

COURT OF APPEAL STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
COURT OF APPEAL NO. A126539  
Division 5

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**UNITED FARMERS AGENTS ASSOCIATION, INC.,**

*Plaintiff/Appellant,*

v.

**FARMERS GROUP, INC., ET AL.,**

*Defendants/Respondents.*

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**BRIEF OF APPELLANT**

Appeal from the Superior Court of the County of San Francisco

CASE NO. CGC 07-463516

The Honorable Paul H. Alvarado, presiding

The Honorable Patrick J. Mahoney, presiding

The Honorable Charlotte Walter Woolard, presiding

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February 16, 2010

**CERTIFICATE OF  
INTERESTED ENTITIES OR PERSONS**

Pursuant to the California Rules of Court, Rule 8.208(d)(3), interested entities or persons are listed below:

<b><u>Interested Entity or Person</u></b>	<b><u>Nature of Interest</u></b>
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FARMERS INSURANCE EXCHANGE	Appellee/Defendant
FARMERS NEW WORLD LIFE INSURANCE COMPANY	Appellee/Defendant
FIRE INSURANCE EXCHANGE	Appellee/Defendant
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UNITED FARMERS AGENTS ASSOCIATION, INC.	Appellant/Plaintiff
WOOLARD, Hon. Charlotte Walter	Judge, trial court

DATED: February 16, 2010

*/s/ William P. Tedards, Jr.*

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WILLIAM P. TEDARDS, JR.

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## **INTRODUCTION AND SUMMARY OF THE ISSUE**

This appeal is from a final judgment based on two orders sustaining demurrers in favor of Defendants and Appellees Farmers Group, Inc. (“FGI”), Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (hereafter, collectively, “Farmers”) and against Plaintiff and Appellant United Farmers Agents Association, Inc. (hereafter, the “Association”).

This is an associational standing case in which the Association is proceeding on behalf of its members. The Association’s complaint seeks declaratory relief with respect to the interpretation of certain provisions in the contract between each of its members and Farmers. The trial court sustained demurrers to all causes of action on the ground that, having sought declaratory relief before on the same issues, the Association’s action is now barred by the statute of limitations governing breach of contract actions. The Association contends that, because its previous declaratory judgment actions were dismissed without prejudice, it is free to bring the actions again and is not barred by the breach of contract statute of limitations, because no breach of contract action has ever accrued (i.e., nothing has occurred which would

trigger the statute of limitations).

## **I. STATEMENT OF THE CASE**

### **A. THE PARTIES AND THE LAWSUIT**

#### **1. Plaintiff/Appellant**

The Association is a California nonprofit corporation composed of independent insurance agents who have contracted with Farmers. It is organized as a voluntary association for the specific and primary purpose of improving working conditions for insurance agents operating under contract with Farmers. (APPX XX - Complaint.) The contracts at issue are form contracts developed by Farmers, which are presented to prospective agents on a “take it or leave it” basis without opportunity for individual negotiation.

Under the terms of the contract, and as the parties operate in practice, the insurance agents are independent contractors for all purposes, each with the sole right to determine the manner in which the objectives of the contract are carried out, limited only by the requirement that the agent conform to “good business practice” and applicable laws. (APPX XX - Complaint.)

#### **2. Defendants/Appellees**

Farmers is a group of five California entities and one Washington

corporation, all with their principal places of business in California, except for the Washington Corporation, whose office is in Washington. They do business collectively as a group, offering personal and commercial lines of insurance such as auto, homeowner, life, and business insurance. Farmers plays no role in soliciting policyholders, developing relevant information about policyholders, or preparing and submitting insurance applications for policyholders. Its role, under the terms of the contract with its agents, is limited to accepting or rejecting applications for insurance policies tendered by the agents' offices and processing claims. (APPX XX - Complaint.)

### **3. Summary of the Association's Claims**

The Association brings five claims for declaratory relief on behalf of all of its members. Each claim requires the interpretation of one or more of the provisions of the contract. Following is a summary.

The First Cause of Action seeks a declaration that the contract does not permit Farmers to target and pressure agents whose insurance clients are not producing what Farmers deems to be sufficient underwriting profits and acceptable numbers and types of insurance policies. The controversy arises because Farmers is using a management tool to threaten agents with adverse actions, including possible

termination of the contract, to force the agents to sell more highly-profitable life insurance policies, to discriminate among their clients in favor of those who will produce higher underwriting profits for Farmers, and to increase the volume of other preferred lines of insurance.

The Second Cause of Action seeks a declaration that the contract does not require the agents to “roll-over” to Farmers insurance policies that were previously placed with other insurers. The controversy arises because Farmers, after withdrawing from certain lines of insurance, (e.g., homeowners and other residential dwellings in California and Texas) for varying periods of time (which allows agents to place new applications for such insurance with other insurers in accordance with the contract), has returned to those markets and taken the position that all of those insurance policies that were placed with other insurers while it was out of the market must now be rewritten or “converted” to Farmers policies when renewed.

The Third Cause of Action seeks a declaration that the contract does not require the agents to sell insurance products underwritten by insurers other than Farmers. The controversy arises because FGI, the management company that controls Farmers, has entered into working relationships with, or acquired, other insurers who underwrite their own

products and has taken the position that the agents must sell those products and submit all applications for those types of products to Farmers.

The Fourth Cause of Action seeks a declaration that, under the contract, agents are not required to obtain separate licenses to sell annuities, securities, and other types of financial products which are regulated separately by the FINRA and cannot be pressured to do so by discriminatory treatment. The controversy arises because Farmers now wants to sell securities and other financial products (with the elimination of the Glass-Steagall barriers), has taken the position that its insurance agents must market these products, and is discriminating against agents who do not wish to do so.

The Fifth Cause of Action seeks a declaration that the contract does not preclude the agents from submitting an insurance application to another insurer where the client insists on a type of policy or feature that is not available from Farmers. The controversy arises because FGI has taken the position that all applications for the types of insurance available from Farmers must be submitted to Farmers or no one, even if the client must have a feature that is not available from Farmers.

## **B. THE COURSE OF PROCEEDINGS BELOW**

The original complaint was filed on May 18, 2007. Farmers demurred to the complaint, in its entirety. On January 31, 2008, the trial court overruled the demurrer as to the First Cause of Action and sustained the demurrer as to the Second through Fifth Causes of Action, with leave to amend. The First Amended Complaint (one of two operative complaints in this appeal) was filed on March 27, 2008 (APPX XX.) Farmers demurred again to the Second through Fifth Causes of Action. On June 13, 2008, the trial court sustained the demurrer to those causes of action without leave to amend. (APPX XX.) The ground was that the Second through Fifth Causes of Action are barred by the statute of limitations governing breach of contract actions. This is one of two orders that the Association is appealing.

Farmers filed its answer to the First Amended Complaint (i.e., its answer to the remaining First Cause of Action) on July 18, 2008. (APPX XX.) The discovery phase began but was interrupted on March 5, 2009 by Farmers' motion for judgment on the pleadings, on the ground that the First Cause of Action is also barred by the breach of contract statute of limitations. On March 27, 2009, the trial court granted the motion with leave to amend "to allege why this action is not

time-barred.” (APPX XX.)

The Second Amended Complaint (the other operative complaint in this appeal) was filed May 26, 2009. (APPX XX.) Farmers demurred again on the same ground. On June 5, 2009, the trial court sustained the demurrer without leave to amend. (APPX XX.) That is the second order that the Association is appealing.

The Notice of Appeal was filed September 11, 2009, while the final judgment was still pending. (APPX XX.) The final judgment was entered October 31, 2009. (APPX XX.)

### **C. STATEMENT OF APPEALABILITY**

On October 31, 2009, the trial court entered its Final Judgment stating “it is adjudged that Plaintiff . . . take nothing from Defendant[s] . . . .” (APPX XX.) That is a final judgment of dismissal which is appealable. On September 11, 2009, the Association had filed a notice of appeal from that judgment, anticipating its entry. (APPX XX.)

## **II. SUMMARY OF THE MATERIAL FACTS**

### **A. Facts Relevant to the Question Whether the First Cause of Action Is Time-barred**

FGI has developed a management tool to pressure the agent force

toward increased “production” (i.e., sales of new policies, with a particular stress on life insurance sales through FGI’s life insurance subsidiary) and toward increased underwriting profits for the Farmers group. (APPX XX, Second Amended Complaint ¶26.)

The device FGI has developed for this purpose is called the “DARG” program, which stands for “Deteriorating Agency Rehabilitation Guidelines.” The purpose of the DARG program, according to a guide distributed internally to Farmers’ district managers, is to determine whether or not an agency is producing an “acceptable business result [i.e., submitting applications which satisfy FGI’s desired revenue and profitability levels], which in turn will determine whether the Agent Appointment Agreement shall be maintained.” (*Id.*, ¶27.)

In 1992, the Association commenced a multi-count associational standing action in the United States District Court for the Western District of Texas on behalf of its members, alleging violations of Section 1 of the federal Sherman Antitrust Act and Section 3 of the federal Clayton Antitrust Act and asserting five supplemental state law claims, seeking declaratory and injunctive relief. (APPX XX.)

The supplemental state law claims included the following allegation, which is analogous to the First Cause of Action in this case:

38. During approximately January, 1992, FARMERS unilaterally attempted to modify the Agent Appointment Agreement, without the agreement of its agents, by adopting Deteriorating Agency Rehabilitation Guidelines, which guidelines impliedly create requirements that: (1) each agent satisfy a certain production level or quota of policies written, (2) the amount of policies-in-force of each agent not decline, and (3) each agent not have “low production” or “unfavorable underwriting trends of poor loss ratio”. These requirements are in direct contravention of the Agent Appointment Agreement and FARMERS’ consistent representations to its agents that the decision as to the volume of production of each agent rests solely upon the agent and not FARMERS. Further, the agents have no control over loss ratios. The Guidelines provide for termination of the Agent Appointment Agreement if FARMERS is not satisfied with the conduct of an agent.

(APPX XX.) The requested relief on this claim was a declaration that “[i]mposing new production requirements on the agents, including plaintiffs’ members, constitutes a breach of the Agreement by Farmers.”

(APPX XX - ¶46 of Declaratory Judgment request) and an injunction under 15 U.S.C. §26, temporarily and permanent enjoining Farmers from “[i]mposing production levels upon Plaintiffs’ members.” (APPX XX.)

Farmers moved for summary judgment with respect to the federal antitrust claims and requested that the Court dismiss the supplemental state law claims. The assigned magistrate judge recommended that the district judge grant the motions for summary judgment and dismiss all

of the supplemental state law claims without prejudice, stating:

The Defendants request that this Court dismiss the UFAA supplemental pendent state law claims. Supplemental jurisdiction is discretionary with the trial court. \* \* \* The complaints made by UFAA with regard to the Agency Appointment Agreement have nothing to do with any of the other alleged illegal activities by Farmers. Many of the complaints deal specifically with interpretation of the Agency Appointment Agreement with regard to termination of an agent, specifically whether Farmers can terminate an agent because the agent has fallen below a certain profit level.

This Court recommends that the United States District Court decline to exercise its pendent (supplemental) jurisdiction over claims arising under state law and dismiss them without prejudice.

(APPX XX.) The district judge adopted the magistrate judge's recommendation in all respects, stating "the supplemental claims filed by United Farmers Agents Association, Inc. are dismissed without prejudice." (APPX XX.)

**B. Facts Relevant to the Question Whether the Second Through Fifth Causes of Action Are Time-Barred**

In 2000, the Association commenced an associational standing action on behalf of its members in California for declaratory relief directed to the same essential claims now made in the Second through Fifth Causes of Action in the First Amended Complaint, filed March 27, 2008. (APPX XX.)

After demurrers and motions for judgment on the pleadings, Farmers filed a successful motion for summary judgment on standing issues. That judgment was reversed on appeal and remanded to the trial court for further proceedings. Three years later, the trial court dismissed the action without prejudice under C.C.P. § 583.320, which states that, where a judgment is reversed and an action remanded for a new trial, the action must be brought to trial within three years after the remittitur is filed by the clerk of the trial court. (These are agreed facts.)

### **III. SUMMARY OF THE ARGUMENT**

Farmers' statute of limitations theory, as applied to both the First Cause of Action (Second Amended Complaint) and the Second through Fifth Causes of Action (First Amended Complaint), is that the mere filing of the previous declaratory relief actions, without more, has triggered the statute of limitations governing breach of contract actions, barring the Association from bringing similar declaratory relief actions now. Farmers concedes that the *members* of the Association, who are the real parties in interest, are not barred by the statute but maintains that the Association is barred *as an entity*.

The essential flaw in this theory is that the breach of contract

statute of limitations is not triggered by the mere filing of a declaratory relief action by a derivative plaintiff. The statute begins to run only when a complete breach of contract action *has accrued*, i.e., when all four elements of that cause of action have occurred, the last being injury to the plaintiff. That has not occurred at any point during these declaratory judgment actions. The Association, which is not the real party in interest, does not have a contract with Farmers, and the four elements of the breach of contract cause of action could never accrue to the Association.

Where all four elements of a breach of contract action *have accrued* to a particular plaintiff, so that an action for damages and an action for declaratory relief *coexist*, it is true that the statute of limitations will begin to run against that plaintiff with respect to both remedies. This avoids circumvention of the statute by a plaintiff who actually has a breach of contract action, waits too long, then tries to resurrect it with a declaratory relief claim. That does not describe this situation, where the Association is only a derivative plaintiff, not the real party in interest, and has no breach of contract action.

Farmers has argued that these fundamental principles should not be applied in this case, because the Association might bring repetitive

declaratory judgment actions forever. But that would be theoretically true of *any* plaintiff in a similar position, and there are judicial mechanisms such as res judicata and collateral estoppel (where determinations occur on the merits) and curbs on vexatious litigation to deal with that type of problem.

#### **IV. ARGUMENT**

##### **A. THE STANDARD OF REVIEW IS *DE NOVO*.**

See *Align Technology, Inc. v. Tran*, 179 Cal App. 4<sup>th</sup> 949, 958

(2009):

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading stated facts sufficient to constitute a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal. Rptr. 2d 271, 21 P.3d 1189].) “In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58]; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075 [60 Cal. Rptr. 2d 263, 929 P.2d 582].)

**B. THE FIRST CAUSE OF ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS GOVERNING BREACH OF CONTRACT ACTIONS**

**The Essential Flaw in Farmers' Demurrer**

Farmers' entire demurrer is based on the principle that "where legal and equitable claims *coexist*, equitable remedies will be withheld if an applicable statute of limitations bars the *concurrent* legal remedy." (APPX XX, Farmers' Demurrer to Second Amended Complaint, p. 7, lines 5-13, citing *Levald v. City of Palm Desert*)(emphasis added). This is because "it is improper for a plaintiff to attempt to escape the applicable statute of limitations merely by *relabeling* its claim as one for declaratory relief." (*Id.*, lines 1-3)(emphasis added). That principle, and the entire line of argument that Farmers develops from it, is inapplicable in this case. The Association has no contract, has never had a "coexisting" or "concurrent" legal remedy, and, thus, has nothing to "relabel."

Farmers states that "[t]he relevant question is whether UFAA, *as an entity*, is barred" from pursuing this action. (APPX XX, *Id.*, p. 3, lines 16-17.)(The emphasis is Farmers.) Farmers also states that the entity UFAA is *not a party* to the contract at issue and has *no legal rights or duties* under the contract. [APPX XX.] This means, of course,

that an action for a breach of the contract could never accrue to the Association. (See the discussion on pages XXX, *infra*.)

Farmers hammers repeatedly that the Association uses the term “breach of contract” in its declaratory judgment complaints, as though that would change the cause of action. But the use of a term does not magically transform these declaratory relief claims into breach of contract actions. Asking for a declaration that the “DARG” program breaches the contract is not the same thing as bringing a breach of contract action.

Because its entire line of reasoning is dependent on a principle that does not apply to a plaintiff that has no legal remedy (and, thus, no statute of limitations to escape by relabeling), Farmers’ demurrer is not sustainable.

**This is an associational standing declaratory judgment action with no breach of contract issues.**

The Association has brought this derivative standing action on behalf of its insurance agent members who have contracts with Farmers, seeking a declaratory judgment with respect to the proper interpretation of those contracts. The complaint states that the lead defendant FGI is attempting to impose improper contract interpretations on the members

of the Association (APPX XX, Complaint, ¶ 1), which are “threatening members with injury and will continue to injure and threaten them indefinitely.” (*Id.*, ¶¶ 9 and 13.) Farmers’ previous answer states, correctly, that the “Plaintiff has [not] sustained damages in any sum” and that the “Plaintiff has [not] sustained any injury, damage or loss by reason of any act or omission” of Farmers, once again confirming that there has never been any breach of contract action. (APPX XX, Answer, ¶¶ 1-2).

The Association has brought this declaratory judgment action for the normal purpose of determining legal rights as a guide for future conduct, thereby avoiding multiple litigations in the future by individual members. See, e.g. *Meyer v. Sprint Spectrum, L.P.*, 45 Cal.4th 634, 637 (Jan. 29, 2009):

The purpose of a declaratory judgment is to “serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.” [Citation.] ‘Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. [Citations.] ‘One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff’s future conduct in order to preserve his legal rights.’ [Citation.]

This action is a classic use of the declaratory judgment procedure, to settle contract interpretation issues where there is a “controversy” but

not necessarily any prior breach:

As noted, Code of Civil Procedure section 1060 does not require a breach of contract in order to obtain declaratory relief, only an “actual controversy.” Declaratory relief pursuant to this section has frequently been used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations. [Citations.]

Id.

**The statute of limitations for breach of contract actions could not bar this declaratory judgment action because no breach of contract action has accrued to the Association.**

What Farmers’ demurrer overlooks is that “[u]ntil some conventional right of action **has accrued**, the statute of limitations does not operate independently to cut off the right to bring one for declaratory relief [citations].” *Jaffe v. Carroll*, 35 Cal.App.3d 53, 59 (2d Dist. 1973) (emphasis added). Explaining “accrual,” the *Jaffe* court stated “[i]t is the general rule that **a cause of action accrues when a suit may be maintained thereon**, and the statute of limitations then begins to run.” (Id.) (emphasis added). In more detail, the California Supreme Court explains the “accrual” concept as follows:

Generally, a cause of action accrues and the statute of limitation begins to run when a suit may be maintained. [Citations.] ‘Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it **does not “accrue until the party owning it is entitled to begin and prosecute an action thereon.”**’ [Citation.] In other words, ‘[a] cause of action accrues “upon the **occurrence of the last element essential to the cause of action.**”’ [Citations.]’ (*County of San Diego v. Myers* (1983) 147 Cal.App.3d 417, 421 [195 Cal.Rptr. 124].)

*Howard Jarvis Taxpayers Assoc. v. City of La Habra*, 25 Cal.4th 809, 815 (2001) (emphasis added). The elements of a cause of action for breach of contract are (1) the contract, (2) plaintiff’s performance or excuse for non performance, (3) defendant’s breach, and (4) damage to plaintiff therefrom. See, e.g., *Jaffe v. Carroll*, op.cit. p. 15, *supra*, at 58-59. Obviously, such a cause of action could never accrue to the Association, which does not even have a contract with Farmers and could never either perform the contract or be damaged by a breach.

When Farmers was unsuccessfully arguing to the Court of Appeal that there was no “controversy” warranting a declaratory judgment in this case, it went to great lengths to confirm that the Association could never commence a breach of contract action. The following excerpt is from the Court of Appeal’s decision:

Farmers has consistently maintained there is no “actual controversy” between the parties in this case, because

UFAA has *no* legal rights or duties under any contract to which it is not a party. UFAA has consistently responded that the doctrine of “associational standing” permits it to litigate the contractual rights and duties of its members. The trial court believed that associational standing and actual controversy were “different issue[s] altogether.” They are not. The cases make clear that *if* UFAA has associational standing, *then* there can be an actual controversy ripe for declaratory relief, even if it is not itself a party to the contract.

*United Farmers Agents Assoc. v. Farmers Insurance Exchange, et al.*,  
2003 WL 21916422 (Cal.App. 1st Dist., not reported in Cal.Rptr.3d)  
(emphasis is the Court’s).

Farmers confirmed this point again in its answer to the First Amended Complaint, stating that the Association “has [not] sustained any injury, damage or loss by reason of any act or omission” by Farmers and “has [not] sustained damages in any sum.” (APPX XX, Answer, ¶¶1-2.) With that consistent history, Farmers cannot now state with a straight face that a cause of action for breach of contract accrued to the Association in the past, thereby triggering the four-year statute of limitations.

**The 1992 Texas litigation has no bearing on issues concerning the statute of limitations.**

The First Cause of Action in each of the Association's complaints addresses FGI's position that it is entitled to impose certain types of performance requirements (referred to by the shorthand term "DARG") on the Association's members. Farmers asserts that this cause of action is the same as one of the claims in the 1992 declaratory judgment action brought by the Association against the Farmers group. Farmers has implied that the first claim was litigated in the Texas court and that this is an effort to "rehash" the same arguments. Those statements, which appeared to be designed to suggest a collateral estoppel-type situation without actually raising the defense, were not true. The earlier claim was not litigated, as Farmers tried to suggest. The Texas federal court declined to exercise jurisdiction over all of the supplemental state law claims and dismissed them without prejudice. (APPX XX.) The net effect of that litigation was that the Association was perfectly free to file another action addressing the DARG programs in the future.

Farmers' remaining argument that the mere filing of the 1992 declaratory judgment action triggered the breach of contract statute of limitations argument is impossible for several reasons. First, the filing

of a declaratory judgment action does not, in itself, trigger a breach of contract statute of limitations. See, e.g., *Martin v. Henderson*, 540 Cal.2d 583, 592 (1953):

There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations. Quiet title actions, forerunners of declaratory actions, may be maintained when an adverse claim to property is asserted, but the period of limitations does not commence to run at that date.

Second, a breach of contract statute of limitations is not triggered until that cause of action *accrues* and we know, from the preceding discussion, that the Association can never accrue a breach of contract action because it has no contract. Third, the filing and dismissal of an action without prejudice has no impact whatsoever on the operation of statutes of limitations. Such actions are treated just as if no action had been brought. See, e.g., *Wood v. Elling Corp.*, 20 Cal.3d 353, 359 (1977).

**C. THE SECOND THROUGH FIFTH CAUSES OF ACTION ARE NOT BARRED BY THE STATUTE OF LIMITATIONS GOVERNING BREACH OF CONTRACT ACTIONS.**

To minimize repetition, the Association here incorporates by reference the entire legal argument presented in Section B, above. The material facts are the same, Farmer's demurrer to the Second through

Fifth Causes of Action is based on the same reasoning, and the flaws in Farmers' position are the same. The only difference is that the declaratory relief claim in the Texas litigation discussed in Section B was dismissed without prejudice in a decision not to exercise federal jurisdiction over supplemental claims, while, here, the earlier claims in California were dismissed without prejudice under C.C.P. § 583.320.

### **CONCLUSION AND REQUEST FOR RELIEF**

There is no basis for Farmers' argument that any part of the Association's derivative standing declaratory judgment action is barred by the statute of limitations governing breach of contract actions. A breach of contract cause of action could never accrue to the Association because the Association does not have a contract. The 1992 Texas litigation and the more recent California actions, which were dismissed without prejudice, do not collaterally estop this action and have no bearing on the statute of limitations. They are simply treated as though they had never been brought.

Farmers' entire argument is irrelevant to this situation. It applies only where legal and equitable claims *coexist*, to keep plaintiffs from *relabeling*. It does not apply where the plaintiff does not have, and

never has had, a legal remedy.

The order sustaining the demurrer to the Second Amended Complaint (First Cause of Action) and the order sustaining the demurrer to the First Amended Complaint (Second through Fifth Causes of Action) should be reversed, the final judgment should be vacated, and the action should be remanded to the trial court for further proceedings.

DATED: February 16, 2010

Respectfully submitted,

*/s/ William P. Tedards, Jr.*

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## CERTIFICATE OF COMPLIANCE

The foregoing **BRIEF OF APPELLANT**, was prepared using the following properties:

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**WILLIAM P. TEDARDS, JR.**

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