IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LYDIA NELLIS and PATRICK NELLIS,
for themselves and all others similarly situated,
Plaintiffs-Appellees,

vs.

Ct. App. No. 29,295
Bernalillo County
(D. Ct. No. CV-2003-02564)

FARMERS INSURANCE COMPANY OF ARIZONA,
Defendant-Appellant.

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Linda M. Vanzi

FARMERS INSURANCE COMPANY OF ARIZONA'S REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 15-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 proportionally spaced and the body of the brief contains 4,387 words. This brief was prepared and the word count determined using Microsoft Office Word 2003.

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I.

INTRODUCTION

Despite receiving exactly what they wanted, expected, and paid for—the right to pay their insurance premiums on a monthly basis—Plaintiffs claim that they may ignore their own contractual obligations to pay a monthly service charge in return for this right, and that Farmers is liable for the staggering sum of ***$84,703,438*** (plus post-judgment interest). Plaintiffs do not even *suggest* that they were defrauded or deceived. Nor can they, because they indisputably received more frequent and conspicuous disclosure of the service charge and insurance premium than they contend the law requires.

Plaintiffs' theory is manifestly unjust: Despite entering into a separate and legally binding agreement with Prematic and promising to pay a service charge to obtain an optional monthly payment arrangement, Plaintiffs argue that they should not have to pay for this option because Farmers *subsequently* issued a "Monthly Payment Agreement" endorsement to their policy. According to Plaintiffs, this endorsement was a magic wand that wiped away their separate contractual obligations to Prematic while allowing them to retain all the contract's benefits. Plaintiffs then assert that their payment of service charges to *Prematic* resulted in a breach of their insurance contract and that *Farmers* must refund the charges that

Prematic collected and retained from New Mexico and Arizona customers from 1997-2003.

Plaintiffs' breach of contract theory fails because Farmers provided insurance coverage for the stated price (the "premium"), and Prematic supplied its administrative services for the stated price (the "service charge"). This Court already rejected Plaintiffs' core theory in *Nakashima v. State Farm Mutual Automobile Insurance Co.*, a substantially identical action brought by the same counsel. There, this Court concluded that State Farm did not breach the policy by charging an additional fee to insureds who opted to pay their premiums on a monthly basis. 2007-NMCA-027, ¶1, 141 N.M. 239, 153 P.3d 664. That decision compels reversal here because the facts are indistinguishable in all material respects:

(1) both named plaintiffs initially paid the full six-month premium in a lump sum and then switched to the monthly payment plan because they valued the convenience of this arrangement;

(2) the optional monthly payment plan required that plaintiffs enter into a separate contract;

(3) plaintiffs were fully aware of the amount of premium *and* service charge they would be required to pay before entering into this separate agreement;

(4) the insurance policy contained several references to the separate payment agreement, and these references would not have appeared had plaintiffs not agreed to the optional monthly payment plan;

(5) the parties agreed upon the insurance contract, and the insurer set the premium, *before* plaintiffs chose the payment plan; and

(6) plaintiffs based their sole claim, for breach of contract, on the theory that the service charges should have been included in the stated price on the declarations page.

As in *Nakashima*, Plaintiffs here also assert an alternative breach theory based derivatively on an alleged violation of New Mexico's Insurance Code, which requires insurers to specify the "premium" in the insurance policy. But Plaintiffs concede that *Nakashima* already defined "premium" as "any charge directly relat[ed] to the insurer's actuarial risk of loss" (Answer Brief ("A.B.") 31), and payment of Prematic's service charges indisputably did not purchase any additional coverage against risk. There is no policy reason for this Court to revisit its well-reasoned opinion, and principles of *stare decisis* compel the same result.

In addition to these deficiencies, several other errors underlie the judgment, including that: (1) Plaintiffs failed to establish that the alleged breach caused them any harm; (2) this is not a proper class action given the predominance of individualized issues highlighted in the summary judgment ruling and the fundamental differences between Arizona and New Mexico law; (3) the class is not entitled to any damages, let alone a complete refund of the fully disclosed and agreed-to charges; and (4) the judgment is a disproportionate sanction that violates due process.

Farmers respectfully requests that this Court reverse the judgment and all associated orders and direct the entry of a new judgment in its favor.[1]

II.

DISCUSSION

A. Plaintiffs Continue To Ignore That They Entered Into Separate And Enforceable Contracts With Farmers *And* Prematic.

Plaintiffs rely on a selectively incomplete account of the facts in an attempt to defend the judgment. (A.B.3-5.) In particular, they overlook the fundamental, undisputed fact that the entire class entered into *two separate contracts*, each of which bound them to certain commitments: (1) they agreed to pay *Farmers* a "premium" in exchange for protection against the risk of loss; and (2) they agreed to pay *Prematic* a monthly "service charge" in exchange for Prematic's premium-processing, forwarding, and administration services.[2] This Court recognized in *Nakashima* that this type of arrangement covering "the method of payment is *separate* from the coverage and cost of coverage contained in the policy." 2007-NMCA-027, ¶12 (emphasis added).

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1 Farmers incorporates each of the arguments from its Brief-in-Chief ("B.I.C."), although it does not repeat them all here.

2 Plaintiffs argue incorrectly that Prematic does no more than simply collect monies. (A.B.34, 50.) In fact, it processes bills, forwards premiums, and allows customers like Plaintiffs to bundle monthly premiums for multiple lines of insurance into one payment. (R.P.1935-38.)

As Plaintiffs acknowledge, Farmers' standard automobile insurance policy has a *six-month* term. (B.I.C.5; A.B.3.) Plaintiffs paid their six-month premiums up front and in full for the first *ten years* they were insured through Farmers. (R.P.855, 1734-37.) When Plaintiffs opted for the Prematic arrangement, they followed these steps:

1. Plaintiffs contacted their Farmers agent, Kimberly Sanchez, and asked about paying their Farmers premium on a monthly basis. (R.P.855, 1734-37.)

2. Ms. Sanchez informed Plaintiffs of the Prematic option and calculated the amount they would owe under this arrangement. (R.P.838 ¶7, 856.)

3. Plaintiffs entered into a separate agreement with Prematic that (a) confirmed that the "Term" of insurance was for six months; (b) identified the entire six-month Farmers premium; (c) divided that six-month premium into six equal monthly payments labeled "Monthly Premium"; (d) disclosed the amount of the first month's "Deposit" (equal to the monthly premium); (e) separately identified the amount of the monthly "Service Charge"; and (f) listed the "Amount Due Now" to Prematic, which consisted of one month's premium, one month's service charge, and the premium "Deposit." (R.P.1925, 1935.)

4. "[I]n consideration of the premium deposit" (which Plaintiffs do not deny paying to Prematic), Farmers issued a "Monthly Payment Agreement"

endorsement that converted the standard six-month policy into a series of six automatically renewing one-month policies for payment purposes. (R.P.28.)

5. Farmers issued a declarations page to Plaintiffs' policy that displayed Plaintiffs' unique Prematic account number. (R.P.9; B.I.C.9.)

6. Plaintiffs received monthly invoices that itemized the amount of "premium" due to Farmers and the amount of the "service charge" owed to Prematic. (R.P.29-30.)

7. For several months, Plaintiffs paid the "Minimum Amount Due" (the monthly premium and service charge) on their Prematic invoices by writing a check to Prematic. (R.P.860, 840 ¶¶21, 25.)

Plaintiffs conveniently ignore Steps 1-3 and concentrate on Step 4. They imply that Farmers deviated from its customary practice and gratuitously amended its standard six-month policies to allow monthly payments for customers who had not agreed to the terms of the Prematic arrangement. But Plaintiffs do not and cannot explain why Farmers would have done this. Among other problems, there would have been no "consideration" for the "Monthly Payment Agreement" endorsement had the insured not paid the premium "Deposit" to Prematic in advance, and it would have been impossible to display the insured's unique Prematic account number on Farmers' declarations page.

Nakashima confirms that the entire sequence of Plaintiffs' agreements with Prematic and Farmers is dispositive. 2007-NMCA-027, ¶11 (The policy's reference to monthly payments "cannot be construed as allowing for installment payments because it only appears on the policy after a policyholder has entered into an agreement ... regarding installment payments"). Although Plaintiffs claim it is "not true" that all insureds actually "receive their copy of" the written Prematic Agreement *before* Farmers issues the "Monthly Payment Agreement" endorsement (A.B.6, 27), this is beside the point because Plaintiffs do not dispute that the entire class agreed to the terms of their Prematic arrangements *before* paying the premium "Deposit" to Prematic and *before* Farmers amended their policies to allow for monthly payments. (R.P.1925.) Nor can Plaintiffs dispute that the exemplar Prematic Agreement in the record—signed by Plaintiffs' son—was materially identical to the one they signed (even though it is not an actual copy of Plaintiffs' agreement). (*Id.*)

Plaintiffs seek to divert attention from the flaws in the judgment by attacking Farmers and falsely accusing its counsel of misstating the record. (A.B.6-8.) For example, Plaintiffs declare that Farmers "doctor[ed]" the exemplar Prematic Agreement to "omit its true origins" (A.B.8), but they do not elaborate on this serious and unsubstantiated accusation. In fact, Farmers' brief included an excerpt and cited the complete document in the record. Plaintiffs argue that the *Prematic*

Agreement is "not even a Farmers document" (*id.*), and Farmers could not agree more. Prematic is a *separate* company that administers the monthly payment program for various lines of insurance and several Farmers-affiliated companies, and it uses an identical form Prematic Agreement regardless of which entity actually provides insurance coverage (Farmers, Mid-Century, etc.). (B.I.C.30-32.)

It also is true that, starting in approximately 2001, some insureds chose the Prematic option verbally and did not execute a written agreement (A.B.6-7; R.P.1925), but once again this does not help Plaintiffs. Even after 2001, some insureds still entered into a separate written agreement. (R.P.1925.) Plaintiffs also admit that before and after 2001, Farmers' insureds could not "'obtain or pay for'" a "'one-month term policy'" independent of the Prematic arrangement, including the service charges. (A.B.29.) In addition, the post-2001 verbal arrangement is no less enforceable than a written one. *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 574 (2d Cir. 1993); Restatement (Second) of Contracts §27 (1981). Moreover, to the extent the distinction matters (and it does not), it would render Plaintiffs atypical of other class members.

B. There Was No Breach Of Contract In This Case.

1. *Farmers Did Not Breach The Plain Language Of Its Policies.*

Plaintiffs' first, "common-law" breach of contract theory—that Farmers charged more than the "stated price" in the insurance policy (A.B.17)—fails for

several reasons. *First*, Farmers provided coverage against risk of loss in exchange for the "premium" quoted on Plaintiffs' policy. The district court's ruling ignores Plaintiffs' separate contract with Prematic. (B.I.C.15); *supra* pp.4-6. Plaintiffs agreed in advance to pay the service charges to Prematic, and Prematic fulfilled its end of the bargain by providing monthly administration services. (R.P.838, 856.) The parties do not dispute these core facts, which establish that there was no "breach."

Plaintiffs received exactly what they wanted, expected, and paid for. Their argument on appeal rests on the flawed premise that Farmers somehow "charged" more than the stated price for a one-month insurance policy. (A.B.9.) This completely disregards the sequence discussed above and the two separate agreements at issue. Stated another way, there is no such thing as a "one-month" Farmers policy without insureds' payment of a premium "Deposit" to Prematic and their acceptance of the service charges associated with this option.[3]

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[3] Plaintiffs do not and cannot dispute that Farmers' insureds who want to pay monthly must do so through Prematic. (A.B.27.) But they take issue with the insertion of "first" in this quotation—"*Plaintiffs conceded that '[i]t was not possible for a Farmers' insured to pay monthly, without [first] going through Prematic*'" (B.I.C.19)—and suggest that this alteration changed its substantive meaning. (A.B.7-8.) In addition to the fact that the brackets expressly signaled an alteration, including the word "first" did not change the quote's meaning. Ms. Sanchez testified that she explained the Prematic service charge to

[Footnote continued on next page]

Second, this Court has already considered and rejected Plaintiffs' common-law breach of contract theory in *Nakashima*. There is no meaningful distinction with this case:

- Both cases involved monthly payment plans.
- Both plaintiffs argued that the insurer had breached the policy because of the additional, separately agreed-to charges for making monthly premium payments.
- Both defendants begin an insurance transaction by offering six-month policies with the entire premium due in one lump sum. *Nakashima*, 2007-NMCA-027, ¶17; (R.P.743-44, ¶¶8, 12).
- The "monthly payment" language appears in both policies only *after* the parties agree to amend the policies to allow for monthly payments, and *after* they enter into separate contracts for that purpose. *Nakashima*, 2007-NMCA-027, ¶11; (R.P.28, 1935).[4]
- Both insurers' amended policies allow the insurers to cancel the policies only if the *premium* (not the "service charge") is not paid on time. *Nakashima*, 2007-NMCA-027, ¶19; (R.P.749 ¶29).

[Footnote continued from previous page]
Plaintiffs *before* they decided to pay monthly. (R.P.774.) Thus, in context, Ms. Sanchez testified that if an insured wants to pay monthly, he or she must *first* go through Prematic. Plaintiffs omitted this sequence in the above quotation despite citing Ms. Sanchez's testimony as support.

4 Plaintiffs seek to sidestep *Nakashima*'s dispositive holding by making an "apples and oranges" comparison of Farmers' *amended* policy—after the insured enters into a separate agreement to pay the service charges in exchange for the ability to make monthly premium payments—to State Farm's policy *before* it was amended to allow for monthly payments. (A.B.25-26.)

As Plaintiffs concede (A.B.31), *Nakashima* held that the term "premium" means charges relating to the insurer's actuarial risk of loss. 2007-NMCA-027, ¶¶22-33. There is no dispute that the Prematic service charges relate to processing and forwarding monthly premium payments and are not "premium" under this definition. *Id.* ¶17.[5] A separate contractual charge relating to the method of payment is not part of the "premium" and does not have to be disclosed in the insurance policy. *Id.* ¶12. Plaintiffs—who paid their six-month premiums to Farmers and received insurance coverage for *ten years* without paying *any* Prematic service charges—cannot plausibly suggest that they were *required* to pay service charges to obtain insurance from Farmers.[6]

Third, Plaintiffs cannot establish a breach through their selective reading of the policy. They suggest that the "price" for a Farmers' policy was the stated amount of "premium" shown on the declarations page:

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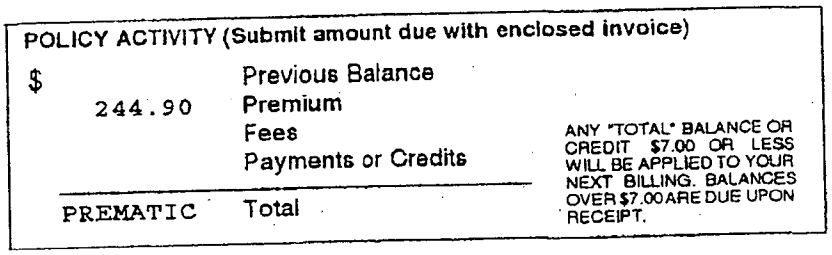
5 Plaintiffs suggest that the service charges in *Nakashima* were for a different purpose than Prematic's charges. (A.B.25.) But they acknowledge that the *Nakashima* charges "covered the expense of allowing policyholders to pay their premium in installments" (*id.* at 28), and they *admitted* that Prematic's service charges were "designed to cover the additional administrative and overhead expense associated with monthly payments." (R.P.744 ¶12.)

6 Farmers identified how this Court's summary discussion of this case in *Nakashima* was based on an incomplete explanation of the record before the district court. (B.I.C.22-23.) Plaintiffs offer no response, and instead simply cite *Nakashima*'s brief (and understandably incomplete) discussion as though this Court already has decided this case. (A.B.10 n.7, 24 n.11.)



POLICY ACTIVITY (Submit amount due with enclosed invoice)

$	Previous Balance	
244.90	Premium	
	Fees	ANY "TOTAL" BALANCE OR CREDIT $7.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING. BALANCES OVER $7.00 ARE DUE UPON RECEIPT.
	Payments or Credits	
PREMATIC	Total	

(R.P.9; A.B.4.) But because Plaintiffs agreed to the Prematic arrangement, their declarations page does not include a "total" price; it lists only a specific amount of "Premium." The "Total" line comes *after* a list of potential charges, and it included "PREMATIC" in lieu of a total.

Plaintiffs argue that this reference to "PREMATIC" is meaningless. (A.B.4-5.) But in light of the full sequence described above—including their unique Prematic account number displayed on the declarations page and their subsequent receipt of monthly Prematic invoices that itemized the "premium" and "service charge" separately—there was nothing uncertain about this arrangement. This Court must give meaning to all terms in a contract and should not render the reference to "PREMATIC" meaningless. *Omni Aviation Managers v. Buckley*, 97 N.M. 477, 481, 641 P.2d 508, 512 (1982).

Plaintiffs also suggest that the parol evidence rule and the policy's integration clauses require this Court to ignore "PREMATIC." (A.B.20-24.) But contracts often allude to objective indicia to "give meaning to" (not "contradict") a particular term, and this type of extrinsic evidence does not violate the parol

evidence rule. *Sanders v. FedEx*, 2008-NMSC-040, ¶26, 144 N.M. 449, 188 P.3d 1200; 10 Williston, A Treatise on the Law of Contracts §29.8 (4th ed. 1999).

Here, parol evidence on the meaning of "PREMATIC" will "aid in [the contract's] interpretation" and is not "offered to contradict the writing." *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991). For these same reasons, the policy's integration clauses do not render the Prematic Agreement void. This was a separate agreement, dealing with the method of making payments to Farmers, and had nothing to do with insurance coverage. *Nakashima*, 2007-NMCA-027, ¶12.[7]

2. *Plaintiffs Cannot Premise Their Claim On An Alleged Violation Of The Insurance Code.*

Unable to establish a straightforward breach of contract on the undisputed record, Plaintiffs assert a derivative claim for an alleged Insurance Code violation. (A.B.30.) But as Farmers established, and as Plaintiffs admit, *Nakashima* forecloses this theory because this Court construed the term "premium" for

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[7] Plaintiffs acknowledge that the Prematic Agreement could be incorporated by reference into their policy if its "terms [were] known or easily available." (A.B.37.) While the Farmers policy and endorsements do not explicitly mention "monthly service fees" (A.B.38), the policy *does* contain multiple references to "PREMATIC" (R.P.9), and the entire class admittedly was aware of the terms of the Prematic arrangement before receiving their policies. Plaintiffs' suggestion that Farmers somehow "waived" this argument (A.B.36-37) misstates the record—Farmers made this argument in its *motion for reconsideration*. (B.I.C.14 n.3; R.P.2291-2292.)

purposes of NMSA 1978, §59A-16-24 (1999) as charges "relating to the insurer's actuarial risk of loss." (A.B.31.) Plaintiffs simply ask this Court to "revisit" its recent, well-reasoned decision (*id.*) without offering any valid reason for doing so. *Cordova v. Taos Ski Valley*, 1996-NMCA-009, 121 N.M. 258, 265, 910 P.2d 334, 341 (filed 1995) (this Court has not "succumbed to the temptation of rejecting horizontal stare decisis").

Applying *Nakashima* to this case is not only good law, it is sound public policy. If this Court were to hold that Prematic's service charges are "premium," it would sanction substantially *less* disclosure and frustrate the Insurance Code's goal of "protect[ing] consumers." *Nakashima*, 2007-NMCA-027, ¶29. Specifically, an insurer complies with Plaintiffs' and the district court's interpretation of section 59A-16-24(B) if it: (a) discloses the service charge *anywhere* in the "policy," because the statute does not specify where, when, or how "premium" must appear; (b) provides *semi-annual* as opposed to *monthly* disclosure of the service charge; and (c) combines the "service charges" and the "premium" as one lump sum (because if service charges *are* "premium," then there is no reason to itemize them). As this Court observed, "[w]e fail to see how policyholders could be more protected under our Insurance Code if insurers were required to embed the

installment fees in the premium stated on the policy." *Nakashima*, 2007-NMCA-027, ¶29.[8]

3. *Plaintiffs Failed To Prove The Necessary Elements Of Causation And Harm.*

Setting aside the absence of any "breach," Plaintiffs' claim fails for the independent reason that Farmers did not cause any harm. These are essential elements of a breach of contract claim, and the absence of either compels reversal. *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 212, 880 P.2d 300, 309 (1994).

Plaintiffs failed to show that the alleged breach harmed them. Instead, they received a benefit from paying their premiums monthly: as Mrs. Nellis testified, it "worked out better for my budget." (R.P.862.) Because the service charges were disclosed to Plaintiffs *before* they entered into their policy, there was not "even the possibility" of harm or injury. *Sheldon v. Am. States Preferred Ins. Co.*, 95 P.3d 391, 393-94 (Wash. Ct. App. 2004). Plaintiffs also failed to demonstrate causation—*i.e.*, that "class members would not have paid the monthly service

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[8] Plaintiffs' voluntary payment of the service charges also precludes recovery (B.I.C.36), and the Prematic Agreement refutes their claim that they paid the charges based on "false information" because the "fee was not owing." (A.B.46-47.) Plaintiffs failed to respond to Farmers' alternative argument that it substantially complied with the district court's interpretation of the Insurance Code. (B.I.C.32.) Nor did they offer any substantive response to Farmers' argument that, at the very least, disputed issues of fact precluded summary judgment in Plaintiffs' favor. (B.I.C.38.) Plaintiffs' suggestion that Farmers "waived" this argument (A.B.39) ignores the record. (R.P.896-902.)

charges had they been disclosed in the policy documents" instead of the Prematic Agreement and every monthly invoice. *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589, 627 (Cal. Ct. App. 2009).[9]

C. The District Court Erred By Refusing To Decertify The Multistate Class.

The district court should have decertified the multistate class in this case for two principal reasons. First, the fundamental conflict between the Arizona and New Mexico Insurance Codes required decertification of the entire class, or at least the Arizona class. (B.I.C.44-46.)

Second, the district court's summary judgment decision required an individual inquiry into the circumstances in which each class member entered into the Farmers' policy and Prematic Agreement. The court held that the various references to "Prematic" in Farmers' policy were "too subtle a 'reminder' for ... *most* customers." (R.P.1037 (emphasis added).) But this means that the references to "Prematic" were *not* too subtle for *some* class members. The classwide

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[9] Plaintiffs seek to brush aside *Sheldon* and *Troyk* as "disclosure" cases and imply that their theory is different. (A.B.43-44.) But from the start, Plaintiffs have argued that "[t]here would be nothing illegal or invalid about Farmers' charging the service fees in question if those fees were clearly described in the Farmers policy form." (R.P.1352.) And the district court's summary judgment order accurately describes Plaintiffs' theory as one of non-disclosure. (R.P.1035-41.)

adjudication of this issue deprived Farmers of its right to present every available defense against *each* class member. (B.I.C.42.)[10]

The district court also erred by presuming that approximately 120,000 class members could prove that they would not have agreed to pay the service charges had they been disclosed on the policy itself. (B.I.C.42.) *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed [in a class action].").[11]

D. Plaintiffs Are *Not* Entitled To A Refund Of The Service Charges They Paid To Prematic As Damages.

There was no basis for awarding Plaintiffs and the Class the full amount of Prematic's service charges—which *Prematic* collected and retained—as "damages" against *Farmers*. (B.I.C.46-48.) This Court already recognized that the district court did not "make any 'finding' that Prematic and Farmers are the

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10 Plaintiffs claim that *Berry v. Federal Kemper Life Assurance Co.*, 2004-NMCA-116, 136 N.M. 454, 99 P.3d 1166, rejected similar arguments (A.B.50-51), but this Court recognized that the defendant would have a "right" following the initial certification decision to "demonstrate that individual inquiries will in fact reach a critical mass that swamps the common questions." 2004-NMCA-116, ¶¶65-66. That is exactly what Farmers did in its motion for decertification. (R.P.1912-16.)

11 Contrary to Plaintiffs' suggestion (A.B.48-49), Farmers timely raised these arguments even though they were not made during the initial class certification briefing in 2004. Farmers' arguments were based on the *summary judgment* decision in January 2005 (R.P.1912), of which Farmers sought an interlocutory appeal. (R.P.1101.)

same legal entity or that the two companies are in privity." *Nellis v. Farmers Ins. Co.*, No. 26,394, Mem. Op. at 12 (N.M. Ct. App. June 29, 2006) (affirming district court's order denying intervention to Prematic).

As for Plaintiffs' agency theory, even assuming *arguendo* that Prematic acted as Farmers' agent, it would have been for the specific, limited purpose of "collecting and forwarding to Farmers the premiums paid on Farmers' policies." (A.B.34.) An agent binds the principal only for acts done within the scope of the agency (Restatement (Third) of Agency §2.02 (2006)), and Plaintiffs cannot claim that Prematic was Farmers' agent for collecting or retaining the *service charges* because Prematic indisputably collected and retained all service charges.

Plaintiffs again misstate the record by claiming that Farmers "abandoned" and therefore waived its argument that it and Prematic were separate entities. (A.B.32.) The cited support for this claim (Farmers' statement that it "has never attempted to 'pass the buck'" (*id.*)) addressed a completely different argument—specifically, Plaintiffs' claim that Farmers violated Insurance Code provisions regarding "insurance administrators." (R.P.751, 947.) Notably, in the same document where Farmers supposedly "abandoned" this argument, Farmers expressly *disputed* Plaintiffs' claim that Prematic and Farmers were the same entity. (R.P.899.)

Even if there were a basis for awarding the Prematic charges as damages against Farmers, the district court should have offset from any award the value of the benefit provided to Plaintiffs through their Prematic arrangement. The district court wrongly allowed Plaintiffs and the class to retain this optional benefit *without cost*. (B.I.C.47-48).[12]

Finally, Plaintiffs insist that the judgment is immune from due process scrutiny simply because there was no punitive damages award. (A.B.40.) But the United States Supreme Court has rejected this very argument and explained that the "protection" afforded by due process is "not to be avoided by the simple label a State chooses to fasten upon its conduct." *Giaccio v. Pa.*, 382 U.S. 399, 402 (1966). Moreover, because Plaintiffs received the full benefit of their bargains, the award goes far beyond compensation and is necessarily punitive. *See Austin v. United States*, 509 U.S. 602, 621 (1993). Lastly, *Troyk* did not "reject[]" a "similar due process claim" (A.B.40)—the court ultimately reversed the judgment, so it "d[id] not address" all of these "premature" arguments. 90 Cal. Rptr. 3d at 629.

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12 Farmers bases its argument on the district court's failure to *offset*, not a claim of unjust enrichment, so Plaintiffs' reliance on *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, 129 N.M. 200, 3 P.3d 695 (A.B.43), is misplaced. Likewise, Plaintiffs' "benefit-of-the-bargain" authorities (A.B.41-42) are inapposite because in none of these cases had the plaintiffs contracted separately to pay the fees in exchange for an additional benefit.

III.

CONCLUSION

Farmers asks that this Court reverse the judgment of the district court and all associated orders and direct the entry of judgment in its favor. Alternatively, Farmers asks that this Court decertify the class and/or remand for a trial.

Respectfully submitted,

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