

FILED  
2ND JUDICIAL DISTRICT COURT  
Bernalillo County  
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CLERK OF THE COURT  
Patricia Serna

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

JOSHUA SMITH, individually and on behalf of  
other similarly situated individuals,

Plaintiff,

v.

INTERINSURANCE  
EXCHANGE of the AUTOMOBILE CLUB,  
aka AAA,

Defendant.

No. D-202-CV-2022-02461

**CLASS ACTION COMPLAINT**

Plaintiff Joshua Smith, for himself and on behalf of the Class and Subclass defined herein, brings this Class Action Complaint to recover damages from Interinsurance Exchange of the Automobile Club, aka AAA (“Defendant”), and states as follows:

**JURISDICTION AND VENUE**

1. This This Court has jurisdiction under Article VI, Section 13 of the New Mexico Constitution.
2. Venue is proper under NMSA 1978, § 38-3-1(B).
3. Defendant is a real party in interest and a proper party to this action.
4. This Court has personal jurisdiction over the Defendant. The acts complained of herein occurred in the New Mexico.

## PARTIES

5. Plaintiff Joshua Smith is, and was at all material times, a resident of Bernalillo County, New Mexico.

6. Defendant Interinsurance Exchange of the Automobile Club Insurance Company, aka AAA, 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.

## FACTUAL ALLEGATIONS

### **Joshua Smith purchased an underinsured motorist policy from Defendant.**

7. In 2020, Defendant issued Mr. Smith a motor vehicle insurance policy effective June 26, 2020. *See Exhibit 1.*

8. The policy that Defendant issued and which was in effect at the time of Mr. Smith's loss was Policy No. NMA 142100722, effective from June 26, 2020 to December 26, 2020. *Id.*

9. Policy No. NMA 142100722 provided liability coverage on one vehicle in the amount of \$25,000 each person and \$50,000 per accident, per vehicle. *Id.*

10. Defendant Policy No. NMA 142100722 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. Smith could purchase given his purchase of liability insurance at the \$25,000.00 per person/\$50,000.000 per accident limit. *Id.*

11. Mr. Smith paid a premium of \$91.00 for the uninsured and underinsured motorist coverage that Defendant purportedly offered from June 26, 2020 to December 26, 2020. **See Exhibit 2, declaration page.**

12. Defendant collected premiums from Mr. Smith since June, 2019.

13. Defendant had Mr. Smith fill out its application for automobile coverage.

14. Defendant has not provided Mr. Smith and his counsel the application for automobile coverage.

15. Defendant had Mr. Smith fill out its UM/UIM selection form.

16. Defendant has not provided Mr. Smith and his counsel with the UM/UIM selection form.

**Defendant's 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 Smith that the underinsured motorist coverage for which Defendant collected a premium was illusory and misleading.**

17. Defendant solicited and sold Mr. Smith an insurance policy and underinsured motorist coverage through its website.

18. Although Mr. Smith requested the application from Defendant, it was not provided.

19. **Exhibit 3** is a copy of Defendant's application and is the substantially similar document provided to Mr. Smith when he had applied for automobile insurance through Defendant's standardized and uniform application process.

20. **Exhibit 4** is a copy of Defendant's UM/UIM selection form and is the substantially similar document provided to Mr. Smith when he had applied for and selected UM/UIM automobile insurance through Defendant's standardized and uniform process.

21. Defendant's boilerplate forms which should allow insureds to select or reject Uninsured and Underinsured Motorists Coverage do not adequately disclose "Underinsured Motorist". See **Exhibits 3 and 4**.

22. Defendant's 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.*

23. Defendant's application and UM/UIM selection forms, 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. Defendant has not provided the application that was used.

24. Defendant's boilerplate forms and ambiguous policy definitions failed to properly inform Mr. Smith about the offset described in *Schmick v. State Farm Mutual Automobile Insurance Company*, 1985-NMSC-073, 103 N.M. 216, 704 P.2d 1092 ("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.").

25. 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.*

26. When Mr. Smith 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.

27. Defendant failed to properly inform Mr. Smith 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. Smith's and insured beneficiaries' recovery of underinsured motorist benefits would be offset by the amount of the tortfeasor's liability coverage. *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.").

28. When Mr. Smith purchased automobile coverage, Defendant 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.

29. Defendant's forms did not contain clear, unambiguous language regarding the effects of the *Schmick* offset.

30. Defendant's systematic processes and forms did not alert Mr. Smith, 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. *Id.*

31. Defendant's systematic processes and forms misrepresented the true value of the illusory underinsured motorist coverage that it advertised and sold to Mr. Smith and for which Defendant collected premiums. *Id.* at ¶ 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.” *Crutcher at* ¶ 30.

**Joshua Smith was injured in a collision with an underinsured motorist.**

32. On October 13, 2020, Mr. Smith sustained bodily injuries, in excess of \$50,000, arising from an automobile crash on Glenrio Road in Albuquerque, New Mexico when an underinsured driver, who was not paying attention, rear-ended Mr. Smith who had slowed down to make a left-handed turn. The minimally insured motorist failed to keep a proper lookout for traffic and was inattentive, causing the collision between his vehicle and Mr. Smith’s vehicle.

33. As a result of the impacts, Mr. Smith suffered serious bodily injuries and other damages.

34. At the time of the collision, Mr. Smith 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.

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

36. At the time of the collision, Mr. Smith was insured by Defendant’s Policy No. NMA 142100722, which provided Mr. Smith with uninsured and underinsured motorists coverage insurance with limits of \$25,000.00 per person/\$50,000.000 per accident.

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

38. The tortfeasor also carried the minimum required liability insurance with limits of \$25,000.00 per person, \$50,000.000 per accident, an amount equal to the underinsured motorists coverage carried by Mr. Smith.

**Joshua Smith makes a claim that Defendant denies.**

39. Before the collision at issue, Defendant collected a premium for automobile coverage pursuant to the Smith Policy, under which Mr. Smith had a reasonable expectation that he carried underinsured motorist coverage of \$25,000.00 per person / \$50,000.00 per occurrence. *See Exhibit 2* .

40. At the time of the collision, Mr. Smith was under the reasonable belief that he and his insureds were entitled to underinsured motorist benefits for insurance policy that Defendant had issued him.

41. After the collision, Mr. Smith reported the collision to Defendant and, through counsel, notified Defendant that a claim for the underinsured motorist coverage, for which Defendant collected a premium for, would be made. *See Exhibit 3*.

42. Defendant, under a standardized business practice, opened a claim, assigned claim number 014422254, randomly assigned the adjustment of the matter to one of its adjusters, and preemptively denied Mr. Smith's underinsured motorist coverage claim for the full amount of UIM coverage as reflected on Defendant's declaration page.

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

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

### CLASS ACTION ALLEGATIONS

45. 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 Defendant collected a premium for an underinsured motorist coverage on a policy that was issued or renewed in New Mexico by Defendant and that purported to provide underinsured motorist coverage on the face of its application and declaration pages, but which effectively provided 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).

46. 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 Defendant 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 but were denied underinsured motorist coverage benefits, in whole or in part, by Defendant.

47. 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.

48. The members of the Class are so numerous that joinder of all members of the

Class is impracticable.

49. Mr. Smith's claims are typical of the claims of members of the Class and Subclass.

50. 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 Defendant breached contractual obligations owed to its New Mexico policyholders;
- b. Whether Defendant breached duties owed to New Mexican insureds under the implied covenant of good faith and fair dealing;
- c. Whether Defendant violated NMSA 1978, §§ 59A-16-1 to 30;
- d. Whether Defendant failed to disclose one or more material facts in connection with the marketing or sale of the insurance policies at issue;
- e. Whether Defendant misled or deceived its policyholders in connection with the marketing or sale of the policies at issue;
- f. How properly to construe Defendant's standard application forms and other standard form documents relative to the *Schmick* offset;
- g. What remedies are available to Mr. Smith 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 Defendant might claim.

51. 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:

52. Common or generalized proof will predominate with respect to the essential elements of the nine claims at issue.

53. 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.

54. 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).

55. 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.

56. 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.

57. The need for proof of Mr. Smith'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.

58. 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.

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

60. 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.

61. 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.

62. 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.

63. Certification of the Class is desirable and proper, because Mr. Smith will fairly and adequately protect the interests of the Class that he seeks to represent. There are no conflicts of interest between Mr. Smith's claims and those other members of the Class. Mr. Smith 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**

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

65. Defendant had a duty to ensure Mr. Smith 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.

66. Defendant had a duty to provide Mr. Smith and Class Members coverage for which a premium was charged and collected.

67. 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. Smith and Class Members was illusory and/or misleading and Defendant therefore materially misrepresented the terms and benefits of underinsured coverage, yet charged a premium for such illusory and/or misleading coverage.

68. 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.

69. A reasonably prudent insurer would not charge a premium for coverage it intended to deny or did not provide.

70. Defendant's 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.

71. As a result of Defendant's negligence, Mr. Smith and Class Members sustained actual damages for which Defendant is liable. Mr. Smith and Class Members are entitled to punitive damages for actions of Defendant 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**

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

73. 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.

74. Defendant failed to deliver the quality or quantity of services applied for and purchased and paid for by Mr. Smith 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. Smith and others similarly situated were under the reasonable belief that such coverage existed and would protect them.

75. In the regular course of its business, Defendant 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.

76. 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 Defendant' customers reasonably expected to receive.

77. In the regular course of its business, Defendant 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.

78. 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, Defendant has been on notice that underinsured motorist policies provide no coverage at minimal limits and misleading coverage at higher limits, yet Defendant markets, advertises, sells, and received premiums for above-minimal limits underinsured motorist policies to and from customers, such as Mr. Smith 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.

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

80. Defendant, 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**

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

82. 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”).

83. 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.

84. Mr. Smith and Class Members were insured under the policies issued by Defendant.

85. Defendant owed Mr. Smith and Class Members the duties of good faith, fair dealing, and the accompanying fiduciary obligations.

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

87. Defendant misrepresented the terms of the policy sold and provided to Mr. Smith 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.

88. Defendant's acts and failures to act were in reckless disregard of Mr. Smith's, and Class Members' rights as insureds under the subject policies.

89. Defendant's acts and practices took advantage of the lack of knowledge and experience of Mr. Smith and Class Members to a grossly unfair degree.

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

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

92. Defendant's failure to act in good faith and Defendant's violations of the Insurance Code and Unfair Practices Act are proximate causes of damages sustained by Mr. Smith and Class Members.

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

94. Mr. Smith 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 Defendant's acts, omissions policies, and conduct in violating UIPA, as set forth above, Mr. Smith 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**

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

96. Mr. Smith 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.

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

98. At the time of contract formation, Defendant and its agents inequitably misrepresented the value of underinsured motorist coverage and failed to inform Mr. Smith 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 Defendant collected premiums.

99. The inequitable failure of Defendant and its agents to inform Mr. Smith and similarly situated Class Members that they were vanishingly unlikely to receive the underinsured motorist coverage reasonably caused Mr. Smith 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.

100. The insurance contracts respectively entered between Defendant and its

agents, on the one hand, and Mr. Smith and Class Members, on the other hand, do not express the intentions and reasonable beliefs of Mr. Smith and Class Members that they would receive the underinsured motorist coverage that they contracted for and for which Defendant collected premiums.

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

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

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

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

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

105. Defendant 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. Smith 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;

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

107. Defendant's 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. Smith and Class Members.

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

#### **CLAIM 6 - NEGLIGENT MISREPRESENTATION**

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

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

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

112. Defendant, however, withheld this information from Mr. Smith 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.

113. From 1985 through the present, Defendant failed to disclose material facts and made material misrepresentations to Mr. Smith and Class Members regarding illusory and/or misleading underinsured motorist coverage.

114. Defendant, by its failures and omissions, misrepresented underinsured motorist coverages through its standard and uniform applications and policies given to Mr. Smith and Class Members, which Defendant knew or should have known, were misleading and contained material misrepresentations.

115. Defendant's material omissions and misrepresentations were made to induce Mr. Smith and Class Members to purchase underinsured motorist coverage that Defendant knew or should have known was illusory and/or misleading.

116. Mr. Smith and Class Members reasonably relied on Defendant's material omissions and misrepresentations when deciding to purchase underinsured motorist coverage at the level of coverage they respectively purchased.

117. As a result of Defendant's misrepresentations and omissions, Defendant is liable to Mr. Smith and Class Members for their damages flowing from those misrepresentations and omissions.

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

#### **CLAIM 7 – UNJUST ENRICHMENT**

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

120. Defendant has applied the *Schmick* offset to its insureds' claims and denied underinsured motorist coverage benefits in New Mexico since 1985. Defendant, through its ambiguous insurance contracts, has 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 Mr. Smith and Class Members. The windfall Defendant received allowed it to invest and enjoy the benefits of its deceptive and intentional conduct.

121. Mr. Smith and Class Members are entitled to the value of the UIM benefits and out-of-pocket damages under the equitable theory of unjust enrichment.

122. Defendant 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**

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

124. 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.

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

126. Mr. Smith, 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**

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

128. Mr. Smith and Class Members are entitled to injunctive relief under the claims they have pled because Mr. Smith 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.

129. Defendant should be enjoined from continuing practices that violate the duties, and the contractual and legal obligations owed to Mr. Smith and Class Members.

130. Defendant must be compelled to stop its 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. Smith and Class Members throughout the application and policy underwriting process.

### **REQUEST FOR RELIEF**

Mr. Smith 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. Smith to represent the interests of the Class Members as appropriate and appointing undersigned counsel to represent the class.
- ii. Awarding compensatory damages to Mr. Smith and Class Members for the damages done to them by Defendant in an amount to be proven at trial;

- iii. Awarding Mr. Smith and Class Members damages from Defendant 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 Defendant and others from such unfair trade practices and wrongful conduct in the future and will punish them for the conduct set forth herein;
- v. Awarding punitive damages as allowable by law which will deter Defendant and others from such wrongful conduct in the future and will punish them for the conduct set forth herein;
- vi. Granting declaratory relief that establishes the rights and obligations of the parties with respect the claims set forth herein;
- vii. Granting injunctive relief requiring Defendant 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;
- viii. Awarding Mr. Smith and Class Members their costs and expenses incurred in these actions, including reasonable attorney's fees, experts' fees, and costs; and
- ix. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Kedar Bhasker

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