



**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.

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**PLAINTIFF-PETITIONER'S REPLY BRIEF**

**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 its body contains 4,043 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 submits the following Reply in support of his Brief-in-Chief, and respectfully requests that the Court reverse the district court's judgment in its entirety.

## **I. Introduction**

As is evident from the Answer Brief, there is no authority excusing Progressive's compliance with New Mexico law that requires insurers to provide UM/UIM coverage on each motor vehicle subject to an automobile insurance policy. The reason for this requirement is clear: The Legislature, when enacting the Underinsured Motorist statute, codified at NMSA 1978, Section 66-5-301 (1983), intended to expand insurance coverage and protect individual members of the public against the hazard of culpable uninsured motorists, *and* to encourage insureds to purchase such coverage. *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 135 N.M. 681; *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, 111 N.M. 154. This has long been the public policy behind the New Mexico Uninsured Motorist statute, which has been articulated over and over again by New Mexico Appellate Courts over at least the last four decades. In contrast to that expansive public policy, Progressive designed its selection/rejection form to encourage insureds to *reject* UM/UIM coverage and is in direct conflict with that public policy.

Important to the particular issues raised in this appeal, Progressive was obligated to provide its insureds, including Plaintiff-Petitioner's father, information for

which they could make knowing and intelligent decisions when choosing UM/UIIM coverage. *See generally Ullman v. Safeway Ins. Co.*, 2023-NMSC-030, ¶¶ 48, 539 P.3d 668; *Contreras v. Fred Loya Ins. Co.*, 2023-NMCA-019, ¶¶ 10, 18, 527 P.3d 658, *cert. denied*, 546 P.3d 658; *Jordan v. Allstate*, 2010-NMSC-051, ¶¶ 18, 20, 149 N.M. 162. As the Court held in *Contreras*, the insurer has the burden of showing that it “meaningfully” offered UM/UIIM coverage to the insureds so that they could “*knowingly and intelligently act* to reject it.” *Id.* ¶ 18. Here, however, Progressive has failed to satisfy its burden that it meaningfully offered UM/UIIM coverage so that Plaintiff-Petitioner could make a knowing and intelligent decision when rejecting all-or-nothing UM/UIIM coverage for his three motorcycles.

The arguments advanced in the Answer Brief underscore the fact that Progressive eliminated any chance for Plaintiff-Petitioner to make knowing and intelligent coverage decisions, thereby impeding his freedom to contract. *See Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341 (“Freedom of contract serves public policies that are no less important to society as a whole and the common good than those policies that undergird the law of tort.”). Rather than allowing the insured to make a knowing and intelligent decision as to what vehicles they want UM/UIIM coverage on and the amount of coverage for each such vehicle; *i.e.* all, none, or some UM/UIIM coverage, Progressive unilaterally limited Plaintiff-Petitioner’s and other Progressive insured’s choices. Progressive acknowledges that it

does not inform its insureds that they are entitled under New Mexico law to obtain UM/UIM coverage on less than all of the vehicles covered under a policy or that they can obtain varying amounts of UM/UIM coverage for the different vehicles.

Progressive is silent on how an insured can make an intelligent and knowing decision when Progressive does not provide them with all the relevant information that is necessary to make that decision. The law does not permit insurers to make all-or-nothing offers, and its justification that Plaintiff-Petitioner would somehow be better off purchasing or rejecting UM/UIM coverage for his three motorcycles is patronizing and insulting to the wants and needs of insureds like Plaintiff-Petitioner. But most importantly, Progressive's position is contrary to public policy and the Underinsured Motorist Statute, which mandates that insurance carriers offer UM/UIM coverage "with respect to *any* motor vehicle registered or principally garaged in New Mexico." Section 66-5-301(A) (emphasis added). The Legislature's directive (and the Court's continued, consistent interpretation) is simple: insurers must offer UM/UIM on *all, some, or none* of the vehicles insured through that insurer. Anything less is not an offer of UM/UIM as contemplated by the Legislature, the administrative regulations governing UM/UIM, and this Court's continued, consistent interpretation of the UM/UIM statute.

Progressive's selection/rejection form prevented Plaintiff-Petitioner from knowing the extent of UIM/UIM coverage available for purchase and obscured the



cost for such coverage on a per-vehicle basis, which made it impossible for him to make a knowing and intelligent decision in selecting or rejecting UM/UIM coverage. This is a violation of long held public policy and the Underinsured Motorist statute. The district court's order granting summary judgment in favor of Progressive should be reversed.

## II. Argument

### A. Progressive Fails to Show That Its Rejection Form Provided Plaintiff-Petitioner with Complete Information on Which to Make a Knowing and Intelligent Decision as to UM/UIM Coverage

Progressive ignores long-standing New Mexico law requiring insurance companies to inform their customers about all available insurance coverage. Instead, it contends that it need not do so on a per-vehicle basis because it would be “complicated” and “complex,” and would “confuse” its policyholders. *See* Answer Brief, pp. 6-7. In other words, Progressive argues that *it* should determine what its customers can and cannot understand, without even providing that option to its insured; that *it* should determine what information to withhold from its customers who are inclined to purchase UM/UIM coverage; that *it* should be allowed to disclose only the combined amount of premiums for all vehicles insured and not for one or more; and that it should be required to explain only stacked and non-stacked coverage. Pro-

gressive's condescending approach is clearly designed to entice its insureds in purchasing more coverage than they want or need, and no evidence or case law allows Progressive to skirt its obligations under New Mexico law.

Progressive does not dispute that there are no legitimate reasons why they could not offer UM/UIM under its multi-vehicle policies on a per vehicle basis. Rather, Progressive conjures the unsupported argument that offering insured UM/UIM coverage on a multi-vehicle policy on a per vehicle basis would be complicated and confusing. Progressive offers no meaningful explanation as to why it would be confusing or complicated other than "just because." Indeed, Progressive could not cite any evidence in the Record Proper to suggest any reason why it could not have made a proper UM/UIM offer or that the offer would be "complicated" and "complex," and would "confuse" its policyholders.

Progressive's lack of explanation on this point is transparent; *i.e.*, that offering UM/UIM coverage would be no more confusing or complicated than offering UM/UIM coverage as Progressive does on an all or nothing basis. All that would be required for Progressive to comply with New Mexico law and public policy would be to simply have a separate *Jordan* selection/rejection form for each insured vehicle. This does not add any further confusion or complexity but rather tells insureds what coverage they are entitled to under New Mexico law so that they can make a knowing and intelligent decision. In the present case, all this would have required

is having a separate *Jordan* selection/rejection form for each motorcycle, which would have added two pages to the policy. Doing so would have informed the insureds: 1) that UM/UIM coverage is available on any one of the covered vehicles; 2) that they are not required to purchase UM/UIM coverage on every covered vehicle; 3) that they can purchase UM/UIM coverage on any one of the covered vehicles for an amount starting at the minimum statutorily required amount up to the amount of the liability coverage; and 4) the premium per vehicle for the differing amounts of UM/UIM coverage. With this information the insureds then can make an intelligent and knowing decision on what vehicles they want covered and the amount of coverage they want for each of the covered vehicles. This is not information that Progressive made available to the insured. This information is neither confusing nor complicated, but rather provides the insured with the information mandated by New Mexico law and public policy—nothing more.

Progressive fails to offer any explanation how its selection/rejection form complies with the mandate issued by the Court in *Jordan* that the insurer must “inform the insured *about premium costs corresponding to the available levels of coverage*” that results from, and is identical to, the New Mexico Supreme Court’s language in *Montano v. Allstate*, 2004-NMSC-020, ¶ 20. Progressive asserts only that its selection/rejection form complies with *Jordan* and the “new” requirement in

*Ullman v. Safeway Ins. Co.*, 2023-NMSC-030, ¶ 43, that offers of UM/UIM coverage must include a brief discussion of stacking. Progressive’s criticism of Plaintiff-Petitioner for supposedly failing to address why its policy eliminates insureds’ freedom of contract and discourages them from purchasing UM/UIM insurance is expressly contradicted by the arguments presented on pages 18-22 of the Brief-in-Chief.

Moreover, on page 9 of its brief, Progressive unsuccessfully attempts to justify its failure to provide premium amounts for varying levels of coverage for each of Plaintiff-Petitioner’s three vehicles. Progressive argues that the ranges offered resulted in Plaintiff-Petitioner “not [being] priced out of purchasing UM/UIM coverage” because he “declined to purchase any amount for as low as \$49.” This example assumes that in determining whether to purchase UM/UIM coverage, Plaintiff-Petitioner could have opted for the lowest, and cheapest, available coverage, for all of his vehicles, or could have opted for the highest, and most expensive, available coverage for all of vehicles. What Progressive fails to consider—and what constitutes a blatant violation of the statute and public policy—is that if given the choice, Plaintiff-Petitioner could have opted for the lowest amount coverage on one vehicle and the highest amount of coverage for another vehicle. The less expensive option (like the \$49 premium mentioned in Progressive’s brief) is not always the best option for consumers.

The following analogy is one in which all consumers are familiar: a grocery store offers three avocados for \$3.00, or \$1.25 per avocado. A shopper making guacamole considers the offer based on the recipe, which calls for two avocados. If the shopper is going to use the extra avocado, a perishable item, again over the next few days, the shopper may opt for the \$3.00 special. If the shopper is not going to use the extra avocado, the shopper may opt to just purchase two at \$1.25 each because the third avocado is not needed and would go to waste. The choice to purchase just two avocados for a higher per-unit price is a decision unique to the shopper's particular needs and use. Nonetheless, the shopper has the information necessary to make an informed and knowledgeable decision based on their needs and circumstances.

Similarly, insureds have diverse and unique circumstances and needs. For example, an insured who operates a ranching operation may have six vehicles, all of which are required to be insured under New Mexico law. Two of those vehicles are just used for ranching operations and never leave the ranch and as such there is no need for UM/UIM coverage. The other four vehicles are driven by family members and the family wants all family members covered for the maximum available coverage to protect them against being injured by an uninsured or underinsured motorist. Progressive's policy would require the family to either insure all six vehicles and pay insurance premiums on two vehicles where UM/UIM coverage is not desired or in the alternative reject all UM/UIM coverage. This directly impedes the insured's

freedom of contract and more importantly does not comport with encouraging insureds to procure as much UM/UIM coverage as they want.

In this case, the Progressive's selection/rejection form prevented Plaintiff-Petitioner from having the information necessary to consider whether to purchase coverage for all three vehicles based on a single corresponding premium amount or to purchase coverage at the highest premium amount for just one or two vehicles that he drives the most. Unlike the analogy above in which the grocery store informed the shopper of the cost for each avocado if purchased separately, Progressive hid the cost of individualized premium amounts from Plaintiff-Petitioner contrary to the Supreme Court's decision in *Jordan*, which reaffirmed that insurers are required to provide insureds affirmative evidence of the extent of the coverage available to which they are entitled. *Jordan*, 2010-NMSC-051, ¶ 27. 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 when deciding how much coverage to purchase or reject, and for which vehicle. *Id.* ¶¶ 17, 21.

In addition, Progressive erroneously states that Plaintiff-Petitioner's position is "debunked by the very nature of UM/UIM coverage which follows the insured not the vehicle ...". Answer Brief, pp. 11-12. Progressive's argument fundamentally misunderstands UM/UIM coverage, and the realities of a consumer's insurance needs. The insureds, not the insurers, know which vehicle they drive the most, and

how much they want or can spend on insurance premiums. Because of this, the insureds are more likely to purchase more UM/UIM coverage on the vehicle driven more often if given the opportunity. It may make financial sense to only purchase UM/UIM on some, but not all vehicles.

An insured, for example, could have three vehicles: one of which they drive the majority of the time and the other two vehicles are rarely used except as backup vehicles. From a financial point of view, the insured is more likely to purchase UM/UIM on the vehicle more frequently used to protect themselves against negligent uninsured or underinsured motorist. Progressive asserts that the insured would have UM/UIM protection that follows them to any vehicle regardless of whether UM/UIM coverage was purchased on the two back up vehicles. This, of course, is legally accurate, but it is not the full story. By purchasing UM/UIM for the routinely operated vehicle there is an additional benefit: Class II passengers (*e.g. friends and guests*) are provided with UM/UIM coverage in the UM/UIM covered vehicle. *See generally State Farm Mut. Ins. Co. v. Safeco Ins. Co.*, 2013-NMSC-006, ¶ 2, 298 P.3d 452 (describing different classes of insureds and the effects of UM/UIM). Purchasing UM/UIM on the two vehicles not used routinely does not provide much additional benefit to the insured unless they are seeking stacked UM/UIM coverage (and even then, the same amount of protection may be provided through higher limits UM/UIM single vehicle policy). But without individual premiums identified for

each vehicle, the insureds never could consider this protection for themselves and/or their passengers.

The Progressive policy prohibits the insured from making this type of informed knowledgeable decision and rather requires the insured to either pay a premium for two vehicles on which he does not want UM/UIM coverage or in the alternative reject UM/UIM coverage altogether. By failing to offer Plaintiff-Petitioner the option to purchase UM/UIM coverage on a per-vehicle basis, Progressive deprived Plaintiff-Petitioner's freedom of choice and to contract in violation of public policy. Therefore, Progressive's statement on page 22 of its Answer Brief that "[Plaintiff-Petitioner's] father simply did not want UM/UIM coverage *in any amount of for any price*" (emphasis in original) is an illogical interpretation of the rejection form that failed to offer him coverage amounts and corresponding premiums for each of the three vehicles insured.

**B. *Jordan and Montano* Govern What Is Required for Valid Selections and Rejections of UM/UIM Coverage, and Progressive's UM/UIM Selection and Rejection Form Falls Far Short**

*Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 135 N.M. 681, is recognized as the foundation for the premium disclosure requirement recognized in *Jordan* and *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, 329 P.3d 646. "*Jordan* followed *Montano* by requiring similar premium disclosure as to 'the premium charges corresponding to each available option' of UM/UIM coverage."



*Whelan*, 2014-NMSC-021, ¶ 25 (quoting *Jordan*, 2010-NMSC-051, ¶ 2). *Whelan* specifically stated: “*Jordan* explicitly relied on *Montano* for its holding.” *Id.* *Jordan* “indicated that retroactivity applied only because *Montano* had in 2004 alerted insurers as to the premium disclosure requirement.” *Id.* ¶ 26. “*Jordan*’s retroactivity relied on the ‘new direction’ set in *Montano*, 2004-NMSC-020, ¶ 1, to further the legislative intent of ensuring that an insured’s rejections of the authorized coverage are knowing and intelligent.” *Id.* ¶ 27. According to the Supreme Court, *Montano* informs what is required for an insured to obtain a valid waiver of UM/UIM coverage.

In the Answer Brief, Progressive criticizes Plaintiff-Petitioner for purportedly arguing that the *Montano* decision *requires* insurers to offer UM/UIM coverage on a per-vehicle basis. *See, e.g.*, Answer Brief, pp. 13-14. Progressive fails to recognize, however, that Plaintiff-Petitioner’s arguments are grounded in the Uninsured Motorist statute and established New Mexico Supreme Court opinions stemming from the 2004 *Montano* decision. While *Montano*’s cited illustration is not binding precedent (simply because the issue raised in this appeal was not before the *Montano* Court), it nevertheless clearly echoes New Mexico public policy and provides guidance to both insurers and to future courts deciding whether a UM/UIM coverage selection and rejection form complies with the legislative intent. *See Montano*, 2004-NMSC-020; *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, 111 N.M. 154. That

intent is to encourage insureds to purchase such coverage to advance the State's public policy of protecting members of the motoring public against the hazard of culpable uninsured motorists. *Id.*

In *Montano*, the Court examined Section 66-5-301(A) and (C) in concluding that the language of the statute requires offering UM/UIM coverage on a per-vehicle basis. *Montano*, 2004-NMSC-020, ¶ 19. "Section 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 coverage is provided therein." *Id.* (emphasis added). The illustration of its holding made clear that insurers like Progressive are to offer UM/UIM coverage *on each vehicle* and afford the insured the opportunity to reject some or all of the coverages offered. *Id.* ¶ 20. This approach fulfills New Mexico's public policy to encourage insureds to purchase UM/UIM coverage because it allows the insured on a multi-vehicle policy, like Plaintiff-Petitioner, to select the amount of coverage desired. *Id.* ¶¶ 16, 20. This approach makes sense because purchase of a single coverage protects the insured independent of the vehicle in which the insured is traveling. UM coverage protects the insureds when traveling in their own vehicle, when they are passengers in another person's vehicle, or when they are struck by a vehicle when riding a bicycle or walking on the sidewalk.

As stated in *Montano*, “the coverage [does] not depend on which vehicle, if any, was occupied at the time of the injury.” *Id.* ¶ 20. *Montano* explained that requiring UM/UIM coverage to be purchased “on a take-it-or-leave-it basis would reduce the freedom of the parties to contract for less coverage and thus their freedom to decide how much they can afford. This could frustrate, rather than advance, the legislative intent behind the UM statute.” *Id.* ¶ 16. Thus, contrary to Progressive’s assertion, nothing in the *Ullman* decision directly impugns the integrity of the Court’s public policy findings in *Montano*, especially when the *Ullman* Court found that, unlike here, such arguments were only “faintly developed.” *Ullman*, 2023-NMSC-030, ¶ 77.

In addition, Progressive’s reliance on the unpublished federal case of *Allstate Fire & Cas. Inc. Co. v. Trissell*, No. 1:17-cv-00362 PJK/GBW, 2017 WL 6028515 (D.N.M. Dec. 5, 2017), is misplaced. *Trissell* misinterprets New Mexico law, is not binding authority, and does not advance Progressive arguments. Specifically, in rejecting the insureds’ argument that the insurer was required to offer per-vehicle rejection of stacking UM/UIM coverage, the court held, without citation, that “[t]here is no requirement that an insurer offer UM/UIM coverage on a per-vehicle basis in a multi-vehicle policy, nor is there a requirement that an insurer provide premium amounts for options not available,” even though it then goes on to state that *Jordan* “requires premium costs be disclosed for ‘each available option.’” *Id.* at \* 4. Again,

that court was erroneously persuaded by the insurance company's complaint that it would be somehow too difficult or "complex" for it to inform insureds of every UM/UIM choice available to them under their policy.

Progressive has seized on the "prohibitively complex" excuse when failing to include the required coverage and corresponding coverage amounts for each insured vehicle. Its argument is nothing short of hyperbole and should be rejected outright.<sup>1</sup> First, and importantly, there is *no evidence* in the record that Progressive would have been overly burdened had it added a few more paragraphs to its policy in order to list all available UM/UIM coverage amounts and corresponding premiums for each of Plaintiff-Petitioner's three vehicles. For this reason alone, the district court should have denied Progressive's motion for summary judgment. Second, the policy at issue provided insurance coverage for a variety of options depending on the motorcycle insured, such as collision only for the 2007 Harley, and accessory coverage for the Harley and the 2004 Honda, but not for the 2005 Kawasaki. **RP 123**. Insurers frequently offer additional premiums for rental cars, roadside assistance, tire and

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<sup>1</sup> The other federal, non-binding cases cited in Progressive's brief are also cited for the proposition that insureds are not required to offer "every permutation" of available coverage. *See Gov't Employees Ins. Co. v. Shroyer*, No. 1:15-cv-00306 PJK/SCY, 2015 WL 12669885 (D.N.M. Dec. 1, 2015); *Jaramillo v. Gov't Employees Ins. Co.*, Civ. No. 10-1095 JCH/LFG, 2011 WL 13085936 (D.N.M. Sept. 14, 2011); *Hawley v. Farm Bureau Prop. & Cas. Ins. Co.*, 840 Fed.Appx. 354 (10<sup>th</sup> Cir. 2021).

window damage, and even for lost keys. Thus, the addition of UM/UIM coverage similar to the accessory coverage for Plaintiff-Petitioner's 2007 Harley and 2004 Honda should have been offered, and the rejection form would have expanded to just a few more paragraphs. As shown above, insureds are quick to offer insureds additional coverage for things like key theft and "accessories" and should be estopped from arguing that it is overly cumbersome to provide information pertaining to UM/UIM coverage amounts and premiums on each vehicle subject to the policy.

**C. Based on 20-Year Precedent Starting with the *Montano* Decision, Progressive Was Aware that New Mexico Requires More Information Regarding UM/UIM Coverage, Not Less; Thus, Retroactive Application Is Required**

Progressive asserts that, in the event the Court reverses 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*. However, none of the three factors enumerated by the *Ullman* Court are satisfied here:

... (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). As discussed throughout, requiring an insured to offer UM/UIM coverage on a per vehicle basis for a

multi-vehicle policy is not new law. *Twenty years ago* in *Montano*, 2004-NMSC-020, ¶¶ 19-20, Progressive’s “all or nothing” approach to UM/UIM insurance coverage was disfavored. Second, retroactive operation 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, Progressive has not shown a “substantial inequitable result” if the waiver form is deemed invalid. In fact, the equities clearly favor insureds based on the intent of the Legislature in enacting the Underinsured Motorist Statute to (1) protect individual members of the public against the hazard of culpable uninsured motorists, *and* (2) encourage insureds to purchase such coverage.

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.

### **III. Conclusion**

WHEREFORE, for the reasons stated above and in the Brief in Chief, 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 affect 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 26th day of June 2024, I caused a true and correct copy of the foregoing to be electronically mailed to:

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