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## State Farm Salvage Vehicles

### UPDATE ON SALVAGE TITLE LITIGATION

February 16, 2007

VIA FACSIMILE (405) 232 8330

David V. Jones

Jones, Andrews & Ortiz, P.C.

21 E Main St., Ste. 101

Oklahoma City OK 73104 2400

Re: Patrick A. Mays and Valerie A. Mays v. State Farm Insurance

Company, et al., Rogers County Case No. CJ-2006-58  
Dear Mr. Jones:

Upon review of your client's objections and responses that you served in response to Plaintiffs' Third Set of Requests for Production of Documents and Fourth Set of Requests for Production of Documents to State Farm Mutual Automobile Insurance Company, we believe that certain responses are incomplete and require supplementation. We set forth our position below. Further, we believe certain objections are groundless and must be withdrawn. This is our good faith attempt to resolve this dispute without involving the Court.

We set forth below our discovery followed by your objections and then our grounds for seeking supplementation.

**REQUEST FOR PRODUCTION NO. 41:** Produce all studies, reports, bulletins, memos or similar documents at any time during the three year period prior to your purchase of the subject vehicle which discuss, reference or pertain to any evaluation by you of safety hazards associated with improperly repaired, collision damages motor vehicles.

**STATE FARM'S RESPONSE:** Defendant objects that this Request incorrectly assumes that State Farm purchased the subject vehicle in the handling of a claim. Subject to and without waiving the foregoing objection, Defendant states that does not have any studies, reports, bulletins, memos, or similar documents that discuss, reference, or pertain to any evaluation of safety hazards

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associated with improper repairs of the subject vehicle in connection with collision damage. To the extent this Request purports to demand a further response, Defendant objects that this Request is overly broad, not sufficiently limited in time or geographic scope, and seeks information irrelevant and immaterial to Plaintiff's claims herein. This Request purports to demand a nationwide search for responsive information, and the probative value of the information sought is outweighed by the time and expense and burden placed upon Defendant if such discovery is permitted. Defendant further objects to this Request to the extent that it improperly purports to demand (i) confidential and proprietary information of Defendant; (ii) production of private information of individuals not parties hereto that is protected from disclosure under State and Federal law, including without limitation the Drivers Privacy Protection Act, the Gramm Leach Bliley Act, or any other privacy statutes; or (iii) information protected under the attorney-client privilege, the attorney work product protection, the Illinois Self-Evaluative Privilege, and other state statutory and common law privileges.

**BASIS FOR SUPPLEMENTATION:**

We request that you remove your objections to Request for Production No. 41 and provide a complete, unqualified response to the foregoing Request for the following reasons:

**State Farm's acquisition of the subject vehicle**

State Farm objects to this Request because it "incorrectly assumes that State Farm purchased the subject vehicle in the handling of a claim." The back of the Texas Certificate of Title for this vehicle lists "State Farm Insurance Co." as "Purchaser" of this vehicle on March 17, 1999. Whether State Farm may consider itself something other than a "purchaser" of the subject vehicle is beside the point. State Farm is shown to be a "purchaser" of the vehicle in the title history.

**Overly broad**

This Request is not overly broad. It asks for all studies, reports, memos or similar type documents that relate to a specific subject: evaluation of safety hazards associated with improperly repaired, collision damaged motor

vehicles. The burden is upon State Farm to identify and specify what, exactly, is overbroad about this Request.

**Not sufficiently limited in time or geographic scope**

The Request is limited in time to the period of three years before State Farm's purchase of the subject vehicle. As discussed above, State Farm purchased the vehicle on March 17, 1999. To impose a geographic scope on this Request would make no sense. Plaintiff does not know from which State Farm corporate office such a report, memo, etc. would be generated. The Request does not relate to laws of any particular state, but rather asks for documents concerning a safety issue which would be the same regardless of the state in which any particular study or report would have been generated.

**Burdensome**

State Farm claims that a "nationwide search for responsive information" would be overly burdensome. One would assume that a corporation the size of State Farm would have some kind of cataloging or indexing system to facilitate access to any reports or studies that State Farm itself prepared or authorized for its own use. If so, then utilizing such a cataloging or indexing system to search for studies or reports of the type requested would not be burdensome. If State Farm's system for accessing its own reports is so inefficient that the information requested is not easily accessible, that is not a legitimate excuse for nonproduction. As the Oklahoma Supreme Court stated, quoting from a federal district court case, "Plaintiffs should not suffer if the information is not easily accessible because defendants have an inefficient filing system." *Farmers Ins. Co. v. Peterson*, 2003 OK 99, ¶ 3, 81 P.3d 659.

**Not calculated to lead to admissible evidence**

The requested documents could lead to admissible evidence of notice to State Farm and its knowledge of the potential safety threat posed by wrecked vehicles that were improperly repaired, which is one of the elements of the fraud claim. Such evidence is also relevant for the punitive damage claim. Oklahoma's punitive damages statute, Okla. Stat. tit. 23, § 9.1, specifically provides that

a jury award of punitive damages must be based upon factor including:

1. The seriousness of the hazard to the public arising from the misconduct;

\* \* \* \*

4. The degree of the Defendant's awareness of the hazard and of its

excessiveness;

5. The attitude and conduct of the Defendant upon discovery of the misconduct

or hazard;

### **Confidential and proprietary information**

The Protective Order entered by the Court resolves the objections based on claims of confidential and proprietary information.

#### **(a) Production of private information protected by Drivers Privacy Protection Act:**

The Drivers Privacy Protection Act does not apply to prevent disclosure of the information requested. This act applies to state department of motor vehicles and its agents. 18 U.S.C. § 2721(a). Even if it did apply to State Farm, the Act allows disclosure of this information "for use in connection with any civil.... proceeding in any Federal, State, or local court ...." 18 U.S.C. § 2721(b)(4).

#### **(b) Production of private information protected by Gramm Leach Bliley Act:**

The Gramm Leach Bliley Act does not apply to prevent disclosure of the information requested. This Act applies to the disclosure of "nonpublic personal information" by financial institutions, including insurance companies. "Nonpublic financial information" is defined as "personally identifiable financial information," either provided by the consumer to the financial institution, resulting from the consumer's transaction, or otherwise obtained by the financial institution. 15 U.S.C. § 6809(4)(a). The Act allows disclosure "to respond to judicial process..." 15 U.S.C. § 6802(e)(8).

#### **(c) Attorney-client privilege**

We fail to see how the attorney-client privilege could apply since we are seeking records created by State Farm

and not by counsel. Further, this litigation does not include any State Farm insureds whose vehicles were declared a salvage loss by State Farm.

In the context of discovery of a claim file, the Oklahoma Supreme Court in *Scott v. Peterson*, ¶ 7, stated “Generally the mere status of an attorney-client relationship does not make every communication between attorney and client protected by the privilege. Consequently, the party seeking to assert the privilege must show that particular documents in the claims file are privileged, and this it did not do.”

*Id.* At a minimum, State Farm must produce a privileged log and produce the documents under seal with the Court. State Farm also claims exemption from discovery invoking the work product doctrine. This claim requires distinguishing between (1) communications and things prepared in anticipation of litigation or for trial by or for another party or by or for the representative of that other party, etc., that may be discoverable and (2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, of which a court shall protect against disclosure. 12 O.S. 2001 § 3226 (B) (2). Ordinary work product prepared in anticipation of litigation or trial is discoverable if the party seeking the materials makes the required showing, but opinion work product prepared in anticipation of litigation or for trial is not discoverable except in extraordinary circumstances. *Ellison v. Gray*, 1985 OK 35, 702 p.2d 360, 363; 12 O.S. 2001 § 3226 (B)(2).

State Farm bears the initial burden of showing that the specific communications in the claims file, either individually, or as a class, are (1) prepared in anticipation of litigation or for trial, etc. or (2) not discoverable as the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. 12 O.S. § 3226 (B)(4). And see *Hurt v. State*, 1956 OK CR 88, 303 P.2d 476, 481 (burden is upon the party asserting the privilege to show the relationship of attorney and client and other facts to bring the evidence within the terms of the statute pertaining to privileged communications.)

**(d) Illinois Self-Evaluative Privilege**

The existence of a privilege is the subject of Oklahoma State law. 12 O.S. §2501 is entitled “Privileges Recognized Only as Provided.” That section states: Except as otherwise provided by constitution, statute or rules promulgated by the Supreme Court, no person has a privilege to:

1. Refuse to be a witness;
2. Refuse to disclose any matter;
3. Refuse to produce any object or record; or
4. Prevent another from being a witness or disclosing any matter or producing any object or record.

The “Illinois Self-Evaluative Privilege” is not a recognized privilege in Oklahoma. This privilege claim is frivolous. Even if a Court were to evaluate your claim under Illinois law, the claim would fail. The Illinois Self-Evaluative Privilege found in the Illinois Insurance Code, 215 ILCS 5/155.35. The privilege applies to “insurance compliance self-evaluative audit documents” which are “documents prepared as a result of or in connection with and not prior to an insurance compliance audit.” § 155.35(g)(2). An “insurance compliance audit” means “a voluntary, internal evaluation, review, assessment, or audit not otherwise expressly required by law of a company activity regulated under [the Illinois Insurance’ Code, or other State or federal law.... designed to identify and prevent noncompliance and to improve compliance with those statutes....” §155.35(g)(1).

An insurance company asserting the insurance compliance self-evaluative privilege has the burden of demonstrating the applicability of the privilege. Then, the burden shifts to the party seeking disclosure to show one of the three bases for the court to require disclosure of the material:

- (1) the privilege is asserted for a fraudulent purpose;
- (2) the material is not subject to the privilege; or,
- (3) even if subject to the privilege, the material shows evidence of noncompliance with State and federal statutes, rules, and orders and the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time.

[§ 155.35(c)(2); (e)(1).]

As a threshold matter, please provide your authority permitting or compelling an Oklahoma District Court to apply an Illinois statute based upon a privilege claim that is not recognized under Oklahoma law. Please also provide a privilege log that would permit the District Court to rule upon this claim of privilege.

**REQUEST FOR PRODUCTION NO. 42:** Produce all studies, reports, bulletins, memos or similar documents prepared at any time during the three year period prior to your purchase of the subject vehicle that compare the quality or standard of repairs performed on vehicles that received a branded salvage title to the quality of repairs performed upon vehicles that required a branded salvage title but did not receive one.

**STATE FARM'S RESPONSE:** Defendant objects that this Request incorrectly assumes that State Farm purchased the subject vehicle in the handling of the claim. Subject to and without waiving the foregoing objection, Defendant states that does not have any studies, reports, bulletins, memos, or similar documents that discuss, reference, or pertain to any comparison of the quality or standard of repairs performed on the subject vehicle. To the extent this Request purports to demand a further response, Defendant objects that this Request is overly broad, not sufficiently limited in time or geographic scope, and seeks information irrelevant and immaterial to Plaintiff's claims herein. This request purports to demand a nationwide search for responsive information, and the probative value of the information sought is outweighed by the time and expense and burden placed upon Defendant if such discovery is permitted. Defendant further objects to this Request to the extent that it improperly purports to demand (i) production of private information of individuals not parties hereto that is protected from disclosure under State and Federal law, including without limitation the Drivers Privacy Protection Act, the Gramm Leach Bliley Act, or any other privacy statutes; (ii) information protected under the attorney-client privilege, the attorney work product protection, the Illinois Self-Evaluative Privilege, and other state statutory

and common law privileges; or (iii) confidential and proprietary information of Defendant.

**BASIS FOR SUPPLEMENTATION:**

We request that you remove your objections to Request for Production No. 42 and provide a complete, unqualified response to the foregoing Request for the reasons discussed in the Basis for Supplementation for Request No. 41, *supra*.

**REQUEST FOR PRODUCTION NO. 43:** Produce your standards, procedures and/or guidelines for inspecting previously wrecked vehicles before you agree to insure them.

**STATE FARM'S RESPONSE:** Defendant objects that this Request incorrectly assumes that State Farm inspects vehicles, whether previously wrecked or otherwise, as a precondition of issuing insurance. Defendant further objects that this Request is overly broad, not sufficiently limited in time or geographic scope, and seeks information irrelevant and immaterial to Plaintiff's individual claims against this Defendant relating to the specific vehicle at issue in this case. Plaintiffs do not allege that they were denied insurance by Defendant, and the probative value of the information sought is outweighed by the time and expense and burden placed upon Defendant if such discovery is permitted. Defendant further objects to this Request to the extent that it improperly purports to demand (i) information protected under the attorney-client privilege, the attorney work product protection, the Illinois Self-Evaluative Privilege, and other state statutory and common law privileges; or (ii) confidential and proprietary information of Defendant.

**BASIS FOR SUPPLEMENTATION:**

We request that you remove your objections to Request for Production No. 43 and provide a complete, unqualified response to the foregoing Request for the following reasons:

**Assumption that State Farm inspects vehicles as a precondition to insuring**

The Request does not assume that State Farm inspects vehicles before insuring them; rather it requests any standards, procedures and/or guidelines for inspecting



previously wrecked vehicles before insuring them if any such standards, procedures and/or guidelines exist. If State Farm never inspects vehicles before insuring them and thus has no standards, procedures and/or guidelines regarding inspection of previously wrecked vehicles before insuring them, State Farm can respond that it has no such documents.

**Not calculated to lead to admissible evidence**

The requested documents could lead to admissible evidence of State Farm's knowledge of the potential safety threat posed by wrecked vehicles that were improperly repaired, which is one of the elements of the fraud claim. The requested documents could also lead to admissible evidence of actual damages (loss of value of the subject vehicle) in that if State Farm requires some type of inspection of previously wrecked vehicles before agreeing to insure them, such vehicles would be more difficult and potentially more costly to insure, affecting the market value of such vehicles. Such evidence is also relevant for the punitive damage claim, as described in the Basis for Supplementation following Interrogatory No. 41. The Plaintiff also requests supplementation of the Response for the reasons discussed in the Basis for Supplementation for Request No. 41, *supra*.

**REQUEST FOR PRODUCTION NO. 44:** Produce all documents that contain or describe your standards or any limitations on your willingness to insure vehicles that have previously been branded with a salvage, rebuilt or similar branded title.

**STATE FARM'S RESPONSE:** Defendant objects that this Request is overly broad, not sufficiently limited in time or geographic scope, and seeks information irrelevant and immaterial to Plaintiff's individual claims against this Defendant relating to the specific vehicle at issue in this case. Plaintiffs do not allege that they were denied insurance by Defendant with respect to any vehicle, and accordingly the probative value of the information sought is outweighed by the time and expense and burden placed upon Defendant if such discovery is permitted. Defendant further objects to this Request to the extent that it improperly purports to demand (i) information protected

under the attorney-client privilege, the attorney work product protection, the Illinois Self-Evaluative Privilege, and other state statutory and common law privileges; or (ii) confidential and proprietary information of Defendant.

**BASIS FOR SUPPLEMENTATION:**

We request that you remove your objections to Request for Production No. 44 and provide a complete, unqualified response to the foregoing Request for the following reasons:

**Denial of insurance to the Plaintiff for the subject vehicle**

The Plaintiff testified in his deposition that he called the State Farm insurance agency that was already insuring the subject vehicle and, without disclosing that it was the vehicle they were already insuring, asked if they would insure for full coverage a vehicle with a salvage title and the agency said no. (Deposition of Patrick Mayes page 170). Ultimately, when the Plaintiff told the agency that they were already insuring the vehicle, the agent told the Plaintiff that the vehicle would still be insured for “whatever we determine it’s worth.” (Deposition at page 171).

This initial statement by a State Farm insurance agent that a vehicle with a salvage title could not be insured for full coverage shows that State Farm appears to have limitations on its willingness to insure a vehicle with a salvage, rebuilt, or similar title. This Request seeks documents describing any standard or limits on willingness to insure such a vehicle. If State Farm has such a policy or practice, it likely has some documentation concerning the policy or practice.

**Not calculated to lead to admissible evidence**

The requested documents could lead to admissible evidence of State Farm’s knowledge of the potential safety threat posed by wrecked vehicles that were improperly repaired, which is one of the elements of the fraud claim. The requested documents could also lead to admissible evidence of actual damages (loss of value of the subject vehicle) in that if State Farm limits its willingness to insure vehicles with salvage or rebuilt titles, such vehicles

would be more difficult and potentially more costly to insure, affecting the market value of such vehicles. Such evidence is also relevant for the punitive damage claim, as described in the Basis for Supplementation following Interrogatory No. 41.

The Plaintiff also requests supplementation of the Response for the reasons discussed in the Basis for Supplementation for Request No. 41, supra.

**REQUEST FOR PRODUCTION NO. 45:** Produce all of the total loss records related to the subject vehicle which you reviewed in connection with your determination that you were unable to confirm that a branded certificate of title was obtained.

**STATE FARM'S RESPONSE:** Defendant objects that this Request as vague and ambiguous in its use of the term "total loss records," and further objects to this Request on the extent that it improperly assumes that State Farm made a determination that a branded certificate of title was required for the vehicle at issue in this action. Subject to and without waiving the foregoing objection, to the extent that this Request seeks production of information relating to damage that the vehicle at issue in this case sustained on or about January 6, 1999 and State Farm's handling of the insurance claim relating to that damage, State Farm states that upon entry of an appropriate confidentiality order, State Farm will produce relevant portions of its claim file relating to its prior acquisition of the subject vehicle after it was damaged in or about January, 1999, which material will include documents referencing the damage to the vehicle, titling of the vehicle, and the actual cash value of the subject vehicle at that time. Any documents in State Farm's possession relating to State Farm's handling of the total loss insurance claim for the subject vehicle, other than privileged attorney-client or work product documents, would be included in those materials.

To the extent that this Request purports to demand further response, State Farm objects to this Request on the grounds that it improperly purports to seek production of (i) private information of individuals not parties hereto that is protected from disclosure under State and Federal

law, including without limitation the Drivers Privacy Protection Act, the Gramm Leach Bliley Act, or any other privacy statutes; (ii) information protected under the attorney-client privilege, the attorney work product protection, the Illinois Self-Evaluative Privilege, and other state statutory and common law privileges; and (iii) the confidential and proprietary information of State Farm.

**BASIS FOR SUPPLEMENTATION:**

We request that you remove your objections to Request for Production No. 45 and provide a complete, unqualified response to the foregoing Request for the following reasons:

**Vague and ambiguous term**

The term “total loss records” cannot be considered “vague and ambiguous” to Defendant because that term was taken directly from the Assurance of Voluntary Compliance, paragraph 4:

State Farm believes that throughout its history its commitment to complying with the various State Branded Title laws has been steadfast, but that even with that continued commitment to compliance with all State Branded Title laws, after conducting a review of its vehicle total loss records from the period beginning June 1, 1997 through the present, State Farm was unable to confirm through its own records that a branded certificate of title was obtained for certain vehicles that may have required one.” [Emphasis added.]

**Assumption that State Farm determined a branded title was needed for subject vehicle**

The Request does not assume that State Farm determined that a branded title was required for the subject vehicle, but rather that a branded title was not obtained. The Request is based on the above-quoted statement from the Assurance of Voluntary Compliance that State Farm reviewed certain documents and “was unable to confirm ... that a branded certificate of title was obtained for certain vehicles that may have required one.” (Emphasis added.) The subject vehicle is one of the vehicles for which State Farm made this determination, referred to in the Assurance of Voluntary Compliance as an “Unresolved Vehicle.” (AVC, ¶ 8).

**Production limited to “relevant portions” of the claim file**

State Farm has responded that it will produce “relevant portions” of the claim file. While many of the documents responsive to Request No. 45 will no doubt be found in the claim file for the subject vehicle, the Request seeks “all” of the “total loss records” reviewed by State Farm in making its determination as described in Paragraphs 4 and 8 of the Assurance of Voluntary Compliance, not just those records found in the claim file.

The Plaintiff also requests supplementation of the Response for the reasons discussed in the Basis for Supplementation for Request No. 41, supra.

I am hopeful that you will agree to supplement your responses without intervention of the Court.

I assume that you carefully considered your objections before you made them and, therefore, you will need little, if any, time to consider the merits based upon the argument advanced herein. As such, I am requesting that you respond within one (1) week of your receipt of this letter advising that you will provide supplemental responses by date certain thereafter. If you need additional time for more consideration of your objections, please just let me know. Your silence on this matter, unless you tell me otherwise, will be treated as your refusal to supplement, and we will seek an Order from the Court compelling full and complete responses. Thank you.