

F I L E D  
Clerk of the Superior Court

JUN 20 2006

By: L. ROCKWELL, Deputy

REC'D JUN 22 2006

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN DIEGO

THOMAS E. TROYK, et al.,  
Plaintiffs,

v.

FARMERS GROUP INC., et al.,  
Defendants.

) CASE NO. GIC 836844

)  
) **ORDER GRANTING PLAINTIFF'S**  
) **SUMMARY JUDGMENT AND DENYING**  
) **DEFENDANTS' SUMMARY JUDGMENT**

The court heard oral argument on June 9, 2006 before the Honorable Jay M. Bloom, Judge presiding. The court, having considered the oral and written arguments, evidence presented by counsel and additional briefing, rules as follows:

(1) The MOTION FOR SUMMARY JUDGMENT by plaintiff Thomas Troyk is GRANTED.

(2) The MOTION FOR SUMMARY JUDGMENT by defendants Farmers Group Inc. dba Farmers Underwriters Association and Farmers Insurance Exchange is DENIED.

Objections are overruled. The court has not considered the late filed evidence submitted by plaintiff. There is no court order to seal and no pending motion to seal. (CRC 243.2)

1 Plaintiff has an automobile insurance policy issued by defendant Farmers Insurance  
2 Exchange ["FIE"]. (First Amended Complaint at ¶¶ 6-7; Plaintiff's Ex. 2) In this class action, he  
3 alleges that in addition to paying the stated premium on his policy, he and class members were  
4 charged additional premiums in the form of 'service charges'. (First Amended Complaint at ¶¶  
5 14-20)

6 When policyholders obtain car insurance through FIE, they have three payment options.  
7 They can (1) pay 100% up front; (2) pay 50% up front and 50% in 60 days; or (3) make  
8 payments monthly through a service offered by non-party Prematic Service Corporation.  
9 (Plaintiff's Ex. 9; Moore Deposition) If the customer pays 100% up front, there is no 'service  
10 charge'. If the customer makes two payments of 50%, FIE charges a 'service charge'. (Moore  
11 Deposition.)

12 However, if the policyholder chooses to make monthly payments, information is sent  
13 from FIE's agent to Prematic, who sets up a Prematic billing account. (Moore Deposition;  
14 Guiffrida Deposition) The policyholder is required to enter into an agreement with Prematic to  
15 make the monthly payments to Prematic, along with a 'service charge' for administering the  
16 plan. (Plaintiff's Ex. 9; Guiffrida Deposition; Guiffida Supplemental Declaration at Ex. 2)  
17 Prematic in turn forwards the payment to the insurer. (Plaintiff's Ex. 9) The policy is amended  
18 from a six month to a one month policy. (Defendants' Undisputed Fact No. 16; Plaintiff's Ex. 5)  
19 Prematic may terminate the agreement if the policyholder fails to make timely payments to  
20 Prematic. (Guiffida Supplemental Declaration at Ex. 2)

21 The insurance policy must provide a statement of the premium. (Ins. Code § 381(f)) It is  
22 a misdemeanor for any insurer to issue a policy in violation of § 381(f). (Ins.Code § 383)

23 "Premium" in the law of insurance means the amount paid to the company for  
24 insurance. It is the sum which the insured is required to pay. (Allstate Ins. Co. v. State Board  
25 of Equalization (1959) 169 Cal.App.2d 165, 168) The gross premium consists of two  
26 elements: the net premium and the loading. The net premium is the expected level of claims  
27 payments. The loading is added to the net premium to cover the expenses of the company and  
28 usually includes the administrative costs of the insurer and an element of profit. (Metropolitan

1 Life Ins. Co. v. State Bd. of Equalization (1982) 32 Cal.3d 649, 66) Thus, the 'service charge'  
2 paid by policyholders to Prematic is a premium under Ins. Code § 381(f) and should be  
3 disclosed as such on the declarations page. "[S]ince many policyholders do not have the  
4 option of paying in full and installment fees may be a significant addition to the cost of an  
5 insurance policy, installment fees represent an integral part of their premium payment."  
6 (California Department of Insurance Opinion dated April 25, 2006)

7 The premium listed on plaintiff's declaration page was \$421.60. (Plaintiff's Ex. 2)  
8 Plaintiff's agreement with Prematic provided that he would be charged \$89.00 for the one  
9 month premium and a \$4.00 service charge. (Guiffrida Declaration at Ex. 2) Plaintiff paid the  
10 premium specified in the declarations page and the monthly 'service charge'. (Plaintiff's  
11 Undisputed Fact No. 5; Troyk Declaration; Troyk Deposition) Because the 'service charge' is a  
12 premium that was not disclosed on the declarations page in violation of Ins. Code § 381(f), and  
13 because FIE did not provide insurance for the amount stated on the declarations page, there is  
14 a breach of the insurance contract. Plaintiff and other class members were required to enter  
15 into a contract to pay these 'service charges' when by law they were only required to pay the  
16 amount of premium specified on their policies. They suffered damages by paying the 'service  
17 charge' above and beyond the premium specified in their insurance policies.

18 Defendants' arguments concerning 'substantial compliance' are unavailing. First, it was  
19 not pled in their answer. Second, defendants have not cited the court to any case where it was  
20 applied to excuse an insurance company from complying with insurance laws. Third, the case  
21 cited by defendants, Asdourian v. Araj (1985) 38 Cal. 3d 276, is distinguishable. That case  
22 dealt with whether Business & Professions Code § 7031 barred an unlicensed contractor who  
23 substantially complied with the licensing statutory scheme from recovering unpaid fees. The  
24 defendants in the Asdourian case who sought to prevent the contractor from recovering were  
25 sophisticated real estate investors and therefore not members of the group primarily in need of  
26 the statute's protection. They also were former friends of plaintiff. Thus, the court found it  
27 would not defeat the statutory policy to allow plaintiff there to recover for the reasonable value  
28 of the work performed. A similar situation is not found here. Plaintiff and the class are

1 members of the public who enter into arm's length transactions with an insurer to procure  
2 automobile insurance. The rationale in Asdourian for applying the substantial compliance  
3 doctrine to avoid unjust enrichment just is not found here. The court notes that since the  
4 Asdourian case was decided, the legislature amended § 7031 to provide that substantial  
5 compliance no longer applied to the statute.

6 This conduct also constitutes an unlawful business practice under Business and  
7 Professions Code § 17200. Business and Professions Code § 17203 authorizes courts to  
8 make orders as may be necessary to prevent the use or employment by any person of any  
9 practice which constitutes unfair competition or as may be necessary to restore to any person  
10 any money which may have been acquired by unfair competition. Restitution must be of a  
11 measurable amount to restore to the plaintiff what has been acquired by violations of the  
12 statute, and that measurable amount must be supported by evidence. (Colgan v. Leatherman  
13 Tool Group (2006) Inc., 135 Cal. App. 4th 663, 698) Here, restitution is of a measurable  
14 amount because it is calculated as the amount to restore plaintiff and other class members  
15 what was acquired by defendants by their violation of the Insurance Code. In this case, that  
16 consists of the 'services charges' each class member paid in addition to their premiums during  
17 the class period. Plaintiff provided evidence that he paid an additional \$4.00 per month.  
18 Therefore, there is evidentiary support to show the amount of restitution.

19 Defendants argue that Prematic is a separate legal corporation and since the 'service  
20 charges' were collected by Prematic pursuant to plaintiff's agreement with Prematic, they are  
21 not liable. The argument is unconvincing. From the evidence presented, it appears that both  
22 defendant Farmers Group Inc. ["FGI"] and Prematic are agents of FIE.

23 FIE is a reciprocal or interinsurance exchange organized and existing under the laws of  
24 California. (Defendants' Undisputed Fact No. 1; Morris Declaration) As an interinsurance  
25 exchange, it consists of its policyholders who insure one another. (Delos v. Farmers Group,  
26 Inc. (1979) 93 Cal.App.3d 642, 651) An attorney in fact or management company is appointed  
27 to handle all of those monetary and other affairs to see that the property is properly accepted,  
28 properly disbursed and properly accounted for. In order to effectual this relationship, every FIE

1 policyholder is required to appoint the attorney in fact. (Id. at 651-652) The attorney in fact  
2 executes FIE's insurance contracts. (Ins. Code § 1303; NGOC Tran v. Farmers Group, Inc.  
3 (2002) 1004 Cal.App.4<sup>th</sup> 1202, 1210)

4 FGI serves as FIE's attorney in fact. (Defendants' Undisputed Fact No. 2; Morris  
5 Declaration) As FIE's attorney, FGI performs the administrative services for FIE. (Id.) FGI's  
6 sole business is to handle the monthly billing for customers of FIE and other insurance  
7 companies by agreement with the policyholders. (Moore Deposition; Henninger Declaration)  
8 FGI provides actuarial, accounting, underwriting, human resources and legal services on  
9 behalf of FIE. It drafts the automobile policies and endorsements, mails the policies and  
10 collects the premiums. (Morris Deposition) It performs all billing and collection functions for the  
11 automobile policies paid in one or two installments. (Id.)

12 For the policies paid for on a monthly basis, FGI enlists its wholly owned subsidiary,  
13 Prematic. However, the evidence suggests it is still FGI that is performing the billing and  
14 collection activities. Prematic relies on FGI for many accounting services. FGI owns the  
15 automated equipment that prints the bills, stuffs the envelopes and sends out the bills for  
16 Prematic. FGI provides auditing services and marketing services. FGI calculates the taxes  
17 Prematic must pay and prepares Prematic's tax returns and financial statements. FGI  
18 maintains Prematic's computers and databases. FGI issues guidelines on how FIE agents and  
19 employees are to discuss the monthly payment plan and enforces the guidelines. Prematic  
20 also relies upon the FGI legal department. Prematic employees receive their paychecks from  
21 FGI. All members of Prematic's Board of Directors are officers or employees of FGI. The  
22 premiums and 'service charges' collected by Prematic are sent by FGI to Prematic's operating  
23 account. Prematic's profits are retained or distributed to its shareholders, i.e., FGI. FGI  
24 determines if a dividend is paid. (Moore Deposition; Moore Declaration) While Prematic is  
25 ostensibly performing FGI's duties as FIE's attorney in fact, in reality it appears FGI is still  
26 performing those duties.

27 FIE and its agent and attorney in fact, FGI, must comply with insurance code provisions,  
28 such as § 381(f). (Ins. Code § 1281) The premiums are collected by FIE's agents, FGI and

1 Prematic. FIE could not provide insurance without its agents. What the agent receives, in legal  
2 effect the insurer receives. (Interinsurance Exchange V. State Bd. of Equalization (1984) 156  
3 Cal.App.3d 606, 611, 613) Thus, FIE, FGI and Prematic are operating as a single enterprise to  
4 transact the business of insurance. Therefore, both FIE and FGI are liable for the insurance  
5 code violations, contract breaches and unfair business practices.

6 There is no triable issue as to defendants' affirmative defenses of waiver, estoppel and  
7 laches. It is undisputed that plaintiff was not aware the 'service charges' were illegal until just  
8 before he filed this lawsuit. (Troyk Declaration) Thus, there has been no unreasonable delay.  
9 The fact that he continued to prosecute this lawsuit and pay the "service fees" in order to  
10 maintain his automobile insurance does not show he intended to relinquish his rights or that  
11 defendants have relied to their injury.

12 Accordingly, summary judgment is granted in favor of plaintiffs and defendants' motion  
13 for summary judgment is denied. Defendants are liable for the premium amounts paid in  
14 excess of the premium stated on the declarations page of the class members' insurance  
15 contracts.

16 (3) Defendants' MOTION FOR LEAVE TO FILE AMENDED ANSWER AND CROSS-  
17 COMPLAINT FOR REFORMATION OF CONTRACT is DENIED.

18 Defendants have delayed in asserting their claim for reformation to the prejudice of  
19 plaintiff. While a motion to file a cross-complaint at any time during the course of the action  
20 must be granted unless bad faith of the moving party is demonstrated (CCP 426.50; Silver  
21 Organizations, Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 98-99), the law does not deprive the  
22 court of choice or discretion where a defendant seeks to file a so-called compulsory cross-  
23 complaint which is not timely and which is not filed in good faith. (Gherman v. Colburn (1977)  
24 72 Cal. App. 3d 544, 558)

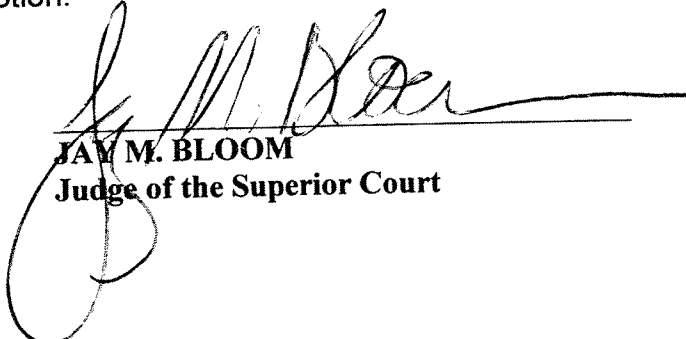
25 Defendants answered the complaint on March 30, 2005. Plaintiff's complaint alleged  
26 that defendants' automobile insurance contracts improperly charged additional premiums in  
27 violation of Ins. Code § 381. Defendants' position has always been that the 'service charges'

28 ///

1 were not premiums. Both sides filed summary judgment motions in September and October  
2 2005, originally set to be heard on December 9, 2005.

3 Now, seven weeks before trial and concurrently with the continued joint motions for  
4 summary judgment, defendants ask the court for leave to file an amended answer and cross-  
5 complaint to assert class action allegations for reformation of defendants' own insurance  
6 contracts with its own policyholders. On April 25, 2006 the Insurance Commission issued an  
7 opinion favorable to plaintiff, finding that the 'service charges' should be part of the premium.  
8 Defendants are chargeable with knowledge that there was always a legal possibility that  
9 plaintiffs would prevail and a cautious pleader would have anticipated such a possibility. Both  
10 sides engaged in extensive law and motion work and both sides requested a stay of the  
11 proceedings and continuances of the motions for summary judgment pending the  
12 Commission's opinion. There are no new facts within the past six months to suggest a new  
13 reason to request reformation. Given the history of this litigation, and the history of litigation  
14 between these parties in other similar cases, the motion for leave appears more a tactical,  
15 strategic maneuver rather than oversight, inadvertence, neglect, or mistake. Thus, it does not  
16 appear to the court that defendants were acting in good faith when they failed to assert the  
17 defense of reformation during the 15 months this case has been pending and then waited until  
18 the eve of trial before bringing this motion.

19  
20 Dated: JUN 20 2006

  
21 **JAY M. BLOOM**  
22 **Judge of the Superior Court**  
23  
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<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> <input type="checkbox"/> COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 <input checked="" type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 <input type="checkbox"/> FAMILY COURT, 1555 6 <sup>TH</sup> AVE., SAN DIEGO, CA 92101-3296 <input type="checkbox"/> MADGE BRADLEY BLDG., 1409 4 <sup>TH</sup> AVE., SAN DIEGO, CA 92101-3105 <input type="checkbox"/> KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 <input type="checkbox"/> RAMONA, 1428 MONTECITO RD., RAMONA, CA 92065-5200 <input type="checkbox"/> SOUTH COUNTY DIVISION, 500 3 <sup>RD</sup> AVE., CHULA VISTA, CA 91910-5649 <input type="checkbox"/> JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792	<b>F I L E D</b> Clerk of the Superior Court  <b>JUN 20 2006</b>  By: L. ROCKWELL, Deputy
PLAINTIFF(S)/PETITIONER(S) THOMAS E. TROYK, et al.,	Judge: JAY M. BLOOM Dept.: 70
DEFENDANT(S)/RESPONDENT(S) FARMERS GROUP INC., et al.,	CASE NUMBER GIC 836844
<b>CLERK'S CERTIFICATE OF SERVICE BY MAIL</b> <b>(CCP 1013a(4))</b>	

I, **MICHAEL RODDY**, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

**ORDER GRANTING PLAINTIFF'S SUMMARY JUDGMENT AND DENYING DEFENDANTS' SUMMARY JUDGMENT**

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at:

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