IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
APR 15 2010

NICOLE NELLIS, for herself and all others similarly situated,

Plaintiff-Appellee,

vs.

MID-CENTURY INSURANCE COMPANY,

Defendant-Appellant.

Ct. App. No. 29,993
(D. Ct. No. D-202-CV 2003-07980)

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Clay Campbell

COPY

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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 proportionally spaced and the body of the brief contains 10,938 words. This brief was prepared and the word count determined using Microsoft Office Word 2003.

I.
INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal challenges the $73 million judgment in favor of a certified class of insureds who suffered no injury, who knowingly and voluntarily agreed to pay the service charges at issue, and who received the full benefits of their separate bargains with Defendant Mid-Century Insurance Company ("Mid-Century") and non-party Prematic Service Corporation (Nevada) ("Prematic"). The district court committed several legal errors in certifying a multi-state class, and then it compounded those mistakes by awarding the windfall class judgment.

Plaintiff Nicole Nellis bases her class action lawsuit on a novel and expansive interpretation of the term "premium" in her insurance policy and in the New Mexico Insurance Code. She argued, and the district court agreed, that the plain meaning of "premium" includes not only consideration for insurance against risk (as commonly understood by courts, regulators, and the insurance industry), but also service charges optionally incurred by insureds who elect to pay their premium on a monthly basis (rather than up front and in full).

Critically, a separate company, Prematic, offers this optional monthly payment plan. Mid-Century insureds who choose to pay their premiums on a monthly basis enter into a separate agreement with Prematic, in which the customer agrees to pay Prematic a monthly service charge, and Prematic agrees to forward the premiums on behalf of its customers and provide additional

administrative services. Although *Prematic* disclosed the service charges and itemized them separately from the premium in the Prematic Agreement and in its monthly invoices, Plaintiff contends that *Mid-Century* also was required to disclose the service charges in its insurance policy issued only semiannually. Reduced to its core, Plaintiff's lawsuit complains that the service charges were disclosed more frequently but on the wrong piece of paper and that this alleged "infraction" warrants a $73 million penalty. This theory, and the class judgment that adopted it, rests upon several reversible errors.

First, there was no breach of any contract. Mid-Century provided the stated insurance coverage in exchange for the quoted premium. Prematic—not Mid-Century—collected and retained the disputed service charge, and Prematic—not Mid-Century—provided monthly premium-forwarding services in exchange for this charge. Absent any "breach," Plaintiff's sole claim for breach of contract necessarily fails.

Second, Prematic's service charges are not "premium," and the disclosure of these charges in the Prematic Agreement and the monthly invoices (as opposed to the declarations page of Plaintiff's insurance policy) does not support a claim for breach of contract. This Court recently considered—and rejected—Plaintiff's core theory and the district court's elastic definition of "premium" in a virtually identical case, *Nakashima v. State Farm Mutual Automobile Insurance Co.*, 2007-

NMCA-027, 141 N.M. 239, 153 P.3d 664. That decision compels reversal here because the facts are materially indistinguishable:

(1) plaintiffs in both cases were well aware they could pay the full six-month premium in a lump sum without a service charge, but both opted to pay monthly because they valued the convenience of those arrangements;

(2) both optional monthly payment plans required that plaintiffs enter into a separate agreement;

(3) plaintiffs in both cases were aware of the amount of premium *and* service charge they were obligated to pay *before* entering into this separate contract;

(4) the insurance policy contained several references to the separate payment agreement, and those references would only appear if plaintiffs 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 in both cases 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.

The district court's judgment is irreconcilable with *Nakashima*.

Third, even if this Court were to define "premium" differently in this case, it still must reverse the judgment because there was no "breach" for several additional reasons: (a) the declarations page of the insurance policy incorporated the Prematic Agreement and the service charges by reference; (b) Mid-Century substantially complied with the Insurance Code because Plaintiff received *more* frequent and conspicuous disclosure of the Prematic service charge than her

lawsuit suggests is required, and the $73 million judgment is an unjust sanction for what is, at most, a technical violation of the Code; and (c) Plaintiff's voluntary payment of the charges with full knowledge of all relevant facts precludes her from recovering damages.

Fourth, even if Mid-Century "breached" the insurance policy, Plaintiff did not and cannot establish the separate elements of causation or harm. Any alleged "breach" or technical violation of the Insurance Code did not cause any harm to Plaintiff or the class because they received the full benefit of their bargain—the convenience of paying their premium on a monthly basis.

Fifth, the district court should not have ordered *Mid-Century* to disgorge the full amount of *Prematic*'s service charges as "damages." The court essentially ordered a complete refund of Plaintiff's and the class's service charges notwithstanding Mid-Century's and Prematic's full performance of their contractual obligations and despite the fact that a non-party collected and retained these amounts. At a minimum, the court should have offset the value Plaintiff and the class received to avoid unjust enrichment because the ruling allows policyholders to enjoy all of the benefits of Prematic's services at no cost.

Sixth, in addition to the legal errors in its summary judgment ruling, the district court also erred in certifying a class because Plaintiff is not an adequate or

typical representative, and the predominance of individual factual issues and the irreconcilable conflict of the laws render this case inappropriate for class treatment.

Seventh, the $73 million judgment violates due process because it is arbitrary, irrational, untethered to any actual harm, and a grossly excessive and disproportionate sanction based on a novel, and retrospectively applied, reading of the contracts and the Insurance Code.

For all of these reasons, this Court should reverse and direct entry of a new judgment in Mid-Century's favor. Alternatively, Mid-Century respectfully requests that the Court decertify the class and/or reverse the judgment and remand for a trial on the merits.

II.
SUMMARY OF THE PROCEEDINGS

A. Summary Of The Facts.

Mid-Century provides automobile insurance to drivers in several Western states, including New Mexico, Arizona, California, Idaho, Montana, Nevada, Oklahoma, Oregon, Washington, and Wyoming. (R.P.4.) As is standard in the insurance industry, Mid-Century quotes its customers a premium for a six-month term of coverage. (R.P.1514, 1536.) The entire six-month, quoted premium is due in one lump sum at the beginning of each six-month term. (*Id.*)

Mid-Century's insureds have several options to pay their six-month premiums including (i) paying the entire amount up front; (ii) financing payment

through a third party (e.g., credit card); or (iii) choosing an optional monthly payment arrangement. An insured who chooses the third option to pay the six-month premium monthly must do so through Prematic, a separate company.[1]

Plaintiff and the class chose the Prematic option. Here are the steps required to obtain this option during the timeframe relevant to this appeal:

1. A Mid-Century agent informs the insured that unless he or she chooses an alternative arrangement, the entire six-month premium is due immediately. (R.P.1515, 1536-38, 1540, 1234.)

2. The Mid-Century agent informs the insured about the Prematic option and that this option has an associated monthly service charge. (*Id.*) Plaintiff was seventeen years old in 1997 when she applied for insurance with Mid-Century, so her parents, Lydia and Patrick Nellis, discussed the payment options with their agent, Kimberly Sanchez, and completed the necessary applications. (R.P.1595-

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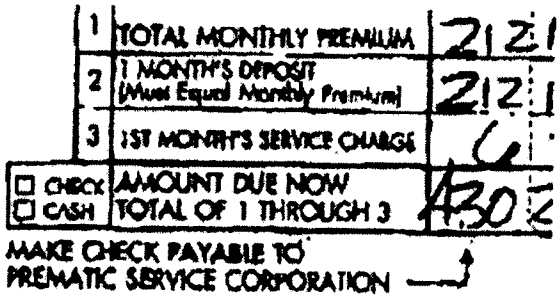
[1] Prematic is not an insurer. It is a separate legal entity that administers a monthly payment plan for several insurers related to Mid-Century. (R.P.1334, 1630-31, 1540-47, 1596-97.) Mid-Century has no ownership interest in Prematic. (R.P.974, 1336.) Mid-Century is owned by Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange, and each Exchange is owned by its policyholders. Prematic Service Corporation (Nevada) is owned by Prematic Service Corporation (California), which is owned 38% by Farmers Group, Inc. (which is ultimately owned by Zurich Financial Services, Ltd.), 53% by Truck Underwriters, and 9% by Fire Underwriters. Neither Prematic nor any of its owners are parties to this case.

99.)[2] Ms. Sanchez first quoted a six-month premium of $849.50 to Plaintiff's mother. (*Id.*) Ms. Sanchez then explained the payment options, including the Prematic Agreement. Plaintiff's mother chose this option because, as Ms. Sanchez explained, "they wanted to go on Prematic for [Plaintiff] and not themselves at that point, because the premium was higher." (R.P.1601, 1618-19.)

3. If the insured chooses the Prematic plan, the insured executes a separate agreement with Prematic, entitled "Prematic Monthly Payment Plan Agreement," that:

- specifies the six-month term of the customer's Mid-Century policy;
- itemizes the "Term Premium" into six equal monthly payments labeled "Monthly Premium";
- assigns a unique Prematic account number; and
- identifies the "Amount Due Now" as "1 Month's Deposit," which is equivalent to the first monthly premium and the "1st Month's Service Charge," as this exemplar shows:



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[2] Plaintiff's parents, Lydia and Patrick Nellis, filed a nearly identical lawsuit against Farmers Insurance of Arizona. *See Nellis v. Farmers Ins. Co.*, D. Ct. No. CV-2003-02564, Ct. App. No. 29,295 ("*Nellis I*"). The complaints in the two cases are verbatim in all material respects.

(R.P.1540-49.)[3] This separate contract thus distinguished the monthly insurance "premium" from "service charges." (R.P.1548 [Prematic Agreement requires insureds to "mak[e] an additional payment of a sum equal to one months premium, as billed, *in addition to the then current service charge*"] (emphasis added).)

Here, Plaintiff's father returned to make the first payment (which included the first month's premium and service charge), and Ms. Sanchez again explained the Prematic Agreement and the monthly service charge. (R.P.1517, 1600.) Mr. Nellis reviewed and signed the Prematic Agreement.[4]

4. After the insured agrees to the Prematic Agreement, the Mid-Century agent prints the insured's Prematic account number onto the insurance application. (R.P.1515, 1541-42.) Next, the agent calculates the monthly premium for two months and the service charge for one month, collects payment from the insured, and forwards the insurance application and the Prematic Agreement to Prematic for processing. (*Id.*) Ms. Sanchez followed that procedure here. (R.P.1596-1600.)

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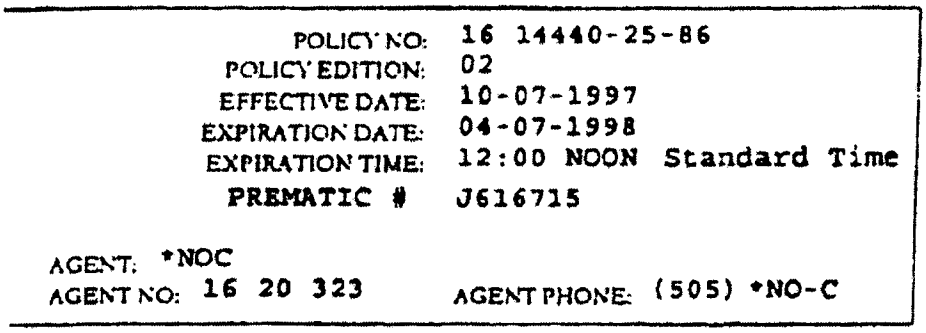
[3] Because the district court found Plaintiff to be typical of the class (R.P.1061), Mid-Century discusses the process that Plaintiff followed in 1997 when she applied for insurance and the Prematic monthly payment plan. There were slight (and immaterial) changes in this process after this time period, as explained in greater detail below. (R.P.1543-46.)

[4] Plaintiff's Prematic Agreement is not in the record but Mid-Century included an exemplar agreement in use during the time she applied for insurance and her father executed this contract. (R.P.1515.) Plaintiff did not dispute the authenticity of this exemplar agreement in the district court.

5. Upon receiving the insured's materials, Prematic would approve the insured for monthly payments, process the payments forwarded by the agent, and forward the necessary documentation and premium to Mid-Century. (R.P.1515, 1542.) After receiving this documentation, Mid-Century would approve the insured and issue the policy. (R.P.1516, 1537.)

6. The declarations page of the Mid-Century insurance policy references the insured's relationship with Prematic in several places. First, in the upper right-hand corner, the policy identifies the insured's Prematic Account Number:

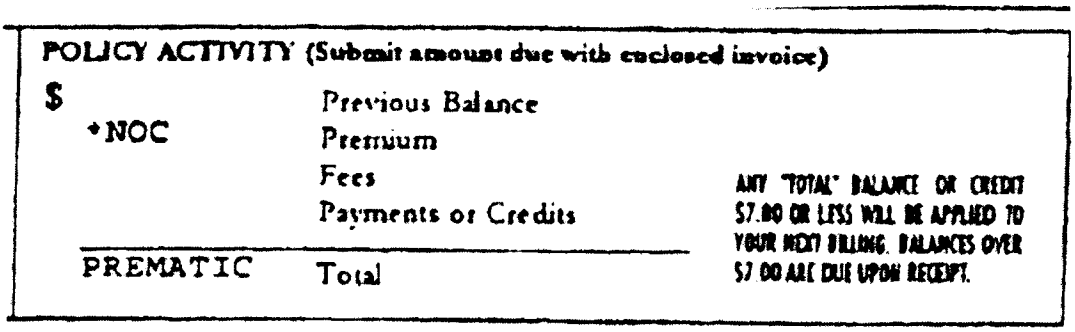


POLICY NO:	16 14440-25-86
POLICY EDITION:	02
EFFECTIVE DATE:	10-07-1997
EXPIRATION DATE:	04-07-1998
EXPIRATION TIME:	12:00 NOON Standard Time
PREMATIC #	J616715

AGENT: *NOC
AGENT NO: 16 20 323 AGENT PHONE: (505) *NO-C

(R.P.1554.)[5] Second, in the "Policy Activity" subsection of the policy, the term "PREMATIC" appears next to the space "Total" in lieu of a specific amount due:

[5] Plaintiff's policy is reconstructed, but she does not dispute its core terms and in fact relied on the reconstructed policy in her summary judgment motion. (R.P.1287.)


POLICY ACTIVITY (Submit amount due with enclosed invoice)

$

*NOC

PREMATIC

Previous Balance
Premium
Fees
Payments or Credits
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.

(*Id.*)

7. "In consideration of the premium deposit" (paid to Prematic),[6] Mid-Century also issues the "Monthly Payment Agreement" endorsement (No. E0022) to its standard six-month policy. This endorsement reflects that the insured has entered into the Prematic Agreement and enables the customer to pay the six-month premiums on a monthly basis. The endorsement amends the payment term from six months to six automatically renewing one-month terms, although the policy is still rated on a six-month term. (R.P.1517, 1537.) The insured receives a "renewal" every six months to contract for a new six-month term. (*Id.*) Mid-Century will not issue the "Monthly Payment Agreement" endorsement unless and until the insured has agreed with Prematic to pay the service charge. (*Id.*)[7]

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[6] After 2001, insureds were no longer required to pay the premium deposit. (R.P.1545.)

[7] Prior to 1999, insureds like Plaintiff were required to execute a separate written agreement before being enrolled in the Prematic monthly payment program. The program was renamed in 1999 to "Farmers EasyPay® Prematic Monthly Payment Plan," but insureds still were required to execute a separate written

[Footnote continued on next page]

8. As the following exemplar shows, Prematic provides monthly billing statements that itemize the premium and service charge:

Vehicle 1988 FORD	162235672	9-03-02	New Policy Premium Premium Policy Fee	9-03 to 10-23 10-24 to 11-23	$164.75 $99.71 $15.00
			Sub Total		$264.46
			Service Charge		$6.00
			Minimum Amount Due		$314.77 (R

(R.P.1516, 1543-44, 1546.) Plaintiff paid her insurance monthly through Prematic for approximately one year. (R.P.1.)

B. Procedural History.

1. Pleadings and Class Certification. On November 20, 2003, Plaintiff filed a class action complaint alleging that Mid-Century breached its insurance policies and violated provisions of New Mexico's and other states' insurance codes by "charging a premium (i.e. service charges) which is not specified in its policies." (R.P.3, 8.) The district court granted Mid-Century's motion to dismiss to the extent Plaintiff based her claim on an alleged violation of the New Mexico Unfair Insurance Practices Act, but it denied the motion in all other respects.

[Footnote continued from previous page]
contract. (R.P.1544.) After February 23, 2001, Prematic no longer required an executed written agreement. (R.P.1545.) Instead, insureds verbally agreed to enroll in the monthly payment plan, and the written agreement followed by mail along with the first bill. (R.P.1545-46.) By paying the first bill, an insured expressly agreed to all of the terms in the written agreement. (*Id.*) All other material aspects of this payment plan remained the same over this period.

(R.P.648-49.) The court later certified the following class:

> [A]ll owners of individual insurance policies (including lapsed or cancelled policies) issued by Mid-Century in Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon and Wyoming; who have purchased insurance on a monthly basis; and who have, within six years of the commencement of this action, paid service charges in connection with their Mid-Century policy.

(R.P.1065.)

2. Summary Judgment. On December 7, 2006, the district court granted Plaintiff's motion for summary judgment and denied Mid-Century's cross-motion. The court held that Mid-Century breached its insurance policies because the law required that the service charges "be included within the premium." (R.P.1807.) The court also found that the service charges paid to Prematic were the proper "measure of damages." (*Id.*)

3. Prematic's Motion to Intervene. Because Plaintiff's claims centered on Prematic's service charges, Prematic attempted to intervene in this action. The district court denied Prematic's motion (R.P.1194), and this Court affirmed.

4. *Nakashima* and Motion for Reconsideration. In *Nakashima v. State Farm Mutual Automobile Insurance Co.*, 2007-NMCA-027, this Court rejected materially identical breach of contract claims brought by insureds of State Farm who paid a monthly fee for the right to pay their premiums monthly. Mid-Century moved for reconsideration of the summary judgment ruling based on *Nakashima*, but the district court denied the motion. (R.P.1913.)

5. Judgment and Appeal. On October 23, 2009, the district court entered its final judgment of $73,082,953 plus post-judgment interest. (R.P.1993.) Mid-Century timely noticed this appeal on November 10, 2009. (R.P.1995.)

III.
THE DISTRICT COURT ERRED IN DENYING MID-CENTURY'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION ON HER SOLE CLAIM FOR BREACH OF CONTRACT

The district court committed multiple legal errors that compel reversal and a new judgment for Mid-Century. This Court reviews *de novo* the district court's decision on summary judgment. *Self v. UPS*, 1998-NMSC-046, ¶6, 126 N.M. 396, 970 P.2d 582. While a district court's decision whether to reconsider its summary judgment ruling is reviewed for an abuse of discretion, *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-052, ¶28, 124 N.M. 186, 947 P.3d 143, once the district court considers and rules on the merits of a motion for reconsideration, this Court reviews that decision *de novo*, *Selby v. Roggow*, 1999-NMCA-044, ¶10, 126 N.M. 766, 975 P.2d 379.[8]

[8] Mid-Century preserved its challenge to the summary judgment order in its Motion for Summary Judgment and supporting Reply Brief, its Opposition to Plaintiff's Motion for Summary Judgment, and its Motion for Reconsideration and supporting Reply Brief. (R.P.1509, 1790, 1622, 1853, 1882.)

A. Plaintiff Did Not And Cannot Establish A Breach Of Any Contract.

Plaintiff asserts that Mid-Century breached its insurance policy contracts by stating one amount of "premium" in the policy but then charging more "premium" (i.e., Prematic's service charge) to insureds who chose to pay monthly. (R.P.3.) But as this Court held in *Nakashima*, the plain meaning of "premium" does *not* include charges assessed pursuant to a separate agreement for the privilege of paying premium on a monthly basis. And even if the facts of this case compelled a different meaning of "premium" (which would make no sense as a matter of law, statutory construction, contract interpretation, or public policy), the judgment still would fail because Prematic—not Mid-Century—charged and collected the service fees (which were fully disclosed in the Prematic Agreement and Plaintiff's monthly invoices), and those fees also were incorporated into Mid-Century's policies by multiple references to "Prematic."

1. Mid-Century Provided Insurance For The Stated Premium, And Prematic Provided Its Services For The Stated Service Charge.

The district court erred in concluding that there was a breach of any contract. Mid-Century fulfilled its promise of providing insurance to Plaintiff and the class for the amount of "premium" stated on the policies—and not a penny more. Mid-Century never charged, collected, or required that insureds incur the Prematic "service charges" that, according to Plaintiff, breached the insurance contract.

(R.P.2.) Separately, Prematic fulfilled its end of the bargain by providing its monthly premium-forwarding services (in exchange for the service charge) pursuant to a separate agreement that Plaintiff acknowledges is enforceable. (R.P.935 ["The Plaintiff does not contend that [the] service fees are, by their nature, 'illegal' or 'invalid.'"].)

Plaintiff effectively seeks a "free" monthly payment plan, in which she receives all of the benefits of the optional Prematic arrangement without her obligation to pay a monthly fee. But Mid-Century does not offer such an option. (R.P.1536-37.) Plaintiff cannot evade her separate commitment to pay service charges to Prematic, and this Court should reverse the judgment and order a new judgment in Mid-Century's favor on this ground alone.

2. Prematic's Monthly Service Charges Are Not "Premium."

At the heart of the district court's analysis of Plaintiff's breach of contract claim is its erroneous legal conclusion that Prematic's service charges constitute additional, undisclosed "premium." (R.P.1807 ["By law, those service fees are required to be included within the premium (NMSA § 59A-16-24(B))."].) This conclusion conflicts with the plain meaning of the term "premium," this Court's binding precedent, and persuasive authority from other jurisdictions.

a. The Plain Meaning Of "Premium" Does Not Include Monthly Service Charges.

Plaintiff's insurance policy does not define "premium," and the district court's expansive construction conflicts with the "plain and ordinary meaning" of that term. *Nakashima*, 2007-NMCA-027, ¶10; *Davis v. Farmers Ins. Co.*, 2006-NMCA-099, ¶7, 140 N.M. 249, 142 P.3d 17 ("When a term is undefined in the policy, we may look to that term's 'usual, ordinary, and popular' meaning, such as found in a dictionary.").

The New Mexico Insurance Code defines "premium" as "the *consideration for insurance* or for an annuity, by whatever name called." NMSA 1978, § 59A-18-3 (1984) (emphasis added). *See also id.* § 59A-1-5 (1984) (defining "insurance" as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils").[9] A policyholder pays "premium" to an insurance company as "consideration ... to indemnify the insured against a specified peril. The amount of premium varies in proportion to the risk assumed." 5 L. Russ, *Couch on Insurance* § 69:1, at 69-5 (3d ed. 2009) (footnote omitted); *see also Webster's Third New Int'l Dictionary* 1789 (2002) (defining

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[9] *See also* NMSA 1978, § 59A-18-3 ("Any 'assessment', or any 'membership', 'policy', 'survey', 'inspection', 'service' or similar fee or other charge *in consideration for* an insurance or annuity contract *or procurement thereof* is part of the premium." (emphases added)).

"premium" as "the consideration paid in money or otherwise for a contract of insurance in the form of an initiation fee, an admission fee, an assessment, or a stipulated single or periodic payment according to the nature of the insurance").

Prematic's service charges do not fall within this definition of "premium." Plaintiff admitted the service charges at issue were "designed to cover the additional administrative and overhead expense associated with monthly payments." (R.P.1289.) It is circular and inconsistent with the commonly understood meaning of "premium" to define this term to include separate "service charges" that insureds have chosen to pay to a separate entity for the privilege of paying their insurance premiums on a monthly basis. (R.P.1607-08.) The service charges are not "premium" because they "are not associated with any sort of transfer or risk, but, instead, cover the costs associated with a payment plan." *Nakashima*, 2007-NMCA-027, ¶20.

b. <u>Binding Precedent From This Court Compels Reversal.</u>

In *Nakashima*, this Court rejected a virtually identical claim brought by the same class counsel in this case. It concluded that the insurer did not breach its insurance contracts by charging a monthly fee to policyholders who elected to pay their premiums on a monthly basis. This Court reasoned that monthly service charges are *not* additional "premium," and the failure to disclose them in the insurance policies did *not* support a claim for breach of contract. *Id.* ¶17. The

Court's decision in *Nakashima* rests on four independent and compelling grounds, each of which requires reversal here.

First, the purpose of the monthly service charges is identical in both cases. As Plaintiff admits, the Prematic service charges were not associated with the transfer of risk (the commonly understood definition of "premium," *supra* pp. 15-16), but instead were "designed to cover the additional administrative and overhead expense associated with monthly payments." (R.P.2, 1512.) This Court held that the term "premium" for purposes of the New Mexico Insurance Code and in insurance contracts means charges relating to the insurer's *actuarial* risk of loss. *Nakashima*, 2007-NMCA-027, ¶¶22-33. Accordingly, the monthly service fees in both cases are not "premiums" because they "cover[ed] the expense of allowing policyholders to pay their premiums" monthly. *Id.* ¶17.

Second, in both this case and *Nakashima*, "payment of installment fees is not a prerequisite to obtaining automobile insurance coverage from [the insurer]." *Id.* ¶18. Just as in *Nakashima*, "an individual can obtain insurance coverage without paying the installment fees by paying his or her premium in a lump sum." *Id.* (R.P.1536-37.) In other words, the monthly payment arrangement is optional and "individuals are in no way obligated to pay the installment fees, aside from their own financial and/or personal preference, [and thus] the installment fees cannot be

considered consideration for the procurement of insurance and are therefore not premium." *Nakashima*, 2007-NMCA-027, ¶18.

Third, Mid-Century's cancellation policy "lends further support to [the] conclusion that installment fees are not premium," *id.* ¶19, because "the policy is not actually cancelled for failure to pay the installment fees, but for failure to pay the premium," *id.* ¶14. In *Nakashima*, when State Farm received a payment for an amount less than the total due (service charge plus premium), it first "applie[d] the payment to the installment fee and then the remaining amount to the premium. Depending on the remaining balance owed on the premium, [the insurer] may send out a cancellation notice or it may simply indicate the shortage on the next bill." *Id.* ¶14.

Aside from the fact that Prematic administers the payment plan, Mid-Century's cancellation policy is substantially the same: (1) each month, Prematic subtracted the service charge from the amount paid by the insured; (2) Prematic then forwarded the balance to Mid-Century to cover the monthly premium installment; and (3) only if the insured ultimately failed to pay 80% of the total premium due would an insured receive a notice of cancellation. (R.P.1329-31.)[10]

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[10] Like the plaintiff in *Nakashima*, 2007-NMCA-027, ¶14, Plaintiff misstated the record and suggested that Mid-Century will cancel the policy for nonpayment of the Prematic service charges. (R.P.1290-91.)

Thus, Prematic's treatment of partial payments does not "make its installment fees part of the premium." *Nakashima*, 2007-NMCA-027, ¶14.

Fourth, and most importantly, mere *references* to monthly payments in the insurance policy do not confer a contractual *right* to pay monthly that abrogates the insured's separate agreement to pay the service charges. As in *Nakashima*, a reference in the policy 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." *Id.* ¶11 (emphases added). (R.P.1537, 1541.) Plaintiff conceded that "[i]t was not possible for a Mid-Century's insured to pay monthly, without going through Prematic." (R.P.1289.) This Court should not disregard the Prematic Agreement here, just as it was unwilling to disregard the insured's separate agreement in *Nakashima*.

The specific mechanics and sequence of the Prematic arrangement do not compel a different result. If anything, the facts here present an even *stronger* case for the insurer, because a separate company and nonparty—Prematic—charged and collected the fees pursuant to a separate contract. (R.P.1514, 1541-46.) In its summary judgment ruling, however, the district court placed considerable weight on the fact that Mid-Century endorsed the policy to amend the term for payment purposes to one month. (R.P.1807 [noting the "integrated endorsements that [Mid-Century] issued to the Plaintiff and maintains as a monthly contract between it and

the Plaintiff").) But any "monthly" policy language cannot be examined in a vacuum without giving effect to the *entire* transaction. *See Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980) (in construing a contract, "[t]he instrument must be considered as a whole; every word, phrase or part of the contract should be given meaning and significance.").

By its plain terms, Mid-Century issued the "Monthly Payment Agreement" endorsement "in consideration of the premium deposit" that insureds pay to Prematic. (R.P.1539.) The Prematic Agreement and premium deposit (which is set forth in the Prematic Agreement) are *conditions precedent* to Mid-Century amending the policy to a one-month term for payment purposes. If Plaintiff had *not* entered into the Prematic Agreement and had *not* paid the "premium deposit" to Prematic, Mid-Century would *not* have issued the "Monthly Payment Agreement" endorsement and Plaintiff would *not* have been able to pay monthly. (R.P.1516-17.) Thus, as in *Nakashima*, the policy language "cannot be construed as allowing for installment payments" independent of the obligations in the Prematic Agreement. 2007-NMCA-027, ¶11.

This is further evident from how Mid-Century treats the class members' policies as six-month policies for all purposes. Mid-Century does not issue a new declarations page each month, but only after the expiration of the six-month term. During the six-month term, insureds who choose the monthly payment option pay

a premium that is set at the inception of the term and cannot be increased during the term, e.g., to reflect accidents or moving violations. (R.P.1536.) Any such adjustments are made only after the expiration of the six-month term. If the policies were true "monthly" policies, as Plaintiff asserts, then an insured who caused a car accident a few days after Mid-Century issued the policy would have to pay an increased premium in the second month. Thus, this arrangement benefited insureds. As Mid-Century's Vice President of Underwriting testified, the class members' policies were not "transform[ed] ... into a one-month policy." (R.P.1537.)

In sum, this case is materially indistinguishable from this Court's prior decision in *Nakashima*.[11]

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[11] The district court's order denying reconsideration relied on *Nakashima*'s passing reference to the summary judgment ruling in *Nellis I*. (R.P.1912 (citing 2007-NMCA-027, ¶31 (noting that the "monthly payment agreement [in *Nellis I*] did not mention a service fee and that there was no evidence that the plaintiff understood a fee would be charged and/or acquiesced to the fee")).) But as Farmers explained in its opening brief in *Nellis I*, the parties' briefs in *Nakashima* either misstated or failed to discuss the material undisputed facts in *Nellis I*. (*See Nellis I*, Aplt.'s Br. at 22-23 (Aug. 24, 2009).) Part of the confusion is likely attributable to the district court's disregard of the Prematic Agreement in the summary judgment and reconsideration rulings in *Nellis I*. (*Id.*) In both *Nellis I* and this case, the full record demonstrates that Plaintiff's monthly payment arrangement is indistinguishable in all relevant respects from the *Nakashima* plan. Because the material facts are the same, this Court should reach the same result here as in *Nakashima*. Whatever minor factual

[Footnote continued on next page]

c. Other Jurisdictions Distinguish Service Charges From "Premium."

Several decisions from other states reinforce the conclusion that the Prematic service charges are not "premium" and support reversal. For instance, Louisiana courts are "convinced" that a monthly service or installment charge "to cover the additional expenses arising from administering the installment plans" "need not be disclosed on the policy" because they do not fall within the plain meaning of "premium." *Blanchard v. Allstate Ins. Co.*, 774 So. 2d 1002, 1005-06 (La. Ct. App. 2000); *accord Cacamo v. Liberty Mut. Fire Ins. Co.*, 885 So. 2d 1248, 1250, 1256 (La. Ct. App. 2004) (cited in *Nakashima*, 2007-NMCA-027, ¶¶25-26); *see also Cooper v. State Farm Mut. Auto. Ins. Co.*, 190 N.W.2d 350, 351-52 (Mich. Ct. App. 1971) (a monthly "service charge for the privilege of making installment payments" was not "premium.").

The California Court of Appeal has reached the same conclusion and held that the plain meaning of "premium" does not encompass charges that were part of an "option[al]" installment payment plan. *See Interinsurance Exch. v. Superior Court (Williams)*, 56 Cal. Rptr. 3d 421, 429-30 (Cal. Ct. App. 2007). That court's later decision in *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589 (Cal. Ct. App.

[Footnote continued from previous page]
distinctions exist do not justify a different construction of "premium" and the extraordinary cost of the $73 million judgment.

2009), conflicts with both *Williams* and *Nakashima*, and it does not support the judgment here for several reasons.

First, *Troyk* is irreconcilable with *Nakashima*. *Troyk* held that service charges were "premium" because, unlike the interest-based charges in *Williams*, the Prematic charges did not recoup the "time value of money." 90 Cal. Rptr. 3d at 607-08. But this distinction is irrelevant as a matter of statutory construction and public policy, and in any event it is inapplicable under New Mexico law because the fees at issue in *Nakashima*, like the Prematic charges here, did not purport to recoup the "time value of money."

Second, *Troyk* involved a novel interpretation of the *California* statute, which (unlike New Mexico law) does *not* define the term "premium." *See Nakashima*, 2007-NMCA-027, ¶28 (noting that "the term 'premium' is not defined in the California Code," and explaining that the California Department of Insurance "consider[ed] a definition of 'premium' quite similar to our own and concluded that if California had such a definition, installment fees would not be considered 'premium' in California").

Third, as discussed below, *Troyk* ultimately reversed the judgment based on the plaintiff's failure to establish that the alleged hypertechnical breach *caused* any harm. 90 Cal. Rptr. 3d at 629. Thus, *no* appellate decision has affirmed a judgment for claims that monthly service charges constitute "premium."

3. Even If Prematic's Service Charges Were "Premium," These Charges Were Incorporated By Reference Into Plaintiff's Insurance Contract.

Even if Prematic's service charges were additional insurance "premium," however, Plaintiff still cannot show any "breach" because those charges were incorporated into, and became part of, Mid-Century's insurance policies. The incorporation-by-reference doctrine requires courts to construe insurance contracts as a whole, and each part "is to be accorded significance according to its place in the contract." *Manuel Lujan Ins., Inc. v. Jordan*, 100 N.M. 573, 575, 673 P.2d 1306, 1308 (1983). "Two documents are properly construed together ... when one or both documents refer to the other." *Master Builders, Inc. v. Cabbell*, 95 N.M. 371, 373, 622 P.2d 276, 278 (Ct. App. 1980). A separate document is part of an insurance policy if "parties manifested [such intent] at the time of contracting and viewed in light of the surrounding circumstances." *Id.* at 374, 622 P.2d at 279.

The Prematic service charges were an integral part of Plaintiff's overall insurance arrangement to pay her insurance premiums to Mid-Century. The declarations page of Plaintiff's insurance policy referenced her Prematic Agreement by including "PREMATIC" next to the "Total" due and displaying her unique Prematic account number. *Supra* p. 9. Mid-Century did not issue the "Monthly Payment Agreement" endorsement unless and until Plaintiff agreed to pay monthly service charges by entering into the Prematic Agreement and paying

the "premium deposit" to Prematic. (R.P.1514, 1517, 1536.) Each month, Plaintiff received an invoice from Prematic that distinguished between the amount of "Premium" due for that upcoming month and the applicable "Service Charge." (R.P.1585.)

The Prematic Agreement was the condition precedent to the "Monthly Payment Agreement" endorsement, and the policy incorporated the Prematic Agreement and its service charges by specific references. *See, e.g., Tucker v. Cullman-Jefferson Counties Gas Dist.*, 864 So. 2d 317, 321 (Ala. 2003) (concluding that "gas bills" were part of the underlying contract between the gas company and its customers because, even though "they are not named in the [contract itself], ... the 'bills' are referred to in [the contract], ... particularly with respect to the fact that all charges are due and payable 'on or before the discount date shown on the bill'"). The district court erred in finding that the Prematic Agreement was not incorporated by reference into Plaintiff's policy.

The district court ignored Plaintiff's separate Prematic Agreement due to the integration clause in the insurance policy. (R.P.1912.) But as this Court held in *Nakashima*, the integration clause does not bar consideration of agreements that are separate from the cost of the *insurance* coverage (or the premium) in the policy. *Nakashima*, 2007-NMCA-027, ¶12 ("[A]n agreement regarding how the premium is to be paid would *not be covered* by the integration clause." (emphasis

added)). This analysis applies with equal force to Plaintiff's separate Prematic Agreement and required the district court to consider the insurance policy's references to "Total: PREMATIC" and Plaintiff's Prematic account number. Moreover, the integration clause in the "Monthly Payment Agreement" endorsement only "supersedes and controls anything to the contrary" (R.P.1582), and the very title of the endorsement demonstrates that both agreements are consistent.[12]

B. Plaintiff May Not Assert A Derivative Violation Of The Insurance Code As The Basis For Her Breach Of Contract Claim.

The foregoing discussion demonstrates that Mid-Century did not breach its insurance policies because the plain meaning of "premium" as used in the policies does not include the Prematic service charges. As an alternative ground for her breach of contract claim, however, Plaintiff asserts a derivative violation of the

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[12] Similarly, parol evidence is often used to give meaning to *all* terms in a contract. *Omni Aviation Managers, Inc. v. Buckley*, 97 N.M. 477, 481, 641 P.2d 508, 512 (1982). This includes express references to "PREMATIC" in the insurance policy. *Supra* pp. 9-10. Contracts often allude to other agreements to "give meaning to" (and not contradict) particular terms. *Sanders v. FedEx*, 2008-NMSC-040, ¶26, 144 N.M. 449, 188 P.3d 1200; 10 S. Williston, *A Treatise on the Law of Contracts* § 29.8 (4th ed. 1999). This "parol evidence" is particularly appropriate here, because it 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); *Master Builders, Inc.*, 95 N.M. at 373, 622 P.2d at 278 ("Two documents are properly construed together ... when one or both documents refer to the other.").

New Mexico Insurance Code, which states that insurers may not "wilfully collect as premium ... any sum in excess of the premium or charge applicable thereto as specified in the policy." NMSA 1978, § 59A-16-24(B) (1984).

Plaintiff contends that: (a) Prematic's service charges are "'premium' within the meaning of" Section 59A-16-24(B); (b) Mid-Century violated this statute by "charging a premium (i.e., service charge) which is not specified in its policies"; and (c) Mid-Century's violation of this statutory requirement is a breach of contract. The district court agreed and concluded that "those service fees are required to be included within the premium (NMSA § 59A-16-24(B))." (R.P.1807.)

But Plaintiff's claim—whether framed as a breach of contract or a derivative claim for violation of the Insurance Code—fails for all of the grounds discussed in the prior section, as well as several additional reasons: (1) an alleged statutory violation is insufficient to establish a breach of contract; (2) Mid-Century complied with the Insurance Code, and the district court's construction conflicts with binding precedent from this Court; and (3) even assuming a technical violation, Mid-Century substantially complied with the district court's interpretation.

1. The District Court Already Rejected This Theory.

Plaintiff may not overcome the defects in her common law breach of contract claim by invoking Section 59A-16-24(B). As Mid-Century argued in its

motion to dismiss, alleged statutory violations are insufficient to establish a breach of contract. (R.P.130.) *See Perrone v. GMAC*, 232 F.3d 433, 438 (5th Cir. 2000); *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶14, 135 N.M. 265, 87 P.3d 545 (filed 2003). The district court agreed and dismissed any breach of contract claim premised on a violation of NMSA § 59A-16-24(B). (R.P.649.) But the court later reversed course and based its summary judgment order in part on this statute. (R.P.1807.) The district court got it right the first time.

The New Mexico Insurance Code authorizes private actions to enforce violations of Section 59A-16-24(B). *See* NMSA 1978 § 59A-16-30 (1990). Plaintiff not only failed to bring such an action—she expressly disclaimed any reliance on the Insurance Code as a basis for her claim. (R.P.190 ["Ms. Nellis is **not** alleging a statutory Unfair Insurance Practices Act (UIPA) cause of action."] (emphasis added).) But she later based her summary judgment motion, in part, on the Insurance Code. (R.P.1295, 1746-47.) Plaintiff cannot have it both ways. *See Tafoya v. Rael*, 2008-NMSC-057, ¶29, 145 N.M. 4, 193 P.3d 551 (rejecting plaintiff's summary judgment argument that presented a new theory of liability).

2. Mid-Century Did Not Violate The Insurance Code.

But even if Plaintiff *could* assert a derivative claim based on an alleged violation of Insurance Code Section 59A-16-24(B), she failed to establish a violation here for several reasons. First, as discussed above, the plain meaning of

"premium" does not include service charges associated with an optional payment plan. *Supra* pp. 15-17. *See also Nakashima*, 2007-NMCA-027, ¶¶20, 22-33.

Second, Plaintiff cannot claim that *Mid-Century* violated Section 59A-16-24(B) because *Prematic*—not Mid-Century—"collect[ed]" the service charges at issue. Nor can Plaintiff argue that Prematic and Mid-Century are the same entity for purposes of this analysis because the district court did not make any finding of alter ego liability.[13] This finding would also be inconsistent with the undisputed factual record in this case, because Prematic is a separate legal entity. (R.P.1629-30; *supra* n. 1.)

In fact, in rejecting Prematic's attempt to intervene, the trial court and this Court (implicitly) determined that Prematic had no interest in, and its rights were unaffected by, this litigation. *Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶9, 142 N.M. 115, 163 P.3d 502 ("Prematic does not have an interest that will automatically be harmed should Plaintiff prevail against Mid-Century."). Plaintiff cannot have her cake (precluding Prematic's intervention in this lawsuit on the

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[13] The district court could not have found any of the factors relevant to imposing alter ego liability—that Prematic was a mere "instrumentality" of Mid-Century, Prematic exists for an "improper purpose," or Prematic was undercapitalized or otherwise did not observe corporate formalities. *See Harlow v. Fibron Corp.*, 100 N.M. 379, 382-83, 671 P.2d 40, 43-44 (Ct. App. 1983); *see also Scott v. AZL Res., Inc.*, 107 N.M. 118, 122, 753 P.2d 897, 901 (1988) ("Some form of moral culpability attributable to the parent, such as use of the subsidiary to perpetrate a fraud is required" for alter ego liability).

basis that she does not challenge the separate transaction with Prematic) and eat it too (by holding Mid-Century vicariously "liable" for Prematic's conduct in charging and collecting the agreed-to service fees). And even if the court had treated Mid-Century and Prematic as the same entity and held that "Mid-Century" collected the service charges, that would necessarily mean that Plaintiff had contracted separately with "Mid-Century" to pay the disputed service charges.[14]

Third, Plaintiff also failed to introduce evidence that the purported statutory violation was "willful." *See* NMSA 1978, § 59A-16-24(B) ("No person shall *wilfully* collect as premium ...." (emphasis added)). At the time of the summary judgment ruling, there was no published appellate authority from *any* jurisdiction holding that service fees associated with monthly payment plans are actually additional "premium." In fact, the existing authorities uniformly supported Mid-

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[14] At the very least, the district court should not have granted summary judgment to Plaintiff and the class on this ground. As the party opposing Plaintiff's motion, Mid-Century was "entitled to have all reasonable inferences construed in [its] favor." *Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc.*, 70 N.M. 144, 148, 371 P.2d 795, 797 (1962). The district court erroneously held that *Mid-Century* breached its insurance policies by "charg[ing]" Plaintiff more "premium" in the form of *Prematic*'s service charges. (R.P.1807.) But it is undisputed that *Prematic*, not Mid-Century, charged and collected these amounts. (R.P.1514, 1541-46.) Mid-Century argued that Prematic is a separate legal entity (*supra* n. 1) and, at the very least, the district court should not have "weigh[ed] th[is] evidence" of corporate separateness and instead should have construed the evidence in the light most favorable to Mid-Century. *Gonzales v. Gackle Drilling Co.*, 70 N.M. 131, 136-37, 371 P.2d 605, 609 (1962).

Century's position (*supra* pp. 17-24), so Plaintiff cannot establish a "willful" violation of Section 59A-16-24(B). *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 50, 69, 70 (2007) (concluding there was no willfulness where "[defendant's] reading of the statute, albeit erroneous, was not objectively unreasonable.... While we disagree with [defendant's] analysis, we recognize that its reading has a foundation in the statutory text [and] ... no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the [agency]." (footnote omitted)).

3. At A Minimum, Mid-Century Substantially Complied With The District Court's Interpretation Of Section 59A-16-24(B).

Even if Plaintiff were able to establish a technical breach of Section 59A-16-24(B), Mid-Century *substantially* complied with the district court's interpretation. The doctrine of substantial compliance excuses technical noncompliance if the defendant satisfied the policy of the statute, the plaintiff received the full protections of the statute, and strict compliance would produce unjust results. *See, e.g., Green Valley Mobile Home Park v. Mulvaney*, 1996-NMSC-037, ¶¶11-13, 121 N.M. 817, 918 P.2d 1317.

This is a paradigmatic case for the application of this doctrine. Plaintiff alleges a hyper-technical violation of Section 59A-16-24(B)—the service charge was disclosed *more often* than supposedly required, but on the wrong piece of

paper. Consequently, to the extent Section 59A-16-24(B) reflects a policy favoring disclosure, and even accepting an elastic definition of "premium" that encompasses the Prematic service charges (contrary to *Nakashima*), Plaintiff received *more* conspicuous and *more* frequent disclosure—a separately itemized charge in the Prematic Agreement and the monthly invoices—than her interpretation requires.

Under Plaintiff's reading (which the district court endorsed), an insurer would comply with Section 59A-16-24(B) if it: (a) disclosed the service charge *anywhere* in the "policy" (which can be dozens of pages long), because the statute does not specify where, when, or how the "premium" must appear in the policy; (b) provided *less* frequent disclosure (because insurers typically issue declarations pages semi-annually while Prematic provides monthly invoices);[15] and (c) combined the "service charges" and the "premium" as one lump sum (because if service charges *are* "premium," then there is no reason to itemize them). The district court's interpretation also unfairly shifts the costs of the monthly payment plan to insureds who opt to pay their premiums up front and in full. For instance, in *Nakashima*, State Farm estimated that if installment fees were embedded in the premium, 50% of policyholders who do not pay their insurance premiums in

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[15] During the year she was insured with Mid-Century from 1997-1998, Plaintiff received *monthly* bills from Prematic and only *two* declarations pages from Mid-Century. (R.P.1540-46.)

installments would be subsidizing a benefit they did not realize. (R.P.1656-57.)

Plaintiff's interpretation thus *undermines* the purpose of Section 59A-16-24(B). *See Nakashima*, 2007-NMCA-027, ¶29 ("We 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."). The $73 million penalty against Mid-Century for noncompliance is precisely the type of unjust result that the doctrine of substantial compliance is designed to avoid. *Mulvaney*, 1996-NMSC-037, ¶¶11-13.[16]

C. Plaintiff Cannot Establish The Necessary Elements Of Causation And Harm.

Even if this Court were inclined to revisit *Nakashima* and hold that Prematic's service charges were premium, the district court's judgment still must be reversed because Plaintiff did not establish two other elements of her breach of contract claim—causation and injury. *See Paiz v. State Farm Fire & Cas. Co.*, 118

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[16] Plaintiff also is barred from recovering as damages the payments that she made voluntarily and with full knowledge of the facts. *Apex Lines, Inc. v. Lopez*, 112 N.M. 309, 311, 815 P.2d 162, 164 (Ct. App. 1991). There is no reasonable dispute that Plaintiff's selection of the Prematic payment plan was fully informed and voluntary. She could have avoided any service charges by paying for insurance in a lump sum every six months. Mid-Century raised the voluntary payment doctrine in its Motion to Dismiss and its Motion for Summary Judgment briefing (R.P.1534, 1799; 255-57; Tr. (10/29/04), pp. 9-12), but the district court did not address that argument.

N.M. 203, 212, 880 P.2d 300, 309 (1994), *holding limited by Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

Plaintiff failed to present any evidence that Mid-Century's alleged failure to disclose Prematic's service charges on its policies—as opposed to the reference to "PREMATIC" and Plaintiff's Prematic account number in the declarations page, the disclosures in the Prematic Agreement, the monthly payment endorsement, and an itemization of the "service charges" and "premium" in the monthly Prematic invoices—caused her any harm. Plaintiff also does not claim that she would have done anything differently had Mid-Century disclosed the service charges in its policies, so she cannot establish causation.

For example, in *Sheldon v. Am. States Preferred Ins. Co.*, 95 P.3d 391 (Wash. Ct. App. 2004), the plaintiff (like Ms. Nellis) claimed a breach of contract based on the defendant's failure to identify installment service charges as "premium" in the insurance policy. *Id.* at 392-93. The court explained that this contention was "debatable," because the charges covered the costs of an optional monthly payment plan (and did not pay "for the procurement of insurance"). *Id.* at 393 n.10. But it ultimately determined that not "even the possibility of" harm or injury could flow from a fully disclosed and agreed-to service charge even if that charge was considered "premium." *Id.* at 394. Likewise, *Troyk v. Farmers Group.* concluded that the plaintiff had not established causation to support his breach of

contract claim, given his failure to demonstrate "that he or the other class members would not have paid the monthly service charges had they been disclosed in the policy documents." 90 Cal. Rptr. 3d 589, 627 (Cal. Ct. App. 2009).

The uncontroverted evidence in this case also demonstrates the *absence* of causation or harm. Plaintiff and the class voluntarily entered into a separate agreement with Prematic that contemplated the service charges, and their monthly invoices also disclosed those charges. (R.P.1540-46.) As Ms. Sanchez testified, Plaintiff chose the Prematic option because "the premium was higher for Nicole," and her parents "felt they could pay it better if they had it on monthly [payments]." (R.P.1601.) When Plaintiff's father returned with the first payment, the agent *again* explained the Prematic arrangement to him before collecting payment. (*Id.*) These undisputed facts refute any suggestion that Plaintiff suffered any harm.

Plaintiff also did not demonstrate that she "would not have paid the monthly service charges had they been disclosed in the policy documents." *Troyk*, 90 Cal. Rptr. 3d at 627. As a result, she cannot establish that a purported breach caused her alleged injury. Plaintiff received exactly what she agreed to and paid for—the privilege of making monthly payments of her Mid-Century premium in exchange for a service charge paid to Prematic. Accordingly, even if this Court finds that the Prematic service charges were "premium," it should reverse the judgment based on Plaintiff's inability to demonstrate causation or harm.

D. Plaintiff Is Not Entitled To The Service Charges As Damages Because She Received The Full Benefit Of Her Bargains.

Next, Plaintiff's claims also fail because she cannot prove any measure of damages.[17] As explained above, Plaintiff received the full benefit of her bargains. Mid-Century fulfilled its promise of providing insurance to Plaintiff and the class for the amount of "premium" stated on the policies—and not a penny more. Mid-Century never *charged*, *collected*, or even *required* that insureds incur the Prematic service charges that, according to Plaintiff, breached her insurance contract. Further, Prematic fulfilled its end of the bargain by providing its monthly premium-forwarding services (in exchange for the service charge) pursuant to a separate agreement that Plaintiff acknowledges is enforceable.

Plaintiff effectively seeks a "free" monthly payment plan, in which she receives all of the benefits of the optional Prematic arrangement without her corresponding obligation to pay a monthly fee. But Mid-Century does not offer such an option. Thus, even if Mid-Century somehow "breached" its insurance contract, Plaintiff suffered no damage because she was still required to pay the service charges according to her separate agreement with Prematic. Plaintiff

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[17] Mid-Century preserved its challenge to measure of damages used by the district court by the issues raised, evidence presented, and arguments made in connection with its opposition to Plaintiff's motion for summary judgment. (R.P.1622.)

cannot evade her separate commitments to pay service charges to Prematic, and this Court should reverse the judgment and order a new judgment in Mid-Century's favor on this ground alone.

At the very least, to avoid unjust enrichment, the district court should have offset the amount of damages it awarded by the amount of value that Plaintiff and class members received from the optional benefit of being able to pay for their insurance on a monthly basis. *See, e.g., Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶21, 126 N.M. 69, 966 P.2d 777 (noting that a "party in breach is entitled to restitution for benefits he has conferred by way of part performance in excess of loss caused by the breach").

IV.
PLAINTIFF'S CLAIM IS NOT AMENABLE TO CLASS TREATMENT

This Court reviews *de novo* whether, in certifying a class, the trial court applied the correct legal standard under Rule 1-023. *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶17, 142 N.M. 557, 168 P.3d 129. The trial court's application of that standard to the facts of the case is reviewed for an abuse of discretion. *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶7, 136 N.M. 599, 103 P.3d 39.[18]

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[18] Mid-Century preserved its challenge to the rulings on class certification by the issues raised, evidence presented, and arguments made in connection with its

[Footnote continued on next page]

The district court's order certifying an eight-state class of Mid-Century policyholders in Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, and Wyoming who pay their premiums monthly through Prematic ignored (1) an irreconcilable conflict between the laws of the several states involved, (2) the predominance of individualized issues over any common issues, and (3) Plaintiff's inability to demonstrate, under a "rigorous analysis," the Rule 1-023 requirements of typicality, adequate representation, superiority, and manageability.

A. The District Court Erred In Maintaining This Case As A Multi-State Class Action Due To The Fundamental Conflicts Of Laws Among The States.

A multi-state action like this one "present[s] particular challenges for district courts" and often precludes class certification. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶12, 144 N.M. 405, 188 P.3d 1156. Where a state's substantive law conflicts with New Mexico law, New Mexico courts must apply the other state's laws to the claims of class members residing in that state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Plaintiff bears the burden of demonstrating that the laws of the eight states in this class action do not conflict. *Ferrell*, 2008-NMSC-042, ¶14. Plaintiff's failure to do so here warrants reversal of the district court's certification order.

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opposition to Plaintiff's motion for class certification. (R.P.1622.)

As discussed above, *Nakashima* demonstrates that New Mexico law does not support the judgment. *Supra* pp. 17-22. If this Court disagrees, however, it must reverse the certification order because the district court's construction of New Mexico law creates an irreconcilable conflict with the laws of the other states at issue for several independent reasons.

First, as in *Nellis I*, the district court's construction of New Mexico law creates an irreconcilable conflict between New Mexico and Arizona law on the fundamental issue of the definition of "premium." While the district court held that the New Mexico Insurance Code's definition of "premium" *includes* Prematic's monthly service charges, Arizona's Insurance Code expressly authorizes a service fee—*separate from "premium"*—that is "reasonably related to the administrative expenses of the monthly premium payment plan." Ariz. Rev. Stat. Ann. § 20-267(C); *id.* § 20-267(A) (requiring that a "monthly *premium* payment plan" be made available to insureds); *id.* § 20-465(B) ("An insurer ... may charge and receive a fee for services *not customarily provided in the transaction of insurance*" if certain conditions are met, including "[t]he amount of the service charge is reasonably related to the cost of the service performed.") (emphases added).

Second, there is a conflict among the states with respect to the law of contract formation and interpretation, even if Plaintiff and the district court were

correct and that "Class Members bought and paid for their Mid-Century insurance *one month at a time*." (R.P.1286 (emphasis added).) This Court must interpret the insurance policy's language based on "the circumstances leading to purchase of the policy." *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶61, 136 N.M. 454, 99 P.3d 1166, *overruled on other grounds by Ferrell v. Allstate Ins. Co.*, 2007-NMCA-017, 141 N.M. 72, 150 P.3d 1022 (filed 2006), *rev'd on other grounds*, 2008-NMSC-052, 144 N.M. 405, 188 P.3d 1156. If a *new* contract was formed each succeeding month, then even if an insured testified she was not fully aware of the Prematic monthly service charges when entering into her *first* monthly contract, the circumstances are necessarily different when she enters into her *twelfth* monthly contract. By that time, she no longer may ignore the multiple references on her policy to "PREMATIC" because, in addition to her initial agreement with Prematic to pay the monthly service charges, she received *eleven* separate monthly invoices from Prematic that detailed the amount of the service charges separately from the premium, and she has knowingly paid these service charges to Prematic on twelve occasions. *See Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶33, 139 N.M. 274, 131 P.3d 661 (filed 2005) (courts should consider the "circumstances contemporaneous with the making of the policy").

The law on this preliminary question of contract formation varies materially across the eight states at issue: (1) in Arizona, California, Nevada, and Wyoming,

insureds whose monthly policies expire and who elect to continue their coverage by paying the next month's billed premium plus service charge are deemed to be purchasers of new insurance contracts; (2) in Montana, New Mexico, and Oregon, the policyholder is deemed to be continuing an existing policy; and (3) this question is unsettled in Idaho. (R.P.726-29.) *See also* 2 L. Russ, *Couch on Insurance* § 29:36 (3d ed. 2008) (in some jurisdictions, "where the parties have not designated its nature, a renewal contract is a new contract of insurance").

Third, there is a fundamental conflict among laws of the states with respect to Mid-Century's affirmative defense of voluntary payment. *Supra* n. 16. Arizona, Idaho, Montana, New Mexico, Oregon, and Wyoming allow the defense while Nevada does not. (R.P.730-32.)

B. Given The Predominance Of Individual Issues, Certifying A Class In This Case Violates Due Process And Rule 1-023(B)(3).

The trial court certified a multi-state class under Rule 1-023(B)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Where, as here, a determination of the merits would require "individualized proof" as to each class member, individual issues likely predominate and class certification is not appropriate. *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶38, 136 N.M. 599, 103 P.3d 39. Likewise, the Due Process

Clause prevents courts from using the class procedure to "abridge, enlarge or modify any substantive right" by creating liability where it might not otherwise exist in an individual action. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (internal quotation marks and citation omitted). As the New Mexico Supreme Court explained, courts cannot "sacrific[e] procedural fairness" in certifying class actions under Rule 1-023(B). *Ferrell*, 2008-NMSC-042, ¶10 (internal quotation marks and citation omitted).

Here, the district court ignored at least two aspects of Plaintiff's claim that required individualized proof. First, while the district court ignored Plaintiff's failure to establish *harm* resulting from the alleged breach (*supra* pp. 34-36), it compounded that error by presuming harm as to the entire class and failing to make this determination on an individualized basis. *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], and defendants have the right to raise individual defenses against each class member."); *see also Berry*, 2004-NMCA-116, ¶65 ("Parties to a[n] [insurance] contract should always have the opportunity to prove where their minds actually met.").

Second, the court also erred by presuming that hundreds of thousands of class members could prove that they would not have entered into the Prematic Agreement had the service charges been disclosed on the policy itself rather than

on the Prematic Agreement and in each monthly invoice. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Amchem Prods.*, 521 U.S. at 613.

C. A "Rigorous Analysis" Of The Rule 1-023 Requirements Demonstrates That The Class Should Not Have Been Certified.

In deciding whether to maintain a class action, the district court was required to engage in a "rigorous analysis" of whether each of Rule 1-023's requirements had been met. *Ferrell*, 2008-NMSC-042, ¶8. This analysis required the court to probe beyond the pleadings "to assess what kind of proof will be necessary to decide the issues." *Id.* (internal quotation marks and citation omitted).

The ruling itself illustrates the district court's failure to analyze the issues with the requisite degree of scrutiny before certifying this multi-state class. The court's "Findings of Fact and Conclusions of Law" referred in two separate paragraphs to Plaintiff's claims against "Hartford," not Mid-Century. (R.P.1060-61.) Four months before the district court's ruling in this case, it issued a class certification ruling in *Johnson v. Property & Casualty Insurance Co.*, D. Ct. No. D-202-CV-200206293 (July 27, 2005), another installment fee case brought by the same class counsel. Many of the court's Findings of Fact and nearly *all* of its Conclusions of Law were taken word-for-word, citation-for-citation, from the court's prior order in *Johnson*. (*Nellis v. Mid-Century Ins. Co.*, D. Ct. No. D-202-CV-200307980, Application Appeal Order Granting Class Certification Under Rule 1-023(F) NMRA, at 7-8 (Ct. App. Nov. 16, 2005).) This demonstrates that

the court did not engage in a "rigorous analysis" of Plaintiff's claims before certifying this class. *See, e.g., Mora v. Martinez*, 80 N.M. 88, 90, 451 P.2d 992, 994 (1969) ("We agree with the federal cases which, without exception, require adequate findings and insist on the exercise of an independent judgment on the part of the trial judge in making his own findings rather than adopting those of one of the parties.").

The lack of any analysis, let alone a *rigorous* one, also led the court to misapply the Rule 1-023 factors. Plaintiff did not and could not establish the required elements of adequacy, typicality, superiority, and manageability. "Failure to establish any one requirement [of Rule 1-023] is a sufficient basis for the district court to deny certification." *Brooks*, 2004-NMCA-134, ¶10.

1. Adequacy. Plaintiff is not an "adequate" class representative because she displays an "alarming unfamiliarity with the suit." *Koenig v. Benson*, 117 F.R.D. 330, 337 (E.D.N.Y. 1987). She does not recall whether she ever paid a service charge or the amount of any charge. (R.P.691.) Nor can she define the class she seeks to represent or what states are involved. (R.P.691-92, 711-12, 715-16.) Plaintiff also is too closely aligned with class counsel and cannot independently represent the class. The only reason she became involved with this lawsuit is because she was contacted by class counsel. (R.P.692, 711.) *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (approving denial of

certification "where the class representatives had so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

2. Typicality. Plaintiff's claims also are not "typical" of the class's claims because her parents entered into the insurance contract and Prematic Agreement for her. She never met with her agent and does not recall reading the insurance application or being present when her father signed it. (R.P.690, 714.) Plaintiff may not even be a class member.

3. Manageability and Superiority. As this Court explained, "[t]he more individual issues that predominate, the less superior and more unmanageable the class action." *Brooks*, 2004-NMCA-134, ¶33. As discussed above (*supra* pp. 39-42), the significant differences in state laws and other individual issues render this class action unmanageable.

V.
THE JUDGMENT VIOLATES DUE PROCESS

Finally, the $73 million judgment in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article 2, section 18 of the New Mexico Constitution for several reasons.[19]

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[19] The Court should consider these due process arguments because they present issues "of great import to the consumers and the insurance industry in this state"

[Footnote continued on next page]

The judgment is arbitrary and capricious, as it is entirely disconnected from any rational benchmark, such as the amount of harm suffered by the class (which is none), a statutory penalty established by the Legislature, or any other measure. *See, e.g.*, *Philip Morris*, 549 U.S. at 351; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003).

Whether characterized as compensatory or punitive, the judgment violates basic due process principles of fair notice. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996). Mid-Century could not have predicted the court's interpretation of the Insurance Code, or the fact that noncompliance with its reading would have yielded such a large monetary sanction. The court's construction also represents an unconstitutional retrospective application of a new rule of law to Mid-Century's and Prematic's business practices. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994).

In addition, given that Plaintiff and the class received the full benefit of their bargains, the $73 million judgment cannot be recognized as being compensatory or restorative, but only as punitive—and also grossly excessive, disproportionate, and unconstitutional. *See Austin v. United States*, 509 U.S. 602, 621 (1993); *Giaccio v.*

[Footnote continued from previous page]
and elsewhere, including Arizona. *See Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶29, 133 N.M. 669, 68 P.3d 909.

Pennsylvania, 382 U.S. 399, 402 (1966). Mid-Century's alleged technical violation of the New Mexico Insurance Code was not "reprehensible" at all, let alone sufficiently "reprehensible" to justify a breathtaking $73 million sanction. The award is unrelated to the purported (but absent) "harm" suffered by Plaintiff and the class, and the amount of the judgment vastly exceeds any comparative sanctions authorized or imposed on any insurer for similar conduct. *State Farm*, 538 U.S. at 419, 424-28; *BMW*, 517 U.S. at 575-85.

VI.
CONCLUSION

Mid-Century requests that this Court reverse the district court's judgment and all associated orders and direct the entry of a new judgment in its favor. In the alternative, Mid-Century requests that this Court reverse, order that the class be decertified, and/or remand for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby that a copy of the foregoing pleading was served by first-class mail to the following counsel of record this 15th day of April, 2010.

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