IN THE SUPREME COURT
STATE OF ARIZONA

AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, *et al.*, Petitioners, v. **HON. JOHN E. DAVIS**, Judge of the Superior Court of Arizona, in and for the County of Pima, Respondent, **LUIS BALLESTEROS** and **ALMA BALLESTEROS**, husband and wife, et al., Real Parties in Interest.	**Case No. CV 08-0233-SA** Arizona Court of Appeals No. 2 CA-SA 2008-0032 Pima County Superior Court No. C-20050987

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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I. INTRODUCTION.

Amicus United Policyholders submits this brief in opposition to the Petition for Review filed in this matter by American Standard Insurance Company ("ASIC"). ASIC concedes that it has always been aware of the fact that Arizona has a large Hispanic population, many members of which are only fluent in Spanish. The company also concedes that it has always been aware of the fact that the Arizona Department of Insurance has promulgated a UM/UIM selection/rejection form in the Spanish language which is available for use in the sale of UM and UIM coverages to such citizens.

ASIC contends, however, that it has the right to treat such customers as second class citizens. The company claims that, as in this case, as long as its sales agents can get such customers to unwittingly sign a form written in English, it is insulated from any and all legal consequences of such conduct because the legislature has supposedly endorsed such behavior in the Uninsured/Underinsured Motorist Act, A.R.S. § 20-259.01 (the "UMA"). United Policyholders respectfully submits that ASIC's interpretation of the statute is flawed and that its Petition for Review should be denied. The Petition should also be denied because, as the trial court recognized, there are material issues of fact that preclude the entry of summary judgment.

II. THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY INTERPRETED THE UMA.

ASIC seeks review of the denial of its motion for summary judgment. In reviewing a summary judgment ruling, the facts must be construed in favor of the party opposing the motion, the Plaintiffs in this case. The facts, viewed

in that respect, show that ASIC (1) presented an insurance coverage form to Luis Ballesteros that it knew he could not read; (2) knew that an approved Spanish language form was available but did not provide that form to him; (3) failed to explain the form to him in his native tongue; and, (4) told him that the form was just something he needed to sign to get his insurance coverage. Trusting his insurance company, Ballesteros signed the form. Until coverage was later needed, he did not realize that he lacked the coverage he thought he had purchased.[1] A reasonable jury could find that these facts support a reasonable inference that Ballesteros had been misled.

ASIC, however, seeks to evade jury review by interpreting A.R.S. § 20-259.01 to deny coverage. The company argues that the statute creates an impregnable insurance company "safe harbor." The argument is contrary to the language, intent, purpose and history of the UMA.

This Court has addressed the standards applicable to the interpretation of the UMA in cases such as *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985):

> The cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute. . . . In determining the Legislature's intent in enacting a statute, this Court will look to the policy behind the statute and the evil which it was designed to remedy. . . . Additionally, we will look to the words, context, subject matter, and effects and consequences of the statute. . . . Our uninsured motorist statute establishes a public policy that every insured is entitled to recover

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[1] Deposition of Luis Ballesteros at 71-73, 77, 100 (March 6, 2007, Exhibit A to Response to Petition for Special Action.

> damages he or she would have been able to recover if the uninsured had maintained a policy of liability insurance in a solvent company. . . . The statute is remedial, and should be liberally construed in order to carry out the intent of the Legislature. . . . The purpose of the statute is to afford protection to victims of financially irresponsible drivers.

Applying this rule in this case, the Petition for Review is without merit and should be denied. The language of the statute does not create a "safe harbor" as suggested by ASIC. In full, the two relevant statutory sentences relied upon by the company are as follows:

> The selection of limits or rejection of [uninsured motorist] coverage by a named insured or applicant on a form approved by the director is valid for all insureds under the policy.[2]

> The selection of limits or rejection of [underinsured motorist] coverage by a named insured or applicant on a form approved by the director shall be valid for all insureds under the policy.[3]

The UMA says nothing about a form being in English or Spanish or "safe harbors." Indeed, the UMA requires that an insurer give a written "offer" to the consumer to select or reject UM/UIM limits and one would expect that the legislature intended that the company present such an offer in an available and approved form in the customer's native tongue to make the offer meaningful.

The UMA indicates that the named insured's "selection" or "rejection" of UM and UIM coverages is "valid" for all insureds. The terms "selection"

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[2] A.R.S. § 20-259.01(A).

[3] A.R.S. § 20-259.01(B).

and "rejection" connote a deliberative process on the part of the customer in which the customer exercises a meaningful decision. The language of the statute indicates that when the named insured makes a knowing and conscious decision to acquire, or not acquire, UM and UIM coverages, that decision binds all others who may be insured under the policy and they cannot later second guess the named insured's decision.

But that does not mean that the coverage "selection" or "rejection" bars a jury from examining the circumstances surrounding an offer.[4] It just means that the consumer's selection or rejection requires the insurance company to honor the consumer's choice. The language of the UMA does not support ASIC's argument that every insurer is insulated from liability anytime it can, by any means, obtain the named insured's signature on a form.

The other considerations surrounding the interpretation of the UMA, including its history, intent, purpose, and context, are also contrary to ASIC's contention that it can deceive its customers with impunity. The legislature enacted the UMA in light of a perceived crisis involving automobile accidents. With the proliferation of vehicles on the highways in the 1950s and 1960s, numerous states, including Arizona, experienced a concomitant increase in the number of motor vehicle accidents and injuries. In some of those accidents, the tortfeasor had sufficient liability insurance coverage

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[4] *See Data Sales Co., Inc. v. Diamond Z Mfg.*, 205 Ariz. 594, 601, 74 P.3d 268, 275 (App. 2003) (Jury may consider testimony and exhibits establishing the surrounding circumstances concerning the parties' intent when making a contract.).

and/or assets to compensate innocent victims. Far too often, however, such coverage and/or assets were unavailable. See generally, A. Widiss, Uninsured and Underinsured Motorist Insurance, Chapter 1 (1995).

Without such compensation, an innocent victim and his or her family could suffer significant consequences. The availability of medical care presents one such example. Without financial recompense, some victims were compelled to forego necessary medical care, producing a ripple effect that could have devastating and long-lasting consequences for a victim and his/her family. Similarly, when health care providers gave care to such victims, the unavailability of a source of payment for such services placed a financial strain on hospitals and other providers which was seen as having adverse societal consequences. Moreover, when financial recompense was unavailable, such victims could become wards of the state, thus placing part of the burden of uncompensated injuries on the taxpayers with a resulting reduction in available public funding for other purposes.

Virtually every state enacted legislation to address this crisis. Most states passed laws which relied on private automobile insurance to provide a solution. The Arizona legislature's initial response was to enact the Financial Responsibility Act, A.R.S. § 28-1101, *et. seq.* (The "FRA" is sometimes referred to in the cases as the "Safety Responsibility Act." It has been renumbered as A.R.S. § 28-4001 *et. seq.*). That statute governs automobile liability insurance policies in Arizona and was adopted to address the "social and economic problems arising from the increasing casualty rate on Arizona

streets and highways." *Midland Risk Management Co. v. Watford*, 179 Ariz. 168, 171-72, 876 P.2d 1203, 1206-07 (App. 1994). The primary purpose of the FRA was to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons. *Schecter v. Killingsworth*, 93 Ariz. 273, 280, 380 P.2d 136, 143 (1963). For over 40 years, the FRA has been part of every Arizona automobile liability policy. *Jenkins v. Mayflower Ins. Exchange*, 93 Ariz. 287, 380 P.2d 145 (1963).

Even with the FRA, there existed a significant gap in coverage. Many automobiles were being operated by persons who had neither liability insurance nor sufficient financial resources to pay damage claims. Thus numerous victims were still uncompensated. The legislature enacted the UMA to fill that gap. *Transamerica Ins. Co. v. McKee*, 27 Ariz. App. 158, 551 P.2d 1324 (1976).

The UMA established a public policy that every insured is entitled to recover from his or her uninsured motorist coverage the damages that he or she would have been able to recover from a negligent uninsured driver if that driver had maintained a policy of liability insurance with a solvent company. *Spain v. Valley Forge Ins. Co.*, 152 Ariz. 189, 731 P.2d 84 (1986). As stated in *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 104, 859 P.2d 724, 727 (1993):

> The purpose of § 20-259.01 is, broadly speaking, to "close the gap in protection under the Safety Responsibility Act, A.R.S. § 28-1101 et seq.", *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985), and protect people who are injured by financially irresponsible motorists, id. at 295, 697 P.2d at 688. Section 20-259.01 is remedial in nature and should be

> liberally construed in order to effectuate its purpose. Id. at 697 P.2d at 687.

Since the UMA's initial enactment in 1965, the legislature has amended the statute to expand the rights of Arizona citizens. In *Spain v. Valley Forge Ins. Co., supra*, this Court addressed those changes:

> The Arizona legislature has continually strengthened the protection available to those injured by the negligence of a driver with no insurance or insufficient insurance. . . . In 1965, the legislature enacted the uninsured motorist statute to "close the gap" in the Financial Responsibility Act by protecting those who were injured by the negligence of a financially irresponsible motorist. A.R.S. § 20-259.01 (Supp. 1969-70); [cites omitted]. . . . A 1972 amendment, however, required every motor vehicle liability insurer automatically to provide UM coverage of $15,000 in every policy, and to give the insured the option of purchasing up to $45,000 UM coverage. A.R.S. § 20-259.01 (Supp. 1972-73). That same year, the legislature increased the minimum liability coverage limits to $15,000 per person and $30,000 per accident. A.R.S. §§ 28-1102 to 28-1174 (Supp. 1972-73). In 1981, the legislature further strengthened the protection by requiring insurance companies automatically to provide in every policy $15,000 coverage each for UM and underinsured motorist coverage. In addition, the insurer was required to notify the insured in writing that he or she could purchase additional UM coverage up to the limits of the liability coverage. A.R.S. § 20-259.01 (Supp. 1981-82). The next year, the legislature eliminated compulsory underinsured motorist coverage, but it has not altered the compulsory UM coverage provisions or the requirement that the insurer offer and, upon purchase by the insured, provide the insured with UM coverage up to the limits of the liability coverage. A.R.S. § 20-259.01 (Supp. 1985).
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> In our view, these amendments to the UM statute signify the legislature's strong commitment to

> require UM coverage and to allow those with foresight to protect themselves and their passengers with coverage above minimum limits, even if their insurance carrier previously would have been unwilling to write such a policy. A.R.S. § 20-259.01(B); 1 A. WIDISS, supra, § 2.12, at 43-44. Arizona's uninsured motorist statute provides greater protection than do the statutes of most states. 1 A. WIDISS, supra, §§ 2.1 to 2.6, at 21-35. . . . Even before the legislature strengthened § 20-259.01 in 1981, Arizona's courts held that the statute was remedial and should be liberally construed to carry out the intent of the legislature.

152 Ariz. at 192-93, 731 P.2d at 87-88. This Court has held that the same legislative intent and public policy considerations that apply to UM coverage also apply to UIM coverage. *Higgins v. Fireman's Fund*, 160 Ariz. 20, 770 P.2d 324 (1989).

The UMA includes mandatory offer provisions that give the insured the right to purchase, or reject, UM and UIM coverages. The statute allows the insured to protect himself and his family from damages caused by financially irresponsible drivers to the same extent that he protects others from the risk of his own negligence. *Spain*, 152 Ariz. at 192, 731 P.2d at 87. To achieve this result, the UMA requires every carrier to extend a written offer to sell such coverages to the insured and requires the insurer to provide such coverage if requested to do so by the insured.

To that end, the purpose of the mandatory offer provisions are to guarantee that responsible drivers "will have an **opportunity** to protect themselves and their loved ones as they would others." *Ormsbee v. Allstate Ins. Co.*, 176 Ariz. 109, 112, 859 P.2d 732, 735 (1993)(emphasis added).

Thus, when an insurer fails to give an insured such an opportunity by failing to extend such a written offer to the insured, UM and UIM coverages are automatically included in the policy by operation of law with limits equal to the liability limits of the policy:

> A.R.S. § 20-259.01(B) states that an insurer shall offer the insured an amount of uninsured coverage equal to the liability limits for bodily injury. The use of the word "shall" indicates a mandatory intent by the legislature. . . . When an insurer's statutory obligation to provide or offer certain coverage is mandatory, the proper remedy [for the carrier's breach of this obligation] is to include the coverage in the policy by operation of law. [citations omitted] The insured is entitled to the additional coverage, usually in an amount equal to bodily injury liability limits of the policy, whether or not the insurer assesses an additional premium for the uninsured motorists coverage.

Insurance Company of North America v. Superior Court, 166 Ariz. 82, 85, 800 P.2d 585, 585 (1990); *see also, St. Paul v. Gilmore*, 168 Ariz. 419, 825 P.2d 944 (1991).

The UMA makes reference to rejection forms approved by the Arizona Department of Insurance but does not make any reference to rejection forms being in any particular language. The Department of Insurance has drafted two forms: one in English and one in Spanish. The drafting of a form in Spanish appears to have been done by the Department in recognition of the fact that Arizona has a significant Spanish speaking minority and that a form in Spanish would advance the legislative intent that customers have a meaningful opportunity to acquire such coverages.

ASIC's position suggests that because there are forms approved by the Department of Insurance in two languages, insurance companies (and not the insured) have the option of using either form in any particular transaction. Thus, according to ASIC's argument, insurers can, at their option, present Spanish speakers with a form written in English and can present English speaking customers with the form written in Spanish. The company contends that so long as it can somehow obtain the customer's signature on either form, the company is insulated from any and all further liability, even in a case such as this where it has misled the customer about the significance of the form.

Amicus believes that the company's interpretation of the statute flies in the face of more than 40 years of history of the UMA. When there are multiple forms available to insurance companies, the option to use one or the other should be made by the insured, not by the insurance company. Giving the insured the option to select the form in either English or Spanish, as contrasted to leaving this decision in the hands of the insurer, advances the legislative goals underlying the UMA. Any other interpretation runs counter to the legislative intent of providing all customers with a meaningful opportunity to protect themselves and their family members from the risks presented by financially irresponsible motorists.

The important point here is that the legislature meant for that statute to make UM/UIM coverage *more* available. *See, e.g., Schultz v. Farmers Ins. Group*, 167 Ariz. 148, 150, 805 P.2d 381, 383 (1991) ("We have previously determined that A.R.S. § 20-259.01 is intended to require, when possible, full

indemnification of insured victims who have accidents with uninsured or underinsured motorists."); *Ormsbee v. Allstate*, 176 Ariz. at 112, 859 P.2d at 735 (the purpose of the UMA "is to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others. 'The offer of UIM coverage mandated by A.R.S. § 20-259.01(c) was intended to implement this protection.'" Quoting *St. Paul Fire & Marine Ins. v. Gilmore*, 168 Ariz. 159, 165, 812 P.2d 977, 983 (1991)).

There is no reason to believe that the legislature meant for the statute to deny UM/UIM coverage arbitrarily to non-English-reading consumers who trust their insurers incautiously. The trial judge upheld these principles by denying summary judgment against the insureds. The Court of Appeals also upheld them by declining to accept special action jurisdiction. This Court should similarly decline the Petition for Special Action.

III. THE PETITION FOR REVIEW SHOULD BE DENIED BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY CONCLUDED THAT THERE ARE FACT ISSUES TO BE DECIDED BY A JURY.

A consumer who cannot read a contract - and who is lulled into thinking that the contract says what it does not say - has no choice. No fair legal system would bind the consumer under those conditions. When a contract's signer is ignorant of the contract's language, and the contents are misread or misrepresented by the other party or by a stranger to the contract, the contract can be held void—unless the signer is negligent. *Pimpinello v. Swift & Co.*, 170 N.E. 530, 531 (N.Y. 1930). This issue raises a question of fact for the jury. *Andrews v. Blake*, 205 Ariz. 236, 248, 69 P.3d 7, 19 (2003)

(The "question of negligence is one of fact for a jury to decide, particularly when, as here, reasonable minds could differ on whether a party has breached his or her duty of exercising reasonable care.")(original punctuation omitted). Indeed, since 1916, the Arizona Supreme Court has held that a court of equity could declare a contract ineffective when the consumer could not read or understand the language in which the contract was negotiated and written - and where the other party had misrepresented its contents. *Smith v. Mosbarger*, 18 Ariz. 19, 24, 156 P. 79, 81 (1916).

ASIC effectively asks this Court to impose a new rule: that trial judges alone will decide contested issues of fact and choose among competing inferences when a consumer makes a factual attack on acceptance of an alleged offer of UM or UIM coverage. Such a rule violates the standard for cases where there are genuine issues of material fact. Here, there are genuine issues of material fact concerning intent, knowledge, and consent. At one end of the range, a jury could find that Mr. Ballesteros intended, knew, and consented to having no UM/UIM coverage. At the other end of the range, a jury could infer that the necessary knowledge, intent, and consent never existed. In cases like this one, the arbiter of facts is the jury. *See, e.g., State ex. rel. McDougall v. Superior Court*, 172 Ariz. 153, 156, 835 P.2d 485, 488 (App. 1992)("The jury occupies the unique province of weighing the credibility, veracity and reliability of evidence and of resolving the conflicting inferences drawn from the evidence."); *Shaw v. Petersen*, 169 Ariz. 559, 561, 821 P.2d 220, 222 (App. 1991)(summary judgment is inappropriate where the

trial judge would be "required to choose among competing or conflicting inferences.").

IV. CONCLUSION.

The trial court properly interpreted the UMA and correctly determined that there are unresolved issues of fact for a jury. The Court of Appeals properly denied special action relief for the same reasons. This Court should decline to accept the Petition.

DATED this 17th day of September, 2008.

LAW OFFICES OF JOHN L. TULLY, P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 3,396 words.

RESPECTFULLY SUBMITTED this _____ day of September, 2008.

LAW OFFICES OF JOHN L. TULLY, P.C.

_____

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CERTIFICATE OF MAILING

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I certify that the original and seven copies of the foregoing Amicus Curiae Brief were filed on September 17, 2008 to:

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