IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JARED KILEEN,

Plaintiff-Petitioner,

v.

No. S-1-SC-39256
No. A-1-CA-39384

TAMBERIN DIDIO, FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY, and PROGRESSIVE DIRECT INSURANCE COMPANY,

Defendants-Respondents.

DEFENDANT-RESPONDENT PROGRESSIVE DIRECT INSURANCE COMPANY'S ANSWER BRIEF

On Petition for Writ of Certiorari to the New Mexico Court of Appeals
Appeal from the Second Judicial District Court, County of Bernalillo
The Honorable Denise Barela Shepherd, District Court Judge
Dist. Ct. No. D-202-CV-2019-06635

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I. TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Court Cases

Other Jurisdictions

New Mexico Statutes Annotated

New Mexico Rules Annotated

Pursuant to Rule 12-318(B) NMRA, Defendant-Respondent Progressive Direct Insurance Company ("**Progressive**") submits the following Answer Brief in response to Plaintiff-Petitioner Jared Kileen's Brief in Chief filed on April 18, 2024.

III. SUMMARY OF PROCEEDINGS

Plaintiff-Petitioner Jared Kileen ("**Kileen**" or "**Petitioner**") does not clearly set forth a section entitled "Summary of Proceedings" in his Brief in Chief as required by Rule 12-318(A)(3) NMRA. Instead, he presents the Court with sections entitled "Introduction," "Summary of Facts," and "Course of Proceedings and Disposition." **[BIC 1-7]**. As directed by Rule 12-318(B), Progressive limits its Summary of Proceedings to clarifying the issue presented to the Court and responding to any misstatements, arguments or omissions made by Kileen in the Introduction, Summary of Facts and Course of Proceedings and Disposition sections of his Brief in Chief.

The nature of the case is clear, and the legal issue presented to the Court in this appeal is narrow. The case involves Kileen's claim for uninsured/ underinsured motorist ("**UM/UIM**") coverage under a policy of insurance Progressive issued to Kileen's father ("**Policy**") for injuries Kileen claims to have sustained in an August 10, 2018, accident with Tamberin Didio ("**Accident**"). Progressive denied the claim on the grounds Kileen's father signed a written rejection of Progressive's offer of UM/UIM coverage and did not pay premiums for such coverage. **[RP 111]**.

Kileen does not dispute that his father opted to "reject the option to purchase any UM/UIM coverage for bodily injury and property damage." **[BIC 5, RP 77]**. He also does not dispute that Progressive offered no less than thirteen UM/UIM coverage options with corresponding premiums: (1) $0 for no coverage, (2) six options for non-stacked coverage with limits ranging from $25,000 each person/$50,000 each accident up to $500,000 combined single limit with premiums ranging from $49 to $295, and (3) the same six options for stacked coverage with premiums ranging from $136 to $489. *Id.* Petitioner nevertheless argues that his father's rejection of UM/UIM coverage is invalid under New Mexico law because Progressive did not offer such coverage on "an individual per[-]vehicle basis and rather only offered UM/UIM coverage collectively on all three motorcycles covered under the [P]olicy." **[RP 8-9, ¶¶ 47-48]**. He raised no other objections to how Progressive offered his father UM/UIM coverage.

Kileen filed suit against Progressive and others in the Second Judicial Court of New Mexico in August of 2019. [**RP 1**]. Progressive and Kileen filed competing Motions for Summary Judgment addressing Petitioner's argument that Progressive's offer of UM/UIM coverage to Kileen's father was not valid because coverage was not offered on a per-vehicle basis. **[RP 63-73, 111-123]**. Petitioner's argument to the district court was based entirely on an "illustration" contained in *Montano v. Allstate Indem. Co.,* 2004-NMSC-020, 92 P.3d 1255, 92 P.3d 1255, and Section 65-

5-301 of New Mexico Statutes Annotated ("**UM/UIM Statute**"). Notably, Kileen articulated no discernable public policy argument that a per-vehicle offer of insurance would encourage consumers, who would otherwise reject UM/UIM coverage, to purchase UM/UIM insurance. **[RP 63-73, 137-149]**.

The Honorable District Court Judge Denise Barela Shepherd rejected Petitioner's argument, granted summary judgment in favor of Progressive **[RP 180]**, denied Kileen's motion for summary judgment **[RP 179],** and dismissed the claims against Progressive **[RP 180]**. Although the district court did not articulate the basis for her ruling in the orders denying Kileen's Motion for Summary Judgment and granting Progressive's Motion for Summary Judgment, she necessarily agreed with Progressive that its offers of UM/UIM coverage to Kileen's father did not violate New Mexico law. *Kileen v. Didio,* mem. op. ¶ 3, No. A-1-CA-39384 (N.M. Ct. App. Feb. 7, 2022) (noting "the district court agreed with Progressive that the law was not violated").

The Court of Appeals affirmed Hon. Judge Shepherd's ruling, explaining it had recently considered the "all or nothing" argument raised by the plaintiffs in *Lueras v. GEICO Gen. Ins. Co.*, 2018-NMCA-051, 424 P.3d 665, and rejected it, holding "[an all-or-nothing] offer of [UM/UIM] coverage does not violate New Mexico law." *Id.* ¶ 4. The specific holding in *Lueras* was that "New Mexico law does not preclude an insurer from requiring an insured to choose the same UM/UIM

coverage (or to reject UM/UIM coverage entirely) for all vehicles covered by a single policy." *Id.* ¶ 3. The plaintiffs in *Lueras* appealed the Court of Appeal's decision and certiorari was granted by this Court on August 16, 2018. *Id.* Meanwhile, in this case, this Court entered a Writ of Certiorari on April 20, 2022. At that time, a decision had not yet been made in the *Lueras* appeal,[1] and thus, the Court stayed a ruling in this case pending its disposition of *Ullman.*

On February 12, 2024, after this Court's decision in *Ullman v. Safeway Ins. Co.*, 2023-NMSC-030, 539 P.3d 668, was published, the Court directed the parties to address "Issue 1 ***only as presented in the petition***." **[2-12-24 Ord. 2]** (emphasis added). Issue 1 in the Petition for Writ of Certiorari was "whether insurers are required to provide UM/UIM coverage for each motor vehicle insured unless the insured makes a valid rejection of such coverage on a per-vehicle basis." **[Pet. 3]**. Contrary to the Court's specific direction that the "only" issue that would be entertained by the Court in this appeal would be the issue presented in Kileen's Petition for Writ of Certiorari filed on March 7, 2022, Kileen, modified the "Question Presented" in his Brief in Chief as follows:

> The Uninsured Motorist Statute requires insurance companies to offer UM/UIM insurance on "*any* motor vehicle" insured through a motor vehicle liability policy in New Mexico and to obtain a meaningful

[1] *Lueras* was also a consolidated appeal in which the Court of Appeals addressed claims asserted by the Lueras family and David Van Epps against GEICO General Insurance Company. *Lueras v. GEICO Gen. Ins. Co.*, Nos. A-1-CA-34961 and A-1-CA-35661. This Court ultimately consolidated the *Lueras* appeal (S-1-SC-37135 and S-1-SC-37137) with an appeal filed by Betty Ullman against Safeway Insurance Company in *Ullman v. Safeway Ins. Co.*, No. S-1-SC-36580.

> rejection of that UM/UIM if the insured chooses not to purchase UM/UIM. NMSA 1978, § 66-5-301(A) (emphasis added). Progressive offered its insured UM/UIM for *all vehicles or no vehicles* on their multi-vehicle liability insurance policy, but not on *any* vehicle in the multi-vehicle policy. Did Progressive's "all or nothing" UM/UIM offer provide the insured a "meaningful[ ]" offer of UM/UIM for *each vehicle* in a multi-vehicle insurance policy?

[BIC 3-4] (emphasis in original).

Progressive further notes that Petitioner's Summary of Facts does not comply with Rule 12-318(A)(3)'s requirement that citations to the record proper, transcript of proceedings, or exhibits supporting each factual representation "shall" be included in the Brief in Chief. Progressive, however, does not dispute the limited underlying facts relevant to this appeal as represented by Kileen in his Brief in Chief.

Finally, Progressive notes that Petitioner improperly includes in his purported summary of proceedings many legal arguments. The legal arguments contained in Kileen's Introduction and Summary of Facts are addressed by Progressive in the following Argument section below.

IV. ARGUMENT

Contrary to this Court's direction that the issue in this case be limited "only as presented in the petition," **[2-12-24 Ord. 2]**, Kileen framed the issue differently in his Brief in Chief than it was presented in the Petition for Writ Certiorari. **[Pet. 3, ¶ 1, BIC 3-4]**. In any event, the essence of Petitioner's argument is that for an insurer's offer to an insured of UM/UIM coverage on a multi-vehicle policy to be

valid, the insured must be given the option to purchase or reject UM/UIM coverage on each vehicle. Furthermore, he argues, if the insured chooses to purchase UM/UIM coverage, the insured must also be allowed to select different amounts of coverage on each vehicle.

The Court of Appeals considered the very same argument in *Lueras*. 2018-NMCA-051. The *Lueras* court provided the following example of what this type of offer might look like:

> Under Plaintiffs' view of the law, an insured with four vehicles must be allowed to select, say, UM/UIM coverage of $100,000/$200,000 on one vehicle, $50,000/$100,000 on the next two vehicles, and no UM/UIM coverage on the fourth, or any other combination that the insured may desire.

Id. ¶ 13. The Court of Appeals rejected the plaintiffs' argument that *Montano* required "per-vehicle" offers of UM/UIM coverage and, furthermore, found "nothing in the UM/UIM statute that provides otherwise." *Id.* ¶ 18.

It is simply not the law in New Mexico that insurers are required to offer UM/UIM coverage on a per-vehicle basis, nor should it be. Such a requirement would result in impossibly complicated offers of UM/UIM coverage that would primarily serve to confuse consumers. Complex offers of UM/UIM coverage for each individual vehicle on a policy along with the confusion that would result from such offers would not enhance consumers' freedom of contract. To the contrary, it

would deter consumers who would otherwise purchase such coverage to reject it and not encourage those who would otherwise reject it to purchase it.

A. NEW MEXICO LAW DOES NOT, AND SHOULD NOT, REQUIRE INSURERS TO OFFER UM/UIM COVERAGE ON A PER-VEHICLE BASIS BECAUSE SUCH OFFERS WOULD NOT ENCOURAGE INSUREDS TO PURCHASE UM/UIM COVERAGE WHERE THEY WOULD OTHERWISE REJECT IT.

As a preliminary matter, it is important to note that other than Petitioner's argument that UM/UIM coverage must be offered on a per-vehicle basis, he does not contend, nor can he, that Progressive's offer failed to comply with New Mexico law. Indeed, Progressive's offer met the requirements set forth in *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214. The offer included UM/UIM coverage equal to his liability limits, the offer provided information regarding "premium costs corresponding to available levels of coverage," Progressive obtained a written rejection of the offered UM/UIM coverage, and the rejection was incorporated into the Policy, affording Kileen's father "a fair opportunity to reconsider the decision to reject" the offered coverage. *Id.* ¶ 30. *See also* **[RP 85-110]**.

Not only did Progressive's offer meet the *Jordan* requirements, but it also met the new requirement set forth in *Ullman* that offers of UM/UIM coverage "must include a brief discussion of stacking." 2023-NMSC-030, ¶ 43. This Court clarified that in order to satisfy this requirement, "insurers need not set out a matrix of all

stacking possibilities in their offers of UM/UIM coverage" because a declaration that "clarifies that an insured who purchases insurance on multiple vehicles and pays multiple premiums would be entitled to stack benefits in the event of a covered loss and affords the insured an opportunity to obtain additional information about stacking will satisfy this requirement." *Id.* Progressive's form entitled "Uninsured/Underinsured Motorist Coverage – Rejection of Higher Limits and Either Election of Lower Limits or Complete Rejection" explained to Petitioner's father the difference between stacked and non-stacked UM/UIM coverage, meeting the new *Ullman* requirement. **[RP 104-106]**.

The most obvious and efficient way to address Kileen's argument regarding the validity of "all or nothing" offers of UM/UIM coverage in New Mexico is to discuss the most recent decision on this issue from this Court in *Ullman*. 2023-NMSC-030. This Court essentially gave plaintiffs, such as Kileen, a road map for what the Court wants to hear on this issue by describing what it has not heard thus far from plaintiffs who have raised this issue in the past, stating:

> [O]ur conclusion that *Montano* does not impose [ ] a requirement [that insurers offer UM/UIM coverage on a per-vehicle basis] does not end the inquiry as to whether New Mexico law, interpreted in light of the Legislature's clear purpose of encouraging the purchase of UM/UIM insurance, supports the imposition of a requirement that insurers offer per-vehicle UM/UIM coverage. ***Plaintiffs have thus far only faintly developed an argument in support of such a requirement***, suggesting that it might enhance freedom of contract and encourage some consumers to purchase UM/UIM insurance who would otherwise elect to reject coverage.

Id. ¶ 77 (emphasis added). The Court declined to "rule on an inadequately-briefed issue where doing so would require this Court to develop the arguments itself, effectively performing the parties' work for them" and gave the Luerases and Van Epps the "opportunity to litigate this issue properly and fully should each choose to do so" on remand to the district court. *Id.* (internal quotation marks and citation omitted).

Like the Luerases and Van Epps in *Ullman*, Kileen relies on the same deficient argument that *Montano* and the language of the UM/UIM Statute mandates "per-vehicle" offers of UM/UIM coverage. While Petitioner gives lip service to and uses key words such as a per-policy offer of UM/UIM coverage is not "meaningful" or that without a per-vehicle offer an insured cannot "knowingly and intelligently act to reject UM/UIM coverage," **[BIC 3]**, he fails to develop any ***substantive*** argument as to how a "per-vehicle" offer to insureds would encourage consumers, like his father who do not want UM/UIM coverage for any price, to purchase UM/UIM insurance.

In this case, Kileen's father rejected UM/UIM coverage altogether, even though he could have purchased varying levels of coverage providing benefits in the amount of $25,000 each person/$50,000 each accident up to $1,500,000 combined single limits at a cost of $49, $106, $136, $177, $206, $283, $295, $341, $470, $471, and $489. Notably, the range of premiums offered by Progressive ensured that

Petitioner's father was not priced out of purchasing UM/UIM coverage. *See Montano*, 2004-NMSC-020, ¶ 16 (declining to require stacked UM/UIM coverage on every policy because it "could result in some lower-income insureds who own multiple vehicles being effectively 'priced out' of UM coverage").

It is hard to perceive, and Kileen entirely fails to explain, how an offer of additional levels of coverage per-vehicle with additional corresponding premium amounts would have encouraged his father to purchase UM/UIM coverage when he declined to purchase ***any*** amount for as low as $49. Assuming Petitioner's father had chosen the least amount of UM/UIM coverage for all three vehicles at the lowest premium offered by Progressive, i.e., $49/year or $4.08/month, he would have been provided UM/UIM coverage for injuries sustained in an accident involving any one of the three motorcycles on the Policy or for any accident involving the use of an UM/UIM vehicle. Presumably, Kileen's argument is that if his father could have chosen cheaper coverage for only one motorcycle as opposed to all three, for example, he would have been encouraged to purchase UM/UIM coverage in some amount. Under this argument, if Progressive had offered UM/UIM coverage on a per-vehicle basis, the lowest level of coverage would have still been the minimum[2] amount of $25,000 each person/$50,000 each accident for one motorcycle. Given the nature of UM/UIM coverage and the fact that it follows the insured not the

[2] The minimum liability limits for bodily injury are $25,000/$50,000. § 66-5-201(A).

automobile,[3] the insureds on the Policy would still be covered for injuries sustained in an accident involving any one of the three motorcycles on the Policy or for any accident involving the use of a UM/UIM vehicle. Under either scenario, the risk to Progressive would be the same and, therefore, the corresponding premium for the coverage would most likely be the same. Kileen simply does not explain how allowing his father to make a per-vehicle choice as to UM/UIM coverage on his multi-vehicle policy would have encouraged him to purchase UM/UIM coverage when Progressive offered him a broad range of coverage options with prices as low as $49, i.e., $4.08/month.

While giving an insured the option of selecting or rejecting UM/UIM coverage as to each individual vehicle on a policy and selecting different amounts of coverage as to each of those vehicles would result in ***more*** choices to the insured, it does not necessarily follow that premiums would be cheaper based on per-vehicle coverage (due to the nature of UM/UIM coverage) or that additional choices (the premiums for which will likely fall within the same range of premiums already

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[3] *See Montano*, 2004-NMSC-020, ¶ 9 ("UM personal injury coverage does not follow the automobile" but "insures one against bodily injury while a pedestrian or a passenger in someone else's vehicle") (citation omitted), *Rodriguez v. Windsor Ins. Co.,* 1994-NMSC-075, ¶ 18, 118 N.M. 127, 879 P.2d 759 (UM/UIM coverage follows the insured and is "not linked in any way to whether [the insured is] riding in one of the cars listed on the policy"), *Vigil v. Calif. Ins. Co.*, 1991-NMSC-050, ¶ 12, 112 N.M. 67, 811 P.2d 565 ("there is no particular relationship between the insurance benefits available to the insured and the automobile or other vehicle involved in the accident" and the amount of benefits "is not limited by the happenstance that the accident does or does not occur in a particular way or with reference to a particular vehicle").

offered to insureds on a per-policy basis) will incentivize people, like Kileen's father who simply do not want UM/UIM coverage, to purchase it. Petitioner offers no explanation whatsoever as to how per-vehicle offers of UM/UIM coverage would "enhance freedom of contract and encourage some consumers to purchase UM/UIM insurance who would otherwise elect to reject coverage." *Ullman*, 2023-NMSC-030, ¶ 77. He does not explain how Progressive's offer deprived his father of his freedom to decide how much coverage he wanted and how much he could afford or articulate how additional choices as to each vehicle would further the legislative intent of the UM/UIM statute.

Not only is Petitioner's position debunked by the very nature of UM/UIM coverage which follows the insured not the vehicle, it also conflicts with well-established UM/UIM insurance law in New Mexico. For example, this Court held in *Ullman* that "the addition of a new vehicle to [a] policy [does] not trigger a new policy warranting compliance with *Jordan's* requirements for rejection of UM/UIM coverage." 2023-NMSC-030, ¶ 57. A mandate that UM/UIM coverage be offered on a per-vehicle basis would unnecessarily complicate the process of an insured obtaining UM/UIM coverage in New Mexico and, for the reasons already discussed above, not result any increased benefit to the insured.

Finally, per-vehicle offers would make offers of UM/UIM coverage and selection/rejection forms corresponding to those offers prohibitively complex.

Convoluted offers and forms would lead to insureds being confused and countless disagreements as to how to apply the choices made by the insured, resulting in endless litigation. This would not result in consumers having a better understanding of UM/UIM coverage or encourage them to purchase coverage where, like Petitioner's father, the insured simply does not want the coverage at any price.

1. *Montano* did not establish a requirement that insurers offer UM/UIM coverage on a per-vehicle basis.

This Court unquestionably held in *Ullman* that *Montano* did not establish a requirement that insurers offer UM/UIM coverage on a per-vehicle basis. *Id.* ¶ 76 ("We agree with the Court of Appeals' conclusion that *Montano* established no such requirement."). The *Ullman* Court noted that both the Lueras and Van Epps plaintiffs in their appeal to the Court of Appeals "relied on *Montano* for their public policy arguments," *id.* ¶ 74, and that "[o]ther than [relying upon] the hypothetical example" in *Montano*, they "cited no authority for the claim that [the insurer] was required to offer per-vehicle coverage," *id.* ¶ 75.

Petitioner in this case also relies almost entirely on *Montano* and his arguments should be similarly rejected. He argues that the hypothetical example in *Montano* supports his statement that under New Mexico law, "[f]or a multi-vehicle liability insurance policy, an insured can purchase UM/UIM coverage for ***all, none, or some*** of the vehicles that have liability insurance with that carrier." **[BIC 1]** (emphasis in original). Despite this Court's unequivocal ruling in *Ullman* that

Montano ***does not*** require insurers to offer UM/UIM coverage on a per-vehicle basis, Petitioner asserts time and time again, citing only *Montano*, that "[t]his Court has consistently rejected an 'all or nothing' approach to UM/UIM insurance coverage." **[BIC 3]**. *See also* **[BIC 5]** ("contrary to this Court's ruling in *Montano* […], the [P]olicy required Plaintiff-Petitioner's father to select stacked or non-stacked UM/UIM coverage on a take it or leave it basis"), **[BIC 14]** (arguing the Policy is "squarely at odds with the [*Montano*] Court's ruling as well as the illustration of that ruling in *Montano*"), **[BIC 15]** ("Even though the *Montano* decision was issued 20 years ago, Progressive failed to follow the Court's guidance and issue a policy to Plaintiff-Petitioner that complies with New Mexico public policy."), and **[BIC 15]** ("As enunciated by this Court in *Montano*, Progressive's take it or leave it approach in the policy before the Court violated New Mexico policy […].").

The *Ullman* court unquestionably ruled that *Montano* did not establish a requirement that insurers offer UM/UIM coverage on a per-vehicle basis and agreed with the holding in *Lueras* that "*Montano* did not consider whether automobile insurers should be required to offer policyholders UM/UIM coverage on a per-vehicle basis, much less impose such a requirement." 2023-NMSC-030, ¶ 75, *citing Lueras*, 2018-NMCA-051, ¶¶ 9, 13, 18. This Court clarified, "*Montano* addressed the requirements an insurer must meet should it seek to preclude stacking of coverages in a multivehicle policy for which the insured pays multiple premiums."

Id. ¶ 76, *citing Montano*, 2004-NMSC-010, ¶ 1. This statement along with the *Lueras* court's statement that "*Montano's* 'illustration' does not describe a mandatory requirement imposed on all insurers offering UM/UIM coverage, but rather provides a voluntary option for those insurers that do not wish to offer stacking," should have put an end to arguments that have been repeated over and over again by plaintiffs in New Mexico that the hypothetical example in *Montano* mandated per-vehicle coverage.

Not heeding this Court's ruling, Kileen in his Brief in Chief continues to argue that *Montano* supports his position without giving this Court any reason to reconsider its recent ruling in *Ullman*. In an attempt to distinguish the facts in this case from the ruling by the Court of Appeals in *Lueras* and this Court in *Ullman*, i.e., that *Montano* does not support much less mandate that insurers must offer UM/UIM coverage on a per-vehicle basis, Kileen argues "the *Ullman* court [...] discussed *Lueras* ***in the context of stacking***, not the failure of insurers to inform policyholders of available UM/UIM coverage and corresponding premiums on a per[-]vehicle basis." **[BIC 17]** (emphasis added). This statement is absolutely inaccurate.

The "primary issue" in *Ullman* was "whether insurers, in their offers of coverage, must include information about *stacked* (or aggregated) benefits insureds may be entitled to recover if they pay multiple premiums for UM/UIM coverage on

multiple vehicles." 2023-NMSC-030, ¶ 1 (emphasis in original), ¶ 27 (the plaintiffs argued that notwithstanding the fact they signed a form rejecting UM/UIM coverage, the rejections were invalid because the forms "failed to inform them that, had they selected UM/UIM coverage for multiple vehicles, they would have been entitled to stack the single coverage limits for each vehicle"). Kileen did not make any argument in this case that Progressive's offer of UM/UIM coverage was deficient because it did not provide his father with information regarding stacked coverage. Indeed, Progressive's offer provided him with information explaining the difference between stacked versus non-stacked coverage. **[RP 101-102]**.

While it is true that the concept of stacking was discussed in *Ullman* in the context of the argument that information regarding stacking must be provided to insureds in offers of UM/UIM coverage, it was not a stacking case. Instead, the cases before the Court in *Ullman*, just like the case before it now, raised arguments regarding deficiencies in the insurers' offers of UM/UIM coverage and the corresponding rejection forms. 2023-NMSC-030, ¶ 3 (in each case, "the insurer denied the claim on the basis that the insured had rejected UM/UIM coverage by signing and returning a selection/rejection form indicating rejection").

In addition to the argument made by the plaintiffs in *Ullman* that their rejections were invalid because they were not provided information regarding stacked coverage in the insurers' offers of UM/UIM coverage, the Luerases and Van

Epps made the same argument Petitioner makes here regarding per-vehicle offers of UM/UIM coverage. *Id.* ¶¶ 70-77. It was within the context of considering the "per-vehicle" argument that the *Ullman* court discussed and ultimately agreed with the *Lueras* court's interpretation that *Montano* simply did not address the issue. *Id.*

Kileen's reliance on *Montano* is entirely misplaced in light of the *Ullman* decision. Accordingly, his argument that *Montano* mandates or even suggested that offers of UM/UIM coverage be made on a per-vehicle basis should be rejected.

2. Imposing a requirement that insurers offer per-vehicle UM/UIM coverage will not encourage consumers, who would otherwise reject such coverage, to purchase it.

Plaintiffs in *Ullman* failed to convince the Court that "New Mexico law, interpreted in light of the Legislature's clear purpose of encouraging the purchase of UM/UIM insurance, supports the imposition of a requirement that insurers offer per-vehicle UM/UIM coverage." *Id.* ¶ 76. After rejecting the Luerases and Van Epps' public policy arguments based on *Montano*, the *Ullman* court stated that they had "thus far only faintly developed an argument in support of [a requirement that insurers offer per-vehicle UM/UIM coverage]," and refused to rule on the "inadequately briefed issue." *Id.* ¶ 77.

Kileen's argument in this case fares no better. Other than his arguments related to *Montano*, Petitioner relies solely on the UM/UIM Statute for his public policy arguments. Petitioner suggests that the language in the UM/UIM Statute

referring to "*any* motor vehicle" requires that the insured be given the option to reject UM/UIM coverage for each insured vehicle and that a failure to allow an insured to accept or reject UM/UIM coverage on a per-vehicle basis renders the offer of UM/UIM coverage meaningless. **[BIC 3]** (citing the UM/UIM Statute and stating, "[w]ithout providing the option to reject UM/UIM coverage for each insured vehicle, Progressive failed to make a meaningful offer of UM/UIM benefits" and that "it was simply impossible for the insured to knowingly and intelligently act to reject UM/UIM coverage from the policy") (internal quotations and citations omitted).

Petitioner takes the use of the word "any" in the UM/UIM Statute to mean "an insured can purchase UM/UIM coverage for ***all, none or some*** of the vehicles" on a liability policy. *Id.* (emphasis in original). *See also* **[BIC 2-3]** (complaining "Progressive did not inform the insured that the Uninsured Motorist Statute both required and allowed UM/UIM to be purchased on ***all, some, or none*** of the three vehicles") (emphasis in original), and **[BIC 3]** (referring to the UM/UIM Statute in his revised "Question Presented" section). This interpretation asks the Court to strain the language and the purpose of the statute too far. Indeed, in *Lueras*, the Court of Appeals determined that "***nothing in the UM/UIM statute***" provides that insurers are required to offer policyholders UM/UIM coverage on a per-vehicle basis. *Ullman*, 2023-NMSC-030, ¶ 75 (emphasis added), *citing Lueras*, 2018-NMCA-051, ¶¶ 16-18. There simply is no support in the UM/UIM Statute itself or

extensive New Mexico case law addressing UM/UIM coverage for Kileen's argument.

It is well-established that the UM/UIM Statute "embodies a public policy of New Mexico to make [UM/UIM] coverage a part of every automobile liability insurance policy issued in this state, with certain limited exceptions," and "was intended to expand insurance coverage and protect individual members of the public against the hazards of culpable uninsured motorists." *Romero v. Progressive Nw. Ins. Co.*, 2010-NMCA-024, ¶ 15, 148 N.M. 97, 230 P.3d 844, *citing Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 6, 111 N.M. 154, 803 P.2d 243. This Court recently stated that the UM/UIM Statute is interpreted liberally "to implement [the] purpose of compensating those injured through no fault of their own" and "to ensure that the insured's reasonable expectations are met and that an insured gets what he or she pays for and no more." *Ullman*, 2023-NMSC-030, ¶ 31. The *Ullman* court further stated that "our case law setting out the requirements for valid offers and rejections of UM/UIM insurance coverage has also sought to advance the legislative purpose of encouraging the purchase of UM/UIM coverage among New Mexico motorists." *Id.* ¶ 33.

Petitioner makes many gratuitous, unsupported arguments, such as: (1) "A meaningful offer of UM/UIM [coverage] requires the insurance company to explain that any vehicle can have UM/UIM up to the amount of the liability insurance" and

"[w]ithout that knowledge, prospective insureds cannot make knowing, meaningful decisions," **[BIC 2]** (citations omitted), (2) "Progressive failed to make a meaningful offer of UM/UIM benefits" by not making premium offers that showed UM/UIM coverage "is available for any vehicle insured with the insurance company," making it "simply impossible for the insured to knowingly and intelligently act to reject UM/UIM coverage," **[BIC 3]** (internal quotations and citations omitted), (3) "insureds need choices in order to make sound and intelligent decisions regarding UM/UIM coverage," **[BIC 14]**, (4) "[c]onsumers cannot knowingly and intelligently waive, reduce or reject UM/UIM coverage on a multi-vehicle policy if they are unaware of the available coverage limits and the corresponding amounts of the premiums related to such levels of coverage, including UM/UIM benefits, that may be available for purchase," **[BIC 14]**, and (5) by not being offered UM/UIM coverage on a per-vehicle basis, an insured is "deprived" of the "right to consider numerous factors when purchasing a policy, such as what he can afford depending on the vehicle, which vehicles should be subject to more UM/UIM coverage, and which vehicles should be subject to less coverage or none at all," **[BIC 18]**. Other than these repeated, vague, overly broad, self-serving statements, Kileen utterly fails to explain ***how*** Progressive's offer of UM/UIM coverage was not meaningful or ***how*** it prevented his father from making a knowing, intelligent and informed decision regarding what UM/UIM coverage was available to him and at what price. He

similarly fails to elaborate ***how*** his father could have possibly been "unaware of the available coverage limits and the corresponding amounts of premiums related to such levels of coverage" or was "deprived" of the "right to consider numerous factors" in purchasing the policy, based on the lack of "per-vehicle" choices in Progressive's offer of UM/UIM coverage in this case.

Kileen fails to address how a per-vehicle offer of UM/UIM coverage would have encouraged his father to purchase such coverage, fails to explain how Progressive's offer in any way discouraged Kileen's father from purchasing such coverage, or fails to articulate how Progressive's offer, as it was made to his father, did not provide "clear, comprehensible information about the costs and benefits of offered coverages." *Ullman*, 2023-NMSC-030, ¶ 41 (stating, "[t]he purpose of the UM/UIM statute is best advanced when insureds are provided clear, comprehensible information about the costs and benefits of offered coverage"). His arguments consist of mere sound bites lacking any substance. Indeed, Kileen does not develop his argument and it is not this Court's job to do it for him.

It is difficult to understand how Progressive's offer of UM/UIM coverage, which included UM coverage equal to his liability limits, provided him with thirteen coverage options with corresponding premium costs, and provided a description of stacked coverage; and Kileen's father's written rejection of that offer, which was incorporated into the Policy via the declarations pages, did not fully comply with

New Mexico law and serve the purpose behind the UM/UIM Statute. To be sure, Petitioner does not explain how it did not comply or how a new requirement that offers of UM/UIM coverage be made on a per-vehicle basis would further New Mexico public policy regarding UM/UIM insurance. Progressive's offer of UM/UIM coverage was meaningful, clear, and comprehensive, and gave Petitioner's father sufficient information to make a knowing and intelligent decision as to whether he wanted or did not want UM/UIM coverage. Kileen's father simply did not want UM/UIM coverage ***in any amount or for any price*** and additional coverage/premium options on a per-vehicle basis would not have made a bit of difference.

In *Allstate Fire & Cas. Ins. Co. v. Trissell*, the United States District Court for the District of New Mexico (Hon. Judge Paul Kelly, Jr., Sitting by Designation), considered arguments made by the Trissells that Allstate did not obtain a valid rejection of stacked coverage because the offer of UM/UIM coverage did not "provide a menu list with the price of UM/UIM coverage for each vehicle for the available level of coverage," "show the available levels of stacked coverage per vehicle with a corresponding price per vehicle," and "contain a per-vehicle rejection of UM/UIM [coverage] on each vehicle." No. 1:17-cv-00362 PJK/GBW, 2017 WL 6028515, * 2 (D.N.M. Dec. 5, 2017). The Trissells further maintained that "the [rejection] form also should have shown the separate costs of stacking none, two, or

three of the coverages (and offered such options) and contained a written rejection of stacking for each vehicle." *Id.* * 3. Like the Policy at issue in this case, the Allstate policy did not provide an option to purchase UM/UIM coverage on some vehicles and reject it on others. *Id.* Judge Kelly concluded that "[t]here is no requirement that an insurer offer UM/UIM coverage on a per-vehicle basis in a multi-vehicle policy." *Id.* * 4. He explained that the "premium disclosure and rejection are designed for available options, ***not every permutation imaginable***." *Id.* (emphasis added), *citing Govt. Employees Ins. Co. v. Shroyer*, No. 1:15-cv-00306 PJK/SCY, 2015 WL 12669885, * 4 (D.N.M. Dec. 1, 2015).

In *Shroyer*, the plaintiffs argued that "an insured must be allowed to purchase UM coverage on each car individually, not on [an] 'all cars' or 'no cars' basis." 2015 WL 12669885, * 3. Shroyer also argued that the insurer's form was deficient "because it does not allow the insured to select different amounts of coverage for each vehicle, should the insured want to purchase coverage on multiple vehicles." *Id.* Like Kileen argues in this case, Shroyer argued that per-vehicle options were "essential for an informed decision" as to UM/UIM coverage. *Id.* The federal district court rejected Shroyer's argument, stating:

> The New Mexico Supreme Court has indicated that disclosure requirements apply to 'available option[s]' or 'available coverage option[s].' *Jordan*, 245 P.3d at 1217, 1220-21, 1223-24. ***There simply is no requirement that an insurer make available, let alone disclose, every permutation regardless of whether it is offered as an option. Taken to its logical end, Ms. Shroyer's approach would require an***

> ***infinite number of choices, an approach that is unworkable***, particularly if a large number of vehicles are involved or vehicles are changed frequently.

Id. * 4 (emphasis added). The *Shroyer* court noted that the insured's "suggestion that an insured be allowed (in the same policy) to elect UM coverage on one vehicle and not another '***would have simply caused confusion rather than alleviating it***.'" *Id.* (emphasis added), *citing Jaramillo v. Govt. Employees Ins. Co.*, Civ. No. 10-1095 JCH/LFG, 2011 WL 13085936, * 7 (D.N.M. Sept. 14, 2011) (rejecting the plaintiffs' argument that the option form provided "insufficient information because it failed to advise them of their ability to reject or choose lower UM/UIM coverage for one or more of their vehicles while maintaining UM/UIM coverage on their vehicles"). In the scenario presented in *Shroyer*, where the policy covered three vehicles and offered five different levels of coverage, the federal court determined that if Ms. Shroyer "were allowed to make separate selections or rejections of UM coverage on each of three vehicles, there would be ***216 possible combinations of UM coverage***." *Id.* * 2 (emphasis added).

In *Hawley v. Farm Bureau Prop. & Cas. Ins. Co.*, the Tenth Circuit Court of Appeals considered the insured's argument that the insurer was required to offer "every combination of UM/UIM coverage stacking for an insured's rejection of stacked coverage to be valid." 840 Fed.Appx. 354 (10th Cir. 2021). The Tenth Circuit considered New Mexico law set forth in *Montano*, *Jordan* and *Lueras* and

concluded, "we have no reason to predict that the New Mexico Supreme Court would require insurers to offer every possible stacking combination before a rejection can be valid." *Id.* 363. The *Hawley* court found the reasons given by the United States District Court for the District of New Mexico in *Shroyer* and *Trissell*, for concluding that "insurers need not offer every combination of UM/UIM coverage or stacking" was compelling. Accordingly, the court rejected Hawley's argument that "the only way [the insurer] could have offered a sufficient range of choice was by providing every combination of stacking for every vehicle, potentially necessitating a vastly expanded number of options." *Id.* 364.

Kileen's argument, like those presented by the Luerases and Van Epps in *Ullman*, should be rejected. Not only is Petitioner's argument weak and undeveloped, but per-vehicle offers of UM/UIM coverage are simply not a workable option and would only create confusion, chaos, endless litigation, and depletion of judicial resources.

B. IF THE COURT WERE TO IMPOSE A REQUIREMENT THAT INSURERS OFFER UM/UIM COVERAGE ON A PER-VEHICLE BASIS, THAT NEW REQUIREMENT SHOULD BE APPLIED PURELY PROSPECTIVELY AS WAS DONE IN *MONTANO*.

Should this Court impose new requirements on insurers to offer UM/UIM coverage on a per-vehicle basis in order to establish a valid rejection of UM/UIM coverage, the new standard should apply purely prospectively.

This Court set forth requirements nearly fifteen years ago in *Jordan* that insurers must meet to establish that an offer of UM/UIM coverage was meaningful and allowed the consumer to knowingly and intelligently act to accept or reject the offer. *Jordan* did not mandate that offers be made on a per-vehicle basis. This Court recently imposed a new requirement in *Ullman* that offers of UM/UIM coverage must now include "a brief discussion of stacking." 2023-NMSC-030, ¶ 30. Petitioner does not argue that Progressive's offer did not meet the *Jordan* or *Ullman* requirements.

In *Jordan*, the holding was applied retroactively because, according to the *Jordan* court, its ruling did not establish new principles of law but, instead, imposed requirements that were "based on settled principles articulated in twenty years of UM/UIM jurisprudence." 2010-NMSC-051, ¶ 27 (internal quotation marks omitted). In *Montano*, on the other hand, where this Court modified the judicially-created doctrine of stacking to require written rejection of stacked coverage where previously the Court used a case-by-case ambiguity analysis, the new rule was applied prospectively only, because it was "new, and not easily foreshadowed." 2004-NMSC-020, ¶ 17. The *Montano* court held that the new rule could not equitably be applied to the insurer in that case "before it has had an opportunity to alter its policy language." *Id.*

In determining whether a new rule of law should be applied prospectively or retroactively, this Court considers the three factors described by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *overruled by Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). *See Rodriguez v. Brand West Dairy*, 2016-NMSC-029, 378 P.3d 13, *citing Beavers v. Johnson Controls World Services, Inc.*, 1994-NMSC-094, ¶¶ 20-22, 118 N.M. 391, 881 P.2d 1376. The first factor considers the degree to which the decision "establish[es] 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." *Rodriguez*, 2016-NMSC-029, ¶ 29, (citation omitted). Under the second factor, courts must "weigh the merits and demerits" of retroactive application "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Rodriguez*, 2016-NMSC-029, ¶ 31, *quoting Marckstadt v. Lockheed Martin, Corp.*, 2010-NMSC-001, ¶ 31, 147 N.M. 678, 228 P.3d 462. Finally, the third factor "weighs the inequity imposed by retroactive application" to determine whether the "decision [...] could produce substantial inequitable results if applied retroactively [...]." *Rodriguez*, 2016-NMSC-029, ¶ 31, *quoting Marckstadt*, 2010-NMSC-001, ¶ 31. "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." *Beavers*, 1994-NMSC-094, ¶ 38.

Should this Court determine that per-vehicle offers are required in New Mexico, the new rule should not be implemented before insurers have time to revise their policies and offers of UM/UIM coverage to comply with the new rule. Drafting offers that provide choices as to each vehicle on a policy in a way that will not overwhelm and confuse insureds would be challenging, if not impossible, given that offers on a policy involving three vehicles and five-levels of coverage, as noted by the court in *Shroyer*, would result in hundreds of options. A new rule would require a complete overhaul of how UM/UIM coverage is offered in New Mexico and require insurers to determine how to assess the risks and costs of such coverage and calculate premiums accordingly. Such drastic changes would take a considerable amount of time for insurers to implement, and it would be incredibly unjust and inequitable to apply the new rule retroactively or selectively prospectively.

Contrary to Petitioner's argument, the illustration in *Montano* did not foreshadow that a per-vehicle offer was necessary for a valid rejection of UM/UIM coverage. In addition, Kileen, like the Luerases and Van Epps in *Ullman*, presents no evidence that a per-vehicle offer of UM/UIM coverage was foreshadowed in New Mexico's UM/UIM jurisprudence. A per-vehicle requirement, if implemented by this Court, would be an entirely new rule, would constitute a new approach, and

would require major, sweeping changes in the insurance industry in New Mexico, such that applying the rule to insurers before they have adequate time to implement the necessary changes would be wholly inequitable. *See Montano*, 2004-NMSC-020, ¶ 22.

The extent to which insurers have relied on the validity of per-policy offers of UM/UIM coverage cannot be overemphasized. *Ullman*, 2023-NMSC-030, ¶ 47, *quoting Beavers,* 1994-NMSC-094, ¶ 27 ("The extent to which the parties in a lawsuit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized."). If the court determines a change is warranted, insurers should be given sufficient time to implement new procedures to ensure compliance with the Court's directives. Retroactive application of any new requirement that insurers offer UM/UIM coverage on a per-vehicle basis to establish a valid rejection of UM/UIM coverage would be analogous to the enactment of a retroactive statute, which is disfavored in New Mexico. *See* § 12-2A-8 NMSA ("A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise[,] or its context requires that it operate retrospectively."); *see also Hill v. Vanderbilt Capital Advisors, LLC,* 834 F.Supp.2d 1228, 1262 (D.N.M. 2011) ("A retrospective law affects acts, transactions, or occurrences that happened before the law came into effect and impairs vested rights, requires new obligations, imposes new duties, or affixes new disabilities to past

transactions."). Retrospective application of the rule would be fundamentally unfair to insurers "before [they have] had an opportunity to [ensure compliance]." *Ullman*, 2023-NMSC-030, ¶ 49, *quoting Montano*, 2004-NMSC-020, ¶ 22.

V. CONCLUSION

Kileen's arguments are not supported by New Mexico statutes, case law or public policy. He does not argue that Progressive's offer of UM/UIM coverage or the form Kileen's father signed rejecting such coverage was ambiguous or otherwise did not comply with New Mexico law. Instead, he argues that under New Mexico law, an insured must be given every conceivable option in order for the offer and corresponding rejection to be valid. This is not the law in New Mexico now and it should not be the law in the future.

Progressive's offer of UM/UIM coverage fully informed Kileen's father that UM/UIM coverage was available to him up to his liability limits, explained the benefits provided by stacked (versus unstacked) coverage, and provided numerous coverage options with corresponding premiums ranging from a minimal cost of $4.08/month up to $40.75/month. Progressive's offer and the range of coverage and premium costs provided to Kileen's father allowed him to understand what coverage was available to him and at what cost. With that information, his decision to reject coverage was fully informed and knowingly made. Neither the UM/UIM statute nor

New Mexico's UM/UIM jurisprudence dictates that consumers have the right to choose coverage on a per-vehicle, as opposed to per-policy, basis.

A new rule requiring insurers to make offers of UM/UIM coverage on a per-vehicle basis would wreak havoc on the insurance industry, upend insurers policies and practices, and result in unending protracted litigation over whether such offers were ambiguous or meaningful. Retroactive application of a new rule or even applying the rule to pending cases would be inequitable and unjust. To the extent the Court implements a new rule requiring per-vehicle offers of UM/UIM coverage, the new rule should be applied purely prospectively to give insurers time to comply with the new mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2024, I filed the foregoing electronically through the e-filing system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G), Defendant-Respondent Progressive Direct Insurance Company hereby certifies that its Answer Brief complies with the limitations set forth in Rules 12-318(F)(3), NMRA (2018). The brief was prepared using a proportionately spaced type-style or typeface (Times New Roman, 14 font) and contains 7655 words. The word count was obtained through Microsoft Word 2016.

/s/ Meena H. Allen
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