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

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

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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 4,395 words, counted using Microsoft Word Version 2208.

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INTRODUCTION

The issue before this Court is whether its prior opinion in *Crutcher v. Liberty Mutual* applies prospectively or retroactively. But instead of addressing *that* question, Plaintiff spends most of his Answer Brief arguing why his Complaint states a claim for relief under federal pleading standards, even if *Crutcher* is held to be prospective. Plaintiff is wrong. But that issue is irrelevant to the certified question before the Court.

The certified question asks whether *Crutcher* applies prospectively or retroactively. And on *that* question, Plaintiff fails to rebut both the expressly prospective language of *Crutcher* and the significant proof of prospectivity under the *Chevron Oil* factors.

On express prospectivity, Plaintiff's reading of the words "now" and "hereafter" cannot be squared with the actual language of *Crutcher*, which ties those unequivocal words of prospectivity to the subsequent disclosure obligations that the case created.

On the *Chevron Oil* factors, Plaintiff mostly ignores the arguments in the Exchange's Brief in Chief, instead resting his case on the federal court opinions that have held *Crutcher* to be retroactive. Those opinions offer little interpretive guidance for this court—both because they were attempting to predict what *this*

Court would say and because they do not address the scope of arguments raised here.

Crutcher announced a new disclosure rule for UIM insurance that is designed to address the consequences of a statutory scheme "purposefully selected" by the New Mexico Legislature. Both *Crutcher*'s express language and its surrounding context under the *Chevron Oil* factors show that *Crutcher* should apply prospectively.

ARGUMENT

I. As in *Crutcher*, this Court should not speculate about hypothetical facts outside of the certified question of law.

The certified question of law does not ask whether "*Crutcher* provides immunity from claims of misrepresentation" (AB 3-7, 17), whether Plaintiff stated a claim for relief under *Federal* Rule of Civil Procedure 12(b)(6) (AB 5, 13-14, 20, 30), or whether Plaintiff's policy contains an "overbroad" offset provision (AB 28-34). The *only* question certified to this Court was: "Whether *Crutcher v. Liberty Mut. Ins. Co.*, 2022-NMSC-001, 501 P.3d 433, applies prospectively or retroactively?" **[11-21-22 Ord. (Dkt. 24) 6]**. This Court could have reformulated the Certified Question (NMSA 1978, § 39-7-5 (1997)), but instead accepted the question as-asked.

As in *Crutcher*, this Court should not opine on the "hypothetical facts" presented in Plaintiff's Answer Brief, and should instead "contain[ ] its opinion to

the question presented." *Crutcher*, 2022-NMSC-001 ¶¶ 1, 12 n.1; *see also Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640 (declining to "reach any issues not certified"). At this stage of the case, there is not a "full record" for the Court's consideration. *See Schlieter v. Carlos*, 1989-NMSC-037, ¶ 11, 108 N.M. 507 (declining to accept a certified question of law for this reason). There are only the allegations in Plaintiff's Complaint, which "Defendant has not been able to answer . . . to confirm or deny." AB 30. So, any decision from this Court opining on the validity of Plaintiff's underlying merits theories would "be based upon anecdotal and speculative argument." *See Schlieter*, 1989-NMSC-037, ¶ 11. The Court should not address such speculative issues.

Further, whether the allegations in Plaintiff's complaint state a claim for relief under *Federal* Rule of Civil Procedure 12(b)(6) is a question bound up with *federal* pleading standards. The federal district court is in the best position to answer that question in the first instance, and review of such an order "would be the prerogative of the Tenth Circuit Court of Appeals"—"not our prerogative." *Las Cruces*, 1998-NMSC-006, ¶ 13.

Nor did *Crutcher* address the merits of any of Plaintiff's underlying causes of action, as Plaintiff seems to think. *Crutcher* made clear that its "opinion addresses *only* the certified question," which asked: (1) whether minimum-limits UIM coverage was "illusory for an insured person who sustains more than $25,000

in damages caused by a minimally insured tortfeasor," and (2) if so, "whether an insurance company may charge premiums for such a policy." *Crutcher*, 2022-NMSC-001, ¶ 1, 13 (emphasis added). *Crutcher* never cited or discussed the elements or requirements for any common law cause of action. Instead, like prior cases interpreting the UIM statute, it was based on the "principled pragmatism of the jurisprudence that declared the need for an offset in the first place." *State Farm v. Safeco Ins. Co.*, 2013-NMSC-006, ¶ 15.

Crutcher did not opine on specific policy language, either. Plaintiff asserts that this Court "determined that '[Mr. Crutcher's] policy is illusory in that it may mislead UM/UIM policyholders.'" AB 4. But Plaintiff's selective alteration distorts what *Crutcher* actually said: "*this type of policy* is illusory . . ." *Crutcher*, 2022-NMSC-001, ¶ 2. *Crutcher* dealt with the *category* of minimum limits UIM coverage, not the specific language of *Mr. Crutcher's* policy.

At heart, Plaintiff wants this Court to declare that the prospectivity of *Crutcher* is irrelevant and that the "application of the *Beavers/Chevron Oil* test is unnecessary" because (according to Plaintiff) "misrepresentation laws have been reaffirmed by *Crutcher* and other cases." AB.[1] But the same federal judges that

[1] Except as to Plaintiff's "reformation" claims. When it comes time to discuss this claim (which is pled as a *cause of action*, not just a form of damages **[Compl. (Dkt. 1-1) ¶¶ 95-101]**), Plaintiff recants, asserting that "the certified question does not ask the Court to make a ruling" on it. AB 20. Apparently, Plaintiff recognizes that it would violate the UIM statute, forty years of precedent from this Court, and

Plaintiff relies on expressly disagree. These judges have stayed their *Crutcher*-based cases because—as the district court found when certifying the question of law here—the prospectivity of *Crutcher* "may be determinative of an issue—if not dispositive of Plaintiff's entire case." **[11-21-22 Ord. (Dkt. 24) 6]**; *see also Schwartz v. State Farm*, No. 18-cv-328, 2023 WL 2973962, at *2 (D.N.M. Apr. 17, 2023) ("An answer from the New Mexico Supreme Court on the retroactivity issue will help resolve a key issue in this case "); *Crutcher v. Liberty Mut.*, No. 18-cv-412, 2023 WL 2806932, at *3 (D.N.M. Apr. 6, 2023) (same); *Soleil v. Hartford*, No. 22-cv-396, Order Staying Proceedings at 1 (ECF No. 28) (D.N.M. Feb. 7, 2023) (same).

As the federal judges explained, the prospectivity of *Crutcher* will define the scope of insurers "pre-*Crutcher* disclosure obligations" (as opposed to "pre-*Crutcher* affirmative misrepresentations"). *Crutcher*, 2023 WL 2806932, at *3; *Schwartz*, 2023 WL 2973962, at *2. That issue is critical to the merits of any of Plaintiff's claims based on "a non-disclosure theory of liability." *See Schwartz*, 2023 WL 2973962, at *2. An answer from this Court about the prospectivity of *Crutcher* will help resolve whether insurers had a duty to disclose the operation of

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longstanding legislative policy to retroactively reform his contract to prohibit the statutory offset. *See* BIC 32-36, 45-46.

the offset prior to *Crutcher* itself. *See R.A. Peck v. Liberty Fed. Sav. Bank*, 1988-NMCA-111, ¶ 9-12, 108 N.M. 84.

But the validity of Plaintiff's Complaint is for the federal court to determine based on *federal* pleading standards under the *federal* rules. This Court is in the best position to explain whether the disclosure obligations in *Crutcher* apply retroactively or prospectively. But the federal district court is fully capable of resolving how that decision impacts the causes of action pled in the various *Crutcher*-based lawsuits.

To the extent that the Court finds it worthwhile to look beyond the certified question and address the validity of Plaintiff's common law theories pled in his Complaint, the Exchange respectfully requests the opportunity to submit supplemental briefing on those issues. The Exchange will otherwise be prejudiced by the need to address *both* the prospectivity of *Crutcher* and these new issues in the limited space available for a Reply Brief.

II. *Crutcher* should apply prospectively.

A. The federal opinions interpreting *Crutcher* offer little guidance to this Court.

As to the *actual* issue before this Court, Plaintiff first faults the Exchange for failing to discuss the federal district court's attempts to determine whether *Crutcher* was prospective. AB 2-3. But each of the federal cases was making an "*Erie*-guess" as to how *this Court* would address the prospectivity of *Crutcher*. *See*

Pehle v. Farm Bureau, 397 F.3d 897, 901 (10th Cir. 2005). Not even the Tenth Circuit gives any deference to such opinions. *Wood v. Eli Lilly*, 38 F.3d 510, 512 (10th Cir. 1994) ("A federal district court's state-law determinations are entitled to no deference.").

It is also unsurprising that some federal judges have rushed to apply *Crutcher* retroactively, despite its clear language of prospectivity. Federal judges work in a world where "judicial decisions have had retrospective operation for near a thousand years." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015) (quotations omitted) (Gorsuch, J.). But unlike federal courts, this Court does not "indulge in the fiction that the law now announced has always been the law," and it explicitly rejects "the hard-and-fast [retroactivity] rule prescribed for federal cases." *Beavers v. Johnson Controls World Servs.*, 1994-NMSC-094, ¶¶ 15-16, 22, 118 N.M. 391 (quoting *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 116 (1993) (O'Connor, J., dissenting)).

The federal cases also have not addressed the scope of arguments raised in this case. For example, none of the cases wrestle with the reality that (unlike the new rules in *Jordan* and *Marckstadt*), *Crutcher's* disclosure obligation cannot be traced to the "plain" or "explicit" text of any statutory or regulatory provision. BIC 17-19, 35-36. The cases do not address how *Weed Warrior* can be the genesis of *Crutcher*'s disclosure obligation when *Weed Warrior* explicitly declined to create

any new disclosures, and the disclosures that *were* created in its companion case—*Jordan*—look nothing like the disclosure required by *Crutcher*. BIC 12-13, 20-27, 39-40. The cases fail to explain how retroactive application of *Crutcher's* disclosure obligation can have any impact on its stated educational purpose. BIC 32-35, 37-38. And the cases do not discuss the distinction between new rules about the *existence* of coverage (as in *Marckstadt* and *Jordan*) and new rules about the *explanation* of coverage (as in *Crutcher*). BIC 41-45. These are just a few examples.

The federal opinions also do not speak with one voice. Despite Plaintiff's assertion to the contrary, one of the federal opinions held that *Crutcher's* new disclosure obligations *were* prospective. *See Lucero v. Nationwide*, No. 19-cv-0311, 2022 WL 4598482, at *10 (D.N.M. Sept. 30, 2022) ("*Crutcher* expressly declared that this requirement applies prospectively by stating that the requirement shall apply 'now' and 'hereafter.'"). Plaintiff points to *Lucero*'s separate holding that the insured could still pursue claims based on allegations "that [the insurer] affirmatively misled her in its application and application process and that its materials and statements misrepresented the coverage she purchased." Id. at *12; *see also* id. at *13 n.6. But that issue says nothing about *Crutcher's* prospectivity.

B. The language of *Crutcher* is expressly prospective.

Plaintiff's argument against express prospectivity relies on a federal district court's reading of *Crutcher* that cannot be squared with this Court's actual language. According to Plaintiff, "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." AB 17 (quoting *Bhasker v. Fin. Indem. Co.*, No. 17-cv-00260, 2022 WL 656354, at *4 (D.N.M. Mar. 4, 2022)).

But that is not what *Crutcher* actually says. The word "hereafter" is not tied to the permissibility of charging premiums for UIM coverage. Instead, it is tied to the new disclosure obligations: "Therefore, *hereafter, the insurer shall bear the burden of disclosure to the policyholder…*" *Crutcher*, 2022-NMSC-001, ¶ 32.

The next paragraph says the same thing. The Court did not *now permit* the "charging of premiums for minimum limit underinsured motorist coverage." *See* AB 17. Instead, the Court held it would "*now require* every insurer *to adequately disclose* the limitations of minimum limits UM/UIM policies …" *Crutcher*, 2022-NMSC-001, ¶ 32. This language shows that *Crutcher* was expressly prospective. *See* BIC 9-14.

Plaintiff also argues that this Court could not have intended *Crutcher* to apply prospectively because it never asked about prospectivity at the *Crutcher* oral argument. AB 1 n.1. Even if the questions at oral argument were more persuasive than the actual text of *Crutcher*, Plaintiff's assertion is wrong. The Court asked about adding disclosures to contracts "going forward," and counsel for the insurers explicitly argued that any new kind of disclosure "should be prospective only." *See* Audio Recording of Oral Argument from *Crutcher*, No. S-1-SC-37478, at 41:22-42:53, 57:31-58:01; *see also* AmB of APCIA and NAMIC 5-6 nn. 2-3 (quoting these portions of the argument).

C. The *Chevron Oil* factors establish that *Crutcher* applies only prospectively.

Plaintiff contends that *Crutcher* did not establish a "new principle of law" under the *Chevron Oil* test because *Crutcher* was resolved based on "longstanding rules of statutory construction and precedent." AB 18. That assertion is belied by the fact of *Crutcher*'s certification, itself. Under this Court's own rules, it could only accept the certified question of law in *Crutcher* if the "question is one for which an answer is *not* provided by a controlling (a) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or (b) constitutional provision or statute of this state." Rule 12-607 NMRA (emphasis added).

The federal district court in *Crutcher* recognized this, too. It rejected Plaintiff's argument that the case was controlled by *Warrior*, holding: "[U]nder

Weed Warrior, insurers' liability, if any, for selling allegedly illusory minimum limits UM/UIM policies when equal to the level of liability under New Mexico's financial responsibility law is an open question." *Crutcher v. Liberty Mut.*, No. 18-cv-412, 2019 WL 12661166, at *3 (D.N.M. Jan. 9, 2019). "[A]ppellate case law following *Weed Warrior*" did not answer that question either. Id.

In fact, Plaintiff does nothing more than point to *Crutcher's* citation of *Weed Warrior* when arguing that *Crutcher's* disclosures were compelled by that case. AB 18. Plaintiff does not respond to the fact that *Weed Warrior* recognized the consequence at the heart of this case without saying *anything* about new disclosure requirements or liability rules to address that situation. *See* BIC at 20-25. Nor does Plaintiff address how post-*Weed Warrior* cases consistently *declined* to expand the disclosure requirements from *Weed Warrior's* companion case, *Jordan*. BIC at 26-27.

The rule in *Crutcher* does not stem from simple "statutory construction," either. *See* AB 18, 23-24, 26-27, 30. Plaintiff asks this Court to take his word for it, but he never explains how to get from the text of the UIM statute to the disclosure obligations identified in *Crutcher*. That is because he cannot.

The "first" step of statutory interpretation looks to the "plain meaning of the statute." *State v. Vest*, 2021-NMSC-020, ¶ 14. It was this type of analysis that led to the retroactive rules in *Marckstadt* and *Jordan*, which stemmed from "explicit"

or "plain" language in the applicable statute. *See* BIC at 17-18. But the disclosure rule in *Crutcher* cannot be discerned from the plain language of the UIM statute. The statute *requires* an offset, but it does not say anything about concomitant disclosure obligations. Instead, as Plaintiff recognizes (AB 23-24), *Crutcher*'s disclosure rule was enacted to further the "legislative purpose" of the UM/UIM statute. *Crutcher*, 2022-NMSC-001, ¶ 30; *see also* BIC 19.

A rule derived from "legislative purpose" is not as obvious as a rule read from the "plain" or "explicit" text of a statute. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 353 ("While—as in this case—one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish"); *see also Beatty v. City of Santa Fe*, 1953-NMSC-110, ¶ 7, 57 N.M. 759, 763 (explaining how "inconsistencies or ambiguities or indefiniteness" can "make it impossible to determine and effectuate the legislative intent"); *Lujan v. Regents of Univ. of California*, 69 F.3d 1511, 1518 (10th Cir. 1995) ("Statutes may have multiple purposes, and may represent a compromise between competing considerations."). And courts in this state often

struggle "attempting to discern legislative intent," because "isolated grammatical analyses raises more difficult questions than it provides definitive answers." *See State v. Strauch*, 2015-NMSC-009, ¶ 15; *see also Phelps v. New Mexico Water Quality Control*, 2006-NMCA-115, ¶ 28, 140 N.M. 464 (finding "genuine uncertainty about the legislative intent" of a statute); *State v. Hicks*, 2002-NMCA-038, ¶ 12, 132 N.M. 68 (explaining how "difficult the trial court found it to discern the legislative intent"); *Ortiz v. New Mexico State Police*, 1991-NMCA-031, ¶ 23, 112 N.M. 249 (Bivins, J., dissenting as to the "legislative intent" found by the majority).

After all, it took nearly forty years for *any* court (or regulator) to read *Crutcher's* disclosure obligation from the "legislative purpose" of the UIM statute. Since the current UIM statute's enactment in 1983, no court before *Crutcher* ever held that the "legislative purpose" of the UIM statute required insurers "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 ¶¶ 30, 33.

A new principle of law may be foreseeable where it is drawn from "explicit language in the relevant provisions" of a statute or regulation, as in *Marckstadt v. Lockheed Martin*, 2010-NMSC-001, ¶ 31, 147 N.M. 678. But *Crutcher*'s disclosure obligation was not drawn from "explicit language" in the UIM statute; it

was instead created to address the consequences that *are* required by the express language of the statute (the statutory offset to minimum limits coverage). *See* BIC 17-19. As in *Montaño,* such "judicially impos[ed]" rules should be applied prospectively. *See Whelan v. State Farm*, 2014-NMSC-021, ¶ 25 (discussing *Montaño v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 17, 135 N.M. 681).

Interestingly, Plaintiff seems to think that *Montaño* cuts in *his* favor as to the second and third *Chevron Oil* factors. *See* AB 20. *Montaño* is like *Crutcher* because it created new disclosure requirements that were "not spelled out in insurance regulations." *See Whelan*, 2014-NMSC-021, ¶ 25; *see also* BIC 16-19, 23-25. *Montaño* held that these new disclosure requirements—which related to anti-stacking clauses—would have "a purely prospective application" because they were a "new, and not easily foreshadowed, aspect to our jurisprudence." 2004-NMSC-020, ¶ 22.

But Plaintiff latches onto the fact that *after Montaño* created new, prospective disclosure obligations, it proceeded to analyze the plaintiff's claims based on its "traditional" rules governing anti-stacking clauses. Id. ¶ 22. That made sense in *Montaño*, because the case came to this Court on direct appeal; the Court had to resolve *the case*, not just a specific certified question. Since the new disclosure rules applied prospectively, the Court had to apply the pre-existing rules to analyze the case before it.

Plaintiff seems to think that *Crutcher* did the same (and that this Court should now endorse Plaintiff's underlying liability theories because of that). But *Crutcher* involved a certified question of law, not a direct appeal. The Court made clear that its "opinion addresses only the certified question," and that question did *not* ask whether the plaintiff could state a claim for relief based on any particular common law theory pre-existing its new disclosure requirements. *Crutcher*, 2022-NMSC-001, ¶ 2. That's why, unlike *Montaño*, *Crutcher's* analysis *concluded* with the new disclosure obligations. Id. ¶¶ 32-33.

As to the second *Chevron Oil* factor, Plaintiff contends that this Court need not concern itself with the upheaval that retroactive application of *Crutcher* would portend (BIC at 36-37) because the district court has not yet certified a class. *See* AB 21-22.[2] But the upheaval caused by *Crutcher* is not limited to any class claims that may be litigated in *this* case. If *Crutcher* is held to require a retroactive recalculation of UIM claims or a refund of UIM premiums for every policy that did not contain its new disclosures, *every single insured in the state* could have a claim against their insurer for failing to comply with *Crutcher*. The upheaval is only *compounded* by the fact that class certification is inappropriate—the courts would be swamped with these individual claims.

[2] Elsewhere, however, Plaintiff assumes that the ruling in this case *will* affect "thousands of insureds." *See* AB 29.

As for the third *Chevron Oil* factor, Plaintiff only reiterates the statement from *Jordan v. Allstate* that it is "more equitable to let the financial detriments be borne by insurers." AB 22-23. But *Jordan* only thought this was more equitable because insurers were "in a better position to ensure meaningful compliance with the law." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 29, 149 N.M. 162. Plaintiff does not explain how that is applicable here, where, prior to *Crutcher*, further disclosure of the statutory offset was *not* the law. *See* BIC 44-45.

Finally, Plaintiff argues that any reference to this Court's precedent in *Samora* or *Fasulo* is "unavailing" because, whatever those cases held at the time: "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." AB 24. In support, Plaintiff cites a number of cases stating that an insured's "reasonable expectations" can be used to interpret ambiguous policy provisions. AB 24-25.

But none of these cases address an insured's "reasonable expectations" in the context of the statutory UIM offset. So, the cases neither explicitly nor implicitly overrule *Samora*'s holding that an insured's "reasonable expectations" cannot circumvent the statutory offset required by the UIM statute. *Samora v. State Farm Mut. Auto. Ins. Co.*, 1995-NMSC-022, ¶ 14, 119 N.M. 467. The "reasonable expectations" doctrine cannot be used to supplant unambiguous policy terms (*W.*

Com. Bank v. Reliance Ins. Co., 1987-NMSC-009, ¶ 8, 105 N.M. 346) and *Samora* makes clear that the statutory offset does not render UIM coverage automatically ambiguous. *See Samora*, 1995-NMSC-022, ¶¶ 14-15.

Plaintiff might instead be suggesting that *Crutcher* itself overruled *Samora*. AB 24. If so, then *Crutcher* ***certainly*** established a "new principle of law" that should be applied only prospectively. *See Stein v. Alpine Sports*, 1998-NMSC-040, ¶ 10, 126 N.M. 258; *Whenry v. Whenry*, 1982-NMSC-067, ¶ 8, 98 N.M. 737.

III. Plaintiff's discussion of the policy language is irrelevant to the certified question and also incorrect.

The final section of Plaintiff's brief completely ignores the certified question, and attempts to argue that the Exchange's actual policy language is misleading. AB 28-34. It is telling that this section never even references *Crutcher*, even though the brief is supposed to help this Court answer "[w]hether [*Crutcher*] applies prospectively or retroactively?" As above, this Court should confine itself to that certified question of law.

Plaintiff's arguments are unavailing, in any event. Plaintiff contends that the Exchange's policy utilizes "overreaching contractual provisions to reduce available underinsured motorist coverage." AB 32. In support, Plaintiff relies on a case holding that an insurer was not entitled to offset amounts "paid under its separate workers' compensation policy." *Cont'l Ins. Co. v. Fahey*, 1987-NMSC-122, ¶ 14, 106 N.M. 603, 607.

Initially, *Fahey* is only applicable to unique situations where the offset could "reduce UM/UIM coverage below the statutory minimum." *Fickbohm v. St. Paul Ins. Co.*, 2003-NMCA-040, ¶ 17, 20, 133 N.M. 414, 419 (explaining that the worker's compensation judgment in *Fahey* might not provide "the full and actual value of the worker's damages."). That is not applicable to an offset under the UIM statute, because "the most an insured can receive is the amount of underinsurance purchased for his benefit . . . offset by available liability proceeds." *Schmick v. State Farm Mut. Auto. Ins. Co.*, 1985-NMSC-073, ¶ 30, 103 N.M. 216.

Courts have also upheld UIM offset provisions similar to the Exchange's as "unambiguously" permitting offsets. *See Mountain States v. Martinez*, 1993-NMSC-003, ¶ 1, 8, 115 N.M. 141; *Hemphill v. Liberty Mut.*, No. 10-cv-0861, 2013 WL 12123306, at *8 (D.N.M. Mar. 27, 2013); *Bonham v. Indem. Ins. Co.*, 507 F. Supp. 2d 1196, 1215 (D.N.M. 2007). Further, insurers are *required* to include offset provisions in their insurance policies. *See* NMAC §§ 13.12.3.10, 13.12.3.17(F)(3)(a). And the language of the provision that Plaintiff challenges was already approved for use by the Superintendent of Insurance as consistent with the UIM statute. *See* NMSA 1978 §§ 59A-18-12, 59A-18-14 (2012); NMAC §§ 13.8.3.1-13.8.3.15; *see also Gila v. N.M. Water Quality Control*, 2018-NMSC-025, ¶ 35 (explaining the "heightened degree of deference" given to agency decisions).

But more importantly, this case does not involve any kind of "overreaching" reduction in UIM coverage pursuant to a contractual offset. *See* AB 32. It only involves the statutory offset *required* by the UIM statute, and consistently reaffirmed by this Court from *Schmick* to *Crutcher* itself.[3] *See* BIC 2-6.

Even if a *contractual* offset provision is void for impermissibly limiting recovery beyond the scope of the UIM statute, the *statutory* offset is still required. *Farmers Ins. Co. v. Sandoval*, 2011-NMCA-051, ¶ 21, 149 N.M. 654, 660 (applying statutory offset, even where contractual offset provision was "void" as overinclusive); *Samora*, 1995-NMSC-022, ¶ 15 (contractual and statutory offsets "are distinct"). After all, an insured cannot even *contract* around the offset imposed by the UIM statutes. BIC 34 (discussing *Martinez v. Allstate Ins. Co.*, 1997-NMCA-100, ¶ 13-14). So, even if correct, Plaintiff's arguments about the "overreaching" contractual offset provision have no bearing on this case.

[3] A contractual "offset" was not applied to Plaintiff because he was not injured by an "underinsured motor vehicle" under the terms of the policy or the statute: the "sum of the limits of liability" of the tortfeasor's insurance policy ($25,000) was *not* "less than the limits of liability under the insured's underinsured motorist coverage" ($25,000). *See* **[7-11-22 Mtn. to Dismiss (Dkt. 7) 5]**. "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." *Bonham*, 507 F. Supp. 2d at 1215.

CONCLUSION

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

Dated: May 1, 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply 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)

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