

### **Lawsuit Update**

As of today, the judge is still considering the motions for summary judgment that were presented to the court in August. Should the judge award a summary judgment to one side or the other on all or some issues, then according to the District of Columbia court rules, both sides must participate in a mandatory mediation process before a trial on the outstanding issues takes place. The judge recently moved the date for mediation from January 15 to February 15.

It is tempting to assign some significance to the postponement. Although it could mean that the judge believes that he will have arrived at a decision by February 15, it could also simply mean that the judge needs more time to consider the motions and that there could be additional postponements of the mediation date. We will inform our members of any court decisions as soon as they are made.

### **Do Agents Sell?**

In the Fall issue of *The Mirror*, we included summaries of the depositions of various State Farm officials. Never in the history of NASFA have we received more response to *The Mirror* than we did on the articles where Chuck Wright and Vince Trosino discuss whether State Farm agents **sell**. Although we leave it to agents to explain why Wright and Trosino would make such statements, we want to provide the following background. Included in the legal definition of what constitutes a franchise is the requirement that you must **sell** something. Although you can do things other than **sell**, such as “offer” or “distribute,” and still qualify as a franchise, in the experience of most State Farm agents, the term **sell** seems to be an excellent description of what we do on a daily basis.

A fair interpretation of franchise law is that it protects independent business owners who entered into an agreement to market a company’s products or services from any company effort to take away the fruits of the owner’s labor. To put it more simply, once the independent business owners reach a certain level of prosperity, many companies have tried to reach back into their pockets and take away substantial amounts of the originally-promised compensation or other benefits. In many cases, it was the owners’ hard work and willingness to risk their own capital that made both the independent business owner and the parent company successful.

If any of this sounds familiar, then you can better understand why State Farm management does not want agents to be declared franchises. However, the legislators of many states have determined that many independent business owners are entitled to receive additional legal protection from larger parent companies by creating franchise laws. To put it simply, by attempting to deny that State Farm agents **sell**, management may be trying to prevent State Farm agents from receiving the benefit of franchise laws.

### **Auto Exception List**

It appears that agents in some zones are being allowed exceptions to the current auto underwriting rules that govern the selection of raw new business. In one zone, an auto underwriter recently informed an agent that, in order to receive an exception, he must first meet the following qualifications: **1) Incurred lost ratio of 63% or less, 2) Licensed Staff, 3) Financial services registered rep, 4) Bank certified, and 5) Select agent.**

We are concerned when any group of agents is given preferential treatment. Individual markets vary. Such variances affect the loss ratio of a given agent as well as the demand for either bank or financial services products. We believe that every consumer should have an opportunity to acquire insurance at a competitive rate, regardless of these local factors or business and marketing decisions of individual agents. NASFA has always believed that every independent contractor should be treated the same and that every consumer should have access to the State Farm products sold by its agents.

**Agent E&O Claims, or are they?**

In what has become a very disturbing, convoluted situation, we are receiving more and more reports from agents who have been forced to pay what has been represented as the \$1,000 deductible provided for in their Errors and Omissions insurance policy. At the time agents are informed that they must either write a check to State Farm for \$1,000 or agree to a payroll deduction, they are told that it is because the company paid a claim based on a “commitment made by an agent or by a staff person.” The implication is that if it had not been for the agent or staff member’s commitment, State Farm would not have been obligated to pay the claim. If it were that simple, then perhaps there is some justification for the collection of \$1,000 and the submission of an E&O claim. But here is where it becomes disturbing and convoluted.

- 1) In the cases we are aware of, there was no clear explanation to the agent as to just what the commitment that the agent made was or how this commitment violated the insuring agreement between the company and the customer.
- 2) A careful examination of the E&O policy, provided by American Home Assurance Company, indicates that the \$1,000 deductible will be subtracted from “the total amount resulting from each claim” and *not* paid up front by the agent. (See Section II, Conditions.)
- 3) In every case that we have been made aware of, *no* formal E&O claim was submitted by either the agent or the company.

Such practices can only generate their own set of questions.

- 1) If no E&O claim is being submitted, and therefore no claim is being paid, why is State Farm collecting the \$1,000 deductible?
- 2) What happens to the \$1,000? Who gets to keep it or where is it applied? Is it treated as a subrogation payment and is it therefore used to reduce the total amount incurred on the loss or is it used to pay for the zone office Christmas Party?
- 3) If the \$1,000 isn’t the E&O deductible, then what is it? Does this mean that State Farm can simply impose a \$1,000 cash penalty on any agent any time it wants to do so?
- 4) If State Farm can collect \$1,000 from an agent, why not \$10,000 or \$100,000. Where is the provision in the Agent’s Agreement that allows this practice. More important, where is the provision for appeal or any other form of due process before the \$1,000 is forcibly surrendered?

NASFA will continue to explore this issue. Should any agent have any additional information about this practice that they would be willing to share, either openly or anonymously, please contact NASFA Headquarters by phone, letter, fax or e-mail. We will keep our members informed about further developments.

**Please remove me from your fax list. My fax # is (    ) \_\_\_\_\_ - \_\_\_\_\_.**