a general doctrinal rule, employers are held liable for the negligent acts and/or omissions of their employees and agents through the doctrine of *respondeat superior* in agency law.<sup>23</sup> Prior to the United States Supreme Court’s decision in *Merrill*, it was a relatively unsettled question as to whether the same rule applied to federal government agencies with respect to agents of the federal government. Prior to 1980, the federal government issued all federal crop insurance policies through the FCIC.<sup>24</sup> *Merrill* stood as a controlling decision in crop insurance litigation for decades, as the FCIC remained the most significant entity providing crop insurance in the United States.

### A. THE MERRILL DECISION

The facts of the *Merrill* case began with copartners that applied for federal crop insurance to insure wheat crops in Idaho in early 1945.<sup>25</sup> The county Agricultural Conservation Committee acted as agent of the FCIC.<sup>26</sup> The copartners informed the conservation committee that a large majority of the acres on which they were planting spring wheat were reseeded as

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23. RICHARD A. MANN & BARRY S. ROBERTS, SMITH & ROBERSON’S BUSINESS LAW 368-69 (15th ed. 2012).

24. *Bullinger v. Trebas*, 245 F. Supp. 2d 1060, 1063 (D.N.D. 2003); *Marzen I*, *supra* note 1, at 626.

25. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 382 (1947).

26. *Id.*

winter wheat acreage, and the conservation committee informed them that the entire crop was insurable.<sup>27</sup> In an unfortunate turn of events for the copartners, however, not only was the majority of the spring wheat crop destroyed by drought, but the crop was not insurable because of the reseeded.<sup>28</sup> The FCIC denied the copartners insurance claim, and litigation ensued.<sup>29</sup>

At the trial, the copartners contended that the committee misled them into believing that the entire spring wheat crop was insurable.<sup>30</sup> In response, the FCIC argued that wheat crop insurance regulations barred recovery for the copartners as a matter of law.<sup>31</sup> The trial court found in favor of the plaintiffs on the claim, and the Supreme Court of Idaho affirmed, adopting the reasoning that the Agricultural Conservation Committee, as agent of the FCIC, could bind the FCIC, irrespective of their statements that were inconsistent with the wheat crop insurance regulations in place.<sup>32</sup>

The United State Supreme Court reversed the Idaho Supreme Court and found in favor of the FCIC.<sup>33</sup> In its decision, the Court adopted more of a *caveat emptor*<sup>34</sup> type of approach to individuals and entities entering into contracts with the government. In states that adhere to the *caveat emptor* doctrine with regard to real estate transactions, buyers of property who later find out the property is defective in some way are precluded from recovery in contract if they failed to conduct a reasonable investigation that would have discovered the defect in the absence of fraud by the seller.<sup>35</sup> Similar to a buyer of real property who may incur risks associated with the purchase of property, the Court in *Merrill* noted that individuals who enter into “an

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 382-83.

33. *Id.* at 386.

34. *Caveat emptor* is from Latin meaning “let the buyer beware.” It is defined as: “A doctrine holding that purchasers buy at their own risk.” BLACK’S LAW DICTIONARY 236 (8th ed. 2004).

35. Alex M. Johnson, *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 102 (1988)

Essentially, the common law doctrine of *caveat emptor* does not require a seller to disclose defects and precludes recovery by a buyer for structural and other defects in the property being sold where: (1) the alleged defective condition is open to observation and is discoverable upon a reasonable inspection; (2) the buyer has the opportunity to examine the premises; and (3) there was no fraud on the part of the vendor with respect to the condition of the premises.

arrangement” with the government take the risk that agents of the government stay within their authority.<sup>36</sup>

In ruling for the FCIC, the Court in *Merrill* also remarked that individuals and entities have constructive notice<sup>37</sup> of all federal statutory regulations in effect.<sup>38</sup> Thus, the Court found the copartners held constructive notice of the Wheat Crop Insurance Regulations.<sup>39</sup> Even the case of “innocent ignorance,” if it results in adversity, would be insufficient for recovery.<sup>40</sup> The Supreme Court stated:

Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance . . . The ‘terms and conditions’ defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government.<sup>41</sup>

The Supreme Court’s majority opinion in *Merrill* appeared to downplay the observation that the FCIC agent allegedly misled the insureds, despite the presence of the official regulations that were in effect. From the date of the decision in *Merrill* to 1980, *Merrill* essentially covered all cases of alleged negligence and misrepresentations by the FCIC and FCIC agents concerning crop insurance coverage. *Merrill* has since been expanded to a number of areas involving allegations of misleading statements and actions of federal agents, including alleged misleading statements concerning Social Security benefits,<sup>42</sup> military housing benefits,<sup>43</sup> medicare cost reimbursement procedures,<sup>44</sup> and payment-in-kind contracts between individuals and the Commodity Credit Corporation.<sup>45</sup>

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36. *Merrill*, 332 U.S. at 384 (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority stays within the bounds of his authority.”).

37. “Constructive notice is notice which the law deems sufficient to apprise the world of a fact.” Jeffrey H. Sussman, *An Imperfect Answer to a Question of Perfection: The 1993 Amendment to California Civil Code Section 2924H(C) and the Avoidability of Nonjudicial Foreclosure Sales Under Sections 544(A)(3), 549, and 362 of the Bankruptcy Code*, 22 CAL. BANKR. J. 287, 296 (1995).

38. *Merrill*, 332 U.S. at 384-85.

39. *Id.* at 385.

40. *Id.*

41. *Id.*

42. See *Cheers v. Sec’y of HEW*, 610 F.2d 463, 468-69 (7th Cir. 1980).

43. See *Brant v. United States*, 597 F.2d 716, 720 (Cl. Ct. 1979).

While *Merrill* still has an expansive reach in a number of areas, the federal crop insurance program changed in 1980. Following the Federal Crop Insurance Act (“FCIA”) of 1980, the program expanded to include private crop insurers who could underwrite crop insurance policies and then receive the benefit of the federal government as a reinsurer.<sup>46</sup> With private insurance companies now offering federally reinsured crop insurance policies, it is an open question as to whether the *Merrill* doctrine applies to a federally reinsured crop insurer. Can waiver and equitable estoppel claims survive in cases of alleged misrepresentations by FCIC agents and agents of federally reinsured crop insurance companies? Waiver and equitable estoppel claims have a longstanding presence not only in insurance law, but in North Dakota law as well.

## B. DOCTRINE OF WAIVER

The doctrine of waiver is commonly defined as encompassing situations in which an individual or party intentionally or voluntarily waives a known right.<sup>47</sup> An insurer or insurer’s agent can exercise a waiver through express statements or in writing.<sup>48</sup> In addition, a waiver might be implied in the insurance context where an insurer or insurer’s agent “acts in a manner inconsistent with an intention to enforce strict compliance of the contested provision . . . and the insured is naturally led to believe that the right has been intentionally given up.”<sup>49</sup> In the area of insurance, an express or implied waiver of specific policy provisions of the insurance contract may result if the statements, conduct, and/or written documents of an insurer or insurer’s agents indicate such a waiver.<sup>50</sup> One instance where waiver may occur in insurance litigation is if an insurer accepts a late premium payment.<sup>51</sup>

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44. See *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 65 (1984).

45. See *Raines v. United States*, 12 Cl. Ct. 530, 532 (1987).

46. Marzen I, *supra* note 1, at 626.

47. Jeremy P. Brummond, *When Will the Smoke Clear? Application of Waiver and Estoppel in Missouri Insurance Law*, 66 MO. L. REV. 225, 225 (2001) (“Waiver is generally referred to as the voluntary (or intentional) relinquishment of a known right.”).

48. *Id.* at 229-30.

49. *Brendle v. Shenandoah Life Ins. Co.*, 332 S.E.2d 515, 518 (N.C. Ct. App. 1985).

50. 46 C.J.S. *Insurance* § 1144 (2013).

51. Peter N. Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 620-21 (1996)

[A]lthough a majority of courts have held that coverage under an insurance policy cannot be created or enlarged by waiver, nevertheless waiver may still be utilized to preserve existing insurance coverage when . . . an insurer accepts a late premium payment or ratifies policy coverage in some other manner, although it has legitimate legal grounds to cancel the policy . . . .

The Supreme Court of North Dakota examined the issue of insurer's *conditional* acceptance of a late premium payment in *Hanson v. Cincinnati Life Insurance Co.*<sup>52</sup> In *Hanson*, the beneficiaries of a life insurance policy appealed a trial court order granting summary judgment to the insurer on their claim of death benefits under the policy.<sup>53</sup> The underlying facts of *Hanson* involved a situation where a life insurance policy allegedly lapsed due to the nonpayment of a premium.<sup>54</sup> However, following the lapse, the insurer reportedly extended a late-payment offer that had an expiration date.<sup>55</sup> While a check was apparently dated by the decedent with a date prior to the expiration of the offer, the insurer reported it did not receive the check until after the offer's expiration.<sup>56</sup> Although the insurer allegedly cashed the premium check, the insurer requested the insured send an additional premium payment and also complete a request for reinstatement form since the policy purportedly lapsed.<sup>57</sup> The additional premium payment and request for reinstatement form were apparently not completed prior to the insured's death.<sup>58</sup>

On appeal, the beneficiaries of the decedent contended that the insurer waived its right to deny coverage under the life insurance policy when it cashed the check in response to the initial late payment offer.<sup>59</sup> In response, the insurer contended that it conditionally accepted the check and did not intend to waive the lapse of the policy.<sup>60</sup> Upholding the summary judgment decision for the insurer, the North Dakota Supreme Court found there was no issue of material fact as to waiver because the insurer's written correspondence "unequivocally informed [the insured] that the policy had 'lapsed,'" among other statements.<sup>61</sup> The North Dakota Supreme Court thusly declared the following rule:

The unconditional acceptance of a premium after the expiration of a grace period is universally recognized as a waiver of an insurer's right to treat a policy as lapsed for nonpayment of the premium . . . . There is no waiver, however, if the insurer conditionally accepts and retains a late premium subject to reinstatement, and the insurer's acceptance and placement of a

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52. 1997 ND 230, 571 N.W.2d 363.

53. *Id.* ¶ 1, 571 N.W.2d at 365.

54. *Id.* ¶ 3.

55. *Id.*

56. *Id.* ¶ 4.

57. *Id.* ¶ 5.

58. *Id.* ¶¶ 6-7, 571 N.W.2d at 366.

59. *Id.* ¶ 12.

60. *Id.*

61. *Id.* ¶ 22, 571 N.W.2d at 368.

check in a suspense account pending reinstatement of the policy does not constitute a waiver if the acceptance is clearly conditional.<sup>62</sup>

In the context of crop insurance, the issue of waiver is one that has appeared in reported cases to date. Similar to *Hanson*, at least one court has faced the issue of whether the acceptance of a late premium payment by the FCIC on a crop insurance policy constituted a waiver. In *Glass v. Federal Crop Insurance Corp.*, a Missouri farmer was issued crop insurance policies for corn and wheat crops in 1979, 1980, and 1981 for himself and his farming business.<sup>63</sup> In order to receive crop insurance for the 1982 crop year, the insureds were required to pay the premiums due for the 1981 year on or before October 10, 1981, the termination date for the policies.<sup>64</sup> However, this allegedly did not occur, and the FCIC terminated the policies at issue.<sup>65</sup> Apparently, the FCIC accepted late payments of the premiums on the policies, and the insureds contended that the acceptance of the late premium payments constituted waiver of denial of coverage for the 1982 crop year.<sup>66</sup>

The United States District Court for the Eastern District of Missouri ruled in favor of the FCIC and rejected the insured's waiver argument.<sup>67</sup> Despite the FCIC's acceptance of the late premium payments, the court emphasized the fact that the insureds' policies terminated and that the only way insurance coverage could have been reintroduced would be through reapplication for coverage.<sup>68</sup> Interestingly, compared with *Hanson*, the insurer conditionally accepted the late premium payment on the life insurance policy, but in *Glass*, the FCIC placed no conditional acceptance on the late premium payments for the crop insurance policies at issue. With the absence of a waiver and the lack of a conditional acceptance of a late premium payment in *Glass*, it might be argued that in cases involving the waiver doctrine and crop insurance, an insurer's acceptance of a late premium payment, by itself, does not constitute circumstances sufficient to support a finding of a waiver. However, two things must be noted. First, *Glass* involved the FCIC's acceptance of a late premium payment, not a private crop insurer selling federally reinsured policies.<sup>69</sup> Second, the court

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62. *Id.* ¶ 21 (internal citations omitted).

63. 643 F. Supp. 272, 273 (E.D. Mo. 1986).

64. *Id.*

65. *Id.*

66. *Id.* at 274.

67. *Id.*

68. *Id.*

69. *Id.* Although the facts of *Glass* involved the FCIC's acceptance of a late premium payment, it still might be argued that *Glass* should apply to cases involving federally reinsured

noted that even if the payments had the effect of continuing the policies for succeeding years, the insureds could not prevail since the insureds allegedly did not file an acreage report required by the policies.<sup>70</sup> Thus, the alleged failure of the insureds to satisfy the terms and conditions of the policies would still defeat coverage and the doctrine of waiver even if the court found sufficient evidence of a waiver.

Grant Ballard, an attorney who litigates numerous crop insurance disputes, has noted that arbitration of disputes is often a contractual requirement in federally reinsured crop insurance policies.<sup>71</sup> The issue of a federally reinsured crop insurer's waiver of arbitration in a crop insurance policy was addressed in *In re 2000 Sugar Beet Crop Insurance Litigation*.<sup>72</sup> In the case, a number of growers of sugar beets alleged waiver of arbitration provisions under multi-peril crop insurance policies.<sup>73</sup> The insureds alleged that both the defendants' removal of the case from state to federal court and its filing of a third-party complaint were actions contrary to an intention to arbitrate the claims.<sup>74</sup> The court disagreed, noting that the answers of the defendants included an affirmative defense of the right to arbitrate,<sup>75</sup> and the court granted the defendants' motion to compel arbitration.<sup>76</sup>

Finally, one other significant issue that is often litigated in crop insurance and other insurance cases is whether an insurer or insurer's agents can waive specific policy provisions of an insurance contract. Many standard insurance policies, including crop insurance policies, require an insured to furnish timely written notice of a loss to an insurer in order for

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crop insurers since at the time of the decision-1986-private insurers were operating in the sale of federally reinsured crop insurance policies.

70. *Id.* at 275

Even if plaintiffs' late payments had the effect of continuing the policies to cover succeeding crop years, plaintiffs still would not prevail. Plaintiffs' 1982 crop did not qualify for coverage. Plaintiffs failed to file an acreage report for the crop year 1982 showing zero acreage as required by the policies. This failure also would serve to terminate the policies.

71. Ballard I, *supra* note 13, at 539

Arbitration is often required by the terms of the Common Crop Insurance Policy, under an arbitration clause pertaining to disputes between an insured and the private insurance provider. The current arbitration provision found within the CCIP provides that, when a disagreement arises between an insured producer and the insurance provider that cannot be resolved by mediation, as to 'any determination' made by the insurance provider, 'the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association.'

72. 228 F. Supp. 2d 992 (D. Minn. 2002).

73. *Id.* at 997.

74. *Id.*

75. *Id.*

76. *Id.* at 999.

the insurer to initiate an investigation of the claim.<sup>77</sup> *Spratlin v. Federal Crop Insurance Corp.* involved a situation in which an insured allegedly did not provide timely written notice of loss to the FCIC relating to a loss of a soybean crop.<sup>78</sup> The crop insurance policy at issue in *Spratlin* included such a provision and permitted indemnification by the FCIC to the insured only if written notice of loss was timely received.<sup>79</sup> The insured conceded that written notice was timely received.<sup>80</sup> However, the insured contended that, since the FCIC paid indemnity on claims in other cases that were untimely filed, the doctrine of waiver applied.<sup>81</sup>

The court rejected the insured's argument, holding the crop insurance policy at issue clearly outlined the procedure for filing claims of loss and that the policy stated that "no term or condition of the policy shall be waived or changed except in writing by a duly authorized representative of the FCIC."<sup>82</sup> From the text of the court's decision, it appears that the insured also fell short of its evidentiary burden on the waiver issue, as the allegations concerning the FCIC's payment on other claims that were untimely filed were apparently supported only by allegations from the face of the complaint.<sup>83</sup> Irrespective of the insured's evidentiary burden on the waiver issue, the *Spratlin* court focused on the observation that the insured had legal notice of the insurance policy contract provisions as well as the FCIC's "rules and regulations regardless of the hardship resulting from innocent ignorance."<sup>84</sup>

In its decision, the court also cited *Merrill*.<sup>85</sup> In articulating one of the themes of *Merrill*, the court stated: "The rule, harsh as it may sound, is that when one deals with the government, he is expected to know the law and may not rely on the conduct of government agents contrary to law."<sup>86</sup> Significantly, *Spratlin* demonstrates that courts may apply the Merrill doctrine in cases involving the doctrine of waiver. In particular, an insured

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77. Marc S. Mayerson, *Perfecting and Pursuing Liability Insurance Coverage: A Primer for Policyholders on Complying with Notice Obligations*, 32 TORT & INS. L.J. 1003, 1004 (1997)

All liability policies contain provisions requiring the policyholder to notify the insurer of certain potentially covered events. Insurance companies typically argue that insureds' compliance with notice provisions is important because prompt notice gives them the opportunity to investigate occurrences and (potentially) to participate from the outset in the defense of a claim or suit.

78. 662 F. Supp. 870, 871 (E.D. Ark. 1987).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 872.

83. *Id.* at 871.

84. *Id.* at 872.

85. *Id.*

86. *Id.*

under a federally reinsured crop insurance policy may claim an agent or representative of the private crop insurer waived a specific policy provision. While *Merrill's* application to agents and representatives of private crop insurers on waiver claims is unsettled, the doctrine of equitable estoppel also operates to estop the actions of agents and representatives of the government and federally reinsured crop insurers who misrepresent or mislead insureds concerning facts of insurance policy provisions in crop insurance claims.

### C. DOCTRINE OF EQUITABLE ESTOPPEL

Federally reinsured private crop insurers may also face claims based on the doctrine of equitable estoppel in crop insurance litigation. The doctrine of equitable estoppel, in essence, protects an insured who has reasonably relied to their detriment based upon the misrepresentations of an insurer or the insurer's agents or representatives.<sup>87</sup> One treatise has described the doctrine as "conduct or acts on the part of the insurer which are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and treat the insured in reliance upon such conduct or acts has changed his or her position to his or her detriment."<sup>88</sup> While both doctrines are similar, a waiver involves a relinquishment of a right and estoppel may arise even in a situation where the person or entity has no intention of relinquishing or changing a right.<sup>89</sup>

In North Dakota, the Legislature has enacted a statute that codifies the doctrine of equitable estoppel. The statute defines the doctrine as follows: "When a party, by that party's own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission."<sup>90</sup>

The Supreme Court of North Dakota examined the doctrine of estoppel in the insurance context in *D.E.M. v. Allickson*.<sup>91</sup> The underlying case involved sexual misconduct allegations by a couple against the pastor of a

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87. ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 152 (5th ed. 2012)

Whatever the doctrine of waiver is, the doctrine of estoppel is closely related to it. The doctrine of estoppel essentially requires two elements: an actual misrepresentation and detrimental reliance. Misrepresentations, when they occur, are often attributable to the activities of agents, who mislead the insured as to the nature of coverage. The insured must rely on this misrepresentation in some way.

88. 46 C.J.S. *Insurance* § 1144 (2013).

89. John T. Hundley, "Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?, 19 S. ILL. U. L.J. 263, 271-72 (1995).

90. N.D. CENT. CODE § 31-11-06 (2013).

91. 555 N.W.2d 596 (N.D. 1996).

church.<sup>92</sup> After the church was made aware of the claims, the church notified its insurer of the possibility that a lawsuit may be filed based upon alleged sexual misconduct.<sup>93</sup> In a written letter to the church, the insurer declined insurance coverage for the claims based upon an exclusion in the church's policy for sexual misconduct claims.<sup>94</sup> It later was revealed such an exclusion did not exist in the policy.<sup>95</sup>

After a settlement was reached in the underlying tort case, a Miller-Shugart agreement<sup>96</sup> was reached, which permitted the plaintiffs to directly pursue collection on the judgment against the church's insurer.<sup>97</sup> Once the plaintiffs sought recovery of the agreement against the insurer, the insurer invoked lack of sufficient notice concerning claims of a "bodily injury" as a defense to the duty to defend and indemnify the church.<sup>98</sup>

The Supreme Court of North Dakota rejected the insurer's argument.<sup>99</sup> Invoking the rule that an insurer who denies coverage on one ground and then later denies coverage on a different ground is estopped from raising the latter ground if the insured is prejudiced,<sup>100</sup> the court held it would be "grossly unjust and unfair to allow [the insurer] to escape liability upon the unasserted lack of notice."<sup>101</sup>

Another area in which the law of insurance intersects with the doctrine of equitable estoppel is in cases involving insurance by estoppel. Professors Jerry and Richmond note that some courts are hesitant to apply the doctrines of waiver and equitable estoppel to expand coverage where

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92. *Id.* at 597.

93. *Id.*

94. *Id.* at 597-98.

95. *Id.* at 598.

96. Jerome Abrams, *Failure to Allocate? Nobody Pays: Using Miller Shugart Settlements in Cases of Questionable Insurance Coverage*, 4 WM. MITCHELL J. L. & PRAC. 2 (2010).

Judge Abrams states:

The *Miller-Shugart* scenario plays out as follows: 1) some incident takes place which gives rise to a claim against a policyholder; 2) the policyholder provides notice to its insurer that they want the insurer to handle the claim, usually invoking both the defense and indemnification duties under the policy; 3) the insurer questions or even denies the claim for reasons it explains; 4) the policyholder fearing personal liability – or at least uninsured exposure – makes a deal to settle the claim solely recoverable from the insurance coverage which arguably covers the claim; 5) the final paperwork allows the claimant to have a judgment against the policyholder collectible from the insurance coverage if it is established. *Id.*

97. *D.E.M.*, 555 N.W.2d at 598.

98. *Id.* at 599.

99. *Id.* at 601.

100. *Id.* at 600.

101. *Id.* at 601.

none exists.<sup>102</sup> The question of whether to extend coverage in an insurance contract by estoppel arose in North Dakota in *Wangler v. Lerol*.<sup>103</sup> In *Wangler*, the underlying facts of the case involved an employee of a company engaged in turkey farming who filed a negligence claim against the employer.<sup>104</sup> However, the company involved in the turkey farming operation was not a named insured under a farm liability policy in effect, and insurance coverage was not available for the plaintiff.<sup>105</sup> In relying on an affidavit of one of the owners of the company, the plaintiff contended insurance by estoppel was available in the case since the owner apparently asked “Now, we’re covered aren’t we?” to his insurance agent following one of the company’s annual insurance reviews.<sup>106</sup>

The North Dakota Supreme Court held the plaintiff’s evidence was not enough to create a fact question on insurance by estoppel.<sup>107</sup> The court noted that the affidavit submitted by the plaintiff gave no indication as to the response of the insurance agent, nor did it indicate any evidence of conduct by the insurance agent or insurer that would lead the insured to an incorrect belief concerning the insurance coverage available for the turkey farming operation.<sup>108</sup>

In the context of crop insurance, the doctrines of waiver and equitable estoppel may work in favor of farmer insureds to prevent federally reinsured crop insurers from benefiting from inconsistent statements, conduct, or their own misrepresentations. But, as noted earlier, the Merrill doctrine has a strong foothold in United States jurisprudence. After private insurers entered the business of federally reinsured crop insurance in the 1980s, courts soon faced the question of whether *Merrill* should be extended beyond the statement(s), conduct, and actions of government representatives or agents to the statement(s), conduct, and actions of representatives or agents of federally reinsured crop insurers to bar waiver and equitable estoppel claims.

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102. JERRY & RICHMOND, *supra* note 87, at 154 (“Some courts have held that the doctrines of waiver and estoppel cannot be used to expand the *coverage* of policies, which is to be distinguished from using the doctrine to prevent rescission of a policy or a defense to a claim within coverage.”).

103. 2003 ND 164, 670 N.W.2d 830.

104. *Id.* ¶ 3, 670 N.W.2d at 832.

105. *Id.*

106. *Id.* ¶ 15, 670 N.W.2d at 834.

107. *Id.* ¶ 12, 670 N.W.2d at 835.

108. *Id.* ¶ 15.

### III. THE MERRILL DOCTRINE: DOES IT APPLY TO FEDERALLY REINSURED PRIVATE CROP INSURERS?

The applicability of the Merrill doctrine to federally reinsured private crop insurers is a critical issue in crop insurance litigation. Application of the doctrine essentially bars the waiver and estoppel claims of farmer insureds in the crop insurance context. Two early federal courts, the United States Court of Appeal for the Fourth Circuit in *Mann v. Federal Crop Insurance Corp.*<sup>109</sup> and the United States District Court for the District of South Carolina in *Walpole v. Great American Insurance Companies*,<sup>110</sup> endorsed application of the Merrill doctrine. However, this early trend applying *Merrill* changed with the decisions of three state courts in the early 2000s which rejected the application of *Merrill*: the Supreme Court of Kentucky in *Dailey v. American Growers Insurance*,<sup>111</sup> the Court of Appeals of Georgia in *Rain & Hail Insurance Services v. Vickery*,<sup>112</sup> and the Court of Appeals of Tennessee in *Simms v. Insurance Co. of North America*.<sup>113</sup> Most recently, the decision of the United States District Court for the Eastern District of Tennessee in *Skymont Farms v. Federal Crop Insurance Corp.*<sup>114</sup> revived the applicability of *Merrill* to federally reinsured crop insurers and indicates a true modern split has occurred concerning the application of the doctrine. The resolution of this split in cases has significant implications for the future crop insurance claims of farmer insureds who assert the doctrines of waiver and equitable estoppel in litigation.

#### A. EARLY DECISIONS UPHOLDING MERRILL: MANN V. FEDERAL CROP INSURANCE CORP. AND WALPOLE V. GREAT AMERICAN INSURANCE COMPANIES

The issue of the Merrill doctrine's applicability to private insurers arose after the FCIA extended the writing of federal crop insurance policies to private insurers in the 1980s. One of the first major cases addressing the application of *Merrill* in a crop insurance litigation context was *Mann v. Federal Crop Insurance Corp.*<sup>115</sup> It should be noted that *Mann* involved the alleged representations of an FCIC insurance agent and field adjustment supervisor and not any agent or representative of a private insurer. In

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109. 710 F.2d 144 (4th Cir. 1983).

110. 914 F. Supp. 1283 (E.D. Va. 1996).

111. 103 S.W.3d 60 (Ky. 2003).

112. 618 S.E.2d 111 (Ga. Ct. App. 2005).

113. No. E2005-00062-COA-R3-CV, 2005 WL 2604049 (Tenn. Ct. App. Oct. 14, 2005).

114. No. 4:09-cv-65, 2012 WL 1193407, at \*12-13 (E.D. Tenn. Apr. 10, 2012).

115. 710 F.2d 144 (4th Cir. 1983).

*Mann*, the plaintiffs and FCIC disputed the total monetary amount due under a policy covering the plaintiffs' peanut crop.<sup>116</sup> The plaintiffs contended they were entitled to keep proceeds they received following the sale of the peanut crop that were above the support price, while the FCIC contended that federal regulations required profits above the support price to be offset by any crop insurance proceeds.<sup>117</sup>

One of the plaintiffs' main arguments was that the FCIC was estopped from offsetting any profits above the support price because agents of the FCIC allegedly represented that "bonuses" would not count toward the FCIC computation of loss.<sup>118</sup> The FCIC agents also apparently admitted that the statements were made, but they noted that the statements were meant to refer to a "seed and drayage" bonus that had been payable in the past and were not meant to include "bonuses" that referred to profits above the support price of a crop.<sup>119</sup> The Fourth Circuit Court of Appeals rejected the plaintiffs' estoppel theory.<sup>120</sup> In its holding, the Fourth Circuit focused on the fact that the FCIC valued the loss according to the terms and conditions of the policy, and it noted that the "farmer is charged with knowledge of the regulation and the policy."<sup>121</sup>

Approximately a decade after *Mann*, in 1994, the United States District Court for the District of South Carolina extended the application of *Merrill* to a federally reinsured private crop insurer in *Walpole v. Great American Insurance Companies*.<sup>122</sup> *Walpole* presented a dispute between farmer insureds and private insurers concerning the amount of an indemnity under a multi-peril crop insurance policy.<sup>123</sup> In the case, the farmer insureds lost a part of their tomato crop due to a July 1992 storm and then later sold the weather-damaged tomatoes that were picked.<sup>124</sup>

The multi-peril federally reinsured crop insurance policy at issue provided insurance coverage until the completion of the harvest.<sup>125</sup> The plaintiffs denied they "harvested" the remaining tomato crop after the storm, but argued they had "salvaged" it instead.<sup>126</sup> In response, the

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116. *Id.* at 145.

117. *Id.* at 145-46.

118. *Id.* at 147.

119. *Id.*

120. *Id.*

121. *Id.*

122. 914 F. Supp. 1283 (D.S.C. 1994).

123. *Id.* at 1284.

124. *Id.* at 1285.

125. *Id.* at 1286.

126. *Id.*

insurers contended that all the marketed tomatoes picked were required to be counted as an offset against the indemnity due under the policy.<sup>127</sup>

After analyzing the language of the policy, the court held that all tomatoes picked and sold from the tomato crop counted as “harvested” production, not “salvaged.”<sup>128</sup> The court noted that if the tomatoes were “picked,” as what happened in the case, then they are “harvested,” and the court also emphasized that the drafters of the policy did not include the word “salvage” in any documents.<sup>129</sup> The court also rejected the plaintiffs’ estoppel argument.<sup>130</sup> The plaintiffs had contended that adjusters of the insurers allegedly “told Plaintiffs to go ahead and harvest and they would be back with the checkbook.”<sup>131</sup> The court not only disagreed with the plaintiffs’ estoppel argument, but it also appeared to assume that even if it could be argued that such statements were misleading, the “statements cannot be applied to extend coverage where there is none because the doctrine of estoppel does not extend coverage beyond that authorized by the policy.”<sup>132</sup> In applying *Merrill* to the conduct of a private crop insurer,<sup>133</sup> the court essentially appeared to imply that even if representations or misrepresentations were made by the agents of the insurer, such representations “cannot vary the clear terms of the policy.”<sup>134</sup> Despite *Walpole* extending the rules of *Merrill* and *Mann* so as to essentially shield private insurers who issue federally reinsured crop insurance policies from waiver and equitable estoppel claims, the early rule extending *Merrill* to private insurers was eclipsed approximately a decade later by the decisions of three state courts in Kentucky, Georgia and Tennessee.

B. THE MERRILL DOCTRINE CHALLENGED: DAILEY V. AMERICAN GROWERS INSURANCE, RAIN & HAIL INSURANCE SERVICES V. VICKERY, AND SIMMS V. INSURANCE CO. OF NORTH AMERICA

In 2003, the Supreme Court of Kentucky became the first court to challenge the application of the Merrill doctrine to federally reinsured crop insurers when it decided *Dailey v. American Growers Insurance*.<sup>135</sup> In

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127. *Id.* at 1289.

128. *Id.* at 1288.

129. *Id.*

130. *Id.* at 1290.

131. *Id.*

132. *Id.*

133. *Id.* at 12901-91. The court in *Walpole* cited both *Mann* and *Merrill* in its decision. In footnote 12, the court noted that “that the *Merrill* and *Mann* holdings are equally applicable to FCIC reinsured policies, as well as FCIC directly issued policies.” *Id.* at 1290 n.12.

134. *Id.* at 1291.

135. 103 S.W.3d 60 (Ky. 2003).

*Dailey*, a Kentucky tobacco farmer brought a number of state law claims, primarily under the Kentucky Unfair Claims Settlement Practices Act, against a private crop insurer.<sup>136</sup> The heart of the dispute, like many other disputes involving crop insurance and the Merrill doctrine, involved a question as to the proper percentage of an indemnity to be paid for a crop loss. The tobacco farmer contended the coverage level was 75%, while the private crop insurer argued coverage should have been available at the 55% level.<sup>137</sup> In *Dailey*, the agent of the private crop insurer apparently assisted with the issuance of a federally reinsured crop insurance policy in the personal name of the insured in 1995 and then assisted with the issuance of a crop insurance policy in the name of an unincorporated business entity in 1996.<sup>138</sup> After a tobacco crop loss in 1996, the private crop insurer denied coverage on the 1996 policy, which provided for 75% coverage of the tobacco crop, on the basis that the unincorporated business entity was not insurable and transferred coverage to the 1995 policy, which provided for the lower 55% indemnity.<sup>139</sup>

The trial court granted summary judgment to the crop insurer largely on the basis that it found that multi-peril crop insurance policies are subject to FCIC regulations, and thus any state law claims were preempted.<sup>140</sup> The Kentucky Supreme Court reversed and held the claims were not preempted by the FCIA or FCIC regulations.<sup>141</sup> Significantly, a majority of the Kentucky Supreme Court also delivered a sweeping concurrence on the issue of the application of *Merrill* to federally reinsured private crop insurers.

On appeal to the Kentucky Supreme Court, the private crop insurer contended that the insured's estoppel claim was barred by the Merrill doctrine.<sup>142</sup> Under the facts of the case, the agent of the private crop insurer, not the insured, apparently completed the application form and drafted the application in the insured's personal name in 1995 and the name of the unincorporated business entity in 1996.<sup>143</sup> In addition, the testimony revealed that the agent also apparently instigated the process to obtain higher insurance coverage levels on the tobacco crop.<sup>144</sup> It also appeared from the text of *Dailey* that there was no evidence that the insured failed to

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136. *Id.* at 62.

137. *Id.* at 62-63.

138. *Id.*

139. *Id.* at 63.

140. *Id.*

141. *Id.* at 66.

142. *Id.* (Cooper, J., concurring).

143. *Id.* at 67-68.

144. *Id.* at 70.

exercise due diligence concerning the application process or that an *in pari delicto*<sup>145</sup> type of situation existed with the case.

In finding that the insured had a colorable estoppel claim, the Kentucky Supreme Court not only closely surveyed the factual allegations surrounding the case, but also examined the very purpose of the Merrill doctrine itself. The Kentucky Supreme Court remarked that one of the important aspects of the Merrill doctrine is that it upholds the doctrine of separation of powers in that “judge-made principles such as estoppel should not be applied to open the public coffers when Congress has explicitly ordered them closed.”<sup>146</sup> The Kentucky Supreme Court also noted that when a private insurance company is involved, separation of powers is not an issue at all.<sup>147</sup> Furthermore, the court in *Dailey* also compared the FCIA to the federal flood insurance program and the National Flood Insurance Act of 1968 (“NFIA”).<sup>148</sup> The *Dailey* court observed that under the NFIA, private insurers are designated “fiscal agents” of the United States,<sup>149</sup> but under the statutory language of the FCIA, private insurers are not deemed to be “fiscal agents” of the United States, so separation of powers concerns are not present with federally reinsured crop insurance companies.<sup>150</sup> Finally, the *Dailey* court also analogized the FCIC and federally reinsured crop insurers to the private insurers that comprise the Foreign Credit Insurance Association.<sup>151</sup> The *Dailey* court noted that two United States federal circuit courts of appeal, the Eleventh Circuit<sup>152</sup> and the Third Circuit,<sup>153</sup> rejected application of the Merrill doctrine to the Foreign Credit Insurance Association.<sup>154</sup>

Approximately two years later, the Court of Appeals of Georgia followed the *Dailey* decision in *Rain & Hail Insurance Services v.*

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145. Black’s Law Dictionary defines *in pari delicto* as “equally at fault.” BLACK’S LAW DICTIONARY 806 (8th ed. 2004).

146. *Dailey*, 103 S.W.3d at 69.

147. *Id.*

148. *Id.*

149. 42 U.S.C. § 4071(a)(1) (2012).

150. *Dailey*, 103 S.W.3d at 69.

151. *Id.* at 70 (“The Foreign Credit Insurance Association . . . is a collection of private insurance companies formed at the behest of the United States Export-Import Bank . . . to provide insurance for foreign commercial ventures.”). Law review articles addressing the Foreign Credit Insurance Association in more detail include Robert Chapman, *The High Utility of FCIA Insurance to Banks in Financing Trade*, 9 HASTINGS INT’L & COMP. L. REV. 439 (1986); Karen Hudes, *Protecting Against Inconvertibility and Transfer Risk: An Outline of Trade Financing Programs of the Export-Import Bank of the United States*, 9 HASTINGS INT’L & COMP. L. REV. 461 (1986); S. Linn Williams, *Political and Other Risk Insurance: OPIC, MIGA, Eximbank and Other Providers*, 5 PACE INT’L L. REV. 59 (1993).

152. *Nu-Air Mfg. Co. v. Frank B. Hall & Co. of N.Y.*, 822 F.2d 987 (11th Cir. 1987).

153. *Lovell Mfg. v. Export-Import Bank of the U.S.*, 777 F.2d 894 (3d Cir. 1985).

154. *Dailey*, 103 S.W.3d at 70.

*Vickery*.<sup>155</sup> In *Vickery*, a private crop insurer denied the insureds' claims for prevented planting losses on the basis that the insureds did not comply with the federally reinsured multi-peril crop insurance policies by submitting an "intended acreage report" to the insurer with their application for insurance.<sup>156</sup> The insureds contended in response that they reasonably relied upon the representations of an agent of the private insurer who reportedly informed them that a personal production history would suffice for the application.<sup>157</sup> The policy in question provided that its provisions could "not be waived by any crop insurance agent."<sup>158</sup>

The trial court denied summary judgment to the private crop insurer on the insureds' equitable estoppel claim.<sup>159</sup> In upholding the trial court's denial of summary judgment, the Court of Appeals of Georgia held that a fact issue remained as to whether the insureds reasonably relied upon the agent's representations.<sup>160</sup> In its decision, the Court of Appeals cited *Dailey* and noted that, because the claim at issue did not "represent a direct claim on the public treasury," the Merrill doctrine did not apply.<sup>161</sup>

Finally, the Court of Appeals of Tennessee has also limited the applicability of *Merrill* to private crop insurers. In the 2005 *Simms v. Insurance Co. of North America* decision, a Tennessee trial court granted summary judgment to a private crop insurer against the claims of an insured who allegedly failed to follow the loss provisions of a multi-peril crop insurance policy after suffering a tobacco crop loss.<sup>162</sup> The private insurer argued that it denied coverage on the basis that the insured destroyed the tobacco crop before the insurer had an opportunity to appraise the crop loss.<sup>163</sup>

On appeal, the Court of Appeals of Tennessee held that a fact issue existed on the insured's estoppel and waiver claims.<sup>164</sup> Testimony at the trial court level apparently revealed that an agent of the private crop insurer instructed the insured to proceed to "bush hog" the tobacco crop after the insured reported the loss.<sup>165</sup> In its decision, the *Simms* court not only cited

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155. 618 S.E.2d 111 (Ga. Ct. App. 2005).

156. *Id.* at 115.

157. *Id.*

158. *Id.*

159. *Id.* at 117.

160. *Id.*

161. *Id.* at 116-17.

162. No. E2005-00062-COA-R3-CV, 2005 WL 2604049, at \*1 (Tenn. Ct. App. Oct. 14, 2005).

163. *Id.*

164. *Id.* at \*6.

165. *Id.* at \*3.

*Dailey* and *Vickery*,<sup>166</sup> but also cited the principle that courts should construe insurance policy provisions relating to coverage in favor of the insured.<sup>167</sup> The Court of Appeals found an issue of fact even though the insured apparently did not include a provision in an affidavit stating that he reasonably relied on the agent's representations.<sup>168</sup> But the recent decision of another court in Tennessee, this time a federal court, jeopardizes the developing rule that the Merrill doctrine does not preclude waiver and equitable estoppel claims against federally reinsured private crop insurers.

C. MERRILL REVIVED? SKYMONT FARMS V. FEDERAL CROP INSURANCE CORP.

In *Skymont Farms v. Federal Crop Insurance Corp.*, the United States District Court for the Eastern District of Tennessee breathed life into the Merrill doctrine's applicability to private insurers.<sup>169</sup> The underlying facts of the *Skymont Farms* case involved the denial of a crop insurance claim following an August 2006 hailstorm on the basis the insured did not have an insurable interest in the crop.<sup>170</sup> The private insurer contended that the insured did not have a 100% ownership or insurable interest in the land at issue as noted in the application, and it argued that since this occurred, the policy could be properly voided on the basis of material misrepresentation.<sup>171</sup>

In the case, it appeared that the insurer issued the policy without inspecting the crops or noting any problems with the application for insurance.<sup>172</sup> In addition, the adjuster of the insurer apparently identified no problems while initially adjusting the claim.<sup>173</sup> However, the *Skymont Farms* court adopted the principles of *Merrill* to bar the estoppel claims of the insured.<sup>174</sup>

In examining *Skymont Farms*, one can differentiate the case from *Dailey*, *Vickery*, and *Simms*. In all three of those cases, it appeared that there was no solid evidence that the insureds' failed to exercise due diligence concerning the claims nor did they allegedly commit any arguably

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166. *Id.* at \*4.

167. *Id.* at \*6 (“We further find that a reasonable construction of the insurance policy in favor of providing coverage to the insured yields the conclusion that preserving a representative sample of the failed crop would not necessarily in all cases be required.”).

168. *Id.*

169. No. 4:09-cv-65, 2012 WL 1193407 (E.D. Tenn. Apr. 11, 2012).

170. *Id.* at \*1.

171. *Id.* at \*1, \*7-10.

172. *Id.* at \*12.

173. *Id.*

174. *Id.* at \*13.

negligent acts themselves. But in *Skymont Farms*, the court voided the policy on the basis of misrepresentation.<sup>175</sup> Therefore, the court reasoned that to allow coverage under estoppel when it was otherwise voided “would contravene the prohibition against estoppel.”<sup>176</sup>

*Skymont Farms* leaves the future application of the Merrill doctrine to federally reinsured crop insurers in unsettled waters. Future courts can resolve this key question by applying a strong presumption against the application of *Merrill*, but with exceptions.

#### IV. PROPOSAL

Courts examining the issue of applying *Merrill* to the conduct of agents of federally reinsured crop insurance companies are faced with addressing two primary policy considerations. On the one hand, there is a general duty for all who enter into contractual arrangements to read the documents that they sign.<sup>177</sup> Whether or not this general duty exists with insurance contracts is ambiguous,<sup>178</sup> but, as a general policy matter, insureds should have at least some semblance of a duty to investigate policy provisions of federally reinsured crop insurance contracts.

However, on the other hand, as a policy matter farmer insureds should be able to place at least some level of trust and confidence in the agent of a federally reinsured private crop insurer. Such a duty should not arise to the level of a fiduciary relationship,<sup>179</sup> but there should at least be some level of a duty of fair dealing. The United States Court of Appeals for the Eight Circuit described such a level of good faith of FCIC agents in 1985 in *A.W.G. Farms Inc. v. Federal Crop Insurance Corp.* as follows:

While we do not hold the government liable under an estoppel theory . . . the factual background regarding the FCIC’s course of dealing with these growers must be considered under basic principles of good faith and fairness . . . . One may have to turn ‘square corners’ when dealing with a governmental entity, but this

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175. *Id.*

176. *Id.*

177. Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That is Yet to Be Met*, 45 AM. BUS. L.J. 723, 729 (2008) (“The duty to read contracts is a well-recognized common law doctrine, which holds contracting parties responsible for the written terms of a contract, whether or not they actually read them. This doctrine is primarily aimed at achieving stability and promoting reliance upon contracts.”).

178. James M. Fischer, *The Doctrine of Reasonable Expectations is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 165 (1998).

179. Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 12 (2004).

does not mean the government may operate so recklessly so as to put parties dealing with it entirely at its mercy.<sup>180</sup>

The United States District Court for the District of North Dakota approvingly quoted this language in 1999, but also noted that even though the “FCIC may not be estopped by representations that subsequently prove inaccurate, it surely cannot seek refuge behind the technicalities of offer and acceptance unique to insurance law, nor the rules of liability governing common law reinsurance arrangements, in order to escape its obligations.”<sup>181</sup> Such a principle should apply to federally reinsured private crop insurance providers as well, particularly since they are afforded specific protection in the form of reinsurance by the federal government.<sup>182</sup>

To balance both the insureds’ duty to investigate policy provisions, the insurer’s duty of good faith in the context of federally reinsured crop insurance policies, and the doctrines of waiver and equitable estoppel is a difficult endeavor. One approach is the adoption of a rule where *Merrill* would not apply in cases of “affirmative misconduct” by the agents of a private crop insurer, and in limited cases courts have allowed equitable estoppel claims against the government where “affirmative misconduct” is found.<sup>183</sup> But the drawback of the “affirmative misconduct” exception is that it typically involves claims against the government and not those against private entities.

One rule that could balance both the interests of farmer insureds and federally reinsured private crop insurers is as follows: (1) That a heavy presumption against the application of *Merrill* to federally reinsured private crop insurers be followed; and (2) that *Merrill* only apply when a federally reinsured private crop insurer makes a “clear and convincing” evidentiary showing that the farmer insured failed to adequately investigate the provisions concerning a crop insurance policy, or when there is a “clear and convincing” evidentiary showing that the insured made a fraudulent misrepresentation on an application for insurance. The “clear and convincing” evidentiary standard would retain the application of *Merrill* to the exceptional cases rather than the general rule that developed in *Dailey*, *Vickery* and *Simms*, but yet reserve its application for cases in which it is “highly probable” that the insured(s) failed to take action to properly

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180. 757 F.2d 720, 728-29 (8th Cir. 1985).

181. *Wiley v. Glickman*, No. A3-99-32, 1999 WL 33283312, at \*13 (D.N.D. 1999).

182. *Marzen I*, *supra* note 1, at 651.

183. Alan I. Saltman, *The Government’s Liability for Actions of its Agents That Are Not Specifically Authorized: The Continuing Influence of Merrill and Richmond*, 32 PUB. CONT. L.J. 775, 789 (2003) (noting several reported cases).

investigate crop insurance policy provisions.<sup>184</sup> The adoption of this rule by the courts would adequately balance the interests of both federally reinsured private crop insurers and farmer insureds, help to provide a fair playing field for all in the crop insurance industry, and provide a workable objective standard to examine each unique fact pattern on a case-by-case basis.

## V. CONCLUSION

The very economic livelihood of thousands of farmers is implicated by the existence of a vital federal crop insurance program.<sup>185</sup> It is likely that a notable number of cases involving questions of coverage under federally reinsured crop insurance policies are amicably resolved without litigation. But in some cases, allegations of misrepresentations as to the amount of or nature of coverage may arise. It is difficult to balance competing claims of both a federally reinsured crop insurer and a farmer insured. On the one hand, a federally reinsured crop insurer is likely to claim that it should be able to completely rely upon the provision of a policy concerning coverage. On the other hand, a farmer insured is likely to claim that he or she should be able to operate free from any misrepresentations of the agents or representatives of private insurers.

That balance is best preserved by the courts applying a heavy presumption against application of the Merrill doctrine. Farmer insureds who conduct due diligence concerning the provisions of a crop insurance policy, as a policy matter, should not have their waiver and equitable estoppel claims against private insurers quashed by the Merrill doctrine. The only time *Merrill* should apply is when the private crop insurer makes a “clear and convincing” evidentiary showing that the farmer insured failed to adequately investigate the provisions concerning a crop insurance policy. The adoption by the courts of such a rule in future cases involving *Merrill* adequately balances both the interests and objectives of federally reinsured private crop insurers and farmer insureds.

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184. Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 462 (2002):

Between the normal civil standard and the criminal standard lies an intermediate civil standard, variously formulated by the courts but most often described as a standard of clear and convincing evidence. Despite this description, the clear and convincing evidence standard does not refer to the quantity or kind of evidence presented, but to the apparent probability that the assertion is true: the party with the burden of proof must convince the trier of fact that it is highly probable that the facts he alleges are correct.

185. See generally Marzen I, *supra* note 1; Marzen II, *supra* note 3.