APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0005p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-2868

[Filed January 11, 2023]

BACHMAN SUNNY HILL FRUIT FARMS, INC., *Petitioner-Appellant*,

v.

PRODUCERS AGRICULTURE INSURANCE COMPANY, *Respondent-Appellee*.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:20-cv-01117—Janet T. Neff, District Judge.

Argued: July 20, 2022

Decided and Filed: January 11, 2023

Before: KETHLEDGE, BUSH, and NALBANDIAN,
Circuit Judges.

COUNSEL

ARGUED: Mark Granzotto, MARK GRANZOTTO, P.C., Berkley, Michigan, for Appellant. Josephine A. DeLorenzo, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellee.
ON BRIEF: Mark Granzotto, MARK GRANZOTTO, P.C., Berkley, Michigan, John D. Tallman, JOHN D. TALLMAN, PLC, Grand Rapids, Michigan, for Appellant. Josephine A. DeLorenzo, Elaine M. Pohl, Olivia M. Paglia, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellee.

OPINION

JOHN K. BUSH, Circuit Judge. When farmers and private insurers enter a federally reinsured crop-insurance contract, they agree to common terms set by the Federal Crop Insurance Corporation (FCIC). One such term requires the parties to arbitrate coverage disputes. In those proceedings, the arbitrator must defer to agency interpretations of the common policy. Failure to do so results in nullification of the arbitration award.

Bachman Sunny Hill Fruit Farms lost at an arbitration with its insurer, Producers Agriculture Insurance Company. Bachman Farms blames its loss on the arbitrator allegedly engaging in impermissible policy interpretation. On that ground, the insured petitioned a federal district court to nullify the

arbitration award. The petition to nullify, however, did not comply with the substance or time limits of the Federal Arbitration Act (FAA). Those FAA requirements govern this challenge to an arbitration award in federal court, as we explain below. We therefore affirm the district court's dismissal of Bachman Farms's petition to nullify.

I.

Bachman Farms grows apples in central Ohio. Like hundreds of thousands of other farms, it protected its 2017 crop with federally reinsured crop insurance. *See* Nat'l Agric. Stats. Serv., U.S.D.A., AC-17-A-51, *2017 Census of Agriculture* 17 tbl.8 (2019) (counting 380,236 farms enrolled in crop-insurance programs in 2017). It purchased two policies from Producers Agriculture to cover that year's crop.

The federal government, through the FCIC, has been in the business of providing crop insurance directly to farmers since the 1930s. *See Ackerman v. U.S. Dep't of Agric.*, 995 F.3d 528, 529 (6th Cir. 2021). And ever since Congress enacted the Federal Crop Insurance Act of 1980, the FCIC and its administrator, the Risk Management Agency (RMA), have also reinsured policies offered to farmers by private insurers. *Id.* The federal reinsurance program allows the FCIC to provide reimbursement, subsidies, and reinsurance for approved crop-insurance policies. *See* Stephanie Rosch, Cong. Rsch. Serv., R46686, *Federal Crop Insurance: A Primer* 25 (2021).

These federally reinsured crop-insurance policies "are not typical private insurance agreements."

Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247, 249 (4th Cir. 2019). Yes, each contract is "between a farmer and an insurance provider," but "the FCIC determines the terms and conditions" of the policy. *Balvin v. Rain & Hail, LLC*, 943 F.3d 1134, 1136 (8th Cir. 2019). In fact, the terms of the insurance Bachman Farms bought from Producers Agriculture—the Common Crop Insurance Policy (common policy)—are set out in full in the Code of Federal Regulations. *See* 7 C.F.R. § 457.8 (hereinafter CCIP). Those terms governed he parties' relationship and gave rise to this dispute.

At bottom, this appeal is about the dispute-resolution mechanisms Bachman Farms and Producer Agriculture agreed to in the common policy. The dispute began when Bachman Farms sought indemnity from Producers Agriculture after hail damaged its apple crop. According to the insured, Producers Agriculture paid for only a small part of its claim. Allegedly, that lesser payout resulted from two mistakes the insurance adjuster made when he handled the claim. His first mistake was his failure to inform Bachman Farms it could seek an independent appraisal of its crop. Adjusters must provide that notice, according to the apple loss adjustment standards handbook. And his second mistake was his directive that Bachman Farms "pack out" its apple crop, a costly harvesting process. This second mistake conflicted with another directive, in the loss adjustment manual standards handbook, which says adjusters are *not* supposed to tell an insured farm whether to harvest its crop.

Dissatisfied with its payout from the claim, Bachman Farms brought an arbitration against Producers Agriculture in 2020. After two days of testimony, the arbitrator entered an award for Producers Agriculture on March 26. His reasoning rested on the two handbooks Bachman Farms accused the insurance adjuster of ignoring. According to the arbitrator, the handbooks were not binding parts of the insurance contract, so even if the adjuster failed to abide by them, that failure did not breach the contract.

But Bachman Farms claims the arbitrator ventured outside his authority when he sided with Producers Agriculture. Under the common policy, an arbitrator's role is limited: "if the dispute in any way involves a policy or procedure interpretation," the parties "must obtain an interpretation from FCIC[.]" CCIP § 20(a)(1). Interpretations by that agency bind the arbitrator. *Id.* § 20(a)(1)(I). And if the arbitrator decides a dispute without obtaining an FCIC interpretation, the arbitration award is nullified. *Id.* § 20(a)(1)(ii). Put simply, "only the FCIC—and not the arbitrator—may interpret the policy." *Williamson Farm*, 917 F.3d at 255. That "leave[s] very little decision[-]making authority to the arbitrator." *Id.*

As it turns out, neither the parties nor the arbitrator went through the formal process of requesting an interpretation from the FCIC. And it was not until several months after entry of the arbitration award that the FCIC determined that the handbooks *are* a part of the insurance contract. So "[n]ot only did the arbitrator violate the proscription against interpreting the contract," says Bachman Farms, but

"his interpretation was wrong."[1] Petition to Nullify, R. 1, PageID 5.

Based on those contentions, Bachman Farms asked a federal district court to nullify the arbitration award under the common policy and its accompanying regulations, in a petition filed on November 19. Producers Agriculture moved to dismiss the petition for failure to state a cause of action under the FAA and for untimeliness under the FAA. It argued that parties challenging an arbitration award must abide by the FAA and its time limits. Bachman Farms responded with an argument that the common policy created an alternative remedy, with new time limits, by allowing for "judicial review of any decision rendered in arbitration" when suit is filed within one year of the arbitration award. CCIP §§ 20(c); 20(b)(3). Bachman Farms also moved to amend its petition to include a claim for vacatur under § 10 of the FAA. After oral argument, the district court denied the motion to amend as futile and dismissed the petition under the FAA. Bachman Farms timely appealed.

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[1] Producers Agriculture disagrees with both allegations. As to the first, it notes that a binding agency determination may take the form of testimony from an RMA employee, *see* 7 C.F.R. § 400.766(b)(1)(ii), and an RMA employee "testified unequivocally" at the arbitration that "the [handbooks] are ['not] part of the policy,'" Arbitration Award, R. 1-5, PageID 63 (citation omitted). And as to the second allegation, it points us to a superseding agency interpretation that agrees with the conclusion reached by the arbitrator. *See* Appellee Additional Citation, 6th Cir. R. 33. But for our purpose—determining whether the FAA bars Bachman Farms's petition—we need not address the merits of the nullification petition.

II.

We review both the dismissal of Bachman Farms's petition and the denial of its motion to amend de novo. *See AK Steel Corp. v. United Steelworkers of Am.*, 163 F.3d 403, 407 (6th Cir. 1998); *Colvin v. Caruso*, 605 F.3d 282, 294 (6th Cir. 2010) (noting that while the denial of motions to amend are normally reviewed under the abuse of discretion standard, the standard is de novo when the motion is denied because "the amended pleading would not withstand a motion to dismiss"). This fresh look calls upon us to answer the same two questions the district court addressed: (1) Does the FAA apply to challenges to arbitration awards entered under the common policy? (2) If yes, does its three-month time limit for motions to vacate bar Bachman Farms's petition to nullify? We take each question in turn.

A. Does the FAA Apply?

The FAA "makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce.'" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (quoting 9 U.S.C. § 2). Neither party disputes that a federally reinsured crop insurance agreement involves commerce. Indeed, federal courts have uniformly reached that conclusion. *See, e.g.*, *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d 1298, 1302 (M.D. Fla. 2010); *Nobles v. Rural Comm. Ins. Servs.*, 122 F. Supp. 2d 1290, 1299 (M.D. Ala. 2004); *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d 992, 995 (D. Minn. 2002). So by the usual measure, the FAA applies here.

But Bachman Farms suggests its agreement with Producers Agriculture is not "governed by the FAA." Appellant Br. at 21. Instead, it argues that the common policy language granting both parties "the right to judicial review of any decision rendered in arbitration" created a remedy outside the FAA. CCIP § 20(c). And it points us to an FCIC response to a public comment in which the FCIC contended that the nullification process is "a mechanism for setting aside an arbitration award that operates independently of the strictures of the FAA." Appellant Br. at 26. In its view, that independent mechanism translates to an independent *judicial* remedy, thus allowing parties an alternative cause of action with which to challenge in federal court crop-insurance arbitration awards entered against them.

Bachman Farms's briefing, however, does not address decades-old holdings that are binding here—namely, *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906 (6th Cir. 2000) and *Corey v. N.Y. Stock Exch.* 691 F.2d 1205 (6th Cir. 1982). "Once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the *exclusive* remedy for challenging acts that taint an arbitration award.'" *Decker*, 205 F.3d at 909 (quoting *Corey*, 691 F.2d at 1211 (emphasis added)). The holdings of *Decker* and *Corey* follow from the FAA's exclusive remedies, which are threefold. The first two—modification or correction of an award—are not relevant here. 9 U.S.C. § 11. The third, vacatur, is. The statute allows a district court to "make an order vacating the award" when one of the "exclusive" reasons of § 10 are met. *Id.*

§ 10; *Hall St. Assocs.*, 552 U.S. at 586.[2] A party must provide notice that it will ask a district court to vacate, modify, or correct an arbitration award "within three months after the award is filed or delivered." 9 U.S.C. § 12. And when none of those challenges to an award is successfully pursued, the FAA gives parties one year to apply for a district court order "confirming the award." *Id.* § 9.

Still, Bachman Farms claims its case is different. This agreement is private, between Bachman Farms and Producers Agriculture, but the parties did not write the terms they agreed to follow. The common policy was set by the FCIC. So should the unusual origins of this arbitration agreement give Bachman Farms an unusual, non-FAA judicial remedy to challenge the arbitration award entered against it? To

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[2] The statute allows for vacatur in four cases:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

answer yes, we would have to conclude that our holdings in *Decker* and *Corey* do not apply here.

But we think they do. Bachman Farms's arguments rest on its assumption that Congress gave the FCIC the authority to create a judicial remedy in *addition* to the FAA remedy we called "exclusive" in *Decker* and *Corey*. Close inspection reveals three key flaws in that assumption.

The first issue is that Congress has not changed the relevant parts of the FAA since our holdings in *Decker* and *Corey*, suggesting that the FAA's status as "the exclusive remedy" for challenging arbitration awards is unchanged as well. *Corey*, 691 F.2d at 1211. Recognizing an exception here risks ignoring binding circuit precedent—something this panel may not do. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004). What is more, *Decker* and *Corey* already rejected arguments very similar to those made here. In *Corey*, we determined that a suit against the administrator of an arbitration proceeding alleging that it deprived the plaintiff of a fair hearing was "no more, in substance, than an impermissible collateral attack on the [arbitration] award itself." 691 F.2d at 1211–12. The alleged "wrongdoing" fell "squarely within the scope of" a § 10 vacatur motion, so we held that the dispute could only be "resolved by timely pursuit of a remedy under th[at] section." *Id.* at 1212. And in *Decker*, we held that when the "ultimate objective" of a suit "is to rectify the alleged harm" caused by an unfavorable arbitration award, a party must "follow the proper procedure for challenging [an] arbitration award under the FAA." 205 F.3d at 910,

911. On its face, the alternative remedy proposed by Bachman Farms is exactly the kind of "collateral attack" we found "impermissible" under the FAA. *Corey*, 691 F.2d at 1212.

Another problem for Bachman Farms is the language of the Federal Crop Insurance Act. It lets the FCIC "enter into and carry out contracts or agreements, and issue regulations, necessary in the conduct of its business" and "issue such regulations as are necessary to carry out" the Act. 7 U.S.C. § 1506(l), (o). The agency must also "establish procedures" for "provid[ing] a final agency determination in response to an inquiry regarding the interpretation" of the Act or its accompanying regulations. *Id.* § 1506(r)(1). An agency "may invoke" a right that Congress created, *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (citation omitted), but Congressional authorization for the FCIC to craft an alternative judicial remedy to challenge arbitration awards, parallel to the FAA remedy, is nowhere to be found in the statute. So because an agency "may not create a right that Congress has not," *id.*, we will not assume that the FCIC sought to do just that by creating a new judicial remedy in the common policy.

Finally, the common policy and its accompanying regulations belie Bachman Farms's suggestion that the FCIC created an alternative judicial remedy. Recall that the "[f]ailure to obtain any required interpretation from FCIC will result in nullification of any agreement or award." CCIP § 20(a)(1)(ii); 7 C.F.R. § 400.767(b)(3)(ii)(B). All the regulations accompanying this nullification provision reveal that parties to a crop-

insurance arbitration have access to unique administrative remedies, but not a unique judicial remedy. To see why, we look to how nullification works in practice.

One opportunity for nullification arises when the parties and arbitrator never seek an FCIC interpretation during the arbitration. In those circumstances, after the conclusion of the proceedings, a "party may request [that] FCIC review the matter to determine if a final agency determination or FCIC interpretation should have been sought." 7 C.F.R. § 400.766(b)(4). The FCIC can then "automatically nullif[y]" an award if it finds that an interpretation "should have been sought and it was not." *Id.* § 400.766(b)(4)(ii)(A). Nullification might also be appropriate when a party seeks an interpretation "after the arbitration award has been rendered." RMA, U.S.D.A., *Final Agency Determination: FAD-230* (April 10, 2015). If the FCIC then issues a post-arbitration interpretation, the award must "be reviewed to determine if it is consistent with the [interpretation]. If it is not consistent, the arbitration award must be nullified if it is determined that the inconsistency materially affected the award. In that case a new award must be issued by the arbitrator applying the issued [interpretation]." *Id.*; *see also* RMA, U.S.D.A., *Final Agency Determination: FAD-232* (April 10, 2015) ("The party seeking nullification has a high burden to show that the arbitrator made an interpretation of statute, regulation, policy or procedure for which no [interpretation] was previously issued or sought.").

In either scenario outlined above, a party can appeal the FCIC's decisions to the Department of Agriculture's National Appeals Division, *see* 7 C.F.R. § 400.766(b)(4)(ii)(B); *id.* § 400.766(b)(6)(iv), and a district court can review and enforce those final determinations, *see* 7 C.F.R. § 11.13(a). Or a federal court could determine, when presented with a timely motion to vacate under § 10(a)(4) of the FAA, that an arbitration award must be vacated because the arbitrator disregarded an FCIC interpretation. *See, e.g.*, *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, No. 20-1978, 2021 WL 3044275, at *2–3 (6th Cir. July 20, 2021) (determining that an arbitration award was not "inconsistent with the agency's view"); *Williamson Farm*, 917 F.3d at 257–58 (vacating an award where an arbitrator interpreted the policy and disregarded an existing determination); *Davis v. Producers Agric. Ins. Co.*, 762 F.3d 1276, 1285–86 (11th Cir. 2014) (confirming an award where the arbitrator did not exceed his authority because an on-point determination had issued). The upshot of this structure is clear: the FCIC can *nullify* an arbitration award when an arbitrator fails to seek the interpretation required by the common policy and its accompanying regulations. And in a timely filed action, a federal court can *vacate* an arbitration award under § 10(a)(4) of the FAA when the arbitrator's decision conflicts with the FCIC's views.

Bachman Farms chose neither approach. It instead went directly to federal court to seek nullification under the common policy and its accompanying regulations—an administrative remedy—rather than vacatur under the FAA. Yet the FAA remains the

exclusive judicial remedy available for parties challenging an arbitration award. So by failing to move for vacatur under § 10 of the FAA, Bachman Farms failed to state a claim a federal court could entertain. The district court was right to dismiss its petition for that reason.

B. Does the Three-Month Time Limit in FAA § 12 Bar the Petition to Nullify?

Not only did Bachman Farms fail to seek relief under the proper legal framework (the FAA), but proper application of the FAA reveals that even if Bachman Farms had done so, its motion still would have been untimely. Bachman Farms claims that because its nullification petition would otherwise have been timely under the FAA, the district court should have allowed amendment of the petition to include a vacatur claim. No one disputes that notice of the petition—filed nearly eight months after entry of the arbitration award—was not given within the three-month period required by § 12 of the FAA. But Bachman Farms argues that the parties agreed to extend that time limit in the common policy, which says that "suit must be filed not later than one year after the date the arbitration decision was rendered." CCIP § 20(b)(3).

That language cannot save its petition to nullify. Our analysis above applies with equal force here: If the FAA governs the parties' agreement, its time limits must apply, despite the common policy's judicial-review provisions.

In general, the FAA limits parties' ability to "contract for expanded judicial review." *Hall St. Assocs.*, 552 U.S. at 583 n.5. That partially explains why "courts have consistently interpreted the FAA notice provision to create a strict deadline." *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 368 (D.C. Cir. 2011) (cleaned up) (rejecting an attempt to use Federal Rule of Civil Procedure 6(b) to extend the deadline in § 12). And it tracks the Sixth Circuit's rule that because the "scope of review" of an arbitration award "is limited by" the FAA, "[f]ailure to comply with th[e] statutory precondition of timely service of notice forfeits the right to judicial review of the award." *Corey*, 691 F.2d at 1212 (collecting cases).

Nevertheless, Bachman Farms reminds us that the FAA requires federal courts "to enforce covered arbitration agreements according to their terms." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019). We agree with that point in principle. But the rule requiring judicial enforcement of arbitration agreements does not mean that parties can agree to alter the FAA itself. Of course, parties may "specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted). And when they "unambiguously intend[] to displace the FAA with state rules of arbitration," courts must enforce that agreement. *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 715–16 (6th Cir. 2014) But in those cases, enforcing the parties' agreements meant applying, not changing, the FAA. So they lend no support to Bachman Farms's position that

parties can expand the FAA by agreement. Neither does its citation to the well-accepted rule that parties can agree to *shorten* a default statute of limitations. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 107 (2013). It is equally well accepted that, unless authorized by statute, "courts do not enforce agreements made at the time of contract formation or prior to the accrual of a claim to waive, not plead, or extend the statute of limitations." 15 Arthur L. Corbin, Corbin on Contracts § 83.8 (2022).

In short, Bachman Farms has offered no authority to support the proposition that parties to the common policy can extend the three-month deadline in § 12 of the FAA for seeking vacatur.[3] Without the ability to extend that deadline, its petition must be barred by the three-month time limit in § 12 of the FAA. So the district court correctly determined that amending the petition to nullify to include a claim for vacatur under § 10 of the FAA would be futile.[4]

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[3] In so holding, we take no position on whether the FAA's time limits are jurisdictional.

[4] Bachman Farms also argues that equitable tolling should apply to its vacatur claim. We have left open the question whether equitable tolling is available in this context. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 247 (6th Cir. 2004). But we need not answer it here because "the facts of this case clearly do not merit equitable tolling." *Id.* Bachman Farms's failure to file a timely petition did not "unavoidably ar[i]se from circumstances beyond [its] control." *Zappone v. United States*, 870 F.3d 551, 556 (6th Cir. 2017) (citation omitted).

III.

For those reasons, we hold that the FAA governs the arbitration agreements in federally reinsured crop-insurance policies, and we find that Bachman Farms's petition to nullify flouted its substance and procedures. We affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:20-cv-1117
HON. JANET T. NEFF

[Filed July 29, 2021]

BACHMAN SUNNY HILL FRUIT FARMS, INC., Petitioner,	)
v.	)
PRODUCERS AGRICULTURE INSURANCE COMPANY, Respondent.	)

ORDER

In accordance with the Bench Opinion issued by the Court on July 29, 2021:

IT IS HEREBY ORDERED that Petitioner's Motion for Leave to Amend Petition (ECF No. 26) is DENIED for the reasons stated on the record.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss (ECF No. 22) is GRANTED for the reasons stated on the record.

A corresponding Judgment will also enter.

Dated: July 29, 2021

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:20-cv-1117
HON. JANET T. NEFF

[Filed July 29, 2021]

BACHMAN SUNNY HILL FRUIT FARMS, INC., Petitioner,	)
v.	)
PRODUCERS AGRICULTURE INSURANCE COMPANY, Respondent.	)

JUDGMENT

In accordance with the Bench Opinion and Order issued by the Court on July 29, 2021:

IT IS HEREBY ORDERED that the Petition to Nullify Arbitration Award (ECF No. 1) is DISMISSED.

Dated: July 29, 2021

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 1:20-cv-1117
Hon. Janet T. Neff

[Dated July 29, 2021]

BACHMAN SUNNY HILL FRUIT FARMS, INC., Petitioner,	)
vs.	)
PRODUCERS AGRICULTURE INSURANCE COMPANY, Respondent.	)

MOTION TO DISMISS

HELD BEFORE THE HONORABLE JANET T. NEFF, U.S. DISTRICT JUDGE

Grand Rapids, Michigan, Thursday, July 29, 2021

APPEARANCES:
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[p.2]

Grand Rapids, Michigan

Thursday, July 29, 2021

At 11:00 a.m.

THE CLERK: All rise, please. Court is in session. You may be seated.

THE COURT: Good morning, everybody.

MR. TALLMAN: Morning.

THE COURT: This is the date and time set for a hearing on the Respondent's motion to dismiss the petition in this case. And it is Case No. 1:20-cv-1117, Bachman Sunny Hill Fruit Farms versus Producers Agriculture Insurance Company.

May I please have appearances and introductions.

MR. TALLMAN: John Tallman for the Petitioner.

THE COURT: Thank you.

MS. PAGLIA: Good morning, Your Honor. Olivia Paglia for Respondent.

THE COURT: Thank you.

Okay. Mr. Tallman, you're up. You have 15 minutes. Let's hear what you have to say, and please do come to the podium.

MR. TALLMAN: Yes, Your Honor. Would you -- Your Honor, would you like me to respond to the motion to dismiss first, or --

THE COURT: You know, I've not been well this

[p.3]

morning. It's Ms. Paglia who has to get started here.

Sorry, Ms. Paglia.

MS. PAGLIA: Good morning.

THE COURT: Good morning.

MS. PAGLIA: This is Producers' motion to dismiss. We are asking the Court to grant our motion. The issues in this case have been extensively briefed by both sides. I won't repeat everything in the brief. I'll go over a few key points and answer any questions that you may have.

The Federal Arbitration Act controls this case, Your Honor. Judicial review is subject to the exclusive jurisdiction under the FAA. Sorry. I wanted to make sure you had enough time to write stuff down.

Because judicial review is subject to the exclusive jurisdiction under the FAA, judicial review is limited to the FFA and subject to those provisions. In this case, the petition fails to state a claim under the FAA and should be dismissed for that reason.

Furthermore, even if this Court were to find that there was a claim under the FAA, the three-month time limitation under Section 12 of the FAA applies and precludes the petition -- precludes the petition as untimely.

Federal case law, including the Sixth Circuit in *Corey*, has said that the failure to meet the statutory conditions of time under Section 12 forfeits the right of

[p.4]

judicial review of the arbitration award. So we ask for dismissal with prejudice on those bases.

THE COURT: Correct me if I'm wrong, Ms. Paglia, but I really view this case as -- as a fairly simple construct. First of all, that the -- the FAA is the controlling law that's looked to.

MS. PAGLIA: Yes. I agree with that, Your Honor.

THE COURT: And under the FAA, once an arbitration has taken place and a ruling has been delivered by the arbitrator, as has in this case, there

are two specific provisions that apply to two different ways of dealing with an arbitration award under § 12:

If a party, either party, wants to vacate or modify or correct the award, in some way attack the award, then they have three months to do that, to file. On the other hand, and for reasons, obviously, I think -- I think the reasons are probably pretty clear, but, on the other hand, if one of the parties seeks to confirm the award, they're happy with the award -- "We got the award. We liked it, but we aren't in any hurry to confirm it" -- they have a year to do that, basically.

So that's kind of -- it really seems to me that the case is that simple.

MS. PAGLIA: I agree with you, Your Honor.

THE COURT: You have -- you have specific statute

[p.5]

sections that apply to specific provisions or actions that an arbitration -- a party to an arbitration might take, and there they are.

MS. PAGLIA: Correct.

THE COURT: And in this case, the Petitioner did not comply because it didn't file within 30 -- er, within three months. Fair enough?

MS. PAGLIA: Fair enough.

THE COURT: Okay. Thank you.

MS. PAGLIA: Thank you, Your Honor.

THE COURT: Mr. Tallman.

MR. TALLMAN: Yes. Thank you, Your Honor. Would you -- Your Honor, would you like me to address my motion to amend also?

THE COURT: Well, I think -- I think it was granted yesterday, wasn't it?

MR. TALLMAN: Leave to file the motion was granted.

THE CLERK: Leave to file the reply was granted.

THE COURT: Yeah. Oh, I'm sorry. That's right. We were dealing with --

Well, you can talk about either one. If you want to talk about leave to -- er, an amended petition, that's fine.

MR. TALLMAN: Okay. Thank you. Thank you, Your Honor. This was an arbitration under the Common Crop Insurance Policy, Your Honor, the CCIP. Common Crop Insurance

[p.6]

Policy is issued under statutes promulgated by USDA generally and FCIC specifically. The CCIP is a federal regulation that was adopted by the FCIC, the Federal Crop Insurance Corporation, Your Honor.

In order for the Respondent here to participate in the crop insurance program, they're required, as a matter of federal law, to agree to the terms of the CCIP, including § 20, including § 20(b)(3), and including § 20(c) of the CCIP.

Now, the reason I bring that up is that those sections of the CCIP provide a couple things:

§ 20 in general in an earlier part of it provides for nullification of the arbitration award if the arbitrator does not follow the rules. And here the rules prohibit the arbitrator from interpreting the -- well, the CCIP or any of the procedures of the Federal Crop Insurance Corporation, Your Honor.

And, here, our argument and the substance of our petition is that this arbitrator did not comply. He proceeded to interpret the CCIP, and he interpreted it incorrectly. And specifically what he did was to say that the LAM and the LASH, the Loss Adjustment Manual, and the -- what is the LASH? I've forgotten. I forget what the LASH is, but these are two manuals used for adjudicating claims. He said they were not part of the contract and not part of the insurance policy, and he's wrong.

[p.7]

After his decision -- and, you know, let me back up. He was required to go to the FCIC and seek what's called -- and seek guidance on this if he had a question about interpretation, and he did not do that. It's called an FAD, a -- yeah, FAD. So he did not do that, Your Honor. He did not seek that -- that -- that guidance from the FCIC. He did not seek an FAD, and he made the wrong decision.

We know that because after the arbitration, we did go to the FCIC. We did seek an FAD. We received the FAD. The FAD said, "Yes, the LAM and the LASH are part of the Common Crop Insurance Policy." And, I

mean, clearly the arbitrator got that wrong. Clearly he interpreted. Clearly under the terms of the CCIP, that was an improper interpretation -- improper and incorrect interpretation of the Crop Insurance Policy.

Now, to go back to 20(b)(3) and 20(c), under those provisions of the Common Crop Insurance Policy, Your Honor, this federal regulation, we've got one year within which to seek nullification or to confirm, and both parties have one year, Your Honor, unlike the FAA.

So where does that leave us? This -- this argument that Respondent is making here in court was presented to FCIC, and FCIC responded, and I quoted some of these comments in the brief, Your Honor. But in general what FCIC said, in response to the argument made here in court by the Respondent, that

[p.8]

this is all controlled by FAA. You've only got three months to seek nullification under the CCIP but vacation under the -- under the FAA.

The Federal Crop Insurance Corporation said, "No. That's not correct. You have a separate claim for nullification under the CCIP. And we're aware of the FAA. We're aware of it at the time that we adopted --" they're referencing section 506(r) of the Act that provided for this.

And they say under -- I'm quoting here from page 10 of my brief, which quotes this, Your Honor.

> ...long-standing legal principle of statutory construction that states that later in time statutes preempt earlier enacted statutes.

So that's the FCIC's interpretation of this, Your Honor, and I respectfully submit that the FCIC is correct.

Now, to go on to my motion to amend, I am not conceding that we do not have a separate claim for nullification. I am not conceding that. I believe we do have a separate claim for nullification for the reasons that I've stated. And I believe under the terms of the CCIP we've got one year to bring that claim in, and we did. But in order to make moot this motion to dismiss, I sought to amend. And I

[p.9]

sought to amend under Rule 15 of the federal rules, Your Honor.

Under Rule 15, leave is to be freely granted when justice so requires. Rule 15 provides that in a situation like this, that the claim that I stated under the FAA, which is a claim that the arbitrator exceeded his powers, and you can't get there under the FAA without also incorporating the CCIP because -- you know, the arbitrator exceeded his powers because he did not comply with the CCIP. He did not follow the rules. He interpreted the insurance policy himself incorrectly.

So under Rule 15, this proposed amendment, Your Honor, relates back to the time of filing. And under -- we tried to find as much federal case law as we could,

Your Honor, regarding this issue in response to Defendant's argument. The Defendant has argued that, "Oh, no, Mr. Tallman is mistaken about this once again because we found a case from Nebraska that says that in a situation like this, the FAA section," and I think it's § 12, "that provides for three months for seeking vacatur under the FAA, that's jurisdictional," the Nebraska court said.

Well, there are a whole bunch of -- I can't say a whole bunch. I cited every federal case that I could find that says that's not true; that it's not jurisdictional. That limitation's period in the FAA is not jurisdictional.

[p.10]

And I think perhaps the best argument that it's not jurisdictional is that the Supreme Court has repeatedly ruled -- United States Supreme Court has repeatedly ruled that the FAA itself is not jurisdictional. It's an anomaly in federal statutes. It does not confer jurisdiction on the Court. You need an independent ground for jurisdiction in order to bring a claim under the FAA, Your Honor.

And so for that reason I think that *Karo* case from Nebraska is wrongly decided. Of course, it's not precedent for this Court. I mean, the Nebraska state court was interpreting federal law.

We've got several federal cases, including from Judge Quist here that -- actually, Judge Quist's ruling was on point with respect to this, that, yes, the parties can agree to amend that FAA three-month limitation's period, and here we did. I mean, the insurance

company here, the Respondent, had to agree in order to comply with federal law in order to issue and offer this insurance policy to my client, Your Honor.

So, what's the other argument? Oh. The other argument that they make is that somehow they're saying that the CCIP, these two sections of the CCIP, 20(b)(3) and 20(c), are somehow consistent with the FAA three-month limitation period. Well, no, they aren't. I mean, one only has to read the CCIP, these two sentences from these two sections of the CCIP, to see that one year is provided for nullification or

[p.11]

for confirmation of an arbitration award, unlike the FAA that provides only three months for a vacation of an arbitration award.

So they're not consistent. There is no way that they can be somehow, you know, made to be consistent. They simply are not. They're in conflict with each other. And I respectfully suggest that the best way to -- to deal with this issue that's been raised by the Defendant is to recognize that, yes, we do have a separate claim for nullification under the CCIP. And even if we don't, you know, this amendment should be allowed to bring the claim within the FAA for the reasons I've said, Your Honor.

THE COURT: Anything further?

MR. TALLMAN: No.

THE COURT: Thank you.

MR. TALLMAN: Thank you.

THE COURT: Ms. Paglia, any rebuttal?

MS. PAGLIA: Yes, Your Honor. Just two quick points. I would reiterate, as in our briefing, we do not believe there is a separate claim for nullification under the CCIP. Everything is subject to the exclusive jurisdiction of the FAA, and we also believe that the Sixth Circuit case, *Corey*, is binding and shows -- and that states that there is -- the statutory precondition of timely service of notice forfeits the right to judicial review. So we believe that the motion

[p.12]

for leave to amend is futile on that basis.

THE COURT: Thank you, Ms. Paglia.

Well, let's deal with that first. I do believe that the Respondent's argument with regard to the amendment of -- the proposed amendment to the petition is well taken. I think that -- it would essentially be futile because it really simply reiterates the argument that has already been made.

And to suggest that there is some additional way to undermine an arbitrator's agreement outside of the provisions of the FAA is simply not supported by any persuasive authority. I think that, again, if -- even if the amendment were allowed, the petition would still be susceptible of a successful motion to dismiss for failure to state a claim on account of the three-month period not having been observed under the FAA.

Now, getting back to the case itself as it initially presented itself. For background -- and these are facts

taken from the petition filed by Bachman -- Bachman is an Ohio corporation, and the Respondent, Producers Agriculture Insurance Company, is an Illinois corporation. And they had a policy of crop insurance for the 2017 growing season.

Now, we've heard this acronym CCIP, which stands for the Common Crop Insurance Policy, and that is codified at 757.8, and it provides for judicial review pursuant to paragraphs 20(b)(3) and 20(c) of the Act.

[p.13]

In 2017, Bachman suffered damage to its apple crop, which apparently the Respondent recognized and paid at least a portion of, which Bachman obviously determined was inadequate. So Bachman, as it properly should have, initiated arbitration proceedings as it was required to do under paragraph 20 of the CCIP.

The claim was arbitrated in February of 2020. In March of 2020, the arbitrator issued an award denying Bachman's claims in their entirety. After the award was issued, a request for a final agency determination was made to the Federal Crop Insurance Corporation.

Now, under § 12, which we've heard about here this morning, of the FAA, and that's 9 U.S.C. § 12, quote, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered," unquote.

And that's what I spoke of originally with Ms. Paglia. No motion to do so, to vacate, modify, or correct,

or in any way attack the validity of the arbitration award was made within three months, which would have been -- the date for the cutoff there would have been June 20, 2020.

Then in November of 2020, Bachman initiated this case by filing a petition to nullify the arbitration award alleging that the arbitrator violated 7 C.F.R. 457.8 in making his own interpretations of the insurance policy rather than requesting

[p.14]

a policy interpretation from the FCIC.

In lieu of filing an answer, the Respondent, Pro Ag, filed this motion to dismiss, Bachman has filed an opposition, and Pro Ag filed a reply. As we've heard again this morning, in June of this year, 2021, Bachman filed a motion for leave to amend, seeking to add a claim to vacate the award under the FAA, and Pro Ag, in due course, filed a response in opposition. And we are here to determine the outcomes of those two matters: The motion by Producers to dismiss, and I've already ruled on the motion of Bachman to amend.

The threshold question, I think, and one that Mr. Tallman makes a valiant effort to avoid, really, is whether the FAA controls this action. And the Respondent, Pro Ag, makes its argument quite forcefully, I think, that the petition filed on behalf of Bachman doesn't state a claim under the FAA because the FAA provides the exclusive remedy for judicial review of arbitration awards issued pursuant to the CCIP, and the petition fails to plead a cause of action under the FAA.

They also argue that Bachman has misconstrued the holding in *Farmers Mutual Hail Insurance Company of Iowa v. Miller*, and that case is at 366 F. Supp. 3d 974, a Western District of Michigan case from 2018, in that the CCIP does not permit a separate cause of action apart from the FAA.

In written response, Bachman argued that the cases

[p.15]

cited by Pro Ag don't support its argument that § 20 of the CCIP must be negated. Specifically, Bachman argues that consistent with *Miller*, a motion to nullify under 457.8 in § 20(c) constitutes grounds for relief separate and distinct from a motion to vacate under the FAA.

Pro Ag responded to that arguing that the idea that there is a separate and independent cause of action for nullification is simply not accurate. The *Miller* case merely recognizes that the FCIC alone can nullify an arbitration award if the FCIC determines that the arbitrator improperly made a policy or procedure interpretation emphasizing that the *Miller* case does not provide authority for Bachman to seek nullification from this Court. And I think that -- I think that's a little bit where Bachman gets off the rails a bit.

As Mr. Tallman has pointed out, and as I have found out in dealing with these cases over the years, not that there have been very many of them, but the procedures and the rules by which these arbitration decisions and these actions under the CCIP can be pursued are very specific and circumscribed.

And what the Respondent points out here and what I think is correct, is that the *Miller* case relied on by the Petitioner, Bachman, simply doesn't provide authority to seek nullification here in the United States District Court.

The Federal Arbitration Act is -- enacted pursuant to authority under the commerce clause provides, quote, "A

[p.16]

written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," close quote, 9 U.S.C. § 2.

In the Sixth Circuit once an arbitration is conducted under a valid contract -- arbitration contract, which I think everybody agrees is the case here, the FAA provides the exclusive remedy for challenging acts that taint an arbitration award. See *Decker v. Merrill Lynch*, 205 F.3d 906, at 909, a 2000 Sixth Circuit case which quotes the *Corey* case noted by Ms. Paglia, *Corey v. New York Stock Exchange*, 691 F.2d 1205, at 1212, a 1982 Sixth Circuit case.

Here, the parties' insurance policy is a written contract that, quote, "evidences a transaction involving commerce," close quote. Both statutory requirements

being met, my holding is that the FAA controls this action.

And there are other district courts that have found FCIC insurance contracts subject to the FAA:

Great American Insurance Company v. Moye, 733 F. Supp. 2d 1298, at 1302, from the Middle District of Florida

[p.17]

from 2010.

In re 2000 Sugar Beet Crop Insurance Litigation, 228 F.Supp.2d 992, at 995 from the Middle District of Alabama in 2002.

And *Nobles v. Rural Community Insurance Services*, 122 F.Supp.2d 1290, from the District of Minnesota in 2002 [sic].

Then the question becomes whether the petition should be dismissed as untimely and whether the amendment, the proposed amendment, would make a difference in that regard. In its written submissions, the Respondent made, essentially, two arguments that we discussed when Ms. Paglia argued.

First, that relying on the *Corey* case, the petition should be dismissed because it was untimely; an untimely motion to vacate, modify, or correct the award as mandated by § 12 of the FAA, and here again I think it's important to note the specificity with which we are dealing with the FAA and its provisions involving timeliness.

The second argument that the Respondent makes is that the one-year time limitation in 20(b)(3) just reflects a one-year time limit to seek confirmation of an award provided by the FAA at 9 U.S.C. § 9. And it's -- I think it's easy to ride over that -- those specific provisions and what they provide in terms of periods of limitation. 20(b)(3) of the Common Crop Insurance Policy is consistent with and doesn't supercede the separate three-month jurisdictional time

[p.18]

requirement for motions to vacate, modify, or correct under the FAA.

It really seems to me that in drafting this legislation, the drafters were very mindful of what they were doing in setting forth a three-month limitation in which a disgruntled party could attack an award, and, on the other hand, a one-year limitation in which a party that was satisfied with an arbitration award could move to confirm it.

Now, Bachman argues and has argued that its proposed claim under the FAA is timely because the parties agreed to a one-year period for seeking judicial review, which then extended the three-month FAA filing period. And that argument's been made again here not only in Mr. Tallman's written submissions but also in argument.

My ruling is that the petition is properly dismissed because Bachman has forfeited their right to judicial review of the award. And, again, we have to really dot the I's and cross the T's when we rule on this. § 12 of the FAA requires that the notice of a motion to vacate,

modify, or correct, that is attack an award, must be served on the adverse party or his attorney within three months after the award is filed or delivered. And there is no question that that is what Bachman seeks to do here; to attack the award.

The Sixth Circuit has held that, quote, "Failure to comply with the statutory precondition of timely service of

[p.19]

notice forfeits the right to judicial review of the award." And that's the *Corey* case, 691 F.2d at 1212. The argument to the contrary fails because the FAA provides its exclusive remedies for seeking to nullify the arbitration award.

The opposition has relied on a case, *International Brotherhood of Teamsters General Teamsters Local 406 v. FiveCap, Inc.*, which was Judge Quist's case mentioned by Mr. Tallman. And there Judge Quist did expressly indicate that in *FiveCap* that neither party cited any case addressing whether the three-month time limit in § 12 is jurisdictional or merely a statute of limitations. He reached his conclusion that the three-month time period could be extended in the absence of any persuasive authority or argument to the contrary.

Finally, I do agree with the Respondent, Pro Ag, that the time limitation provided for in 20(b)(3) of the CCIP does not alter the three-month time limitation in 9 U.S.C. § 12 but is consistent with the one-year time limit to seek judicial confirmation of an award under the FAA, and again emphasizing, to seek judicial confirmation.

Because both the original and proposed amended petitions are untimely under the FAA, Bachman's amendment would be futile, as I indicated earlier. Leave to amend is properly denied.

And the motion by Pro Ag to dismiss the petition is

[p.20]

granted. An order and judgment will issue in due course.

Is there anything further, Mr. Tallman?

MR. TALLMAN: No. Thank you, Your Honor.

THE COURT: Thank you. Ms. Paglia?

MS. PAGLIA: No. Thank you, Your Honor.

THE COURT: Thank you, both. We're adjourned.

THE CLERK: All rise, please. Court is adjourned.

(At 11:40 a.m., the matter was concluded.)

* * * * *

REPORTER'S CERTIFICATE

I, Melinda I. Dexter, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true, and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript

has been prepared by me or under my direction. WITNESS my hand this date,

August 3, 2021.

/s/ Melinda I. Dexter
Melinda I. Dexter, CSR-4629, RMR, CRR
U.S. District Official Court Reporter
402 Federal Bldg
110 Michigan St NW
Grand Rapids, MI 49503

APPENDIX E

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0025n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-2792

[Filed January 11, 2023]

NAU COUNTRY INSURANCE COMPANY, Petitioner-Appellee,	)
v.	)
ALT'S DAIRY FARM, LLC, Respondent-Appellant.	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: DONALD, BUSH, and NALBANDIAN, Circuit Judges.

JOHN K. BUSH, Circuit Judge. For federally reinsured crop-insurance contracts, the Federal Crop Insurance Corporation (FCIC) sets common terms, including a requirement that the parties arbitrate coverage disputes. In resolving such controversies, the

arbitrator must defer policy interpretations to the Risk Management Agency (RMA) or FCIC, or else the arbitration award may be nullified.

Alt's Dairy Farm, LLC (Alt's Dairy) lost at an arbitration with its insurer, NAU Country Insurance Company (NAU). Several months later, NAU petitioned for a district court to confirm the arbitration award in its favor. Alt's Dairy responded by filing a counter-petition to nullify the arbitration award, blaming its loss on an alleged impermissible policy interpretation by the arbitrator. As we explain below, the counter-petition to nullify did not comply with the substance or time limits of the Federal Arbitration Act (FAA), whose requirements govern Alt's Dairy's challenge to the arbitration award in federal court. We therefore AFFIRM the district court's ruling in favor of NAU and the dismissal of Alt's Dairy's counter-petition to nullify.

I.

After Alt's Dairy's 2017 apple crop was damaged by freezing weather, it sought recovery from NAU.[1] The loss was calculated under a fresh-fruit-quality endorsement, which provided additional coverage when a certain percentage of its apple production was sold as fresh in any of the preceding four years. NAU allegedly agreed that Alt's Dairy met those requirements in 2015 based on its apple production in 2013. But the insurer later declined to provide such coverage after concluding that the 2017 crop did not qualify. The parties' dispute

[1] Alt's Dairy purchased both common crop insurance and apple crop insurance from NAU.

over fresh-fruit coverage went to arbitration, as required by the insurance policy. The arbitrator heard from the parties' experts, an NAU employee, employees of Alt's Dairy's customers, and Jason Rowekamp, a regional compliance manager for the RMA, and the agency that manages the FCIC. The arbitrator entered an award for NAU on March 11, 2020.

Those are the immediate facts of the case, but to fully understand the dispute, an explanation of the parties' relationship is warranted. Their relationship is no ordinary insurer-insured arrangement. NAU sold its policies to Alt's Dairy under the Federal Crop Insurance Act of 1980 (the Act) and its accompanying regulations, which allow for federal reinsurance of crop insurance. Reinsurance agreements allow for subsidization of crop insurance by the federal government, specifically, the FCIC. *See generally* J. Grant Ballard, *A Practitioner's Guide to the Litigation of Federally Reinsured Crop Insurance Claims*, 17 Drake J. Agric. L. 531, 536 (2013). But subsidized insurance comes with a catch: the terms of every federally reinsured crop insurance policy are set by the FCIC and codified at 7 C.F.R. § 457.8, the Common Crop Insurance Policy (the common policy or CCIP). *See* 7 C.F.R. § 457.2(b). And though that policy calls for arbitration when mediation proves unfruitful, it limits the arbitrator's role in the resolution of disputes involving a policy or procedure interpretation. CCIP § 20(a)(1). Only the RMA or the FCIC has the authority to interpret the common policy, the FCIC's regulations, and the Act. *Id.* So, when an arbitrator steps outside his or her role and interprets any of the above

provisions, the usual consequence is severe—nullification of the arbitration award. *Id.* § 20(a)(1)(ii).

And nullification of the award is what Alt's Dairy seeks here. The insured maintains that the arbitrator of its dispute with NAU ventured outside his authority and interpreted the common policy. Alt's Dairy raised this objection first by asking the FCIC for a final agency determination about the apple crop provisions. The request Alt's Dairy submitted is not in our record, but the agency determination reflects that it was submitted May 6, 2020. The FCIC determined on July 21, 2020, that the "key inquiry" in determining whether apples are sold as fresh "is whether the price received is commensurate with the price generally received by other growers for fresh apples." FAD-295, R. 10-6, PageID 115. But the FCIC never addressed whether the arbitration award should be nullified.

Meanwhile, NAU asked the district court on July 1 to confirm the arbitration award in its favor under section 9 of the FAA. *See* 9 U.S.C. § 9. The insurer noted that Alt's Dairy had not moved to vacate, modify, or correct the arbitration award within the three-month time limit in section 12 of the FAA. *See id.* § 12. Alt's Dairy filed its opposition and a counter-petition to nullify the arbitration award under the common policy and the FCIC regulations on August 28. It argued that the nullification provisions, not the FAA, provided the only relief it needed. And because the arbitrator's award deviated from the later-issued agency determination, and Alt's Dairy had filed suit within the one-year limit in the common policy, it asked the court to nullify the award.

NAU moved to dismiss the counter-petition. It asked the court to apply the FAA's three-month time limit for motions to vacate and dismiss the counter-petition as untimely. *See* 9 U.S.C. § 12. Alt's Dairy again noted that nullification under the common policy and its accompanying regulations is different than vacatur under the FAA and does not require compliance with the FAA. *Compare id.*, *with* CCIP § 20(a)(1)(ii). But Alt's Dairy asked for permission to amend its counter-petition to add an FAA vacatur claim to "moot" NAU's argument that the common policy offered no relief. Alt's Dairy argued that timeliness was no issue because the parties had agreed to extend the FAA's deadlines in the common policy.

After hearing oral argument, the district court ruled for NAU from the bench. Its reasoning was four-fold. First, it determined that the FAA provides the exclusive remedy for challenges to arbitration awards when a contract is covered by the FAA. Second, the district court found that this crop insurance contract was covered by the FAA, so the FAA controlled this case. Third, the district court determined that the common policy was not a "parallel procedural vehicle," so Alt's Dairy's counter-petition had to comply with the FAA. In fact, the district court noted the one-year time limit in the common policy aligns with the FAA's one-year time limit for confirmation of an award. Finding the counter-petition untimely, it dismissed Alt's Dairy's counter-petition and denied its motion to amend. Fourth, and finally, the district court concluded that, in the alternative, the arbitrator did not exceed his authority. Alt's Dairy timely appealed.

II.

We review both the dismissal of Alt's Dairy's petition and the denial of its motion to amend de novo. *See Colvin v. Caruso*, 605 F.3d 282, 294 (6th Cir. 2010) (noting that while the denial of motions to amend are normally reviewed under the abuse-of-discretion standard, the standard is de novo when the motion is denied because "the amended pleading would not withstand a motion to dismiss" (quoting *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008)); *AK Steel Corp. v. United Steelworkers of Am.*, 163 F.3d 403, 407 (6th Cir. 1998).

This fresh look calls upon us to answer the same, central questions the district court addressed: (1) Does the FAA apply as the exclusive remedy to challenges to arbitration awards entered under the common policy? (2) If yes, does its three-month time limit for motions to vacate bar Alt Dairy's petition to nullify? For reasons set forth below, and as we discussed in *Bachman Sunny Hill Fruit Farms, Inc. v. Producers Agric. Ins. Co.*, __ F.4th __, No. 21-2868 (6th Cir. January 11, 2023), we hold that the FAA applies, and its three-month time limit bars Alt's Dairy's petition to nullify.

A. Does the FAA Apply?

The FAA "makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce.'" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (quoting 9 U.S.C. § 2). So by the usual measure, the FAA applies here.

Yet, Alt's Dairy suggests that its agreement with NAU is governed by the common policy language requiring a federal court to enforce the one-year time limit provided for by the common policy because that unique nullification process does not fit neatly within the FAA's procedural framework. This does not address the binding precedent that applies here—namely, *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906 (6th Cir. 2000) and *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982). "Once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the *exclusive* remedy for challenging acts that taint an arbitration award.'" *Decker*, 205 F.3d at 909 (emphasis added) (quoting *Corey*, 691 F.2d at 1211); *see Bachman Sunny Hill*, slip op. at 5–7 (discussing the implications and holdings of *Corey* and *Decker*).

Alt's Dairy claims its case is different because it is a private agreement between Alt's Dairy and NAU. To grant Alt's Dairy a non-FAA judicial remedy, we would have to conclude that our holdings in *Corey* and *Decker* do not govern here. But that precedent applies for three key reasons: (1) Congress has not changed the relevant parts of the FAA since our decisions in *Corey* and *Decker*, meaning the FAA is the "exclusive remedy" here; (2) Congress did not grant the FCIC the authority to create alternative judicial remedies to challenge arbitration awards; and (3) the common policy provides for a unique administrative remedy of nullification but not a judicial remedy of nullification. *Bachman Sunny Hill*, slip op. at 7–9.

An opportunity for nullification occurs when the parties and arbitrator did not seek an FCIC interpretation during an arbitration and should have, 7 C.F.R. § 400.766(b)(4), or when a party disputes an interpretation after an award is rendered and a review determines that an inconsistent interpretation materially affects the award, RMA, U.S.D.A., *Final Agency Determination: FAD-230* (April 10, 2015). *See Bachman Sunny Hill*, slip op. at 8. In either case, a party can appeal the FCIC's decision, and a district court can review and enforce final determinations from the Department of Agriculture's National Appeals Division. *See* 7 C.F.R. § 11.13(a). Or a district court, if presented with a timely motion to vacate under section 10(a)(4) of the FAA, can determine that an arbitration award must be vacated because of the disregarded FCIC interpretation. 9 U.S.C. § 10(a)(4); *see, e.g.*, *Farmers Mut. Hail Ins. Co. of Iowa v. Miller*, No. 20-1978, 2021 WL 3044275, at *2–3 (6th Cir. July 20, 2021).

Here, Alt's Dairy did not ask the district court to review an appeal from an FCIC decision or to vacate the arbitration award under section 10(a)(4) of the FAA. Instead, Alt's Dairy asked the district court to nullify the arbitration award under the common policy, so Alt's Dairy failed to state a claim the district court could resolve. *Bachman Sunny Hill*, slip op. at 8–9.

B. Does the Three-Month Time Limit in FAA Section 12 Bar the Petition to Nullify?

Even if Alt's Dairy sought relief under the FAA, its motion was still untimely. While Alt's Dairy argues that the parties agreed to extend the time limit to one

year to challenge the arbitration award, as stated in the common policy, CCIP § 20(b)(3), section 12 of the FAA only allows for a three-month period to challenge the award, *see* 9 U.S.C. § 12. Because the petition was filed more than five months after the entry of the arbitration award, it is untimely since the FAA is the exclusive remedy here, which requires the petition to be filed within three months of the arbitration award. *Bachman Sunny Hill*, slip op. at 9–10.

Alt's Dairy's claim that equitable tolling should apply to save its motion is also unconvincing. This court has yet to decide whether equitable tolling is available in this context. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 246–47 (6th Cir. 2004). But we need not do so in this case. As in *Berry* "the facts of this case clearly do not merit equitable tolling." *Id.* at 247. "In general, equitable tolling is available 'when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Zappone v. United States*, 870 F.3d 551, 556 (6th Cir. 2017) (quoting *Jackson v. United States*, 751 F.3d 712, 718 (6th Cir. 2014)). The burden to seek nullification was Alt's Dairy's, whether through the administrative process, *see* FAD-232, or through a timely motion to vacate, *Corey*, 691 F.2d at 1211–12.

Ultimately, the parties' agreement under the common policy did not extend the deadline in section 12 of the FAA for seeking vacatur, so Alt's Dairy's petition must be barred by the three-month

time limit in section 12 of the FAA.[2] Thus, the district court correctly determined that amending the petition to nullify to include a claim for vacatur under section 10 of the FAA would be futile. Because of this, the district court's alternative reasoning for its holding—its conclusion that the arbitrator did not exceed his authority—does not require review on appeal.

III.

For those reasons, we hold that the FAA governs the arbitration agreements in federally reinsured crop-insurance policies, and we find that Alt's Dairy's petition to nullify defied its substance and procedures. We affirm the judgment of the district court.

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[2] In so holding, we take no position on whether the FAA's time limits are jurisdictional.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:20-cv-597
HON. JANET T. NEFF

[Filed July 8, 2021]

NAU COUNTRY INSURANCE COMPANY,
Petitioner,

v.

ALT'S DAIRY FARM, LLC,
Respondent.

ORDER

In accordance with the Bench Opinion issued by the Court on July 8, 2021:

IT IS HEREBY ORDERED that Respondent's Motion for Leave to File First Amended Counter-Petition (ECF No. 26) is DENIED for the reasons stated on the record.

IT IS FURTHER ORDERED that Petitioner's Motion to Dismiss Alt's Dairy Farm, LLC's Counter-Petition and Confirm Arbitration Award (ECF No. 21) is GRANTED for the reasons stated on the record.

A corresponding Judgment will also enter.

Dated: July 8, 2021

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:20-cv-597
HON. JANET T. NEFF

[Filed July 8, 2021]

NAU COUNTRY INSURANCE COMPANY,
Petitioner,

v.

ALT'S DAIRY FARM, LLC,
Respondent.

JUDGMENT

In accordance with the Bench Opinion and Order issued this date:

IT IS HEREBY ORDERED that Judgment is entered in favor of Petitioner and against Respondent in conformity with the parties' Arbitration Award.

Dated: July 8, 2021

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:20-cv-597
Hon. Janet T. Neff

[Dated July 8, 2021]

NAU COUNTRY INSURANCE COMPANY,
Petitioner/Counter-Respondent,

vs.

ALT'S DAIRY FARM, LLC,
Respondent/Counter-Petitioner.

MOTIONS

HELD BEFORE THE HONORABLE
JANET T. NEFF, U.S. DISTRICT JUDGE

Grand Rapids, Michigan, Thursday, July 8, 2021

APPEARANCES:
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[p.2]

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[p.3]

Grand Rapids, Michigan

Thursday, July 8, 2021

1:31 p.m.

THE CLERK: All rise, please. Court is in session. You may be seated.

THE COURT: Afternoon, everybody.

MR. PATTEE: Afternoon.

MR. TALLMAN: Good afternoon, Your Honor.

THE COURT: This is the date and time set for a hearing on the Petitioner's motion to dismiss and the Respondent's counter-motion to confirm regarding an arbitration award in Case No. 1:20-cv-597, NAU Country Insurance Company versus Alt's Dairy Farm.

May I have appearances and introductions, please, Gentlemen?

MR. PATTEE: Yes, Your Honor. Steven Pattee on behalf of NAU Country Insurance Company.

MR. ALBARRAN: And Paul Albarran on behalf of NAU Insurance.

THE COURT: Thank you.

MR. TALLMAN: John Tallman on behalf of Alt's, Your Honor.

THE COURT: Thank you. This case -- before we get into the arguments, I believe it's fair to say that this case involves a real niche in the law that -- well, I'll tell you

[p.4]

that being a federal district judge is, perhaps, at least for me, one of the most interesting jobs that anybody can have, and it seems that at least once a week I come into contact with an area of the law that either I don't know anything about or occasionally I never even heard of before, and this case is kind of an example of that.

The crop insurance situation, I mean, who knew, those of us who aren't farmers or have never even been related to a farmer. So it's been an interesting educational process for me, and I appreciate your submissions, and I'm anxious to hear your arguments.

So who will argue for the insurance company? Mr. Pattee, you?

MR. PATTEE: Yes, Your Honor.

THE COURT: Okay. Will you please come to the podium.

MR. PATTEE: Your Honor, this has been fairly extensively briefed, and you have had some time to digest them. I don't plan to reiterate what's in the brief, but, rather, hit a couple of high points to answer any questions that you may have.

To your point about it being a niche practice, I did grow up on a farm, and I did know about crop insurance from there, but I wouldn't even be in the practice but for a law school classmate becoming general counsel for one of the

[p.5]

larger crop insurance companies in the country. He called me and said, "Hey, I think you'd be able to handle these cases. What do you think?" And I started on a journey 18 years ago to learn this little narrow area of law that maybe a dozen of us nationwide practice is the way it seems at times.

Having said that and provided that introduction, I would like to ask the Court, respectively, to grant the

motion to dismiss the petition or, an alternative, to confirm the arbitration award and to deny the motion to vacate.

Touching on the procedural issues momentarily, the Federal Arbitration Act provides 90 days to bring the motion to vacate. That was not met in this case. Even assuming the one-year contractual limitations period is a modification of the Federal Arbitration Act, the motion for leave to assert that counter-petition wasn't brought within one year of the arbitration award, in any event.

Speaking more to the merits that, perhaps, weren't briefed as much, it --

THE COURT: In the case of the Respondent, it was, unfortunately. I mean, the Respondent's brief, if I recall correctly, dealt extensively with the merits, which I think is really kind of irrelevant here, isn't it, based on the arguments?

MR. PATTEE: Well, if it's purely -- if you're going to make the decision purely on procedural grounds, and that's

[p.6]

where we're at, then I would agree that the merits are beyond the scope of what you had instructed us to brief last December, I believe it was, and what you're going to base this initial decision on.

If you would like to decide that issue first, the procedural issue, I would stand on the brief because I don't have anything significant to add. If you would

like to move past that and deal with the merits at the same time, I'm prepared to address that as well, Your Honor.

THE COURT: Well, let's talk about the procedural issue. It really -- and, again, you know, this is an area of the law that was not only quite new to me, it was totally new to me, and it's -- it struck me as I read through the various statutory provisions, Section 20 and then Section 10, it seemed to me to be pretty straightforward that, that the language of the statute, as opposed to the language of the contract, clearly the one-year period, if I read it correctly, is strictly limited to motions to confirm the award under the Act, whereas any attempt at attacking the award, if you will, to modify it or vacate it or correct an error, that's your three-month period.

It seems to me that it all boils down to that. And maybe I'm missing something, and that's why, you know, I'd like you to address that. Am I missing something?

MR. PATTEE: Your Honor, from my reading, no, you are

[p.7]

not missing anything, and, in fact, that's precisely our argument. Unfortunately, because this is such a narrow area of the law, I can't give you a case that says precisely that in a crop insurance case under this contract because there simply are not many cases nationwide that make it to this level, let alone to a circuit court of appeals.

THE COURT: Doesn't that suggest the fact that --

MR. PATTEE: That it's relatively cut and dry.

THE COURT: -- that it's so clear that --

Well, let's -- let's hear from Mr. Tallman, and maybe he can disabuse me of my understanding --

MR. PATTEE: Okay. Great. Thank you, Your Honor.

THE COURT: -- of what the law is.

Thank you, Mr. Pattee.

Mr. Tallman?

MR. TALLMAN: Yes. Thank you, Your Honor. So I guess first what I'd like to say is that my motion for leave to file a first amended petition was filed several weeks ago, and the period for responding to it, if it was opposed, has passed. It passed last week. So I'm assuming by that, although Mr. Pattee didn't say this, that my motion is not opposed.

THE COURT: Which doesn't necessarily mean it's going to be granted. I mean, just because a motion is not opposed doesn't mean the Court is automatically going to grant the

[p.8]

motion. Maybe the motion is so clearly without merit that the Court is going to deny it.

MR. TALLMAN: Sure. Right. No. I understand that, Your Honor. But if it's not opposed, then it is granted.

I think that makes this argument moot, and it makes it moot because the claim under the FAA would relate back to the filing of the -- of the original petition. And the parties agreed under the terms of the common crop insurance policy to a one-year period for seeking judicial review, and that's in Section 20 of the crop insurance policy, Your Honor.

Under the case -- I cited a case that was decided by Judge Jonker several years ago, the *Teamsters v* -- somebody -- *FiveCap*, I think. And Judge Jonker found that the three-month period was a period of limitations that could be lengthened by agreement of the parties, and I'd submit that that's exactly what happened here, Your Honor.

All that being said, I think -- I mean, with all due respect to Your Honor, I think that it's clear or that we've got a separate cause of action, separate claim here, maybe not cause of action, but a separate claim under the insurance policy itself which speaks of nullification in this circumstance where the arbitrator has improperly and in violation of the law interpreted the policy.

Not only did he make an interpretation --

THE COURT: Well, let me just interrupt you for a

[p.9]

moment, Mr. Tallman.

MR. TALLMAN: Yes, of course, Your Honor.

THE COURT: If I recall correctly, your proposed amended counter-petition would add a claim under the FAA. Is that right?

MR. TALLMAN: Yes, that's right, Your Honor.

THE COURT: Then in light of that, you are specifically acknowledging that the case law requires you to seek judicial review of the award solely under the FAA, right?

MR. TALLMAN: No. I'm not acknowledging that at all. I'm simply attempting to respond to this motion that was brought and to -- to make that argument moot, Your Honor. No. I strongly believe that we've got a separate claim on --

THE COURT: Under the FAA.

MR. TALLMAN: -- the insurance policy. I'm sorry, go ahead.

THE COURT: Under the FAA, but if you're -- if you're -- if you're --

MR. TALLMAN: Not under the FAA. Under the insurance policy itself which speaks of nullification. I had a very similar case in front of Judge Jonker a couple of years ago, the *Miller* case.

THE COURT: If I recall correctly, I think -- I think *Miller* -- I don't have it right in front of me, but it seems too that there were distinguishing features about *Miller*.

[p.10]

MR. TALLMAN: Not with respect to this. We brought a claim under the FAA, and we brought a claim under the insurance policy. And Judge Jonker ruled that we did not prove our claim under the FAA, but we did under the insurance policy, and so he nullified the arbitration award. Why? Because we've got a separate claim under the insurance policy for nullification.

THE COURT: I'm going to have to ask Mr. Pattee to respond, then, to the motion for leave to amend your petition.

Mr. Pattee?

MR. PATTEE: Thank you, Your Honor. As I review *Miller*, I too thought it could be distinguished. It doesn't address the timing of pursuing the motion to vacate and seeking nullification, which we are addressing in this case. And it also doesn't provide any guidance to the Court on the framework for considering the nullification.

That's our position or any use position that the nullification spoken of still arises under the Federal Arbitration Act and within the framework of the Federal Arbitration Act.

THE COURT: Well, all right. I understand.

Then let me hear Mr. Tallman speak to the motion to dismiss based on the failure to comply with the three-month requirement under the Crop Insurance Act.

Mr. Tallman?

[p.11]

MR. TALLMAN: You said the three-month requirement under the Crop Insurance Act? It's under the Federal Arbitration Act.

THE COURT: I'm sorry, I beg your pardon.

MR. TALLMAN: Yes. Right. I guess I don't have a heck of a lot to add to what I've already said. I think that the motion to amend -- I respectfully ask the Court to grant the motion to amend. It's unopposed, and I --

THE COURT: You keep saying that. I want to tell you once again, it doesn't matter. Okay?

MR. TALLMAN: All right. Do you want me to argue about why it should be granted, or should I just skip that?

THE COURT: Well, no. You've already done that. I'm asking you to speak to the question of why your petition shouldn't be dismissed for failure to meet the three-month requirement under the FAA.

MR. TALLMAN: Because we have a separate claim under the crop insurance policy. The crop insurance policy is not simply a contract. It's a matter of federal law. It's an adopted federal regulation. And the RMA has actually spoken to this very issue at length, and I can provide that information to the Court in this case if you'd like me to.

But the RMA, which is an agency of the -- of the USDA, Department of Agriculture, believes very

strongly that there is a separate claim for nullification under the

[p.12]

insurance policy, and it explained why in comments that address this very issue to the effect that -- I believe the argument was that because the crop insurance policy was adopted after the FAA with knowledge of the FAA, that the USDA when it adopted this regulation, which is the contract in Section 20 of the contract, it did it with full knowledge of the FAA, and it created a separate remedy for violation of the crop insurance rules under the common crop insurance policy by the arbitrator.

And I can quote from the insurance policy, Your Honor, if you'd like me to. And this is at Section 20(b)(3):

> If arbitration has been initiated in accordance with this section and completed and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered.

And that's precisely what we've done, Your Honor.

THE COURT: Doesn't it also say, though, that it -- a suit may be filed to conform -- confirm the award? Isn't that --

MR. TALLMAN: No. That's part of the FAA, Your Honor. You're mixing up the two. No, it does not. It

does not say that. What you're -- the FAA has one limit of

[p.13]

one year if the parties are seeking to confirm the arbitration award and another limit of three months if you're seeking to vacate the arbitration award. That's under the FAA.

THE COURT: Isn't vacation the same thing as nullification?

MR. TALLMAN: I don't think so. I do not think so.

THE COURT: How are they -- how do they differ?

MR. TALLMAN: Well, there are a number of things that could lead to vacation of an award. For nullification, there is only one thing that can lead to nullification of -- of a crop insurance arbitration award, and that is if the arbitrator fails to follow the rules. And here the arbitrator failed to follow the rules by interpreting the policy incorrectly and improperly. So nullification is a separate remedy separate and apart from vacation.

I agree in the way I pled it in my proposed amended complaint is that we can fit nullification within the bounds of vacation by arguing that the arbitrator exceeded his powers under the FAA. But, nonetheless, nullification is a separate remedy. It's a separate term. It's a separate matter of federal law that was adopted after the FAA was adopted.

And if Your Honor rules that I don't have a claim because we didn't file within three months, then what

you're doing is, in effect, nullifying the crop insurance policy, nullifying Section 20 of the crop insurance policy. I don't

[p.14]

know how you get around that. I don't know how counsel gets around it. Nobody has made an argument about how you get around the one-year provision in the crop insurance policy. I haven't heard anything about that. There is no case that says that.

And as I said, the agency itself, the USDA, has spoken to this matter, and they said very clearly that nullification under the insurance policy is a separate remedy, separate and apart from the FAA. They were asked that question by counsel, and they responded in writing in that way, and I can provide that to the Court if you'd like to see it, Your Honor.

THE COURT: Well, let's let -- let's let Mr. Pattee respond to that.

Is nullification a separate remedy, Mr. Pattee?

MR. PATTEE: Nullification, as spoken of in the policy, is separate from vacation. I would agree with that. What is not spoken of in the policy is the procedure to get you to that nullification and how does that fit within the Federal Arbitration Act, which was law at the time that the Federal Crop Insurance Act was put into law and the policies were drafted.

Typically when a government entity makes a law that is going to fall within framework of existing laws,

it will either specifically exclude it from that framework or it will

[p.15]

continue to have that framework apply. There was no specific exclusion of the Federal Arbitration Act's framework in this case. There is nothing in the policy that says that.

The policy is the law. An interpretation of a bureaucrat, it does not carry the same weight as an enacted law through a legislative process or rules that are promulgated under the authority granted in that statute.

So short answer back to your original question, Your Honor, I -- nullification is discussed in the policy and does -- you know, since it's a different word than vacation, I would say that there was contemplation of a separate remedy, but there is no indication of how you reach that remedy procedurally, which pulls it back into the framework of the Federal Arbitration Act: 90 days to vacate, to nullify. One year to confirm.

Is there anything further, Your Honor, at this time?

THE COURT: Just a minute. I'm going to --

MR. PATTEE: Okay.

THE COURT: Well, no, that's enough. Thank you, Mr. Pattee. I think I understand your position.

MR. PATTEE: Thank you.

THE COURT: And I think really the -- the contest here is -- is, I think succinctly put by you, Mr. Pattee,

just now that the issue of nullification as opposed to vacation seems to me that although there isn't a specific procedural

[p.16]

mechanism established in the event that nullification really does differ from vacation, although I have some real questions about that myself, but, in any event, I think it is correct that we have to refer back to the FAA for that procedural framework.

And the procedural framework is that you have three months to attack an award. You have one year to confirm it. And why they established that, I can only imagine. I mean, assuming you have a -- an award in your favor and you aren't -- the remedy is not forthcoming, and so you can wait up to a year to request confirmation of the award.

On the other hand, if you have not prevailed and the -- the issue is attacking the award, seeking to vacate it, modify it, correct it, that is -- or nullify it, that is a point at which a shorter period of time -- in this case, a very short period of time, three months, to make the attack known and the basis for it. And I -- you know, I can sort of see the reasoning there or the logic there; although, again, it doesn't -- it's not anything that I am -- why they did it is not crystal clear to me.

Anyway, I'm just going to do a bench ruling here and start out by putting some of the facts on the record, which are essentially taken from the petition, which is ECF No. 1.

The Petitioner, NAU Country Insurance Company, is a Minnesota corporation. And the Respondent, Alt's Dairy Farm,

[p.17]

LLC, is a Michigan entity. And there was a policy of crop insurance issued for the 2017 growing season, and the policy does, in fact, provide for a judicial review, and paragraph 20(b)(3) and 20(c), which is ECF 1-2.

The Respondent, the dairy farm, sought indemnity and was denied, and timely initiated arbitration proceedings as required under paragraph 20 of the insurance policy. The parties went to arbitration, and the arbitrator issued an award in March of 2020.

And that event is what kicked off the question of what further legal steps would be timely or untimely. And under Section 12 of the Federal Arbitration Act, notice of the motion to vacate, modify, or correct an award must be served on the adverse party or his attorney within three months after the award is filed or delivered. So if the Respondent did seek to vacate, modify, or correct the award, they had to do so within three months or by June 11, 2020.

Countering that, we have on July 1st, 2020, under Section 9 of the Federal Arbitration Act, the Petitioner, the insurance company, filed their petition to confirm the arbitration award. Now, that would be within the one-year time limit to seek to confirm an award.

In August, the Respondent here, the dairy farm, filed an answer and a counter-petition asking the Court

to nullify the arbitration award and attacking on the merits the award,

[p.18]

alleging that the arbitrator interpreted the policy, which was improper, which is improper under the rules. And that was not filed within 30 -- within three months, but it was filed within a year of the issuance of the award, and that's where we are right now with the request by the insurance company to confirm the award, the request by the dairy farm to nullify it.

The first and threshold question is whether the FAA controls this action. The insurance company, Petitioner, says, yes, it does, because the crop insurance policy's arbitration provision was in writing, and, secondly, the policy was a contract evidencing a transaction involving commerce, citing 9 USC § 2.

The insurance company -- I'm sorry, the dairy farm, Respondent, makes the argument that the FAA and the policy itself offer an independent basis for relief, and that's where they cite the *Miller* case, which is Judge Jonker's case, at 366 F.Supp.3d 974.

However, the Respondent, dairy farm, concedes that it could have petitioned the Court in the alternative to vacate the arbitration award under the FAA, which seems quite clear it could have, but it would have been constrained under those circumstances by the three-month notice provision.

And the Respondent argues -- the dairy farm argues that the three-month notice provision doesn't have any bearing

[p.19]

on the counter-petition because it is a petition to nullify, which in a sense sets -- would set up a -- sort of a -- two parallel forms of attack on the arbitration award. And the insurance company argues that this is -- is -- is not what is intended or provided either by the policy or by the act, arguing that the policy language regarding nullification, which dairy farm says -- has -- is a separate provision outside of the FAA, but the insurance company says, nope, it must be interpreted in conjunction with the FAA; that is, that the policy identifies a ground for nullification while the FAA provides the procedure which must be followed to nullify the award.

And the Petitioner, insurance company, points out that there is really no other guidance in the policy regarding the procedure to seek nullification and that *Miller* does not compel a different result where the opinion in that case does not indicate the timing of the motion to vacate in relation to the date of the award or whether the insurance company sought to confirm the award as it did in this case or whether the court considered anything other than the merits in that case, which -- which to me make the *Miller* case really completely distinguishable from this one.

We do have timing of both the request to confirm and the request to nullify. We do know that the insurance company did seek to confirm the award within the applicable

[p.20]

three-month period of time. And assuming the procedural issues are accurately determined, the merits really aren't in question here.

Now, the FAA is enacted by congress under the commerce clause, and it provides, quote:

> A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

And that's § 2 of 9 U.S.C.

Now, in *Nichols v Dwyer*, which quotes *Citizens Bank v Alafabco*, the latter at 539 U.S. 52, 56 to 57, a 2003 Supreme Court case, the Sixth Circuit in speaking to the text of § 2, talks about the full scope of the expansive power of commerce under the commerce clause. That those powers under the

[p.21]

commerce clause may be exercised in individual cases without showing any specific effect upon interstate

commerce if, in the aggregate, the economic activity in question would represent a general practice that bears on interstate commerce in a substantial way.

And there, in that *Nichols* case, that Sixth Circuit case, the plaintiff, who is an employee, contended that his employment agreement was the source of his right to arbitrate, but the Sixth Circuit disagreed and held that the employment agreement evidenced a transaction involving commerce, and, therefore, the FAA applies. And once -- under Sixth Circuit law, you know, citing *Decker v Merrill Lynch* at 205 F.3d 906, 909, quoting *Corey v New York Stock Exchange*, 691 F.2d 1205, 1212, once an arbitration is conducted under a valid arbitration contract, it is the FAA that provides the exclusive remedy for challenging acts that taint an arbitration award.

And this is -- this concept is bolstered by *Anderson v Charter*-something-or-other, which is at No. 20-5894, 2021 WL 2396231, in just June of this year where the Sixth Circuit said, essentially, that the Federal Arbitration Act establishes procedures for parties to enforce arbitration agreements in federal court. Period.

So here we have an insurance policy, which is, I think without controversy, a written contract that evidences a

[p.22]

transaction involving commerce. And both of the statutory requirements being met, it's my holding that it is the FAA that controls this case.

There are some other cases that have found that the crop insurance insurance contracts are subject to the FAA:

Great American Insurance Company v Moye, 733 F.Supp.2d 1298, at 1302. That's a Middle District of Florida case.

In re 2000 Sugar Beet Crop Insurance Litigation, 228 F.Supp.2d 992 at 995, Middle District of Alabama.

Nobles v Rural Community Insurance Services, 122 F.Supp.2d 1290, District of Minnesota.

So having established, at least in this Court's opinion, that the FAA, the Federal Arbitration Act, controls this case, the question is what result follows from that holding? Should the Court dismiss the counter-petition or allow the Respondent to amend?

The insurance company argues that dismissal is proper because of the failure to timely file the motion -- any motion to vacate, modify, or correct the award under Section 12 of the FAA, and that the federal courts of appeal across the country, including the Sixth Circuit, routinely hold that failure to comply with this statutory precondition of timely service of notice essentially forfeits the right of judicial review of the award. And that -- for that we'd cite the Corey

[p.23]

case again.

In addition, the insurance company argues that the dairy farm can't assert any defense to the petition to confirm the arbitration award, and that it could have --

that it could have raised in a timely fashion to vacate the award, citing *Skarnulis v Diversified Financial Consulting* at 886 F.Supp. 621 at 623, note 3. That's an Eastern District of Michigan case.

And this is where the dairy farm, the Respondent, argues that this is not -- its counter-petition is not a request to vacate, modify, or correct the arbitration award under the FAA, but it is separately a nullification request, and, alternatively, that since it separately moved the Court to amend its counter-petition to add a request to vacate the award under the FAA and that the proposed amendment is not untimely because the parties extended the three-month filing period of the FAA by including a one-year period for judicial review.

So it really is a parallel track that the Respondent, dairy farm, is arguing here. Parallel to the FAA. And I -- I simply am of the view that that is not what is required either under the contract or the FAA.

The counter-petition, in my view, is properly dismissed because the Respondent forfeited the right to judicial review for failing to serve notice within three

[p.24]

months after the award is filed. Under *Corey*, the Sixth Circuit has held that failure to comply with the statutory precondition of timely service of notice forfeits the right to judicial review.

And the argument to the contrary fails because the FAA provides the exclusive remedies for seeking to nullify the arbitration award. There is no parallel

procedural vehicle where the FAA controls. The FAA controls.

In addition, the Respondent relied on the *FiveCap* case, which I don't have the cite to right at my fingertips, which was a Judge Quist case, I guess.

Oh. Okay. Thank you.

FiveCap is *International Brotherhood of Teamsters General Teamsters Union Local 406 v FiveCap, Inc.*, No. 102-cv-928, 2003 Westlaw 22697173, Judge Quist case.

He expressly indicated in *FiveCap* that neither party cited any case addressing whether the three-month limit in Section 12 of the FAA is jurisdictional or merely a statute of limitations. And his conclusion in this case was in the absence of any persuasive authority or argument to the contrary, the three-month period in Section 12 is a period of limitations and may be extended by the agreement of the parties.

However, I would observe that the time limitation provided for in 20(b)(3) of the common crop insurance policy

[p.25]

doesn't attempt to extend or otherwise alter the three-month time limitation in 9 U.S.C. § 12. Instead, 20(b)(3) reflects and is consistent with the one-year time limit to seek judicial confirmation of an award under the FAA. I'd also cite 9 U.S.C. § 9 to the effect that at any time within one year after the award is

made, any party to the arbitration may apply to the court so specified for an order confirming the award.

By seeking leave to file an amended counter-petition to add a claim under the FAA, I disagree with Mr. Tallman, I believe he has acknowledged that the case law requires the Respondent to seek judicial review of the arbitration award exclusively under the FAA. And because both the original and proposed amended counter-petitions are untimely for failure to meet the three-month requirement, any amendment would be futile, and leave to appeal is properly denied. See *Doe v Michigan State University* at 989 F.3d 418, at 427, which holds that commonly understood rule under Rule 15(a) of the federal rules that the Court may deny a motion to amend if the amended complaint would not withstand the motion to dismiss for failure to state a claim and in this case for futility.

Finally, even assuming arguendo that the Court could reach the merits of the counter-petition, I am persuaded that the insurance company, Petitioner's, argument that the arbitrator did not exceed his authority as set out in the

[p.26]

reply brief, ECF No. 23 at page ID 215 to 217. On the merits, I think the Petitioner Insurance Company wins.

The last thing is whether the Court has to confirm the arbitration award, and I haven't heard any argument on that this afternoon.

So, Mr. Pattee, would you make whatever brief argument you have on that issue, and then I'll hear from Mr. Tallman, and we'll go from there?

MR. PATTEE: Thank you, Your Honor. The Federal Arbitration Act is clear that barring a valid reason to vacate the arbitration award, that it must be confirmed upon presenting a petition to the Court to confirm the award.

Simply put, the Federal Arbitration Act requires confirmation. No further case law or interpretation is needed. Thank you.

THE COURT: Thank you.

Mr. Tallman?

MR. TALLMAN: I don't have anything to add, Your Honor.

THE COURT: Thank you.

In the written submission, the insurance company emphasized that confirmation is essentially a summary proceeding, and that the Court must confirm the award where it's not vacated, modified, or corrected, citing *Wachovia Securities, Inc. v Gangale* at 125 F. App'x 671 at 676.

[p.27]

And the Respondent didn't address the -- that argument either in its written submissions or here this afternoon.

The standard for review of arbitration awards is, quote "One of the narrowest standards of judicial

review in all of American jurisprudence," close quotes. *Tennessee Valley Authority v Tennessee Valley Trades & Labor Council*, 184 F.3d 510 at 514 to 515. See, for example, *Skarnulis*, which I think I mentioned earlier, at 886 F. Supp at 623. Quote, "The parties have bargained for the arbitrator's decision and not the decision of the court," close quotes.

This Court's scope of review of an arbitration award is limited to determining whether the arbitrator, quote, "even arguably construing or applying the contract and acting -- was applying the contract or acting within the scope of his authority," close quotes. *United Paperworkers International Union v Misco, Inc.*, 484 U.S. 29 at 38.

So long as the arbitrator's award essentially drives -- draws its essence from the collective bargaining agreement, is not merely the arbitrator's, quote, "own brand of industrial justice," close quote, the award must be upheld. *Id* at 36.

Given the plain language of the FAA and the Court's limited role in confirming arbitration awards under the FAA, the award in this case is properly confirmed.

[p.28]

So the Court denies the Respondent's motion to amend and grants the Petitioner's motion to dismiss the counter-petition and confirm the award. I'm rejecting -- specifically rejecting the idea that there is a parallel procedure for nullification of an arbitration award as established in the -- to be established in the contract.

An order will issue, and because this opinion and order resolves all pending claims, a judgment will also enter in conformity with the award.

Anything further we need to cover, Mr. Pattee?

MR. PATTEE: No, Your Honor. Thank you.

THE COURT: Mr. Tallman, anything further we need to cover this afternoon?

MR. TALLMAN: No. Thank you, Your Honor.

THE COURT: Thank you.

I notice you don't stand up when you address the Court, Mr. Tallman, and while you might not like my rulings, I think that's really pretty poor form. We're adjourned.

THE CLERK: All rise, please. Court is adjourned.

(At 2:25 p.m., the matter was concluded.)

[p.29]

REPORTER'S CERTIFICATE

I, Melinda I. Dexter, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true, and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction. WITNESS my hand this date,

July 21, 2021.

/s/ Melinda I. Dexter
Melinda I. Dexter, CSR-4629, RMR, CRR
U.S. District Official Court Reporter
402 Federal Bldg
110 Michigan St NW
Grand Rapids, MI 49503

APPENDIX I

RELEVANT STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 12 of the Federal Arbitration Act, 9 U.S.C. § 12, provides:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award is made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 20 of the Common Crop Insurance Policy, 7 C.F.R. § 457.8, provides in relevant part:

> 20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.
>
> (a) If you do not agree with any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If the disagreement cannot be resolved through mediation, or you and we do not agree to mediation, you must timely seek resolution through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.
>
> (1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in anyway involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretations by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

(iii) An interpretation by FCIC of a policy provision is considered a determination that is a matter of general applicability.

(iv) An interpretation by FCIC of a procedure may be appealed to the National Appeals Division in accordance with 7 CFR part 11.

(2) Unless the dispute is resolved through mediation, the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator. All agreements reached through settlement, including those resulting from mediation, must be in writing and contain at a minimum a statement of the issues in dispute and the amount of the settlement.

(b) Regardless of whether mediation is elected:

(1) You must initiate arbitration proceedings within 1 year of the date we denied your claim or

rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and

(4) In any suit, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

(c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

7 C.F.R. § 400.766, which sets out the rules governing a request for final agency determination from the Federal Crop Insurance Corporation, provides in relevant part:

> (b) With respect to a final agency determination or a FCIC interpretation:
>
> (1) If there is a dispute between participants that involves a final agency determination or a FCIC interpretation:
>
> (i) The parties are required to seek an interpretation of the disputed provision from FCIC in accordance with this subpart (This may require that the parties seek a stay of the proceedings until an interpretation is provided, if such proceedings have been initiated); and
>
> (ii) The final agency determination or FCIC interpretation may take the form of a written interpretation or, at the sole discretion of FCIC, may take the form of testimony from an employee of RMA expressly authorized in writing to provide interpretations of policy or procedure on behalf of FCIC.
>
> (2) All written final agency determinations issued by FCIC are binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. All written FCIC interpretations and testimony from an employee of RMA are binding on the parties to the dispute, including the arbitrator, mediator, judge, or NAD.

(3) Failure to request a final agency determination or FCIC interpretation when required by this subpart or failure of NAD, arbitrator, mediator, or judge to adhere to the final agency determination or FCIC interpretation provided under this subpart will result in the nullification of any award or agreement in arbitration or mediation in accordance with the provisions in the "Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review" section or similar section in all crop insurance policies.

(4) If either party believes an award or decision was rendered by NAD, arbitrator, mediator, or judge based on a disputed provision in which there was a failure to request a final agency determination or FCIC interpretation or NAD, arbitrator, mediator, or judge's decision was not in accordance with the final agency determination or FCIC interpretation rendered with respect to the disputed provision, the party may request FCIC review the matter to determine if a final agency determination or FCIC interpretation should have been sought in accordance with § 400.767.

(i) Requests should be submitted through one of the methods contained in § 400.767(a)(1);

(ii) If FCIC determines that a final agency determination or FCIC interpretation should have been sought and it was not, or the decision was not in accordance with the final agency

determination or FCIC interpretation rendered with respect to the disputed provision:

(A) The award is automatically nullified; and

(B) Either party may appeal FCIC's determination that a final agency determination or FCIC interpretation should have been sought and it was not, or the decision was not in accordance with the final agency determination or FCIC interpretation rendered with respect to the disputed provision to NAD in accordance with 7 CFR part 11.