Filed
Supreme Court of New Mexico
2/24/2023 3:45 PM
Office of the Clerk

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.

On certification from the United States District Court for the District of New Mexico (No. 1:22-cv-00447-JHR-KK), the Honorable William P. Johnson

No. S-1-SC-39659

OPENING BRIEF OF DEFENDANT INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB ADDRESSING THE CERTIFIED QUESTION OF LAW

Meena H. Allen
Allen Law Firm, LLC
6121 Indian School Road NE
Suite 230
Albuquerque, NM 8711
(505) 298-9400

Michael E. Mumford
BAKER & HOSTETLER LLP
Key Tower
127 Public Square,
Suite 2000
Cleveland, OH 44114
(216) 621-0200

Rodger L. Eckelberry
Kevin P. Zimmerman
(*Pro hac vice applications pending*)
BAKER & HOSTETLER LLP
200 South Civic Center Drive, Suite 1200
Columbus, Ohio 43215
(614)-228-1541

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

QUESTION PRESENTED 1

BRIEF ANSWER 1

SUMMARY OF PROCEEDINGS 2

ARGUMENT 9

I. *Crutcher* expressly declared that its new disclosure rule should operate prospectively. 9

II. The *Chevron Oil* factors also show that *Crutcher's* disclosure rule applies only prospectively. 14

A. *Crutcher* established a "new principle of law." 15

1. Before Crutcher, no statute, regulation or prior judicial opinion foreshadowed the new disclosure obligations. 15

2. The Exchange was entitled to rely on the pre-*Crutcher* state of the law. 25

B. Retroactive application of the *Crutcher* rule will not further its operation. 32

C. Retroactive application of the new *Crutcher* rule would be highly inequitable. 38

CONCLUSION 46

STATEMENT OF COMPLIANCE UNDER RULE 12-318(G)

This brief complies with the type-volume limitations set forth in NMRA 12-318(F). This brief was prepared in 14-point Times New Roman font and the body of this brief, as defined in NMRA 12-318(F)(1), contains 10,985 words, counted using Microsoft Word Version 2202.

/s/Meena H. Allen
Meena H. Allen

TABLE OF AUTHORITIES

Cases

Page(s)

Adkins v. Sky Blue, Inc.,
701 P.2d 549 (Wyo. 1985) 11

Akins v. United Steelworkers of Am.,
2009-NMCA-051, 146 N.M. 237 38

Am. Fam. Mut. Ins. Co. v. Ryan,
330 N.W.2d 113 (Minn. 1983) 39

Am. Nat'l Prop. & Cas. Co. v. Arbelaez,
No. 11-cv- 443, 2012 WL 13005332 (D.N.M. Mar. 19, 2012) 27

Beavers v. Johnson Controls World Servs. Inc.,
1994-NMSC-094, 118 N.M. 391 ..... *passim*

Bhasker v. Fin. Indem. Co.,
No. 17-cv-260, 2022 WL 860368 (D.N.M. Mar. 23, 2022) 33

Bonham v. Indem. Ins. Co. of N. Am.,
507 F. Supp. 2d 1196 (D.N.M. 2007) 16

Cent. Mkt., Ltd., Inc. v. Multi-Concept Hosp.,
2022-NMCA-021, 508 P.3d 924 46

Christy v. Travelers Indem. Co. of Am.,
810 F.3d 1220 (10th Cir. 2016) 8

Crutcher v. Liberty Mut. Ins. Co.,
2022-NMSC-001, 501 P.3d 433 ..... *passim*

Crutcher v. Liberty Mut. Ins. Co.,
No. 18-cv-412, 2019 WL 12661166 (D.N.M. Jan. 9, 2019) 5

Curry v. Great Nw. Ins. Co.,
2014-NMCA-031, 320 P.3d 482 27

Fasulo v. State Farm,
1989-NMSC-060, 108 N.M. 807 ..... 4, 13, 15, 35

Ford v. Georgia,
498 U.S. 411 (1991) 11

Garman v. Campbell Cty. Sch. Dist. No. 1,
462 F. App'x 785 (10th Cir. 2012) 11

Govich v. N. Am. Sys., Inc.,
1991-NMSC-061, 112 N.M. 226 10

Hawkins v. Allstate Ins. Co.,
152 Ariz. 490, 733 P.2d 1073 (1987) 44

Jackson v. City of Bloomfield,
731 F.2d 652 (10th Cir. 1984) 14

Jaramillo v. Gov't Emps. Ins. Co.,
573 F. App'x 733 (10th Cir. 2014) 27, 34

Jordan v. Allstate Ins. Co.,
2010-NMSC-051, 149 N.M. 162. Civil ..... *passim*

Kent Nowlin Const. Co. v. Gutierrez,
1982-NMSC-123, 99 N.M. 389 22

Lopez v. Maez,
1982-NMSC-103, 98 N.M. 625 ..... 29, 39

Lowing v. Allstate Ins. Co.,
176 Ariz. 101, 859 P.2d 724 (1993) 29

Lucero v. Nationwide Mut. Ins. Co.,
No. 19-cv-0311, 2022 WL 4598482 (D.N.M. Sept. 30, 2022) 35, 45

Marckstadt v. Lockheed Martin Corp.,
2010-NMSC-001, 147 N.M. 678 ..... *passim*

In re Marriage of Sheldon,
124 Cal. App. 3d 371 (Ct. App. 1981) 37

Martinez v. Allstate Ins. Co.,
1997-NMCA-100, 124 N.M. 36 ..... 16, 34, 45

Montaño v. Allstate Indem. Co.,
2001-NMSC-020, 135 N.M. 681 ..... *passim*

New Jersey Mfrs. Ins. Co. v. Breen,
297 N.J. Super. 503, 688 A.2d 647 (App. Div. 1997), *aff'd on other grounds,* 153 N.J. 424, 710 A.2d 421 (1998) 31

New Mexico Life Ins. Guar. Ass'n v. Quinn & Co.,
1991-NMSC-036 ..... 29, 40, 47

Padilla v. Wall Colmonoy Corp.,
2006-NMCA-137, 140 N.M. 630 28

Proctor v. Waxler,
1972-NMSC-057, 84 N.M. 361 11

Progressive Nw Ins. Co. v. Weed Warrior Servs.,
2010-NMSC-050, 149 N.M. 157 ..... *passim*

Rodriguez v. Brand W. Dairy,
2015-NMCA-097, 356 P.3d 546 ..... 32, 39

Rodriguez v. Brand W. Dairy,
2016-NMSC-029, 378 P.3d 13 ..... *passim*

Romero v. Byers,
1994-NMSC-031, 117 N.M. 422 ..... 11, 17, 19, 24

Samora v. State Farm Mut. Auto Ins. Co.,
1995-NMSC-022, 119 N.M. 467 ..... 4, 13, 15,35

Schmick v. State Farm Mut. Auto. Ins. Co.,
1985-NMSC-073, 103 N.M. 216 ..... *passim*

Scott v. Rizzo,
1981-NMSC-021, 96 N.M. 682 11

State Farm v. Conyers,
1989-NMSC-071, 109 N.M. 243 13

State v. Consaul,
2014-NMSC-030, 332 P.3d 850 10

Stein v. Alpine Sports, Inc.,
1998-NMSC-040, 126 N.M. 258 ..... 14, 33, 38

Stroh Brewery Co. v. Dir. of New Mexico Dep't of Alcoholic Beverage Control,
1991-NMSC-072, 112 N.M. 468 ..... 12, 37

Tamerlane Corp. v. Warwick Ins. Co.,
412 Mass. 486, 590 N.E.2d 191 (1992) 39

Taos Ski Valley, Inc. v. Elliott,
1972-MSC-037, 83 N.M. 763 11

U.S. Fid. & Guar. Co. v. United States,
209 U.S. 306 (1908) 11

Ullman v. Safeway Ins. Co.,
2017-NMCA-071, 404 P.3d 434 27

Valdez v. State,
2002-NMSC-028, 132 N.M. 667 ..... 40, 41

Whelan v. State Farm Mut. Auto. Ins. Co.,
2014-NMSC-021, 329 P.3d 646 ..... *passim*

Whenry v. Whenry,
1982-NMSC-067, 98 N.M. 737 ..... 14, 27, 37, 38

Williamson v. Smith,
1971-NMSC-123, 83 N.M. 336 11

Statutes

NMSA 1978 § 59A-17-3 (1984) 40

NMSA 1978 § 59A-18-12 (2012) 29

Insurance Rate Regulation Law, NMSA 1978 § 59A-17-1 to -36
(1984, as amended through 2007) 29, 40

NMSA 1978 § 66-5-301 (1983) 2, 4, 34

Rules

Fed. R. Civ. P. 23 33

Other Authorities

Black's Law Dictionary (11th ed. 2019) 10

Scope of Insurance Regulation, 1 COUCH ON INS. § 2:1 40

QUESTION PRESENTED

The United States District Court for the District of New Mexico certified to this Court, and this Court accepted, the following certified question:

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

BRIEF ANSWER

This Court should hold that its opinion in *Crutcher v. Liberty Mutual Insurance Co.* applies prospectively. *Crutcher* announced a new disclosure rule for underinsured motorist automobile insurance that is designed to address the consequences of a statutory scheme "purposefully selected" by the New Mexico Legislature. In doing so, the Court made clear that its new rule should only apply on a going-forward basis, using the unequivocal words: "we will now require" and "hereafter." That is the language of express prospectivity.

Crutcher also satisfies this Court's standard for prospectivity under the governing *Chevron Oil* factors. *First*, *Crutcher's* disclosure obligation is a new rule that is not drawn from the text of the UIM statute nor clearly foreshadowed by prior judicial opinions. *Second*, insurers like Defendant were entitled to rely on the established pre-*Crutcher* state of the law, particularly in light of the complex regulatory oversight governing insurers, which never contemplated *Crutcher*-style disclosures. *Third*, retroactive application of the *Crutcher* rule would do nothing to

further its educative purpose; it would instead cause upheaval in the insurance industry by forcing recalculation of claims long since settled—some of which were *affirmed* by this very Court. *Finally*, the equities favor prospectivity because the new disclosure rule does not regulate who was or was not previously entitled to coverage. To the contrary, *Crutcher* reaffirmed that prior claims were *correctly* calculated with an offset. Accordingly, it would be inequitable and unreasonable to permit Plaintiff to pursue a recalculation of UIM claims or a refund of UIM premiums by applying *Crutcher* retroactively.

SUMMARY OF PROCEEDINGS

In a New Mexico automobile insurance policy, *under*insured motorist ("UIM") coverage is part of *un*insured motorist ("UM") coverage – it is a single, combined coverage. UIM coverage provides indemnification to an insured if they are involved in an accident with an at-fault, third-party who has less liability insurance (to pay the insured) than the amount of the insured's UIM limit.

Forty years ago, the New Mexico Legislature passed a statute prohibiting insureds from purchasing more UM/UIM coverage (to pay themselves) than liability coverage (to pay others). *See* NMSA 1978, Stat. § 66-5-301 (1983). Not long after the statute's enactment, this Court confirmed that it also requires UIM payments to be "offset by available liability proceeds" from a tortfeasor's insurer. *Schmick v. State Farm Mut. Auto. Ins. Co.*, 1985-NMSC-073, ¶ 30, 103 N.M. 216.

In other words, the statute requires an insurer to "subtract whatever the driver receives from the tortfeasor's insurance company from the payment due to its own policyholder." *Crutcher v. Liberty Mut. Ins. Co.*, 2022-NMSC-001, ¶ 9, 501 P.3d 433.

A consequence of the statutory offset is that when an insured driver and a tortfeasor both chose to purchase only the minimum limits of liability coverage ($25,000 per person and $50,000 per occurrence), the offset from the tortfeasor's liability proceeds can reduce the insured's UIM proceeds to zero.[1] The tortfeasor's liability coverage would pay the insured up to the full limits of that coverage, and because the insured chose to purchase only the minimum limits of liability coverage, the insured could not carry greater UM/UIM coverage under the statute. The amount paid by the tortfeasor's insurance (up to $25,000 per person) would

[1] This isn't always the case. There are multiple "real-world circumstances in which insureds with minimum UM/UIM limits will recover UIM benefits" even if the tortfeasor carries only minimum limits liability coverage. *Crutcher*, 2022-NMSC-001, ¶ 40 (Nakamura, J., dissenting). For example, in *Schmick*, the insured recovered UIM benefits after the offset was applied because the insured was entitled to "stacked" coverage. 1985-NMSC-073, ¶¶ 10, 20-22. Insureds also still retain the benefit of UM coverage, because if UM coverage is implicated, that means the tortfeasor did not carry *any* liability coverage. *See Crutcher*, 2022-NMSC-001, ¶ 27. In such situations there is no liability coverage to offset the UIM coverage.

reduce the amount available under the insured's UIM coverage (up to $25,000 per person), potentially down to zero.[2]

This is how UIM coverage has been calculated in New Mexico for decades. And this Court has routinely reaffirmed the validity of the offset—without ever mentioning that its validity was premised on a proper explanatory disclosure.

For example, in *Fasulo v. State Farm*, this Court held that UIM coverage "must be offset. . . [r]egardless of the number of underinsured tortfeasors at fault" because "the legislature intended that the injured party's underinsurance recovery should be limited to the amount of UIM coverage purchased, less available liability proceeds." 1989-NMSC-060, ¶ 15, 108 N.M. 807. Years later, in *Samora v. State Farm Mutual Automobile Insurance*, this Court held that an insureds' "reasonable expectations" could not negate the offset, either. 1995-NMSC-022, ¶ 14, 119 N.M. 467. Even when an insured "could reasonably expect UIM coverage by virtue of

---

[2] It is more accurate to state that UIM coverage is not implicated in the first place because a tortfeasor whose liability limits equal an insured's UM/ UIM limits is, by definition, not an "underinsured motorist." *See* § 66-5-301 ("'underinsured motorist' means an operator of a motor vehicle . . . 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." (emphasis added)); *see also Samora v. State Farm Mut. Auto Ins. Co.*, 1995-NMSC-022, ¶ 13, 119 N.M. 467 ("According to the definition of Section 66–5–301(B), the negligent driver was not underinsured because the negligent driver's liability coverage of $50,000 exceeded [the insured's] UIM coverage of $25,000.). So, there is no "offset" when an insured's and tortfeasor's limits are equal—only when an insured's UM/UIM limits are *higher* than the tortfeasor's liability limits is there an "offset" of amounts paid by the tortfeasor's insurer.

his contractual relationship," and even if the offset "was not contemplated by the parties," an offset must still apply because "an insured cannot reasonably expect to recover more than the UIM coverage for which he or she paid." Id. ¶ 14.

This Court even recognized the possible practical consequences of the offset rule over a decade ago in *Progressive Northwest Insurance Company v. Weed Warrior Services*, 2010-NMSC-050, ¶ 10, 149 N.M. 157 ("If the tortfeasor carried the statutory minimum of liability insurance and the injured driver carried the statutory minimum of UM/UIM coverage, the injured driver would have no recourse for injuries suffered over the minimum amount of $25,000."). But even this recognition did not give the Court reason to discard the offset, change its application, or compel a disclosure of its operation.

This all changed in this Court's recent opinion, *Crutcher v. Liberty Mutual Insurance Company*, 2022-NMSC-001. *Crutcher* arrived at this Court's doorstep on a certified question from the United States District Court for the District of New Mexico. In the underlying district court case, Plaintiff alleged that he had been duped into purchasing minimum limits UIM coverage, because his insurer "failed to meaningfully explain to policyholders" that the statutory offset "works to cancel UIM benefits that policyholders expect to receive." *Crutcher v. Liberty Mut. Ins. Co.*, No. 18-cv-412, 2019 WL 12661166, at *2 (D.N.M. Jan. 9, 2019). The district court thus asked this Court whether minimum limits UIM coverage is "illusory"

and, if so, "whether insurance companies may charge premiums for such a policy." *Crutcher*, 2022-NMSC-001, ¶ 1.

This Court began its answer in *Crutcher* by again reaffirming the necessity of the offset under New Mexico's UIM statute. Some jurisdictions, the Court explained, apply an "excess theory" of recovery, where UIM coverage "will fully compensate an insured injured driver for the cost of the driver's damages, even if the total is more than what the driver purchased in UM/UIM coverage." Id. ¶ 18. But that is not the rule in New Mexico. Id. The New Mexico Legislature has "adopted the gap theory, because 'the most an insured can receive is the amount of underinsurance purchased for [the insured's] benefit, [and] that amount must be offset by available liability proceeds.'" Id. ¶ 18 (quoting *Schmick*, 1985-NMSC-073, ¶30). So, "underinsured motorist benefits are calculated by subtracting the amount of the insured's uninsured motorist coverage from the amount of the tortfeasor's liability coverage." Id. ¶ 18.

But after recognizing the necessity of the offset under the statute, the Court expressed concern that insureds may not "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." Id. ¶¶ 26, 29. That recognition led to the key conflict the Court hoped to address: the statutory language "makes clear that the sale of this type of insurance is reflective of the statutory scheme

purposefully selected by the New Mexico Legislature, and thus is permitted," but it may still be "misleading" to policyholders. Id. ¶ 28.

So, the Court fashioned a new disclosure rule to address this conflict. Id. ¶¶ 28, 32-33. As the Court explained: "We therefore conclude that the law allows an insurer to sell minimum limits UM/UIM coverage to a policyholder and only provide coverage for uninsured motorist coverage, and that insurers may charge a premium for such coverage as long as they make a proper disclosure to the policyholder, as discussed hereunder." Id. ¶ 28.

The Court then articulated the new disclosure rule as follows:

> Therefore, ***hereafter***, the insurer shall bear the burden of disclosure to the policyholder that a purchase of the statutory minimum of UM/UIM insurance may come with the counterintuitive exclusion of UIM insurance if the insured is in an accident with a tortfeasor who carries minimum liability insurance. Consistent with the purpose and intent of the UIM statute, this disclosure will allow purchasers to make a fully informed decision when selecting UM/UIM insurance coverage.
>
> **IV. CONCLUSION**
>
> For the foregoing reasons, we conclude that UM/UIM coverage at the minimum level is permitted because the law not only allows, but requires, it to be sold as was done so here. However, such coverage is illusory because it is misleading to the average policyholder. As such, we will ***now*** require every insurer to adequately disclose the limitations of minimum limits UM/UIM policies in ***the form of an exclusion*** in its insurance policy. If the insurer provides adequate disclosure, it may lawfully charge a premium for such coverage.

Id. ¶¶ 32-33 (emphasis added).

After *Crutcher*, similar lawsuits "flooded" the District of New Mexico, alleging that insurers had not fulfilled their *Crutcher* disclosure obligations. *See* **[11-21-22 Ord. (Dkt. 24) 3, 6]**. This action against the Interinsurance Exchange of the Automobile Club ("the Exchange") is one of those lawsuits. Here, as in other cases, Plaintiff alleges that "Defendant had a duty to adequately disclose that, given its application of the *Schmick* offset, Plaintiff would not receive the UIM benefits that Plaintiff thought he had bargained for. *See Crutcher v. Liberty Mut. Ins. Co." See* **[8-10-22 MIO Mtn. to Dismiss (Dkt. 16) 1]**; *see also* **[Compl. (Dkt. 1-1) ¶¶ 24-31]**.

But as the District Court recognized, if *Crutcher*'s new disclosure rule only applied "now" and "hereafter" the issuance of the opinion—as per its language—that may be "dispositive of Plaintiff's entire case." *See* **[11-21-22 Ord. (Dkt. 24) 6]**. 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. *See, e.g., Christy v. Travelers Indem. Co. of Am.*, 810 F.3d 1220, 1229 (10th Cir. 2016).[3]

[3] The Exchange also argued to the District Court that Plaintiff's claims were inconsistent with the language of his policy (**[7-11-22 Mtn. to Dismiss (Dkt. 7) 4-5]**) and that the policy *did* adequately disclose the statutory offset, using language that multiple courts have held to "unambiguously" limit an insured's UIM recovery (**[7-11-22 Mtn. to Dismiss (Dkt. 7) 6, 21-22]**). The Exchange also argued that Plaintiff's various common law causes of action failed to state a claim for relief or suffered from other legal infirmities. *See* **[7-11-22 Mtn. to Dismiss. (Dkt. 7) 18-31]**. The District Court has not yet addressed these arguments. Instead, it correctly

The District Court thus certified the following question to this Court: "Whether *Crutcher v. Liberty Mut. Ins. Co*, 2022-NMSC-001, 501 P.3d 433, applies prospectively or retroactively?" **[11-21-22 Ord. (Dkt. 24) 5.]** On January 10, 2023, this Court accepted the certified question.

The Exchange respectfully submits that the Court should answer the certified question by holding that *Crutcher* applies prospectively.

ARGUMENT

This Court does not follow the "federal courts' bright-line rule applying appellate court decisions retroactively in all civil cases." *See Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 26, 149 N.M. 162. Civil holdings are initially presumed to apply retroactively, but the presumption can be overcome by an "express declaration" from the issuing court *or* a showing under "one or more of the *Chevron Oil* factors." *See Beavers v. Johnson Controls World Servs. Inc.*, 1994-NMSC-094, ¶ 22, 118 N.M. 391.

Here, either avenue leads to the same destination: *Crutcher*'s new disclosure rule should apply only prospectively from the date of its opinion.

I. *Crutcher* expressly declared that its new disclosure rule should operate prospectively.

The retroactivity presumption can be overcome "by an express declaration,

---

recognized that the prospectivity of *Crutcher* is an underlying question that may obviate the need to resolve any of these other issues.

in the case announcing the new rule," that the rule is intended to operate prospectively. *Beavers*, 1994-NMSC-094, ¶ 22. That is exactly what this Court offered in *Crutcher*.

In the penultimate paragraph of the opinion, this Court pronounced its new rule: "Therefore, ***hereafter***, the insurer shall bear the burden of disclosure to the policyholder that a purchase of the statutory minimum of UM/UIM insurance may come with the counterintuitive exclusion of UIM insurance if the insured is in an accident with a tortfeasor who carries minimum liability insurance." *Crutcher*, 2022-NMSC-001, ¶ 32 (emphasis added).

The word "hereafter" is defined as "from now on" or "at some future time." *See Hereafter*, Black's Law Dictionary (11th ed. 2019). That is precisely how this Court has used the word previously—to mean *from now on* or *in the future*. *See, e.g., State v. Consaul*, 2014-NMSC-030, ¶ 37, 332 P.3d 850 (explaining that "'criminally negligent child abuse' should *hereafter* be labeled 'reckless child abuse''); *Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 12, 112 N.M. 226 (noting that, "[a]s a matter of terminology, we properly should refer *hereafter* to the mandatory sections of our rules of appellate practice as 'mandatory' and discard the term 'jurisdictional' that has been used over time by most federal and state courts") (emphasis added to each).

This Court has also routinely used that *exact* word to establish the

prospectivity of its new rules. *See, e.g., Romero v. Byers*, 1994-NMSC-031, ¶ 23, 117 N.M. 422 ("[T]he holdings here adopted are applicable to the instant case and all cases filed ***hereafter***."); *Scott v. Rizzo*, 1981-NMSC-021, ¶ 32, 96 N.M. 682 ("[W]e hold that the rule herein adopted be applicable to the instant case and all cases filed ***hereafter***."); *Williamson v. Smith*, 1971-NMSC-123, ¶ 29, 83 N.M. 336 ("This holding is applicable to all cases tried ***hereafter***.") (emphasis added to each); *see also Taos Ski Valley, Inc. v. Elliott*, 1972-MSC-037, ¶ 2-3, 83 N.M. 763 (*Williamson* "unequivocally" established prospectivity with this language); *Proctor v. Waxler*, 1972-NMSC-057, 84 N.M. 361 (same).

Even the United States Supreme Court has long recognized that language "is prospective" if "it provides 'that hereafter . . .'" *U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 314 (1908); *see also Ford v. Georgia*, 498 U.S. 411, 425 (1991) (state court opinion applying "to cases tried '*hereafter*'" announced a rule "prospectively").

The word "hereafter" is also unnecessary in the quoted sentence from *Crutcher*, unless this Court wished to articulate the prospective nature of its new disclosure requirement. *See Garman v. Campbell Cty. Sch. Dist. No. 1*, 462 F. App'x 785, 789 (10th Cir. 2012) (noting that "terms such as 'hereafter,' 'thereafter,' 'shall be,' and 'henceforth'" can be "indicative of an intent to apply a decision only prospectively." (citing *Adkins v. Sky Blue,* 701 P.2d 549, 553-54

(Wyo. 1985)). If the Court wished to recognize an *existing* disclosure obligation, it would have said: "Therefore, . . . the insurer [*bears*] the burden of disclosure . . ." *Compare Crutcher*, 2022-NMSC-001, ¶ 32 (actually saying: "Therefore, *hereafter*, the insurer *shall bear* the burden of disclosure . . .").

But this Court's indication of express prospectivity did not end with the word "hereafter." In the conclusion of the opinion, the Court continued: "As such, we will ***now*** require every insurer to adequately disclose the limitations of minimum limits UM/UIM policies in the form of an exclusion in its insurance policy." *Crutcher*, 2022-NMSC-001, ¶ 33 (emphasis added). Again, the Court did not say that insurers "are required" or "were required" to disclose the limitations of minimum limits UM/UIM coverage; instead, the Court would "now require" the disclosure, moving forward. *See Stroh Brewery Co. v. New Mexico Dep't of Alcoholic Beverage Control*, 1991-NMSC-072, ¶ 12, 112 N.M. 468 (language that prior case ""is no longer good law' . . . is the language of prospectivity, not retroactivity").

This reading also makes practical sense in the context of *Crutcher*'s new rule. The disclosure required by *Crutcher* informs consumers about an offset mandated by a statute that is over forty years old. *See Schmick*, 1985-NMSC-073,

¶¶ 21-24 (explaining how the offset stems from the statute)[4]; *see also Crutcher*, 2022-NMSC-001, ¶¶ 18-19 (explaining that "under a statute like ours" the insured's recovery "must be offset by available liability proceeds"). And in the years since, the offset has been consistently re-affirmed by this Court, without any mention of a required disclosure. *See, e.g., Fasulo*, 1989-NMSC-060, ¶ 15; *State Farm v. Conyers*, 1989-NMSC-071, ¶ 13, 109 N.M. 243; *Samora,* 1995-NMSC-022, ¶ 8-14; *see also Crutcher*, 2022-NMSC-001, ¶¶18-20. Even a decade ago, when the court recognized the possible practical consequence of the offset (which motivated the new disclosure in *Crutcher*), the Court said nothing of any disclosure obligation stemming therefrom. *See Progressive Nw. Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-50, ¶ 6-10, 149 N.M. 157.

If, prior to *Crutcher*, insurers were required to disclose the operation of the offset in an exclusion in order to apply it, none of these cases would have been correctly decided. Rather than consistently *re-affirming* the legality of the offset, these cases would have instead held that an offset is permitted by the statute, but only if properly disclosed in the policy exclusions. None of them did.

The Exchange believes that this Court recognized these realities in *Crutcher*

---

[4] The offset rule is often referred to as the "*Schmick* offset." But *Schmick* makes clear that the rule arose from the statute, not from judicial fiat. *Schmick*, 1985-NMSC-073, ¶24 ("Our statute provides a specific formula by which to compute whether one was underinsured and by what amount."),

when it held that the new disclosure must be applied "now" and "hereafter." *See Crutcher*, 2022-NMSC-001, ¶¶ 32-33. *Crutcher*'s disclosure rule is a new, prospective obligation created to address the potential confusion stemming from the statutory offset. So, this Court expressly cabined its new rule to apply prospectively.

II. The *Chevron Oil* factors also show that *Crutcher's* disclosure rule applies only prospectively.

Even if *Crutcher* did not expressly state that it applies prospectively, the Court may now clarify that the new rule applies prospectively because there is "sufficient proof" under the so-called *Beavers / Chevron Oil* factors. *Stein v. Alpine Sports, Inc.*, 1998-NMSC-040, ¶ 7, 126 N.M. 258. This Court has applied the *Chevron Oil* test to establish the prospectivity of its prior opinions, even where the prior opinion was silent on the issue. *See, e.g.*, id. ¶ 8; *Whenry v. Whenry*, 1982-NMSC-067, ¶¶ 6-7, 98 N.M. 737; *see also Jackson v. City of Bloomfield*, 731 F.2d 652, 655 (10th Cir. 1984).

The *Chevron Oil* factors are:

> *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 ... its operation.

> *Finally,* we have weighed the inequity imposed by retroactive application, for where 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.

Whelan v. State Farm Mut. Auto. Ins. Co., 2014-NMSC-021, ¶ 19, 329 P.3d 646.

A sufficient showing under "one or more" of the factors can overcome the presumption of retroactivity. *Beavers*, 1994-NMSC-094, ¶ 22. Here, *each* factor favors prospectivity.

A. *Crutcher* established a "new principle of law."

1. Before Crutcher, no statute, regulation or judicial opinion foreshadowed the new disclosure obligations.

Before *Crutcher*, no statute, regulation, common law doctrine, or other case ever required an insurer "to adequately disclose the limitations of minimum limits UM/UIM policies in the form of an exclusion in its insurance policy." *Crutcher*, 2022-NMSC-001, ¶ 33. Instead, this Court routinely *re-affirmed* that, under the UIM statute, an "injured party's underinsurance recovery should be limited to the amount of UIM coverage purchased, less available liability proceeds." *Fasulo*, 1989-NMSC-060, ¶ 15. This Court even held that an insured's "reasonable expectations" to the contrary could not defeat the "mandatory statutory offset contained in Section 66–5–301(B)." *Samora*, 1995-NMSC-022, ¶¶ 3, 14-15. These cases reaffirmed the offset without ever mentioning or contemplating a

concomitant *disclosure* requirement.

Unsurprisingly, lower New Mexico courts followed suit. Following the guidance from this Court (as they must) New Mexico appellate courts and federal courts routinely upheld the validity of the offset. *See, e.g., Martinez v. Allstate Ins. Co.*, 1997-NMCA-100, ¶ 13, 124 N.M. 36 ("Allstate's liability is calculated by the formula contained in Section 66–5–301(B) as explained by our Supreme Court in [*Schmick*], and reaffirmed by the Court a number of times."); *Bonham v. Indem. Ins. Co. of N. Am.*, 507 F. Supp. 2d 1196, 1215 (D.N.M. 2007) ("Since Plaintiff received more from the tortfeasor than her total UM/UIM coverage limits, the tortfeasor was not underinsured within the meaning of the statute or the Policy."). But just like this Court, the lower New Mexico courts never contemplated the need for any disclosures in order to apply the offset.

Montaño v. Allstate Indemnity Company is thus instructive. 2004-NMSC-020, 135 N.M. 681. There, this Court created a new rule requiring insurers to disclose the premium costs for each available level of stacked coverage, as a means of guaranteeing that consumers could knowingly exercise their statutory rights to purchase UM/UIM coverage. Id. ¶¶ 17, 19-20. But just like the new disclosure created by *Crutcher*, the *Montaño* disclosure was "judicially impose[d]" and "not spelled out in insurance regulations." *See Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646 ("Until *Montaño*, no statute or

regulation suggested that premium disclosure was required for a UM/UIM rejection to be effective."). So, *Montaño* held that its new disclosure requirement would have "a purely prospective application" because it was a "new, and not easily foreshadowed, aspect to our jurisprudence." *Montaño*, 2004-NMSC-020, ¶ 22, 135 N.M. 681. As the Court recognized, it would be "inequitable" to apply the new disclosure rule against insurers before they had an opportunity to alter their policy language. Id. ¶ 22. The same is true here.

Crutcher also differs from several prior cases which declined to apply new insurance rules prospectively when the rule stemmed from "explicit" or "plain" language in the applicable statute or regulation. *See, e.g., Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 31, 147 N.M. 678 (holding that it was not applying a "new rule" because the decision was based on "statutory and regulatory interpretation drawing on explicit language in the relevant provisions"); *Jordan*, 2010-NMSC-051, ¶ 27 (declining to apply its holding prospectively because the existing statutes "plainly state" the Legislature's intent to impose the rule); *Whelan*, 2014-NMSC-021, ¶ 28 (explaining that a new rule in *Romero v. Dairyland*, which was not prospective, "did not impose new rejection requirements but rather imposed UM/UIM coverage where the existing regulatory requirements were violated").

Like *Montaño*—and unlike *Marckstadt*, *Jordan*, and *Romero*—*Crutcher's*

new disclosure obligation does not stem from any existing statutory or regulatory provision. Quite the opposite, *Crutcher* recognized that New Mexico law *required* insurers to provide UM/UIM coverage exactly as it was sold here. *See Crutcher*, 2022-NMSC-001, ¶ 33 ("[W]e conclude that UM/UIM coverage at the minimum level is permitted because the law not only allows, but requires, it to be sold as was done so here."). According to *Crutcher*, "the applicable statutory language makes clear that the sale of this type of insurance is reflective of the statutory scheme purposefully selected by the New Mexico Legislature, and thus is permitted despite being misleading." Id. ¶ 28.

This Court did question the policy implications of this statutory scheme, but it correctly recognized that its hands—and insurers' hands—were tied:

> New Mexico lawmakers have purposefully chosen to adopt a gap theory of underinsurance coverage, and it is within their power to do so. If they are so inclined, state lawmakers are also empowered to revisit the state's uninsured motorist coverage statutory scheme in light of the issues outlined by this case. However, we are bound by the language that the New Mexico Legislature has chosen. We therefore conclude that the law allows an insurer to sell minimum limits UM/UIM coverage to a policyholder and only provide coverage for uninsured motorist coverage, and that insurers may charge a premium for such coverage as long as they make a proper disclosure to the policyholder, as discussed hereunder.

Id. ¶ 28.

In other words, the disclosure obligation imposed by *Crutcher* was not drawn from the "explicit" or "plain language" of the UIM statute, nor from any existing regulatory commands. *Accord Marckstadt*, 2010-NMSC-001, ¶ 31;

Jordan, 2010-NMSC-051, ¶ 27. Instead, the obligation was born from this Court's concern about policyholders' *understanding* of the UIM coverage that the statute *required* insurers to sell. *Crutcher*, 2022-NMSC-001, ¶ 29-31 ("While charging premiums for minimum limits UM/UIM coverage may be legally permitted, this Court remains concerned about an average policyholder's understanding of the true limits of this type of coverage.").

So, the Court crafted the new disclosure not from the *text* of the UIM statute, but to further the "purpose and intent of the UIM statute" by "allow[ing] purchasers to make a fully informed decision when selecting UM/UIM insurance coverage." Id. ¶ 32; *see also* id. ¶ 41 (Nakamura, J., dissenting) ("The duties imposed on insurance companies in [*Romero* and *Weed Warrior*] were pursuant to what the UM/UIM statute and/or regulations required. Here, by contrast, the majority requires an (incorrect) explanation of the *effect* of the UM/UIM statute, cast as a coverage exclusion."). As in *Montaño*, that makes the new disclosure requirement a "new principle of law." *See Montaño*, 2004-NMSC-020, ¶ 22; *Whelan*, 2014-NMSC-021, ¶¶ 27-28.

Crutcher's new disclosure rule also was not "*clearly* foreshadowed by previous decisions in this or other jurisdictions." *Beavers*, 1994-NMSC-094, ¶ 23 (emphasis in original). For example, in *Beavers*, this Court held that its recognition of a cause of action for prima facie tort established a "new principle of law," even

though "prima facie tort [was] not a recent innovation," other jurisdictions had already recognized the tort as a cause of action, the recognition was "consistent with this state's imposition of liability for other intentional conduct resulting in harm," and the tort was already recognized in the Restatement (Second) of Torts. *Beavers*, 1994-NMSC-094, ¶ 25-26 (alterations omitted). Even all of these signals did not show that the Court's recognition of the cause of action was "*clearly* foreshadowed by previous decisions in this or other jurisdictions." Id. ¶ 26 (emphasis in original).

Here, there are not even these kinds of indicators. There are no cases from other jurisdictions requiring similar offset disclosures, no longstanding common law principles that clearly foreshadowed the disclosure, and no Restatements or other recognized treatises calling for the imposition of a *Crutcher*-style disclosure. Not even insureds seemed to think that further disclosure of the offset was necessary, as lawsuits like this only "flooded" the District of New Mexico in recent years. *See* **[11-21-22 Ord. (Dkt. 24) 3, 6]**. The disclosure obligation recognized by *Crutcher* is a truly novel innovation.

This Court's decision in *Weed Warrior* is not to the contrary. Over a decade ago, *Weed Warrior* recognized that the operation of the UIM statute could give rise to the situation at the heart of *Crutcher* and this case:

> If the tortfeasor carried the statutory minimum of liability insurance and the injured driver carried the statutory minimum of UM/UIM coverage,

> the injured driver would have no recourse for injuries suffered over the minimum amount of $25,000. The injured driver, though in theory having purchased UIM coverage, would in fact have purchased only UM coverage—rendering the inclusion of "UIM" in the statute superfluous.

See Weed Warrior, 2010-NMSC-050, ¶ 10; *see also Crutcher*, 2022-NMSC-001, ¶ 27 (explaining that its holding was based on "the same consequence previously illuminated in *Weed Warrior*.").

But after recognizing this possible *consequence* of the statute, *Weed Warrior* said *nothing* about any new disclosure requirements to address that situation—much less a disclosure to be included in the exclusion section of the policy, as dictated by *Crutcher*. *See Weed Warrior*, 2010-NMSC-050, ¶ 6-15. *Weed Warrior* only held that insurers were required to offer UM/UIM coverage in an amount equal to the liability limits of the policy. *Weed Warrior*, 2010-NMSC-050, ¶ 14.

The fact that *Weed Warrior* recognized the situation at the heart of *Crutcher, without* discussing any disclosure obligation, shows that it was not the genesis of *Crutcher*'s rule. Not even the Superintendent of Insurance or other courts read *Weed Warrior* that way. In the eleven years after *Weed Warrior* was decided, no court or regulator read *Weed Warrior* to require a disclosure addressing the operation of minimum limits UIM coverage—until *Crutcher*.

Weed Warrior also made clear that it "responds to the certified question only," which was "whether the election by an insured to purchase UM/UIM

coverage in an amount less than the policy liability limits constitutes a rejection of the maximum amount of UM/UIM coverage permitted under Section 66–5–301." Id. ¶ 1. Answering that question did not require the creation of any new disclosure requirement like the *Crutcher* rule. Nor did it call into question the viability of the offset without a disclosure.

Weed Warrior's discussion about the consequences of the UIM statute was also dicta. That discussion was not required to answer the certified question, or to reach the Court's ultimate holding: "Section 66–5–301 requires an insurer to offer UM/UIM coverage in an amount equal to the liability limits of the policy and that the choice of the insured to purchase any lower amount functions as a rejection of that maximum amount of coverage statutorily possible." *Weed Warrior*, 2010-NMSC-50, ¶ 15. And as dicta, this discussion from *Weed Warrior* could not be the genesis of the *Crutcher* disclosure obligation. *See Kent Nowlin Const. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 8, 99 N.M. 389 ("Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law").

Further, the "application" of *Weed Warrior*'s holding was discussed in *Weed Warrior's* companion case, *Jordan v. Allstate*, filed the same day. *Weed Warrior*, 2010-NMSC-050, ¶ 1; *see also Jordan*, 2010-NMSC-051, ¶¶ 3-4.

Jordan did create new disclosure requirements for UIM coverage, but the *Jordan* disclosures pertain to the *offer* and *rejection* of UIM coverage. *Jordan*,

2010-NMSC-051, ¶ 20-24. The disclosures are also quite detailed, but look nothing like the disclosure required by *Crutcher*:

> If an insurer does not (1) offer the insured UM/UIM coverage equal to his or her liability limits, (2) inform the insured about premium costs corresponding to the available levels of coverage, (3) obtain a written rejection of UM/UIM coverage equal to the liability limits, and (4) incorporate that rejection into the policy in a way that affords the insured a fair opportunity to reconsider the decision to reject, the policy will be reformed to provide UM/UIM coverage equal to the liability limits.

Jordan, 2010-NMSC-051, ¶ 22.

Jordan also contemplated a pre-policy disclosure, *see* id. ¶¶ 22, 24, 32, while *Crutcher* commands a disclosure "in the form of an ***exclusion***" in the policy. *Crutcher*, 2022-NMSC-001, ¶ 33 (emphasis added). If either *Jordan* or *Weed Warrior* intended to say that minimum-limits UIM coverage required a disclosure in the exclusions about the possible operation of this coverage, they would have said so. But they did not.

As to *Jordan,* itself, *Crutcher* does not even cite to *Jordan*. So, *Jordan* could not have been the genesis of *Crutcher's* new disclosure rule, either. *See Whelan*, 2014-NMSC-021, ¶ 25 (holding that *Jordan* could only have retroactive effect back to the date of *Montaño* because "*Jordan* explicitly relied on *Montaño* for its holding").

Nor was the rule in *Crutcher*, "based on settled principles articulated in twenty years of UM/UIM jurisprudence," as the rule in *Jordan* was said to be.

Jordan, 2010-NMSC-051 ¶ 27 (citing *Montaño*, 2004-NMSC-020, ¶ 20 & *Romero*, 1990-NMSC-111 ¶ 9). *Jordan* determined that its holding stemmed from *Montaño* and *Romero*, both of which related to how insurers offer UIM coverage, and how insureds must affirmatively accept or reject such coverage. *See* id. ¶ 27.

But this Court subsequently explained that *Jordan* really only traced back to *Montaño* (not *Romero*), which was decided only six years before *Jordan*. *See Whelan*, 2014-NMSC-021, ¶ 26-28. As this Court explained: "Prior to *Montaño*, no case could have signaled insurers that premium disclosure was required for a UM/UIM rejection to be effective. *Romero* did not impose a premium disclosure requirement." Id.¶ 28. It was *Montaño* that first charted the "new course" that led to *Jordan*, by requiring that insurers disclose the premium costs for each available level of stacked UM/UIM. Id. ¶ 25 (quoting *Montaño*, 2004-NMSC-020, ¶¶ 17-20). Accordingly, *Jordan* could only be applied retroactively to the date of *Montaño*, not *Romero*. Id. ¶ 28.

The point of all this is that, here, there is no prior case that charted a "new course" from which *Crutcher* followed. Just as *Romero* could not "serve as *Jordan*'s outer bound because *Romero* did not impose new rejection requirements" (*Montaño*, 2004-NMSC-020, ¶ 28), *Weed Warrior* cannot serve as *Crutcher*'s predecessor, because *Weed Warrior* did not impose new disclosure requirements. And again, *Crutcher* never even ***cites*** *Jordan* or *Montaño*, so those

cases could not have been the genesis of the *Crutcher* rule.

Instead, *Crutcher* blazed a new trail about how the *application* of the UIM offset should be explained to policyholders. *Crutcher* re-affirms that minimum limits coverage "is permitted because the law not only allows, but requires, it to be sold as was done so here," and reaffirms that "under a statute like ours" an offset is required. *Crutcher*, 2022-NMSC-001, ¶ 19, 33. But in order to address the potentially inequitable *consequences* of those statutory realities, the Court "will ***now*** require every insurer to adequately disclose the limitations of minimum limits UM/UIM policies in the form of an exclusion in its insurance policy." Id. ¶ 33 (emphasis added).

Crutcher thus charted a new path forward that was not compelled by the language of the UIM statute nor "*clearly*" foreshadowed by this (or any other) Court's precedent. *See Beavers*, 1994-NMSC-094, ¶ 26 (emphasis in original). Instead, *Crutcher*'s disclosure obligation is a "new principle of law" that should be applied only prospectively.

2. The Exchange was entitled to rely on the pre-*Crutcher* state of the law.

Under the first prong of the *Chevron Oil* test, the Court must also consider the degree of the parties' reliance on the pre-existing law. *Beavers*, 1994-NMSC-094, ¶ 26-27. This consideration "can hardly be overemphasized," and "is so important in retroactivity analysis that we think it deserves recognition almost

independent from the recognition given to the element of 'newness' in the first factor." Id. ¶¶ 26-27. The reliance factor weighs most heavily in favor of prospectivity "in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction." Id. ¶ 28; *see also Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 51, 378 P.3d 13 (applying new rule prospectively because of "the reliance interests of employers combined with the practical difficulties that would result from retroactive application").

Insurers like the Exchange were entitled to rely on the pre-*Crutcher* state of the law because, as explained above: (1) minimum limits UM/UIM coverage was *required* to be offered by the statutory scheme, *Crutcher*, 2022-NMSC-001, ¶ 28, 33; (2) this Court has consistently re-affirmed the legality of the statutory offset without ever suggesting that a concomitant disclosure was required; and (3) *Weed Warrior* recognized one possible practical result of this statutory scheme without commenting on any disclosure requirements stemming therefrom.

And again, *Jordan* set out already-detailed instructions as to how to lawfully disclose and offer UIM coverage—instructions that said nothing about a *Crutcher*-style disclosure in the exclusion section of the policy detailing the consequences of the offset. *See Jordan*, 2010-NMSC-051, ¶ 20-22. Insurers were entitled to rely on the understanding that if they followed *Jordan*'s already-detailed instructions, they

could permissibly offer minimum-limits UM/UIM coverage.

Subsequent cases reaffirmed this understanding by declining to expand *Jordan* beyond its four "workable requirements." *See Jaramillo v. Gov't Emps. Ins. Co.*, 573 F. App'x 733, 747 (10th Cir. 2014) (declining to extend *Jordan* to require "a 'discussion' or 'explanation' of stacking principles."); *Ullman v. Safeway Ins. Co.*, 2017-NMCA-071, ¶ 43-44, 404 P.3d 434 (rejecting contention that *Jordan* requires disclosure of maximum possible amount of UM/UIM coverage for multiple vehicles); *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 17, 320 P.3d 482 (rejecting claim that *Jordan* required UM/UIM premium disclosures to "appear on the written UM/UIM coverage rejection form itself"); *Am. Nat'l Prop. & Cas. Co. v. Arbelaez*, No. 11-cv- 443, 2012 WL 13005332, at *6 (D.N.M. Mar. 19, 2012) (declining to extend *Jordan's* reformation rule to reopen final judgments or settlements). Neither insurers nor courts had any reason to believe that *Jordan* or *Weed Warrior* meant anything more than they said. *See Whenry*, 1982-NMSC-067, ¶ 8 (holding that reliance interests favored prospectivity where courts relied on the rule established by existing case law).

Nor is this a situation like *Marckstadt*, where reliance interests were less pronounced because many insurers had already adopted the written rejection requirements outlined in the case. *See Marckstadt*, 2010-NMSC-001, ¶ 31. This pattern, the Court explained, "suggests either that the superintendent of insurance

codified an existing practice or insurance companies understood perfectly that written rejections are required in New Mexico." Id. ¶ 31.

Here, the Exchange's regulator never contemplated exclusionary language explaining the statutory offset prior to *Crutcher*. The Superintendent of Insurance instead rushed to promulgate *Crutcher*-compliant language only after, and because of, the *Crutcher* decision itself. *See* **[Ex. A to 7-11-22 Mtn. to Dismiss (Dkt. 7-1) 1-3]**. And as the bevy of post-*Crutcher* cases against insurers makes clear, other insurers had not included *Crutcher*-style disclosures, either. *See* **[11-21-22 Ord. (Dkt. 24) 6)]** (noting that "there are at least twelve *Crutcher*-related cases pending in the District of New Mexico that involve policies issued pre-*Crutcher*").

The contractual and regulatory framework governing insurance also sets this case apart from the world of tort, where reliance interests are less important. *See Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 15, 140 N.M. 630 (unlike in the tort context, "[r]eliance is a weighty concern where property rights or contract-type issues are involved"). For example, in *Beavers*, this Court held that reliance interests did not favor prospectively recognizing a new tort cause of action, because it was "hard to imagine that a potential defendant plans his or her conduct with rules of liability or nonliability in mind." *Beavers*, 1994-NMSC-094, ¶ 31.

But that is *exactly* what insurers must do every day. Insurers must conform to the existing statutory framework (like the UIM statute), existing regulatory

requirements (including approval of premium rates and policy language by the Superintendent of Insurance[5]), and existing judicial requirements (like the disclosure scheme outlined in *Jordan*).

In fact, the regulatory framework governing the insurance industry is so comprehensive that additional layers of judicial oversight are often unnecessary "where the New Mexico Department of Insurance in fact has regulated a product" already. *See New Mexico Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, ¶ 15 n.5, 111 N.M. 750. The Exchange was entitled to rely on the detailed statutory, regulatory, and judicial framework before it—none of which said anything about additional *Crutcher*-style disclosures in the exclusion of the policy. *See Lopez v. Maez*, 1982-NMSC-103, ¶ 17, 98 N.M. 625 ("If the new law imposes significant new duties and conditions and takes away previously existing rights, then the law should be applied prospectively"); *Rodriguez*, 2016-NMSC-029, ¶ 47 (applying new rule prospectively where it would require employers to purchase new insurance coverage and "assume various other new duties" relating to that coverage); *see also Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 108, 859 P.2d 724, 731 (1993) (applying new UM coverage rule prospectively where court was "breaking with clear precedent, and there have been no changed circumstances that

[5] *See* NMSA 1978 § 59A-18-12 (2012); Insurance Rate Regulation Law, NMSA 1978 § 59A-17-1 to -36 (1984, as amended through 2007).

would alert insurance companies that this was likely.").

The Exchange's policies were not even silent about the offset or the calculation of UIM coverage. Again, *Schmick* held than an insured's UM/UIM recovery "is always offset by the tortfeasor's liability insurance coverage." *Schmick*, 1985-NMSC-073, ¶ 30. The Exchange's policy says the same thing: "Any amounts otherwise payable under COVERAGE E [UIM] shall be reduced [*i.e.*, offset] 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 [*i.e.*, by a tortfeasor's liability insurance carrier]." *See* **[7-11-22 Mtn. to Dismiss (Dkt. 7) 5]** (quoting **[Compl. (Dkt. 1-1) 69]**). The *Schmick* offset is explicitly included in the policy itself.

The Exchange's policy language also tracked the exemplar policy language that was handed down by the Superintendent of Insurance to comply with the new disclosure rule. The Superintendent's proposed language read: "This Automobile Insurance Policy excludes UIM coverage in the event of a loss from a motor vehicle accident in which the total reimbursement you receive from other parties' insurance policies is equal to or in excess of the UM/UIM coverage provided by this Policy." *See* **[Ex. A to 7-11-22 Mtn. to Dismiss (Dkt. 7-1) 3]**. The regulator's proposed language is just like what is already plainly stated in Plaintiff's policy. Both inform the consumer that UIM coverage will not be available if the

"reimbursement you receive from other parties" (or: "amounts: a. Paid or payable . . . by or on behalf of any person or organization") equals or exceeds the insured's UIM coverage limit.

But in this case (and others like it) Plaintiff demands *more*. Latching onto *Crutcher*, Plaintiff asserts that something more was required to comply with this Court's stated disclosure requirement—perhaps most notably, a disclosure in the exclusion section of a policy. The Exchange (and other insurers across the state) have now included exactly that disclosure, following the commands of *Crutcher* and the *subsequent* commands of the Superintendent. *See* **[Ex. A to 7-11-22 Mtn. to Dismiss (Dkt. 7-1) 1-3]**; *see also New Jersey Mfrs. Ins. Co. v. Breen*, 297 N.J. Super. 503, 514, 688 A.2d 647, 653 (App. Div. 1997) ("Changing [prior insurance] rule without allowing a period for adjustment and for changes in the policy form prescribed by the Department of Insurance would be inequitable"), *aff'd on other grounds,* 153 N.J. 424, 710 A.2d 421 (1998).

But prior to *Crutcher*, the Exchange had no reason to believe that its current disclosures were insufficient. It relied on the existing rules—including the detailed guidance articulated in *Jordan* and its progeny—to promulgate the UIM coverage *demanded* by the UIM statute and explicitly sanctioned by its regulator. Prior to *Crutcher*, the Exchange had no reason to believe that anything more was necessary.

B. Retroactive application of the *Crutcher* rule will not further its operation.

The second *Chevron Oil* factor "considers the new rule's history, purpose, and effect to determine whether retroactive application will further its operation." *Rodriguez, v. Brand W. Dairy*, 2015-NMCA-097, ¶ 35, 356 P.3d 546. The purpose of the *Crutcher* disclosure rule was *not* to change how UIM coverage should be priced, calculated, or paid—after all, the court re-affirmed that insurers are required to offer minimum limits UIM coverage and apply an offset. *Crutcher*, 2022-NMSC-001, ¶¶ 18-20, 28, 33.

Instead, the Court was "concerned about an average policyholder's *understanding* of the true limits of this type of coverage." *Crutcher*, 2022-NMSC-001, ¶ 29 (emphasis added). The *Crutcher* rule was thus designed to ensure that policyholders are "fully informed of the relative benefits and limitations of a given policy" so that policyholders could properly "determine how much protection they would like to purchase." Id. ¶ 30.

Retroactive application of the *Crutcher* rule would do nothing to further this educative purpose. Policyholders cannot retroactively be "informed of the relative benefits and limitations of a given policy" they held in the past, because they already purchased those past policies. *Crutcher*'s disclosure rule can only inform *future* purchasing decisions.

Plaintiff argues that the rule *could* be applied retroactively to require either

(1) a recalculation of UIM claims without an offset for any policies without the *Crutcher* disclosure (*see* **[Compl. (Dkt. 1-1) ¶¶ 42-43, 101, 122, 125]**) or (2) a reimbursement of premiums paid for any such policies (*see* **[Compl. (Dkt. 1-1) ¶¶ 44-45, 67-69, 77-79, 118, 122]**). And at least one federal district court held that—but for adequacy issues relating to the named plaintiff's relation to her counsel—Fed. R. Civ. P. 23 classes could be certified seeking each form of retroactive relief. *See Bhasker v. Fin. Indem. Co.*, No. 17-cv-260, 2022 WL 860368, at *2, 12 (D.N.M. Mar. 23, 2022).

But neither form of relief would do anything to promote the actual ***educative*** purpose of *Crutcher*'s disclosure rule. Instead, it would flout the Legislature's longstanding policy decisions. *See Stein*, 1998-NMSC-040, ¶ 13 (declining to apply a new rule retroactively because it would cut against legislative purpose). For better or for worse, "New Mexico's uninsured/underinsured motorist statute, as presently enacted by our Legislature does not allow" for recovery without an offset. *Crutcher*, 2022-NMSC-001, ¶ 28 (quoting *Schmick*, 1985-NMSC-073, ¶ 31). And the statutory language makes clear that "the sale of this type of insurance is reflective of the statutory scheme *purposefully selected* by the New Mexico Legislature." Id. ¶ 28. (emphasis added). It may be "more equitable" for the Legislature to enact an "excess theory" statute (albeit at the cost of higher premiums), but that is not the path the Legislature has chosen. *See* Id. ¶ 28.

Not even *insureds* can contract around the offset imposed by the UIM statutes. *See Martinez*, 1997-NMCA-100, ¶ 13-14. In *Martinez,* the insured argued that "she should be free to contract with [her insurer]" to negate the offset by applying the tortfeasor's liability payments to her total damages, rather than her UIM coverage limit. Id. ¶ 14. But the Court held that this was "not possible under New Mexico statutory law." Id. ¶ 13. As the Court explained:

> [*Schmick*] clearly holds that the insurance policy may not provide either *more* or less than Section 66–5–301(B) allows. More than ten years ago, our Supreme Court invited the legislature to consider amending the statute to obtain the result Martinez wishes. *See Schmick*, 1985-NMSC-073, ¶ 31. The legislature has not changed the statute, and when the courts have clearly left it up to the legislature to act, principles of judicial restraint dictate against the court attempting that same result by judicial construction.

Id. ¶ 14 (emphasis in original); *see also Jordan*, 2010-NMSC-051, ¶ 23 ("[A]lthough public policy generally supports freedom of contract, the necessity of meeting the statutory and regulatory requirements plainly conditions freedom of contract in the context of UM/UIM insurance." (quotations and alterations omitted)).

Retroactively applying *Crutcher* to require recalculation of claims without an offset would also violate New Mexico's cap on the amount of UIM coverage that a consumer can purchase. By statute, an insured cannot purchase more UIM coverage (applicable only to themselves) than liability coverage (applicable to others that they injure). § 66-5-301 (A)-(B); *see also Jaramillo v. Gov't Emps. Ins.*

Co., 573 F. App'x 733, 743 (10th Cir. 2014). The point is that insureds should not be able to purchase more coverage for themselves than they are willing to provide others. But if *Crutcher* were applied retroactively to require a recalculation of claims without an offset, that is exactly what would happen—insureds would be provided more coverage than they were willing to offer others.

So, reversing and recalculating UIM claims by removing the offset—including claims like those explicitly affirmed by this Court in *Fasulo* and *Samora*—would upend the Legislature's clear and longstanding policy choices. *See Lucero v. Nationwide Mut. Ins. Co.*, No. 19-cv-0311, 2022 WL 4598482, at *16 (D.N.M. Sept. 30, 2022) (holding that retroactive recalculation of UIM claims without an offset is "is contrary to New Mexico law and public policy"). So too would refunding premium for coverage that "the law not only allows, but requires" insurers to sell. *Crutcher*, 2022-NMSC-001, ¶ 33.

The contrary Legislative policy distinguishes this case from *Marckstadt* and *Jordan*, too. Again, the rules in these cases were derived from the "explicit language" (*Marckstadt*, 2010-NMSC-001, ¶ 31) and "plain language" (*Jordan*, 2010-NMSC-051, ¶ 27) of the relevant statutory and regulatory provisions. This Court thus held that these rules should be applied retroactively because "the Legislature and the superintendent of insurance intended their rules to take effect immediately." *Jordan*, 2010-NMSC-051, ¶ 28 (quoting *Marckstadt*, 2010-NMSC-

001, ¶ 31).

But in this case, the "statutory scheme purposefully selected by the New Mexico Legislature" *demands* insurers to offer minimum limits UIM coverage and calculate that coverage with an offset. *See Crutcher*, 2022-NMSC-001, ¶¶ 18-20, 28. Reversing all prior claims and refunding all prior policies that lacked a *Crutcher* disclosure would upend those Legislative dictates, not enforce them. After all, the Legislature is "empowered to revisit the state's uninsured motorist coverage statutory scheme in light of the issues outlined by this case." Id. ¶ 28. But until it does so, this Court is "bound by the language that the New Mexico Legislature has chosen." Id. ¶ 28.

Retroactively applying *Crutcher* to require a recalculation of UIM claims or a refund of UIM premium would also cause "numerous impracticalities" (to say the least). *See Rodriguez*, 2016-NMSC-029, ¶ 49 (applying a new rule prospectively because of the "numerous impracticalities a retroactive holding could create"). Every claim file would have to be re-assessed to determine what the insured's recovery would be without an offset—again, including those claims where the application of the offset was affirmed *by this Court*. That would involve re-determining coverage, re-assessing the tortfeasor's liability coverage, re-calculating the insured's expenses in excess of that coverage, and re-adjudicating the underinsured portion of the claim. And for Plaintiff's alleged premium refund,

each underwriting file would have to be re-assessed in light of the insurer's actuarial records to determine what percent of the insured's *ex-anti* premium was attributable to the UIM (as opposed to UM) portion of the risk.

Courts assessing these claims would also have to speculate about which insureds would have purchased minimum limits coverage anyway, even if they had known of the offset—for example, insureds who were already aware of the offset from a prior UIM claim, but continued to purchase UM/UIM coverage anyway. After all, minimum limits coverage "still retains some value for policyholders"—including the full benefit of *UM* coverage because it is a single, combined coverage in New Mexico. *See Crutcher*, 2022-NMSC-001, ¶ 27.

"[I]mpracticalities" is an understatement. *See Rodriguez*, 2016-NMSC-029, ¶ 49. Retroactive application would involve relitigating millions of claims from insurers across the state. *See Whenry*, 1982-NMSC-067, ¶ 10 (declining retroactive application of a new rule which would "permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled" (quoting *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 380 (Ct. App. 1981)).

Finally, this Court has recognized that when the purpose of a rule is forward-looking, prospective application is particularly apt. *See Stroh Brewery*, 1991-NMSC-072, ¶¶ 18-21. In *Stroh* the forward-looking purpose of the new rule was to "deter future acts of discrimination against interstate sellers of beer." Id. ¶ 21

(alterations omitted). Here, the forward-looking purpose is to "allow purchasers to make a fully informed decision when selecting UM/UIM insurance coverage." *Crutcher*, 2022-NMSC-001, ¶ 32; *see also Whenry*, 1982-NMSC-067, ¶ 9 (applying a new rule prospectively where the purpose of the rule was to remove disincentives for future military enlistment or re-enlistment). This Court's "refusal to reopen cases, long since final," will not curb the forward-looking educative purpose of the new rule announced in *Crutcher*. *See Whenry*, 1982-NMSC-067, ¶ 9.

C. Retroactive application of the new *Crutcher* rule would be highly inequitable.

If a new rule "could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustices or hardship by a holding of nonretroactivity." *Whelan*, 2014-NMSC-021, ¶ 22; *see also Akins v. United Steelworkers of Am.*, 2009-NMCA-051, ¶ 17, 146 N.M. 237; *Whenry*, 1982-NMSC-067, ¶¶ 10-11.

Here, too, the Exchange's reliance on the pre-*Crutcher* state of the law counsels in favor of prospectivity. *See Stein*, 1998-NMSC-040, ¶ 14; *see also Beavers*, 1994-NMSC-094, ¶ 38 ("The greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively."). The Exchange—like every other insurer in the state—relied on the dictates of the UIM

statute, the comprehensive regulatory scheme, and the detailed disclosure requirements in *Jordan* when issuing coverage that "the law not only allows, but require[d], it to" sell. *See Crutcher*, 2022-NMSC-001, ¶ 33. The imposition of "new liability" based on "new duties and conditions" specified in *Crutcher* would be inequitable. *See Lopez*, 1982-NMSC-103, ¶ 17; *see also Tamerlane Corp. v. Warwick Ins. Co.*, 590 N.E.2d 191, 194 (Mass. 1992) (applying new insurance rule prospectively because "[i]nsurers are entitled to rely on existing law in managing policies and claims," "[p]olicyholders likewise can be charged with such knowledge," and "[a] contract of insurance contemplates risks according to the law at the time of its making.").

Jordan has supplied the applicable UIM disclosure rules in this state for over two decades and, before *Crutcher*, no court or regulator ever suggested that more was necessary. *Rodriguez,* 2016-NMSC-029, ¶ 50 (finding third *Chevron Oil* factor to favor prospectivity due to parties' "long-standing, substantial, and reasonable reliance" on the old rule). Neither *Weed Warrior* nor *Jordan* articulated the need for greater disclosure, even after recognizing the situation at the heart of the *Crutcher* opinion. Retroactive application of the *Crutcher* disclosure rule "would be analogous to the enactment of a retroactive statute" requiring such disclosure, "which is generally disfavored in New Mexico." *Rodriguez,* , 2015-NMCA-097, ¶ 36; *see also Am. Fam. Mut. Ins. v. Ryan*, 330 N.W.2d 113, 115

(Minn. 1983) (the policy underlying prospectivity of laws affecting insurance "is the avoidance of unfair hardship upon insurers and insureds who have set rates, purchased coverage for reasonably anticipated risks, and otherwise justifiably acted in reliance upon the continued existence of the [prior rule]".).

The inequity is compounded by the fact that insurers operate within the tight confines of a closely regulated industry. *See New Mexico Life*, 1991-NMSC-036, ¶ 31 (discussing the state's "substantial" interest in regulating insurers); *see also Scope of Insurance Regulation,* 1 COUCH ON INS. § 2:1. Again, prior to *Crutcher*, the New Mexico Superintendent of Insurance never intimated the need for a *Crutcher*-style disclosure; it rushed to issue such guidance only *after Crutcher*. *See* **[Ex. A to 7-11-22 Mtn. to Dismiss (Dkt. 7-1) 1-3]**.

And as with any insurance premiums charged in New Mexico, the Superintendent of Insurance reviewed and approved the UIM premium rates charged by the Exchange to ensure that they are not "excessive, inadequate or unfairly discriminatory." NMSA 1978 § 59A-17-3 (1984); *see also* Insurance Rate Regulation Law, NMSA 1978 § 59A-17-1 to -36 (1984, as amended through 2007) (requiring the filing of insurance rates). By virtue of the Superintendent's approval, such rates are subject to the "filed rate doctrine," meaning that they are "per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Valdez v. State*, 2002-NMSC-028, ¶ 5, 132 N.M. 667. "[T]he heart of the filed rate

doctrine is not that the rate mirrors a competitive market, nor that the rate is reasonable or thoroughly researched, it is that the filed rate is the only *legal* rate." *Id.* ¶ 5 (quotations omitted; emphasis in original).

Retroactively applying *Crutcher*'s disclosure rules to compel a refund of the UIM-portion of insureds' premium would cast aside the policy judgments underlying this doctrine by placing courts in the institutional shoes of the state regulator. *See Id.* ¶ 5 ("The policy behind the filed rate doctrine is to prevent price discrimination and to preserve the role of agencies in approving rates and to keep courts out of the rate-making process."). Courts would be asked to take up the rate-making role of the regulator and retroactively recalculate the "only *legal* rate[s]" (*id.* ¶ 5) previously reviewed and approved by the institutional body with the expertise for that task. It would be inequitable to subject insurers to that piecemeal re-review of the Superintendent's judgment.

The inequities here are also not like those that compelled retroactive application in *Marckstadt* and *Jordan*. In *Marckstadt*, retroactive application of the Court's rule was appropriate because of the "hardship we would cause to many rightful beneficiaries of UM/UIM coverage should we apply our rule prospectively." *Marckstadt*, 2010-NMSC-001, ¶ 31.

The rule in *Marckstadt* involved the parameters for properly offering and rejecting UM/UIM coverage, and the insureds affected by *Marckstadt*'s rule were

"rightful beneficiaries" of coverage because, under the plain text of the UIM statutes, an insured was entitled to UM/UIM coverage as "the default," unless they expressly "exercised the right to reject the coverage through some positive act." Id.¶ 15. Those insureds who had not properly rejected UIM coverage (as *Marckstadt* commanded) should have otherwise been defaulted into such coverage. *See* id. ¶ 15.

But that is not how *Crutcher*'s new rule operates. *Crutcher*'s disclosure informs consumers about the *consequences* of the statutory scheme; it does not regulate whether insureds are entitled to UIM coverage in the first place. And it is only reasonable to assume that an insured is the "rightful beneficiary" of a premium refund for their UIM coverage if this Court believes that the insured would have *rejected* UIM coverage (and thus not have paid premiums), had these consequences been disclosed as required by *Crutcher*.

That could not have been what *Crutcher* intended. After all, the UIM statute was "designed to *expand* insurance coverage," not restrict it. *See Marckstadt*, 2010-NMSC-001, ¶ 15 (emphasis added). *Crutcher*'s application of the statute could not have been intended to result in *less* UIM coverage through *more* UM/UIM rejections.

It is theoretically possible that some insureds might have selected *greater* UIM coverage had they received *Crutcher*'s disclosure, but that would have

resulted in *higher* premium payments, not premium refunds.[6] The only subset of insureds who may possibly have received greater coverage if *Crutcher's* rule was in place earlier are those insureds who: (1) would have read the new *Crutcher* exclusion in their policy, (2) would have selected greater coverage *because of* this language, (3) were in an accident that entitled them to UIM coverage,[7] (4) suffered injuries from that accident sufficient to trigger the higher UIM coverage that they chose to purchase (that is, over $25,000 in bodily injury, per person), and (5) would have been entitled to additional coverage from that accident in an amount greater than the increased premiums that they paid over the life of their policy. Not even *Plaintiff* pleads that he would have satisfied these parameters. *See generally* **[Compl. (Dkt. 1-1)]**. Plaintiff's Complaint never says that he would have purchased higher coverage limits or rejected coverage, had a *Crutcher* disclosure been included earlier. *See* **[id]**.

Determining who *would* satisfy these parameters would require relitigating a series of counterfactuals about what each insured would have done years (if not decades) earlier, in a hypothetical alternative world. That litigation would take place against the backdrop of lost evidence and faded memories for thousands and

---

[6] Greater *ex-post* coverage means higher *ex-anti* premiums.

[7] That is, an accident with an *underinsured* driver, as opposed to an *uninsured* driver. *See Crutcher*, 2022-NMSC-001, ¶ 27.

thousands of insureds across the state. It is not nearly as easy as returning insureds to the "default" position they should have been in, as in *Marckstadt*. *See Marckstadt*, 2010-NMSC-001, ¶ 15; *see also Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 504-05, 733 P.2d 1073, 1087-88 (1987) (applying new rule prospectively where retroactive application "would force further litigation in this and other lawsuits similarly situated, where the parties have prepared and presented their cases in reliance upon clear precedent.").

Nor are the equities in this case like *Jordan*, where the Court retroactively reformed policies that did not comply with its new rules about how to offer and reject UM/UIM coverage. *Jordan* recognized that such reformation "will necessarily result in an unplanned cost to insurers who have not secured meaningful rejection and who have not collected appropriate premiums for full coverage." *Jordan*, 2010-NMSC-051, ¶ 29. But *Jordan* believed that it was more equitable to let these "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." Id ¶ 29.

That reasoning is not applicable here, because *Crutcher*'s new rule is not about compliance with *existing* law or "settled principles articulated in twenty years of UM/UIM jurisprudence." *Jordan*, 2010-NMSC-051, ¶ 27, 149 N.M. 162. Again, *Crutcher*'s disclosure rule does not stem *from* the Legislative scheme, but

was instead enacted prophylactically because of the *consequences* of that scheme. *See Crutcher*, 2022-NMSC-001, ¶¶ 28-33. Insurers were not in "a better position to ensure meaningful compliance with the law" because, prior to *Crutcher*, disclosure was *not* the law. The point of *Crutcher* was not to effectuate compliance with any existing law; it was to create a new rule to inform policyholders about the practical consequences of the laws already in effect.

And again, retroactively applying *Crutcher*'s disclosure rules to compel a recalculation of coverage without an offset (as Plaintiff demands) would directly contradict the Legislature's command—even if that result *were* "more equitable." *Crutcher*, 2022-NMSC-001, ¶ 28 ("New Mexico's uninsured/underinsured motorist statute as presently enacted by our Legislature does not allow for such recovery."); *see also Martinez*, 1997-NMCA-100, ¶ 11. In *Jordan*, retroactive reformation effectuated retroactive *compliance* with the UIM statutes. But the opposite would happen here. Retroactively reforming insureds' policies to require a recalculation of coverage without an offset would flout "the statutory scheme purposefully selected by the New Mexico Legislature" because that scheme *requires* an offset. *Crutcher*, 2022-NMSC-001, ¶¶ 18-20, 28; *see also Lucero*, 2022 WL 4598482, at *16.

Retroactive reformation could also result in hundreds of thousands of insurance policies that are void as inconsistent with the Legislature's chosen

scheme. *See Cent. Mkt., Ltd., Inc. v. Multi-Concept Hosp.*, 2022-NMCA-021, ¶ 22, 508 P.3d 924 (contractual provisions are void if contrary to public policy). That could not have been what the Legislature intended. *See Crutcher*, 2022-NMSC-001, ¶ 14 ("When this Court construes statutes, our charge is to determine and give effect to the Legislature's intent"). This Court should not subvert the Legislature's clear and longstanding statutory commands by retroactively applying *Crutcher*'s disclosure rules.

CONCLUSION

Prior to *Crutcher*, the Exchange had no reason to think that it was operating outside the confines of New Mexico Law. It was following the dictates of the UM/UIM statute which *required* it to provide minimum limits UM/UIM coverage and *precluded* it from offering insureds greater UM/UIM coverage than liability coverage. It was applying offsets to the calculation of UM/UIM coverage, as commanded by the Legislature, affirmed by *Schmick,* and consistently reaffirmed by this Court ever since. It was complying with the detailed offer and rejection commands of *Jordan* and subsequent cases declining to expand *Jordan* beyond its four workable requirements. It was obeying the mandatory guidance of its regulator, which included securing approval of policy rates and forms, but *never* included adding *Crutcher*-style disclosures to its policies. And it was even already disclosing the operation of the UIM offset in its existing policy language.

That all changed in *Crutcher*. *Crutcher* required *new* disclosures intended to educate policyholders about the consequences of the statutory scheme purposefully selected by the New Mexico Legislature. It would be inequitable, unreasonable, and just unfair to apply those disclosure requirements retroactively and permit Plaintiff to pursue a recalculation of UIM claims (without an offset) or a refund of UIM premiums for all current and former policyholders.

This Court should answer the certified question by holding that its decision in *Crutcher v. Liberty Mutual* applies prospectively.

Respectfully Submitted,

/s/Meena H. Allen
Meena H. Allen
ALLEN LAW FIRM, LLC
6121 Indian School Road NE
Suite 230
Albuquerque, NM 8711
(505) 298-9400

/s/Rodger L. Eckelberry
Rodger L. Eckelberry
Kevin P. Zimmerman
(*Pro hac vice applications pending*)

BAKER & HOSTETLER LLP
200 South Civic Center Drive,
Suite 1200
Columbus, Ohio 43215
(614)-228-1541

Michael E. Mumford
BAKER & HOSTETLER LLP
Key Tower
127 Public Square,
Suite 2000
Cleveland, OH 44114
(216) 621-0200

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Opening Brief of Defendant Interinsurance Exchange of the Automobile Club Addressing the Certified Question of Law was served on all counsel via electronic transmission by filing the document through the Court's ESF system, as permitted under NMRA 12-307.2(D)

/s/Meena H. Allen
Meena H. Allen