IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
Ct. App. No. 29,295
D.Ct. No. D-202-CV-2003-02564

LYDIA NELLIS and PATRICK NELLIS, for themselves and all others similarly situated,

Plaintiffs/Appellees,

vs.

FARMERS INSURANCE COMPANY OF ARIZONA,

Defendant/Appellant.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
Bernalillo County, New Mexico
THE HONORABLE LINDA M. VANZI

PLAINTIFFS'/APPELLEES' ANSWER BRIEF

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INTRODUCTION

For over a century insurance companies have insisted their insurance policies be read and enforced in accordance with their terms, using long-standing principles of contract interpretation, sometimes with devastating consequences for consumers. The Farmers policy involved here tells its insureds to "READ YOUR POLICY CAREFULLY" (emphasis in original). [R.P. 14] The admonition is reciprocal. This case tests whether Farmers is required to perform under the same contract rules and requirements as its insureds, or whether it may operate under its own rules, free from the constraints of a policy it wrote and the rules of contract construction it has long used to its benefit. Justice requires that the same rules that apply to Farmers' insureds apply to Farmers as well.

This appeal raises three fundamental questions: The first is whether Farmers Insurance Company of Arizona ("Farmers"), an insurer that issues monthly automobile insurance policies requiring the insured to pay monthly premiums in advance, can later impose additional fees when the insured pays those premiums monthly, in advance, as required by the policy. The district court held Farmers cannot, and entered summary judgment against it, concluding that the imposition of extra fees for a benefit that already existed under the terms of the policy was a breach of contract. [R.P. 1035-40 and 1101]

The second question is whether, under Plaintiffs' breach of contract cause of action, the proper measure of damages is the amount of extra monthly payment fees charged to Class members during the Class period. The district court held that it was. Accordingly, the parties stipulated to the aggregate amount of monthly payment fees collected from Class members during the Class period and a form of Judgment agreed upon by the parties was then entered by the district court.

The third question is whether the district court properly certified a class of New Mexico and Arizona policyholders.[1] Because the claims asserted by the Class are based on identical policy language, identical breaches of contract and uniform laws in both New Mexico and Arizona, the district court found that class certification was appropriate. [R.P. 633]

None of the eight reasons advanced by Farmers in its Brief-in-Chief ("BIC") warrant reversal of the district court's summary judgment entered against Farmers. Five of the eight reasons are raised for the first time on appeal and should be disregarded by the Court.

[1] Farmers of Arizona operates only in Arizona and New Mexico.

STATEMENT OF FACTS

The Nellises, like other Class members, bought automobile insurance policies from Farmers. The Declarations page of each of the Nellises' two policies stated the "Premium" for six months of coverage. However, the Nellises and other Class members did not buy six months of insurance coverage. Instead, their policies contain a "Monthly Payment Agreement," endorsement (EOO22), which states that they are buying separate, one calendar month policies and paying for their coverage, in advance, one month at a time. Endorsement E0022 is attached to each policy and, along with all the other endorsement to the policy, is listed on the Declarations page.

MONTHLY PAYMENT AGREEMENT **E0022** 1st Edition

In consideration of the premium deposit, we agree to the following:

(1) The policy period is amended to one Calendar month. It will commence with the effective date shown in the Declarations.

(2) The policy shall continue in force for successive monthly periods if the premium is paid when due. The premium is due no later than on the expiration date of the then current monthly period.

(3) The monthly premium shall be subject to future adjustment. Such adjustment will apply the then current rate on the semi-annual or annual anniversary of the policy whichever is indicated in the Declarations as applicable.

This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

91-0022 1STEDITION 7-88

I-86 E0022101

[R.P. 28].

The "Premium," which is the cost of a policy including all of its endorsements is stated on the Declarations page.[2] The policies do not allow for any additional fees; they expressly disclaim them. The Declarations page of each policy provides a space in which any "Fees" associated with the policies are to be inserted. This space is left blank. [R.P. 9]

POLICY ACTIVITY (Submit amount due with enclosed invoice)

$	
	Previous Balance
350.10	Premium
	Fees
	Payments or Credits
PREMATIC	Total

ANY "TOTAL" BALANCE OR CREDIT $7.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING BALANCES OVER $7.00 ARE DUE UPON RECEIPT.

This means there are no "fees" imposed. Nevertheless, the Nellises were charged an additional $4.00 per month in monthly payment fees over and above the premium stated in their policies. By imposing those additional fees, Farmers breached its

[2] Although the amount stated next to the word "Premium" on the Declarations page shows the amount charged for a six-month term, Farmers has always contended, and courts have agreed, that the six-month premium is for rating purposes only and has no effect on the one-calendar month period of each separate policy. *See Crawford v. Farmers Group, Inc.*, 207 Cal. Rptr. 155, 158 (Cal. App. 1984) ("The six-month term was used for rating purposes only and did not constitute a term of insurance coverage. The 'Monthly Payment Endorsement' attached to and incorporated into the policy expressly amended the policy period to one calendar month...By rating the policy in six-month periods, plaintiff was guaranteed that her monthly premiums would remain the same for six months.").

contracts with the Nellises and other Class members. As a result, Class members paid an average of approximately $300 (at the rate of a few dollars per month) in improper monthly payment fees. There are more than 200,000 Class members, [R.P. 1521-2], and the aggregate amount they have been required to pay is $60,341,109.00. [R.P. 2304-5] The Judgment of the district court makes Class members whole by awarding damages in the amount they paid in improperly imposed monthly payment fees, plus pre-judgment interest. [R.P. 2306-7]

Class members paid their monthly payments through Farmers' agent and corporate affiliate Prematic Service Corporation ("Prematic"). The undisputed evidence of the relationship between Farmers and Prematic establishes that Farmers and Prematic are essentially part of a single business enterprise. *See* Section III.A, *infra*. Indeed, Farmers represented to the district court that it was abandoning its arguments regarding its relationship with Prematic, and, instead affirmatively represented that "Farmers has never attempted to 'pass the buck' in this case." [R.P. 913] And yet, that is precisely what Farmers is trying to do in its appeal.

ARGUMENT

I. FARMERS' MISSTATEMENTS OF FACT.

The premise for Farmers' argument on liability is that each insured must enter into a written Prematic agreement *before* a Farmers policy is issued. For example, Farmers states that an insured's entering into a Prematic agreement is a condition precedent to Farmers' issuing a one month policy [BIC pp. 20], and that Farmers will not issue a policy with a Monthly Payment Agreement endorsement E0022 until the insured has entered into a written Prematic agreement. [BIC, pp. 26-27] Additional statements to the same effect are found at pp. 5-10, 19, 23, 38 and 39 of the BIC.

These statements are not true, and Farmers knows it.

The Prematic document, which Farmers describes at BIC pp. 5-7, has not been used since about 2000. Farmers' practice for the past nine years has been that a Prematic document, entitled "Farmers Easypay," is mailed to the Farmers insured, together with the first billing statement, *after* the Farmers policy has been issued. The billing statement says that, by paying the bill, the insured is agreeing to the Farmers EasyPay plan. [R.P. 1765] The document is generic; it contains no information relating to the individual insured, and is not signed by the insured.

This is established by the testimony of Farmers' Rule 30(B)(6) witness, Philip Moore. [R.P. 977, 1755-6][3]

These facts are acknowledged in Farmers' Response to Plaintiffs' Memorandum Regarding Farmers' Right to a Setoff, at p. 3 [R.P. 1726], in which Farmers stated: "Until early 2001, when a customer agreed to pay and be billed on a monthly basis with an associated service charge, it was Farmers' practice to require that the customer sign a Prematic Agreement" and that "In 2001, Prematic stopped requiring that customers sign the Prematic agreement at policy inception. Instead, customers choosing monthly payments received a copy of the agreement with their initial billing statement." Farmers' Memorandum in Support of its Motion to Decertify, at p. 9 [R.P. 1914] recites the same facts.[4]

Farmers also argues that Plaintiffs "conceded" Farmers' position that the Monthly Payment Agreement in the Farmers policy only appears after the insured has entered into a Prematic agreement. [BIC, p. 19]. In making this "concession" argument, Farmers altered a quotation from a brief the Plaintiffs had filed in the

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[3] Farmers' Rule 30(B)(6) witnesses speak for Farmers. *GTE Products Corp. v. Gee,* 115 FRD 67 (D. Mass. 1987).

[4] The Nellises first bought a monthly Farmers policy in December, 2001 [R.P. 855] about a year after Farmers adopted the new procedure.

district court. [R.P. 743, ¶ 7] The actual quotation is "It is not possible for a Farmers' insured to pay monthly without going through Prematic." Farmers altered the quotation by adding the word "[first]" before the word "going" in order materially to change the meaning of the quoted language.

Finally, the excerpted portion of the alleged Prematic agreement pasted into page 6 of the BIC was not entered into by the Plaintiffs or any member of the Class. [R.P. 1758] It is not even a Farmers document. The excerpt is from Mid-Century Insurance Company, a Farmers affiliate, and was doctored to omit its true origins.

II. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT AGAINST FARMERS FOR BREACH OF CONTRACT.[5]

The district court found that Farmers' imposition of a monthly payment fee was a breach of contract because Farmers had issued one-month-at-a-time policies that required monthly payments in advance. [R.P. 1035-38] The district court concluded that by issuing such a policy, any extra fee imposed by Farmers for the right to pay monthly was without consideration. Interpretation of an insurance policy is a legal determination for the Court. *Battishill v. Farmers Alliance Ins.*

[5] At an August 20, 2004 Scheduling Conference, Farmers asked the district court to decide cross-motions for summary judgment on liability; the court agreed. [R.P. 737]

Co., 2006-NMSC-4, ¶6, 139 N.M. 24, 127 P.3d 1111, 1113 ("The interpretation of an insurance policy is a matter of law about which the court has the final word."). While this Court reviews the district court's summary judgment decision *de novo*, the district court's ruling is fully supported by the language of Farmers' policies, applicable law and the factual record.

It is important to an analysis of the district court's summary judgment decision to correctly identify the two independent bases of Plaintiffs' breach of contract claim, as opposed to Farmers' distorted description of Plaintiffs' claim.

Plaintiffs' first theory alleges that Farmers may not charge extra fees for paying monthly premiums because the plain language of the policy does not permit such charges. Complaint ¶¶ 1-13. [R.P. 1-3] By issuing one month policies that required monthly payments, Farmers had no right to charge extra fees in order to pay monthly. This is a simple common law breach of contract. The alternative theory advanced by Plaintiffs alleges that Farmers' collection of extra fees from insureds when they pay a monthly "premium", as defined by NMSA 1978, § 59A-18-3 (1984), violates the "specified in the policy" prohibitions of

NMSA 1978, § 59A-16-24 (1984).[6] Complaint ¶¶ 16-21 [R.P. 3-4]. Recognizing that Plaintiffs' breach of contract claim raised two separate theories, the district court's summary judgment opinion addressed each theory separately and determined that under either theory Plaintiffs prevail. [R.P. 1035-40][7]

A. PLAINTIFFS' COMMON LAW BREACH OF CONTRACT CLAIM.

1. The Language Of Farmers' Policies Does Not Permit The Imposition Of Additional Fees For Paying Monthly Premiums For Monthly Policies.

The district court found that nothing in the language of the Farmers policy allows Farmers to charge extra fees for paying a monthly premium for a monthly policy. [R.P. 1036] ("This Court has read the Declarations page and like Plaintiffs,

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[6] Even though Plaintiffs would prevail based on a straight-forward common law interpretation of the language of the policy, the extra fees charged Farmers are also just the type of improper fees prohibited by § 59A-16-24(B) ("No person shall willfully collect as premium, administration fee or other charge for insurance or coverage any sum in excess of the premium or charge applicable thereto as specified in the policy, in accordance with the insurer's applicable classifications and rates then lawfully in effect.").

[7] After the district court decided the cross-motions for summary judgment, this Court issued its opinion in *Nakashima v. State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-27, 141 N.M. 239, 182 P.3d 664. On August 22, 2008, Farmers filed a Motion for Reconsideration of the district court's rulings on the cross-motions for summary judgment. [R.P. 2254] The district court entered its Decision denying this Motion on November 5, 2008 [R.P.2295-97], reasoning that, as this Court determined in *Nakashima*, the facts of that case are distinguishable from the facts here.

fails to read a service fee into the language on that page or, for that matter, any other page that is part of the policy.") The district court's analysis is consistent with established New Mexico law. Courts will apply the plain meaning of the written contract in interpreting terms of a contract of insurance, and will not supply provisions to an insurance policy when an insurer is faced with unanticipated liability. *Rummel v. Lexington Ins. Co.,* 1997-NMSC-41, ¶¶ 20 and 50, 123 N.M. 752, 945 P.2d 970. In construing policy language, the test is not what the insurer intended its words to mean, but rather what a reasonable insured would understand them to mean. *Phoenix Indemnity Insur. Co. v. Pulis*, 2000-NMSC-023, ¶ 23, 129 N.M. 395, 9 P.3d 639. Courts focus upon the objective expectations that the policy language would create in the mind of a hypothetical reasonable insured, rather than what a particular insured might understand. *Computer Corner Inc. v. Fireman's Fund Insur. Co.,* 2002-NMCA-054, ¶ 7, 132 N.M. 264, 46 P.3d 1264; *Rodriguez v. Windsor Insur. Co.*, 118 N.M. 127, 130, 879 P.2d 759 (1994). Specialized knowledge of the insurance industry, case law, academic treatments and industry norms or standards do not enter into the inquiry. *Berry v. Federal Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 61, 136 N.M. 454, 99 P.3d 1166. An insurer has a duty to draft policy language that is "plain, clear and prominent" to a layperson, and ambiguous language in an insurance policy is construed against the

insurer. *Pribble v. Aetna Life Ins. Co.*, 85 N.M. 211, 215, 501 P.2d 255 (1972); *Pulis, 2000-NMSC-023*, at ¶ 23. An insurer's interpretation of the terms of a policy must be clearly expressed in the policy language. *Rummel, 1997-NMSC-041,* ¶ 23.

A number of provisions in the Farmers' policy at issue are inconsistent with the after-the-fact imposition of an additional fee for an insured's making the monthly payments that Farmers required. The first page of each Farmers policy is the Declarations page. [R.P. 9] The Declarations page identifies *all* of the components of the policy (declarations, policy forms and endorsements) and states the price of the policy.[8]

Of critical importance is the inclusion of endorsement E0022 on the Declarations page. E0022 is the "Monthly Payment Agreement" endorsement, setting forth the agreement that the policy provides monthly insurance only and requires monthly prepayment. [R.P. 28] By listing endorsement E0022 on the Declarations page, along with all other policy endorsements, Farmers acknowledges

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[8] The components of an auto policy are defined by statute. *See* NMSA 1978, § 59A-5-205.3(E) (2003) ("Every motor vehicle insurance policy shall be subject to the following provisions, which may be contained in the policy: . . . (4) the policy, the declarations page, the written application and a rider or an endorsement that does not conflict with the provisions of the Mandatory Financial Responsibility Act constitute the entire contract between the parties"). *See also* NMSA 1978, § 59A-18-2 (1984) and Ariz. Rev. Stat. Ann. §§ 20-112 (1954) and § 28-4009(C)(5)(d) (1998).

that E0022 is similarly one of the endorsements purchased by its insureds for the price stated in the policy.

ENDORSEMENT NUMBERS			
E0022	E0107	E1140	E1154
E1200	E1248	E1401	H1105
S1606	S1609	S1655A	

MESSAGES / RATING INFORMATION

CAR SYMBOL(U).
SEE ENDORSEMENT E0022.
COMMUTER, LESS THAN 10 MI. ONE WAY, AGE 60-69.
THE TERRITORY IS 14.
PLEASE CONTACT YOUR FARMERS AGENT FOR A FREE FARMERS FRIENDLY REVIEW TO ENSURE THAT YOUR FAMILY IS PROPERLY PROTECTED AND THAT YOU ARE RECEIVING ALL OF THE DISCOUNTS/CREDITS AND PACKAGE POLICIES AVAILABLE.

The significance of the endorsement E0022 language is that it clearly reflects that what Farmers is selling, and what the insured is buying, is a monthly policy, requiring monthly pre-payments. *See* endorsement E0022 (stating that "the policy period is amended to one calendar month . . ."; and later stating that "the policy shall continue in force for successive monthly periods if the premium is paid when due.") Thus, endorsement E0022 plainly states that the only requirement for continuing the policy in force for successive monthly periods is that the insured pay the "premium" when due. There is no requirement that the insured pay any fee in addition to the premium to continue the policy in force for successive monthly periods.

The "POLICY ACTIVITY" section of the Declarations page states the price of the policy. [R.P. 9] In the part of this section entitled "Premium," a dollar amount is found. In contrast, the part entitled "Fees," is left blank. The district court correctly found that this "Policy Activity" section on the Declarations page meant that there would be no fees associated with the policy.[9] [R.P. 1037] *See also Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589, 611(Cal. Ct. App. 2009) (The fact that the policy activity section of the declarations page contains no "fees" amount "would lead a reasonable person to believe that there are no fees (e.g., service fees or charges) due or payable in addition to the stated aggregate premium.").

The Declarations page also says "The policy is issued in reliance upon the statements in the Declarations." The Declarations twice refer to the Monthly Payment Agreement, endorsement E0022. This confirms that the policy was issued in reliance on the fact that the insured would pay monthly.

The bottom of the Index of Policy provisions states that "ANY ADDITIONAL PROVISIONS AFFECTING YOUR POLICY ARE ATTACHED

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[9] Stated another way, the "Policy Activity" language supports the reasonable expectation on the part of the insured that there would be no fees other than the stated premium. *Computer Corner*, 2002-NMCA-054, ¶ 7.

AS 'ENDORSEMENTS'" [R.P. 14] (emphasis in original). Any provision calling for additional payment for a benefit provided by the policy would be a provision "affecting" the policy. *See Crawford,* 207 Cal. Rptr. at 158 ("The payment plan administered by Prematic is a service furnished in connection with the providing of insurance."). There is nothing in the Farmers policy that requires an additional fee in order to pay monthly.

The "AGREEMENT" paragraph of the policy states "We agree with you, in return for your premium payment, to insure you subject to all the terms of this Policy." [R.P. 16]. This confirms that, in return for payment of the premium stated on the Declarations page, the insured will receive all of the rights provided by the Policy, including endorsement E0022's right to pay monthly.

The policy section entitled "Changes," states "This Policy with the Declarations includes all agreements between you and us *relating* to this insurance. No other change or waiver may be made in this Policy except by endorsement, new Declarations or new Policy issued by us." (emphasis added) [R.P. 25] Billing services "relate" to the purchase of Farmers' insurance. *See* [R.P. 787]

The next and crucial portion of the policy is endorsement E0022, the "MONTHLY PAYMENT AGREEMENT." (emphasis in original) [R.P. 28]. This endorsement amends the policy period to one calendar month and requires the

insured to pay each monthly premium in advance (before "the expiration date of the then current monthly period") in order to obtain successive monthly policies. The endorsement also states: "The policy shall continue in force for successive monthly periods if the premium is paid when due." It also states "This endorsement is part of your Policy. It supersedes and controls *anything* to the contrary." (emphasis added).

The policy language is clear: it calls for monthly policy periods; requires monthly pre-payments; refers only to a "premium" as the price for the policy and makes no reference to additional fees. A space for additional fees is provided, and that space is blank.

Neither party argued to the district court that the policy language is ambiguous.[10] Farmers nevertheless refers to language in *Berry,* 2004-NMCA-116, ¶ 65, that if policy language is ambiguous, the insurance company "also has the right to try and prove as an affirmative defense that specific insureds shared its idea of what the agreement was with regard to the premium structure." However, *Berry* also states that if the insurer does not provide evidence to establish this

[10] *See* Farmers' Response to Plaintiffs' Motion for Summary Judgment, at p. 10 [R.P. 903] ("The Nellis policies are not ambiguous on their face or in the context of the transactions.").

affirmative defense, then a court should construe ambiguities against the insurer. *Id.* ¶ 63. Thus, even if the policy language were ambiguous, for Farmers to have established this affirmative defense, it was required to present evidence on the issue in response to Plaintiffs' Motion for Summary Judgment. Farmers did not present any such evidence.

2. The Insured's Payment Of The Price Stated In The Farmers Policy Buys All Of The Benefits Provided By The Policy, Including The Right to Pay Monthly.

Farmers' says "Farmers provided the stated insurance coverage in exchange for the quoted premium." BIC at 12. Farmers misconstrues its contract obligation. The stated price for a Farmers policy is all an insured must pay for all benefits the policy provides, including endorsement E0022.

It is fundamental that paying the stated price for a contract buys all the benefits under the contract. *Estate of Duncan v. Kinsolving*, 2003-NMSC-13, ¶ 20, 133 N.M. 821, 70 P.3d 1260, involved a lease that set forth rent for the "above described leased premises." Another clause also gave the lessee use of a Ruidoso residence, but did not state any additional consideration for use of that residence. *Id.* The lessor claimed that as to the Ruidoso residence, the lease was unenforceable for lack of additional consideration. The Supreme Court disagreed, stating:

> [I]f the performances or promises on one side fulfill the legal requirements of consideration, they will support any number of counter-promises on the other. A common illustration of this principle is found in a sale with a warranty. The consideration for the promise to warrant is the making of the sale for the agreed price.

Kinsolving, 2003-NMSC-13, ¶¶ 20-21. Under the reasoning in *Kinsolving*, the "premium" amount stated on the Farmers' Declarations page (*i.e.*, the price of the policy) bought the insured the benefits of all the terms in the Farmers policy, including endorsement E0022.

The Farmers policy says: "We agree with you, in return for your premium payment, to insure you subject to all the terms of this policy." [R.P. 16] The policy does not say "some" of the terms of the policy, it says "all." This policy language explicitly states that in return for the insured's paying the premium amount stated in the policy, the insured will receive the benefit of all terms of the policy, including the right to pay monthly.

Farmers cannot prevail on an argument that Class members made an enforceable additional promise to pay a monthly payment. *Western Bank v. Biava*, 109 N.M. 550, 551, 787 P.2d 830, 831 (1990) (noting "an agreement to do what one is already legally bound to do is not sufficient consideration for the promise of another."). *See also Sims v. Craig*, 96 N.M. 33, 35-6, 627 P.2d 875 (1981); *Nakashima*, 2007-NMCA-047, ¶ 13.

Through the Monthly Payment Agreement (E0022) Farmers was obligated to provide all of the benefits provided by the policy in exchange for the insured's paying monthly premiums. Farmers therefore had no right to impose fees to do what it was already obligated to do — permit monthly premium payments.

Farmers asserts that Class members want the right to pay monthly for "free." BIC at 2. Farmers is wrong. As stated in *Kinsolving,* the stated price for a contract buys *all* the rights provided in the contract. Paying the premiums stated in the Farmers policy bought the right to pay monthly.

Farmers complains it would not be fair to decide this case based on the plain language of the policy that Farmers wrote. BIC at 48-49. This argument is the opposite of the argument Farmers' parent company made, and won in *Reisbeck v. Farmers Insurance Exchange,* 163 P.3d 1289, 1293 (Mont. 2007):

> If the Agreement's failure to explain the purpose and ultimate disposition of these funds was a cause of concern to Reisbeck, he should have addressed it when the Agreement was made, or sought written modification at some point over the life of the contract.... 'Courts can give no solace where parties to a contract find themselves minus expected profit through failure to exercise care in drawing up such contract.'

(citations omitted). *See Rummel,* 1997-NMSC-041, ¶ 50 (It is not the province of the courts to supply provisions to an insurance policy when an insurer is faced with unanticipated liability.).

3. The Parol Evidence Rule Together With The Integration Clauses Of The Farmers Policy Render Inoperative Any Claimed Extrinsic Agreement Relating To Monthly Payments.

Western Farm Bureau Ins. Co. v. Barela, 79 N.M. 149, 151, 441 P.2d 47 (1968), states:

> A contract of insurance, which has been embodied in a formal written instrument, termed a "policy," merges all prior or contemporaneous parol agreements touching the transaction.

Restatement (Second) Contracts § 213(2), states "A binding completely integrated agreement discharges prior agreements to the extent they are within its scope." Comment c. to § 213 of the *Restatement* says that "Where the parties have adopted a writing as a complete and exclusive statement of the terms of the agreement, even consistent additional terms are superseded." The three integration clauses in the Farmers policy show it is a completely integrated contract. [R.P. 14, 25 and 28] Any parol agreement relating to monthly payments would be an agreement "touching the transaction," and "within the scope" of the policy.

Farmers argues that if Class members had not entered into a Prematic agreement, Farmers would not have issued them a month-to-month policy. [BIC, p. 20]. Even if Farmers' position were factually correct, that would not help

Farmers insofar as the parol evidence rule is concerned. In *American Institute of Marketing v. Keith,* 82 N.M. 699, 702, 487 P.2d 127 (1971), the defendant argued that "the inducing cause of execution of the contract" was a parol agreement between the parties and sought to introduce evidence of that agreement. 82 N.M. at 702. *Keith* holds that such evidence was excluded by the parol evidence rule. *Keith* recognizes that if a parol agreement is the inducing cause of a written contract, extrinsic evidence intended to show that fact can be admissible. *Keith* further holds, however:

> The principle which admits such evidence under the condition stated has *no application*, however, where the parol agreement relates directly to the subject of the written contract, even though it be alleged, as in the case at bar, that the written contract was signed upon the faith of the oral promises."

82 N.M. at 702 (emphasis added).

The exception to this rule, permitting parol evidence where such evidence is to show fraud or misrepresentation, is inapplicable here. *See Wilburn v. Stewart,* 110 N.M. 268, 794 P.2d 1197 (1990). Farmers' Answer does not allege fraud or misrepresentation. [R.P. 0135]

The parol evidence rule plainly renders inoperative extrinsic agreements that are inconsistent with an integrated agreement. *Restatement (Second) Contracts §*

213(1). The Declarations page has a space for "Fees" which is left blank. This means there are no fees associated with the policy. Memorandum Opinion at 3 [R.P. 1037]. *Troyk,* 90 Cal.Rptr.3d at 611. The Monthly Payment Agreement endorsement states that the only condition for the policy's continuing in force for successive monthly periods is that "the premium is paid when due." Parol evidence that there were fees associated with the policy, or that the insured was required to pay both the premium and an additional fee to keep the policy in force, would be inconsistent with the language of the policy. *See Constitution Life Insurance Co. v. Rogerson,* 273 P.2d 1019, 1022 (Colo. 1954). (When the insurance contract has an "integration" provision, the insurance company cannot charge more than the price stated in the contract, and then justify such increase by an alleged parol agreement between the insured and the insurer's agent.)

Farmers' parent company has availed itself of the protections of the parol evidence rule when it has served its interests. *Reisbeck,* 163 P.3d at 1293. ("Reisbeck is in fact trying to vary the terms of the Agreement. He seeks to add a critical and significant payment provision which the Agreement simply does not contain.") But here Farmers is trying to vary the terms of a policy which it drafted by adding a payment provision the policy does not contain.

The parol evidence rule applies to prior and contemporaneous agreements. *Nakashima*, 2007-NMCA-027, at ¶ 12. Because the post-2000 Farmers EasyPay document is not mailed to the insurers until after a Farmers policy has been issued, the common law parol evidence rule would not apply to that document. The rule would, however, preclude evidence as to any communications between Class members and Farmers' agents occurring before or at the time the Farmers policy was issued. The rule would also apply if, as Farmers has argued, the pre-2000 form of Prematic agreement came into effect before or at the same time as issuance of the Farmers policy.

The Farmers policy states "This policy with Declarations includes all agreements between you and us relating to this insurance. No other change or waiver may be made in this policy except by endorsement, new Declarations, or new policy issued by us." [R.P. 25]. The contract in *Reisbeck* "contained a clause to the effect that any prior oral agreements between the parties were superseded by the contract (a merger clause), and further provided that any modifications to the Agreement had to be accomplished in writing." 163 P.3d at 1291. *Reisbeck* holds that this type of contract language bars evidence of any parol agreement, either before or after the written agreement. *Id.* at 1292-3. Here, the "no modification" clause in the Farmers policy not only requires that any post-policy issuance

modification be in writing, it also mandates that no change in the policy is valid unless the document is an endorsement to the policy itself.

Finally, any agreement (such as the post-2000 Farmers EasyPay document) that came into existence after the issuance of the Farmers policy would be unenforceable for lack of consideration. *Sims*, 96 N.M. at 35-6; *Nakashima,* 2007-NMCA-047, ¶ 12.

4. The Breach Of Contract Analysis In *Nakashima* Supports the District Court's Summary Judgment Decision.

Although there are important differences between the policy language and the facts of this case and those found in *Nakashima*,[11] *Nakashima*'s breach of contract analysis supports the district court's summary judgment ruling.

There are two controlling differences between *Nakashima* and this case. First, the language in the State Farm policy in *Nakashima* is very different from the language in the Farmers policy. The Farmers policy provides for separate one month policies and requires the insured to pay monthly in advance; the State Farm policy was for a six-month term and did not give the right to make installment payments.

[11] *Nakashima*, 2007-NMCA-27, ¶ 31, distinguishes the facts of this case from those found in *Nakashima.*

Second, there is a fundamental difference in the nature of the installment fees involved in *Nakashima* and the nature of the monthly payment fees involved here. In *Nakashima*, "the installment fees are associated with the privilege of paying a premium in installments . . . ." 2007-NMCA-27, ¶ 23. There are no installment payments involved here; each policy is for one month with payment required in advance. Farmers recognized this distinction in a brief it filed in *Crawford*. ("The service charge is paid for the privilege of purchasing coverage in smaller quantities; it is not paid for the privilege of deferring payment or of paying some greater whole on an installment basis.") [RP 109] *See Crawford*, 207 Cal. Rptr. at 158 ("The Monthly Payment Endorsement attached to and incorporated into the policy expressly amended the policy period to one calendar month.")

a. There are controlling differences between the policy language in *Nakashima* and the language of the Farmers Policy.

Nakashima recognizes that whether the imposition of an additional fee constitutes a breach of contract depends on "the language of the policy." 2007-NMCA-27, ¶ 21. *Nakashima* states that the insured's breach of contract claim "hinges on whether the insurance policy itself permits installment payments," and then explains that the decision there was based on the fact that the State Farm policy required full payment in advance for a six month policy period. 2007-

NMCA-27, ¶ 10. The Farmers policy is different. It does not permit or require full payment in advance for six months of coverage. Instead it requires the insured to make monthly payments in advance for each one month policy.

The "separate contract" discussion in *Nakashima* was premised on the fact that the State Farm policy did not permit installment payments. *Id.* ¶ 13. *Nakashima* further recognizes that if the State Farm policy had given the right to make installment payments, there would have been no consideration to support a second contract relating to installment payments. *Id.* Because endorsement E0022 requires the insured to pay monthly, there is no consideration for a "second contract" requiring a fee in exchange for a pre-existing contractual right to pay monthly.

Another reason why the difference in policy language is significant relates to the policy's "integration" clauses and the parol evidence rule. *Nakashima*, 2007-NMCA-27, ¶ 12, states "It appears the method of payment is separate from the coverage and cost of coverage contained in the policy. Accordingly, an agreement regarding how the premium is to be paid would not be covered by the integration clause." *Id.* Here, endorsement E0022 states that premium must be paid monthly and that "the policy shall continue in force for successive monthly periods if the *premium* is paid when due." (emphasis added) The Declarations page has a space

to insert the amount of any "Fees," which is left blank. Any purported second agreement regarding monthly payment fees would therefore relate to something explicitly addressed in the policy and would be subject to the integration clauses in the policy.

Nakashima is also distinguishable as regards the principle discussed in *Kinsolving* that payment of the stated price in a contract buys all the benefits provided by the contract. 2003-NMSC-013, ¶¶ 20-21. In *Nakashima*, the State Farm policy did not permit monthly payments such that paying the stated price of the policy did not buy the benefit of monthly payments. The Farmers policy provides the right to pay monthly such that paying the stated price of the policy buys the right to pay monthly.

Nakashima notes that any language in the State Farm policy regarding monthly payments "only appears in the policy after a policyholder has entered into an agreement with [State Farm] regarding installment payments." 2007-NMCA-27, ¶ 11. That is not the case here. For at least the past nine years, Class members have been issued their insurance policies *before* they receive their copy of a post-2000 Farmers EasyPay plan. *See* Section I.

Both *Blanchard v. Allstate Insur. Co.*, 774 So.2d 1002 (La. App. 2002) and *Cacamo v. Liberty Mutual Fire Insur. Co.*, 885 So.2d 1248 (La. App. 2004), upon

which Farmers relies, are discussed in *Nakashima,* 2007-NMCA-27, ¶¶ 24-26. As *Nakashima* confirms, the basis of the decision in *Blanchard* rested on the fact that the installment payments involved there were paid "for the privilege of paying the premium over time." *Cacamo* followed *Blanchard*, further noting that in that case, the ability to pay monthly was not provided by the contract. *Troyk* recognizes this distinction. 90 Cal.Rptr.3d at 608. ("The cases Farmers cite from other jurisdictions [e.g., *Blanchard, Cacamo* and *Nakashima*] are also factually inapposite and do not support its position. Unlike the present case, all of those cases involved true installment payments of premium.").

Interinsurance Exchange of the Auto Club v. Superior Court, 56 Cal.Rptr.3d 421 (Cal. App. 2007) was decided by the same panel that decided *Troyk.* At 90 Cal.Rptr.3d 607-8, *Troyk* states that "*Auto Club* is factually inapposite and does not support Farmers' position."

b. The monthly payment fees here are paid as consideration for purchase of a one-month policy; and are not paid for the privilege of paying on an installment basis.

Nakashima held that State Farm's installment fees were not consideration for a contract of insurance but, instead covered the expense of allowing policyholders to pay their premium in installments. 2007-NMCA-027, ¶ 17.

The Farmers policy, however, states it is bought and paid for one month at a time. Mem.Op. at p. 4 [R.P. 1038] *See Troyk,* 90 Cal.Rptr.3d at 606 ("The service charges FIE required Troyk and the other class members to pay were *not* imposed for the privilege of paying the premium for a six-month term policy in monthly installments or otherwise over time. Rather, as shown by the Monthly Payment Agreement endorsement (form no. E0022), the policy issued to the class members was for a one-month term, not a six-month term.").

Class members here, like those in *Troyk* "were *required* to pay a service charge in addition to the stated premium to obtain and pay for a one-month term of insurance coverage. They could not *obtain* or pay for that one-month term policy by paying only the premium stated in the Declarations page or elsewhere in the policy." 90 Cal. Rptr.3d at 604 (emphasis in original). *See also*, deposition of Farmers' agent, Ms. Sanchez (A Farmers' insured who pays monthly effectively pays more for insurance than an insured who buys a six-month policy.) [R.P. 776]

The district court correctly concluded (Memorandum Opinion, at p. 4) that:

> Additionally, because their contract with Defendant is monthly, it is not clear why Plaintiffs are required to pay a service fee. This court's understanding of the service fee concept is that the fee is imposed for the added cost to the insurer that occurs when an insured chooses to divide her

> annual payment into a number of smaller payments. That is not the picture the Endorsement E0022 paints. It states that the "policy period is . . . one Calendar month." Therefore, by paying the premium due at the time it is due, for each month of insurance that they purchase, Plaintiffs have not taken advantage of (nor been offered) any so-called pay plan." [R.P 1038].

Judge Vanzi was correct. The Farmers policy does not obligate the insured to pay a monthly payment fee. Nor is there any consideration for a supplemental promise by the insured to pay an additional fee for the "privilege" of paying monthly. Farmers' imposition of a monthly payment fee was a breach of contract.

B. PLAINTIFFS' STATUTORY BREACH OF CONTRACT CLAIM.

The second, independent, basis for Plaintiffs' claim involves an alleged breach of contract related to a violation of Section 59A-16-24 B. The statute requires that any premium, administrative fee or other charge for an insurance policy be "specified in the policy." The statute reflects a codification of the rule described in *Kinsolving*, *i.e.*, that the price stated in an insurance contract is consideration for all the rights provided by the contract, and that any amount payable in consideration for a benefit found in an insurance contract must be specified in that contract. Similarly, Section 59A-18-3, defines "premium" as any amount, however named, paid in consideration of a contract of insurance. An amount payable for a contract of insurance is any amount payable for any right

found in an insurance polilcy.[12] Plaintiffs respectfully disagree with that portion of *Nakashima* which limits the meaning of "premium" to any charge directly relating to the insurer's actuarial risk of loss. *See Nakashima*, 2007-NMCA-047, ¶¶ 22-33. Plaintiffs ask that the Court revisit this aspect of *Nakashima* in light of the analysis found in *Troyk,* 90 Cal. Rptr. 3d at 603-7.

In any event, Plaintiffs' common law breach of contract claim does not depend upon the applicability of these statutes. This was recognized by the district court's Memorandum Opinion [R.P. 1235-40], and by *Nakashima,* 2007-NMCA-247, ¶ 7, both of which analyzed separately the two theories of the insured's claims.

III. FARMERS CANNOT RAISE ISSUES FOR THE FIRST TIME ON APPEAL.

"To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked." Rule 12-216(A) NMRA. The appellant must have clearly raised the issue below and invoked a ruling by the district court. *Diversy Corp. v. Chem Source Corp.,* 1998-NMCA-112, ¶ 12, 125 N.M. 748, 965 P.2d 332. The burden is on the appellant to show that an issue it raises on appeal

[12] The terms "contract of insurance" and "insurance policy" are synonyms. *Barela*, 79 N.M. at 151; NMSA 1978 § 59A-18-2 (1984).

has been decided by the trial court. *Luevano v. Group One,* 108 N.M. 774, 776, 779 P.2d 552 (Ct. App. 1989). An appellant cannot change its argument on appeal. *Rust Tractor Co. v. Consolidated Constructors Inc.*, 86 N.M. 658, 660, 526 P.2d 800 (Ct. App. 1974). Thus, while appellate review of a summary judgment is *de novo*, that review must be based upon the evidence and the legal arguments presented when the district court was deciding the summary judgment motion. *Barela,* 79 N.M. at 152.

On the other hand, a trial court decision generally will be affirmed if it is "right for any reason." *Maralex Resources, Inc. v. Gilbreath,* 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626.

The issues Farmers failed to preserve include:

A. FARMERS' FAILURE TO INVOKE A DECISION FROM THE DISTRICT COURT CONCERNING THE RELATIONSHIP BETWEEN FARMERS AND PREMATIC.

On appeal, Farmers argues it did not breach its contract because Farmers and Prematic are separate companies. BIC at 14. Farmers abandoned this argument at summary judgment. In their Motion for Summary Judgment, Plaintiffs described in detail the overlapping relationship between Farmers and Prematic. [R.P. 743-746], and devoted seven pages in their motion to discussing the legal principles and factual matters related to this issue. [R.P. 757-63] This

included 21 statements of undisputed material facts with exhibits, showing that Farmers and Prematic were part of a single enterprise, or alternatively, that Prematic was acting as Farmers' agent. [R.P. 743-5] In its response to Plaintiffs' motion, Farmers did not argue that Plaintiffs' Motion for Summary Judgment should be denied based upon the relationship between Farmers and Prematic. In fact, in its response to Plaintiffs' arguments, Farmers stated "Farmers has never attempted to 'pass the buck' in this case." [R.P. 913] While Farmers sometimes stated below that Prematic and Farmers were separate companies, it *never* relied on this argument as a basis for the district court to deny Plaintiffs' motion for summary judgment. Farmers abandoned the Farmers/Prematic issue and did not invoke a ruling of the district court regarding it.[13]

The district court's Memorandum Opinion on summary judgment does not discuss or rule upon the Prematic issue. [R.P. 1235-40] There is a simple reason for this. Farmers did not invoke such a ruling. Nor did Farmers' Motion for Reconsideration ask the district court to reconsider its summary judgment decision on the basis that Prematic and Farmers were separate companies.

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[13] Failure to respond to an argument is generally deemed an acquiescence. *Murford v. Altria, Inc.*, 242 F.R.D. 615, 622, n 5 (D.N.M. 2007).

Even if Farmers had raised the Prematic issue below, it would not prevail. Farmers argues that it is not liable because the monthly payment fees were collected by Prematic, and because the district court did not make a finding of "alter ego" liability. BIC at 30-31. There are several reasons why this argument is wrong.

First, the Farmers/Prematic relationship is not a necessary element of Plaintiffs' claim. Farmers is being held liable for breach of a contract to which it is a party. But for Farmers' breach of its own contract and its requirement that Class members use Prematic exclusively, there would have been no need to deal with Prematic. *Troyk*, 90 Cal.Rptr.3d at 605, states: "Because FIE *required* the insureds to pay those service charges to obtain a one-month term policy, it is irrelevant that Prematic, instead of FIE, directly received that service charge." (emphasis in original)

Second, at a minimum, a principal/agent relationship exists between Farmers and Prematic. A principal and an agent are, by definition, two different entities. *Madsen v. Scott,* 1999-NMSC-42, ¶ 8, 128 N.M. 255, 992 P.2d 268. Prematic acts for Farmers in collecting and forwarding to Farmers the premiums paid on Farmers' policies. Prematic was established as part of the Farmers Insurance Group to provide monthly payment plans to Farmers' policyholders. [R.P. 744, ¶ 20]

Farmers' requires an insured who buys one-month policies to pay through Prematic. [R.P. 772] Prematic provides services only for insurance companies within the Farmers Insurance Group. [R.P. 743, ¶ 9] The Nelisses' Farmers agent described Prematic as Farmers' "internal billing system." [R.P. 771-2, 774-5]. The Farmers Insurance Group logo on Prematic documents indicates that Prematic is affiliated with Farmers. [R.P. 783]. The post-2000 Prematic document is entitled "Farmers EasyPay." [R.P. 1761] *See also* [R.P. 780-826]. At the very least, Prematic had apparent or implied authority to act on Farmers' behalf. *Robertson v. Carmel Builders Real Estate,* 2004-NMCA-356, ¶¶ 21-23, 135 N.M. 641, 92 P.3d 653.

Prematic's status as Farmers' agent is further shown by the facts that (1) Prematic sends Notices of Cancellation to Farmers' insureds who are delinquent in their payments [R.P. 833]; notwithstanding that (2) only an insurer or its agent can send a notice of cancellation. NMSA 1978, § 59A-18-29A (1984).

With respect to money received from third parties "the possession of this money by the agent is the possession of the [principal]." *Samples v. Samples,* 2 N.M. 239, 244 (1882). *See also Interinsurance Exchange of the Automobile Club of Southern California v. Board of Equalization,* 203 Cal. Rptr. 74, 78 (Cal. App. 1984) (money received by an insurer's agent is, in legal effect, received by the insurer.) *Troyk,* 90 Cal.Rptr.3d 618, held that "Prematic was acting as FIE's agent

in billing and collecting premiums and service charges from the class members." *Crawford* found Prematic to be the "billing and collection subsidiary" of Farmers Group Inc., and that Prematic "acted as the collection arm of its parent corporation, Farmers." 207 Cal.Rptr. at 159.

Finally, the undisputed facts set forth in Plaintiffs' Motion for Summary Judgment support an "alter ego" theory of liability. *Troyk*, 90 Cal.Rptr.3d at 619-20.

B. FARMERS' FAILURE TO RAISE IN THE TRIAL COURT ITS "INCORPORATION BY REFERENCE" ARGUMENT.

Farmers has a new theory on appeal: that the terms of a written Prematic agreement signed *before* the policy was issued were incorporated by reference into the policies by the appearance of the word "PREMATIC" on the Declarations page. BIC at 26-27. Nowhere in Farmers' briefing on the cross-motions for summary judgment below [R.P. 894 or 836] did Farmers make an argument based on a purported Prematic agreement.

Farmers contends Judge Vanzi was confused and improperly disregarded the Prematic agreement in granting summary judgment to Plaintiffs. [BIC, p. 22] There is a simple reason the judge did not consider a Prematic agreement in deciding the cross-motions for summary judgment. Farmers never mentioned such a document.

Farmers' "incorporation by reference" argument before the district court was that the *billing invoices* received by its insureds *after* the inception of the policy were incorporated by reference into the policy. [R.P. 841] ("the references to 'Prematic' in the Policy Activity section clearly are references to the Prematic *billing invoices*.") (emphasis added). The new theory which Farmers pursues on appeal was never raised in the district court. When Farmers moved the district court for reconsideration, it argued that the Prematic agreement was a "separate agreement," [R.P. 2254] separate and apart from the Farmers policy. Not only did Farmers not make an "incorporated by reference" argument before the district court, but such an argument is the polar opposite of the "separate agreement" argument it made below.

But even if Farmers had preserved this issue for appeal, the evidence does not support it. "For the terms of another document to be incorporated into the document executed by the parties, the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Troyk,* 90 Cal.Rptr.3d at 610.[14] The

[14] Mr. Troyk first bought his Farmers Policy in 1991 (90 Cal.Rptr.3d at 599), and therefore was subject to the pre-2000 form of Prematic document.

deposition of Farmers' Rule 30B(6) witness, Minah Anna White, contradicts Farmers' position:

> Q. If that insured were to read that policy from front to back, the Declarations Page, the policy form and all the endorsements, they would not see anything on the subject of monthly service fees. Is that correct?
>
> A. Yes

[R.P. 974] This testimony, binding on Farmers, constitutes an admission that contradicts the argument Farmers belatedly raises on appeal.

Any agreement with Prematic was not in effect until after the Farmers policy had been issued,[15] and could not have been incorporated by reference into that policy. This is particularly true of the post-2000 Farmers EasyPay document, which is not seen by the insured until after the policy has been issued.

Farmers says reference to a "premium deposit" incorporates the Prematic document. BIC at 8. That contention was never argued to the district court and is unsupported by the facts. There is no evidence in the record that either Farmers or any Class member interpreted the policy in this way. Ms. White's testimony

[15] The pre-2000 Prematic document states it did not come into effect until approved by Prematic's regional office [R.P. 1758], which would be after the corresponding Farmers policy had been issued.

supra, contradicts this position. The post-2000 Farmers' EasyPay document does not refer to a "premium deposit." [R.P. 1761-2]

Troyk, 90 Cal.Rptr.3d at 610, rejected Farmers' "incorporation by reference" argument.

C. FARMERS' FAILURE TO RAISE IN THE DISTRICT COURT ITS ARGUMENT THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE CLASS.

Farmers argues there were genuine issues of material fact that precluded summary judgment in favor of the Class. BIC at 38-40. Farmers did not make that argument in its Response to Plaintiffs' Motion for Summary Judgment. [R.P. 894] *See* Rule 1-056(E) NMRA ("an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.") Nor did Farmers' Motion for Reconsideration [R.P. 2254] make such an argument.

D. FARMERS' FAILURE TO RAISE IN THE DISTRICT COURT ITS DUE PROCESS ARGUMENT.

Farmers never raised a due process argument before the district court. Farmers invokes the general public interest exception, Rule 12-216(B)(1) NMRA to avoid the consequences of its admitted failure to raise this argument below. BIC at

48. In *Azar v. Prudential Insurance Company of America,* 2003-NMCA-62, ¶¶ 21, 29, 133 N.M. 669, 68 P.3d 909, cited by Farmers, this Court stated that general interest was implicated because the "TILA preemption" issue in question affected consumers and the insurance industry generally, and affected more than 20 other pending cases. This is a breach of contract case, the outcome of which will hinge upon the language of the Farmers Policy and upon the facts of this case. No other insurance company (other than Farmers' affiliates) uses this same contract language. Farmers' due process argument does not satisfy the general interest exception.

The cases cited by Farmers concern punitive damage awards. There was no punitive damage award here. The aggregate damages awarded in this case are the actual damages sustained by Class members. There are over 200,000 members of the Class. [R.P. 1521-2] On the average, each Class member's damage, including prejudgment interest, is about $400. The bottom line of Farmers' due process argument is that it is a violation of due process to accumulate the small claims of numerous consumers into a single class action. This argument was rejected in *Fiser v. Dell Computer Corp.*, 2008-NMSC-46, ¶12, 144 N.M. 464, 188 P.3d 1215 ("The opportunity for class relief and its importance to consumer rights is enshrined in the fundamental policy of New Mexico.") A similar due process claim was rejected in *Troyk,* 90 Cal.Rptr.3d at 629-630.

A class action was the only appropriate mechanism whereby the thousands of New Mexico and Arizona residents who were injured in small amounts could recover from Farmers the many millions of dollars it wrongfully obtained.

Farmers' due process argument is frivolous.

IV. PLAINTIFFS ARE ENTITLED TO RECOVER ALL SERVICE FEES THEY HAVE PAID DURING THE CLASS PERIOD.

"The goal of damages for breach of contract is putting the injured party in as good a position as he would have had if performance had been rendered as promised." *Hubbard v. Albuquerque Truck Center LLD*, 1998-NMCA-58, ¶15, 125 N.M. 153, 958 P.2d 111. A common measure of damages in a breach of contract case is the difference between the contract price and the cost to the plaintiff of obtaining the contracted-for benefits. *Louis Lyster, General Contractor Inc. v. Town of Las Vegas*, 75 N.M. 427, 430, 405 P.2d 665 (1965). *Montgomery v. Karavis,* 45 N.M. 287, 294, 114 P.2d 776 (1941) states that when a contracting party fails to keep his agreement, the measure of the other party's damages is always the sum that would put him in as good a position as if the contract had been performed and that "this will generally be shown by the cost of getting work done or completed by another person."

This is the "benefit of the bargain" measure of damages. Class members had to pay not only the contract price, but also a monthly payment fee, to obtain the monthly payment benefit provided by the Farmers policy. The difference between the contract price and the cost to Class members in obtaining the contracted-for benefit is the amount of monthly payment fees paid.

The "benefit of the bargain" standard is applied in *Dierkes v. Blue Cross & Blue Shield of Missouri*, 991 S.W.2d 662, 669 (Mo. 1999). *Dierkes* was a class action alleging that Blue Cross charged premiums that exceeded the price stated in its policies. *Dierkes* held that "damages are easily ascertainable by subtracting the premiums authorized by [the policy] from the actual premiums paid by the subscribers."

Farmers claims that Class members suffered no damages because they "remain contractually obligated to pay those charges to Prematic." BIC at 47. If Farmers had honored its contract, Class members would not have been required to deal with Prematic.

Farmers argues that to avoid unjust enrichment, the district court should have offset the amount of damages by the amount of value that Class members received from the benefit of monthly payments. BIC at 47-8. Farmers' argument

was addressed in the district court's March 24, 2006 Decision Letter. [R.P. 1817-1819]

> "In addition, I find that there can be no unjust enrichment when Plaintiffs had a right to buy insurance monthly. See *Ontiveros Insulation Company v. Sanchez*, 2002-NMCA-051, ¶ 17, 129 N.M. 200 ("If a [party] has already paid for the benefit, there can be no enrichment, much less unjust enrichment.") In any event, unjust enrichment is an equitable remedy relied upon when 'in the absence of privity, a party cannot claim relief in contract and must instead seek refuge in equity.' *Id.* at ¶ 11. This equitable remedy is not available to Defendant under the circumstance."

Farmers says Plaintiffs failed to prove they had suffered harm as a result of Farmers' failure to disclose. [BIC 34-35] Farmers says it raised this issue in its Brief on Damages found at [R.P. 1822]. [BIC, p. 34.] But Farmers did not file a Request for Hearing in connection with this Brief, nor did it request or receive a ruling from the district court on the issues raised in the Brief. The primary issue raised by that Brief, the dollar amount of fees paid by Class members, was later resolved by Stipulation of the parties. [R.P. 2304]

Even if Farmers had properly invoked a district court ruling on this issue, it would not prevail. This is not a non-disclosure case; it is a breach of contract case. It is not necessary for Plaintiffs to prove damages resulting from non-disclosure. *Troyk*'s discussion of damages is consistent with this analysis. *Troyk* states that "causation of damages in contract cases requires that the damages be

proximately caused by the defendant's breach." 90 Cal.Rptr.3d at 629. Farmers partially quotes a sentence in *Troyk* that Mr. Troyk had failed to demonstrate "that he or other class members would not have paid the monthly service charges had they been disclosed in the policy documents." [BIC, p. 35]. Farmers deletes the end of the quoted sentence; *i.e.*, "as required by section 381, subdivision (f)." Section 381(f) of the California Insurance Code requires any premium to be disclosed in the policy.

Thus, *Troyk* states that (1) to recover damages based upon breach of contract, a plaintiff must show the breach of contract caused damages; and, (2) to recover damages based upon violation of a disclosure statute, a plaintiff must show the failure to make the required disclosure caused damages. Because § 381(f) is a disclosure statute, *Troyk* concluded that damages caused by a violation of that statute would be damages caused by a failure to make the disclosures required by the statute.

Sheldon v. American States Preferred Ins. Co., 95 P.3d 391 (Wash. App. 2004), also relied on by Farmers, is distinguishable. *Sheldon* involved an insurance policy that did not permit monthly payments. *Sheldon* involved installment fees, whereby the insured paid a service fee for the privilege of paying a six-month premium in installments, while this case involves month-to-month policies. The

essence of the plaintiff's claim in *Sheldon* was that the insurer had breached a disclosure statute, while Plaintiffs' claim is that Farmers refused to provide Class members with a right expressly provided by the Farmers policy.

V. PLAINTIFFS' RECOVERY IS NOT BASED UPON A VIOLATION OF THE UNFAIR INSURANCE PRACTICES ACT.

Farmers says the Plaintiffs may not assert a derivative violation of the Unfair Insurance Practices Act. BIC at 27-34. This argument is mistaken because, as Plaintiffs stated in their Response to Farmers' Motion to Dismiss, "Plaintiffs are *not* seeking to recover under the "private cause of action" section of the Unfair Insurance Practices Act ("UIPA") NMSA 1978, §59A-16-30 cause of action." [R.P. 549] (emphasis in original)

When an insurance company breaches its policy, the fact that such a breach also violates the UIPA does not preclude the insured from proceeding under a breach of contract claim. NMSA 1978, § 59A-16-30B (1984) says that the UIPA's statutory remedy is "in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state." *See New Mexico Life Ins. Guar. Assoc. v. Quinn and Co.*, 111 N.M. 750, 762, 809 P.2d 1278 (1991).

Farmers relies upon *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433 (5th Cir. 2000). The plaintiffs in *Perrone* alleged only federal statutory causes of action. The complaint in *Perrone* did not allege a breach of contract claim. *Perrone* did not involve a statute similar to Section 59A-16-30B.

Whether Farmers has violated the UIPA is irrelevant to Plaintiffs' common law breach of contract claim.

VI. THE CLASS' CLAIMS ARE NOT BARRED BY THE VOLUNTARY PAYMENT DOCTRINE.[16]

The bills Class members received stated that payment of a monthly payment fee was required. A consumer receiving a bill from a company such as Farmers presumes that the bill is proper and pays it. Mrs. Nellis testified, "I paid each month whatever the bill was that I received." [R.P. 864].

But the district court found that the monthly payment fee was not owed. Therefore, the monthly bills misled Farmers' insureds. An insurer has an obligation to provide accurate information to its insured. *Azar,* 2002- NMCA- 062, ¶ 57. An insurer that gives false information breaches this duty regardless of whether it is done fraudulently, negligently or innocently. *Id.* ¶ 58. Class members received bills

[16] Contrary to Farmers' assertion at BIC, p. 37, the district court ruled against Farmers on this issue. [R.P. 1818]

that contained false information by demanding payment of a monthly payment fee that was not owing.

Aetna Life Ins. Co. v. Nix, 85 N.M. 415, 417, 512 P.2d 1251 (1973) holds that an insurer that has made payment under an erroneous belief that the terms of the contract required such payment is entitled to recover the payment. This is the result even if the insured had innocently provided the incorrect information. *Id.* at 417. *See Sunwest Bank v. Colucci,*, 117 N.M. 373, 376, 872 P.2d 346 (1994) (When a plaintiff has paid money in the mistaken belief that an enforceable contract exists, the plaintiff is entitled to recover the money paid.); 5 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* , § 79:50 (3d ed. 2005) ("A premium payment made to the insurer through the mistaken belief that it is due may be recovered from the insurer.")

A consumer's paying a bill based upon false information regarding the amount payable is not a voluntary payment. *See Durant v. Service Master Co., 159* F.Supp.2d 977, 981 (E.D. Mich. 2001) ("When one is over-billed and then mistakenly submits full payment in response to that bill, one has made a mistake of fact."); *Nationwide Mutual Insur. Co. v. Glickman,* 1996 U.S.Dist. LEXIS 15530 (E.D. Penn. Oct. 22, 1996) (An insurance company could recover monies paid to a treating physician, when the physician's bills overstated the amount owing.); *Kidd v.*

Delta Funding Corp., 2000 N.Y. Misc. LEXIS 29 (Sup. Ct., N.Y.County, Feb. 22, 2000) (Sending a customer a bill which includes improper charges is an implied representation that those charges are owing, and is deceptive.) *See also Restatement (First) of Restitution* § 55 (1937); *Restatement (Third) of Restitution*, § 6 (Tentative Draft No. 1, 2001); 7 Joseph M. Perillo, *Corbin on Contracts*, §§ 28.50, 28.51 (rev. ed. 2002).

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CERTIFYING A CLASS OF NEW MEXICO AND ARIZONA INSUREDS.

A district court's decision to certify a class is reviewed under an abuse of discretion standard. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-242, ¶ 39, 144 N.M. 405, 188 P.3d 1156.

None of the arguments which Farmers made in its Response to Plaintiffs' Motion to Certify are the subject of this appeal. The issue, therefore, is whether the district court committed reversible error in denying Farmers' Motion to Decertify. [R.P. 1906] A court should not decertify a class "absent "some significant intervening event," or "a showing of compelling reasons to re-examine the question." *Doe v. Karadzik*, 192 F.R.D. 133, 136-7 (S.D.N.Y. 2006).

The Motion to Decertify did not claim there had been any intervening change in the controlling law, nor did it present any evidence not available when

the Class was originally certified. The district court denied Farmers' Motion to Decertify, stating that "Although a class must be decertified before Final Judgment if the evidence shows that the requirements for certification are not met, there is no change in the facts or law that mandates decertification." [R.P. 2192]

A district court has broad discretion in ruling upon a motion for reconsideration and will only be reversed for an abuse of discretion. *GCM Inc. v. Kentucky Central Life Ins. Co.,* 124 N.M. 186, 194, 947 P.2d 143 (1997). The district court asked Farmers to identify any change in circumstances which would justify decertification, but no such change in circumstances was proffered. [Tr. Vol. 5 of 5, at pp. 5-6] The district court did not abuse its discretion in denying the Motion to Decertify.

Even if Farmers had timely raised the class action arguments it makes here, those arguments have no merit. As regards Farmers' choice of law argument, *Ferrell v. Allstate Ins. Co., supra,* an automobile policy "installment fee" case, held that the district court had properly certified a multi-state class action that included Allstate's Arizona insureds.

The letter the Arizona Director of Insurance gave to a Farmers' lobbyist is inadmissible hearsay. *See Sheldon,* 95 P.3d at 392-3 ("We agree with Sheldon that the letters from the commissioner to third parties were hearsay and should not have

been considered."). This letter obviously does not represent the "clearly established" law of Arizona. *Ferrell*, 2008-NMSC 042, ¶ 37. Moreover, the letter does not address Plaintiffs' common law breach of contract claim. The Director does not say she has ever read the Farmers policy. *See Berry*, 2003-NMCA-116, ¶¶ 101, 116 ("Final authority with regard to matters of . . . breach of contract, rests with the courts.") This letter also represents an improper effort at informal rule-making in contravention of Arizona law. *See* Ariz. Rev. Stat. Ann. § 41-1030(A) (2002); *Cochise County v. Arizona Healthcare*, 825 P.2d 968 (Ariz. App. 1991).

Regarding Farmers' reference to Ariz. Rev. Stat. Ann. § 20-465 (2001), the Arizona Department of Insurance held hearings in 1994 to determine when a fee could be charged for services not customarily provided in the transaction of insurance, as required by the statute. The Department issued an Amended Order [R.P. 2057-2065] that, among other things, determined that a fee in addition to the premium could not be charged for such services as "collecting all monies associated with the insurance transaction."

Farmers asserts the district court ignored the Plaintiffs' alleged failure to establish damages from Farmers' breach. [BIC at 42-3] Farmers did not make that argument either in its initial response to Plaintiffs' Motion for Class Certification or in its Motion to Decertify. [*See* R.P. 418, 1906]. Moreover, *Berry*, 2004-NMCA-

116, ¶ 67, rejected a similar argument that damages could not be decided on a class-wide basis because of each class member's alleged "waiver of performance." *Berry* also rejects the argument that a breach of insurance contract claim necessarily involves individualized issues as to each class member's understanding of the meaning of the policy language. *Id.* ¶ 66.

CONCLUSION

Distilled to its essence, Farmers' position is that (1) the stated price for an insurance policy that requires the insured to pay monthly does not apply when the insured pays monthly, and (2) payment of the stated price for an insurance policy buys the insured only some, but not all, of the benefits provided in the policy. Farmers' position is contrary to the policy language, the evidence and the law. The district court's Judgment should be affirmed.

Respectfully submitted,

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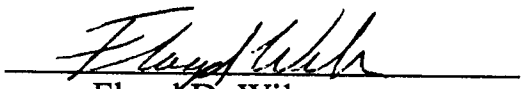

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA in that the brief is proportionately spaced and the body of the brief contains 11,000 words. This brief was prepared and the word count determined using Microsoft Office Word 2000.

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