IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ARTHUR ARGUEDAS, BARBARA ARGUEDAS and HELEN BRANSFORD,

Plaintiffs-Appellants,

v.

Ct. App. No. 35,699

GARRETT SEAWRIGHT, DONALD FRANK ABERNATHY, AIMEE ABEYTA, ANDREW T. ABEYTA, LORRAINE S. ADEKY, JOSEPHINE AGUIRRE, JUDITH G. ALBA, BRIAN C. ALEXANDER, JUSTIN L. ALONZO, ELIZABETH A. AMUNDSON, BRIAN MICHAEL ANASTASIO, GILBERT T. APODACA, R. MICHAEL APODACA, JEREMY A. ARAGON, JOSE LORENZO ARCHULETA, JENNIFER E. ARGUELLO, JAMES EDWARD ARMIJO, JODY LYNN ARNALL, JULIANA Y. ARROYOS, MARQUITA J. ATCHLEY, NATHAN M. ATKINS, HERBERT W. ATKINSON, ALLAN BABER, CYNTHIA LOUISE BAHLING, CHERYL BAKER, DENNIS W. BAKER, VICKI LYNN BAKER, CHRISTINE J. BALDERRAMA, DEBORAH ANN BALL, TRACEY L. BARA, BELINDA BARRERAS-MEDRANO, JOYCE L. BAUER, WENDY MICHELLE BENCH, STEVE T. BENEDICK, DENISE E. BENFIELD, KENDRA R. BERCH, NANCY H. BERCH, KARLA MAE BLOOMFIELD, JULIE A. BOETTLER, CATHERINE E. BONING, DAVID BONNER, JOANNA DE BLASS BOOTHE, TODD WILLIAM BORGIA, ROSINA BRANTLEY, LIBETH A. BROWN, KENNETH L. BRUDOS, CINDY A. BUNCH, KENTON R. BYERS, LORI K. BYERS, ALLEN W. CALLENDER, JOE D. CARABAJAL, SHANNON C. CARABAJAL, GREG CARBAJAL, LEO WRAY CARBAJAL, RICHARD A. CARBAJAL, CINDY KAYE CAREY, GREGORY R. CAREY, ERIN E. CARNETT, JONATHAN HOUSTON CARNETT, CHRISTINA T. CERECERES, MARY M. CHANDO, GENETTE E. CHAPMAN, ROBERTA B. CHAVEZ, ANNA M. CHERRY, JULIA CHRISTIAN, LILTA RENEE CLAUNCH, SHERRY R. COLE, CHARLENE M.

COMBA, MICHAEL A. CONTRERAS, ROBERT P. CONWAY, SHERYL I. COOPER, TAMITHA A. COOPER, JOSEPH N. CORDOVA, JANICE M. COWLES, RONALD JOHN COWLES, VICKIE DIANE CREEK, MARY KAY CROSS, RICHARD ROBERT CROSS, PATRICIA A. DAVENPORT, DAVID DE LA CRUZ, FELICIA DE LA O, TAMARA S. DE LA O, NANCY I. DESALVO, DESIREE DIAZ, JESSE DEXTER DOMPREH, JUDITH LESLEY DOPSON, LARRY DORSEY, ANDREW ROBERT DUNGAN, MONICA F. DURAN, PATRICIA L. EASTMAN, ROBERT C. EDWARDS, MICHELLE ANN ENCINIAS, TAMMY KAY EVANS, BRANDY LEIGH EVERETT, CAROL M. EVERETT, LILLIE N. EVERTS, TOIY FERNANDEZ, BELINDA A. FERRERO, HOLLY L. FITZSIMMONS, THOMAS L. FITZSIMMONS, CRISTA LEE FLINN, MARGIE ANN FLYNT, ERLINDA R. FRAZIER, EDDIE L. GALLEGOS, PAULINE LILLIAN GALLEGOS, REGINOLD A. GALLEGOS, TIMOTHY E. GALLEGOS, GUS GANDARA, MARINA R. GANDARA, AMY SUE GARCIA, CHRIS SANTIAGO GARCIA, LEYLA M. GARCIA, TANYA A. GARCIA, EDD GAULDIN, VERONICA LYNN GILBERT, DORIAN ROCHELLE GILMER, GLENDA GOMEZ, LEANOR V. GOMEZ, NANCY GOMEZ, ROBERT L. GOMEZ, ERICA A. GONZALES, MICHAEL DION GONZALES, PATRICIA E. GORDON, FRANCISCO GRANILLO, CHARITY L. GREENE, SANDRA JEAN GREENWALT, RICHARD G. GRIEGO, SOHELA GRIEGO, MIKE ANTHONY GUERIN, LINDA N. GULLEY, OLIVIA V. GUTIERREZ, SANDRA GUTIERREZ, DINA HALL, SARAH J. HAMILTON, HUBERT R. HARDERN, MONETTE D. HARDERN-LOPEZ, FRANCIS CAMMIE HARDING, KRISTI E. HARRISON, SHELLY L. HAYES, ANGELA M. HAZZARD, TERESA K. HENSLEY, ANDRE HERNANDEZ, MAGGIE S. HERRERA, MARILYN M. HERRERA, KARRAH JO HESTER, SARAH LYNN HIGDON, ARLENE C. HIGHFILL, CRAIG MACK HIGHFILL, DEBRA JANE HOGAN, DONNA LUCILLE HOLLINGSWORTH, STEPHANIE J. IACOBELLI, NATHAN LEGRAND JACK, MERRY JACKA, GINGER NICOLE JACKSON, HAELY L. JAMES, JERRY JARAMILLO, YOLANDA D. JARAMILLO, JOAN ELAINE JENSEN, CYNTHIA KAY JIACALONE, ADRIANA JIMENEZ, NATALIE G. JIMENEZ, TESSA RAE JIMENEZ,

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THOMSON, DAVID DOUGLAS TODD, RONNA PORTER TODD, BEVERLY L. TORRES, BRIGETTE C. TORRES, NICOLE MARIE TROTTER, BEN F. TRUJILLO, CONSUELO A. TRUJILLO-LEFEBRE, THERESA A. TYMESON, MANUEL A. VALDEZ, MARIA M. VALENZUELA, SOPHIA VANDEN BOUT, GUADALUPE A. VARELA, PATRICIA M. VECCHIO, BRIGETTE S. VEGA, KRISTIN M. VERBA, MICHAEL A. VOLK, ANGELA D. WARD, KATHI S. WARD, KIM D. WATKINS, ROBIN L. WEBB, MAUREEN S. WEDDINGTON, KATRINA SHYAMLA WEISS, AMBER LYNN WELLS, ELIZABETH M. WELLS, PAUL DOUGLAS WHITSON, DAVID LEE WHITTEN, RENEE M. WILLES, PRESTON KEITH WILLIAMS, KENT D. WILSON, LOU ELLEN WILSON, CHRISTOPHER W. WINCH, LYNN J. WINTON, BETH M. WRIGHT, ELEANOR L. YOUNG, ELIZABETH ZAFFINO, DEBORAH ELAINE ZELLNER, KAREN MARIE ZUSCAR, SHANNON ROSE ABEYTA, TIFFANY NICOLE ANAYA, INGRID JOANA ARCOS-GAMBOA, GARY THEODORE ARMIJO, ELIZABETH ANN BARTLETT, SUSAN BESSETTE, RHIANNON MARIE BRANSFORD, JACQUELINE GRACE BRAUN Y HARYCKI, ARTHUR RICKY BUCKNER, JEANETTE SHARON CARMONA, CARLENE RAMONA C DEBACA, JASON G. CHANDLER, JESSICA ASHLEY COLE, LISA E. COVELL, STEPHANIE YVONNE DATUIN, MICHELLE LYNN DEMING, MONICA DURAN, SKYLER B. EATON, AMANDA MARIE EVANS, WANDA GAIL FRAZIER, BEVERLY MAE GABALDON, PAUL R. GALLEGOS, ILEANA L. GARAY, DANIEL FERNANDO GARCIA, DANIEL GABRIEL GARCIA, PORFIE V. GARCIA, GABRIELA GAYTAN, TRUDY L. GOLDSMITH, BLANCA YVONNE GONZALES, MICHAEL ANTHONY GRIEGO, CHRISTINA WHITE GUNTER, RALPH R. JIMENEZ, NINA A. KIRSANOFF, CHERIE J. KNIGHT, HANNAH K. KUNKLE, KIMBERLY ANNE KUSCHNEREIT, ROXANNE BROOKE LANGNER, JENNALE RUTH LISTON, TIFFANY ROSE LUCERO, RIANN LUCY, ROSE MARIE MARTINEZ, JUSTIN GLEN MAZURANICH, BRITTANY LAUREN MCCUTCHEON, JUDD CONNOR MCGRAW, VICKI S. MEDINA, BRYNDA LISA MENCHACA, JOANN MIRANDA, LISA M. MONTOYA, TIFFANY LANETTE MORFIN, JULIA E. MUNDE,

JULIE A. MUNOZ, SHERI MARIE NEFF, KEVIN HAYDEN NELSON, REYNALDO NIETO-CONTRERAS, LETICIA MARIE OJEDA, ERICA ONTIVEROS, DEBORAH LYNN PALM, ADRIANNA PALOMAREZ, JENNIFER R. PETE, MICHELLE LORRAINE PIPER, JUAN JOSE PORRAS, KEVIN NICHOLAS POST, HEIDI B. PUNKE, LORENA RAMIREZ, CARRIE BETH REMUND, ANGELEE ROSE RICH, TANYA LORENA RODRIGUEZ, CLORINDA TERESA ROMERO, REGINA ANN ROMERO, LISA ANN ROSE, CYNTHIA M. RUIZ PALMER, THERESA ANN RUSSELL, LESLIE SALOMON, JESSICA C. SANDS, MICHAEL JOHN SCOTTY, STACIE JANINE SILA, LAURA MAE SPARKS, JESSICA ELYSE STAPLETON, CASEY G. STULTS, LEXY LYN THOMPSON, AMY NICOLE TOMASI, CARLOS M. TREVIZO, GENEVA O. TREVIZO, MIA VAIL, DENIECE VALENZUELA, JENNIFER SUZANNE VALLEJOS, OSIRIS M. VELA, JESSICA VENEGAS, ROBERT M. WOOD, BEATRICE LOUISE WOODFILL, LAURA OLIVO YZAGUIRRE,

Defendants-Appellees.

APPELLANTS' BRIEF-IN-CHIEF

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

Submitted By:

BERARDINELLI LAW FIRM
DAVID J. BERARDINELLI
Post Office Box 1944
Santa Fe, New Mexico 87504-1944
(505) 988-9664
sheila@djblawfirm.com
renea@djblawfirm.com
Attorney for Plaintiffs-Appellants

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STATEMENT OF COMPLIANCE

Counsel undersigned hereby certifies that that the body of Appellants' Brief in Chief is done in proportionally-spaced Times 14-point font style and contains 10256 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. SUMMARY OF THE PROCEEDINGS

On May 10, 2013, Plaintiffs, acting as Class Representatives for all similarly situated New Mexico State Farm policyholders, filed this class action alleging, among others, claims for knowing or willful violations of the New Mexico Unfair Trade Practices Act [UPA], NMSA 1978, Sections 57-12-2(D) and (E), systematically committed by each of 479 New Mexico State Farm insurance agents while conducting sales of Uninsured Motorist [UM] coverage [UM sales transactions] between May 20, 2004 and June 12, 2011. [**1 RP 1-113**].

Plaintiffs named State Farm insurance agent Garrett Seawright [Defendant Seawright] as the Class Representative for a defendant class of 479 licensed and appointed New Mexico State Farm insurance agents, specifically identified in the Complaint by name and New Mexico business address as published by the New Mexico Superintendent of Insurance. [**1 RP 6-21**]. Plaintiffs alleged that between May 20, 2004 and June 12, 2011 each of these New Mexico State Farm insurance agents routinely conducted UM sales transactions using the same, or substantially similar, deceptive or unconscionable sales practices, principally among them being the collective, uniform refusal to provide New Mexico consumers with the "decision making tool" needed to make realistically informed, knowing and intelligent decisions to purchase or reject UM coverage, *i.e.*, the premium prices for the available limits of UM coverage being offered. [**1 RP 59, 62, 64-70, 72,**

76-77, 82-85, ¶¶ 154, 167, 176, 178-80, 185, 189-92, 204, 216-17, 220, 245-46, 252, 256].

Plaintiffs alleged that, between May 20, 2004 and June 12, 2011, each of the Defendant Agents knew, or should have known through the exercise of reasonable professional diligence, that he or she owed duties to Plaintiffs and each of the absent class members, under the remedial purposes of the UM Statute and the New Mexico common law [*Modisette v. Foundation Reserve Ins. Co.*, 1967-NMSC-094, ¶¶ 16-17, 77 N.M. 661, 427 P.2d 21], to affirmatively disclose to Plaintiffs and the Class Members all facts material to the offering and sale of UM coverage [UM sales transactions]. **[1 RP 35-47]**.

The overarching focus of Plaintiffs' class claims was Defendants' systematic deprivation of the Plaintiff Class Members' statutory right under NMSA 1978, Section 66-5-301(C) and NMAC §13.12.3.9 [the New Mexico UM Statute], and the UPA, NMSA 1978, Section 57-12-2, to be provided with all the material facts needed to make realistically informed, knowing and intelligent decisions about how much UM coverage they could afford and/or wanted to purchase or reject. **[1 RP 30-33, 35-36, 38-39, 41-43, 45-46, 52-53, 56-60, 65-66, 69-70, 75-78, 82-84, ¶¶ 56-57, 59, 62, 67, 74, 79, 81-82, 89, 91, 96, 99, 124, 139, 142, 148, 150-52, 157-58, 178, 190, 211-14, 217-18, 220-21, 242, 245-46, 252]**.

Plaintiffs alleged that, as an historic practice among all State Farm agents, Defendant Seawright sold Plaintiffs separate UM policies on each car they insured since 1992, *i.e.*, all UM coverages sold were "stacked." [**1 RP 50, ¶ 119, 57, ¶ 146; 2 RP 314, 326, 334; 7 RP 1601, ¶ 67**]. Defendants never disputed the fact that each separate UM policy they sold after May 20, 2004 provided stacked UM coverage. [**1-12 RP 1-2657; 3-28-16 Tr. 1-43**]. Plaintiffs alleged every Defendant Agent knew, or should have known, after the Supreme Court's holding in *Montaño v. Allstate Indem. Co.*, 2004-NMSC-020, ¶¶ 16-20, 135 N.M. 681, 92 P.3d 1255, that the facts material to every UM sales transaction included the UM premium costs for each available level of stacked UM coverage being offered to enable consumers to make realistically informed, knowing and intelligent decisions about whether to purchase or reject UM coverage. [**1 RP 35-47; 7 RP 1594-98, 1605-06**].

The overarching objective of Plaintiffs' UPA Class Complaint was to achieve awards of statutory damages for each of the absent class members under NMSA 1978, Section 57-12-10(E), which Plaintiffs contended should be liberally and consistently interpreted to allow absent class members to recover the same statutory damages as are allowed to Plaintiffs as individuals under NMSA 1978, Section 57-12-10(B). [**1 RP 60-63, 70-72, 83, 94, 96-97, ¶¶ 162, 170, 172, 193-203, 247, 282-83, 291-97**].

Plaintiffs alleged that the remedial purposes of the UPA demand that the UPA individual remedy [Section 57-12-10(B)] and the UPA class remedy [Section 57-12-10(E)] be liberally *and* consistently interpreted to achieve the overall objective of the UPA, *i.e.*, the prevention of unfair, deceptive and/or unconscionable sales practices as well as the creation of a consumer-friendly remedy to supplement the common law misrepresentation remedy. **[1 RP 70-72, 96-97, ¶¶ 193-99, 200-03; 2 RP 291, 296-97]**.

Plaintiffs alleged the remedial purposes of the UPA and the absent class members' right to equal protection under the N.M. Const. art. II, §18, require that individual plaintiffs and absent class members be treated equally by being equally allowed to recover statutory damages. **[1 RP 71-72, ¶¶ 199-203]**. Plaintiffs alleged there was no rational basis for liberally interpreting the UPA's individual remedy section [Section 57-12-10(B)] to allow recovery of statutory or nominal damages without any proof of actual loss—despite statutory language requiring individuals to show some "loss of money or property"—while strictly interpreting the UPA's class remedy [Section 57-12-10(E)] as not allowing absent class members to also recover statutory damages for the same UPA violations but requiring them to individually prove actual losses. [***Id.***].

Plaintiffs alleged there was no rational basis or compelling governmental purpose to support applying a narrow, literal interpretation to the term actual

damages used in Section 57-12-10(E) thereby requiring each absent class member to provide proof of actual damages, while applying a liberal interpretation of the term "loss of money or property" in Section 57-12-10(B) to allow individuals to recover statutory damages without requiring any proof of actual damages. [***Id.* ¶¶ 201-03**]. Plaintiffs also alleged there was no rational basis or valid justification for discriminating against absent class members based solely on their status as unnamed Plaintiffs by treating them differently from the identically situated named Plaintiffs for purposes of their entitlement to statutory damages as a means of enforcing the broadest possible application of the UPA to all innocent New Mexico consumers. [***Id.* ¶¶ 202-03**].

Plaintiffs alleged the public evil the UPA was enacted to prevent is the deception involved in deceptive or unconscionable sales practice which is accomplished through the enforcement of statutory damages under both Sections 57-12-10(B) and (E). [**1 RP 96, ¶ 291**]. After quoting the language of both sections, including the language of Section 57-12-10(B) requiring individuals to show some "loss of money or property," Plaintiffs alleged both sections of the UPA must be read together, and liberally interpreted, to resolve any conflict between them in favor of broadening the class remedy to include the same right to statutory damages for absent class members regardless of any evidence of actual damages. [**1 RP 96, ¶¶ 292-94**].

Plaintiffs further alleged that the overwhelming public interest in establishing a means for achieving the prevention of unfair, deceptive and unconscionable trade practices in New Mexico, as well as the effective enforcement of the statutory right and the remedial purposes of NMSA 1978, Section 66-5-301 and NMAC §13.12.3.9, demands that the class remedy provided in Section 57-12-10(E) be interpreted liberally, and as broadly as possible, to provide an effective enforcement remedy for the unnamed Plaintiff Class Members who were all equally victimized by the same UPA violations. [**1 RP 97, ¶ 296**]. Plaintiffs also alleged that, in order to make the UPA an effective consumer protection statute, the UPA must be interpreted consistently to allow absent class members to recover the same statutory damages as individual plaintiffs are allowed to recover without the need to prove any loss of money or property upon proof of classwide, systematic UPA violations. [**1 RP 97, ¶ 297**].

State Farm Insurance Company was not named as a defendant or a party in Plaintiffs' Class Complaint. Nevertheless, on June 17, 2013, State Farm Insurance Company filed a Motion to Intervene in the State Court proceedings alleging that the New Mexico courts should not be allowed to decide how or whether its agents should use State Farm's forms. [**2 RP 384-449, 442**]. Without awaiting any ruling on that Motion to Intervene, State Farm also filed a Notice of Removal that same afternoon. [**2 RP 450-69**].

On June 28, 2013, Plaintiffs filed a Motion to Remand to State Court. [**5 RP 1028-43**]. While the case was pending in Federal Court, State Farm and Defendant Agents filed a joint Motion to Dismiss. [**5 RP 1065-96**]. In their Motion to Dismiss, Defendants argued that the equal protection and rational basis claims asserted in Plaintiffs' Class Complaint were unfounded under New Mexico law. [**5 RP 1085-86**]. On July 24, 2013, State Farm filed an Amended Motion to Intervene. [**5 RP 1098-1157**]. Defendants' federal Motion to Dismiss, including their arguments on Plaintiffs' equal protection and rational basis claims, was attached as Exhibit A to State Farm's Amended Motion to Intervene. [**5 RP 1111-43**].

After conducting a hearing on Plaintiffs' Motion to Remand, the Federal Court entered its Order remanding Plaintiffs' case to the State Court on June 3, 2015. [**7 RP 1557**]. After remand, State Farm withdrew its Motion to Intervene. [**7 RP 1564-66**]. On August 11, 2015, Plaintiffs filed an Amended Class Complaint naming each of the 479 New Mexico State Farm insurance agents as individual Defendants, instead of including them as a defendant class. [**7 RP 1567-1623; 8 RP 1624-32**].

As they had done in their original Class Complaint, Plaintiffs alleged again that absent class members must be "equally entitled" to an award of statutory damages, the same as individual plaintiffs are, upon proof of classwide violations

of the UPA by the named Defendant Agents. [**7 RP 1615, ¶ 119; 8 RP 1626-27, ¶¶ 159-65**]. Plaintiffs alleged that, as affected New Mexico consumers whom the UPA was enacted to protect, the absent class members must also be equally entitled to an award of the same statutory damages as individual plaintiffs are entitled to recover under Section 57-12-10(B). [**7 RP 1615**].

Plaintiffs realleged the public interest in achieving the prevention of unfair, deceptive and unconscionable trade practices which, combined with the overwhelming need for a method to effectuate the statutory right of *all* uninformed New Mexico consumers to be provided with the premium prices needed to make realistically informed decisions about how much UM coverage they want and can afford—especially in the face of the New Mexico insurance industry's universal defiance of the Supreme Court's holding in *Montaño*, dictate that the class remedy provided in Section 57-12-10(E) be interpreted liberally, and as broadly as possible, to provide an effective enforcement remedy for the absent class members who were all equally victimized by the same UPA violations. [**8 RP 1627, ¶ 164**].

Plaintiffs again alleged that, since the UPA is a remedial consumer protection statute providing broad protection to New Mexico consumers, it is both proper and imperative that absent class members should also be equally allowed to assert class claims for UPA statutory damages under Section 57-12-10(E), exactly as the

individual plaintiffs are entitled by law to do under Section 57-12-10(B). **[8 RP 1627, ¶ 165]**.

Plaintiffs made no claims for reformation of any UM policies. Plaintiffs limited the allegations in their original Class Complaint, and their Amended Complaint, to the institutional UPA violations systematically committed by the Defendant Agents between May 20, 2004 and June 2011, *i.e.*, knowingly or willfully concealing the UM premium costs for each available level of stacked UM coverage in order to prevent the class members from being able to make their own realistically informed, knowing and intelligent decisions to purchase or reject UM coverage as required by the UM Statute. Original Class Complaint: **[1 RP 30-33, 38-39, 41-46, 56-60, 64-67, 69-70, 82-84, 88-89, ¶¶ 57, 59, 62, 67, 79, 82, 89-91, 93, 96, 99, 139-40, 142-43, 148, 150-52, 154, 157, 176-80, 189-90, 192, 245-47, 252, 270]**; Amended Class Complaint: **[7 RP 1595-97, 1605-07, 1609-11, 1614-18, 1620-21, ¶¶ 41, 44-49, 84-87, 98, 101, 117-18, 124, 127, 135]**.

On August 21, 2015, Defendants' counsel filed an "Emergency Motion to Stay Issuance of Summons to 478 Newly Named Defendants Pending Resolution of the Motion to Dismiss." **[8 RP 1797-1807]**. The Motion was granted without objection from Plaintiffs so that none of the other 478 Defendant Agents were ever served with Plaintiffs' Amended Complaint. **[9 RP 1930]**.

On August 21, 2015, and amended on August 25, 2015, Defendant Seawright also filed his Motion and Memorandum to Dismiss Plaintiffs' Amended Complaint and the UPA claims asserted against him for failure to state a claim under Rule 1-012(B)(6) NMRA. **[8 RP 1772-96, 1812-34]**. Although he succeeded in preventing the service of the other Defendant Agents, Defendant Seawright also argued Plaintiffs' Amended Complaint failed to state claims against the other 478 unserved New Mexico State Farm insurance agents. ***[Id.]***

Defendant Seawright argued that Plaintiffs failed to state individual UPA claims against him because Plaintiffs automatically got equal limits UM coverage *from* State Farm, without payment of any premiums, due to the retroactive reformation ordered by the Supreme Court in *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214. **[8 RP 1775-76, 1824-26]**. Defendant Seawright argued that Plaintiffs suffered no loss of money or property as a result of his own deceptive or unconscionable sales practices because long after the UM sales transactions in question, State Farm retroactively "self-reformed" their UM policies at no cost. ***[Id.]*** Based on State Farm's retroactive self-reformation, Defendant Seawright argued none of the absent class members suffered actual damages from the substantially similar deceptive or unconscionable sales practices committed by himself or any of the Defendant Agents. ***[Id.]***

Defendant Seawright did not address the issue of whether he was personally liable to the named Plaintiffs for statutory damages, without any proof of loss of money or property, for knowingly or willfully concealing from Plaintiffs the material facts they needed to make their own realistically informed, knowing and intelligent decisions about how much UM coverage they wanted and could afford—nor for affirmatively preventing Plaintiffs from being able to do so. [**8 RP 1772-96, 1812-34**].

Defendant Seawright also argued that Plaintiffs' UPA claims amounted to "retroactive deception." [**8 RP 1782-84, 1820-22**]. Defendant Seawright argued that neither he nor any of the other Defendant Agents could not have known they were required to disclose UM premiums during UM sales transactions conducted with absent class members before the *Jordan* Opinion was filed. [***Id.***]

Defendant Seawright did not dispute that, after May 20, 2004, the facts material to every UM sales transaction included the UM premium prices for each limit of UM coverage available under every auto liability insurance policy being offered and sold to a New Mexico consumer. [**8 RP 1772-96, 1812-34**]. Defendant Seawright did not dispute that after May 20, 2004, and as a general business practice, he, and the other State Farm New Mexico insurance agents, never provided any relevant UM premium prices to Plaintiffs, nor any of the absent class members, while offering them indisputably stackable UM coverage as mandated

in *Montaño*. [***Id.***] Defendant Seawright never disputed the fact that he and the other Defendant Agents routinely prepopulated UM rejection forms, without the class members' prior knowledge or informed consent, and then presented these prepopulated forms to them for signature without further explanation. [***Id.***]; *cf.* [**7 RP 1605-1607, 1609, 1620; 8 RP 1629**].

Plaintiffs' filed their Motion for Summary Judgment on August 26, 2015. [**9 RP 1870-88**]. Plaintiffs noted the UPA is a remedial statute intended to provide an improved, consumer-friendly remedy to supplement the common law fraud remedy. [**9 RP 1875**]. Plaintiffs argued the UPA must be liberally interpreted to facilitate and accomplish its purposes and intent—which is to extend the UPA's broad protection to innocent consumers by providing them with an effective remedy, and damages, to deter unfair, deceptive or unconscionable sales practices. [**9 RP 1875-76**].

Plaintiffs also argued the Supreme Court has emphasized that the UPA class action is enshrined in New Mexico's fundamental policy because the UPA class action provides an effective vehicle for protecting consumer rights by spreading costs and thereby allowing large numbers of consumers with small claims an opportunity for relief that would otherwise be economically infeasible. [**9 RP 1875-76**]. Plaintiffs also argued that the remedial purpose of the UPA class remedy dovetails with the strong public policy of the UM Statute embodied in the

principle that uninformed New Mexico consumers must be provided with the material facts they need to make realistically informed, knowing and intelligent decisions about how much UM coverage they want and can afford. [**9 RP 1876**].

Plaintiffs argued that, unless Section 57-12-10(E) is liberally interpreted to allow absent class members to recover the same statutory damages as individuals upon proof of systematic, classwide UPA violations, these uninformed and vulnerable consumers would be deprived of an effective UPA class remedy. [***Id.***] Plaintiffs argued the rationale and liberal interpretation of Section 57-12-10(B) should be applied equally to Section 57-12-10(E). [**9 RP 1875-79**]. Plaintiffs contended this was the Court of Appeals' holding in *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶¶ 44, 47, 142 N.M. 437, 166 P.3d 1091, also a putative class action. [**9 RP 1978-79**].

Plaintiffs pointed out that a strict, literal interpretation of Section 57-12-10(B) would require individual UPA claimants to produce some proof of "loss of money or property." [**9 RP 1880**]. Nevertheless, the Supreme Court applied a liberal interpretation to Section 57-12-10(B), despite its literal language to the contrary, to permit recovery of statutory damages without any proof of loss so as not to negate the UPA's remedial consumer protection purpose. [***Id.***]

Plaintiffs argued that Section 57-12-10(E) must be consistently and liberally interpreted so as not to negate the remedial consumer protection purpose of the

UPA class remedy by denying absent class members the right to recover statutory damages upon proof of classwide UPA violations where actual damages could not be shown. [**9 RP 1879-80**]. Plaintiffs argued that the public policy underlying the need for an effective UPA class remedy, together with the rule that statutory subsections should be interpreted consistently to achieve their remedial objectives, required the trial court to apply the same liberal interpretation to Section 57-12-10(E) as the Supreme Court applied to Section 57-12-10(B) so that absent class members should also be entitled to the same statutory damages as individuals. [**9 RP 1879-84**].

Plaintiffs also explained the institutional problem this UPA class action was intended to redress. [***Id.***] Since May 20, 2004, New Mexico law has required New Mexico insurance agents to inform New Mexico consumers about the premium prices for the available limits of UM coverage when selling UM coverage. [***Id.***] After May 20, 2004, these Defendants, and the New Mexico insurance industry as a whole, simply chose to ignore the Supreme Court's holding in *Montaño*. [***Id.***]

Instead of obeying the law by providing UM premium prices, these Defendants continued "to offer UM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice." [**9 RP 1881-84**]. Plaintiffs argued the UPA class remedy was the only effective way to redress these persistent, deceptive and unconscionable sales practices done in direct

violation of New Mexico law. [*Id.*] Plaintiffs also argued that New Mexico public policy demands that the UPA be interpreted to provide an effective consumer protection class action remedy to redress large-scale, institutional sales practices that are inherently unfair, deceptive or unconscionable but which, in any particular case, do not offer sufficient economic incentive for consumers, or their attorneys, to bring individual UPA actions. [**9 RP 1884-86**].

Plaintiffs also argued that strictly interpreting Section 57-12-10(E) to require absent class members to prove actual damages would conflict with fundamental New Mexico public policy and the consumer protection purpose of the UPA's class remedy section. [**9 RP 1879-80, 1884-87**]. Plaintiffs argued that applying a strict, literal interpretation to Section 57-12-10(E) to deny absent class members a right to recover class statutory damages would violate absent class members' right to equal protection under the UPA, without any rational basis, since the Supreme Court had applied a liberal interpretation to Section 57-12-10(B) to allow recovery of statutory damages without any proof of loss, despite literal language to the contrary. [**9 RP 1885-87**].

Plaintiffs contended there is no rational basis for discriminating against absent class members in a way that bars any viable UPA class remedy for the widespread, systematic use of sales practices that are both deceptive and unconscionable. [**9 RP 1885**]. Plaintiffs also contended there is no rational basis

for adopting a literal interpretation that would discriminate so profoundly against similarly situated absent class members, all of whom had been subjected to the same deceptive and unconscionable sales practices, based solely on their status as a named or unnamed party in the UPA class action. **[9 RP 1886-87]**.

Plaintiffs also pointed out that the Supreme Court has held that New Mexico consumers do not have the knowledge they need to make realistically informed decisions when purchasing or rejecting UM coverage unless they are provided with the relevant premium prices in advance of a UM sales transaction. **[9 RP 1887]**. The UM Statute's fundamental policy is that every consumer's decision to purchase or reject UM coverage should be the result of a realistically informed, knowing and intelligent decision. **[9 RP 1881]**. A literal interpretation of Section 57-12-10(E) would essentially allow New Mexico insurance agents to take advantage of the ignorance of thousands of innocent, uninformed New Mexico consumers without any personal liability under the UPA. **[9 RP 1885-87]**.

Defendant Seawright refused to file a response to Plaintiffs' Motion for Summary Judgment. **[1-12 RP 1-2657]**. On September 14, 2015, Defendant Seawright filed a Motion to Strike Plaintiffs' Motion for Summary Judgment in lieu of a response. **[9 RP 1900-1911]**. Defendant Seawright raised three arguments in support of his Motion to Strike. **[9 RP 1900]**.

First, Defendant Seawright argued Plaintiffs' Motion for Summary Judgment was "procedurally improper" because it sought declaratory relief on the issue of the availability of UPA class statutory damages when the other Defendants had not yet been served [due to Defendant's Motion to Stay Service]. [*Id.*] Second, Defendant Seawright argued the Motion for Summary Judgment was "substantively meritless" because it asked the trial court to ignore the plain language of Section 57-12-10(E). [*Id.*] Third, Defendant Seawright argued the Motion for Summary Judgment was "utterly unnecessary" since he had already filed his Motion to Dismiss. [*Id.*] These arguments mirrored the arguments made in Defendant Seawright's Motion to Dismiss—made on his personal behalf. [*Id.*]; *cf.* [**8 RP 1772-96, 1812-34**].

On September 29, 2015, Plaintiffs filed their Response to Defendant Seawright's Motion to Dismiss. [**9 RP 1945-56**]. Since the arguments raised in Defendant's Motion to Dismiss were "the obverse" of the arguments made in Plaintiffs' Motion for Summary Judgment, Plaintiffs incorporated the arguments and legal authorities cited in their Motion for Summary Judgment. [**9 RP 1945 n.3**]. Thus, Plaintiffs realleged their arguments on fundamental policy and equal protection. [*Id.*] Plaintiffs also incorporated by reference all of the factual allegations made in their original Class Complaint. [**9 RP 1951 n.4**].

Plaintiffs argued their UPA claims were alleged against Defendant Agents personally and so had nothing to do with State Farm or State Farm's reformation of any UM policies. [**9 RP 1946**]. Plaintiffs again argued that Section 57-12-10(E) should be interpreted consistently with the Supreme Court's interpretation of Section 57-12-10(B) to find that absent class members are equally entitled to recover statutory damages under the UPA's remedy section. [**9 RP 1947**]. Plaintiffs argued their UPA claims were aimed at the uniform, systematic business practices collectively engaged in knowingly or willfully by all the Defendant Agents which were deceptive and unconscionable long before the Supreme Court's holding in *Jordan*. [**9 RP 1946-48**]. Plaintiffs were not attacking the validity of any of the underlying UM rejection forms issued by State Farm to the Defendant Agents. [***Id.***]

Plaintiffs pointed out it was undisputed that none of the Defendant Agents ever provided a UM premium menu to Plaintiffs, nor any of the absent class members, at any time between May 20, 2004 and June 2011. [**9 RP 1950**]. As argued in their Motion for Summary Judgment, Plaintiffs reiterated the public policy of the UM Statute to expand UM coverage by giving every New Mexico consumer a statutory right to be provided with the material facts needed to make realistically informed, knowing and intelligent decisions about how much UM coverage they wanted and could afford. [***Id.***] Plaintiffs also responded that New

Mexico insurance law has long presumed that the average, unsophisticated consumer must rely on the insurance agent to fully and honestly provide full disclosure of everything the consumer needs to know when buying insurance, and especially UM coverage. [**9 RP 1953**].

As experienced agents, Plaintiffs argued the Defendant Agents also knew consumers, like the absent class members, must rely on them to provide all the relevant, material information needed to decide how much UM coverage they want and can afford. [***Id.***] Plaintiffs relied on their allegations that the Defendant Agents, as professional and trained insurance sales professionals, knew, or should have known through the exercise of reasonable professional diligence, that presale disclosure of the relevant UM premiums had been required since May 20, 2004. [**9 RP 1954-57**]. Plaintiffs also argued that presale UM premium disclosures were required to allow average, uninformed consumers to decide for themselves how much UM coverage they wanted and could afford. [***Id.***]

As the persons conducting all New Mexico UM sales transactions, Plaintiffs argued the Defendant Agents were personally liable under the UPA for continuing to conduct UM sales transactions in ways that were not conducive to allowing consumers to make realistically informed choices about how much UM coverage they want and can afford. [***Id.***] In addition to concealing the relevant UM premiums, Plaintiffs also argued that under these circumstances, Defendant

Agents' systematic practice of prepopulating UM rejection forms constituted an inherently deceptive or unconscionable sales practice. [**9 RP 1951-54**].

Plaintiffs also pointed out that the common law fraud remedy did not require proof of actual damages to maintain such an action. [**9 RP 1963-64**]. Plaintiffs therefore argued, as a simplified substitute for class action fraud cases, their allegations would support claims for fraud or constructive fraud so that the cases holding the UPA's private remedy allows statutory damages without any showing of actual loss would also support interpreting Section 57-12-10(E) as allowing absent class members to recover nominal [statutory] damages in a UPA class action. [**9 RP 1963-65**]. Finally, Plaintiffs reargued the point that strictly interpreting Section 57-12-10(E) as requiring each absent class member to prove actual damages would nullify the UPA class remedy and thus violate the remedial public policy it represents. [***Id.***]

Plaintiffs treated Defendant Seawright's Motion to Strike as a response to their Motion for Summary Judgment and filed a Reply to that response on October 6, 2015. [**9 RP 2001-11**]. Plaintiffs argued, given the public policy and remedial purposes underlying the UPA, there was "no principled reason" to interpret the UPA class remedy as meaning that similarly situated but absent class members should be denied the same statutory damages that individual plaintiffs are entitled to recover without any proof of actual loss. [**9-P 2003**].

Plaintiffs argued it made little sense to interpret the same UPA remedy, Section 57-12-10, as allowing individual consumers to recover statutory damages, without any showing of economic loss, while at the same time prohibiting class member consumers from recovering statutory damages when a large number of consumers are similarly affected by institutional deceptive or unconscionable sales practices. [**9 RP 2006-07**]. Plaintiffs contended the Legislature could hardly have intended such disparate treatment of similarly situated, similarly affected, consumers. [**9 RP 2007**].

Finally, Plaintiffs argued that the issue of whether the UPA should be consistently and equally interpreted to allow absent class members to recover statutory damages invokes the fundamental policy of New Mexico and the efficacy of the UPA class remedy as a viable device for the vindication of consumer rights where actual damages may not be provable but where highly prized statutory rights of thousands of innocent, ignorant and vulnerable New Mexico consumers have been systematically and knowingly violated on a wholesale basis, and where the persons responsible for knowingly committing these deceptive or unconscionable sales practices also occupy a position of trust and superior knowledge. [**9 RP 2010**].

On October 14, 2015, Defendant Seawright filed his Reply on his Rule 1-012(B)(6) Motion to Dismiss. [**9 RP 2020-30**]. Defendant Seawright's Reply

argued that Defendant Agents' uniform practice of prepopulating UM rejection forms, without the consumer's prior knowledge or informed consent, and presenting them to Plaintiffs, as uninformed consumers, to sign without further explanation was not a deceptive or unconscionable sales practice because Plaintiffs and the other absent class members evidenced their "consent" by signing the forms upon instructions from their agents. **[9 RP 2024-25**; *cf.* **7 RP 1605-1607, 1609, 1620; 8 RP 1629]**.

Defendant Seawright argued Plaintiffs failed to allege sufficient facts to support an individual UPA claim against himself, individually, as their State Farm insurance agent based on his retroactive deception theory. **[9 RP 2020-21, 2024-26]**. Defendant Seawright also argued Plaintiffs' civil conspiracy allegations were insufficiently pled. **[9 RP 2027-28]**. Finally, Defendant Seawright argued again that Section 57-12-10(E), interpreted strictly and literally, prohibits absent class members from recovering statutory damages. **[9 RP 2029]**. Defendant Seawright did not address the Supreme Court's contrary interpretation of Section 57-12-10(B) which also literally prohibits individuals from recovering statutory damages without a showing of "any loss of money or property." **[*Id.*]**

On October 6, 2015, Plaintiffs filed their Request for Hearing on their Motion for Summary Judgment. **[9 RP 2012-13]**. On October 15, 2015, Defendant Seawright filed a Reply on his Motion to Strike. **[9 RP 2031-41]**. Attached to his

Reply was an October 7, 2015, email from defense counsel to the trial court asserting Defendant's Motion to Dismiss, Motion to Strike and Conditional Motion for Extension of Time should be heard before Plaintiffs' Motion for Summary Judgment. **[9 RP 2042]**.

On October 19, 2015, Defendant Seawright requested a hearing on his Motion to Dismiss. **[10 RP 2090]**. On November 13, 2015, the trial court set a hearing on Defendant Seawright's Motion to Dismiss for January 26, 2016. **[10 RP 2094]**. On December 10, 2015, the trial court reset the hearing on Defendant Seawright's Motion to Dismiss for March 28, 2016. **[10 RP 2098]**. On March 11, 2016, the trial court set a hearing on Plaintiffs' Motion for Summary Judgment for March 28, 2016. **[10 RP 2101]**.

On March 28, 2016, the trial court held a hearing on Defendant Seawright's Motion to Dismiss and Defendant Seawright's Motion to Strike. **[3-28-16 Tr. 2-3]**. At the hearing, and contrary to its March 11, 2016 Notice of Hearing, the trial court stated Plaintiffs' Motion for Summary Judgment had not been set for hearing on March 28, 2016, but might be heard if needed on a different day. **[3-28-16 Tr. 2-3]**.

During the hearing, the trial court acknowledged there were appellate cases filed before *Jordan* "that indicated how agents were supposed to act with regard to uninsured motorist insurance...and it's true, it didn't have those technicalities of

Jordan but there certainly was the meat of *Jordan* before." **[3-28-16 Tr. 7]**. The trial court also acknowledged that before *Jordan* there was a requirement that "the decision about UM be knowing and intelligently made." **[3-28-16 Tr. 8]**.

Defense counsel argued that the dispositive issue was whether Section 57-12-10(E) allowed absent class members to recover statutory damages without any proof of actual loss of money or property. **[3-28-16 Tr. 9-10]**. Defense counsel argued that the UPA does not allow any recovery of statutory damages without any "detriment," *i.e.*, some proof of actual loss of money or property. **[3-28-16 Tr. 10-12]**. As in his Motion to Dismiss, defense counsel argued that State Farm's retroactive reformation of all UM policies after *Jordan* provided a benefit that essentially absolved all of the Defendant Agents from any individual liability under the UPA for the deceptive and unconscionable sales practices alleged in the Amended Complaint. **[*Id.*]** Defense counsel acknowledged that Plaintiffs' Motion for Summary Judgment raised the issue of whether absent class members were entitled to recover statutory damages. **[3-28-16 Tr. 12]**.

In response, Plaintiffs' counsel pointed out that Defendant's Motion to Dismiss also raised the issue of whether Section 57-12-10(E) allows absent class members to recover statutory damages, the same as individuals are allowed to do under Section 57-12-10(B), without any proof of loss of money or property, *i.e.*, the same issue raised in Plaintiffs' Motion for Summary Judgment. **[3-28-16 Tr.**

12-13]. When the trial court asked Plaintiffs' counsel if that issue was important, counsel specifically asked for a ruling on the issue. [*Id.*]

Plaintiffs' counsel explained that the reason for bringing this class action was to address longstanding business practices uniformly engaged in by State Farm's insurance sales agents. [**3-28-16 Tr. 13-14**]. Plaintiffs' counsel explained that the root cause of these classwide deceptive or unconscionable sales practices arises from the historic unprofitability of UM coverage sold in New Mexico—among the top 5% in the country. [**3-28-16 Tr. 13**]. Plaintiffs' counsel argued the sales practices alleged were designed to prevent uninformed consumers from being able to make their own realistically informed, knowing and intelligent decisions about how much UM coverage they want, or can afford, to buy or reject. [**3-28-16 Tr. 13-15**].

By way of example, Plaintiffs' counsel pointed out that Plaintiffs alleged State Farm's New Mexico insurance agents have been filling in the consumer's selection of UM limits on UM selection/rejection forms, without the consumer's prior knowledge or informed consent, for over 25 years. [*Id.*] Plaintiffs' counsel also read paragraph 16 from *Montaño* to illustrate the Supreme Court's ruling requiring that consumers, and not the agents, act as the real decision-makers in making an informed decision about how much UM coverage they can afford. [**3-28-16 Tr. 15**]. The trial court acknowledged it understood this point of law,

and agreed with Plaintiffs' counsel, but wanted Plaintiffs' counsel to address the statutory damages issue. **[3-28-16 Tr. 15-16]**.

Plaintiffs' counsel then read the Supreme Court's discussion of the three relevant subsections of Section 57-12-10 in *Page & Wirtz Const. Co.*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349. **[3-28-16 Tr. 16-17]**. Plaintiffs' counsel argued the rules of statutory construction require the trial court to read Section 57-12-10 as a whole to determine whether Section 57-12-10(E) should be interpreted literally or whether it should be interpreted liberally and consistently with Section 57-12-10(B) since Section E refers directly to Section B. **[3-28-16 Tr. 17-18]**. Plaintiffs' counsel argued that the interpretation of Section 57-12-10 invokes the equal protection and rational basis arguments raised in Plaintiffs' Motion for Summary Judgment. **[3-28-16 Tr. 18]**.

Plaintiffs' counsel then proceeded to read from *Lohman* in arguing the UPA's remedy sections should be interpreted consistently regarding the availability of statutory damages without proof of loss of money or property. **[3-28-16 Tr. 22-25]**. Plaintiffs' counsel pointed out that the UPA issue in *Lohman* was whether the plaintiff's "UPA *class* claim" should be dismissed for failure to state cognizable damages. **[3-28-16 Tr. 23]**. Plaintiffs' counsel quoted the summary in *Lohman* stating that even if the plaintiff *and* his class members are unable to prove economic losses "*they* may nevertheless seek the statutory $100 minimum." **[3-28-**

16 Tr. 24-25]. The trial court responded it was not bound by *Lohman* because the Court did not expressly consider Section 57-12-10(E). [**3-28-16 Tr. 26-27**].

Plaintiffs' counsel then argued the UPA's class remedy is fundamental to New Mexico's public policy because the opportunity for class relief is essential to vindication of consumer rights. [**3-28-16 Tr. 28-29**]. Plaintiffs' counsel next described for the trial court why the Court of Appeals' holding in *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 45, 136 N.M. 599, 103 P.3d 39 was inapplicable. [**3-28-16 Tr. 29-30**]. Plaintiffs' counsel also argued the issue of class statutory damages was argued and considered in *Lohman* but did not have the appellate briefs at hand. [**3-28-16 Tr. 26-27**].

Plaintiffs' counsel again argued there was "no rational basis" for discriminating against absent class members, who were victims of the same deceptive sales practices, by interpreting Section 57-12-10(E) as denying them an equal right to the same statutory damages, without proof of actual loss, which named plaintiffs can recover. [**3-28-16 Tr. 30**]. Plaintiffs' counsel also argued such a holding would not only violate the fundamental policy and purpose of the UPA class remedy but also nullify the UPA's class remedy as an effective remedy for vindication of consumer rights. [**3-28-16 Tr. 30-31**]. Again, Plaintiffs' counsel argued there was no rational basis, nor any legislative purpose, for discriminating between similarly situated consumers who are victims of the same deceptive sales

practices by allowing only named plaintiffs, but not absent class members, to recover statutory damages. **[3-28-16 Tr. 31]**. Defense counsel responded to these arguments but made no argument on equal protection or rational basis. **[3-28-16 Tr. 31-33]**.

The trial court stated she believed Plaintiffs' Amended Complaint "states a cause of action for a deceptive trade practice based on the law as it existed, at least as of *Montaño*, if not before." **[3-28-16 Tr. 34-35]**. However, the trial court determined that since absent class members could not recover statutory damages under its literal interpretation of Section 57-12-10(E), Plaintiffs' UPA class action must be dismissed. **[3-28-16 Tr. 35-39]**. On May 12, 2016, the trial court entered its Amended Order dismissing Plaintiffs' Amended UPA Class Complaint with prejudice. **[10 RP 2288-89]**.

B. LEGAL ARGUMENT

Plaintiffs' UPA class claims are especially compelling in light of three factors. First, is the need to liberally interpret the remedial UPA class remedy, one that is "enshrined" in New Mexico's fundamental policy, as the effective, and equally fair, consumer protection device it was meant to be in cases of institutional consumer fraud affecting thousands of New Mexico consumers. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶¶ 12-15, 144 N.M. 464, 188 P.3d 1215.

Second, is the public policy of the UM Statute which requires insurers and their agents to provide consumers with the information they need to make their own realistically informed decisions about how much UM coverage they want and can afford, *i.e.*, the premium costs for each available level of stackable UM coverage. *Montaño*, 2004-NMSC-020, ¶¶ 16-20.

Third, is the judicial response to the refusal by State Farm and its agents to acknowledge, much less abide by, *Montaño*'s consumer-protective premium disclosure rule between May 20, 2004 and June 2011. *Cf. Jordan*, 2010-NMSC-051, ¶ 20.

This is a question of substantial public interest that arises at the intersection of two of New Mexico's most important public policy statutes—the UPA and the UM Statute. This convergence demands a constitutionally consistent interpretation of the UPA's class remedy to protect the UM Statute's public policy by providing an effective, realistic consumer protection class remedy to address institutional consumer fraud.

This case was brought on behalf of thousands of New Mexico consumers who, between May 20, 2004 and June 12, 2011, were victimized by institutional consumer fraud designed to deprive them of their statutory right to make their own realistically informed decisions about how much UM coverage they wanted and could afford. As the Supreme Court stated in 2010:

> Despite this Court's ***repeated pronouncements*** that an insured's decision to reject UM/UIM coverage must be ***knowing and intelligent*** in order to effectuate New Mexico's public policy...these consolidated cases indicate that insurers ***continue to offer*** UM/UIM coverage ***in ways that are not conducive*** to allowing the insured to make ***a realistically informed choice***.

Jordan, 2010-NMSC-051, ¶ 20, (citations omitted) (emphasis added). *See also Montaño*, 2004-NMSC-020, ¶¶ 16-17, 20.

It is undisputed that, after May 20, 2004, all State Farm agents were selling "stacked" UM coverage—making the prospective *Montaño* premium disclosure rule applicable to every UM sales transaction they conducted thereafter.[1] Defendant Agents never disputed they failed to obey the *Montaño* disclosure rule. They argued they didn't know the *Montaño* disclosure rule applied to them.[2]

Defendants argued ignorance—despite the fact the Supreme Court held in 2014 that State Farm, *and* its agents, knew after *Montaño* they were required to disclose "premium costs for each available level of stacked UM coverage" being offered to enable uninformed consumers to make realistically informed decisions about how much UM coverage they wanted and could afford. *Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646 ("Fourteen years after *Romero*, this Court created a new rejection requirement in *Montaño*, charting what we called 'a new course' by judicially imposing a requirement not spelled out in insurance regulations, that insurers ***disclose the premium costs for***

[1] **[1 RP 35-47, 50, 57; 2 RP 314, 326, 334; 7 RP 1594-98, 1601, 1605-06].**
[2] **[8 RP 1782-84; 1820-22].** No Answer was ever filed by Defendants in this case.

each available level of stacked coverage as a means of guaranteeing that consumers can knowingly exercise their statutory rights to UM/UIM coverage. *See Montaño*, 2004–NMSC–020, ¶¶ 17, 20, 135 N.M. 681, 92 P.3d 1255." (emphasis added)).

1. This Appeal Should Be Certified To The Supreme Court

It is axiomatic that Plaintiffs' allegations must be accepted as true on this appeal. Therefore, the only issue presented is whether Plaintiffs' putative class members are legally entitled to recover statutory damages under NMSA 1978, Section 57-12-10 for each knowing or willful violation of the UPA as alleged without any showing of actual damages.

Plaintiffs filed their Motion for Certification on September 20, 2016. On December 27, 2016, this Court assigned this case to the General Calendar, holding Plaintiffs' Motion in abeyance pending submission to a panel. The issues raised and argued below invoke a matter of such substantial public interest, affecting the rights of all New Mexico consumers, that they should be resolved by the Supreme Court. *VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶ 9, 130 N.M. 287, 24 P.3d 319; *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 38, 356 P.3d 564.

Plaintiffs also argued an apparent conflict exists between this Court's holdings in *Brooks*, 2004-NMCA-134, ¶¶ 37, 45, and *Lohman*, 2007-NMCA-

100, ¶¶ 44, 47. Plaintiffs ask this Court to take judicial notice of the appellate briefs filed in *Lohman* and *Brooks*. These appellate briefs show that in *Brooks*, this Court's comments on Section 57-12-10(E) were *dicta*. In contrast, these briefs show the issue of statutory damages for absent class members was argued in *Lohman*.

In *Brooks*, Plaintiffs never raised or argued the issue of whether Section 57-12-10(E) allows absent class members to recover statutory damages in their Brief In Chief or in their Reply Brief. **BIC 1-37; RB 1-24**. Plaintiffs never cited the Supreme Court's holding in *Page & Wirtz*. ***Id.*** Nor did Plaintiffs cite any particular section of the UPA. ***Id.*** Likewise, Plaintiffs never claimed, as is required, to have raised the issue in the trial court. ***Id.*** Plaintiffs' argument was limited to whether the trial court erred in denying class certification under Rule 1-023 NMRA. ***Id.*** The issue of whether Section 57-12-10(E) allows absent class members to equally recover statutory damages was never properly before this Court in *Brooks*.

The only mention of Section 57-12-10(E) occurred in Defendants' Answer Brief. **AB 28-29**. ("Accordingly, Plaintiffs must prove the actual damages suffered by each member of the class. *Cf. Page & Wirtz*, 110 N.M. at 211-12, 794 P.2d at 354-55 (under §57-12-10(B), 'the aggrieved party must produce evidence

of loss of money or property as a result of the practice.'...The district court properly concluded that Plaintiffs are unable to satisfy this burden in this case.").[3]

Plaintiffs' Reply Brief in *Brooks* never mentioned Section 57-12-10(E). Instead, Plaintiffs asked this Court to "focus on the sole legal issue of this appeal—whether the district court, citing only concerns regarding manageability, applied the wrong legal standard in ruling that the case could not be maintained as a class, when such ruling effectively terminates the litigation." **RB 5.**

The *Lohman* briefs show the parties argued the holding in *Brooks*, 2004-NMCA-134, ¶ 37. Plaintiff argued the UPA allowed "Plaintiff [and] *any other person*" to recover statutory damages under Section 57-12-10(B) and that *Brooks* was inapplicable. **AB [Chrysler] 11-12; AB [USTC] 13-14.**

In its Reply Brief, USTC argued *Brooks* and Section 57-12-10(E) prohibited "unnamed class members" from recovering statutory damages.

> Even assuming for purposes of argument that reliance is not required, Plaintiff must still establish causation - the alleged wrongful conduct must have caused Plaintiff to suffer actual damages. *Brooks v. Norwest Corporation*, 2004-NMCA-134, ¶ 37, 136 N.M. 599, 611, 103 P.2d. 39, 51. As discussed, Plaintiff has failed to allege any such actual damages with sufficient specificity. Finally, as a fall-back position, Plaintiff argues that, even in the absence of actual damages, he is entitled to statutory minimum damages in the amount of $100. Plaintiff's purported entitlement to statutory damages, however, is not at issue in this appeal. At issue is whether or not Plaintiff has adequately alleged actual damages. He has not done so, and

[3] Defendants failed to finish the quotation. *Page & Wirtz*, 1990-NMSC-063, ¶ 23 ("The record in this case reflects no such [economic] loss. Therefore, recovery is limited to one hundred dollars, which may be trebled by the court when the party willfully has engaged in the unfair or deceptive practice.").

accordingly, his claim for actual damages should be dismissed as a matter of law. [FN2].

> [FN2] The issue of actual damages also remains relevant ***because statutory damages are not available to unnamed class members.***

USTC RB 7 n. 2 (emphasis added) (quotation marks omitted).

This Court's Opinion in *Lohman* is relevant because this Court relied on the public policy underlying *Page & Wirtz* to find Plaintiff *and* his absent class members were equally entitled to recover statutory damages, without any proof of economic loss. *Lohman*, 2007-NMCA-100, ¶ 47 ("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.***" (emphasis added)).

This case should be certified to the Supreme Court due to these apparent conflicts.

2. The Trial Court's Literal Interpretation Of Section 57-12-10(E) Was Unconstitutionally Inconsistent With The Liberal Interpretation The Supreme Court Gave Section 57-12-10(B)

"The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." *Breen v. Carlsbad Mun. Schs.*, 2005–NMSC–028, ¶ 10, 138 N.M. 331, 120 P.3d 413.

This Court acknowledged this disparate treatment of similarly situated UPA victims in *Brooks*, holding that Section 57-12-10(E) appears to be "less fair" to

class members. *Brooks*, 2004-NMCA-134, ¶ 45. Defendants repeatedly quoted ¶ 45 of *Brooks* as holding that "any relief realized by class members is limited to actual damages; they are barred from collecting statutory or treble damages." **[5 RP 1084; 6 RP 1391; 7 RP 1393; 8 RP 1785, 1823]**. Defendants failed to quote the next sentence in *Brooks* where this Court recognized the inherent unfairness in this dissimilar treatment of similarly situated UPA victims. *Brooks*, 2004-NMCA-134, ¶ 45 ("Hence, the UPA not only provides a remedy for Plaintiffs, it also ***appears to be less fair*** to those members ***to pursue their remedy as a class action***." *Id.*, ¶ 45 (emphasis added).

Therefore, the fact that the trial court's literal interpretation of Section 57-12-10(E), as urged by Defendants, created a class of similarly situated persons who are treated dissimilarly was undisputed and self-evident. *Id.* Plaintiffs proved this self-evident discrimination while Defendants repeatedly cited this Court's holding that a literal interpretation of Section 57-12-10(E) results in treatment that is "less fair" to similarly situated absent class members. **[5 RP 1084; 6 RP 1391; 7 RP 1393; 8 RP 1785, 1823]**. Nowhere did the trial court or Defendants articulate any rational basis for this discriminatory interpretation. Plaintiffs met their burden of preserving this issue.

A. Strict Interpretation Results In Dissimilar Classification And Discrimination That Is Arbitrary, Unreasonable, Unrelated To A Legitimate Statutory Purpose, And Not Based On Real Differences

This Court reviews *de novo* the constitutionality of legislation, including the constitutionality of statutory construction. *See Rodriguez v. Scotts Landscaping*, 2008–NMCA–046, ¶ 8, 143 N.M. 726, 181 P.3d 718. The UPA is economic or social legislation. *Breen*, 2005–NMSC–028, ¶ 11. The trial court's interpretation of Section 57-12-10(E) is reviewed under the rational basis standard. *Id.*

"The Equal Protection Clause mandates that, 'in order to be legal,' ostensibly discriminatory classifications in social and economic legislation 'must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule' for the class that suffers the discrimination." *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 1, 378 P.3d 13 (citations omitted). *See also Pruey v. Dept. of Alcoholic Beverage Control of New Mexico*, 1986-NMSC-018, ¶ 7, 104 N.M. 10, 715 N.M. 458; *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 62 N.M. 219, 308 P.2d 199.

Interpreted literally, Section 57-12-10(B) limits recovery to "any person who suffers any loss of money or property." *Pedroza v. Lomas Auto Mall, Inc.*, 663 F. Supp. 2d 1123, 1128, 1131 (D.N.M. 2009). Section 57-12-10(E) allows

awards of damages to named plaintiffs "as provided in Subsection B and may award [class] members such actual damages as were suffered." *Id.*

Therefore, read literally and consistently together, both subsections provide *no* private remedy for damages, whether for individuals or class members, *unless* the named plaintiff can show a "loss of money or property." This would be the proper interpretation for both subsections were it not for *Page & Wirtz Const. Co.*, 1990-NMSC-063, ¶¶ 21-23, where the Supreme Court held:

> The first remedy under the statute, injunctive relief, expressly is not conditioned upon proof of monetary loss. Any person *likely* to be damaged by an unfair or deceptive trade practice of another may obtain such relief; monetary loss is "not required." Section 57–12–10(A)...In contrast, recovery of damages under paragraph (B) includes only those persons "who suffer any loss of money or property." The paragraph authorizes recovery of "actual damages" or the sum of one hundred dollars, whichever is greater. Section 57–12–10(B). Such damages might be suffered either by a consumer of goods or services, or the commercial competitor of an enterprise engaged in deceptive trade practices. However, in either case the aggrieved party must produce evidence of "loss of money or property" as a result of the practice. *Id.* The record in this case reflects no such loss. Therefore, recovery is limited to one hundred dollars, which may be trebled by the court when the party willfully has engaged in the unfair or deceptive practice. *Id.*

The Supreme Court liberally interpreted Section 57-12-10(B) to achieve the UPA's remedial objective *despite* its literal language to the contrary. *Id.* Before *Page & Wirtz*, there could be *no* recovery under the UPA without some proof of "loss of money or property." *Page & Wirtz* changed the focus of the UPA from recovering economic losses to preventing deceptive sales practices. That change affected, and applied to, *all* private damage subsections of Section 57-12-10.

Before *Page & Wirtz*, the classifications inherent in Section 57-12-10 were rational because *everyone*, named as well as unnamed parties, was required to show *some* economic loss to achieve any UPA recovery. Before *Page & Wirtz*, the language in these subsections was definitionally identical and equally applied. After *Page & Wirtz*, proof of economic loss was no longer required under Section 57-12-10(B), despite literal language to the contrary.

After *Page & Wirtz*, there was no longer any rational basis for dissimilar and discriminatory treatment of class members under Section 57-12-10(E) based solely on their party status. *McGeehan v. Bunch*, 1975-NMSC-055, ¶ 16, 88 N.M. 308, 540 P.2d 238 ("[A] classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered.").

After *Page & Wirtz*, there was no difference with a substantial relation to the object of the UPA, to justify such "unfair" [*Brooks*, 2004-NMCA-134 ¶ 47] discrimination between similarly situated New Mexico consumers—and even more so after the Supreme Court held the UPA class remedy, in particular, is "enshrined" in New Mexico's fundamental policy. *Rodriguez v. Brand West*, 2016-NMSC-029, ¶ 11; *Fiser*, 2008-NMSC-046, ¶¶ 12-15; *cf. Feeney v. Dell Inc.*, 908 N.E.2d 753, 763 (Mass. 2009) ("Permitting consumers to sue as a class cured the defect inherent in the consumer protection statute that no matter how

egregiously a consumer might have been wronged, 'the economics of a litigation designed to seek redress precluded an effective attack'...The right to a [UPA] class action in a consumer protection case is of particular importance where, as here, aggregation of small claims is likely the only realistic option for pursuing a claim.").

The unconstitutionality of such inconsistent interpretations is the implicit conclusion reached by this Court in *Lohman*. *Lohman*, 2007-NMCA-100, ¶ 47; *cf. Aspinall v. Phillip Morris Companies, Inc.*, 813 N.E.2d 476, 486, 492 (Mass. 2004) ("We reject the proposition that the purchase of an intentionally falsely represented product cannot be, by itself, an ascertainable injury under our consumer protection statute...It follows that, if the violations of [the UPA] alleged by the plaintiffs are proved, all members of the class of purchasers of Marlboro Lights in Massachusetts will have been injured...This is so because all purchased (and, presumably, smoked) a product that was deceptively advertised, as a matter of law...Thus, all will be entitled to statutory damages [$25], without regard to whether the plaintiffs are successful in establishing that consumers were overcharged for the deceptively advertised cigarettes.").

3. The Trial Court Erred In Failing To Decide The Merits Of Plaintiffs' Equal Protection Claim

"When litigants allege that the government has unconstitutionally discriminated against them, courts must decide the merits of the allegation

because if proven, courts must resist shrinking from their responsibilities as an independent branch of government, and refuse to perpetuate the discrimination—regardless of how long it has persisted—by safeguarding constitutional rights. Such is the constitutional responsibility of the courts." *Rodriguez v. Brand West*, 2016-NMSC-029 ¶ 2; *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865; *Conoco Inc. v. Taxation & Rev. Department,* 1997-NMSC-005, ¶ 23, 122 N.M. 736, 931 P.2d. 730. The trial court erred by refusing to hear or rule on Plaintiffs' equal protection claim despite Plaintiffs' request for a hearing on the issue. **[9 RP 2012-13]**.

4. The Trial Court's Strict Interpretation Of Section 57-12-10(E) Was Erroneous As Contrary To The UPA's Remedial Objective

The question here is one of statutory construction. Issues of statutory interpretation are reviewed *de novo*. *In re Grace H.*, 2014–NMSC–034, ¶ 34, 335 P.3d 746. This Court also reviews *de novo* "a discretionary decision that is premised on misapprehension of the law." *New Mexico Right to Choose/NARAL v. Johnson,* 1999–NMSC–005, ¶ 15, 126 N.M. 788, 975 P.2d 841.

The UPA's remedial objective is to extend the "broadest possible" protection to consumers subjected to deceptive sales practices by providing a consumer-friendly alternative to the common law fraud remedy. *Lohman*, 2007-NMCA-100, ¶ 25 ("The remedial purpose of the legislation, as a consumer protection measure, is also consistent with the broadest possible application.");

State ex. rel. King v. B&B Investment Group, Inc., 2014-NMSC-024, ¶ 48, 329 P.3d 658 ("In order to facilitate the consumer-protective legislative purpose of the UPA, there was ample reason to grant restitution to borrowers for Defendants' unconscionable trade practices. It would not further the purpose of the UPA under these circumstances to allow Defendants to retain the full profits of their unconscionable trade practices."); Pridgen, *Consumer Protection and the Law*, § 1:1 (2016) (history and difficulty of bringing common law fraud leading to passage of consumer protection acts ["little FTC Acts"] providing a consumer-friendly alternative to common law fraud).

As with the FTC, actual damages are secondary to the remedial, consumer-protective objective of the UPA, *i.e.*, the prevention of deceptive sales practices. NMSA 1978, Section 57-12-4 (UPA interpretations follow FTC holdings); *Floersheim v. F.T.C.*, 411 F.2d 874, 878 (9th Cir.1969) ("Deception itself is the evil the [FTC] statute is designed to prevent."); *In Re International Harvester Co.*, 104 F.T.C. 949, 1056 (1984) ("Our deception analysis thus focuses on risk of consumer harm, and actual injury need not be shown.").

Actual damages are not an element of the common law fraud action. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 20, 310 P.3d 611. Likewise, economic loss cannot be an element of the UPA's private remedies

operating as consumer-friendly alternatives to common law fraud. *Page & Wirtz*, 1990-NMSC-063; *Lohman*, 2007-NMCA-100.

Strictly interpreting the UPA's class remedy so as to make it "less fair" to absent class members is contrary to the remedial purpose of the UPA and the fundamental public policy of New Mexico. *Brooks*, 2004-NMCA-134, ¶ 45; *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73 ("In the UPA, the Legislature has provided for damages and other remedial relief for persons damaged by unfair, deceptive, and unconscionable trade practices...Since the UPA constitutes remedial legislation, 'we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent'...'[W]e ensure that the Unfair Practices Act lends the protection of its broad application to innocent consumers.'" (citations omitted)); *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 34 ("In determining the public policy behind the UPA, we must first examine the statute's plain language...The UPA is a law that prohibits the economic exploitation of others."); *Jolley v. Associated Elec. & Gas Ins. Servs., Ltd.*, 2010–NMSC–029, ¶ 8, 148 N.M. 436, 237 P.3d 738 ("To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied."); *Fiser*, 2008-NMSC-046, ¶¶ 12-15; *Brooks*, 2004-NMCA-134, ¶ 45.

The trial court's strict interpretation was also contrary to basic principles of statutory construction.

> We presume that the legislature is well informed as to existing statutory and common law and does not intend to enact a nullity, and we also presume that the legislature intends to change existing law when it enacts a new statute...When several statutes relate to the same subject matter, we will, if possible, construe them in such a fashion as to give effect to every provision of each...While normally bound to follow legislative definitions, we are not so bound when a particular definition would result in an unreasonable classification...In such a case, we look to the intent of the language employed by the legislature rather than to the precise definition of the words themselves...Finally, we seek to adopt a construction which will not render an application of the statute absurd or unreasonable.

Incorporated County of Los Alamos v. Johnson, 1989-NMSC-045, ¶ 4, 108 N.M. 633, 776 P.2d 1252 (citations omitted).

Plaintiffs repeatedly argued that a literal interpretation would render Section 57-12-10(E) a nullity—a result New Mexico law prohibits—because it would be literally impossible to bring a UPA action when it is most needed, *i.e.*, where deceptive sales practices are committed on a systematic, institutional basis involving thousands of individual New Mexico consumers. *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 ("We have repeatedly cautioned that despite the 'beguiling simplicity' of parsing the words on the face of a statute, we must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction.").

C. CONCLUSION

First, and given the Supreme Court's emphatic pronouncement that the UPA class remedy is "enshrined" in New Mexico's fundamental public policy, the best option for this Court is to certify this issue and case directly to the Supreme Court at this stage of the proceedings. The overwhelming importance of this issue to New Mexico's consumer protection policies means, as a practical matter, that the Supreme Court will eventually be presented with this case—regardless of which side of the issue this Court favors.

Certification will save the preciously limited judicial resources of this Court and its staff. It will avoid the waste of three-plus years of judicial and party resources when this issue must eventually end in the Supreme Court in any event. This is not to say that this Court cannot decide this issue. It merely states the obvious. The substantial public interest issues involved are best resolved sooner rather than later—and are best decided by the Supreme Court as the ultimate arbiter of New Mexico's public policy in which the UPA class remedy is enshrined.

Alternatively, this Court should hold the trial court erred in rejecting, or refusing to hear, Plaintiffs' equal protection claims. Nowhere did the trial court or Defendants define any rational basis for the inherently discriminatory inconsistency of applying an "unfair" literal interpretation to Section 57-12-10(E)

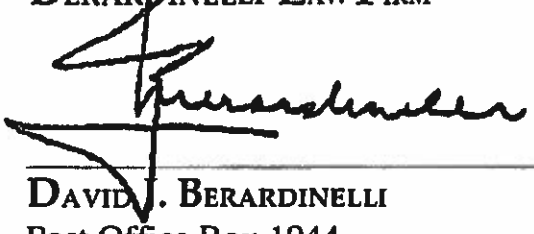
when the Supreme Court applied a liberal interpretation to Section 57-12-10(B) to conclude that economic loss was not an element of the UPA private remedy despite definitionally identical language to the contrary.

As a second alternative, this Court should reconsider the assignment to the General Calendar and assign this appeal to the Summary Calendar with a proposed affirmance based on its holding in *Brooks*, 2004-NMCA-134.

Since this Court reviews constitutionality *de novo*, and the courts have a duty to decide equal protection claims when raised, this Court should rule that the *interpretation* of Section 57-12-10(E) applied by the trial court—as contrasted with the interpretation applied to Section 57-12-10(B) by the Supreme Court—amounted to an unconstitutional deprivation of the equal protection of rights of absent class members. This Court should reverse the trial court and reinstate Plaintiffs' Amended Class Complaint for trial on the merits.

Respectfully submitted,

BERARDINELLI LAW FIRM

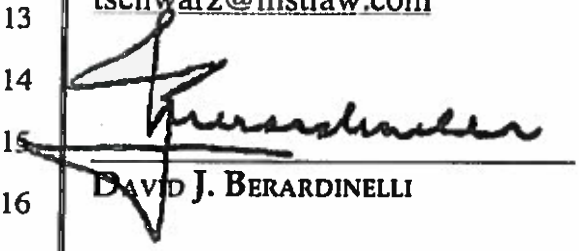


DAVID J. BERARDINELLI
Post Office Box 1944
Santa Fe, New Mexico 87504-1944
(505) 988-9664
Attorney for Plaintiffs/Appellants

I hereby certify that on May 10, 2017, I caused a true and correct copy of this Brief In Chief to be served by electronic mail, upon counsel for Defendant/ Appellee Garrett Seawright as follows:

Terry R. Guebert, Esq.
Guebert Bruckner P.C.
Post Office Box 93880
Albuquerque, NM 87199-3880
tguebert@guebertlaw.com

Todd A. Schwarz, Esq.
Miller Stratvert P.A.
Post Office Box 25687
Albuquerque, NM 87125-0687
tschwarz@mstlaw.com



DAVID J. BERARDINELLI