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27 SUPERIOR COURT OF THE STATE OF CALIFORNIA
28 FOR THE COUNTY OF LOS ANGELES

RICHARD JELKE and LISA JELKE,

Plaintiffs,

vs.

FIRE INSURANCE EXCHANGE; a
California corporation; FARMERS FGI dba
FARMERS UNDERWRITERS
ASSOCIATION, a California corporation,
and DOES 1 through 100, inclusive,

Defendants.

Case No.: BC 321057

[Honorable Anthony Mohr]

PLAINTIFFS RICHARD JELKE AND
LISA JELKE'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
ADJUDICATION; MEMORANDUM OF
POINTS AND AUTHORITIES

Date: July 13, 2006

Time: 9:00 a.m.

Dept.: 309

[Filed Concurrently With Separate
Statement; Request For Judicial Notice;
Declaration of Lisa Jelke; Declaration of
James Karroum; and Proposed Order.]

Action Filed: September 7, 2004

Trial Date: Not set

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD: Please take notice
2 that on July 13, 2006, at 9:00 a.m. or as soon thereafter as the matter can be heard in Department
3 309 of the above entitled court located at located at 600 South Commonwealth, Los Angeles,
4 California, 90005, Plaintiffs, RICHARD and LISA JELKE (“Plaintiffs” or the “JELKES”) will,
5 and hereby do, move for an order, pursuant to Code of Civil Procedure section 437c(f)(1), that
6 summary adjudication be entered in their favor and against defendants, FIRE INSURANCE
7 EXCHANGE (“FARMERS”), on the following legal issue as put on the record by counsel for
8 the parties during the March 7, 2006 status conference before the court:

9 **“Whether the content of the notice that Farmers claims to have sent to its insureds**
10 **advising them of the change in coverage from Guaranteed Replacement Cost**
11 **coverage to Extended Replacement Cost coverage was substantively adequate to**
12 **comply with Insurance Code Section 678”**

13 This motion is made on the grounds that there are no triable issues of material fact as to
14 the issue of FARMERS’ duty under California Insurance Code Section 678 to give a plain, clear,
15 and understandable notice of any “reduction of limits” and/or “elimination of coverage”, and that
16 Plaintiffs are entitled to summary adjudication in their favor as a matter of law.

17 This motion is based on this Notice, the attached Memorandum of Points and Authorities,
18 Plaintiffs’ Separate Statement of Undisputed Facts, Request for Judicial Notice, the declaration
19 of LISA JELKE, the declaration of James Karroum, all papers, pleadings and records on file in
20 this action, all matters of which this Court may take judicial notice, and upon such other oral and
21 documentary evidence as may be presented.

22 Dated: May 18, 2006.

Respectfully submitted,
SHERNOFF BIDART & DARRAS, LLP
By: _____
MICHAEL J. BIDART
Attorneys for Plaintiffs

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 1.

3 INTRODUCTION

4 The JELKES have continuously had homeowner’s insurance with FARMERS since they
5 purchased their home in 1986 (Jelke Decl.¶2). On October 26, 2003, firestorms burned the
6 JELKES’ home to the ground (Jelke Decl.¶3). During FARMERS’ adjustment of their claim,
7 the JELKES learned for the first time that they apparently no longer had *Guaranteed*
8 Replacement Cost coverage but instead had only *Extended* Replacement Cost coverage, which
9 provided less coverage, which was insufficient for them to repair or replace their insured
10 property to its pre-loss condition (Jelke Decl.¶3).

11 From the time they purchased their home until 1995, the JELKES had Guaranteed
12 Replacement Cost coverage (Jelke Decl.¶4). With this coverage, FARMERS promised the
13 JELKES that if they suffered a loss, FARMERS would pay to repair or replace the JELKES’
14 home regardless of the policy’s limit (Jelke Decl.¶4).

15 During the 1995 renewal, FARMERS unilaterally changed the JELKES’ insurance
16 coverage from Guaranteed Replacement Cost to Extended Replacement Cost (Jelke Decl.¶5).
17 Under Extended Replacement Cost, FARMERS provided coverage for the JELKES’ dwelling up
18 to the policy limit, plus an additional 25 percent extension of that limit (Jelke Decl.¶5).

19 FARMERS’ unilateral change from Guaranteed Replacement Cost to Extended
20 Replacement Cost effectively reduced the JELKES’ overall coverage limit. That is, Guaranteed
21 Replacement Cost provided coverage for loss *regardless* of the policy’s limit. On the other
22 hand, Extended Replacement Cost provided coverage *up to* the policy limit plus a 25 percent
23 extension (Jelke Decl.¶5).

24 California Insurance Code Section 678 (“Section 678”) and California common law
25 requires that an insurer provide written notice of any reduction of limits and/or elimination of
26 coverage in advance of any renewal. In this instance, Section 678 required FARMERS to notify
27 the JELKES at least 45 days before renewal, of the change in coverage from *Guaranteed*
28 Replacement Cost to *Extended* Replacement Cost. The JELKE’S have alleged that FARMERS

1 never gave such a notice (Jelke Decl.¶7). FARMERS disputes this fact, asserting that it did send
2 a notice in 1995 to all of its insureds, including the JELKES, notifying them of the change in
3 coverage from Guaranteed to Extended Replacement Cost coverage. On March 4, 2005, in
4 response to this court’s order, FARMERS produced a form of the notice that it claims to have
5 sent (RJN, Exhibit “A”).

6 Plaintiffs vigorously dispute whether FARMERS, in fact, ever sent the notice. The
7 purpose of this motion is *not* to challenge the *procedural* requirements of Section 678 (i.e. that
8 the notice was in fact sent at least 45 days prior to renewal). That dispute is reserved for another
9 day, if necessary, as the granting of this motion would render those issues moot. Rather,
10 Plaintiffs challenge the legal *adequacy* of the notice that FARMERS purports to have sent.
11 Specifically, Plaintiffs seek an order from this Court finding that, as a matter of law, FARMERS
12 breached its duty under both Section 678 and California common law by failing to provide an
13 adequate notice of the reduction of limits and/or elimination of coverage when the JELKES’
14 coverage was changed from Guaranteed Replacement Cost to Extended Replacement Cost.

15 **2.**

16 **THE LEGAL ISSUE OF DEFENDANTS' DUTY**
17 **TO PROVIDE AN ADEQUATE NOTICE MAY BE SUMMARILY**
18 **ADJUDICATED UNDER C.C.P. SECTION 437c(f)(1)**

19 C.C.P. §437c(f)(1) provides that "[a] party may move for summary adjudication as to . .
20 . one or more *issues of duty*...". And, “a motion for summary adjudication shall be granted only
21 if it completely disposes of*an issue of duty*.” (C.C.P. §437c(f)(1).

22 Plaintiffs' motion will completely dispose of the issue of FARMERS’ duty to provide its
23 insureds, including Plaintiffs, a plain, clear and understandable notice of the “reduction of limits”
24 and/or “elimination of coverage” that resulted when FARMERS changed its coverage from
25 Guaranteed Replacement Cost to Extended Replacement Cost. This motion fits squarely within
26 the language and purpose of C.C.P. §437c(f)(1). Therefore, this “issue of duty” is ripe for
27 summary adjudication by this court.
28

FACTUAL BACKGROUND

The JELKES purchased a homeowners policy through FARMERS when they purchased their home in 1986 and they have been continuously insured with FARMERS since that time (Jelke Decl.¶2). On October 26, 2003 the JELKES’ home was completely destroyed during the Grand Prix wildfires and their claim was promptly tendered to FARMERS (Jelke Decl.¶3).

The policy issued to the JELKES at the time of their loss – policy number 90785-35-38 – was effective from September 19, 2003 to September 19, 2004 and covered, among other things, a loss due to fire (Jelke Decl.¶6, Exhibit “C”). By its modified terms, the policy has a limit of \$188,000, plus a 25 percent extension for dwelling coverage, and \$141,000 in personal property coverage (Jelke Decl.¶6, Exhibit “C”).

Unlike the policy in force at the time of the loss, the original policy the JELKES purchased in 1986 included Guaranteed Replacement Cost coverage on buildings under the FARMERS “Protector Plus” policy (Jelke Decl.¶4, Exhibit “A”). The original policies prior to the 1995 renewal explained that with Guaranteed Replacement Cost coverage, there was “no limit on the amount that could be paid to replace your home in the event it was destroyed as the result of a covered loss”. (RJN, Exhibit “A”).

When the JELKES renewed their FARMERS policy in 1995, FARMERS issued them a new policy that changed their coverage from Guaranteed Replacement Cost coverage to Extended Replacement Cost coverage (Jelke Decl.¶5, Exhibit “B”). The JELKES assert that FARMERS never sent them any notice of this change in coverage while FARMERS claims that it did send a notice (Jelke Decl.¶7). On March 4, 2005, in response to this court’s order, FARMERS produced an exemplar of the document that it claims to have sent (RJN, Exhibit “A”).

This purported notice states that it is an “endorsement” to the policy that should be kept with the policy. A true and correct copy of the notice is set forth below:



**PLEASE KEEP THIS
ENDORSEMENT
WITH YOUR POLICY
NEW FORM**

01-600 1ST 000008 1st RJN

Dear Policyholder:

The Extended Replacement Cost and Building Ordinance or Law Coverage Endorsement (E6047) on the reverse side will change the coverage provided by your Homeowners policy in the following ways:

Section 1 — Property, Losses Not Insured, Item 5 is deleted.

1. Building Ordinance or Law Coverage added to Section 1 — Property, Additional Coverages, Item 10.

Your Present Policy

If your policy currently does not have the Building Ordinance or Law Endorsement (E6477):

The additional cost to repair or replace your home consistent with current building codes is not covered.

If your policy currently has the Building Ordinance or Law Endorsement (E6477):

For an additional premium, the additional cost to rebuild or repair your home consistent with current building codes is covered.

This endorsement is being deleted and the additional premium charge omitted.

Your Revised Policy

Section 1 — Property, Additional Coverages, Item 10 to be added:

Following a covered loss, the additional cost to repair or rebuild buildings covered under Coverage A - Dwelling or Coverage B - Separate Structures in compliance with current building codes is covered.

This coverage does not increase the limit of insurance applying to the covered property under Coverage A - Dwelling or Coverage B - Separate Structures.

This coverage is important to you since local governments frequently upgrade building codes regarding all new construction to comply. For this reason the coverage is being provided for all Homeowners policies. Farmers is pleased to make this coverage a part of your policy.

Guaranteed Replacement Cost Endorsement

2. Guaranteed Replacement Cost Coverage replaced by Extended Replacement Cost.

Your Present Policy

Section 1 — Property, Additional Coverages, Item 8 to be deleted:

There is no limit on the amount that could be paid to replace your home in the event it was destroyed as the result of a covered loss.

Your Revised Policy

Section 1 — Property, Additional Coverages, Item 9, Extended Replacement Cost - Coverage A to be added:

Your policy will pay up to one-hundred-twenty-five percent (125%) of Coverage A - Dwelling Limit of Insurance at the time of loss, if a covered loss exceeds that amount.

This extension does not apply to the amount of coverage for Coverage B - Separate Structures.

Extended Replacement Cost specifies the total amount of coverage provided for the replacement of your dwelling. It helps protect your biggest investment, your home, from the effects of rising building costs.

These changes are effective on the renewal date shown on the attached billing notice or declaration sheet.

If you have any questions about this endorsement or the amounts of coverage on your policy, please contact your Farmers Agent.

(RJN, Exhibit "A").

SHERNOFF BIDART DARRAS
LAWYERS FOR INSURANCE POLICYHOLDERS
600 S INDIAN HILL BLVD CLAREMONT CA 91711 TEL 909 621 4935

1 For the reasons set forth below, as a matter of law, this purported notice did not satisfy
2 FARMERS' statutory duty under Section 678, or California common law, to provide a plain,
3 clear and understandable notice of the reduction in limits and/or elimination of coverage
4 resulting from the change in coverage.

5 **4.**

6 **FARMERS HAD A DUTY TO PROVIDE SPECIFIC**
7 **NOTICE OF THE "REDUCTION OF LIMITS"**
8 **AND THE "ELIMINATION OF COVERAGE"**

9 Section 678 imposed a statutory duty on FARMERS to give advance written notice of
10 any reduction of limits or elimination of coverage upon renewal of a policy. The version of
11 Section 678 in force during the 1995 renewal of the JELKES' policy stated the following:

12 "At least 45 days prior to policy expiration, an insurer shall deliver to the named
13 insured or mail to the named insured at the address shown in the policy, either of
14 the following:

- 15 (a) An offer of renewal of the policy contingent upon payment of premium as
16 stated in the offer, *stating any reduction of limits or elimination of*
17 *coverage if any.*
18 (b) A notice of nonrenewal of the policy. (Section 678(a)&(b)) (emphasis
19 added).

20 Section 678 goes on to provide for the remedy available in the event an insurer fails to
21 give an appropriate notice:

22 "In the event an insurer fails to give the named insured either an offer of renewal
23 or notice of non-renewal as required by this section, *the existing policy, with no*
24 *change in its terms and conditions, shall remain in effect* for 45 days from
25 the date that either the offer to renew or the notice of nonrenewal is delivered or
26 mailed to the named insured. A notice to this effect shall be provided by the
27 insurer to the named insured with the policy or the notice of renewal or
28 nonrenewal."

1 The statutory duty imposed by Section 678 is also supported under California common
2 law. As stated in *Davis v. USAA* (1990) 223 Cal.App.3d 1322:

3 “It is a long-standing general principle applicable to insurance policies that ***an insurance***
4 ***company is bound by a greater coverage in an earlier policy*** when a renewal policy is
5 issued but the insured is not notified of the specific reduction in coverage.

6 [Citations]...[E]xceptions and limitations on coverage the insured could reasonably
7 expect ***must be called to the subscriber’s attention clearly and plainly*** before the
8 exclusion will be interpreted to relieve the insurer of the liability for performance.”
9 (Emphasis added).

10 In *Davis*, USAA added a provision to a homeowner’s policy specifically and expressly
11 excluding third-party negligence as a covered property loss peril. In the “Important Notice” to
12 its insureds included with the renewal policy, USAA informed the insureds under a heading
13 entitled “Clarification of Coverage” that three new exclusions had been added and included a
14 general description of the third-party negligence exclusion. The appellate court held that the
15 notice was insufficient to put the insureds on notice that the renewed policy excluded damage
16 resulting from contractor negligence. The *Davis* court went on to state:

17 “The law, however, requires notice of the *specific* reduction in coverage; a general
18 admonition to read the policy for changes is insufficient.” (Id., emphasis in original)

19 Notably, the court reached this conclusion despite the fact that the exclusion was
20 specifically identified as an exclusion and was generally described in the “Important Notice”
21 included with the renewal policy.

22 A comprehensive discussion of this rule and its application is also contained in Croskey,
23 Kaufman, et al., *California Practice Guide: Insurance Litigation* (Rutter 2004) paragraphs
24 4:166-4:172. That highly-regarded treatise notes that:

25 “As a matter of public policy, insurers are required to provide *clear, conspicuous* notice
26 in an *expected place* of any reduction in coverage on renewal of existing policies. . . .

27 Absent such notice, the insured’s failure to read the renewal policy and note the reduced
28

1 coverage may be excused and the reduction held ineffective.” (Croskey, Kaufman, *supra*,
2 paragraph 4:166; italics in original.)

3 The Croskey treatise goes on to addresses the issue of the sufficiency of a notice of
4 reductions in coverage:

5 “Exceptions and limitations on coverage afforded under prior policies must be called to
6 the insured’s attention ‘*clearly and plainly*’ before they will be given effect. . . .A general
7 admonition to ‘read the policy for changes’ is not sufficient.”

8 (Croskey, Kaufman, supra, paragraph 4:167; italics in original.)

9 For several reasons, even if the purported notice had been mailed by FARMERS to its
10 policyholders before changing coverage, it did not satisfy the requirements of Section 678 or
11 California common law.

12 **5.**

13 **THE CHANGE FROM GUARANTEED**
14 **REPLACEMENT COST TO EXTENDED REPLACEMENT**
15 **COST CONSTITUTED BOTH A “REDUCTION OF LIMITS”**
16 **AND AN “ELIMINATION OF COVERAGE”**

17 When FARMERS changed the JELKES coverage from Guaranteed Replacement Cost to
18 Extended Replacement Cost coverage, a Section 678 notice was required since there was
19 necessarily a “reduction of limits” and an “elimination of coverage”. A “reduction of limits”
20 occurred since, under the prior policy’s Guaranteed Replacement Cost coverage, the JELKES
21 had an *unlimited* amount of dwelling coverage in the event of such a loss. To the contrary,
22 under the renewal policy issued to the JELKES with the Extended Replacement Cost benefit, the
23 dwelling coverage was *capped* at a stated limit. Also, the loss of Guaranteed Replacement Cost
24 coverage also constituted an “elimination of coverage” that previously existed.

25 ///

26 ///

27 ///

28

1 6.

2 **FARMERS’ PURPORTED NOTICE DOES NOT SATISFY**
3 **THE REQUIREMENTS OF CALIFORNIA LAW**

4 Section 678 has both procedural and substantive requirements. Procedurally, it requires
5 that the notice be in writing and sent at least 45 days prior to a policy renewal. Substantively, it
6 requires that the notice clearly, conspicuously, and plainly state any “reduction of limits” or
7 “elimination of coverage”. As pointed out above, the JELKES claim that FARMERS never sent
8 the purported notice, and therefore failed to meet the procedural requirements of Section 678.
9 However, for purposes of this motion, plaintiffs challenge only the substantive sufficiency of the
10 purported notice because it does not provide a plain, clear, and understandable notice of the
11 “reduction of limits” and/or “elimination of coverage” that resulted when FARMERS
12 unilaterally changed the JELKES coverage from Guaranteed Replacement Cost to Extended
13 Replacement Cost coverage.

14 The “plain and clear” requirement applied to a notice of reduction of coverage in a
15 renewal policy – and which is also applied in the context of a policy’s exclusionary language – is
16 stringent. The reduction in coverage must be communicated in a manner which is “precise and
17 understandable” by the average layperson.” (*Id.*, paragraph 4:150; *Travelers Ins. Co. v. Leshner*
18 (1986) 187 Cal.App.3d 169, 184, 231 Cal.Rptr. 791, 796; *State Farm Mut. Auto Ins. Co. v.*
19 *Jacober*_(1973) 10 Cal.3d 193, 207, 110 Cal.Rptr. 1, 10.)

20 But, as noted by the court in *Ponder v. Blue Cross of So. Calif.* (1983) 145 Cal.App.3d
21 709, 723, 193 Cal.Rptr. 632, 640, “[t]his means more than the traditional requirement that the
22 contract terms be unambiguous. Precision is not enough. *Understandability* is also required.”
23 Similarly, the court noted, “[t]he terminology used must be comprehensible to the persons
24 purchasing the insurance” and where an insurer markets its policies to the general public, the
25 limiting terms “must be expressed in language comprehensible to citizens of average education,
26 knowledge and experience.” (*Ponder*, 145 Cal.App.3d at 724, 193 Cal.Rptr. at 640.) The
27 *Ponder* court also explained that the information must be “couched in language which is
28 ‘comprehensible to lay persons’ or ‘clear to the ordinary mind’” and that “the confusing

1 arrangement of common words” or “the unusual arrangement of common words” can render the
2 provisions insufficiently plain or clear. (*Ponder*, 145 Cal.App.3d at 725, 193 Cal.Rptr. at 641.)

3 These principles were recently reaffirmed by the California Supreme Court in *Haynes v.*
4 *Farmers Insurance Exchange* (2004) 32 Cal.4th 1198. In *Haynes*, as it is here, FARMERS was
5 attempting to limit coverage by way of an added endorsement that would have limited coverage
6 to permissive users in an auto policy to \$15,000 regardless of the policy limit. The Supreme
7 Court ultimately found that FARMERS’ attempted limitation of coverage was invalid and
8 unenforceable, noting that:

9 “[c]overage may be limited by a valid endorsement and, if a conflict exists between the
10 main body of the policy and an endorsement, the endorsement prevails. [citations]. But
11 to be enforceable, any provision that takes away or limits coverage reasonably expected
12 by an insured must be ‘conspicuous, plain and clear’. [citation]. Thus, any such
13 limitation must be placed and printed so that it will attract the reader’s attention. Such a
14 provision also must be stated precisely and understandably, in words that are part of the
15 working vocabulary of the average layperson. [citation]. The burden of making
16 coverage exceptions and limitations conspicuous, plain and clear rests with the insurer.”
17 (*Id.*, at 1204)

18 The rationale applied by the court in *Haynes* is equally applicable here. The notice
19 FARMERS relies upon to limit coverage from Guaranteed Replacement Cost to Extended
20 Replacement Cost, as explained below, falls far short of the standards under California law and
21 is inadequate as a matter of law.

22 A.) **The Notice Makes No Mention Of A “Reduction Of Limits”**

23 The purported notice simply identifies that Guaranteed Replacement is “replaced” with
24 Extended Replacement. Nowhere does the notice affirmatively indicate that the change in
25 coverage constitutes a “reduction of limits” since the “guarantee” is gone and the insured now
26 has a finite limit. Rather, the Notice simply says that the policy will pay “*up to one-hundred-*
27 *twenty-five percent (125%) of the Coverage A – Dwelling Limit of Insurance at the time of loss,*
28 *if a covered claim exceeds that amount.*” The Notice is ambiguous about whether the policy

1 pays 125% above policy limits (i.e., increases limits by 25%) in the event of a total loss, or
2 increases them by an extra 125%. But irrespective of how that ambiguity is resolved, the fact
3 remains that Extended Replacement Cost is a *reduction of limits* from the unlimited guarantee
4 provided under Guaranteed Replacement Cost coverage. FARMERS’ notice never points that
5 out. And the fact that the purported notice claims to attach the Extended Replacement Cost
6 endorsement itself does not support FARMERS’ position. As stated by the Supreme Court in
7 *Haynes*, “...neither the prevalence of endorsements in the industry nor our recognition that they
8 may validly modify an insurance policy diminishes an *insurer’s burden in notifying insureds of*
9 *reductions in otherwise reasonably expected coverage.*” (*Id.*, at 1208) (emphasis added).

10 The absence of any language in FARMERS’ notice pointing out the reduction of limits
11 that resulted with the change from Guaranteed Replacement Cost to Extended Replacement Cost
12 coverage is particularly significant when compared with other notices that FARMERS has sent
13 to its insureds describing reductions in coverage that occurred with other endorsements that were
14 added on renewals. For example, in 2001, FARMERS incorporated a new endorsement to some
15 of its policies, the H6114A (2nd Edition) endorsement (Karroum Decl., ¶3). Among other things,
16 the H6114A (2nd Edition) endorsement made changes to the “water damage” and “mold”
17 provisions in prior policies (Karroum Decl., ¶3). Along with a copy of the H6114A (2nd Edition)
18 endorsement itself, insureds were given a notice from FARMERS explaining the changes that
19 would be made to their policy once the H6114A (2nd Edition) endorsement took effect (Karroum
20 Decl., ¶3).

21 The inadequacy of FARMERS notice at issue here is best demonstrated by comparing it
22 to the notice that FARMERS sent in connection with the implementation of the H6114A (2nd
23 Edition) endorsement, where the first two sentences of that notice stated the following:

24 “Dear Valued Customer:

25 Endorsent H6114A, second edition, has been added to your policy. **THE CHANGES**
26 **TO YOUR POLICY MADE BY THIS ENDORSEMENT AND DESCRIBED**
27 **BELOW, REDUCE COVERAGE PROVIDED BY YOUR POLICY.**” (Emphasis in
28 original). (Karroum Decl., Exhibit “A”).

1 Notably, this notice made it clear from the outset that the H6114A (2nd Edition)
2 endorsement operated to “**REDUCE**” coverage. In addition, FARMERS attempted to
3 conspicuously bring this reduction of coverage to the attention of its insureds by both
4 capitalizing and bolding the second sentence of the notice, and by additionally underlining the
5 word “**REDUCE**”. Clearly, FARMERS knew how to draft a proper notice.

6 In stark contrast to FARMERS’ notice describing the reduction in coverage under the
7 H6114A (2nd Edition) endorsement, the introduction of the notice at issue here simply and
8 blandly stated the following:

9 “Dear Policyholder:

10 The Extended Replacement Cost and Building Ordinance or Law Coverage
11 Endorsement (E6047) on the reverse side will change the coverage provided by your
12 Homeowners policy in the following ways:” (RJN, Exhibit “A”).

13 Nowhere in this introduction, nor later in the body of the notice, is the reduction in
14 limits resulting from the change from Guaranteed Replacement Cost to Extended Replacement
15 Cost coverage pointed out at all, much less conspicuously. When compared with FARMERS
16 own notice with respect to the H6114A (2nd Edition) endorsement, the notice of the reduction in
17 limits from Guaranteed Replacement Cost to Extended Replacement Cost coverage is woefully
18 inadequate.

19 ***B.) The Notice Does Not Adequately Identify An “Elimination Of Coverage”***

20 The notice does not adequately advise the insured of the elimination of Guaranteed
21 Replacement Cost coverage in that, the notice deceptively leads an insured to believe that they
22 are receiving ***better*** coverage.

23 First, the name of the new coverage alone leads one to believe it is something more than
24 what they had before (i.e. ***Extended*** Replacement Cost Coverage). In truth, FARMERS was
25 ***reducing*** coverage and not “extending” it.

26 Second, the notice lulls the policyholder into a false sense of security, stating that,
27 “Extended Replacement Coverage specifies the total amount of coverage provided for the
28 replacement of your dwelling. ***It helps protect your biggest investment, your home, from the***

1 *effects of rising building costs.*” Implicitly, this gives the false impression that the prior
2 coverage did not have the same protection when, in fact, Guaranteed Replacement gave the best
3 protection available against rising building costs – *an unlimited guarantee!* This fact alone
4 renders the purported “notice” not only defective, but deceptive.

5 Third, equally misleading is the fact that the policyholder is not put on notice that the
6 policy limit, which had previously been irrelevant, would now be critical. That is, under
7 Guaranteed Replacement Cost, coverage for the insured dwelling would be provided
8 *irrespective of the policy limit*, while under Extended Replacement Cost, the coverage is *capped*
9 *at the policy limit* plus the extension. The notice does not advise an insured that if the policy
10 limit is not sufficient to cover the repair or replacement of the dwelling to its pre-loss condition,
11 that the policyholder would be rendered under-insured and personally responsible for the
12 balance.

13 C.) *The Notice Is Misleading Since It Also Mentions Additional Coverages Being*
14 *Provided In The Renewal Policy*

15 Before discussing the change from Guaranteed to Extended Replacement Cost coverage,
16 the notice begins by advising the insured of an additional coverage being provided for code
17 upgrades. With respect to newly added code upgrade coverage, the notice states:

18 “This coverage is important to you since local governments frequently upgrade building
19 codes requiring all new construction to comply. For this reason the coverage is being
20 provided for all Homeowners policies. Farmers is pleased to make this coverage a part of
21 your policy.”

22 Obviously, while the code upgrade coverage is a welcome addition to the renewal policy,
23 it is neither a “reduction of limits” or an “elimination of coverage”. But by including notice of
24 this additional and improved coverage, the notice further misleads and lulls an ordinary insured
25 to think the renewal policy is something better than what they had before. Indeed, when read as
26 a whole, the purpose of the notice appears to be to identify how the policy has been *improved*,
27 which is contrary to the purpose of a Section 678 notice which is to identify any *lessening* of
28

1 coverage by identifying a “reduction of limits” and/or “elimination of coverage”. This fact alone
2 renders the notice as deceptive as it is defective.

3 **D.) FARMERS Did Not Provide A Notice Of The “Reduction Of Limits” Or**
4 **“Elimination Of Coverage” But Simply Enclosed The Extended Replacement**
5 **Cost Endorsement**

6 The purported notice is not really a “notice” at all. Instead, it is simply a cover letter
7 enclosing a copy of the endorsement itself. Most insureds are not sophisticated in reading and
8 interpreting their insurance policies in the first place, which is why an clear, conspicuous, and
9 separate *notice* is required to bring adverse changes in the renewal policy to the insured’s
10 attention.

11 The importance of an adequate notice is amplified when dealing with a renewal policy.
12 As stated in Croskey, Kaufman, et al., *California Practice Guide: Insurance Litigation* (Rutter
13 2004) paragraph 4:168:

14 “Insureds are even less likely to read renewal policies than original policies. Therefore, it
15 is not enough that the new exclusion is ‘plain and clear’ and appears in a ‘conspicuous’
16 place in the renewal policy. Some form of specific notice *separate from the policy* is
17 required to direct the insured’s attention to the change.” (Croskey, Kaufman, *supra*,
18 paragraph 4:168; italics in original.)

19 (Citing *Sorensen v. Farmers Ins. Exch.* (1976) 56 Cal.App.3d 328, 128 Cal.Rptr. 400,
20 403).

21 Here, the purported notice simply states at the top “**PLEASE KEEP THIS**
22 **ENDORSEMENT WITH YOUR POLICY**”. This does not bring to an insured’s attention that
23 their coverage has been drastically reduced. Instead, a heading which might have stated,
24 “**IMPORTANT NOTICE OF REDUCTIONS IN YOUR LIMITS AND ELIMINATION**
25 **OF CERTAIN COVERAGES**” as an introduction to a properly stated and conspicuous notice
26 would have been much more likely to call to the attention of an insured the reductions in
27 coverage contained in the renewal policy.

28 ///

7.

EXAMPLE OF WHAT FARMERS' NOTICE SHOULD HAVE PROVIDED

The obvious question then, is “what *should* have FARMERS said in its notice?” One example of a plain, clear and understandable notice of the reduction of limits and elimination of coverage resulting from the change from Guaranteed to Extended Replacement Cost coverage is the following:

IMPORTANT NOTICE OF REDUCTIONS IN YOUR LIMITS AND

ELIMINATION OF CERTAIN COVERAGES: THE COVERAGE WE ARE

OFFERING YOU IN THIS RENEWAL HAS BEEN **REDUCED** AND

SUBSTANTIALLY DIFFERS FROM THE COVERAGES PROVIDED BY YOUR

CURRENT HOMEOWNERS' POLICY. YOUR CURRENT HOMEOWNERS

POLICY CONTAINS “GUARANTEED REPLACEMENT COST” COVERAGE

WHICH GUARANTEES THAT WE WILL PAY TO REPAIR OR REPLACE YOUR

HOME IN THE EVENT OF A LOSS EVEN IF IT THE COST EXCEEDS THE

POLICY LIMIT. THE COVERAGE UNDER THIS RENEWAL POLICY HAD BEEN

REDUCED. THE “GUARANTEED REPLACEMENT COST” COVERAGE HAS

BEEN **ELIMINATED**. INSTEAD, THIS RENEWAL POLICY CONTAINS

“EXTENDED REPLACEMENT COST” COVERAGE. ALTHOUGH YOUR

RENEWAL COVERAGE IS ENTITLED “EXTENDED REPLACEMENT COST”

COVERAGE, THAT COVERAGE DOES NOT CONSTITUTE AN IMPROVEMENT

IN YOUR CURRENT COVERAGE. RATHER, UNDER “EXTENDED

REPLACEMENT COST” COVERAGE, YOUR COVERAGE IS LIMITED TO THE

STATED POLICY LIMIT PLUS A 25% EXTENTION OF THAT LIMIT. **THUS, YOU**

WILL NO LONGER HAVE A GUARANTEE THAT YOU WILL BE PAID

BENEFITS SUFFICIENT TO REPAIR OR REPLACE YOUR PROPERTY TO

ITS PRE-LOSS CONDITION IN THE EVENT OF A LOSS.

FARMERS did not give such a clear and explicit notice of what was happening. As will be demonstrated later in this litigation, FARMERS was seeking to cap its overall exposure by

1 changing from the unlimited Guaranteed Replacement Cost policies to the limited Extended
2 Replacement Cost coverage. But only the legal sufficiency of FARMERS' purported notice, and
3 not FARMERS' motives, are the subject of this motion. The simple fact remains that
4 FARMERS' purported notice did not meet the requirements of California law.

5 **8.**

6 **CONCLUSION**

7 Based on the foregoing, Plaintiffs respectfully request that this Court find that
8 FARMERS breached its duty to give its insureds a plain, clear and understandable notice of the
9 significant and substantial changes it was imposing on its insureds' coverage by replacing
10 Guaranteed Replacement Cost with Extended Replacement Cost coverage.

11 Dated: May 18, 2006.

12 Respectfully submitted,
13 SHERNOFF BIDART & DARRAS, LLP

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15 By: _____
16 MICHAEL J. BIDART
17 Attorneys for Plaintiffs



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **May 18, 2006**, I served the foregoing document described as **PLAINTIFFS RICHARD JELKE AND LISA JELKE'S NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES** on the following interested parties in this action:

PLEASE SEE ATTACHED SERVICE LIST

BY MAIL I deposited the envelopes with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California.

BY E-MAIL I forwarded copies of the above-noted document to all parties via e-mail using the internet.

BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX.

OVERNIGHT To expedite delivery, a copy was sent by FEDERAL EXPRESS to the individuals indicated on the attached service list.

BY PERSONAL SERVICE I caused such document to be hand-delivered to the individuals listed below.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **May 18, 2006**, at Claremont, California.

DEBBIE HUNTER

1 *Jelke v. Fire Ins. Exchange, et al.*
Case No.: BC321057

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