IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ARTHUR ARGUEDAS, BARBARA ARGUEDAS and HELEN BRANSFORD,

Plaintiffs-Appellants,

v. **No. A-1-CA 35,699**

GARRETT SEAWRIGHT, et al.,

Defendants-Appellees.

APPELLANTS' CONSOLIDATED ANSWER BRIEF TO AMICI CURIAE BRIEFS FILED BY WASHINGTON LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ALBUQUERQUE HISPANO CHAMBER OF COMMERCE, THE NEW MEXICO ASSOCIATION OF COMMERCE AND INDUSTRY, AND THE NATIONAL ASSOCIATION OF INSURANCE COMPANIES AND INDEPENDENT INSURANCE AGENTS OF NEW MEXICO

On Appeal from the First Judicial District Court, County of Santa Fe
Hon. Sarah M. Singleton, No. D-0101-CV-2013-01293

Submitted By:

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STATEMENT OF COMPLIANCE

Counsel undersigned hereby certifies that the body of Appellants' Consolidated Answer Brief To Amici Curiae Briefs Filed By Washington Legal Foundation, Chamber Of Commerce Of the United States Of America, The Albuquerque Hispano Chamber Of Commerce, The New Mexico Association Of Commerce And Industry, And The National Association Of Insurance Companies And Independent Insurance Agents Of New Mexico is done in proportionally-spaced Times 14-point font style and contains [7,897] words including headings, footnotes, quotations and all other text except the cover page, table of contents, table of authorities, signature block and certificate of service.

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A. AMICI'S ARGUMENTS SUPPORT PLAINTIFFS' MOTION FOR CERTIFICATION

The themes of the arguments made in these Amici briefs reflect an ultra-conservative, political agenda designed to realign public policy to favor the interests of big business over individual consumers—especially when those consumers invoke the class remedy to even the playing field. These arguments are most relevant to multi-state or national consumer protection class litigation. They are utterly irrelevant to New Mexico's consumer protection law in general, and the UPA class remedy in particular, which is not comparable to that of any other state. Thus, this case, and the issue it presents, has no national significance, import or relevance.

New Mexico's consumer protection law is defined by a unique approach to the UPA and the importance of the UPA class remedy to fundamental New Mexico public policy. This unique public policy arises from a longstanding recognition that New Mexico's relatively small population of citizens are, on the whole, historically less educated and more economically disadvantaged than those in most sister states—and thus far more vulnerable to exploitation by unfair, deceptive or unconscionable sales practices. *See e.g.*, *State ex rel. King v. B&B Investment Grp., Inc.*, 2014-NMSC-024, ¶¶ 14-16, 26, 34, 48, 329 P.3d 658; *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶¶ 12-16, 18, 144 N.M. 464, 188 P.3d 1215; *cf. Montaño v. Allstate Indem. Co.,* 2004-NMSC-020, ¶ 16, 135 N.M. 681, 92 P.3d 1255.

In this case, these Amici groups represent an American property & casualty industry whose total financial assets in 2015 were $6.774 **trillion**. *2017 Insurance Fact Book,* Chapter 6, Property/Casualty Financial Data, at 49, 81 (Net earned premiums for the American property casualty insurance industry increased from $367 billion in 2002 to $514 billion in 2015 while total financial assets reached $6.774 trillion).

To put into context the enormity of the financial interests brought to bear in this case, the New York Times published a comparison graph on February 12, 2006, to give its readers some sense of scale of $1 trillion in light of then President Bush's proposed $2.77 trillion budget. *See* New York Times, February 12, 2006, Section 4, at 2, "The Basics." The Times graph shows that a trillion is 27 times greater than the total number of acres of land on the earth [37 billion]. *Id*. It is 10 times greater than the total number of all people estimated to have ever lived [100 billion]. *Id*. It is 6.66 times greater than the total number of pennies in use [150 billion]. *Id*. And, it is 2.5 times greater than the total number of stars estimated to be in the Milky Way [400 billion]. *Id*. Thus, this industry's financial assets are worth *over* six times these comparisons.

On a smaller, and perhaps more easily grasped scale, let's look at one-tenth of a percent [.1%] of $1 trillion which is $1 billion. If a person, and his or her decedents, were to have been given the sum of $250,000 every year starting from

the day Jesus Christ was born, it would still take another 1983 years before the total sum paid would reach $1 billion.

And against whom does this $6 trillion industry choose to oppose with these Amici briefs? Two Plaintiffs who are retired state employees and who are represented by a solo practitioner, with no law clerks or associates—all three of whose combined financial assets would represent the value of less than one penny compared to just $1 billion. So, why then should the prodigious power of these mammoth financial and political entities be brought to bear, in such an unprecedented[1] manner, on an issue before the New Mexico Court of Appeals?

The answer is self-evident. This case presents an issue of *substantial* public interest involving matters of fundamental New Mexico public policy affecting the rights of *all* New Mexicans, as established by the New Mexico Supreme Court, which therefore should, and indeed must, be certified to the Supreme Court. *VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶ 9, 130 N.M. 287, 24 P.3d 319.

The arguments made, and policy positions taken, in these Amici briefs only serve to reinforce Plaintiffs' arguments for certification in their two previous Motions for Certification which this Court is holding in abeyance. *See* Order on Plaintiff's Amended Motion for Certification, July 28, 2017 ("Motion held in abeyance pending submission to the panel.").

[1] As stated in their Amended Motion for Certification, Plaintiffs' counsel can find no reported decision where these Amici have previously appeared before the New Mexico Court of Appeals.

The underlying theme of all three Amici briefs is that individual UPA actions should be favored over UPA class actions and UPA class actions should be discouraged as a matter of public policy to protect "business" from "disastrous consequences." The realistic alternative to a UPA class action, such as this one where consumers are presumed to be ignorant of their statutory rights under the UM Statute, is not 100,000 individual suits, but zero individual suits.

> But although the district judge might have said more about manageability, the defendants have said nothing against it except that there are millions of class members. That is no argument at all. The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30…The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660-61 (7th Cir.2004) (Posner, J.) (citing *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (emphasis in original)).

As recently noted by New Mexico Federal Judge James Browning, Judge Richard Posner of the 7th Circuit is "the most-cited legal scholar of all time." *Zuniga v. Bernalillo County*, 319 F.R.D. 640, 673 n.11 (D.N.M. 2016). In another class action opinion, Judge Posner again noted, contradicting Amici's arguments, that the class action remedy is an essential consumer protection tool since without it "defendants would be able to escape liability for tortious harms of enormous

aggregate magnitude but so widely distributed as not to be remediable in individual suits." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir.2013).

As discussed below, Amici ignore or misstate the "apparent" conflict between this Court's holdings in *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶¶ 37, 45, 136 N.M. 599, 103 P.3d 39 and *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶¶ 3, 44, 47, 142 N.M. 437, 166 P.3d 1091, which, at a minimum, appear to create an uncertain state of law which should not exist and, again, justifies certification. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶ 38, 356 P.3d 564.

In addition, Amici's arguments bolster Plaintiffs' request for certification due to the uncertainty in the law created by the conflict between the holding in *Brooks* [and *Lohman* as Amici interpret it] and the Supreme Court's repeated holdings on the rational, liberal interpretation and remedial objectives of the UPA stated in *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *Ashlock v. Southwest Bank of Roswell, N.A.*, 1988-NMSC-026, ¶ 7, 107 N.M. 100, 753 P.2d. 346, *Fiser*, 2008-NMSC-046, ¶¶ 12-15, and *B & B Investment Grp.,* 2014-NMSC-024, ¶¶ 14-16, 26, 34, 48.

As with Defendant's Answer Brief, none of the Amici bother to cite the New Mexico Supreme Court's seminal holding in *Fiser* which was decided after both *Brooks* and *Lohman*. This omission is critical to all of Amici's arguments. In

Fiser, the Supreme Court sets forth the same rationale as did the 7th Circuit in *Carnegie* and *Butler*. The Supreme Court's full statement on the public policy favoring UPA class actions over individual UPA actions again directly contradicts Amici's arguments.

> The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim…"In many cases, the availability of class action relief is a *sine qua non* to permit the ***adequate vindication of consumer rights"***…"The class action is one of the few legal remedies the small claimant has against those who command the status quo.'"
>
> The opportunity for class relief and ***its importance to consumer rights is enshrined in the fundamental policy of New Mexico*** and evidenced by our statutory scheme…Notably, the ***UPA specifically references class actions as a private remedy*** available under the act. ***Section 57–12–10(E).*** Further, the New Mexico Uniform Arbitration Act declares that arbitration clauses that require consumers to decline participation in class actions are unenforceable and voidable…While this provision may be preempted by the FAA…it is ***clear evidence of the fundamental New Mexico policy*** of allowing consumers ***a means to redress their injuries via the class action device***.
>
> In New Mexico, we recognize that the class action was devised for "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."

Fiser, 2008-NMSC-046, ¶¶ 12-14 (citations omitted)[2] (emphasis added).

The plainly stated objective of the Amici briefs is to change the fundamental New Mexico public policy established by the New Mexico Supreme Court to conform with their political and financial agenda, *i.e.*, the abolition of UPA class actions in New Mexico. The direct conflict between these arguments and the

[2] As in *Carnegie*, *Fiser* also cited and quoted *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997). *Id.* ¶ 14.

Supreme Court's strong endorsement of the UPA class action in *Fiser* as fundamental to New Mexico public policy are more than sufficient reason for this Court to certify this case to the Supreme Court immediately.

For all these reasons, this Court should grant Plaintiffs' Motions for Certification without further delay and allow these indisputably substantial issues of public interest affecting the fundamental consumer rights of all New Mexicans to be decided in the forum they demand—the New Mexico Supreme Court.

B. SUMMARY OF ARGUMENTS RAISED BY AMICI

Amici raise the following arguments based essentially on their collective view of what New Mexico public policy on both the UPA and class actions in general should be. Below is a summary of the arguments made by each of the Amici and citations to where these same arguments were raised and answered previously on this appeal.

U.S. Chamber of Commerce [Chamber]:

1. The Court Should Prohibit No-Injury Class Actions Under New Mexico's Consumer Protection Law.

   [**BIC 15, AB 17-23, RB 11-15**].

2. New Mexico's Consumer Protection Law Requires Actual Injury For Class Claims And Adequately Deters Violations.

   [**BIC 6-9, 13-15, 28-29, 38-43, AB 17, RB 11-15**].

3. Construing The State's Consumer Protection Laws To Allow Non-Injury Class Actions Raises Serious Due Process Concerns.

   [Never raised or argued by either party].

4. States With Similar Consumer Protection Statutes Overwhelmingly Prohibit No-Injury Class Actions.

[**BIC 38-39, AB 29-30, FN 70** (not citing same cases)].

5. There Is An Eminently Rational Basis For The Legislature To Have Prohibited No-Injury Class Actions.

[**BIC 21, 36-38, 42-45, AB 20, RB 11-14**].

Washington Legal Foundation [WLF]:

1. This Court Should Honor The Careful Statutory Balance The New Mexico Legislature Struck In Crafting The UPA.

[**BIC 15, 36-39, 40-43, AB 17-21, 29-30, RB 11-14**].

2. The Private Remedy In § 57-12-10 Reflects The Legislature's Desire To Incentivize Suits To Deter Unfair Practices While Also Protecting New Mexico Courts And Businesses From Abusive Class Actions.

[**BIC 15, 36-39, 40-43, AB 17-21, 29-30, RB 11-14**].

3. Allowing Class-Wide Recovery Of Statutory Damages Would Upset § 57-12-10's Delicate Statutory Balance And Invite Disastrous Consequences.

[**BIC 15, 36-45, AB 20, RB 11-14**].

4. It Is For The New Mexico Legislature, Not The Courts To Create Substantive Law.

[**BIC 21, 36-38, 42-45, AB 20, RB 11-14**].

National Association Of Mutual Insurance Companies [NAMIC]:

1. The UPA Is Unambiguous And Cases Interpreting The Statute Is [Sic] Well Settled.

[**BIC 15-18, 28-29, 31-34, 40-44; AB 16-17, 20-26**].

2. Public Policy Mandates Affirmation Of The District Court's Ruling.

[**BIC 12-20, 27-34, 42-45; AB 27-30; RB 11-14**].

Accordingly, Plaintiffs will not reiterate in full the arguments they have already addressed in their Brief-In-Chief and Reply as shown above. However, Plaintiffs will address arguments not raised by the parties and, therefore, improper for Amici to raise *sua sponte* and arguments already answered but restated by Amici as public policy issues.

C. AMICI CANNOT RAISE DUE PROCESS ISSUES ON APPEAL

Chamber's argument that allowing so-called "no-injury" UPA class actions would violate due process is not an issue before this Court. This constitutional issue was never raised by Defendant in the trial court nor on appeal. *Whittington v. State Dep't of Pub. Safety,* 2002–NMSC–010, ¶ 3, 132 N.M. 169, 45 P.3d 889 (quoting *State ex rel. Castillo Corp. v. N.M. State Tax Comm'n,* 1968-NMSC-117, ¶ 18, 79 N.M. 357, 443 P.2d 850) ("Amicus must accept the case on the issues as raised by the parties, and cannot assume the functions of a party."); *see also New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, ¶ 45, 274 P.3d 53 ("Amicus curiae status does not afford the same rights as those available to a party on appeal. 'Amicus must accept the case on the issues as raised by the parties, and cannot assume the functions of a party'…Unlike parties, amici curiae may not make or respond to procedural motions, *see* Rule 12–309 NMRA, and cannot submit a reply brief, *see* Rule 12–213 NMRA.").

Therefore, this issue is not properly before this Court and cannot be considered as it is raised by Chamber for the first time. Chamber does raise the

rational basis arguments Plaintiffs raised repeatedly below—but misconstrues the thrust of that argument as explained below.

D. THE REMEDIAL PUBLIC POLICY UNDERLYING THE UPA CLASS ACTION

Unlike federal courts, New Mexico courts presume that the Legislature intended to include New Mexico common law in all statutory enactments—unless specifically abrogated in the statutory language. *Valdez v. State*, 1972-NMSC-029, ¶ 6, 83 N.M. 720, 497 P.2d. 231; *Sims v. Sims*, 1996-NMSC-078, ¶ 24, 122 N.M. 618, 930 P.2d. 153. The UPA did not abrogate New Mexico's common law tort of fraud which, nevertheless, must be considered when interpreting the UPA consistent with its remedial purpose. *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 20, 150 N.M. 64, 257 P.3d 884.

The issues to be considered when interpreting any remedial statute, such as the UPA, were summarized by the New Mexico Supreme Court 40 years ago.

> There are three points to be considered in the construction of all remedial statutes; ***the old law, the mischief, and the remedy***; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. ***And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy***….Applying this rule, it becomes clear that the liberal construction of the statute, the construction which ***the Legislature obviously intended and which would 'suppress the mischief and advance the remedy,' should be applied here***.

Albuquerque Hilton Inn v. Haley, 1977-NMSC-051, ¶¶ 7-8, 90 N.M. 510, 565 P.2d. 1027 (emphasis added).

The old law was the common law fraud remedy—and the harshness of both *caveat emptor* as well as its heavy burden of proving both scienter and detrimental reliance. The "mischief" the UPA was enacted to remedy, was to ameliorate the harsh obstacles of the common law action to address the problem of the widespread commercial use of deceptive and unconscionable sales practices involving unsophisticated and vulnerable New Mexico consumers. Pridgen, *Consumer Protection And The Law*, § 2:1 (2016) (state UPA acts were enacted in response to mass sales practices and enable consumers to bring actions for sales misrepresentations without being subject to harshness of caveat emptor rule and proof requirements for common law fraud).

Thus, public policy and the common law underlying the UPA must allow for awards of statutory damages to *all* innocent New Mexico consumers without the need to show actual damages—regardless of whether these consumers are denominated as named parties or class members. *Lohman*, 2007-NMCA-100, ¶¶ 3, 44, 47. The UPA's remedy provides a lower burden of proof for deceptive or unconscionable sales practices that cause little if any economic harm and might otherwise go unpunished. *Hale v. Basin Motor Co.,* 1990-NMSC-068, ¶ 27, 110 N.M. 314, 795 P.2d 1006.

It is the task of the courts to construe the UPA to suppress the mischief of consumer fraud through the broadest possible application of its remedial purpose. *Lohman*, 2007-NMCA-100, ¶ 25 ("The remedial purpose of the legislation, as a

consumer protection measure, is also consistent with the broadest possible application."). Further, the public policy underlying the UPA is not derived solely from statutory law but also from New Mexico's common law and equity. *B & B Investment Grp.,* 2014-NMSC-024, ¶ 38.

By eliminating the need to prove the fraud elements of scienter and detrimental reliance, the New Mexico courts ensure that the UPA lends the protection of its broad application to all innocent New Mexico consumers. *Ashlock*, 1988-NMSC-026, ¶¶ 6-7; *cf.* NMSA 1978, Section 57-12-4; *FTC v. Freecom Commc'ns, Inc.,* 401 F.3d 1192, 1202-03 (10th Cir.2005) ("Among other things, [FTCA] § 5 declares unlawful 'deceptive acts or practices in or affecting commerce'…The primary purpose of § 5 is to lessen the harsh effects of *caveat emptor*… Neither proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation."); *Dejay Stores v. Federal Trade Commission*, 200 F.2d 865, 867 (2d Cir.1952) (to establish a violation of § 5 "it is not necessary to show that person deceived has suffered any pecuniary loss.").

These federal holdings on the FTCA are consistent with the Supreme Court's holding in *Page & Wirtz*, 1990-NMSC-063, ¶¶ 22-23, where Section 57-12-10(B) was liberally interpreted to allow recovery of nominal or statutory damages upon proof of a UPA violation and despite the lack of any proof of "any loss of money or property." As explained below, *Page & Wirtz* created a disconnect between the Supreme Court's liberal, remedial interpretation of the

UPA's individual remedy as allowing a nominal recovery in the absence of any proof of damages and the trial court's strict, literal interpretation of the UPA's class remedy. Neither Defendant, nor any of the Amici, have thus far articulated any principled basis for this radical difference.

It may be rightly said that Amici are self-interested entities who are motivated by a desire to immunize themselves from liability for institutional sales practices committed against large numbers of New Mexico consumers who, as a practical matter, have neither the knowledge nor the fortitude needed to pursue an individual UPA action for a $100 recovery.

> In recent years, class actions—and particularly class actions which are resolved by settlement—have been subjected to considerable public criticism. At times, this criticism has been warranted. However, much of the criticism has been generated by self-appointed professional objectors ***and by self-interested entities who are motivated by a desire to immunize themselves from liability for wrongs*** rather than by ***any concern for the public interest***. Certain types of businesses, such as financial institutions ***and insurers***, commonly deal with large numbers of consumers in similar ways. Often, such businesses are ***essentially immune from individual suits for damages*** since the amounts at issue as to any particular consumer are small. These entities ***harbor an expectable dislike for the class action procedural device, since it provides an effective tool for consumer redress in such situations***.

Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 377 (1997), cited with approval *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 55, 140 N.M. 879, 149 P.3d 976 (emphasis added).

Shortly after the enactment of the UPA's private remedy section in 1971, a New Mexico Law Review article discussed the public policy role the UPA class remedy would play in addressing widespread, institutional use of deceptive or unconscionable sales practices—essentially predicting the Supreme Court's 2009 holding in *Fiser* on the fundamental importance of the UPA class remedy for New Mexico public policy.

> The more common device is the suit brought on behalf of a class of plaintiffs, the typical consumer class action. The benefits derived in suits for damages from such an action are readily apparent. Wrongs committed by a single business against one consumer are often replicated in many transactions, yet the separate damage claims of each individual claimant might be small. As a result many people suffer wrongs that go unremedied. The ***consumer may be unaware of the existence of the claim, or it may be so small that individual litigation is uneconomical***. The offending party may be aware of his misconduct yet find it expedient and profitable to settle the occasional individual claim that is presented to him, while continuing in his unlawful activity as to the larger number of unknowing customers. The class suit overcomes these problems by making litigants of all persons with claims, whether or not they initially know it, thereby asserting their respective claims at minimal litigation cost. In addition, the large sum of money derived from a recovery on behalf of the class is distributed among the victims, not simply to a single plaintiff as punitive damages might be.
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> * * *
>
> The circumstances in which a defendant class action can be valuable include: (1) where an unlawful, deceptive or unconscionable trade practice is engaged in ***as standard practice throughout a trade***; (2) where a statute followed in a trade is ruled in a test case to be unconstitutional, or implicitly repealed by another law, but continues to be followed; and, (3) where a court interprets an ambiguous statute differently from the interpretation given in the trade, ***and the new interpretation is ignored***.

Paul Biderman, *Consumer Class Actions Under The New Mexico Unfair Practices Act*, 4 N.M. L.Rev. 49, 54-55 (1973) (emphasis added).

This is precisely the situation presented here. The Supreme Court unambiguously mandated the affirmative disclosure of UM premiums during all future UM sales transactions conducted in New Mexico. *Montaño,* 2004-NMSC-020, ¶¶ 16, 20. The entire New Mexico insurance industry, including the Defendant Agents, chose to ignore this new interpretation of the requirements for making a valid offer of UM coverage. *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 20, 149 N.M. 162, 245 P.3d 1214 ("[T]hese consolidated cases indicate that [after *Montaño*] insurers continue to offer UM/UIM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice."). These Amici ask this Court to give these Defendant Agents a "get out of jail free" card for refusing to follow the Supreme Court's clear mandate in *Montaño*.

Contrary to Amici's arguments, the individual UPA remedy is only suited to cases where individual consumers have been harmed by isolated instances of deceptive or unconscionable sales practices. It is, however, wholly inadequate to remedy the institutional, systematic use of deceptive and unconscionable sales practices on a statewide basis which can only be effectively addressed by the UPA class action which is enshrined in New Mexico's fundamental policy. *Fiser*, 2008-NMSC-046, ¶¶ 12-14.

Amici's insistence that the UPA individual remedy is sufficient to redress such industrial scale sales deception rests on two fatally false assumptions. The

first is that the consumer class members will even know that they have a UPA claim against these Defendant Agents when these consumers have long been presumed not to know New Mexico insurance law. *Rodriguez v. Windsor Ins. Co.*, 1994-NMSC-075, ¶ 13, 118 N.M. 127, 879 P.2d 759; *Read v. Western Farm Bureau Mut. Ins. Co.,* 1977-NMCA-039, ¶¶ 18-20, 90 N.M. 369, 563 P.2d 1162; *Computer Corner, Inc. v. Fireman's Fund Ins. Co.,* 2002-NMCA-054, ¶ 7, 132 N.M. 264, 46 P.3d 1264.

The second is, even if a consumer were willing to institute litigation to recover $100-$300, that there would be any lawyers willing to take on the arduous burden of litigating such a case just for the sake of *possible* attorney fees—a situation where the lawyer will by definition be putting his or her own interests ahead of the client's.

Amici [and Defendant] also confuse the concepts of actual damages with the legal injury that New Mexico law requires under the common law fraud action which the UPA supplements. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 20, 310 P.3d 611 (damages are not an element of common law fraud). Damages, or actual damages, means nothing more than a legal injury which constitutes an invasion of a legally protected right. *Sharts v. Natelson*, 1994-NMSC-114, ¶ 11 n. 1, 118 N.M. 721, 885 P.2d 642 ("The terms 'damages' and 'injury' are used interchangeably by many courts to refer to the 'actual injury' a client must suffer before the client has a claim for relief against his or her

attorney…We ***read 'damages'*** in these passages ***as 'injury***.' In addition…we define 'injury' as the loss of a right, remedy or interest, or the imposition of a liability." (citations omitted) (emphasis added)); *Lovelace Med. Center v. Mendez*, 1991-NMSC-002, ¶¶ 25-26, 111 N.M. 336, 805 P.2d. 603. Plaintiffs have more than alleged legal injuries, on a class-wide basis, sufficient to constitute a basis for an award of nominal or statutory damages to every absent class member in this case under the clear public policy and remedial purposes of the UPA.

E. WLF'S "BALANCE" ARGUMENT IGNORES *PAGE & WIRTZ*

WLF, funded by the Koch brothers, argues that the New Mexico appellate courts should "honor the careful statutory balance the New Mexico Legislature struck in crafting the UPA." **WLF Brief 6-12**.

The Legislative balancing suggested by WLF really occurs with the UPA's "trade-off" between creating a consumer friendly remedy which lessens the burden of proof required for a common law fraud action in exchange for limiting a business's liability for punitive damages to only three times any actual or statutory damages awarded. The consumer protective policy of the UPA is to allow for *some* recovery upon proof of a UPA violation. The policy objective evinced by *Page & Wirtz* is not the recovery of damages but the protection of all New Mexicans by the prevention of deceptive and unconscionable sales practices which affect all New Mexico consumers. Limiting liability for punitive damages

to three times any award of actual or statutory damages for the violation itself is a business friendly compromise if ever there were one.

As originally "crafted," a strict interpretation of Section 57-12-10(B) would limit *any* individual UPA recovery to "any person who suffers any loss of money or property," *i.e.*, actual damages. *Pedroza v. Lomas Auto Mall, Inc.*, 663 F.Supp.2d 1123, 1128, 1131 (D.N.M. 2009). The result of applying a strict, literal and consistent construction to both Section 57-12-10(B) and Section 57-12-10(E) would be that no person could recover under the UPA unless everyone, including both individuals and class members, could show actual damages. *Id*. As argued in Plaintiffs' Brief-In-Chief, this would be the correct result were it not for the New Mexico Supreme Court's seminal holding in *Page & Wirtz*, 1990-NMSC-063, ¶¶ 21-23, which changed the landscape of New Mexico consumer protection law.

In *Page & Wirtz*, the Supreme Court rejected the literal construction of the UPA's remedy section espoused by Amici, and adopted by the trial court. Instead, the Supreme Court relied on the public policy and remedial purpose of the UPA to "lend[] the protection of its broad application to innocent consumers." *Ashlock*, 1988-NMSC-026, ¶ 7. The Supreme Court has applied this same policy rationale to UPA class actions holding, contrary to Amici's argument about the role of New Mexico courts in establishing "substantive law," that it "is the task of the courts to 'ensure that the Unfair Practices Act lends the

protection of its broad application to innocent consumers.'" *B & B Investment Grp.,* 2014–NMSC–024, ¶ 48.

Where both Defendant and Amici's arguments miss the mark lies with the basic difference between the UPA and the common law fraud action which it supplements. The common law fraud action constitutes a substantive right. The UPA provides remedial procedural rights which supplement common law fraud by providing an alternative method of obtaining redress for a substantive right originating under common law. *Hale*, 1990-NMSC-068, ¶ 18 ("Substantive rights are to be distinguished from procedural or remedial rights that prescribe methods of obtaining redress or enforcement of substantive rights.").

As with *Fiser*, neither the Amici nor Defendant cite to the Supreme Court's holding in *B & B Investment Grp.,* a UPA class action brought by the New Mexico Attorney General. *Id*. In *B & B Investment Grp.,* the Supreme Court expressly held that detriment, injury or damage are presumed upon proof that a seller systematically engaged in the knowing or willful use of unconscionable sales practices. *B & B Investment Grp.,* 2014–NMSC–024, ¶ 26 ("The UPA does not require a subjective, individualized showing of detriment [in a UPA class action]…We may presume detriment from the evidence that Defendants' corporate practices took unfair advantage of borrowers' disadvantages [or ignorance] to a gross degree.").

Plaintiffs alleged that they and their putative class members were presumed to be ignorant of the material facts knowingly or willfully omitted by these Defendant Agents, *i.e.*, the premium prices for the stacked UM coverage they were selling to Plaintiffs and their class members. *Progressive Northwestern Ins. Co. v. Weed Warrior Services*, 2010-NMSC-050, ¶ 13, 149 N.M. 157, 245 P.3d 1209 ("The courts of New Mexico assume the average purchaser of automobile insurance 'will have limited knowledge of insurance law,' and we will not impose on the consumer an expectation that she or he will be able to make an informed decision as to the amount of UM/UIM coverage desired or required without first receiving information from the insurance company.").

F. THE CONFLICT BETWEEN *BROOKS* AND *LOHMAN*

This is the point in Plaintiffs' argument where Plaintiffs must once again explain why *Brooks* does not stand for the proposition for which it is cited while *Lohman* does, indeed, hold and mean exactly what it unambiguously says, *i.e.*, individual plaintiffs and absent class members are equally entitled to recover statutory damages upon proof of systematic, institutional use of deceptive or unconscionable sales practices.

The UPA Holding In *Brooks* Was Dictum With No Precedential Value

Dictum or *obiter dicta* is defined as statements in an appellate opinion that, no matter how deliberately or emphatically phrased, are not necessary or essential to the issues presented and decided and thus lack the force of an

adjudication. *Phoenix Indem. Ins. Co. v. Pulis,* 2000-NMSC-023, ¶ 18, 129 N.M. 395, 9 P.3d 639 ("We are not, however, bound by comments [dictum] that exceed the scope of the holding."); *Ruggles v. Ruggles,* 1993-NMSC-043, ¶ 22 n. 8, 116 N.M. 52, 860 P.2d 182 (quoting *Black's Law Dictionary* 454 (6th ed. 1990)) ("It is obvious that this statement, since it was unnecessary to decision of the issue before the Court, was dictum, no matter how deliberately or emphatically phrased…Dictum [is defined as] 'Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand…[which] lack the force of an adjudication.'").

The issue in *Brooks* was whether the district court abused its discretion in refusing to certify a class after a hearing at which both sides presented evidence. *Brooks,* 2004-NMCA-134, ¶¶ 1, 7, 9. This Court itself observed that its ruling was limited to an analysis of whether the district court abused its discretion. *Id.*, ¶ 1 ("Plaintiffs appeal the district court's decision denying class certification under Rule 1–023 NMRA 2004. The appeal raises several issues, including the legal standards for determining whether a class definition is legally sufficient and the standards under which the predominance and superiority criteria of Rule 1–023(B)(3) are tested with regard to manageability. We also review the decision for substantial evidence. We affirm the district court.").

The issues presented were whether plaintiff's evidence at the class certification hearing was insufficient to meet their burden because: a) plaintiff failed to provide a reliable way to identify class members; and b) the individual liability issues promised to overwhelm the lawsuit, thereby making the class unmanageable and not superior. *Id*., ¶ 13.

Long before it engaged in any discussion of Section 57-12-10(E), this Court had already decided the trial court did not abuse its discretion in denying class certification based on Plaintiffs' failure to prove all the elements required under Rule 1-023(B)(3). *Id*., ¶ 16 ("Since neither party disputes the district court's findings as to Rule 1–023(A) requirements, we limit our analysis to the class definition and Rule 1–023(B)(3) requirements. Our analysis of these two issues subsumes the 'member preference' issue listed by the district court as a separate basis for denial. Because we find the grounds for the district court's decision are otherwise sufficient, we decline to address the issue of whether potential counterclaims might make this case less manageable."); *Id*., ¶ 20-34 (finding generally plaintiffs failed to meet their burden to prove all elements required under Rule 1-023 necessary for class certification).

By ¶ 35 of the *Brooks* Opinion, this Court had already decided the dispositive issue, *i.e*., whether the trial court abused her discretion in denying class certification.

> [T]he district court properly applied the law to its analysis of the Rule 1–023(B)(3) requirements. The court found that Plaintiffs failed to carry their burden that common issues predominate. It found there were crucial issues as to liability that would require individualized determinations, including what oral or written disclosures were made, the date when members learned or were put on notice of the posting order change, a determination of any individual adjustments to the posting order by Norwest's staff, and the fact that some members prefer the high-low posting order. The court concluded that these factors, together with the difficulties in determining which members were subject to counterclaims, presented management difficulties that were "almost or totally insurmountable."

Id., ¶ 35.

This Court's discussion of Section 57-12-10(E) did not begin in *Brooks* until ¶ 37 of its Opinion—two full paragraphs after deciding this dispositive issue. *Id.*, ¶ 37. ("Plaintiffs as a class must also establish causation—that Norwest's failure to disclose the new posting method, its reasons, and its effects caused Plaintiffs to suffer 'actual damages.' *See* NMSA 1978, § 57–12–10(B), (E) (1987) (limiting the award for unnamed plaintiffs in a class action to actual damages, while allowing named plaintiffs to collect statutory and treble damages); *see also* UJI 13–1707 NMRA 2004 (instructing that plaintiffs 'may recover damages proximately caused by the deception.')."").

Much later, again in dictum, this Court observed that the UPA class remedy was "less fair to those members who pursue their remedy as a [UPA] class action" because class members were entitled to recover neither statutory damages nor triple damages. *Id.*, ¶ 45. Other than quoting the language of the statute itself, this Court never mentioned *Page & Wirtz*. This Court also ignored the UPA's

public policy and remedial purposes of the Supreme Court's liberal, contradictory interpretation of the definitionally indistinguishable language from Section 57-12-10(B). This Court likewise ignored the repeated prior holdings of the Supreme Court, and this Court, on the remedial purposes and objective of the UPA to be considered when interpreting the UPA. *Id*., ¶¶ 37, 45; see *e.g*., *Ashlock*, 1988-NMSC-026, ¶¶ 6-7; *Hale,* 1990-NMSC-068, ¶¶ 18, 27; *Jones v. General Motors Corp*., 1998-NMCA-020, ¶¶ 22-23, 124 N.M. 606, 953 P.2d 1104.

Further, *Brooks*' examined Section 57-12-10(E) in a vacuum, instead of considering the UPA remedy section as a whole—and interpreting both Sections 57-12-10(B) and (E) consistently. *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (stating that courts must analyze a "statute's function within a comprehensive legislative scheme" and may not consider subsections "in a vacuum").

Brooks' mechanical interpretation of the UPA class remedy, albeit in dictum, not only violated the UPA's remedial purpose of providing the broadest possible protection to all New Mexico consumers but also ignored the inherent conflict this interpretation created with the Supreme Court's liberal interpretation of the definitionally indistinguishable language in Section 57-12-10(B). *Brooks,* 2004-NMCA-134; *cf. Page & Wirtz*, 1990-NMSC-063, ¶¶ 21-23. In fact, this Court failed to even cite, much less consider, *Page & Wirtz* in reaching these dubious conclusions.

In ignoring this irreconcilable conflict, *Brooks* also ignored the rule that it is the high duty and responsibility of the New Mexico judiciary to interpret the UPA to accomplish and facilitate its remedial purposes and intent—rather than rendering it a feckless, "less fair" remedy. *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶¶ 29-30, 147 N.M. 583, 227 P.3d 73 ("[I]t is the high duty and responsibility of the judicial branch of government to facilitate and promote the Legislature's accomplishment of its purpose…In the UPA, the Legislature has provided for damages and other remedial relief for persons damaged by unfair, deceptive, and unconscionable trade practices. Sections 57–12–3, –10. Since the UPA constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent…We ensure that the Unfair Practices Act lends the protection of its broad application to innocent consumers." (quote marks and citations omitted)); *Id.*, ¶ 34 (the UPA "should not be read so…as to negate [its] remedial consumer protection purposes").

Brooks also ignored the oft-repeated holdings limiting "literal" statutory interpretation when it leads to absurdity or contradiction. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 3, 117 N.M. 346, 871 P.2d. 1352 ("Courts will not add words except where necessary to make the statute conform to the obvious intent of the legislature, or to prevent its being absurd. But where the language of the legislative act is doubtful or an ***adherence to the literal use of words would lead to injustice, absurdity or contradiction***, the statute will be construed

according to its obvious spirit or reason, even though ***this requires the rejection of words or the substitution of others***." (emphasis added)); *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 30, 309 P.3d 1047 ("We refuse to parse the Legislature's words in such a literal and mechanical manner…We will not rest our conclusions upon the plain meaning of the language if the intention of the Legislature suggests a meaning different from that suggested by the literal language of the law." (quote marks and citations omitted)).

Finally, this Court's Opinion in *Brooks* was issued before the Supreme Court's seminal holdings in *Fiser*, *Truong*, and *B & B Investment Grp.,* all of which cast considerable doubt on the viability of these superficial and conclusory statements about the UPA class remedy.

The *Lohman* Holding Means Exactly What It Says

There are dispositive differences between the context of the statements in *Brooks* and those made by this Court in *Lohman* on the intent and meaning of Section 57-12-10(E). First, it must be understood, from a grammatical perspective, that there was only *one* named Plaintiff in *Lohman*, a person identified as M. D. Lohman suing "individually and on behalf of all similarly situated persons."

Second, unlike *Brooks*, the specific issues presented to this Court included the issue of whether plaintiff could legally state a valid UPA *class* claim without alleging economic losses. *Lohman,* 2007-NMCA-100, ¶ 3 ("Defendants advance

a two-pronged attack on the legal sufficiency of Plaintiff's first amended complaint. First, Defendants contend that Plaintiff has failed to allege a false or misleading representation, which is not preempted by federal law and which falls within the parameters of the UPA. Second, USTC asserts that ***Plaintiff has failed to allege damages or loss as required by the UPA***." (emphasis added)).

Thus, the issue presented was not limited to whether plaintiff, as an individual, was required to allege economic or monetary damage to maintain a UPA claim. The issue was whether plaintiff's allegations, which did not allege any specific economic loss, were legally sufficient to support both his individual UPA claim as well as the UPA claims of his putative class members. In this context, it is clear this Court's holding was that, in a UPA class action, it is not necessary for a plaintiff to allege that he/she *and* his/her putative class members have suffered any "loss of money or property" to maintain a UPA class action.

> The second prong of Defendants' attack on the sufficiency of the allegations in the first amended complaint concerns damages. USTC specifically contends that Plaintiff has failed to allege *any* cognizable injury, and it asserts that this constitutes a fatal defect…In summary, the issue of damages does not present a bar to Plaintiff's UPA claim. Even if Plaintiff fails ultimately to prove that ***he and his putative class members*** have suffered economic losses, ***they*** may nevertheless ***seek the statutory $100 minimum***.

Id., ¶¶ 43, 47 (emphasis added).

The normal rules of English grammar will apply when reading this holding. *Cf. In re Goldsworthy's Estate,* 1941-NMSC-036, ¶¶ 18-22, 45 N.M. 406, 115 P.2d 627 (1941). The word "they" is a plural third person pronoun referring to

more than one person. *Merriam-Webster's Dictionary of the English Language*, at 1298 (2014) ("they…used as third person pronoun serving as the plural of he, she or it").

Defendant, and Amici, focus on this Court's discussion of Section 57-12-10(B) and the Supreme Court's holding in *Page & Wirtz* during its analysis of the damages issue. *Lohman*, 2007-NMCA-100, ¶¶ 44-45. However, it is contextually clear that this Court was applying the Supreme Court's *rationale* for finding in *Page & Wirtz* that the Section 57-12-10(B) did not require proof of "loss of money or property," despite explicit language to the contrary, to the UPA claims of the putative class members as well—claims that could only be asserted under Section 57-12-10(E).

> It appears that USTC interprets this provision to require a showing of some form of actual damages in order to support any monetary award. However, the New Mexico Supreme Court has applied Section 57–12–10(B) as the basis for an award of the statutory $100 minimum, even in the absence of proof of economic or property loss. *See Page & Wirtz Constr. Co. v. Solomon,* 110 N.M. 206, 211–12, 794 P.2d 349, 354–55 (1990) (stating that the claimant was entitled to recover the statutory one hundred dollars, despite his failure to produce evidence showing that the defendant's deceptive practice caused loss of money or property). More recently, this Court confirmed that "[i]n the absence of actual losses, [a] [p]laintiff is still entitled under [the] UPA to recover the statutory damages of one hundred dollars." *Jones,* 1998–NMCA–020, ¶ 23, 124 N.M. 606, 953 P.2d 1104. These authorities ***clearly establish*** that ***the UPA does not require proof of actual monetary or property loss***.

Id., ¶ 44 (emphasis added)); *cf. Page & Wirtz*, 1990-NMSC-063, ¶¶ 21-23.

Thus, and in contrast to *Brooks*, *Lohman* did consider, and analyze, the rationale of *Page & Wirtz*, as well as the existing jurisprudence on the UPA's

remedial purpose in reaching its conclusion that "they [plaintiff and his putative class members] may nevertheless seek the statutory $100 minimum." *Lohman*, 2007-NMCA-100, ¶¶ 3, 25, 31, 43-45, 47. As already shown in Plaintiffs' Brief-In-Chief, *Brooks* was cited by the defendants in the *Lohman* briefing and considered by this Court in reaching this conclusion. **BIC 33**.

This result is consistent with federal FTC holdings that the prevention of consumer fraud, and not the recovery of money or property, is the objective of the FTCA upon which the UPA is modeled. Section 57-12-4; *FTC v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (quoted with approval in *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir.2005)) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers [to damages]."); *FTC v. Medical Billers Network, Inc.*, 543 F.Supp.2d 283, 304 (S.D.N.Y. 2008) ("'The law is violated if the first contact ... is secured by deception ... even though the true facts are made known to the buyer before he enters into the contract of purchase.' *Exposition Press, Inc. v. FTC,* 295 F.2d 869, 873 (2d Cir.1961). It is not required that the deception have been made in bad faith or with intent to deceive.").

Amici cite a number of cases and state UPA statutes which conform to their view of how this Court should interpret New Mexico UPA's class remedy. However, none of those states have cases where language identical to that in Section 57-12-10(B) has been interpreted by the state's highest appellate court as

not requiring any proof of loss of money or property, despite explicit language to the contrary in the statute itself. From a national perspective, New Mexico's UPA law is unique as is the Supreme Court's holding in *Page & Wirtz* with no truly comparable holdings from other states. Further, this Court cannot ignore the plain intent of *Page & Wirtz*, and its progeny, holding that, notwithstanding statutory language to the contrary, the New Mexico UPA allows all New Mexico consumers, whether individuals or putative class members, to seek statutory damages upon proof of the institutional, systematic use of deceptive and unconscionable sales practices. *Lohman*, 2007-NMCA-100, ¶ 44 ("These authorities [*Page & Wirtz*] clearly establish that the UPA does not require proof of actual monetary or property loss."); *Page & Wirtz*, 1990-NMSC-063, ¶¶21-23.

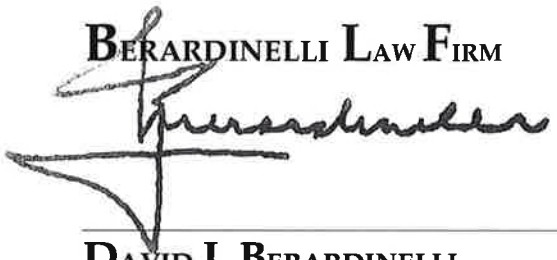
G. CONCLUSION

In conclusion, the policy issues raised by the Amici briefs can only be decided by the New Mexico Supreme Court. This Court has no jurisdiction to overrule Supreme Court precedent or even distinguish it based on the rationale stated in these briefs. *Padilla v. State Farm Mut. Auto. Ins. Co.,* 2003–NMSC–011, ¶ 5, 133 N.M. 661, 68 P.3d 901. Nor is it this Court's role to implement a radical departure from many holdings regarding the remedial purpose and intent of the UPA—and its intent to provide the broadest possible protection to all innocent New Mexico consumers. *Cf. Ashlock,* 1988-NMSC-026, ¶ 7; *Truong*, 2010-NMSC-009, ¶ 30; *B & B Investment Grp.*, 2014-NMSC-024, ¶ 48.

The interests and agenda represented by these Amici, whose appearance before this Court appears to be a first in this Court's history, are clearly national in scope. They provide this Court with no acceptable rationale for ignoring this Court's holding in *Lohman,* interpreting the Supreme Court's holding in *Page & Wirtz* as meaning the UPA does not require any consumer to prove actual damages as a requisite for bringing any UPA action, including a UPA class action.

Plaintiffs contend, again, that this Court has but two choices here. Either reverse the trial court based on the most recent Supreme Court UPA holdings, and especially its holding in *Fiser*, or else certify this case to the Supreme Court for final resolution of all these issues without further delay.

Respectfully submitted,



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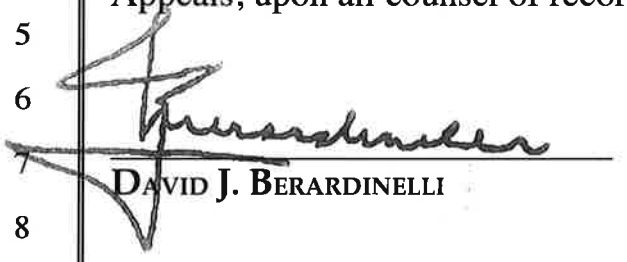
I hereby certify that on September 20, 2017, I caused a true and correct copy of this pleading to be served electronically by the Odyssey/Tyler Host electronic filing system employed by the New Mexico Court of Appeals, upon all counsel of record.



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