

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

NATIONAL ASSOCIATION OF)	
STATE FARM AGENTS, INC.,)	
)	
Plaintiff,)	
v.)	C.A. No. 02ca004089
)	Calendar 7
STATE FARM MUTUAL)	Judge Leonard Braman
AUTOMOBILE INSURANCE)	
COMPANY, <i>et al.</i>)	
)	
Defendants.)	

**PLAINTIFF’S COMMENTS ON DEFENDANTS’ FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Plaintiff, National Association of State Farm Agents (“NASFA”) submits these comments on Defendants’ Proposed Findings of Fact and Conclusions of Law.

The Partner Agent Program

The Defendants’ proposed findings of fact and conclusions of law fail to controvert NASFA’s proof that the PAP violates the Agent Agreement and the implied covenant of good faith and fair dealing. State Farm’s proposed findings (a) fail in any way to address much of NASFA’s uncontroverted proof at trial; (b) distort the evidence at trial; or (c) are not supported by the evidence at trial.

A. State Farm Has Failed to Show a Defense to NASFA’s Proof That the PAP Was Adopted and Perpetuated In Bad Faith.

State Farm’s proposed findings and conclusions do not even purport to controvert or explain NASFA’s proof that the Partner Agent Program was adopted in bad faith as part of the “grow or go” program to drive out older agents who had the AA3 or AA4 contracts that had commissions 25 to 50 percent higher than the AA97. Not only did State Farm fail to controvert

(or even address) Mr. Killingsworth's direct testimony on this point (PPFC¹ 33-36) but it also failed to explain why State Farm studied the number of non-registered agents by age (Court Ex. 2, Document SMF NASFA 1339); or why it had extensive documentation with respect to direct mail to non-registered agents (Court Ex. 2, Document SMF NASFA 1340-1343). State Farm's lack of good faith is evidenced further in its failure to explain how, in July 2005, AFE's were still requesting agents to appoint partner agents (PX 91); and why, when it purported to "correct" its July 2005 emails, State Farm permitted appointments that had been made in error, or appointments made by AFEs for non-registered agents who had failed to make appointments, to stand. The cumulative weight of State Farm's silences in the face of this evidence can only lead to the conclusion that it has no response or defense to the charges of bad faith.

B. State Farm's Defense That the PAP Ended Is Unsupported.

State Farm's principal defense--that the PAP has ended and that, in any event, both it and the RRRD were "voluntary" and did not "require referrals"—is not supported by the evidence. (DPFC² 61, 99.)

Despite the fact that the Court asked for written evidence of the instructions about the "end" of the PAP, (TR 7/27/05 at p. 52) there is not a single piece of paper that says the Partner Agent Program no longer exists or has been replaced. Court Exhibit 3, which Mr. Reichler provided in response to the Court's request for documentation on the end of the PAP, appears to document only that the RRRD was being "updated." None of the "outlines" or "frequently asked questions" (PX 13, 14 or 71) states that the PAP no longer exists. While State Farm's proposed findings of fact say that "Mr. Sikora sent an email to zone management announcing that the

¹ Plaintiff's Proposed Findings and Conclusions.

² Defendants' Proposed Findings and Conclusions.

company was instituting the RRRD, and wished to update the information contained in the former Partner Agent Database,” and refers to Court Ex. 3, document SFM NASFA 4721, as support, that document in fact neither “announces” the RRRD, nor does it refer to the “former partner agent database.” To the contrary, it says, “It is time to update the [RRRD] that is used for referring securities customers to a local registered State Farm Agent.” No AFE reading this document would have any notice that the PAP had been discontinued. Indeed, we have no idea what message the AFEs received, since State Farm failed to call any as witnesses. We do know that the agents never were told the PAP had ended. (PPFC 45.) The “updated instructions” referred to in Defendants’ proposed findings 64 (Court Ex. 3, Document SFM 4717-18) likewise direct the AFO to “update” the database. While State Farm insists that under the RRRD “the company would not choose a referral agent for the non-registered agent if he/she declined to select one,” (DPFC 65) Court Ex. 3, Document SFM NASFA 4717-18 tells a different story:

All non-registered agents should be asked to select a registered agent for referrals involving securities products needs. Customers currently assigned to the non-registered agents who contact corporate for securities products information will be referred to this selected registered agent. If a non-registered agent chooses not to select a registered agent, that agent should be made aware that:

- A local registered agent will be assigned for securities products, sales and ongoing service.
- Assignments over time could result in multiple agents servicing securities products clients within that agent’s current client base.

The message is clear: Under the RRRD, if an agent did not pick a partner, there was a risk that “multiple agents” would be servicing clients “within that agent’s current client base.”

Also, there is no support for State Farm’s contention that “no direct marketing component” was contemplated for the RRRD (DPFC 65). To the contrary, the email announcing the results of the test in Iowa states, “there are no plans to expand a direct mail marketing effort

involving non-registered agents.” (Court Ex. 3, document SFM NASFA 4722.) In other words, there was no decision to withdraw the elaborate plan for direct marketing to non-registered agents that was already in place. (PPFC 51.)

State Farm’s assertion that “the RRRD was begun on a clean slate” and “did not include appointments made under the Partner Agent Program” (DPFC 66) is contradicted by its own documents. The instructions to the AFEs calls for a “update” of the database, and far from being a “clean slate,” refers to “attached listings” to which changes “can be recorded directly on the list.” Mr. Sikora’s testimony, cited for the proposition that when the RRRD was implemented it did not include prior appointments (DPFC 66), simply does not support that point. (Sikora 7/27/05 TR 53: 12-15.) What Mr. Sikora says is that *today*, prior appointments are not included. Similarly, while Mr. Sikora testified that agents were given the opportunity to “de-select” (Sikora 7/27/05 TR 17: 10-18), nothing in Court Ex. 3 shows this option.

Mr. Sikora’s testimony on what agents were told was admittedly without foundation. He admitted that no agent had access to the materials given to AFEs—PX 9, 14 or 71 (Sikora 7/27/05 at p. 23: 22-24); there was no document in evidence that showed the change from the PAP to the RRRD, (Sikora 7/27/05, TR 24: 14-16); he could not testify that AFEs actually gave the information to agents or that agents got it. (Sikora 7/27/05, TR 25: 2-4; 13-18.) Agents would not know what was in Plaintiff’s Exhibits 9, 14, or 71 unless they asked (Sikora 7/27/05, TR 25: 22-25; 26:1.) Mr. Sikora never, himself, sent anything to agents. (Sikora 7/27/05, TR 26: 16-19.)

Sikora further testified about a document that was supposedly given to agents describing a “second look” at the PAP Program (Sikora 7/27/05, TR 27: 8-13) and one that explained the difference between the PAP and RRRD (Sikora 7/27/05, TR 27: 19-24), but neither was ever

produced. Likewise, Sikora could not say what was given to agents (Sikora 7/27/05, TR 27: 17-18). In the end, he conceded that he did not know of any document that went to the agents or any document that AFEs were instructed to give to agents. (Sikora 7/27/05, TR 28: 3-9.)

Most dramatically, the emails that corporate sent to agents in July 2005, directing them to select “partner agents” or have partner agents selected for them were never fully explained at trial. State Farm’s initial instructions to AFEs specifically say “the attached is a list of agents who currently do not have a partner registered agent.” (DX 68.) How could this be if the “Partner Agent Program” had terminated? Defendants’ Proposed Findings of Fact 72, which states that “AFEs were asked to consult with non-registered agents in their AFO’s who had not selected referral agents, or whose referral agents had retired, to see if they wanted to make a new appointment” is flatly contradicted by the source it cites—Defendants’ Exhibit 68:

“The attached is a list of agents who currently do not have a partner registered agent. Please review the attached list of registered and non-registered agents, update the list and email the updated list back to home . . . by July 15, 2005.”

Even Mr. Fisher understood it to say that agents were to select a partner or have one selected for them. (PPFC 51.)

State Farm’s characterization of Mr. Fisher’s “correction” that he instructed “ASR to advise the AFEs, and through them the agents, that participation in the RRRD was strictly voluntary, that agents were not required to appoint a referral agent, and that if an agent chose not to make such an appointment, no referral agent would be appointed for him/her” (DPFC 74) is spun from whole cloth. Nowhere does Exhibit 70 say that participation is voluntary or that if an agent chose not to make such an appointment a referral agent would not be appointed. To the contrary, it states that if the non-registered agent does not submit a selection, “the securities products department will handle inquiries on a rotation basis.” That is, as Court Exhibit 3, SFM

NASFA 4717-18 says, “multiple agents [will service] securities products clients within that agents’ current client base.”

Finally, Defendants’ proposed findings contain nothing showing that State Farm attempted to inform agents who had selected “referral agents” (or had had them selected by AFEs) that they could de-select them or that it attempted to identify agents who had made such selections. The facts show, in short, that the Partner Agent Program continued to exist, and that State Farm encouraged it to exist.

A number of other aspects of Defendants’ findings are not supported:

DPFC 21 improperly relies upon the deposition testimony of a State Farm witness for the rationale of the PAP. The only evidence of the rationale for the program that properly is of record is that State Farm told agents that customer demand required them to offer mutual funds. (PPFC 38(a).) That “demand,” in the end, was not supported by the evidence. (PPFC 56.)

DPFC 26 asserts that the agents signed another agreement with the “Company” for the sale of mutual funds. In fact, they signed no agreement with State Farm—they signed an agreement with another company that is not in evidence. (PPFC 5.)

DPFC 35’s assertions that non-registered agents were “never required to refer any customers to the partner agent” is contradicted by the documents.³ For example, Exhibit PX 8 states, “the partner’s agent will become involved with the referrals and with the marketing of the retail mutual funds to customers in their book of business.” The letter of understanding that the unregistered agent was asked to sign states: “If a customer or prospective customer expresses interest in, requests information about or appears, in your opinion, to need information about the

³ Additionally, Mr. Knapp’s testimony of July 26, 2005 referred to in DPFC 35, is taken out of context. Mr. Knapp said that agents were not required to refer customers in the context of what AFEs told them at the introductory meeting; he went on to state that agents were told that the licensed agent would be allowed to contact the policyholder of the non-registered agent and ask for their business.

products you don't handle—you refer the person to your partner for assistance and possible sale of those products.” (PX 10.) Exhibit 14, the “Registered Representative Referral Database Outline” states “this registered agent will handle referrals from the non-registered agent . . .” It goes on to say “the non-registered agent selects a registered agent of his or her choice to assist their customers with securities products needs.”

DPFC 43's assertion that direct marketing under the PAP would “only be done in collaboration with a non-registered agent” ignores the fact that direct marketing was plainly contemplated and that mutual funds marketing to customers with a non-registered agent would be “consistent” with the plans for marketing to ones with a registered agent. (Court Ex. 2 at SFM NASFA 1336.)

Finally, there was no evidence whatsoever that the Partner Agent Program could not be resurrected at any time. In fact, the July 2005 emails, and the company's benign neglect of agents who may have been forced at that time to choose partners unwillingly simply demonstrates that the program could be resurrected at any time—and it was.

Conclusions of Law

We will limit our comments on Defendants' Conclusions of Law to the points they have raised in their proposed findings. We have adequately addressed Plaintiff's contentions in our proposed findings and memorandum of law.

With respect to Section I (B) of the Agent Agreement, State Farm has a duty not to encumber agents with non-contractual requirements, particularly those that require them to refer their customers to other agents for matters not covered by the contract. This is not a case of simply “requiring two independent contractor agents to work together.” To the contrary, under

the PAP, agents were required to select a Partner Agent or have one selected for them who would then deal with that agent's clients.

Rather than address the legal issue, State Farm argues that Plaintiff's contention "crumbles against the facts." But it does not:

- State Farm asserts that no agent was ever required to have dealings with any other agent under the program. (DPFC 82.) In fact, however, it is undisputed that under the PAP, agents had to appoint another agent or have one appointed for them, and under the RRRD, they either had to appoint an agent or have one appointed on a "rotation" basis. Contrary to DPFC 83, non-registered agents indeed had to refer customers to their Partner Agent.
- The assertion that the PAP was "entirely voluntary" is totally unsupported. Agents had to pick a partner or have one picked for them.

With respect to Section I (H), the testimony was undisputed that State Farm violated its own policy and contractual undertakings that it would leave in an agent's account all policies credited to the agent. It transferred business without prior notice to agents and without a bona fide request in writing. (PPFC 50.)

State Farm's argument that the PAP and RRRD did not violate the anti raiding provision of I (H) rests upon its observations, unsupported by the facts that "State Farm took all reasonable and appropriate steps to guard against any possibility of raiding" and that "registered agents were repeatedly reminded of their obligation to refrain from raiding." (DPFC 95.) This is simply not supported by the record. In fact, there is no testimony from anyone who directly told an agent that they were to refrain from raiding. The only evidence is that a partner agent had to sign a letter of understanding that said he would not raid. (PX 10.) The mere fact that there was no evidence of actual raiding is not grounds to deny relief to Plaintiff.

State Farm's contention that there is no justiciable case or controversy (DPFC 98) because "there is no reasonable expectation that the wrong will be repeated" is unsupported.

First, the July 2005 emails (PX 91) demonstrate that there is a high likelihood of repetition. The Defendants' burden is to show there is no reasonable expectation of recurrence is a "heavy" one. *U.S. v. W.T. Grant Co.*, 345 U.S. 629 (1953). State Farm has not met that burden.

State Farm's argument that the AA3 and AA4 agreements are governed by the laws of 47 different states is raised here for the first time. This Court has considered summary judgment motions under the law of Illinois with no resort to the laws of other states.

State Farm's arguments that the RRRD and PAP were adopted in good faith are completely undercut by the Company's implementation of the Partner Agent Program in the July 2005 emails and its total failure to practice what it preaches—that the program was voluntary. Additional evidence of bad faith is set forth at length in the Plaintiff's findings and conclusions.

Select Agent Program

The facts regarding the Select Agent Program, for the most part, are not disputed: The parties have stipulated to most or all of the criteria and most or all of the benefits. The focus of controversy, therefore, is whether State Farm may lawfully implement the program under the contract. This, in turn, appears to involve three issues: Whether the Select Agent Program is a "bonus" or "award" that falls within the Company's discretion under Section II (C) of the AA3 or AA4 contract or Section II (D) of the AA97 contract; if the Select Agent Program is not a "bonus" or "award," is it a set of extra-contractual "benefits" that the company may bestow upon some agents, but not others? Third, are the criteria fairly achievable to all agents? Most of the issues here are legal; the factual differences are relatively narrow.

While State Farm now contends that the SAP is a "bonus, award or prize" program, Mr. Wright admitted at trial that the ability to broker products of other companies, eligibility to receive block assignments, internet leads, internet referrals and eligibility to receive mutual fund

referrals—all of which are confined to Select Agents—are a “benefit,” not a “bonus.” (Wright 7/29/05, TR p. 567-68.) Moreover, State Farm does not proffer any contention now as to what these terms,—“bonus,” “award” and “prize”—mean, nor did it, at trial elicit any testimony as to the meaning of those terms under the contract.

The dictionary defines them as follows:

bonus: “something in addition to what is expected or strictly due” (Merriman-Webster’s Collegiate Dictionary, 10th Ed. at 131.)

prize: “something offered or striven for in competition or contests of chance.” (*Id.* at 928.)

award: “something conferred or bestowed, especially on the basis of merit or need.” (*Id.* at 81.)

Mr. Knapp’s testimony that bonuses and awards were consideration given for productivity or production over a short-term period of 30 to 90 days is consistent with these definitions and was not contradicted. (Knapp 7/29/05, TR p. 502.) Mr. Knapp said there were no other features or conditions, such as referrals, or having a licensed sales assistant, associated with receiving a bonus, prize or award. (Knapp 7/29/05, TR p. 508.) State Farm’s Mr. Wright in fact testified about “bonuses” and “awards” in terms similar to Mr. Knapp. (*See* DPFC 116-117.)⁴ In short, the SAP is not a “bonus,” “prize” or “award.”

Of great importance, and not at all discussed by State Farm, is the fact that with the exception of mutual fund referrals, the benefits of the SAP are the very subject matter of the Agent Agreement—insurance: block assignments, internet referrals of insurance business, the

⁴ DPFC 115 misquotes Stipulation #31 of the Joint Pretrial Statement. That Stipulation says that “State Farm instituted a program known as Select Agent Program.” That Stipulation does not state that it is a bonus or award program, as State Farm would have the Court believe.

right to broker insurance products of Phoenix, Fortis, AON or other companies; or advertising for insurance. There is no question that the benefits of the SAP are the bread and butter of the Agent's Agreement. *See* AA97 (PX 3) at Preamble: "It is to our mutual interest to serve the insuring public . . ." At Section I (A): "The Agent will solicit applications for insurance . . ." Section I (G): "The fulfillment of this Agreement will be your principal occupation . . . and you will not . . . service insurance for any other company."

While State Farm contends that the Select Agent Program is "inclusive" and that its criteria are "not difficult" for agents to satisfy (DPFC 120), State Farm called no witness with first-hand knowledge of what an agent does. Rather, its witnesses sit in the executive suite at least two or three levels removed from the agents. (DX 73.) They testified in a conclusory fashion that the criteria were "not difficult" to achieve, but gave no basis for such testimony. At least 24 percent of the agents are not Select Agents. Does "not difficult" and "inclusive" mean that excluding one out of four agents is "good enough?" The Court is entitled to draw a negative inference from State Farm's failure to call a witness with personal knowledge of the difficulty of achieving the Select Agent criteria—an inference that the criteria are indeed not achievable by the 24 percent who are not Select Agents.

State Farms' argument that the LSA requirement was necessary to meet state regulatory requirements (DPFC 127) is not logical. Either states require the licenses or they don't. Similarly, the argument that the quality requirement was "not difficult to satisfy" is undercut by the fact that it was based on the Legion of Honor which excluded 30 to 35 percent of all agents. (DPFC 129-130.) As noted in Plaintiff's proposed findings, State Farm's "statistical data" is of no probative value. (PPFC 92.)

Perhaps most telling about State Farm's quality criterion is its admission that when a single agent complained in 2004 that he would not become a Select Agent except for the profitability component of the quality criterion (DPFC 133), State Farm changed that requirement. But who was this unnamed single agent who prompted the elimination of the profitability component in 2004, when NASFA and its members had been complaining about this criterion to no avail since this case was filed in 2001? What standard did State Farm use to "include" that single, unnamed agent, when the same standard excluded NASFA members?

With respect to product availability, Mr. Wright's testimony that State Farm only asked agents to give "good faith" verbal agreements to make all products available to customers is undercut by PX 31. That document, an "overview" of the SAP, states at page 516 that referrals will be measured by "product penetration in a State Farm household," that "if the agent hasn't cooperated in making our products available, he/she will only have 2 years left on their Select Agent certification." The document further notes that an agent's referrals will be monitored and reported.

Contrary to State Farm's contentions that "it has never been difficult for an agent to have a business plan" and that "State Farm instructs its AFEs to receive agents business plans in confidence" State Farm's documentation requires that the plans have goals, action plans and a year long budget that it is evaluated throughout the year. (PX 33.) No document states that any plan will be accepted or that no plan was ever deemed unacceptable. No document states that plans are received or will remain in confidence.

Conclusions of Law

State Farm's contention that the SAP is not a breach of contract because the Company has the discretion to provide "awards and benefits" above and beyond agent compensation and

that “there is no contractual entitlement to the awards and benefits available under the Select Agent Program” founders on State Farm’s erroneous contention that the Select Agent Program is an “award.” Because the benefits are in fact lines of insurance, insurance referrals, advertising and other bread and butter aspects of the insurance business, the SAP deprives non-Select Agents of this subject matter. As set forth in Plaintiff’s Proposed Findings and Conclusions, if the Agent Agreement means anything, it must mean the same thing for all agents. “Insurance” cannot mean different things for different agents. State Farm’s contention that, for example, there was never any right to block assignments in the contract because block assignments are not specifically mentioned is no more persuasive than saying insurance on Ford automobiles is not part of the contract because Ford automobiles are not specifically mentioned. If State Farm can take away block assignments and whole classes of referral business by calling them “prizes,” or “awards” then any category of insurance can be a “prize.”

The same argument applies to advertising. Historically, State Farm made advertising benefits available to all. Now co-op advertising is available only to Select Agents. State Farm has basically eliminated the advertising provision in the contract. State Farm could have, when it promulgated these contracts, reserved to itself the right to deny certain benefits to classes of agents or groups of agents. It did not. It cannot do so now.

With respect to good faith, State Farm’s contentions that the program is equally available to all and that all could qualify if they chose to do so (DPFC 151) is unsupported by competent evidence. Availability, moreover, does not make the program lawful. There is no reason why agents should have to do more to enjoy the benefits for which they bargained at the outset. The self-serving change of quality criteria in 2004, as noted, is highly revealing.

Finally, State Farm’s contention that nothing in the contract prohibits it from creating different classes of agents is contradicted by the law. State Farm has elected to use one form of agreement at any one time; that agreement either means something or it does not. State Farm has the option of creating a second form of agreement if it so chooses. The Restatement of Agency’s assertion that a principal may assist an agent in making a sale is a far cry from saying that a principal may ignore the terms of a uniform agreement and treat one agent under the agreement differently from another when the agreement provides no basis for that distinction in treatment. *Bertera Chrysler Plymouth Inc. v. Chrysler Corp.*, 992 F. Supp. 64 (D. Mass. 1998) is inapposite. In that case, the court’s finding that there was no violation of the implied covenant of good faith and fair dealing was based upon the fact that the contract specifically provided that the conduct at issue—approval of acquisition of another dealership—was to be handled on a deal-by-deal basis.

Restrictions on Sales of New Products and Policies

State Farm’s proposed findings fail to squarely address the issue whether the Company may, in the absence of natural disasters or other circumstances beyond its control, impose restrictions on the writing of new policies when the “reasons” for those restrictions are or have been completely foreseeable and are the results of actions that State Farm has taken.

At the outset, State Farm makes no distinction between forms of the AA3 and AA4 contracts on the one hand and the AA97 on the other. As noted in our proposed findings, the AA3 and AA4 do not contain language giving the company the right to prescribe “limitations on the submission of applications by individual agents, market area, line of coverage, policy type and Company or by other means.”

State Farm's contention that NASFA's witnesses "acknowledged that these contracts give State Farm the right to impose restrictions on the writing of new policies" overstates their testimony.⁵ Other quotes are incomplete (Knapp Depo. at p. 44: 17-19) or unclear. (Knapp Depo. at p. 47: 5-11.) What State Farm has done is confused deposition questions that concerned the company's restrictions on new policies in the wake of natural catastrophes and restrictions as the result of the foreseeable loss of money.

State Farm's account of its decision-making process (DPFC 170) is impressionistic, general and conclusory. While State Farm contends that "the company set specific profitability targets based on historical loss trends and the rate adequacy of each market" (DPFC 170) it failed to offer one single profitability target, one specific loss trend or any example of rate adequacy. Moreover, not a single document was produced to support this generalized testimony.

Similarly, although State Farm contends that it was "very concerned about Agents," in imposing restrictions, this self-congratulatory testimony tells us nothing about how the Company took Agents' concerns into account. And the fact that agent income rose during the period that it was imposing restrictions because of higher rates fails to address the fact that if State Farm had used other means, agent income may have been higher.

State Farm's findings, moreover, are totally devoid of any evidence showing a connection between the agent agreement and State Farm's restrictions. Assuming that State Farm had discretion under the Agreement to limit sales, the issue is how it exercised that discretion. Mr. Wright's lengthy discussion of how the Company decided to restrict business omitted any mention of the agreement, as did Ms. Bitzer's. There was absolutely no testimony to show that the company understood the agent agreement to be a factor in deciding whether to write new

⁵ Knapp Depo. at p. 40: 11-15: The Company may determine underwriting rules; Swift Depo. at p. 60: 9-12: State Farm has the right to make a final decision on whether to write a policy.

business or not. And the absence of any documentation reflecting its decision-making process warrants a negative inference that any such documentation would show that the Company did not consider the Agent Agreement. Finally, State Farm's assertion that limitations remain in only Texas, Louisiana and Florida is undercut by its own exhibit, DX 45, which shows restrictions continue to exist in Mississippi, North Carolina, West Virginia and California.

Conclusions of Law

State Farm's construction of the contract—that its power to determine “all policy forms and provisions, premiums, fees and charges for insurance . . .” gives it discretion to restrict the writing of all new business would, if accepted, give the Company power to stop writing insurance entirely. Likewise, it could stop writing insurance in any jurisdiction that it so decided; it could stop writing insurance during the third week of every month; or it could stop writing insurance to anyone whose last name began with a “C.” (DPFC 73.)

State Farm's contention that limitations imposed after natural disasters are no different than those imposed after foreseeable adverse financial conditions is sophistry. What justified State Farm's limitations in the past after natural disasters was a doctrine of economic impossibility or impracticability. What is at issue here is whether the Company has the discretion to stop writing policies when they are the result of conditions within the Company's control. Certainly under the AA3 and AA4, the Company does not have the discretion, as a matter of contract, to stop writing new policies.

The cases cited by State Farm are not germane because they concern limitations of the Company imposed after natural disasters. *Hemmans v. State Farm Insurance Co.*, 653 So.2d 69 (La. App. 3/21/95) involved a loss control program applicable only to individual agents who were not profitable. *Appling v. State Farm Mutual Automobile Insurance Co.*, 340 F.3d 769 (9th

Cir. 2003) held that the risk provision authorized an exposure management program adopted in response to Hurricane Andrew and the Northridge Earthquake in California. The issues raised here were not before those courts.

State Farm's arguments that its decisions to restrict the sale of new business were consistent with the implied covenant of good faith and fair dealing are simply not supported by the record. State Farm has pointedly ignored the testimony of Mary Bitzer, which showed that State Farm's decision making process was anything but rational, business-like or sensible. Ms. Bitzer's testimony, moreover, completely undercut Mr. Wright's conclusory and self-serving testimony at trial. Finally, even putting apart Ms. Bitzer's testimony, State Farm's testimony at trial was a far cry from what State Farm would have the Court believe—that "State Farm's limitations on new business were narrowly tailored to the specific circumstances of each different market in which it operated." (DPFC 181.) The process was, indeed, infected with bad faith. The decision making was neither rational nor supported by facts, and was a violation of the implied covenant of good faith.

Brokering For Other Insurers

While State Farm goes to great lengths to talk about its purported justifications for refusing brokerage (DPFC 185-191) it is not disputed that its witnesses testified in deposition that there were no studies or evidence to support the reasons that it claimed for refusing to permit brokering. (PPFC 194-197.) Rather, as State Farm admits, when it denied agents' requests for brokering, it gave them a litany of reasons (DPFC 189) but it was unable to cite any substantiation for those reasons.

While State Farm speaks of the need to minimize "reputational risks" it failed to cite one single example of a customer who blamed State Farm for another insurer's unreasonable

behavior. State Farm has failed to explain why it allows brokering from some companies, and apparently assumes these risks with them. (DPFC 186.) Likewise, the supposed conflict in fiduciary duties (which is derived from snippets of NASFA’s witnesses’ testimony) is not reconciled with the brokering of Fortis, Phoenix Mutual, AON, and other products, nor is the threat of loss of “trade secrets” to these companies. Similarly, there is no explanation of why State Farm’s trade secrets are not threatened with brokering by these other companies.

The cases State Farm cites for the proposition that a “detrimental effect” upon an agent does not violate the implied covenant of good faith are not relevant since that is not the point the agents are making here. Rather, State Farm has to exercise its discretion reasonably and honestly. (Cf. UCC 1-201(19) good faith is “honesty in fact.”) State Farm has violated the implied covenant by telling agents one thing—that there are various “factors” it considers—when in fact it does not.

Finally, State Farm’s contention that Agents were not substantially harmed is not supported by the increase in agent compensation. (DPFC 215.) There is no showing as to what the agents would have made if the brokerage requests had been granted.

Mandatory Meetings

While there are differences in details with respect to the mandatory meetings, there is no dispute as to the essential facts: State Farm requires agents to attend a once-yearly meeting that purports to be on the subject of ethics. The question is whether State Farm can require this meeting.

State Farm’s construction of the Agent Agreement—that the term “daily activities” means “the types of conduct agents are engaged in on a daily basis” eviscerates the meaning of the provision when taken in full: “You have full control over your daily activities, with the right

to exercise independent and judgment as to the time, place, and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement.” The Agent Agreement, moreover, also provides that State Farm will only “invite” agents to meetings, and very specifically states that “we do not seek, and will not assert, control of your daily activities.” (Preamble.) There is only one construction that these provisions can allow—that is, that agents cannot be forced to go to meetings.

The Agreement’s provisions that State Farm will not control the Agent’s daily activities, and that the agent has full control over them are specific provisions that override the more general statements that the agent will conduct business in a lawful manner or cooperate with the Company. *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 984 F.2d 223 (7th Cir. 1993). State Farm’s cases are inapposite: they concern the issue whether a person was an independent contractor or “employee.” They do not shed light on the issue of the meaning of the State Farm Agent Agreement. Similarly, State Farm’s citation of the Restatement is not controlling. Nothing in the Restatement or the cases cited by State Farm, stands for the proposition that a principal may give directions to an agent contrary to the agreement of the parties.

State Farm may achieve its ends by instructing agents to conduct themselves in an ethical manner. It can even direct them to learn ethical principals. But it cannot, contrary to its agreements, require that they attend certain classes.

RESPECTFULLY SUBMITTED,

DATED: September 23, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2005 a true and correct copy of “PLAINTIFF’S COMMENT ON DEFENDANTS’ FINDINGS OF FACT AND CONCLUSIONS OF LAW and PLAINTIFF’S POST TRIAL MEMORANDUM IN REPLY TO THE POST TRIAL MEMORANDUM OF DEFENDANT STATE FARM was served upon the following attorneys of record for Defendants herein, by Federal Express:

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