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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOSHUA SMITH, individually and on behalf of other similarly situated individuals, Plaintiff, v. INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB, aka AAA Defendant.	NO. S-1-SC-39659 On certification from the United States District Court for the District of New Mexico (No. 1:22-cv-00447-WJ-KK), the Honorable Chief William P. Johnson

JOSHUA SMITH'S ANSWER BRIEF

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I. QUESTION PRESENTED

The Honorable Chief Judge P. William Johnson, *sua sponte*, certified the following controlling question of law:

"Whether *Crutcher v. Liberty Mut. Ins. Co, 2022-NMSC-001*, 501 P.3d 433, applies prospectively or retroactively?"

Joshua Smith v. Interinsurance Exchange of the Automobile Club aka AAA, 22-cv-447-WJ-KK, (Doc. 24). **RP 1,** Order accepting certification request.

II. INTRODUCTION

In answering whether *Crutcher* applies retroactively or prospectively the Court should find, as it did in *Crutcher*[1], that AAA is not immune from claims of misrepresentation and that an insurer, like AAA may charge a premium for underinsured motorist coverage that may be limited or excluded under certain circumstances, if proper (or adequate) disclosures of such limitations or exclusions are made. The Court should find, as it did in *Crutcher*, that, as a matter of law, Defendant's insurance policy does not provide adequate disclosure pursuant to *Crutcher*.

[1] Defendant's counsel in this case argued the "prospective application" position in their *Crutcher* certified question briefing and at oral argument. The Court was not receptive to that defendants' prospective only argument and did not follow up with any questions at oral argument. The *Crutcher* opinion does not cite to any case law that would support Defendant AAA's position that the Court made a prospective only ruling. *See Crutcher*, S-1-SC-37478, record proper 16, Answer Brief, filed June 6, 2019, *see also* https://supremecourt.nmcourts.gov/wp-content/uploads/sites/3/2020/12/Supreme_Court_20200107_0901_01d5c539181a1d30.mp3.

Several Federal judges in the United States District Court for the District of New Mexico have provided an answer to this similar question, in favor of Plaintiffs. The Honorable Chief Judge William P. Johnson, the Honorable Judge Kea Riggs, the Honorable Judge Kirtan Khalsa, and the Honorable Judge James O. Browning have all determined that *Crutcher* does not provide immunity for claims of past misrepresentation and have denied various motions of insurance carrier defendants to dismiss at the 12(b)(6) and summary judgment stages where the similar prospective only position was heavily used. Defendant's Brief in Chief (BIC) does not provide any mention of these important cases[2]:

> Defendant appears to believe that *Crutcher* applies prospectively and grants it immunity from pre-*Crutcher* misrepresentation claims as to minimum limit underinsured motorist coverage. See Doc. 141 at 8 ("under *Crutcher*, insurers such as Defendant here had no obligation to make such a disclosure to insureds, such as Plaintiff ... here ... that, in turn, fully negates Plaintiff's liability theory that Defendant acted wrongfully by failing to make this type of disclosure."). The Court disagrees and concludes that *Crutcher* does not mandate summary judgment in Defendant's favor… the New Mexico Supreme Court meant that "hereafter" it would not prohibit the charging of premiums for minimum limit underinsured motorist coverage if the policy contained a disclosure or exclusion explaining the limited value of minimum limit underinsured motorist coverage.

Bhasker v. Fin. Indem. Co., 2022 WL 656354, at *2 and 4 (D.N.M. Mar. 4, 2022)(Riggs, K);

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[2] *See also Padilla et. al v. GEICO Advantage Insurance Company et. al.*, D-202-cv-2019-02317 (Franchini, N), Order Granting in Part and Denying in Part GEICO's Motion to Dismiss Plaintiffs' First Amended [Class Action] Complaint, filed January 13, 2023.

> The New Mexico Supreme Court applied well established misrepresentation law to the *Crutcher* case and therefore, this factor weighs in favor of retroactivity….The [District] Court concludes that the presumption of retroactive application has not been overcome and therefore, *Crutcher* does not provide Defendants with immunity for misrepresentation claims which arose pre-*Crutcher* and does not mandate dismissal of Plaintiff's claims.

Belanger v. Allstate Fire & Cas. Ins. Co., 588 F. Supp. 3d 1249, 1260 (D.N.M. 2022);

> Titan argues that it had no obligation to inform Plaintiff about the "operation of her minimum limits UM/UIM coverage" before *Crutcher* was decided because *Crutcher's* holding is purely prospective. According to Titan, the *Crutcher* court expressly declared that its ruling applies prospectively by stating, "hereafter, the insurer shall bear the burden of disclosure to the policyholder" and that the New Mexico Supreme Court "will now require every insurer to adequately disclose the limitations of minimum limits UI/UIM policies in the form of an exclusion in its insurance policy.". In essence, Titan maintains that it cannot be held accountable for misrepresenting the operation of minimum limits UI/UIM policies before the new rule stated in the *Crutcher* decision. (Doc. 25 at 8). The Court disagrees.")(Internal quotations omitted.).

Lucero v. Nationwide Mut. Ins. Co., 2022 WL 4598482, at *9 (D.N.M. Sept. 30, 2022)(Khalsa, K); *see also Thaxton v. GEICO Advantage Ins. Co.*, 2022 WL 424997, at *3 (D.N.M. Feb. 11, 2022)(Riggs, K); *see also Palmer v. State Farm Mut. Auto. Ins. Co.*, 584 F. Supp. 3d 1018, 1024 (D.N.M. 2022)("The Court disagrees and concludes that Crutcher generally supports Plaintiffs' claims.")(Riggs, K); and *see also Schwartz v. State Farm Mut. Auto. Ins. Co.*, 584 F. Supp. 3d 1007, 1011 (D.N.M. 2022)(Riggs, K); *see also Apodaca v. Young Am. Ins. Co.*, No. 18-cv-0399-JB-JMR, (Doc. 67, filed September 21, 2022, order dismissing defendant's motion to dismiss.).

Plaintiff Joshua Smith, like Mr. Crutcher, seeks to recover from his underinsured motorist (UIM) insurance carrier, which misrepresented and failed to adequately disclose that the minimum limits UIM coverage for which he had paid premiums was excluded. In *Progressive Northwestern Insurance Company v. Weed Warrior Services*, 2010-NMSC-050, ¶ 10, 149 N.M. 157, 245 P.3d 1209, this Court observed "[a]n insured carries UIM coverage only if the UM/UIM limits on her or his policy are greater than the statutory minimum of $25,000." Since *Weed Warrior*, this Court in *Crutcher*, answered the certified controlling question of law that the Honorable Judith C. Herrera, United States District Judge for the District of New Mexico, certified:

> Under N.M. Stat. Ann. § 66-5-301, is underinsured motorist coverage on a policy that offers only minimum UM/UIM limits of $25,000 per person/$50,000 per accident illusory for an insured who sustains more than $25,000 in damages caused by a minimally insured tortfeasor because of the offset recognized in *Schmick v. State Farm Mutual Automobile Insurance Company*, and, if so, may insurers charge a premium for that?

Crutcher v. Liberty Mut. Ins. Co., et al., No. 1:18-cv-00412-JCH-KBM (D.N.M. Jan. 9, 2019) (Doc. 53), Certification Order to the New Mexico Supreme Court, 8.

On October 4, 2021, this Court determined that "[Mr. Crutcher's] policy is illusory in that it may mislead minimum UM/UIM policyholders to believe that they will receive underinsured motorist benefits, when in reality they may never receive such a benefit." *Id.*, ¶ 2. Despite this Court's clear ruling in *Crutcher*, Defendant,

along with various other insurance defendant carriers, believe that *Crutcher* provides immunity from claims of misrepresentation and have manufactured the prospective-only position.

While the outcome of this question will have a significant impact on many similarly situated individuals, it is important to remember that it has been raised in the context of Mr. Smith's claims. At this stage, the Defendant bears the burden to prove that Mr. Smith is barred from pursuing his well pled claims, which are currently presumed to be true. Although the Defendant's brief in chief acknowledges this legal standard when it references its Motion to Dismiss at page eight, it appears that Defendant ignores the applicable 12(b)(6) standard to dispose of Mr. Smith's claims, and instead, relies on the failed contention that this Court made an express statement of prospectivity.

New Mexico misrepresentation laws are well-established. Defendant contends that "If the Exchange did not have a pre-*Crutcher* duty to disclose the operation of the offset, it could not be liable for such non-disclosure." **RP 5, at 8**, Brief in Chief. Similar arguments were rejected by various judges in the Federal District Courts.:

> To get around *Crutcher's* holding, Defendant argues that *Crutcher* applies prospectively, i.e., that Plaintiff cannot assert misrepresentation claims as to minimum limit underinsured motorist coverage which accrued prior to *Crutcher*. Defendant appears to believe that *Crutcher* grants it immunity from misrepresentation claims that arose prior to the issuance of the *Crutcher* opinion. The Court disagrees... Moreover,

Defendant's argument ignores the reasoning of the rest of the *Crutcher* opinion.

See Bhasker, 2022 WL 656354, *3, 5; *see also Belanger*, *Lucero*, *Thaxton, Palmer, Schwartz*, and *Apodaca*.

Despite the clear reasoning in *Crutcher*, insurance companies like the Defendant who operate in New Mexico have persisted in using imaginative, prospective only arguments, causing delays in providing real relief. This question is a result of Defendant's reluctance to follow well-established misrepresentation laws and the Federal District Court's concern of judicial federalism. *Crutcher* established, unequivocally that "the language of the statute [does not] provide[] immunity from claims that [Defendants] misrepresented the coverage available to consumers like Mr. Crutcher[]…while the Legislature authorized the selling of premiums together, **its intent was not to sanction the deception of those consumers in their selection of policies and coverage levels.**" *Crutcher*, ¶26 (emphasis added.).

The application of the *Beavers/Chevron Oil* test is unnecessary as established misrepresentation laws have been reaffirmed by *Crutcher* and other cases. *See Lucero v. Nationwide Mut. Ins. Co.*, 2022 WL 4598482, at *12 (D.N.M. Sept. 30, 2022); *citing Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, ¶ 29, 299 P.3d 424, 433. ("Since *Crutcher* did not state a new rule as to those requirements, there is no reason to continue to analyze whether they apply retroactively."). According to Defendant, misrepresentation laws are not applicable in this case

because *Crutcher* created a new principle of law. **RP 5, at 15**. However, Defendant contends that there is a presumption that new case laws are retroactively applied, unless there is an express declaration to the contrary. *Id.* Moreover, the Defendant asserts that even if the Court determines that no express declaration was made [in *Crutcher*], there is adequate evidence to satisfy the *Beavers/Chevron Oil* criteria. ***Id*, at 14**. Should this Court undertake the *Beavers/Chevron Oil* analysis, the Court should determine that Defendant failed to meet its burden pursuant to *Beavers/Chevron Oil* test. This Court should allow Mr. Smith's claims to proceed because *Crutcher* does not provide immunity for claims of past misrepresentation and it should provide an answer to the certified question of yes; *Crutcher* applies retroactively.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The policy.

In 2020, Defendant Interinsurance Exchange of the Automobile Club aka AAA ("AAA") issued Smith a motor vehicle insurance policy effective June 26, 2020. **RP 17, Doc. 1-1**, Class Action Complaint ¶ 7, filed May 4, 2022 ("Compl."). AAA issued the policy in effect at the time of Smith's loss—Policy No. NMA 142100722, effective from June 26, 2020 to December 26, 2020. *Id.* ¶ 8. AAA Policy No. NMA 142100722 provided Smith with liability insurance with limits of $25,000.00 per person, $50,000.00 per accident. *Id.* ¶ 9. The AAA policy also

purportedly provided uninsured motorist ("UM") coverage and underinsured motorist ("UIM") coverage in the amount of up to $25,000.00 per person, $50,000.00 per accident, which was the maximum coverage Smith could purchase given his purchase of liability insurance at the $25,000.00 per person, $50,000.000 per accident limit. *Id.* ¶ 10. Smith paid a premium of $91.00 for the UM coverage and UIM coverage that AAA purportedly offered for the period June 26, 2020 to December 26, 2020. *Id.* ¶ 11. AAA collected premiums from Mr. Smith since June 2019. *Id.* ¶ 12.

B. The collision.

On October 13, 2020, Mr. Smith sustained bodily injuries, in excess of $50,000.00, arising from an automobile crash on Glenrio Road in Albuquerque, New Mexico when an underinsured driver, who was not paying attention, rear-ended Mr. Smith who had slowed down to make a left-handed turn. *Id.* ¶¶ 32-35. The minimally insured motorist failed to keep a proper lookout for traffic and was inattentive, causing the collision between his vehicle and Mr. Smith's vehicle. *Id.* Like Smith, the tortfeasor also carried the minimum required liability insurance with limits of $25,000.00 per person, $50,000.00 per accident. *Id.* ¶ 38. After the collision, Smith made a claim with the tortfeasor's insurer and received $25,000.00, the full extent of liability coverage from the tortfeasor's insurer. *Id.* ¶ 37.

Smith also reported the collision to AAA and a claim was opened (claim number 014422254) on the UIM coverage for which he had paid a premium. *Id.* ¶¶ 41–4. AAA denied Crutcher's UIM coverage claim in its entirety. *Id.* ¶ 42. Smith received nothing from AAA, his UIM policy carrier. *Id.* ¶ 43.

C. Defendant misled Smith.

When Smith purchased his UIM coverage policy from Defendant and at the time of the collision, he reasonably believed he would benefit from the policy for which he paid premiums for twelve years. *Id.* ¶¶ 39, 47. Smith's reasonable belief was caused by Defendant's incomplete and misleading representations regarding the policy's coverage. *See id.* ¶¶ 17–31. In its application and policy, Defendant failed to adequately and meaningfully explain the operation of the offset that Defendant would apply to cancel Smith's UIM benefits. *Id.* ¶ 24. The word "offset" is not mentioned anywhere in documents provided to its UIM purchasers. Defendant failed to adequately and meaningfully explain to Smith that, if he sustained injuries caused by another driver who carried any liability insurance, the Defendant would subtract from his UIM coverage any insurance benefits he received from the tortfeasor's liability coverage. *See id.* ¶¶ 17–31. And most importantly, Defendant entirely failed to explain that, because Smith had purchased a minimum-limits UIM coverage policy—which provides a level of UIM coverage that equals New Mexico's statutorily required minimum liability coverage—there would be almost no

circumstance under which Defendant would ever pay Smith any insurance benefits on the UIM coverage it sold him. *Id.* Defendant failed to explain that, because of its application of the *Schmick* offset, the UIM coverage that it sold to him, and for which it charged a premium, was excluded. And Defendant failed to offer this explanation despite the New Mexico Supreme Court's conclusion in *Progressive Northwestern Insurance Company v. Weed Warrior Services* that a policyholder carries no UIM coverage when the policyholder has a minimum-limits policy. 2010-NMSC-050, ¶¶ 10–11, 149 N.M. 157, 245 P.3d 1209. Defendant knew all of these facts, concealed them from Smith and Class Members, and nevertheless sold them essentially worthless UIM policies. *Id.* ¶¶ 17–31. As a result, Smith purchased a minimum-limits UIM policy from Defendant, and, in exchange for the premiums he paid for UIM coverage, the Defendant gave Smith something which it knew to be of no value. *Id.* ¶ 43.

D. Smith filed suit.

After AAA denied his claim for UIM policy benefits, Smith filed suit in New Mexico state court against AAA. The class action complaint seeks relief for violations of the Unfair Practices Act and the Insurance Code, negligent misrepresentation, breach of the covenant of good faith and fair dealing, and reformation of the insurance contract, and unjust enrichment. **RP 17. Compl. ¶¶ 64-**

122. The complaint also seeks relief and class certification on behalf of similarly situated individuals and provides a class definition:

> 45. This action is properly maintainable as a class action pursuant to Rule 1-023 NMRA. The Class is defined as follows:
>
> > All persons (and their heirs, executors, administrators, successors, and assigns) from whom Defendant collected a premium for an underinsured motorist coverage on a policy that was issued or renewed in New Mexico by Defendant and that purported to provide underinsured motorist coverage on the face of its application and declaration pages, but which effectively provided no underinsured motorists coverage and/or misleading underinsured coverage, reflected on Defendant's declaration page, because of the statutory offset recognized in *Schmick v. State Farm Mutual Automobile Insurance Company*, 704 P.2d 1092 (1985).
>
> 46. Pursuant to Rule 1-023(C)(4)(b), the Class properly includes a Subclass:
>
> > All Class Members (and their heirs, executors, administrators, successors, and assigns) where an underinsured motorist coverage on a policy that was issued or renewed in New Mexico by Defendant and that purported to provide the underinsured motorist coverage on the face of its application and declaration pages, but which in fact provides no underinsured motorists coverage and/or misleading underinsured coverage because of the statutory offset recognized in *Schmick v. State Farm Mutual Automobile Insurance Company*, 704 P.2d 1092 (1985), and who sustained damages in excess of an insured tortfeasor's policy limits, received the extent of all bodily injury liability limits available but were denied underinsured motorist coverage benefits , in whole or in part, by Defendant.

RP 17, Doc 1-1, ¶¶ 45-46.

On June 13, 2022, Defendant removed the action to Federal District Court. **RP 17, Doc. 1**. On July 11, 2022, Defendant filed a motion to dismiss. **RP 17, Doc. 7**. On August 10, 2022, Smith responded to Defendant's motion to dismiss. **RP 17, Doc. 16**. Notice of completion of briefing was filed on August 26, 2022. **RP 17, Doc. 21**. On November 11, 2022, Chief Judge Johnson, *sua sponte*, certified a question of law to the New Mexico Supreme Court. **RP 1**. The New Mexico Supreme Court accepted Judge Johnson's certified question of law on January 10, 2023. **RP 2**. The case is now stayed pending the Court's answer. **RP 17, Doc 24**.

IV. ARGUMENT

A. Standard of review.

"The interpretation of an insurance contract is a matter of law about which the court has the final word," *Rummel v. Lexington Ins. Co.,* 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970, and is subject to de novo review, *Battishill v. Farmers Alliance Ins. Co.,* 2006-NMSC-004, ¶ 6, 139 N.M. 24, 127 P.3d 1111; *see also Cordova v. World Finance Corp. of NM*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901 (concluding that whether a contract provision is unconscionable and unenforceable is a question of law reviewed de novo). In construing insurance contract provisions, "[a]mbiguities arise when separate sections of a policy appear to conflict with one another, when the language of a provision is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular

matter of coverage is not explicitly addressed by the policy." *Rummel*, 1997-NMSC-041, ¶ 19 (citations omitted). In connection with interpreting automobile insurance contracts, the Court "has liberally interpreted Section 66-5-301 and its implementing regulation, now codified as 13.12.3.9 NMAC, for their remedial purposes." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214; *see also Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 14, 147 N.M. 678, 228 P.3d 462 (concluding that the UM/UIM statute must be interpreted liberally to fulfill its remedial purpose of "expand[ing] coverage to protect members of the public against uninsured motorists").

Statutory interpretation is also a question of law, subject to de novo review. *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69. The Court's "primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. "To determine legislative intent, [this Court] looks not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet*, 2004-NMSC-010, ¶ 10.

Rule 12(b)(6) permits the Court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must have sufficient factual matter that if true, states a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677

(2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. As such, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). All well-pleaded factual allegations are "viewed in the light most favorable to the nonmoving party." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014).

In ruling on a motion to dismiss, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). The Court must draw all reasonable inferences in Plaintiff's favor. *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). However, mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

B. Defendant's argument that the *Crutcher* opinion applies prospectively only is wrong and does not support dismissal.

Defendant is incorrect that the New Mexico Supreme Court's holding in *Crutcher* only applies prospectively, to eliminate Plaintiff's well-pled claims, and ignores the applicable 12(b)(6) standard that its pending motion to dismiss relies on.

In addressing the certified question posed to it, the New Mexico Supreme Court in *Crutcher* interpreted § 66-5-301 (B) to allow insurers to continue to offer

and collect premiums for minimum-limits UIM coverage, ***but only upon proper disclosure.*** *See Crutcher*, ¶ 1, *see also Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 167, 245 P.3d 1214, 1219. ("The provision of the maximum possible amount of UM/UIM coverage in every insurance policy is the default rule, and any exception to that rule must be 'construed strictly to protect the insured.'" *citing Romero v. Dairyland,* 111 N.M. at 156, 803 P.2d at 245; *see also Progressive Northwestern Insurance Company v. Weed Warrior Services,* 2010–NMSC–050, ¶ 14, 149 N.M. 157, 245 P.3d 1209 (explaining that our statutory scheme requires that insurers offer the maximum amount of UM/UIM coverage possible.)).

The only prospective application of *Crutcher* is the Court's determination that a premium may be charged as long as the insured is provided adequate notice of coverage exclusions. The Court was putting insurers on notice of the requirements they must follow in order to comply with notice duties and the duty to clearly advise insureds of the extent and limitations of coverage under a policy. *Crutcher* ¶30. This is similar to what the Court held in *Montano*. In *Montano* this Court advised insurers of requirements they must follow in order to obtain valid and unambiguous rejections of stacking going forward. *Montano,* 2004-NMSC-020, ¶ 22, ("Although we have set forth the policy language requirements for future stacking cases…" "To resolve this case, we will instead rely on our traditional ambiguity analysis, as described in *Rodriguez.*"); *see also Lucero*, *10 and 11(Internal citations omitted.):

> In other words, while *Montano* announced a new, prospective rule, that rule did not relieve the defendant from liability for ambiguous policy provisions that pre-dated it... *Crutcher* did not state a new rule that insurers may not mislead consumers or misrepresent their policies. New Mexico courts have long held that insurers have a duty to meaningfully inform consumers about their coverage options.... Since *Crutcher* did not state a new rule as these requirements, there is no reason to continue to analyze whether they apply retroactively.

Lucero, 10.

That insurers may not misrepresent or mislead insureds about coverage has long been the law of the land. The principle is not a sudden and surprising revelation which might warrant prospective application of the long existing principle.

The Court in *Crutcher* in no way immunized insurers from past misconduct of collecting premiums from insureds while providing no coverage for such premium, and where they misrepresented the coverages available. The answer to the certified question of controlling law here should be yes, *Crutcher* applies retroactively and prospectively. The *Beavers/Chevron* analysis is unnecessary because New Mexico misrepresentation laws are well-established and *Crutcher* did not announce a new rule nor did this Court make an express statement of prospectivity, allowing the Federal District Court to rule on Defendant's pending Motion to Dismiss.

C. Should the Court conduct the *Beavers/Chevron Oil* analysis, the Court should find that the Defendant has not met its burden to demonstrate that *Crutcher* is only applicable prospectively and New Mexico law mandates retrospective application of the *Crutcher* opinion.

Defendant heavily relies on a failed analysis in arguing that there was a new "express declaration" in *Crutcher*. **RP 5, at 10**. There was not an express declaration of new law regarding pre-*Crutcher* misrepresentations. Rather, as the Honorable Judge Riggs correctly stated in *Bhasker*, "the New Mexico Supreme Court meant that "hereafter" it would not prohibit the charging of premiums for minimum limit underinsured motorist coverage if the policy contained a disclosure or exclusion explaining the limited value of minimum limit underinsured motorist coverage. *Bhasker*, at *4. *see also Lucero*, 2022 WL 4598482, at *11 *citing Schmick* at 1100 and *Weed Warrior Svc.*, ¶ 10. ("[T]he misleading nature of such coverage was clearly foreshadowed by 1985 in *Schmick*, and was expressly identified by 2010, in [*Weed Warrior*].").

In the event Plaintiff is obligated to respond to Defendant's *Beaver/Chevron Oil* position, prospective only application in this case is not appropriate. In *Beavers*, the New Mexico Court affirmed a three-factor test:

> *"First,* the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> *Second,* it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in

> question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> *Finally,* we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Beavers v. Johnson Controls World Services, Inc., 1994-NMSC-094, ¶ 23, 118 N.M. 391, 881 P.2d 1376.

First, the *Crutcher* holding did not overrule any precedent, instead the Court relied on longstanding rules of statutory construction and precedent to hold that minimum-limits UIM coverage on a policy like Mr. Crutcher's is illusory, i.e., and that, without adequate disclosures, Defendant cannot collect premiums. *Crutcher*, ¶ 30. Insurance companies have routinely litigated to withhold valuable insurance benefits for which premiums were collected. The *Crutcher* Court stated that, "In this case, we are simply identifying the same consequence previously illuminated by *Weed Warrior*. *Crutcher*, ¶ 27. Defendant here cannot argue that this resolution was not 'clearly foreshadowed'". *See Belanger*, 1260. ("The New Mexico Supreme Court applied well established misrepresentation law to the *Crutcher* case and therefore, this factor weighs in favor of retroactivity; *see also Lucero*, at *11 ("In addition, the misleading nature of such coverage was clearly foreshadowed by 1985 in *Schmick*, and was expressly identified by 2010, in [*Weed Warrior*].."). According

to the Honorable Judge Khalsa, the legal analysis ends at the first *Beaver/Chevron Oil* prong because:

> "the use of "hereafter" and "now" applies to *Crutcher*'s new mandate for *how* disclosures about minimum limits UIM coverage must be made **going forward** by insurers who choose to continue charging a premium for such coverage, *not* to requirements that insurers must provide accurate information about their policies and avoid misleading customers about their options, which pre-date the *Crutcher* case.")

Id, at *12 (original emphasis). This case, like the *Crutcher* case, is about deceptive business practices and failing to provide a "meaningful offer" of insurance coverage with an adequate disclosure of the extent and limitations of the coverage. It is well-established in New Mexico that that an insurance company is in a better position to inform its insured about the coverages. *Crutcher*, ¶ 32.

Other Federal District Court judges, such as the Honorable Judge Riggs and the Honorable Chief Judge Johnson, were faced with similar insurance carrier defendants' arguments and continued the *Beavers/Chevron Oil* analysis under the second and third prongs. In *Belanger* and *Bhasker,* both judges stated that: "This [second] factor also weighs in favor of retroactive application. The *Crutcher* court was clear that although minimum limit underinsured coverage was statutorily authorized, nothing in the statute authorizes insurers to misrepresent the extent of underinsured motorist coverage.". *See Belanger*, *1260 and *Bhasker*, WL 656354, *5.

Should the Court consider the second and third *Beavers/Chevron Oil* prongs in this case, prospective only application to claim of misrepresentation is not appropriate because, like *Montano*, nothing in the statute authorized insurers to misrepresent the extent of underinsured motorist coverage. *See also Marckstadt*, 2010-NMSC-001 at ¶ 31. ("Second, the purpose of the rule we recognize today is to promote the Legislature's remedial policy of expanding UM/UIM coverage by assuring that rejections are knowingly and intelligently made."). Regarding the second prong, Defendant's BIC seems to be concerned about the calculation of damages, mainly reformation of Mr. Smith's insurance contract. **RP 5, at 35**. However, the certified question does not ask the Court to make a ruling on all of Plaintiff's damages that may be based on Defendant's representations and misrepresentations. Rather, because the certified question was posed while Defendant's motion to dismiss is pending, it is proper to determine if *Crutcher* applies retroactively in context with his claims, all of which at this stage are taken as true. That is what Judge Khalsa did in *Lucero* when she allowed all of Ms. Lucero's claims based on misrepresentation to proceed. *Lucero*, *21. Defendant provides citation to the *Lucero* case for the claim that "holding that retroactive recalculation of UIM claims without an offset is "contrary to New Mexico law and public policy." **RP 5, at 35**. However, Defendant failed to provide the full context of this citation. The Honorable Judge Khalsa distinguished Ms. Lucero's reformation

of insurance contract claim from her claims based on misrepresentations when she dismissed Ms. Lucero's reformation claim:

> Finally, the Court will grant the Titan Motion in part and deny it in part. *Crutcher* does not bar Plaintiff's claims resting on allegations that Titan misrepresented the value of minimum limits UIM coverage in its application, Policy, and oral and written statements. Moreover, the Offset Provision, read in the context of Plaintiff's misrepresentation allegations, was by itself insufficient to inform Plaintiff that she may not have UIM coverage in most circumstances. However, *Crutcher* precludes Plaintiff's claims to the extent they are based solely on Titan's sale of minimum limits UM/UIM coverage to Plaintiff, its adjustment of Plaintiff's claim, or its offset of UIM coverage by the amount the tortfeasor's insurer paid Plaintiff.

Lucero, *20. Again, the certified question does not seek an answer on damages on all of Mr. Smith's claims. Under the second *Beavers/Chevron Oil* prong, Defendant goes on to complain that applying *Crutcher* retroactively would cause numerous impracticalities. **RP 5, at 36**. For example, Defendant asserts that "[r]etroactive application would involve relitigating millions of claims from insurers across the state." *Id.* at 37. Although Mr. Smith believes there are common questions of law and fact making class-wide relief appropriate, Defendant's concern about a putative class's damages in addressing the certified question seems to spread a wide cast. It appears that Defendant is skipping Mr. Smith's Rule 23 class certification burdens and wants this Court to assume that are "millions of claims from insurers across the state." According to Defendant, it seems that this Court should consider Fed. R. Civ. 23 when addressing Defendants concern of "impracticalities". However, Rule 23 has

been the legal vehicle for thousands of New Mexicans receiving the opportunity to obtain real relief. The United Stated District Court for the District of New Mexico has recently granted similar parties' agreed preliminarily approval orders where many New Mexicans will be able to make claims dating back to 2004. *See supra* 6, n. 3. The notion put forth by the Defendant that it is not feasible to hold them responsible for their previous misrepresentations is untenable. Worse, it asks this Court to place the burden of insurers' past misrepresentations on New Mexican citizens who have been deceived, rather than the insurers who have perpetrated the misrepresentations. *See Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 17, 111 N.M. 154, 159, 803 P.2d 243, 248 ("reasoning that the duty to read one's insurance policy and become familiar with its terms may be less binding, '[g]iven the realities of the automobile liability insurance business in which the unfamiliar terminology of a policy describes coverage under complex rights and obligations of personal injury and liability law,' ... an insured who is unsophisticated in business affairs, and ... the public policy favoring insurance coverage for personal injury"). Which leads us to consider the third factor from *Beavers/Chevron Oil*.

Considering the third factor, prospective application only is improper because, like *Markstadt* and *Jordan*, any risk of inequity when tasked to assess damages for the sale of worthless coverage should not fall on the consumer. *Markstadt*, ¶ 31 and see *also Jordan*, ¶ 29:

> On balance, we deem it more equitable to let the financial detriments be borne by insurers, who were in a better position to ensure meaningful compliance with the law, than to let the burdens fall on non-expert insureds, who are the Legislature's intended beneficiaries. Declining prospective only application also will ensure that similarly situated insureds will be treated equally.

Therefore, because Defendant AAA was and always has been in a better position to provide all of the information to its insureds, prospective only application is improper. *See Belanger*, *6. ("Retroactive application is not inequitable to insurers especially here where the New Mexico Supreme Court has historically held that any hardship resulting from retroactive application of a rule should be borne by insurers."); *see also Bhasker*, WL 656354, *6 ("The New Mexico Supreme Court clearly believed it was inequitable for insureds to believe they purchased coverage when none was provided. The New Mexico Supreme Court has previously forced insurers to bear the cost of retroactive rules."). Again, Defendant's BIC recycles old arguments to assert that retroactive application of *Crutcher* would be inequitable. **RP 5, at 38-46**, supra 1, n. 1. For example, Defendant argues that *Crutcher* imposed a "new rule" and that the *Crutcher* ruling "does not stem *from* Legislative scheme, but was instead enacted prophylactically because of the *consequence* of that scheme." **RP 5, at 45**. However, Defendant missed entirely in *Crutcher* where the Court stated that:

> **"In order to fulfill the UM/UIM statute's legislative purpose** to place the burden on the policyholders to determine how much protection they would like to purchase, the policyholders must be fully

> informed of the relative benefits and limitations of a given policy. See § 12-2A-18(A)(1). If a person pays for something called "underinsured motorist" insurance, we think it reasonable for the person to be under the impression that he or she is, in fact, eligible to receive UIM coverage if involved in an accident with someone who does not have enough insurance to cover the costs of the insured's injuries. The average insured driver likely has limited knowledge of insurance law and may not understand the details of the underinsurance law statute, Section 66-5-301(B), and the *Schmick* offset rule, and therefore may not understand that by choosing to purchase only the statutory minimum amount of UM/UIM insurance, he or she will never receive the benefit of underinsured motorist coverage."

Crutcher, ¶ 30 (emphasis added.).

Any reference made by Defendant to the *Samora* or *Fasulo cases* is unavailing because it is clear that over the last 34 years since these cases were decided an insured's reasonable expectations are considered when the Supreme Court determined in *Crutcher* that the coverage at issue was illusory, or misleading. *Crutcher*, ¶ 22, 26:

> "we now conclude that the Legislature intended to place the burden on the policyholders to determine how much protection they want and are willing to pay for, and that this burden is conditioned upon the policyholders having knowledge of what they are purchasing. The certified question asks us to resolve this point and to determine whether an insurer may charge a premium for such policies... We refuse to impose on the insured the obligation to be aware of and understand the consequences of New Mexico's UM/UIM statutory provisions, much less the offset rule derived by its technical language."

Crutcher, ¶ 22, 26. *See also Rummel*, ¶ 22, ("The court's construction of an insurance policy will be guided by the reasonable expectations of the insured."); *Rodriguez v. Windsor Ins. Co.,* 1994-NMSC-075, ¶ 13, 118 N.M. 127, 879 P.2d 759, *modified on*

other grounds by Montano., 2004-NMSC-020, (concluding, under the doctrine of reasonable expectations, the court "refer[s] to what the hypothetical reasonable insured would glean from the wording of the policy and the kind of insurance at issue [.]"); *see also Fed. Ins. Co. v. Century Fed. Sav. & Loan Ass'n,* 1992-NMSC-009, ¶ 27 ("Giving effect to the insured's reasonable expectations, in cases of policy ambiguity, is of course a well-settled approach to construing and applying language in insurance policies."); *see also Sanchez v. Herrera,* 1989-NMSC-073, ¶ 24, 109 N.M. 155, ("The reasonable expectations of the insured . . . provide the criteria for examining an insurance contract on the basis both of the actual words used and of unresolved issues that the insurance company has an obligation to address."); *see also Carolina Cas. Ins. Co. v. Nanodetex Corp.*, 733 F.3d 1018, 1022–23 (10th Cir. 2013) ("Although the focus should be on the expectations that the policy language would create in the mind of a reasonable insured who has only a 'limited knowledge of insurance law,' the meaning of legal terms of art that are not part of common speech is best determined by using legal sources.") (quoting *Battishill*, 139 N.M. 24 (2006)) (*citing Hinkle v. State Farm Fire & Cas. Co.*, 2013-NMCA-084, ¶ 18, 308 P.3d 1009)). *But see, e.g.*, *Samora v. State Farm Mut. Auto. Ins. Co.*, 1995-NMSC-022, ¶ 16, 119 N.M. 467, 892 P.2d 600 (holding that, in calculating underinsured motorist benefits owed to an insured, injured passenger by his Class I insurer, the Class I coverage is reduced by a liability payment made by the Class II insurer even

where the Class II insurer's liability payment also reduced the Class II insurer's underinsured motorist benefits for the injured passenger); *American States Ins. Co. v. Frost*, 1990-NMSC-065, ¶ 10, 110 N.M. 188, 793 P.2d 1341 (applying *Fasulo* and holding that "UIM coverage does not apply separately to each concurrent tortfeasor when one is underinsured and one is uninsured"); *Fasulo v. State Farm Mut. Auto. Ins. Co.*, 1989-NMSC-060, ¶ 16, 108 N.M. 807 (holding that § 65-6-301(B) does not allow application of underinsured motorist coverage separately as to each concurrent tortfeasor, but rather requires the insured's total post-stacking underinsured motorist coverage to be offset by the total of the two concurrent tortfeasors' liability proceeds.).

Regardless, *Samora* and *Fasulo* existed when the Court answered the certified question of law presented in *Crutcher* and did not prevent the Court from considering and basing its opinion on statutory construction and the reasonable expectations of an insured, like Mr. Crutcher. The Court should apply the same reasonable expectations analysis when answering this question. In the context of a dry declaratory judgment action that started in the late 1990s, the *Samora* Court's finding is understandable, but distinguishable from the context of misrepresentation, reasonable expectations analysis, and clear contract ambiguities presented in both *Crutcher* and this case. *Samora*, ¶ 3. ("Samora filed a declaratory relief action

requesting that the district court declare the rights and liabilities of the parties with respect to the insurance policy.").

Here, if the Court determines that a new law was proclaimed, the presumption of retroactive application cannot be overcome to eliminate all of Plaintiff's well-pled claims because (1) the *Crutcher* Court relied on longstanding rules of New Mexico statutory construction and reasonable expectations for its answers, (2) retroactive application to allow misrepresentation claims to proceed and the Court's liberal interpretation of the UM/UIM statute will further its remedial purpose and (3) it would be more equitable to let the financial detriments be borne by insurers, who are in a better position to ensure meaningful compliance with the law, than to let the burden fall on non-expert insureds, who are the Legislature's intended beneficiaries. *Jordan* at ¶ 29.

With the inception of the statute's effective date, insurance companies are obliged to offer insurance that adheres to the legislation and provide a clear explanation of any exclusions or limitations that may exist with their offer, enabling the insured to make an informed decision. This is not a novel legal principle that couldn't have been anticipated. Insurance companies cannot simply wait for a lawsuit to inform them of the required disclosures and specific language to use; it is an essential aspect of their business. It remains the burden of insurance carriers, like AAA, who have teams of insurance lawyers to fully disclose all terms, exclusions,

and limitations. *See Chisholm's Vill. Plaza, LLC v. Travelers Commercial Ins. Co.*, 2022 WL 3369202, at 45 (D.N.M. Aug. 16, 2022):

> In the market, the burden should fall on the insurer to write meaningful policies and price them to cover what the insurer wants to cover, and to exclude clearly what it does not want to cover, rather than writing ambiguous policies and hoping the courts bail them out down the road. *Citing Crutcher*, ¶ 32, 501 P.3d 433, 441 ("It is the obligation of the insurer to draft an exclusion that clearly and unambiguously excludes coverage." (quoting *Battishill*, ¶ 12,).

Chisholm's Vill. Plaza, 45. *See also Rummel*, ¶ 50 ("It is not the province of the courts to supply provisions to an insurance policy when insurers are faced with an unanticipated liability.").

D. Plaintiff's complaint is well-pled, Defendant is not immune from claims of misrepresentation because Defendant's insurance contract is misleading and does not meet the reasonable expectations of an average insured.

Defendant's written representations have been attached to the Complaint and provide factual support that Defendant uses ambiguous, boilerplate applications, declaration pages, and policy booklets to mislead and deceive their insureds, like Mr. Smith, into reasonably believing that they have underinsured motorist coverage in the amount represented in the insurance contract, when they do not. **RP 17, Doc. 1 and Docs. 1-1 to 1-5**. *See Bhasker*, 361 F. Supp. 3d 1045, 1137-38. (Browning, J., 2019, *Bhasker II*), *citing Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 728 F.Supp.2d at 1193 ("The Court has previously construed the UPA and has noted that, 'in the right circumstances, it could grant judgment as a matter of law on whether a

statement is deceptive or misleading' although 'generally the question is a matter of fact.'"). These uniform written representations and misrepresentations all create similar, if not the same, common questions of law and fact that were also addressed in the *Bhasker* case, making class certification appropriate, so that thousands of insureds are provided fair treatment. *See Bhasker v. Fin. Indem. Co.*, 2022 WL 860368, at *4, 5, 7, 12 (D.N.M. Mar. 23, 2022):

> "Whether a common representation made in a contract to all insureds is lawful is a common question… The relief she seeks is based on the same evidence and legal theories as the classes… The Court finds that certification is appropriate under Fed. R. Civ. P. 23(b)(3) because questions common to the class predominate over those that are individualized… Plaintiff has satisfied most of the requirements under Fed. R. Civ. P. 23(a) and (b)(3) for class certification…".

See id.

Notably, Defendant's motion, like the defendant's argument in *Bhasker*, disregards its own boilerplate declaration page that implies, and provides an insured with the reasonable expectation, that policyholders purchased UIM policy limits in the amount that is printed on the insurance contract. **RP 17, Doc. 1-1, pages 36-96**. Plaintiff's briefing regarding the ambiguity of Defendant's insurance contract is in his response to Defendant's Motion to Dismiss. **RP 17, Doc. 16, pages 6-18**.

Finally, Defendant incorrectly asserts that its insurance contract "*did* adequately disclose the statutory offset, using language that multiple courts have held to "unambiguously" limit an insured's UIM recovery." **RP 5, at 8**. Considering

the scope of the certified question of law in this case, it may be appropriate for the Court, in the context of Mr. Smith's reformation of insurance contract claim, to consider the record proper, i.e. the insurance contract. Defendant's written representations to Mr. Smith and thousands of other insureds are ambiguous and do not provide a meaningful offer, in violation of New Mexico laws. **RP 17, Doc. 1-1, ¶¶95-101**. Notably, AAA does not have a copy of Mr. Smith's application in its file. **Id., ¶ 14**. However, because this case is pending due to Defendant's Rule 12(b)(6) and the certified question of law, Defendant has not been able to answer the complaint to confirm or deny the claims. Regardless, at this stage, Mr. Smith's allegations are taken as true. However, Mr. Smith provided a "sample" application to show that AAA's applications fail to provide any meaningful offer of underinsured motorists benefits and it is reasonable to believe that a lay person, like Mr. Smith, and like Mr. Crutcher, could not understand the required applications, declarations, and insurance booklet to provide a knowing and intelligent acceptance/rejection of underinsured motorist coverage that may or may not be limited. **Id., page 92-95**. These well-established principles of statutory construction, reasonable expectations, and contract law override any other principles that Defendant may claim in support of retroactive application.

Upon closer examination of AAA's policy language, Defendant's insurance contract, the language upon which this Court relies on, includes an over broad

contractual clause that purports to limit AAA's liability under Part III – Uninsured Motorists Coverage that was previously rejected as invalid by this Court. **RP 17, Doc. 1-1, pages 67-73**. Defendant's policy purports that AAA is entitled to reduce/offset Plaintiff's available UM/UIM coverage based on **any** liability insurance recovered by **any other source:**

> "*Underinsured motor vehicle* – means a land ***motor vehicle*** which at the time of the accident is:
>
> 1. insured for bodily injury liability; or
>
> 2. covered under a cash deposit or bond posted to satisfy a financial responsibility
>
> but the sum of the limits of liability under all policies or bonds applicable at the time of the accident is less than the limits of liability under the *insured's* underinsured motorists coverage.
> ...
>
> 3. Any amounts otherwise payable under COVERAGR E, shall be reduced by any amounts:
>
> a. Paid or payable to or for any ***insured*** as damages by or on behalf of any person or organization who may be legally liable for the ***bodily injury***. This includes all sums paid under PART I.
>
> b. Paid or payable to or for any ***insured*** under PART II."

RP 17, Doc. 1-1, page 69.

Compare Defendant's contractual language with the statutory definition of "underinsured motorist": "an operator of a motor vehicle with respect to the ownership, maintenance or use of which **the sum of the limits of liability under all**

bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage." *See* NMSA 1978, See § 66-5-301(B)(emphasis added.). Defendant's insurance policy provided to Mr. Smith includes ambiguous contractual language when you couple these complex rules and hidden limitations with the declaration page and applications, where Defendant purports to provide limits of $25,000 per person / $50,000 per occurrence. **RP 17, Doc. 1-1, page 33, 41, 44, 51, and 85**. *See also Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 13, 114 N.M. 778, 845 P.2d at 1235. ("Once the court concludes that an ambiguity exists, the resolution of that ambiguity becomes a question of fact."). New Mexico contract law "requires the construction of ambiguities and uncertainties in a contract most strongly against the party who drafted the contract." *Schultz & Lindsay Constr. Co.*, 1972-NMSC-013, ¶ 6, 83 N.M. 534, 494 P.2d 612, 614. *See Rummel*, ¶ 22, ("An ambiguity in an insurance contract is usually construed against the insurer, because courts will weigh their interpretation against the party that drafted a contract's language.").

This Court has explicitly rejected insurers attempt to utilize these types of overreaching contractual provisions to reduce available underinsured motorist coverage. In *Continental Ins. Co. v. Fahey*, 1987-NMSC-122, 106 N.M. 603, 747 P.2d 249, *superseded by statute on other grounds as stated in Mountain States Mut. Cas. Co. v. Vigil*, 1996-NMCA-062, 121 N.M. 812, 918 P.2d 728, the New Mexico

Supreme Court considered an offset provision similar to the one relied upon by Defendant in this matter. As a matter of precedential law, Defendant's disclosure could not be an adequate disclosure as it misleads the insured regarding benefits and limitations of the UIM coverage. It does not track the statutory language and its "any amounts recovered" language violates New Mexico law New Mexico law which limits offsets, if adequately disclosed, to the amount recovered from liability proceeds from underinsured motorists' liability coverage. *See Continental Ins. Co.* 1987-NMSC-122, ¶ 8:

> "As a general rule, uninsured motorist policy provisions that limit the insured's recovery of damages are void. Limitations on recovery under the uninsured motorist statute must accord with those set out in the statute. NMSA 1978, Section 66-5-301(B)…
>
> Continental's exclusionary clause contravenes the express language of the uninsured motorist statute which mandates that the uninsured motorist insurer provide a minimum liability. NMSA 1978, § 66–5–215. The exclusionary clause here would unacceptably reduce Continental's liability below the minimum required by statute. *American Mut. Ins. Co. v. Romero*, 428 F.2d 870 (10th Cir.1970). Reliance on the superintendent's regulation will not legitimate an insurer's attempts to reduce its minimum liability or to restrict its insured's entitlement to the coverage the insured paid premiums to receive."

see also Schmick v. State Farm Mutual Automobile Insurance Company, 1985-NMSC-073, 103 N.M. 216, 704 P.2d 1092,"); *see also State Farm Mut. Auto. Ins. Co. v. Valencia,* 1995-NMCA-096, ¶ 1, 120 N.M. 662, 662, 905 P.2d 202, 202.

Upon careful examination, it becomes clear that, similar to other plaintiffs like Ms. Bhasker, Mr. Crutcher, Ms. Belanger, Ms. Lucero, Ms. Apodaca, Ms. Schwartz

and Mr. Palmer regarding their respective automobile insurance carriers' contractual language, the Defendant's insurance contract language fails to sufficiently inform policyholders like Mr. Smith that they are unlikely to receive any underinsured motorist (UIM) coverage or benefits.

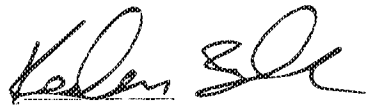
V. CONCLUSION

For the foregoing reasons, this Court should answer the certified question as follows: yes, *Crutcher v. Liberty Mut. Ins. Co, 2022-NMSC-001*, 501 P.3d 433 applies retroactively so that the Federal District Court may properly rule on Defendant's Motion to Dismiss.

STATEMENT OF COMPLIANCE UNDER RULE 12-318

This answer to the brief in chief complies with type-volume limitations set forth in Rule 12-318. The body of this brief in chief was prepared in 14-point Times New Roman font and contains 8,491 words, counted using Microsoft Word for Mac 2023.

Respectfully Submitted,



Kedar Bhasker

CERTIFICATE OF SERVICE

The forgoing was served on the following this 10th day of April 2023. The document was filed through the New Mexico e-file service, and also served via electronic mail upon those persons whose e-mail addresses are indicated below.

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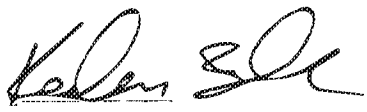
Respectfully Submitted,



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