

**UNITED STATES DISTRICT COURT
FOR THE DISRICT OF NEW MEXICO**

GREGORY CRUTCHER, individually and on behalf of
other similarly situated individuals,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
LIBERTY PERSONAL INSURANCE COMPANY,
FIRST NATIONAL INSURANCE COMPANY OF
AMERICA, LM GENERAL INSURANCE COMPANY,
LM PROPERTY AND CASUALTY INSURANCE
COMPANY, LM INSURANCE COMPANY,
SAFECO INSURANCE COMPANY OF AMERICA, and
SAFECO NATIONAL INSURANCE COMPANY,

Defendants.

No. 1:18-cv-00412-JCH-LF

SECOND AMENDED CLASS ACTION COMPLAINT

1. Plaintiff Gregory Crutcher, for himself and on behalf of the Class and Subclass defined herein, brings this Second Amended Class Action Complaint to recover damages from Liberty Mutual Insurance Company, Liberty Personal Insurance Company, First National Insurance Company, LM General Insurance Company, LM Property and Casualty Insurance Company, LM Insurance Company, Safeco Insurance Company of America, and Safeco National Insurance Company (“Defendants”), and states as follows:

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §§ 1332 (a) and 1332(d)(2).
3. Venue is proper under 28 U.S.C. § 1391(b)(2) or, in the alternative, 28 U.S.C. § 1391(b)(3).

4. Defendant is a real party in interest and a proper party to this action.

5. This Court has personal jurisdiction over the Defendant. The acts complained of herein occurred in the District of New Mexico.

PARTIES

6. Plaintiff Gregory Crutcher is, and was at all material times, a resident of Bernalillo County, New Mexico.

7. Defendant Liberty Mutual Insurance Company is a foreign for-profit corporation conducting business, including the marketing and sale of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

8. Defendant Liberty Personal Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

9. Defendant First National Insurance Company of America is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

10. Defendant LM General Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

11. Defendant LM Property and Casualty Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

12. Defendant LM Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

13. Defendant Safeco Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

14. Defendant Safeco National Insurance Company is a foreign for-profit corporation conducting business, including the sales and solicitations for the sales of insurance policies, throughout the State of New Mexico. Process is properly served on it via its registered agent, the Office of Superintendent of Insurance.

15. Defendant Liberty Mutual Insurance Company, Defendant Liberty Personal Insurance Company, Defendant First National Insurance Company of America, Defendant Safeco Insurance Company, and Defendant Safeco National Insurance Company are herein collectively referred to as “Defendants.”

FACTUAL ALLEGATIONS

Defendants operate as a joint venture.

16. Defendants work and worked together as a joint venture to solicit and sell automobile insurance policies to New Mexico residents and adjust claims, including Gregory Crutcher. They are jointly and severally liable for the acts and resulting damages herein.

17. Defendants publicly display the companies affiliated with Defendants (which self-identifies as “Liberty Mutual Insurance” on its website, www.libertymutualgroup.com).

18. Defendants have an agreement to combine their money, property, time, resources, and sales, underwriting, and claims adjusting services in the provision of insurance products and services in New Mexico.

19. Defendants’ corporate organization of policy design and language, billing, soliciting, and selling underinsured motorist coverages is uniform amongst all Defendants.

20. Defendants use the same staff adjuster, Aaron Lilly, to adjust, evaluate, and/or handle underinsured motorist claims for all Defendants in New Mexico. See **Exhibit 1**, and <https://sbs.naic.org/solar-external-lookup/lookup/licensee/summary/16705606?jurisdiction=NM&entityType=IND&licenseType=SAJ>, and **Exhibit 2**, Denial Letter.

21. Defendants use the same insurance producers to procure underinsured motorist coverages for New Mexico residents. See **Exhibit 3** and <https://sbs.naic.org/solar-external-lookup/lookup/licensee/summary/333408?jurisdiction=NM&entityType=IND&licenseType=PRO>.

22. Defendants solicit and sell underinsured motorist coverage at minimal limits and higher limits in New Mexico through its substantially similar applications, declaration

pages, and applications in a systematic and uniform fashion. These documents are created and maintained by all Defendants, mutually, in the coordination and goal of sharing profits and losses for the sale of underinsured motorist coverage in New Mexico. These types of documents are managed by Defendants' "forms managers" for their department titled "Liberty Mutual Agency Markets". See **Exhibit 4**.

23. All named Defendants have right of mutual control over all Defendants' business or insurance activities.

24. Safeco's letterhead plainly states that it is a Liberty Mutual Company. See **Exhibit 2**.

Gregory Crutcher purchased an underinsured motorist policy from Defendants.

25. In 2006, Defendants issued Mr. Crutcher a motor vehicle insurance policy effective March 17, 2006. See **Exhibit 5**.

26. On March 17, 2008, Defendants renewed the insurance policy and subsequently renewed that policy on September 17, 2008; March 17, 2009; September 17, 2009; March 17, 2010; September 17, 2010, and annually thereafter through the present.

27. The policy that Defendants issued and which was in effect at the time of Mr. Crutcher's loss was Policy No. X5211257, effective from September 17, 2016 to September 17, 2017. See **Exhibit 6**.

28. Policy No. X5211257 provided liability coverage on one vehicle in the amount of \$25,000 each person and \$50,000 per accident, per vehicle.

29. Defendants Policy No. X5211257 also purportedly provided uninsured and underinsured motorist coverage in the amount of up to \$25,000.00 per person/\$50,000.00 per

accident, which was the maximum amount of coverage that Mr. Crutcher could purchase given his purchase of liability insurance at the \$25,000.00 per person/\$50,000.000 per accident limit.

30. Mr. Crutcher paid a premium of \$90.00 for the uninsured and underinsured motorist coverage that Safeco purportedly offered from September 17, 2016 to September 17, 2017.

31. Mr. Crutcher paid \$525 for uninsured and underinsured motorist coverage over the past 12 years from the initial filing of the original complaint.

Defendants' systematic application process, declarations, UM/UIM information and selection forms, and policy are ambiguous and misrepresented the true value of underinsured motorist coverage and failed to properly and adequately disclose to Crutcher that the underinsured motorist coverage for which Defendants collected a premium was illusory and misleading.

32. Defendants solicited and sold Mr. Crutcher an insurance policy and underinsured motorist coverage through its website.

33. Although Mr. Crutcher requested the application from Defendants, it was not provided.

34. **Exhibit 7** demonstrates substantially similar information provided to Mr. Crutcher when he had applied for automobile insurance through Defendants' standardized and uniform application process.

35. Defendants' boilerplate forms which should allow insureds to select or reject Uninsured and Underinsured Motorists Coverage do not adequately disclose "Underinsured Motorist". Id.

36. Defendants' boilerplate forms which allow insureds to select or reject Uninsured and Underinsured Motorists Coverage are ambiguous and do not in any manner refer to the New Mexico statute, NMSA § 66-5-301(B). Id.

37. Defendant's application, pursuant to NMSA § 66-5-301(C), should provide adequate disclosures so that a meaningful offer is made and an insured is able to make a knowing and intelligent choice of UM/UIM coverage. Defendants have not provided the application that was used.

38. Defendant's boilerplate forms and ambiguous policy definitions failed to properly inform Mr. Crutcher about the offset described in *Schmick v. State Farm Mutual Automobile Insurance Company*, 704 P.2d 1092 (1985) ("the *Schmick* offset") and did not meet his reasonable expectations of being properly insured in the event he sustained significant injuries. See *Crutcher v. Liberty Mut. Ins. Co.*, 2022-NMSC-001, ¶ 2, 501 P.3d 433, 434. "We conclude that this type of policy is illusory in that it may mislead minimum UM/UIM policyholders to believe that they will receive underinsured motorist benefits, when in reality they may never receive such a benefit."

39. Nothing in Defendant's boilerplate forms advise an insured that they will never receive the full amount of underinsured motorist coverage for which they have contracted. *Id.*

40. When Mr. Crutcher purchased automobile coverage, Defendant did not properly inform him of how underinsured motorist coverage is illusory in the event of a covered occurrence involving an underinsured driver.

41. Defendant failed to properly inform Mr. Crutcher that he and his insured beneficiaries would most likely not be afforded the full UIM benefits from paying a premium for stacked underinsured motorist coverage because, pursuant to the *Schmick* offset, Mr. Crutcher's and insured beneficiaries' recovery of underinsured motorist benefits would be offset by the amount of the tortfeasor's liability coverage. See *Id.*, ¶ 26. "We refuse to impose on the insured the obligation to be aware of and understand the consequences of New Mexico's

UM/UIM statutory provisions, much less the offset rule derived by its technical language.”

42. When Mr. Crutcher purchased automobile coverage, Defendants did not properly inform him of how underinsured motorist coverage is illusory and/or misleading in the event of a covered occurrence involving an underinsured driver.

43. Defendants’ forms did not contain clear, unambiguous language regarding the effects of the *Schmick* offset.

44. Defendants’ systematic processes forms did not alert Mr. Crutcher, nor make clear to ordinarily and similarly situated insureds, the fact that the *Schmick* offset drastically and materially diminished payment of benefits arising from a covered occurrence under the policy for crashes involving underinsured motorists. See *Id.*

45. Defendants’ systematic processes and forms misrepresented the true value of the illusory underinsured motorist coverage that it advertised and sold to Mr. Crutcher and for which Defendants collected premiums. See *Id.*, ¶ 26. “First, we find no merit in Defendant’s argument that the language of the statute provides immunity from claims that it misrepresented the coverage available to consumers like Mr. Crutcher. Certainly, while the Legislature authorized the selling of premiums together, its intent was not to sanction the deception of those consumers in their selection of policies and coverage levels. The Court in *Weed Warrior* concluded that it was the obligation of the insurance company to clearly provide its policyholders the opportunity to match their UM/UIM policy with their liability coverage. *Id.* ¶ 15. In this case [*Crutcher*], we are simply identifying the same consequence previously illuminated in *Weed Warrior*. *Id.* ¶ 10.) and *Id.*, ¶ 27. If a person pays for something called “underinsured motorist” insurance, we think it reasonable for the person to be under the impression that he or she is, in fact, eligible to receive UIM coverage if involved in an

accident with someone who does not have enough insurance to cover the costs of the insured's injuries." *Id.*

Gregory Crutcher was injured in a collision with an underinsured motorist.

46. On June 3, 2017, Mr. Crutcher sustained bodily injuries, including a broken left collar bone, and other damages in excess of \$50,000, arising from an automobile on Ellison Drive in Albuquerque, New Mexico when an underinsured driver, who traveled at a high-rate of speed, failed to stop at a traffic signal, and t-boned Mr. Crutcher's vehicle.

47. The minimally insured motorist failed to keep a proper lookout for traffic and traveled at an excessive rate of speed, causing the collision between his vehicle and Mr. Crutcher's vehicle.

48. As a result of the impacts, Mr. Crutcher suffered serious bodily injuries and other damages, including a broken left collar bone.

49. At the time of the collision, Mr. Crutcher was abiding by the traffic laws of the State of New Mexico and the City of Albuquerque and was not at fault for the collision.

50. Mr. Crutcher sustained total actual damages in excess of \$50,000.00.

51. At the time of the collision, Mr. Crutcher was insured by Safeco Policy No. X5211257, which provided Mr. Crutcher with liability insurance with limits of \$25,000.00 per person/\$50,000.000 per accident.

52. After the collision, Mr. Crutcher made a claim with the tortfeasor's insurer and received \$25,000.00, the full extent of liability coverage from the tortfeasor's insurer.

53. Like Mr. Crutcher, the tortfeasor also carried the minimum required liability insurance with limits of \$25,000.00 per person, \$50,000.000 per accident.

Gregory Crutcher makes a claim that Defendants deny.

54. Before the collision at issue, Defendants collected a premium for automobile coverage pursuant to the Crutcher Policy, under which Mr. Crutcher had a reasonable expectation that he carried underinsured motorist coverage of \$25,000.00 per person / \$50,000.00 per occurrence. **Exhibit 6.**

55. At the time of the collision, Mr. Crutcher was under the belief and had a reasonable expectation that he and his insureds were entitled to underinsured motorist benefits for insurance policy that Defendants had issued him.

56. After the collision, Mr. Crutcher reported the collision to Defendants and, through counsel, notified Defendants that a claim for the underinsured motorist coverage, for which Defendants collected a premium for, would be made.

57. Defendants, under a standardized business practice, opened a claim, assigned claim number 1072829560101, and randomly assigned the adjustment of the matter to one of its adjusters and preemptively denied Mr. Crutcher's underinsured motorist coverage claim for the full amount of UIM coverage as reflected on Defendants' declaration page.

58. Mr. Crutcher did not receive, in violation of his reasonable expectations, the full amount of stacked underinsured motorist coverage from Defendants, his UIM policy carrier, as reflected on Defendants' declaration pages.

59. Mr. Crutcher had a reasonable expectation he would benefit from the insurance premiums Defendants collected from him in the amounts reflected on the face of his declaration pages.

CLASS ACTION ALLEGATIONS

60. This action is properly maintainable as a class action pursuant to Rule 1-023

NMRA. The Class is defined as follows:

All persons (and their heirs, executors, administrators, successors, and assigns) from whom Defendants collected a premium for an underinsured motorist coverage on a policy that was issued or renewed in New Mexico by Defendants and that purported to provide underinsured motorist coverage on the face of its application and declaration pages, but which effectively no underinsured motorists coverage and/or misleading underinsured coverage, reflected on Defendant's declaration page, because of the statutory offset recognized in *Schmick v. State Farm Mutual Automobile Insurance Company*, 704 P.2d 1092 (1985).

61. Pursuant to Rule 1-023(C)(4)(b), the Class properly includes a Subclass:

All Class Members (and their heirs, executors, administrators, successors, and assigns) where an underinsured motorist coverage on a policy that was issued or renewed in New Mexico by Defendants and that purported to provide the underinsured motorist coverage on the face of its application and declaration pages, but which in fact provides no underinsured motorists coverage and/or misleading underinsured coverage because of the statutory offset recognized in *Schmick v. State Farm Mutual Automobile Insurance Company*, 704 P.2d 1092 (1985), and who sustained damages in excess of an insured tortfeasor's policy limits, received the extent of all bodily injury liability limits available and would be or were denied those benefits by Defendants due to the *Schmick* offset.

62. The proposed class and subclass definitions are precise, objective, and presently ascertainable, and it is administratively feasible for the Court to ascertain whether a particular individual is a member of the Class.

63. The members of the Class are so numerous that joinder of all members of the Class is impracticable.

64. Mr. Crutcher's claims are typical of the claims of members of the Class and Subclass.

65. Certification of the Class and Subclass is desirable and proper, because there are questions of law and fact in this case common to all members of the Class. Such common questions of law and fact include, but are not limited to:

- a. Whether Defendants breached contractual obligations owed to their New Mexico policyholders;
- b. Whether Defendants breached duties owed to New Mexican insureds under the implied covenant of good faith and fair dealing;
- c. Whether Defendants violated NMSA 1978, §§ 59A-16-1 to 30;
- d. Whether Defendants failed to disclose one or more material facts in connection with the marketing or sale of the insurance policies at issue;
- e. Whether Defendants misled or deceived their policyholders in connection with the marketing or sale of the policies at issue;
- f. How properly to construe Defendants' standard application forms and other standard form documents relative to the *Schmick* offset;
- g. What remedies are available to Mr. Crutcher and Class Members in light of the answers to the foregoing questions; and
- h. Whether and to what extent there may be merit in any affirmative defenses that Defendants might claim.

66. These common questions of law or fact common to members of the Class predominate over any questions affecting only individual members, and a class action is superior to all other available methods for the fair and efficient adjudication of the controversy. In this action:

67. Common or generalized proof will predominate with respect to the essential

elements of the nine claims at issue.

68. The common questions of law or fact that pertain to the Class predominate over any individual questions and any individual issues do not overwhelm the common ones.

69. If any member or members of the Class has an individually controlling interest to prosecute a separate action, they may exclude themselves from the Class upon receipt of notice under Rule 1-023(C)(2).

70. The determination of the claims of all members of the Class in a single forum and in a single proceeding would be a fair, efficient and superior means of resolving the issues raised in this litigation.

71. Any difficulty encountered in the management of the proposed Class is reasonably manageable, especially when weighed against the impossibility of affording adequate relief to the members of the Class through numerous independent actions.

72. The need for proof of Mr. Crutcher's and Class members' damages will not cause individual issues to predominate over common questions. The amounts of losses can be efficiently demonstrated either at trial or as part of routine claims administration through accepted and court-approved methodologies with the assistance of court-appointed personnel, including Special Masters. Certain types or elements of damage are subject to proof using aggregate damage methodologies or simply rote calculation and summation.

73. The particular common issues of liability and the quantum of punitive damages or ratio of punitive damages to actual harm, are common to Class Members no matter what type of harm or injury was suffered by each Class Member.

74. Defendants have acted or refused to act on grounds generally applicable to all Class Members, thereby making appropriate injunctive relief and corresponding

declaratory relief with respect to Class Members. Mr. Crutcher seeks to establish the rights and obligations of the parties with respect to the claims at issue in this case and to enjoin Defendants from continuing to engage in those practices that violate the duties, and the contractual and legal obligations owed to Mr. Crutcher and Class Members under New Mexico statutory and common law.

75. A class action is superior to maintenance of these claims on a claim-by-claim basis when all actions arise out of the same circumstances and course of conduct. A class action allows the Court to process all rightful claims in one proceeding. Class litigation is manageable considering the opportunity to afford reasonable notice of significant phases of the litigation to Class Members and permit distribution of any recovery. The prosecution of separate actions by individual Class Members, or the individual joinder of all Class Members in this action, is impracticable and would create a massive and unnecessary burden on the resources of the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of each Class Member, should that be determined to be appropriate.

76. The conduct of this action as a class action conserves the resources of the parties and the court system, protects the rights of each member of the class, and meets all due process requirements.

77. Certification of the Class with respect to particular common factual and legal issues concerning liability, as well as the necessary and appropriate quantum of punitive damages, or ratio of punitive damages to actual harm, is appropriate under Rule 1-023.

78. Certification of the Class is desirable and proper, because Mr. Crutcher will fairly and adequately protect the interests of the Class that he seeks to represent. There are no

conflicts of interest between Mr. Crutcher's claims and those other members of the Class. Mr. Crutcher is cognizant of his duties and responsibilities to the Class. Mr. Crutcher's attorneys are qualified, experienced, and able to conduct the proposed class action.

CLAIM 1 - NEGLIGENCE

79. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as if they were fully stated herein.

80. Defendants had a duty to ensure Mr. Crutcher and Class Members would be offered and obtain the maximum benefit of underinsured coverage purchased and would not be sold illusory and/or misleading underinsured coverage.

81. Defendants had a duty to provide Mr. Crutcher and Class Members coverage for which a premium was charged and collected.

82. Since the issuance of the New Mexico Supreme Court's opinion of *Schmick* on August 14, 1985 it was reasonably foreseeable that the underinsured coverage sold Mr. Crutcher and Class Members was illusory and/or misleading and Defendants therefore materially misrepresented the terms and benefits of underinsured coverage, yet charged a premium for such illusory and/or misleading coverage.

83. A reasonably prudent insurance company exercising ordinary care would offer and sell underinsured coverage that was not illusory and/or misleading and would not materially misrepresent the terms of underinsured coverage by properly informing its insureds of the coverage they were purchasing and obtaining a written waiver acknowledging its insured's consent to the purchase of what amounts to illusory underinsured motorist coverage.

84. A reasonably prudent insurer would not charge a premium for coverage it

intended to deny or did not provide.

85. Defendants' actions and inactions, through its agents, employees, or others on its behalf, were negligent in that they breached the standard of care required of an insurance company issuing auto policies in New Mexico.

86. As a result of Defendants' negligence, Mr. Crutcher and Class Members sustained actual damages for which Defendants is liable. Mr. Crutcher and Class Members are entitled to punitive damages for actions of Defendants that were willful, reckless and wanton, and in bad faith and/or based on dishonest business judgments.

CLAIM 2 - VIOLATIONS OF THE NEW MEXICO UNFAIR TRADE PRACTICES ACT

87. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as if they were fully stated herein.

88. There was in effect, at all times material, a New Mexico statute commonly known as the New Mexico Unfair Trade Practices Act, N.M.S.A.1978, § 57-12-2 to 58-12-10 ("UPA"), including but not limited to Sections 57-12-2(D)(7), (D)(14), (D)(15), (D)(17) and Section 57-12- 2(E), which prohibits a person selling insurance from engaging in unfair or deceptive trade practices:

D. "unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Trade Practices Act [Chapter 57, Article 12 NMSA 1978], a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead and includes but is not limited to:

(7) representing that the goods or services are of a particular standard, quality or grade or that goods are of

a particular style or model if they are of another ;

- (14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;
- (15) stating that a transaction involves rights, remedies or obligations that it does not involve;
- (17) failing to deliver the quality or quantity of goods or services contracted for;

E. “unconscionable trade practice” means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person’s detriment: takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or results in a gross disparity between the value received by a person and the price paid.

89. Defendants failed to deliver the quality or quantity of services applied for and purchased and paid for by Mr. Crutcher and other insureds by failing to provide insurance applications and policies containing sufficient information to properly inform a reasonably prudent person purchasing underinsured insurance when Mr. Crutcher and others similarly situated were under the reasonable belief that such coverage existed and would protect them.

90. In the regular course of its business, Defendants or its agents knowingly made oral and written statements that were false and misleading in connection with the sale of underinsured motorist insurance in New Mexico.

91. These ambiguous, false, and misleading representations may, tend to, and do deceive or mislead persons into believing that underinsured motorist coverage has a value that it does not have and into contracting for and paying premiums for underinsured motorist policies that are illusory and/or misleading and do not provide the underinsured motorist

coverage and benefits that Defendants' customers reasonably expected to receive.

92. In the regular course of its business, Defendants or its agents took advantage of its customers' lack of knowledge, ability, experience or capacity to a grossly unfair degree by marketing, advertising, selling, and receiving premium payments for illusory underinsured motorist coverage.

93. Since the New Mexico Supreme Court's opinion in *Progressive Northwest Insurance Co. v. Weed Warrior Services*, 2010-NMSC-050, 149 N.M. 157, 245 P.3d 1209, Defendants has been on notice that underinsured motorist policies provide no coverage at minimal limits and misleading coverage at higher limits, yet Defendants markets, advertises, sells, and received premiums for above-minimal limits underinsured motorist policies to and from customers, such as Mr. Crutcher and Class Members, who do not know and do not understand that if they purchase underinsured motorist coverage, they will not receive any underinsured motorist coverage at all when damages in excess of the tortfeasor's liability coverage are incurred, losing the full benefit of their above-minimal limits coverage displayed on the face of their declaration pages because of the *Schmick* offset.

94. Defendants' actions resulted in a gross disparity between the value of the illusory and/or misleading underinsured motorist coverage received by Mr. Crutcher and Class Members and the price of the premiums that Mr. Crutcher and Class Members paid for illusory and/or misleading underinsured motorist coverage.

95. Defendants, acting through its agents, adjusters, and employees, as set forth above, knowingly and willfully engaged in unfair trade practices in violation of Section 57-12-3, including but not limited to Sections 57-12-2(D)(7), (D)(14), (D)(15), (D)(17) and Section 57-12- 2(E).

CLAIM 3 - VIOLATIONS OF THE NEW MEXICO UNFAIR INSURANCE PRACTICES ACT

96. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as if they were fully stated herein.

97. There was in effect at all times material a New Mexico statute commonly known as the Insurance Code New Mexico Unfair Insurance Practices Act, NMSA 1978, §§ 59A-16-1 to 59A-16-30 (“UIPA”).

98. The UIPA provides a private right of action to any person covered by the UIPA who has suffered damages as a result of a violation of that statute by an insurer or agent and is granted a right to bring an action in district court to recover actual damages.

99. Mr. Crutcher and Class Members were insured under the policies issued by Defendants.

100. Defendants owed Mr. Crutcher and Class Members the duties of good faith, fair dealing, and the accompanying fiduciary obligations.

101. In the sale and provision of insurance, Defendants failed to exercise good faith and failed to give the interests of Mr. Crutcher and of Class Members the same consideration it gave their own interests.

102. Defendants misrepresented the terms of the policy sold and provided to Mr. Crutcher and Class Members, and/or failed to disclose material facts reasonably necessary to prevent other statements from being misleading and failed to implement and follow reasonable standards in the sale and provision of insurance.

103. Defendants’ acts and failures to act were in reckless disregard of Mr. Crutcher’s, and Class Members’ rights as insureds under the subject policies.

104. Defendants' acts and practices took advantage of the lack of knowledge and experience of Mr. Crutcher and Class Members to a grossly unfair degree.

105. Defendants failed to abide by its statutory duties under the UIPA, and such violations constitute negligence per se.

106. Defendants misrepresented to Mr. Crutcher and Class Members pertinent facts or policy provisions relating to coverages at issue, in violation of NMSA 1978, § 59A-16-20(A).

107. Defendants' failure to act in good faith and Defendants' violations of the Insurance Code and Unfair Practices Act are proximate causes of damages sustained by Mr. Crutcher and Class Members.

108. Defendants' conduct was in bad faith, malicious, willful, wanton, fraudulent, based on dishonest business judgments and/or in reckless disregard of Mr. Crutcher's and Class Members' rights.

109. Mr. Crutcher and Class Members are entitled to attorneys' fees and costs pursuant to NMSA 1978, §§ 59A-16-30 and 39-2-1. As a direct and proximate result of Defendants' acts, omissions policies, and conduct in violating UIPA, as set forth above, Mr. Crutcher and Class Members have sustained damages, in addition to the damages common to all counts of this complaint, including but not limited to the actual damages incurred, the cost of prosecution of this lawsuit, attorneys' fees, and interest on the sums owed under the policy. These injuries and damages are ongoing, permanent, and are expected to continue in the future.

CLAIM 4 - REFORMATION OF INSURANCE POLICY

110. Mr. Crutcher and Class Members incorporate by reference the preceding

paragraphs as though they were stated fully herein.

111. Mr. Crutcher and similarly situated Class Members mistakenly believed that, by paying a premium for specific dollar amounts and limits of underinsured motorist coverage, they would receive underinsured motorist coverage at those same specific dollar amounts and limits.

112. Defendants and its agents knew that, because of the operation of the offset described in *Schmick*, Mr. Crutcher and similarly situated Class Members were unlikely to receive the full underinsured motorist benefits that they contracted for and for which Defendants collected premiums.

113. At the time of contract formation, Defendants and its agents inequitably misrepresented the value of underinsured motorist coverage and failed to inform Mr. Crutcher and similarly situated Class Members that, because of the operation of the offset described in *Schmick*, they were unlikely to receive the underinsured motorist benefits that they contracted for and for which Defendants collected premiums.

114. The inequitable failure of Defendants and its agents to inform Mr. Crutcher and similarly situated Class Members that they were vanishingly unlikely to receive the underinsured motorist coverage reasonably caused Mr. Crutcher and similarly situated Class Members to believe that, by paying a premium for underinsured motorist coverage, they and their covered insureds would receive the full amount of underinsured motorist coverage reflected on their declaration pages.

115. The insurance contracts respectively entered between Defendants and its agents, on the one hand, and Mr. Crutcher and Class Members, on the other hand, do not express the intentions and reasonable beliefs of Mr. Crutcher and Class Members that they

would receive the underinsured motorist coverage that they contracted for and for which Defendants collected premiums.

116. The Court should reform the ambiguous insurance contracts respectively entered between Defendants and Mr. Crutcher and Class Members, to conform to the intentions and reasonable beliefs and expectations of Mr. Crutcher and Class Members that they would receive the underinsured motorist coverage that they contracted for and for which Defendants collected premiums.

CLAIM 5 - BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

117. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as though they were stated fully herein.

118. A special relationship exists between Defendants, on the one hand, and Mr. Crutcher and Class Members, respectively, on the other hand, sufficient to impose a duty of good faith and fair dealing on Defendants owed to Mr. Crutcher and Class Members.

119. Implicit in the contract of insurance between Mr. Crutcher and Class Members, on the one hand, and Defendants on the other, was the covenant that Defendants would, at all times, act in good faith and deal honestly and fairly with Mr. Crutcher and Class Members.

120. Defendants breached the implied covenant of good faith and fair dealing, in one or more of the following ways, including but not limited to:

- a. Failing to properly inform Mr. Crutcher and Class Members of the illusory and/or misleading coverage it solicited and sold;
- b. Charging a premium for coverage that would not be provided;

121. As a direct and proximate result of Defendants' acts and omissions alleged herein, Mr. Crutcher and Class Members have suffered damages in an amount to be proven at trial.

122. Defendants' acts and omissions alleged herein and breach of the implied covenant of good faith and fair dealing were done intentionally, willfully, wantonly, grossly, with dishonest business judgment, and/or with reckless disregard for the rights of Mr. Crutcher and Class Members.

123. Accordingly, Mr. Crutcher and Class Members are entitled to recover punitive damages in an amount to be determined by the jury and sufficient to punish Defendants for its misconduct and to deter others from similar conduct in the future.

CLAIM 6 - NEGLIGENT MISREPRESENTATION

124. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as though they were stated fully herein.

125. A special relationship existed between Defendants, on the one hand, and Mr. Crutcher and Class Members, respectively, on the other hand, sufficient to impose a duty on Defendants to disclose accurate information to Mr. Crutcher and Class Members.

126. As early as 1985, when the New Mexico Supreme Court published its decision in *Schmick v. State Farm*, Defendants knew that underinsured motorist coverage would be illusory and/or misleading under most ordinary circumstances.

127. Defendants, however, withheld this information from Mr. Crutcher and Class Members and hid from them the fact that the underinsured motorist coverage as impacted by the *Schmick* offset is illusory and/or misleading in its effect.

128. From 1985 through the present, Defendants failed to disclose material facts

and made material misrepresentations to Mr. Crutcher and Class Members regarding illusory and/or misleading underinsured motorist coverage.

129. Defendants, by their failures and omissions, misrepresented underinsured motorist coverages through their standard and uniform applications and policies given to Mr. Crutcher and Class Members, which Defendants knew or should have known, were misleading and contained material misrepresentations.

130. Defendants' material omissions and misrepresentations were made to induce Mr. Crutcher and Class Members to purchase underinsured motorist coverage that Defendants knew or should have known was illusory and/or misleading.

131. Mr. Crutcher and Class Members reasonably relied on Defendants' material omissions and misrepresentations when deciding to purchase underinsured motorist coverage at the level of coverage they respectively purchased.

132. As a result of Defendants' misrepresentations and omissions, Defendants are liable to Mr. Crutcher and Class Members for their damages flowing from those misrepresentations and omissions.

133. As a direct and proximate result of Defendants' negligent misrepresentations, Mr. Crutcher and Class Members suffered economic loss, including the payment of premiums for coverage that had no value. Mr. Crutcher and Class Members seek the full measure of damages allowed under applicable law.

CLAIM 7 – UNJUST ENRICHMENT

134. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as though they were stated fully herein.

135. Defendants have applied the *Schmick* offset to its insureds' claims and

denied underinsured motorist coverage benefits in New Mexico since 1985. Defendants, through its ambiguous insurance contracts, have misled, deceived, and acted in an unfair manner for decades and retained benefits (*i.e.* the payment of UIM claims, and retained premium charges which were unearned) from thousands of New Mexican insureds for years, including Ms. Belanger and Class Members. The windfall Defendants received allowed them to invest and enjoy the benefits of their deceptive and intentional conduct.

136. Ms. Belanger and Class Members are entitled to the value of the UIM benefits and out-of-pocket damages under the equitable theory of unjust enrichment.

137. Defendants should be ordered to disgorge of the value of the UIM benefits retained, the UIM premiums received, and the unjust profit that it derived from.

CLAIM 8 - DECLARATORY JUDGMENT

138. Mr. Crutcher, and Class members incorporate by reference the preceding paragraphs as though they were stated fully herein.

139. An actual controversy exists between the parties thereby rendering declaratory relief proper under the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 through 44-6-15.

140. The Court should reform the insurance contracts respectively entered between Defendant and their agents, and Mr. Crutcher and Class Members to conform to the intentions and reasonable beliefs of Mr. Crutcher and Class Members that they would receive the underinsured motorist coverage that they contracted for and for which Defendant collected premiums

141. Mr. Crutcher, and Class Members are entitled to a declaratory judgment establishing their respective rights and obligations of the parties with respect to the claims set

forth herein.

INJUNCTIVE RELIEF

142. Mr. Crutcher and Class Members incorporate by reference the preceding paragraphs as though they were stated fully herein.

143. Mr. Crutcher and Class Members are entitled to injunctive relief under the claims they have pled because Mr. Crutcher and Class Members would suffer an irreparable injury that monetary damages at a later time would not adequately compensate them for the injury of paying a premium for illusory and/or misleading coverage.

144. Defendants should be enjoined from continuing practices that violate the duties, and the contractual and legal obligations owed to Mr. Crutcher and Class Members.

145. Defendants must be compelled to stop their practice of collecting premiums for the sale of illusory and/or misleading underinsured motorist coverage and failing to provide underinsured motorist coverage benefits equal to the limits of liability coverage where they failed to properly inform Mr. Crutcher and Class Members throughout the application and policy underwriting process.

REQUEST FOR RELIEF

Mr. Crutcher and Class Members request a jury trial and the following relief:

- i. An order certifying this action to proceed as a class action, authorizing Mr. Crutcher to represent the interests of the Class Members as appropriated and appointing undersigned counsel to represent the class.
- ii. Awarding compensatory damages to Mr. Crutcher and Class Members for the damages done to them by Defendants in an amount to be proven at trial;
- iii. Awarding Mr. Crutcher and Class Members damages from Defendants as a

- result of its violations of the UIPA, in an amount to be determined at trial for attorneys' fees and costs;
- iv. Awarding treble damages in accordance with NMSA 1978, Sections 57-12-10(B) and any and all damages pursuant to NMSA 1978, Sections 57-12-1 through -26, which will deter Defendants and others from such unfair trade practices and wrongful conduct in the future and will punish them for the conduct set forth herein;
 - v. Granting declaratory relief that establishes the rights and obligations of the parties with respect the claims set forth herein;
 - vi. Granting injunctive relief requiring Defendants to properly inform Mr. Crutcher and Class Members throughout the application and policy underwriting process of the true value of the underinsured motorist benefits that are being advertised and sold;
 - vii. Awarding Mr. Crutcher and Class Members their costs and expenses incurred in these actions, including reasonable attorney's fees, experts' fees, and costs; and
 - viii. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Kedar Bhasker

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