



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JARED KILEEN,

Plaintiff-Petitioner,

v.

No. S-1-SC-39256
(Ct. App. No. A-1-CA-39384)

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

Defendants-Respondents.

PLAINTIFF-PETITIONER'S BRIEF IN CHIEF

Oral Argument Requested

**Civil Appeal from the Second Judicial District Court,
Case No. D-202-CV-2019-06635, Hon. Denise Barela Shepard**

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Rule 12-318(G) NMRA Statement of Compliance

I HEREBY CERTIFY that this Brief was prepared using proportionally-spaced, 14-point, Times New Roman typeface in the Microsoft Word 2013 word-processing program and the body of the foregoing Brief in Chief contains 4801 words according to Microsoft Word's word-count function, in compliance with Rule 12-318(F)(3).

/s/ Brian K. Branch

Brian K. Branch

Attorney for Plaintiff-Petitioner

Plaintiff-Petitioner Jared Kileen hereby respectfully submits his Brief-in-Chief pursuant to the New Mexico Supreme Court’s Order of February 21, 2024, requesting the parties to address Issue 1 set forth in the Petition for Writ of Certiorari.¹ For the reasons set forth below, Plaintiff-Petitioner requests that the district court’s judgment be reversed in its entirety.

I. Introduction

The Legislature mandated Uninsured/Underinsured (“UM/UIM”) coverage “with respect to *any* motor vehicle registered or principally garaged in New Mexico.” NMSA 1978, § 66-5-301(A) (emphasis added); *see also Montano v. Allstate Indem. Co.*, 2004-NMSC-020, ¶ 19, 135 N.M. 681, 92 P.3d 1255 (“§ 66–5–301(A) provides that no vehicle liability policy shall be delivered with respect to *any* vehicle registered or principally garaged in New Mexico unless UM/UIM coverage is provided therein.”). For 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. *See* § 66-5-301(A); *see also Montano*, 2004-NMSC-020, ¶ 20 (“As an illustration of our holding, in a multiple-vehicle policy insuring three cars, the insurer shall declare the premium charge for *each of the three* UM

¹ *Issue 1*: “Whether insurers are required to provide UM/UIM coverage for each motor vehicle insured unless the insured makes a valid written rejection of such coverage on a per-vehicle basis.”

coverages and allow the insured to reject, in writing, *all or some* of the offered coverages.”) (emphasis added). If consumers choose not to purchase UM/UIM coverage for *all* vehicles in a multi-vehicle policy, then they must do so in writing with the knowledge that UM/UIM was available for each vehicle covered by that policy. *See id*; *see also Marckstadt v. Lockheed Martin Corp*, 2010-NMSC-001, ¶ 16, 147 N.M. 678, 228 P.3d 462.

This Court’s interpretation (and the Legislature’s continued agreement) of the intent behind the Underinsured Motorist Statute allows insureds to purchase the amount of UM/UIM they can afford, up to the amount of the liability coverage, and need for their family on *any vehicle*. A meaningful offer of UM/UIM requires the insurance company to explain that *any vehicle* can have UM/UIM up to the amount of the liability insurance. Without that knowledge, prospective insureds cannot make a knowing, meaningful decision as required by this Court and intended by the Legislature. *Marckstadt v. Lockheed Martin Corp*, 2010-NMSC-001, ¶ 16; *see also Jordan v. Allstate*, 2010-NMSC-051, ¶ 18, 149 N.M. 162, 245 P.3d 1214.

Progressive, however, chose a different type of UM/UIM offer in this case: “all or nothing.” Progressive’s UM/UIM offer in this case was a limited and factually inaccurate choice: stacked or unstacked UM/UIM for all three vehicles. 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. The result was that the UM/UIIM premium offer did not reflect what the Legislature codified: UM/UIIM is available for any vehicle insured with the insurance company. *See* § 66-5-301(A). Without providing the option to reject UM/UIIM for each insured vehicle, Progressive failed to make a “meaningful[] offer” of UM/UIIM benefits. *See Marckstadt*, 2010-NMSC-001, ¶ 16. Consequently, it was simply impossible for the insured to “knowingly and intelligently act to reject” UM/UIIM coverage from the policy. *Id.*

This Court has consistently rejected an “all or nothing” approach to UM/UIIM insurance coverage. *See Montano*, 2004-NMSC-020, ¶¶ 19-20. This case provides an opportunity for the Court to ensure New Mexico’s insureds can select, reject, or choose a combination of UM/UIIM insurance to fit their families’ needs as they see fit, consistent with New Mexico law. Allowing an “all or nothing” approach to UM/UIIM coverage prohibits insurance consumers from making an informed decision regarding their statutory right to UM/UIIM insurance coverage.

II. Question Presented

The Uninsured Motorist Statute requires insurance companies to offer UM/UIIM insurance on “*any* motor vehicle” insured through a motor vehicle liability policy in New Mexico *and* to obtain a meaningful rejection of that UM/UIIM if the insured chooses not to purchase UM/UIIM. NMSA 1978, § 66-5-301(A)(emphasis added). Progressive offered its insured UM/UIIM 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?²

III. Summary of Facts

On August 10, 2018, a vehicle driven by Tamberin Didio struck a motorcycle ridden by Plaintiff-Petitioner. Ms. Didio caused the collision, and Plaintiff-Petitioner suffered serious injuries, including hospitalization, which exceeded available benefits under Ms. Didio’s insurance policy. At the time of the collision, Plaintiff-Petitioner was insured under a Progressive insurance policy issued to his father, Martin Kileen, Policy No. 37095948, that covered three motorcycles, including the one Plaintiff-Petitioner rode when Ms. Didio crashed into him.

The policy provided *combined* single limits coverage for three motorcycles in the amount of \$500,000 per accident, and set forth premiums for stacked and unstacked UM/UIM coverage for all three motorcycles *combined*. The policy provided premiums for stacked and unstacked UM/UIM coverage for various levels of coverage, ranging from \$25,000 each person/\$50,000 each accident bodily

² In its February 12, 2024 Order, the Court asked the parties to brief Issue 1 from Plaintiff-Petitioner’s petition for writ of certiorari, which is “Whether insurers are required to provide UM/UIM coverage for each motor vehicle insured unless the insured makes a valid written rejection of such coverage on a per-vehicle basis.”

injury/\$10,000 property damage up to \$500,000 combined single limit coverage.

The Coverage offered was as follows:

<input checked="" type="checkbox"/>	I reject the option to purchase any UM/UIM Coverage for bodily injury and property damage	premium \$0.00
I want Stacked UM/UIM Coverage at the limits selected below:		
<input type="checkbox"/>	\$25,000 each person/\$50,000 each accident bodily injury/\$10,000 each accident property damage	\$136.00
<input type="checkbox"/>	\$50,000 each person/\$100,000 each accident bodily injury/\$25,000 each accident property damage	\$177.00
<input type="checkbox"/>	\$100,000 each person/\$300,000 each accident bodily injury/\$50,000 each accident property damage	\$341.00
<input type="checkbox"/>	\$250,000 each person/\$500,000 each accident bodily injury/\$100,000 each accident property damage	\$470.00
<input type="checkbox"/>	\$300,000 combined single limit	\$471.00
<input type="checkbox"/>	\$500,000 combined single limit	\$489.00
I want Non-Stacked UM/UIM Coverage at the limits selected below:		
<input type="checkbox"/>	\$25,000 each person/\$50,000 each accident bodily injury/\$10,000 each accident property damage	\$49.00
<input type="checkbox"/>	\$50,000 each person/\$100,000 each accident bodily injury/\$25,000 each accident property damage	\$106.00
<input type="checkbox"/>	\$100,000 each person/\$300,000 each accident bodily injury/\$50,000 each accident property damage	\$206.00
<input type="checkbox"/>	\$250,000 each person/\$500,000 each accident bodily injury/\$100,000 each accident property damage	\$283.00
<input type="checkbox"/>	\$300,000 combined single limit	\$283.00
<input type="checkbox"/>	\$500,000 combined single limit	\$295.00
This form is made a part of your policy as if attached thereto.		

However, the policy did *not* provide the option for the insured to elect UM/UIM coverage in any amount, stacked or unstacked, for each individual vehicle covered under the policy, and did not inform the insurer what the premiums for UM/UIM would be on a per-vehicle basis. In addition, contrary to this Court's ruling in *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 135 N.M. 681, 92 P.3d 1255, the policy required Plaintiff-Petitioner's father to select stacked or non-stacked UM/UIM coverage on a take it or leave it basis. In other words, rather than allowing the policyholder to decide how many vehicles he could afford to cover with stacked as opposed to non-stacked coverage, Progressive required him to either select

stacked coverage on all three vehicles or select non-stacked coverage on all three vehicles,.

Following the collision, Plaintiff-Petitioner demanded coverage in the amount of \$1,500,000, claiming that the policy violated New Mexico law as it pertained to UM/UIM coverage because he was not given the option to elect, or reject, UM/UIM coverage on a per-vehicle basis. Progressive denied the claim.

IV. Course of Proceedings and Disposition

Plaintiff-Petitioner filed suit against Progressive and Ms. Didio (Defendants-Respondents) on August 22, 2019 and a First Amended Complaint on August 28, 2019. RP 1-10, RP 14-23. Defendants-Respondents filed Answers to the First Amended Complaint on August 28, 2019 (Ms. Didio)³ and February 21, 2020 (Progressive). RP 26-32, RP 53-62. The parties filed cross-motions for summary judgment on Plaintiff-Petitioner's claims for benefits and for a declaratory judgment that Progressive's policy violated New Mexico law.⁴ RP 63-82, RP 111-126. Following a telephonic hearing on October 6, 2020, RP 173-74, the District Court, on October 29, 2020, issued two orders, one denying Plaintiff-Petitioner's motion, RP 179, and one granting Progressive's motion. RP 180-81.

³ Plaintiff's claim against Ms. Dido have been resolved.

⁴ Plaintiff filed a motion for partial summary judgment on declaratory judgment claim against Progressive on June 16, 2020, RP 63-82, and Defendants-Respondents filed a motion for summary judgment on July 8, 2020, RP 111-126.

On November 11, 2020, Plaintiff-Petitioner (then Appellant) filed his Notice of Appeal of the October 29, 2020 Order Granting Progressive's Motion for Summary Judgment and Dismissal with Prejudice pursuant to Rule 12-201(A)(1)(b) NMRA. RP 182-86. After briefing, the Court of Appeals, on September 7, 2021, issued a Notice of Proposed Summary Disposition affirming the District Court's orders. On September 24, 2021, Petitioner filed a Response Memorandum in Opposition to Proposed Summary Disposition. On February 7, 2022, the Court of Appeals filed its Memorandum Opinion affirming the District Court's orders.

On March 8, 2022, Plaintiff-Petitioner filed a Petition for Writ of Certiorari. On April 20, 2022, this Court issued a writ of certiorari and order, granting the petition as to both issues presented in the petition, and held the matter in abeyance pending the Court's disposition in the related matter of *Ullman v. Safeway Ins. Co.*, S-1-SC-36580. On October 2, 2023, the Court issued its opinion in *Ullman*, 2023-NMSC-030, 539 P.3d 668. In an Order dated February 12, 2024, the Court vacated its April 20, 2022 Order as to the abeyance, found that Issue 2 presented in the petition for writ of certiorari is moot, and requested the parties to submit briefing on Issue 1 in accordance with Rule 12-318, NMRA, and comment on the New Mexico Court of Appeals memorandum opinion issued on February 7, 2022.

V. Standard of Review

Because this case involves the interpretation of a contract, this Court's review is *de novo*. “[T]he interpretation of an insurance contract is a matter of law.” *Salas v. Mountain States Mut. Cas. Co.*, 2007-NMCA-161, ¶ 8, 143 N.M. 113, 173 P.3d 35. The interpretation of insurance contracts, like statutes, present questions of law that are reviewed *de novo*. *Rummel v. Lexington Ins. Co.*, 1997-NMCA-041, ¶ 60, 123 N.M. 752, 945 P.2d 970.

Further, this Court's review of summary judgment is *de novo*. *City of Rio Rancho v. Amrep SW. Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414, *United Nuclear v. Allstate Ins. Co.*, 2012-NMSC-023, ¶ 9, 285 P.3d 644. When reviewing a motion for summary judgment on appeal, the Court “must examine the whole record, considering the facts and drawing all reasonable inference in a light most favorable to the nonmoving party.” *Potter v. Pierce*, 2015-NMSC-002, ¶ 8, 342 P.3d 54. The Court views the facts in the light most favorable to the party opposing summary judgment and indulges all reasonable inferences in favor of a trial on the merits. *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943.

VI. Argument

A. New Mexico's Long-Standing Policy Requires Insurers, Including Progressive, to Provide Consumers Complete Information Regarding Available UM/UIM Coverage So Consumer Can Make Informed Choices

New Mexico law requires insurers to give consumers understandable information regarding the maximum and minimum amounts of UM/UIM coverage available for purchase, and the corresponding costs for each coverage amount, so that the insureds can make a knowing and informed decision about how much coverage they need and can afford. *Jordan*, 2010-NMSC-051, ¶¶ 20, 24, 27. New Mexico law also requires insurers to attach or endorse a rejection (*i.e.*, provide affirmative evidence of the rejection) of UM/UIM coverage to a policy in a manner that allows the insureds a fair opportunity to reconsider or later reflect on any decision to reject. *Id.* ¶¶ 22, 32, 25.

Insurers are required to provide UM/UIM coverage under the UM statute unless the insurer obtains a valid rejection of such coverage. *Marckstadt*, 2010-NMSC-001, ¶ 15. All multi-vehicle UM/UIM policies, such as the policy at issue here in which more than one vehicle is insured, are presumed to include stacked UM/UIM coverage unless the insurer obtains a valid written rejection of stack coverage from the insured. *Montano*, 2004-NMSC-020, ¶¶ 18-19. If a policy is reformed to provide UM/UIM coverage, reformation of the policy includes stacked coverage under New Mexico law. *Arias v. Phoenix Indem. Ins. Co.*, 2015-NMCA-027, ¶¶ 11, 14, 495 P.3d 1136.

New Mexico's UM/UIM statute is broadly construed by our courts because the public policy underlying New Mexico's UM/UIM statute, § 66-5-301, is to

encourage New Mexico families to purchase UM/UIM coverage to protect against the tragic hazards of auto accidents with culpable uninsured motorists. *Marckstadt*, 2010-NMSC-001, ¶ 15. “The policy behind our UM/UIM statute is consistent with the requirement that the insurer offer the maximum amount of UM/UIM coverage to the insured.” *Progressive Nw. Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-050, ¶ 12, 149 N.M. 157, 245 P.3d 1209. The insured is also entitled to purchase the minimum limits of UM/UIM coverage with limits corresponding to the Mandatory Financial Responsibility Act (“MFRA”). *Jordan*, 2010-NMSC-051, ¶¶ 16; *Weed Warrior*, 2010-NMSC-050, ¶ 12 (quoting *Montano*, 2004-NMSC-020, ¶ 16). As a result, the form and manner of how insurers present offers to the insured in obtaining UM/UIM selections or rejections is of paramount importance. *Jordan*, 2010-NMSC-051, ¶¶ 17, 21. If the insured does not understand the full extent of UM coverage available for purchase, and at what cost, the insured cannot make an informed decision before deciding how much coverage to purchase or reject. *Id.*

Fourteen years ago the *Jordan* Court found that because insurers continued “to offer UM/UIM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice[,]” 2010-NMSC-051, ¶ 20, it was “necessary to prescribe workable requirements for a valid and meaningful rejection of UM/UIM coverage in amounts authorized by statute.” *Id.* A policy is reformed to provide UM/UIM coverage equal to liability limits “[i]f 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[.]” *Id.* ¶ 22 (emphasis added). Further, if, as in this case, the insurer sells stacked UM/UIM coverage, an invalid waiver requires the insurer to provide stacked coverage. *Lueras v. GEICO Gen. Ins. Co.*, 2018-NMCA-051, ¶ 32, 424 P.3d 665; *see Arias*, 2014-NMCA-027, ¶¶ 1, 14.

This Court construes whether insurers inform the insured as to the “maximum amount” of insurance available to the insured. *Jordan*, 2010-NMSC-051, ¶ 15; *Weed Warrior*, 2010-NMSC-050, ¶ 14. “The provision of the maximum possible amount of UM/UIM coverage in every insurance policy is the default rule, and any exception to that rule must be ‘construed strictly to protect the insured.’” *Jordan*, 2010-NMSC-051, ¶ 15 (quoting *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 6, 111 N.M. 154, 803 P.2d 243). The “maximum possible amount” of coverage is also understood as providing the insured with “affirmative evidence of the extent of coverage” available, *id.*, ¶ 18, or making clear the “full amount of coverage to which the insured is entitled.” *Id.* ¶¶ 2, 29; *see also Weed Warrior*, 2010-NMSC-050, ¶ 12 (same). And this Court acknowledges that § 66-5-301 also requires the insurer to offer the minimum levels of coverage corresponding to the limits set forth by the

MFRA. *Jordan*, 2010-NMSC-051, ¶ 16; *Weed Warrior*, 2010-NMSC-050, ¶¶ 5, 10, 12.

The *Jordan* Court’s requirement that the insurer must “inform the insured about premium costs corresponding to the available levels of coverage” results from, and is identical to, the New Mexico Supreme Court’s language in *Montano v. Allstate*, 2004-NMSC-020. The *Montano* Court required insurance carriers to “provide insureds with the premium costs for each available level of stacked coverage in order to allow insureds to contract for the exact amount of coverage they can afford and want to purchase.” *Jordan*, 2010-NMSC-051, ¶ 24 (explaining *Montano*, 2004-NMSC-020, ¶ 20). Insurers are required to provide affirmative evidence of the “extent of UM/UIM coverage” in the rejection form and in the policy issued to the insured. *Id.* ¶¶ 18, 27. As recognized by the Special Concurrence in *Lueras*, “*Montaño* requires ‘insurers [to] disclose the premium costs for each available level of stacked coverage as a means of guaranteeing that consumers can knowingly exercise their statutory rights to UM/UIM coverage.’” *Lueras*, 2018-NMCA-051, ¶ 32 (bracket in original) (quoting *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646).

As discussed below, Progressive’s offer of UM/UIM coverage does not comply with New Mexico law. Thus, the policy should be reformed to afford the highest level of stacked UM/UIM coverage for Plaintiff-Petitioner.

B. Progressive's Policy Violates New Mexico Law Because It Does Not Offer UM/UIM Coverage Options For Each Vehicle Insured and Does Not Provide the Cost of the UM/UIM Coverage Premium For Each Vehicle

Although Plaintiff-Petitioner insured three vehicles, Progressive's selection form on page 3 of 6 of the policy fails to correctly advise him of the coverage amounts and corresponding premium for each of the three vehicles. Instead, the policy provides information only as to the premiums for the stacked and non-stacked amounts of UM/UIM coverage for all three vehicles. For example, as shown above, the policy offers stacked UM/UIM coverage for \$25,000/\$50,000 per person, each accident, with a premium of \$136.00 for all three motorcycles and non-stacked UM/UIM coverage for all three motorcycles for \$49.00. Nowhere in the policy does Progressive advise the insured as to what UM/UIM coverage and corresponding premium amounts are for each motorcycle. This prohibits the policyholders from choosing the amount of UM/UIM coverage, if any, they desire for each vehicle based on the premium. The Progressive policy prevents the policyholder from selecting, reducing or rejecting UM/UIM coverage for one or two vehicles, and instead requires the insured to select, reduce or reject coverage on all three vehicles on an all or none, take it or leave it basis. The policy prevents the insured from the opportunity of selecting varying amount of coverage depending on the vehicle and the amount of the premium (*e.g.*, the policyholder may chose UM/UIM for a motorcycle that is driven more than the others), and from rejecting UM/UIM coverage for vehicles that are in repair, rarely used, or temporarily garaged.

Under New Mexico law, insureds need choices in order to make sound and intelligent decisions regarding UM/UIM coverage. Consumers cannot knowingly and intelligently waive coverage on a multi-vehicle policy if they are unaware of the coverage limits available for each vehicle and the premiums related to such levels of coverage, including UM/UIM coverage that may be available for purchase. In this case, Progressive offered Plaintiff-Petitioner a take-it-or-leave it policy, which prohibited Plaintiff-Petitioner's freedom to contact to decide how much coverage they can afford.

Consumers 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. Here, Progressive offered Plaintiff-Petitioner a take-it-or-leave it policy. This resulted in Plaintiff-Petitioner not having the choice to purchase UM/UIM coverage for fewer than all three of his vehicles and/or to opt out purchasing UM/UIM coverage for one or more vehicles and/or reducing UM/UIM coverage on one or two of the motorcycles covered under the policy. The Progressive policy necessarily interfered with Plaintiff-Petitioner's freedom to contract, and is squarely at odds with the Court's ruling as well as the illustration of that ruling in *Montano*:

As an illustration of our holding, ***in a multiple-vehicle policy insuring three cars***, the insurer shall declare the premium charge ***for each of the three UM coverages and allow the insured to reject, in writing, all or some of the offered coverages***. Thus, hypothetically, in the case of a \$25,000 policy, if the premium

for one UM coverage is \$65m two coverages is an additional \$60, and three coverages \$57 more, the insured who paid all three (for a total premium of \$182) would be covered up to \$75,000 in UM bodily injury coverage. However, the insured may reject, in writing, the third available coverage and pay \$125 for \$50,000 of UM coverage; or the insured may reject, in writing, the second and third coverages and pay \$65 for \$25,000 of UM coverage; or the insured may reject all three UM coverages. In any event, the coverage would not depend on which vehicle, if any, was occupied at the time of the injury. Thus, *the insured's expectations will be clear, and an insured will only receive what he or she has paid for.*

2004-NMSC-020, ¶ 20, 135 N.M. 681, 92 P.3d 1255 (emphasis added).

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. Moreover, the Court in *Ullman v. Safeway Ins. Co.* cited to the above-quoted illustration in *Montano* for the proposition that, at least with respect to stacking, "some flexibility ... could benefit insureds by ensuring the availability of low-cost options to consumers seeking lower premiums" and "expressed the hope that our decision would help to ensure that, going forward, insureds would receive the benefit of the premiums they had paid—no more, and no less." 2023-NMSC-030, ¶ 32, 539 P.3d 668.

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 in that it:

...reduces the freedom of the parties to contract for less coverage and thus their freedom to decide how much coverage they can afford. This could frustrate, rather than advance, the legislative intent behind the UM statute. By requiring insurers to offer UM coverage, see NMSA 1978, § 66-5-301 (1983), the legislature wanted to encourage insureds to purchase such coverage.

Requiring stacking for all vehicles would put the insured who owns multiple vehicles in the position of paying for all of the coverages or rejecting UM coverage**1260 *686 altogether, rather than deciding how much coverage they can afford. This could result in some lower-income insureds who own multiple vehicles being effectively “priced out” of UM coverage.

2004-NMSC-020, ¶ 16, 135 N.M. at 685-86, 92 P.3d at 1259-60.

The *Ullman* Court also noted the public policy considerations for valid offers and rejections of UM/UIM insurance coverage to “advance the legislative purpose of encouraging the purchase of such coverage among New Mexico motorists.” *Id.* ¶ 33. The *Ullman* Court reiterated that in *Marckstadt*, 2010-NMSC-001, ¶¶ 15-16, “[w]e determined that a knowing and intelligent rejection of UM/UIM coverage requires an affirmative act on the part of the insured,” *Ullman*, 2023-NMSC-030, ¶ 33, which Progressive did not afford Plaintiff-Petitioner in this case when it issued him take-it-or-leave-it UM/UIM coverage for this three vehicles. Importantly, in *Ullman*, the Court stressed that its “intention in setting out these requirements and stating that failure to meet them would result in reformation of the contract *was to provide a definitive guide to insurers as to what they must do to secure a legally binding rejection of coverage.*” *Id.* ¶ 35 (citing *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 25). The Court held that “[s]eeking to ensure that insureds could ‘make a realistically informed choice,’ we articulated clear ‘requirements for a valid and meaningful rejection of UM/UIM coverage in amounts authorized by statute.” *Id.* ¶ 34 (quoting *Jordan v. Allstate Inc. Co.*, 2010-NMSC-052, ¶ 20).

Again, the Progressive policy did not take into consideration the “clear requirements for a valid and meaningful rejection of UM/UIM coverage” articulated by this Court’s precedent.

C. **The Court of Appeals’ February 7, 2023 Memorandum Opinion, Based on the *Lueras* Decision, Is Limited to “All or Nothing” Stacking, Not The Absence of Options to Select or Reject UM/UIM Coverage For Each Vehicle Insured**

In affirming the district court’s ruling in this case in its February 7, 2023 Memorandum Opinion, the Court of Appeals relied on its decision in *Lueras v. GEICO Gen. Ins. Co.*, 2018-NMCA-051, which rejected the notion that “all or nothing” policies are *per se* in violation of New Mexico law. As shown above, however, the *Ullman* Court, which consolidated *Lueras* and one other related appeal,⁵ 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. In fact, the *Ullman* Court left open for “further development” whether “Defendant-insurers must offer UM/UIM coverage on a per-vehicle basis.” 2023-NMSC-030, ¶ 58. This case falls into the “further development” category contemplated by the *Ullman* Court and presents a textbook example of an insurance company depriving its insureds of selecting UIM/UIM coverage for one vehicle and not the other(s), eliminating knowing and intelligent choices.

⁵ *Ullman* was consolidated with *Lueras* and *Rodriguez v. GEICO Indemnity Co.*, Case No. No. S-1-SC-37137.

Consistent with New Mexico case law cited above addressing UM/UIM coverage and statutory requirements in the context of public policy, the Progressive policy at issue should be reformed in order to provide full UM/UIM coverage. The policy deprived Plaintiff-Petitioner 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.

New Mexico jurisprudence and § 66-5-301 mandate protections for the insured at the time of making the decision to purchase or reject UM/UIM coverage. The requirement that UM/UIM coverage be *meaningfully* offered by insurers is “to encourage insureds to purchase such coverage.” *Weed Warrior*, 2010-NMSC-050, ¶ 12 (quoting *Montano*, 2004-NMSC-020, ¶ 16). This Court has never wavered in explaining that § 66-5-301 “embodies a public policy of New Mexico to make uninsured motorist coverage a part of every automobile liability policy issued in the state, with certain limited exceptions” and is “intended to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured motorists.” *Romero*, 1990-NMSC-111, ¶ 6. And “[w]hen construing the legislative intent behind our UM/UIM statute, this Court has long applied a ‘qualitatively different analysis’ than we use when construing many other types of statutes and insurance policies.” *Jordan*, 2010-NMSC-051, ¶ 15 (quoting *Padilla v.*

Dairyland Ins. Co., 1990-NMSC-025, ¶ 10, 109 N.M. 555, 787 P.2d 835). This Court “has liberally interpreted § 66-5-301 and its implementing regulation, now codified as 13.12.3.9 NMAC, for their remedial purposes.” *Jordan*, 2010- NMSC-051, ¶ 15; *see also Marckstadt*, 2010-NMSC-001, ¶ 14 (stating that the UM/UIM statute must be interpreted liberally to fulfill its remedial purpose of “expand[ing] coverage to protect members of the public against uninsured motorists”).

D. Retroactive Application Is Required

Plaintiff-Petitioner anticipates that Progressive will assert in its Answer Brief that, in the event the Court is inclined reverse the district court and find that, as a matter of law, the subject waiver form is invalid, the decision should be applied prospectively, not retroactively, similar to the Court’s decision in *Ullman*. In *Ullman*, the Court found:

While we observe ‘a presumption of retroactivity for a new rule [adopted] in a civil case,’ this presumption ‘may be overcome by a sufficiently weighty combination’ of several factors: (1) whether the decision to be applied prospectively establishes a new principle of law, (2) whether retroactive operation will advance or inhibit the operation of the new rule, and (3) whether retroactive application may ‘produce substantial inequitable results.’

2023-NMSC-030, ¶ 44 (quoting *Beavers v Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶¶ 22-23, 118 N.M. 391, 881 P.2d 1376). Here, the Court should reject an argument in favor of a presumption of retroactivity because none of the three factors are satisfied.

First, requiring an insured to offer UM/UIM coverage on a per vehicle basis for a multi-vehicle policy is not new law. As discussed above, the election form in this case is facially contrary to the “all or nothing” approach to UM/UIM insurance coverage that the Court disfavored *20 years ago* in *Montano*, 2004-NMSC-020, ¶¶ 19-20. Progressive is one of the largest insurance companies in the United States and is well aware of state-specific UM/UIM coverage requirements. It should not be permitted to violate long-standing consumer protection laws. Second, retroactive operation of will not “advance” or “inhibit” the purported “new rule.” The “old rule”; *i.e.*, providing UM/UIM coverage on a per vehicle basis, was well-established and in use by other insurance companies doing business in the state since the *Montano* decision. Third, no “substantial inequitable result” will be produced if the waiver form is deemed invalid. On balance, the equities clearly favor the insured because Progressive failed to inform him of “the premium charge for *each of the three* UM coverages” so that he could “reject, in writing, *all or some* of the offered coverages.” *Montano*, 2004-NMSC-020, ¶ 20. Progressive had no excuse for its failure to comply with this requirement; thus, prospective application is wholly unwarranted.

Therefore, Plaintiff-Petitioner should have been duly informed of all available coverage options for each vehicle as well as the corresponding premium amounts for each vehicle. Because Progressive failed to inform its insureds of the amount of

UM/UIM coverage available for the corresponding costs, the policy does not comply with New Mexico law and its waiver form is invalid as a matter of law.

VII. Conclusion

WHEREFORE Plaintiff-Petitioner Jared Kileen respectfully requests that this Court reverse the Court of Appeals' affirmance of the district court's judgment and hold as a matter of law that Progressive does not comply with what is required to effect a valid waiver of UM/UIM coverage in this case.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 18th day of April 2024 I caused a true and correct copy of the foregoing to be electronically mailed to:

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