

MABRY ORDER # 1 (12/01/00)

- (6)(A): State Farm's own documents evidence the existence of DV.
- (7): DV has been covered under State Farm auto policies since the Simmons decision in 1965.
- (7), p. 5: State Farm has recognized its contractual obligations to cover DV losses. Premiums paid by State Farm policyholders are based on historical losses; payments for DV are included in those historical losses.
- (12) State Farm has taken the position that if a policyholder's vehicle is properly repaired, there is no DV.
- (15), p. 4: The Court finds that it is the practice and policy of State Farm not to inform its policyholders about coverage for a loss of DV.

RUDINE MABRY, INDIVIDUALLY, MAURICE)
J. CARDENAS, INDIVIDUALLY, AND ON)
BEHALF OF ALL OTHERS SIMILARLY)
SITUATED,)

Plaintiffs,)

vs.)

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)

Defendant.)

CIVIL ACTION
FILE NO. SU 99 CV 4915

ORDER

This matter is before the Court on Plaintiffs' Motion for Declaratory and Injunctive Relief. Plaintiffs move the Court to declare that under Georgia law State Farm Mutual Automobile Insurance Company's ("State Farm") automobile insurance policy requires assessment of, and, if applicable, payment for diminution in value in first party physical damage claims, and by injunction order State Farm to give effect to such declaration. Based upon the following evidence which has been submitted, received and admitted by the Court, both in documentary form and during the course of evidentiary hearings and which is catalogued below, this Court finds and concludes that Plaintiffs' Motion should be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) After hearings conducted on May 15, 2000, and June 12, 2000, the Court certified this action as a class action in its Order dated June 15, 2000.

References herein to the May 15, 2000, hearing will be shown as May 15, 2000, at p. _____.

(2) Plaintiffs moved for, and the action was certified for, the purpose of determining whether declaratory, injunctive and other necessary and proper equitable relief should be afforded Plaintiffs and the absent class members. See generally June 15 Order.

(3) The Court conducted a two-day evidentiary hearing on Plaintiffs' Motion for Declaratory and Injunctive Relief on September 7-8, 2000. References herein to the September 7-8, 2000, hearing will be shown as September 7-8, 2000, at p. _____.

(4) At the conclusion of such hearing, and in a subsequent Order entered on October 12, 2000, the Court directed both Plaintiffs and Defendant State Farm to submit Proposed Orders on Plaintiffs' Motion.

(5) Such Proposed Orders have been submitted and reviewed.

(6) "Diminished value" or "diminution in value" (hereinafter sometimes referred to as "DV") concerns the loss of or reduction in an automobile's value due to its involvement in an accident or other event. This loss could occur where a vehicle was repaired properly. In every event of loss, there is the potential for a DV loss. See, September 7-8, 2000, at pp. 75, 76, 80. The Court references the following evidentiary support:

(a) State Farm's own documents evidence the existence of diminution in value:

- (1) "There is a common perception in the public that a wrecked vehicle is worth less simply because it has been wrecked. It matters little that the vehicle has been adequately repaired, that new parts were used, or there is no evidence of damage after repair. Whether this perception is accurate is not for us to debate, it simply exists. Therefore, if the plaintiff has enough competent evidence to show diminution in value, the jury will normally award an amount for diminution in value." September 7-8, 2000, at pp. 143-144; 178-179.
- (2) "The phrase diminution in value has traditionally been used to describe the before and after difference in the value of property damaged in an accident. With respect to repairable property, like automobiles, the measure of this loss in value was the cost of repairing that property to its pre-accident condition. Occasionally some persons would argue that even when properly repaired an automobile was worth less after an accident simply because it was a repaired vehicle. This allegation of an inherent loss in value is what most persons are referring to when they present claims for diminution in value." September 7-8, 2000, at p. 143.

(b) State Farm's witnesses also confirm the existence of diminution in value, testifying, among other things, that when a policyholder is involved in an automobile accident, the potential exists that a loss occasioned by DV could occur (September 7-8, 2000, at p. 80); that State Farm recognizes the potential for DV even if a vehicle is properly repaired (September 7-8, 2000, at p. 76); that there is the potential for a DV claim in every property damage claim presented to State Farm (September 7-8, 2000, at p. 188); that the perception exists in the public that a wrecked vehicle is worth less than an unwrecked vehicle (September 7-8, 2000, at p. 187); that DV can occur regardless of make or model; DV is not restricted to expensive cars; DV is not restricted to vehicles with a certain mileage; DV is not restricted to the type of damage sustained to a vehicle (September 7-8, 2000, at p. 77); that

State Farm can anticipate that a vehicle will have DV once it is repaired (September 7-8, 2000, at p. 115); and, that the public would choose an unwrecked vehicle over a wrecked vehicle assuming the vehicles are the same otherwise (September 7-8, 2000, at p. 186).

(7) There is no express reference to or mention of DV in the text of State Farm's automobile insurance contract. State Farm recognizes and the Court finds that DV is a covered loss under the first party physical damage coverages of State Farm's contract of insurance. State Farm's own testimony establishes the support for this finding. State Farm's witnesses have testified, among other things, that the State Farm insurance contract typically provides comprehensive and collision coverage; that the comprehensive coverage pays for a "loss" to the insured vehicle except for loss by collisions; that the collision coverage conversely pays for a "loss" caused by a collision (May 15, 2000, at p. 78; State Farm automobile insurance policy, Exhibit 1); that State Farm policyholders pay a portion of their premium to receive coverage for DV (May 15, 2000, at pp. 79-80); that State Farm policyholders pay a premium that includes coverage for DV (September 7-8, 2000, at p. 137); that the "loss" definition in the insurance contract includes DV (September 7-8, 2000, at p. 96); that, State Farm has not modified or changed its insurance policy to reflect its obligation to cover and pay for DV losses (September 7-8, 2000, at p. 90); that DV has been covered under the State Farm auto policy in Georgia since at least 1965 (May 15, 2000, at p. 79); that since the Simmons decision (1965), DV has been covered by the State Farm insurance policies in Georgia (September 7-8, 2000, at p. 83); and, that State Farm has paid DV claims

Further, in interrogatory responses, State Farm has recognized its contractual obligation to cover DV losses and its policyholders payment of premium for DV:

Interrogatory 10.

Does the policy of insurance issued by State Farm Fire and Casualty
value? If not, state the reasons why not.

Response

In Georgia, State Farm Fire & Casualty does not provide "diminution in value" coverage as such. In Georgia, diminished value, when it exists, is only an element of damage, not a type of coverage, and certainly not a given damage in every case. It is State Farm's position that in Georgia, under first party coverages, an insured may be entitled to recover both the cost of repair and any diminution of value, so long as both are satisfactorily established and that they do not total more than the market value of the vehicle before the accident in question. (emphasis supplied)

(Response of Defendant State Farm Fire and Casualty Company to Plaintiff's Fourth Interrogatories and Third Request for the Production of Documents to Defendant State Farm, Interrogatory #10; State Farm Fire & Casualty and State Farm Mutual Automobile Insurance Company provide for coverage for the same losses in Georgia; September 7-8, 2000, at p. 58.)

"The premiums that State Farm policy-holders pay are based upon the historical losses paid for the coverage provided under the insurance policy, appropriately adjusted for expected future trends including inflation of costs. To the extent that there have been payments for diminution in value in Georgia, those payments would be included in the historical losses paid..." (Answer of State Farm Mutual Automobile Insurance Company to Plaintiffs' First Set of Interrogatories, Interrogatory No. 35).

(8) For purpose of complying with their obligations under the State Farm automobile insurance contract, State Farm recognizes and the Court finds that an insured, like Plaintiffs Mabry, Cardenas and Childs, must report a loss to State Farm and thereafter cooperate by providing information about and access to the vehicle. The Court finds that each of the named Plaintiffs has fulfilled each and all obligations under the State Farm insurance contract. See Exhibits "NN" and "OO" to Plaintiffs' Motion to Maintain Class Action and for Class Certification (hereinafter "Certification Motion"); September 7-8, 2000, at pp. 212-271. In support hereof, the Court references the following from the record:

- (a) State Farm's automobile insurance contract, p. 5, "Reporting A Claim - Insured's Duties (September 7-8, 2000, at pp. 90-95);
- (b) State Farm's witness testimony that, there is no other document other than the insurance contract that sets out the obligations of the insured (September 7-8, 2000, at p. 93); and that there is no obligation or duty of the insured to make a specific claim for DV, that all that is required of the insured is to report the loss and cooperate. A "loss" would include DV. (September 7-8, 2000, at pp. 94-95).

(9) State Farm recognizes and the Court finds that State Farm's obligations under its automobile insurance contract require State Farm to evaluate for and pay its policyholders for all covered losses including DV. State Farm's own documents recognize its obligation of good faith and fair dealing in its contractual relationships with its policyholders.

(a) State Farm Auto Claim School Administration Guide (01/01/98),

(1) Always tell the insured what we owe. (emphasis supplied)

(2) It is the responsibility of the claim representative to have knowledge of and tell the person making a claim about other State Farm coverages and policies which could apply. Bates No. 012729 (emphasis supplied).

(3) One of the most challenging responsibilities of a claim representative is to fully explain the claim process. Bates No. 012733 (emphasis supplied).

(4) The claim representative has to educate the customer. Bates No. 012734.

See Exhibit "U" to Certification Motion; May 15, 2000, at p. 99.

(b) State Farm, "Explanation of Claim Policy" states as

follows:

It is our policy to explain the Auto Damage claim Policy and the claim handling process to each customer. The claim representative is trained to react to information that develops during the course of discussions with insureds and claimants which would affect coverage, liability, and damages. Due to the complexity of these topics, it is our requirement that these explanations are made by a claim representative."

See Exhibit "V" to Certification Motion, Bates No. 010879 (emphasis supplied); September 7-8, 2000, at pp. 158-161.

(c) State Farm "Good Faith Claim Handling" states as

follows:

We need to understand and practice good faith claim handling. Our promise to the insured is outlined in the policy. These items should define our interactions with the insureds: For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, the insurer must give at least as much consideration to the insureds interest as it does to its own.

See Exhibit "W" to Certification Motion, Bates No. 010558 (emphasis supplied); September 7-8, 2000, at pp. 162-164.

(d) State Farm distributed a document entitled, 'We're here to Help Get the Wrinkles Out', which states:

If you have a loss, you are entitled to fast, fair claim service...to be paid the amount covered by insurance. After all, that's why coverage is purchased.

We intend to deliver on your claim, because how we deliver is your one sure way of determining if we are the Good Neighbor we promise to be. And that means not just paying what we owe, but showing concern for you as well.

See Exhibit "X" to Certification Motion, Bates Nos. 021502-021504; May 15, 2000, at p. 100.

(e) Auto Claim Manual, January 1998, "Guiding Principle - Automobile Insurance Claims," which includes the following:

Because of our contractual relationship, we owe a loyalty and duty to those whom we insure. ... We declare it to be our earnest intent and purpose to: Determine the amount of automobile and other property losses promptly and fairly.

Pay Party claim handling

Our Commitment is our Policyholders

It is the responsibility of the State Farm claim staff to implement Company philosophy with respect to claim handling. Our commitment to our policyholders is to treat them like a good neighbor. We should: Be familiar with and in compliance with those laws and regulations that impact claims in the appropriate state, and treat policyholders consistent with requirements of the law. Explain all relevant coverages under the policy. Encourage policyholders to report all losses and avail themselves of all benefits under their coverages. make an objective evaluation of the facts and circumstances supporting our policyholders' claims. Doing so helps ensure our policyholders obtain all benefits available provided by the insurance policy.

See Exhibit "Y" to Certification Motion, Bates Nos. 006382-006385 (emphasis supplied); May 15, 2000, at p. 100.

(f) State Farm's "Unfair Claim Practice Acts", states as follows:

It is your job as a claim professional to know, understand and comply with the unfair claim practices acts of your state. Issues addressed in nearly all UCPA's are: misrepresenting facts or policy provisions relating to coverage of an insurance policy.

See Exhibit "Z" to Certification Motion, Bates No. 010554; September 7-8, 2000, at pp. 166-169.

(g) State Farm's Physical Damage Manual requires, when writing estimates, the following:

Our estimating activities has 2 goals.

1. To provide service to our customers.
2. To accurately establish the amount of damage on specific claims.

See Exhibit "AA" to Certification Motion, Bates No. 018615 (emphasis supplied); September 7-8, 2000, at pp. 169-170.

(h) State Farm distributes to its policyholders who report a loss "Auto Damage Claim Information", which sets forth State Farm Mutual's claim policy. This Auto Damage Claim Policy makes no reference to diminution in value nor does it include an evaluation thereof as part of the claim process. By sending the information to its insureds, State Farm Mutual acknowledges that it informed its insureds of the coverages and handling of those coverages to the extent it focuses the insured on the issues the company desires to address. However, the document could mislead an

insured with regard to the coverage of or potential of diminution in value by leaving it out of the claims process explanation. See Exhibit "BB" to Certification Motion, Bates Nos. 021499-021501.

(i) State Farm distributes to its policyholders that report a loss "Auto Damage Claim Information," which states:

Allow approximately 45 minutes to one hour for your Claim Service Appointment. Your appointment will include an estimate of damages and a meeting with a claim representative to discuss your loss.

See Exhibit "CC" to Certification Motion, Bates No. 021489 (emphasis supplied); September 7-8, 2000, at pp. 170-171. See also Exhibit "DD" to Certification Motion, Bates No. 021505.

(j) State Farm distributed "What Is Auto Insurance", which states:

COLLISION. Pays to repair your car or replace it (when repair costs exceed car's value) when it is damaged in a collision, even if you're at fault. The amount of coverage is based on the car's value.

See Exhibit "EE" to Certification Motion, Bates Nos. 021496-021498.

(k) State Farm distributed "Like a Good Neighbor State Farm is

There" which states:

Deductible collision - Coverage G

Pays for loss to any car covered by the policy, caused by collision with another object (or upset of the car) but only for the amount of loss in excess of the deductible amount stated in the policy. (If the deductible is \$100 or less, it does not apply if collision is with another car insured with State Farm.)

See Exhibit "FF" to Certification Motion, Bates Nos. 021519-021521.

(l) State Farm's "Quality Results Profile" provides as follows:

Claim decisions must be based solely on the merits of the claims. At the time of loss, it has always been State Farm's policy and practice

to provide effective claim service to our policyholders, fairly and accurately determined what is owed, and pay that amount.

See Exhibit "GG" to Certification Motion, Bates Nos. 018645-018646; September 7-8, 2000, at pp. 171-173.

(10) State Farm's contractual obligation to evaluate for and pay total losses or repair losses is accomplished through extensive home office training, comprehensive training manuals and materials, an internal computer system for claims processing and administration, research, computer software packages designed to quantify repair estimates and actual cash values, guidelines, documentation and support. State Farm produced over 30,000 pages of documents that outlined the training and resources for evaluating total losses or repair losses. Further, State Farm does not require its policyholders to make a specific demand for these losses nor provide any proof thereof. See Certification Motion, pp. 22-25; September 7-8, 2000, at pp. 66, 72, 109, 119, 295, 300-310.

(11) On the other hand, DV losses receive strikingly different treatment by State Farm. DV is not mentioned in any of the 30,000 pages State Farm's training or operations manual, computer software programs, internal computer claims administration system, guidelines, or other instruction with respect to DV, except for one internal memo, Bates No. SFF 3857, dated July 16, 1998. (Exhibit "4" to September 7-8, 2000, hearing.) This document, together with the testimony of State Farm's witnesses, makes it clear that State Farm will not address a DV loss unless and until a policyholder makes a specific demand for DV, and, that, furthermore, State Farm will require its policyholder to prove both quality of repairs

and amount of DV. DV is the only element of loss covered under the physical damage coverages that State Farm requires its policyholders to make a specific demand for payment and to prove the amount of loss. See May 15, 2000, at pp. 111-114, 136; September 7-8, 2000, at pp. 73, 74, 84, 111, 121, 123, 132-35, 156-158, 205-211, 502.

(12) The Court finds that State Farm has taken the general position that if a policyholder's vehicle is properly repaired, there is no DV. State Farm takes this position even though it has neither obtained nor conducted any research or studies on this issue and despite the fact it recognizes that the public has a contrary perception. According to State Farm, a determination of whether a vehicle has lost value in an accident can only be made once the vehicle has been repaired and requires collecting information about the vehicle, i.e., make, model, VIN, engine, accessories, options, condition (mechanical and appearance), prior damage history, etc., as well as, a post-repair inspection. State Farm has no procedure in place to acquire this information or to inspect its policyholders' vehicles after repair however. See September 7-8, 2000, at pp. 80-84, 155-160, 192.

(13) The Court finds that despite the fact that State Farm has its policyholders' cooperation, as well as forms, checklists and computer fields available to generate or obtain any of the information it represents it would need to quantify a DV loss, State Farm does not request or obtain this information for purposes of making a DV loss determination. See May 15, 2000, at pp. 124-125; September 7-8, 2000, at pp. 152-154, 504.

(14) The Court finds that State Farm does not submit for approval its policies and procedures for the administration of physical damage losses, including DV, to the Georgia Insurance Commissioner. State Farm's manuals, guidelines, computer programs or systems are not submitted for approval, nor has State Farm ever submitted its most recent workflow internal procedure for processing DV losses (referenced at paragraph 11, supra) to the Georgia Insurance Commissioner. The only involvement of the Commissioner's office has been to reject two attempts by the Insurance Services Office ("ISO") to have DV losses excluded from coverage in the State of Georgia. The ISO, on behalf of the majority of the insurance companies doing business in Georgia, has attempted twice over the past two years to seek approval of an endorsement that would exclude DV losses from coverage under the physical damages coverages of automobile insurance contracts in Georgia. The Commissioner's office rejected both submissions, citing to the number of Georgia cases requiring coverage for DV losses. See May 15, 2000, at pp. 120, 121, 141-145.

(15) State Farm policyholders receive no information or notice that their State Farm policies provide coverage for DV losses, nor does State Farm provide any advice, information or materials to its policyholders with regard to what constitutes DV or to any process available to have a DV loss evaluated and paid for, despite State Farm's recognition that most people are not familiar with the concept of DV and do not know it is a covered loss under the insurance contract. State Farm does not tell its policyholders about DV because of its concern that policyholders will request payment for it. In fact, despite its obligation to explain

all the benefits or coverages to its policyholders, State Farm trains its claims representatives not to mention DV even if an insured specifically asks a State Farm claims employee to explain all benefits available to them under the State Farm insurance contract. The Court finds that it is the practice and policy of State Farm not to inform its policyholders about coverage for or loss of DV. See May 15, 2000, at p. 135; September 7-8, 2000, at pp. 91, 158, 160, 162-164, 166-173, 193, 197-198, 201.

(16) State Farm did not provide any information, materials or advice to Plaintiffs Mabry and Cardenas about DV nor did State Farm obtain any information from the Plaintiffs about their vehicles or inspect their vehicles post-repair. State Farm did not evaluate for or pay Ms. Mabry nor Mr. Cardenas for DV. With respect to Mr. Childs, only after he raised the issue did State Farm have any communication with him about DV. Nevertheless, State Farm did not evaluate or pay Mr. Childs for his DV loss. See Exhibit "NN" and "OO" to Certification Motion; September 7-8, 2000, at pp. 212-271.

(17) The Court finds that State Farm has the capability, through its administration, personnel, technology and other resources to provide notice to its policyholders of the coverage for DV losses, to evaluate for DV losses and pay same when owed. The testimony of State Farm's employees, including its corporate representative, evidence, among other things, that, State Farm could easily include bullet points in its Auto Damage Claims Policy to notify its policyholders about DV (September 7-8, 2000, at p. 96); that such a notice could be on State Farm's website, in its billing statements, renewal notices or State Farm

could just tell its policyholders about DV when a loss is reported (September 7-8, 2000, at pp. 97-98); that State Farm acknowledges that the repair facilities it contracts with could disseminate information about DV (September 7-8, 2000, at p. 105); that all State Farm claims representatives are trained to make DV appraisals (September 7-8, 2000, at p. 107); that State Farm has the computer capability to assist in DV calculations that is utilized by State Farm to determine if a vehicle is a total loss (September 7-8, 2000, at p. 118); that it would cost State Farm less than \$10.00 per policyholder to evaluate for and pay its policyholders for DV or inform the policyholder why no payment is forthcoming in every claim (September 7-8, 2000, at p. 147); that State Farm also has computer technology to make repair estimates and actual cash value ("ACV") determinations both of which could be used to determine DV (September 7-8, 2000, at p. 119); that State Farm has the capability to change its computer codes to reference DV (September 7-8, 2000, at p. 87); that State Farm can obtain whatever information about the vehicle it needs to make its ultimate decision on DV losses (September 7-8, 2000, at pp. 124-125); that State Farm has forms already in use such as the "Vehicle Inspection Report/Total Loss Settlement," - a form prepared by State Farm to acquire information on total losses that provides a mechanism to note condition, vehicle information, salvage value, etc., all of the information necessary to calculate an ACV (September 7-8, 2000, at pp. 300-310); that State Farm has form affidavits for theft and vehicle fire losses designed to obtain every conceivable piece of information about a vehicle to make a value determination without the vehicle itself (September 7-8, 2000, at pp. 312-313); that when a vehicle is not

available, State Farm depends on its policyholders to help it understand the condition of the vehicle and will evaluate for or pay a loss without seeing the vehicle (September 7-8, 2000, at pp. 318-320); and, that information similar to the Vehicle Inspection Report/Total Loss Settlement and theft and fire affidavits can be used by State Farm to determine DV with only a change of the names on the forms (September 7-8, 2000, at p. 326).

(18) This Court has jurisdiction over the parties and over the subject matter of this action. See Constitution of the State of Georgia, Art. 6, § 1, ¶ 4; Art. 6, § 2, ¶ 3; Art. 6, § 4, ¶ 1. See also O.C.G.A. § 9-4-1 et seq.; O.C.G.A. § 9-5-1.

(19) Insureds like the named Plaintiffs here, on behalf of the class members they represent, have the same opportunity as insurers to determine the scope of policy provisions. Atlantic Wood Industries, Inc. v. Argonaut Ins. Co., 258 Ga. 800, 801, 375 S.E.2d 221, 222 (1989).

(20) This matter presents an actual and justifiable controversy between State Farm and the class members. Plaintiffs Mabry and Cardenas had no knowledge of their right to be paid for diminution in value and were neither paid for same nor advised that no diminution in value had occurred. Plaintiff Childs requested payment of diminution in value, and State Farm refused payment. Incidents giving rise to claims under State Farm's policy, which potentially include as an element of damage diminution in value, occur almost daily. The evidence showed that State Farm did not evaluate whether the named Plaintiffs' vehicles had diminished in value, and that State Farm did not affirm or deny payment for diminution in value with respect to the named Plaintiffs. The evidence also showed

that State Farm does not as a matter of course evaluate its policyholders' vehicles for diminution in value as part of the claims process, and that State Farm as a matter of course does not affirm or deny payment for diminution in value. The ends of justice thus require that the Court make the declaration sought for here. See O.C.G.A. § 9-4-2. See also Allstate Ins. Co. v. Schuman, 163 Ga.App. 313, 293 S.E.2d 868 (1982); Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312, 66 S.E.2d 726 (1951).

(21) Relief by declaratory judgment is available notwithstanding that the complaining party may have some other adequate legal or equitable remedy. O.C.G.A. § 9-4-2(c).

(22) It appears to the Court, however, there is no other adequate remedy. State Farm steadfastly disputes the occurrence of diminution in value, and it does not undertake to evaluate its policyholders' vehicles for such element of damage as part of the damage appraisal and repair process. Yet, losses are reported almost daily. Policyholders as a general rule do not know about their right under the policy to be paid for diminution in value, and they do not know to make a specific claim for diminution in value, which State Farm argues a policyholder is required to do.

(23) State Farm's persistent and systematic failure to determine and pay DV takes this case out of the general rule that a court may not enjoin a prospective breach of contract. Here, the evidence of State Farm's clear and consistent pattern of conduct demonstrates its unwillingness to determine as a matter of course as part of its regular claims handling process whether DV has

occurred. Until this conduct is changed, insureds who report first party physical damage claims will continue not to be compensated for this item of their losses.

(24) Plaintiffs have not brought this action pursuant to the Unfair Claims Practices Act, O.C.G.A. § 33-6-31 et seq., or the Georgia Motor Vehicle Repairs Act, § 33-34-1 et seq.

(25) The "primary jurisdiction doctrine", urged by State Farm as a bar to this action, is a rule of judicial construction which permits a court, in the exercise of its sound discretion, to defer to an administrative agency for the initial resolution of certain disputes. United States v. Western Pac. R. Co., 352 U.S. 59, (1956). It is not a mandatory doctrine. "This doctrine is usually invoked when resolution of a dispute will require special skill or knowledge peculiar to a certain agency." Curran v. Merrill-Lynch, Pierce, Fenner and Smith, Inc., 622 F.2d 216, 235 (6th Cir. 1980), aff'd. 456 U.S. 353 (1982). The doctrine suggests judicial abstention "when protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 93 (9th Cir. 1996).

(26) Plaintiffs are seeking equitable relief. There is no provision in the Insurance Code of Georgia giving the Commissioner the power or authority to issue injunctions. See, e.g., Art. VI, Sec. I, Par. IV, Ga. Constitution (only the Superior and Appellate Courts in Georgia have the power to issue process in the nature of an injunction). The Commissioner cannot grant equitable relief in any form. Thus, the doctrine of primary jurisdiction, and/or the doctrine of exhaustion of remedies, should not be employed here. Cravey v. Southeastern Underwriters' Ass'n., 214

Ga. 450, 457, 150 S.E.2d 497 (1958) (A court should, prior to denying equitable relief, determine whether the non-equitable relief is "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity").

(27) In addition to the unavailability of appropriate classwide relief in the Office of the Insurance Commissioner, actions concerning the rights and obligations and duties of parties to insurance contracts are typically brought in the courts of Georgia. This action does not depend upon the special expertise of the Office of the Insurance Commissioner for resolution.

(28) In Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454, the Supreme Court interpreted the language of an automobile insurance policy and held that "the primary obligation of the insurer was to pay for the loss caused by collision and ... the correct measure of that loss would be the difference in the market value of the automobile immediately before the collision and the combined amount of its market value immediately after being repaired, plus the \$100 deductible". Id. at 315, 127 S.E.2d at 461.

(29) Three years later, the Georgia Court of Appeals interpreted the language of a State Farm automobile insurance policy similar to the State Farm policy here at issue. See Simmons v. State Farm Automobile Insurance Company, 111 Ga.App. 738, 143 S.E.2d 55 (1965). Relying on Gibbs, the Court of Appeals held that State Farm "had an option to pay for the loss in money, to repair the vehicle, or to replace it with other property of like kind and quality, but the contract requires that no matter which alternative is chosen, the market value of the

property plus [the deductible] after payment must equal the market value before the loss". Id. at 740, 143 S.E.2d at 57.

(30) Several years later, the Georgia Court of Appeals interpreted another insurance policy and held that depreciation in market price should be added to the cost of repairs or included in any payment such that the insured will be made whole. See Georgia Farm Bureau Mutual Ins. Co. v. Lane, 129 Ga.App. 166, 197 S.E.2d 273 (1973).

(31) In 1982, the Georgia Court of Appeals decided United States Fire Ins. Co. v. Welch, 163 Ga.App. 480, 294 S.E.2d 713 (1982). Consistent with the previously cited authority, the Court of Appeals stated: "[w]e construe repair to mean restoration of the vehicle to substantially the same condition and value as existed before the damage occurred". Id. at 481, 294 S.E.2d at 714. "[T]he market value of the property plus (deductible) after payment must equal the market value before the loss." Id. at 482, 294 S.E.2d at 714, quoting Simmons v. State Farm, supra, 111 Ga.App. 738, 740, 143 S.E.2d 55.

(32) In Hartford Fire Ins. Co. v. Rowland, 181 Ga.App. 213, 351 S.E.2d 650 (1986), the phrase "diminution in value" appears. "Hartford argues that its refusal to pay for the diminution in value of plaintiff's vehicle is in good faith because 'Georgia law does not necessarily obligate [it] to pay depreciation under collision coverage when the insured has elected to repair the car.' In light of our holding in Division 1 of this opinion, this argument is without merit." Id. at 217, 351 S.E.2d at 654.

(33) From these cases the Court concludes that automobile insurance policies with language like that addressed in Gibbs, Simmons, Lane, Welch and Rowland provide coverage for diminution in value. The State Farm policy here at issue contains such language.

(34) Georgia cases have consistently made it clear that "every contract imposes upon each party a duty of good faith and fair dealing in the performance of their respective duties and obligations". Southwestern Composite Technology Corp. v. Americus-Sumter Payroll Development Authority, 239 Ga.App. 342, 521 S.E.2d 378 (1999). The term "good faith" is a "shorthand way of saying substantial compliance with the spirit, and not merely the letter, of a contract." Fisher v. Toombs County Nursing Home, 223 Ga.App. 842, 479 S.E.2d 180 (1996). Cases interpreting the concept have not limited it to certain situations, but rather have extended the concept to all contracts. "As with any contract, however, 'this contract imposed upon each party a duty of good faith and fair dealing in the performance and completion of their respective duties and obligations.'" Phillips v. Key Services, Inc., 235 Ga.App. 564, 510 S.E.2d. 304 (1998) (citing Toncee, Inc. v. Thomas, 219 Ga.App. 539, 466 S.E.2d 27 (1995)).

(35) "[I]t is a time honored rule that the highest degree of good faith is demanded of the parties to an insurance contract." Avemco Insurance Co. v. Rollins, 380 F.Supp. 869 (N.D. Ga. 1974). In Leader Nat. Ins. Co. v. Smith, 177 Ga.App. 267, 339 S.E.2d 321 (1985), an action by an insured against an insurer, the Court of Appeals noted: "as [the insured] correctly points out, every contract imposes a duty of good faith and fair dealing in the fulfillment of each party's

(40) Applying the above-referenced authority and principles, State Farm has a duty under the automobile insurance policy here at issue to pay diminution in value, whenever any diminution in value exists.

(41) State Farm long has known or should have known of its duty under its contract of insurance to pay diminution in value, whenever it exists. State Farm's internal documents recognized this duty. On State Farm document Bates stamped SFMAB 021305, entitled "Section 251, Property Damage Workshop, Diminution in Value, there is the following:

**HAS DIMINUTION OF VALUE BEEN DEFINED
UNDER GA. LAW FOR INSURED?**

YES - THE FOLLOWING CASES HAVE UPHELD DIMINUTION OF VALUE LOSSES TO INSURED:

A) UNITED STATES FIRE INS CO. V. WELCH 163 GA APP 480 1982 GA COURT OF APPEALS

B) HARTFORD FIRE INS CO. V. ROWLAND 181 GA APP 213 1988 GA. CASE

(CASES OUTLINED/SEE- SHARON W. WARE & ASSOCIATES)

(MEMORANDUM DATED 10/26/92)

BOTH CASES ESTABLISH THAT THE INSURANCE COMPANIES ARE OBLIGATED TO PAY DIMINUTION OF VALUE (IF THE LOSS CAN BE ESTABLISHED). BOTH CASES CONTAIN LAW THAT WOULD BE APPLICABLE TO OUR STATE FARM AUTO POLICY, AND ACCORDING TO CLAIM LITIGATION, "IT APPEARS THAT WE WOULD OWE DIMINUTION OF VALUE CLAIMS FOR LOSSES TO OUR POLICY HOLDERS VEHS COVERED UNDER PERILS INSURED BY OUR POLICY."

Other State Farm documents similarly evidencing State Farm's knowledge of this duty have been presented to this Court.

(42) State Farm's superior knowledge of Georgia law, including the duty of good faith and fair dealing, and of that law's application to State Farm's policies insuring automobiles, requires State Farm to make its duty to pay diminution in

value, if any, effective. Specifically, the Court concludes that when an insured gives notice of a loss, as he or she is required to do under the State Farm policy, that insured has given notice of all elements of damage associated with that loss, including any diminution in value. State Farm then must undertake to evaluate the claim for diminution in value, as it must do and does do for all other elements of damage. If, at the conclusion of the adjustment and repair process, State Farm has determined the vehicle has sustained diminution in value, State Farm must offer to pay its insured for such diminution in value. If State Farm determines its insured's vehicle has not diminished in value, State Farm must advise its insured that it is denying any claim for diminution in value.

(43) Nothing the Court has held herein should be construed to alter the measure of damage as set forth in the cases discussed, including Gibbs, Simmons, Lane, Welch, and Rowland.


CONCLUSION

The Court herein **DECLARES** that the law of Georgia requires State Farm to pay its insureds making a first party physical damage claim for any diminution in value which the vehicle may have sustained. The Court **DECLARES** that the law of Georgia requires State Farm, once its insured reports a loss, to evaluate the claim in good faith to determine if the insured's vehicle has sustained a loss resulting from diminished value. The Court **DECLARES** that the law of Georgia requires State Farm, at the conclusion of the adjustment and repair process, to either affirm the presence of diminution in value and offer to pay same, or deny the presence of diminution in value and so advise its insured.

INJUNCTION

Pursuant to the power vested in the Superior Courts of the State of Georgia, this Court hereby **ORDERS** and **ENJOINS** State Farm to evaluate first party physical damage claims for the presence of diminution in value by an appropriate methodology and procedure, and to offer to pay such diminution in value if it determines it has occurred or to deny the presence of diminution in value and so advise its insureds. The Court **ORDERS** and **ENJOINS** State Farm to collect, catalog and maintain any information necessary to make a determination as to the amount of any loss for diminution in value sustained by the vehicles of its insureds. The Court further **ORDERS** and **ENJOINS** State Farm to report to the Court within 45 days of the date of this Order the manner in which it is complying with the Court's Order and Injunction.

So ordered this 1 day of December 2000.


Douglas C. Pullen
Superior Court Judge