COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
On Appeal from the Colorado Court of Appeals Case No. 2023CA1327 District Court of El Paso County, Colorado Honorable Marla R. Prudek, Judge Division 14, Case No. 21CV31587	
Petitioners: UNITED SERVICES AUTOMOBILE ASSOCIATION, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. **Respondent:** ANTHONY WENZELL	▲ COURT USE ONLY
Attorneys for Amicus Curiae: Gideon S. Irving, No. 55761 LEVIN SITCOFF PC 455 Sherman Street, Suite 490 Denver, CO 80202 P: (303) 575-9390; F: (303) 575-9385 gideon@lsw-legal.com	Case No.: 2024SC000372
BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDER IN SUPPORT OF RESPONDENT	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 3,551 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

s/Gideon S. Irving
Gideon S. Irving

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I. IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus curiae United Policyholders ("UP") incorporates by reference the Statement of Interest contained in its Motion for Leave to File Brief of *Amicus Curiae* United Policyholders in Support of Respondent, filed concurrently with this brief.

II. ARGUMENT

Nullifying exhaustion provisions in excess underinsured-motorist policies does not conflict with Colorado law as set forth in *Public Service Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 941 (Colo. 1999), or elsewhere. Rather, failing to nullify such provisions would conflict with unique the duties imposed on excess underinsured-motorist carriers by contract, common law, and statute—and would frustrate Colorado's explicit public policy goals.

1. Under Colorado law, exhaustion provisions in excess UM/UIM insurance policies are void and unenforceable

a. *Colorado's public policy disapproves of excess UM/UIM exhaustion provisions.*

The Colorado General Assembly has adopted the express goal of "assur[ing] the widespread availability to the insuring public of insurance protection against financial loss caused by negligent financially irresponsible motorists." C.R.S. § 42-7-102(1) (emphasis added). Specifically, the General Assembly has declared "that it is necessary to simplify the process for an innocent victim to access the negligent driver's liability insurance policy or his or her own uninsured motorist coverage in order to prevent the burden from being borne by the taxpayer or the health-care system." C.R.S. § 42-7-102(2)(b)(II) (emphasis added).

The General Assembly wisely recognized that easy access to UM/UIM insurance not only protects individuals, but Colorado at large. Indeed, 19.7% of Colorado drivers are completely uninsured, the ninth highest in the nation. **Exhibit 1**, *Facts + Statistics: Uninsured Motorists*, Insurance Information Institute, at 2. More alarmingly, Colorado ranks first in the nation with a staggering 49.7 percent of drivers underinsured. **Exhibit 2**, *Uninsured and Underinsured Motorists: 2017-2023, Summary Page*, Insurance Research Council. And, unfortunately, the rates of uninsured and underinsured drivers have been steadily climbing in recent years. *Id.* Nationwide, private insurers pay only 54% of all costs of motor vehicle crash costs, with 46% of the costs passed on to the rest of society. **Exhibit 3,** *The Economic and Societal Impact of Motor Vehicle Crashes, 2019 (Revised)*, Blincoe et al., Report No. DOT HS 813 403 (National Highway Traffic Safety Administration, February 2023), at 16, 29. Due to Colorado's nation-leading rate of underinsured motorists, the societal cost to Colorado is surely higher.

Exhaustion provisions in excess UM/UIM insurance policies delay claims handling, invite litigation, and prevent payment of UM/UIM benefits, contrary to Colorado's public policy of ensuring easy access to UM/UIM benefits for the protection of injured motorists and all Coloradans.

i. Excess UM/UIM exhaustion provisions undermine the purpose of § 10-4-609 by delaying and preventing compensation for innocent people injured by underinsured motorists.

In furtherance of protecting injured drivers—and all Colorado taxpayers—from the unnecessary financial burdens of underinsurance, Colorado requires motor vehicle insurers to offer uninsured/underinsured motorist ("UM/UIM") coverage to ever person purchasing mandatory liability coverage. C.R.S. § 10-4-609(1). Full recovery of these UM/UIM insurance benefits—even in amounts double or quadruple the statutory minimum coverage—fosters Colorado's "public policies of providing full recovery within policy limits and, placing 'an injured party having uninsured motorist coverage in the same position as if the uninsured motorist had been insured.'" *See Barnett v. Am. Family Mut. Ins. Co.*, 843 P.2d 1302, 1308 (Colo. 1993) (quoting *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759, 764 (Colo. 1989)). On the other hand, excess UM/UIM exhaustion provisions undermine the General Assembly's goals of protecting injured Coloradans—and taxpayers—from the financial strain of underinsured motorists.

Oftentimes, after being injured in a car accident, people are strapped for cash and urgently need their insurance proceeds. They could be facing mounting medical bills or need to purchase a replacement car to commute to work. Whatever the individual reason may be, many insureds need to settle their auto insurance claims

quickly, which usually means accepting an amount below policy limits. Those who do are left out to dry by exhaustion clauses.

If an insured has one primary UM/UIM policy and one excess UM/UIM policy with an exhaustion clause, the only way to access the excess policy is to obtain the limits of the primary policy via settlement or litigation (which is often cost-prohibitive). This creates an unjust situation where the primary carrier holds the insured's excess layer UM/UIM of coverage hostage until the primary carrier offers (or is ordered) to pay its policy limits. This hurts insureds who have injuries exceeding the primary UM/UIM policy but have an urgent need to settle quickly with the primary carrier (usually below policy limits). When this occurs, the insured loses out on the excess UM/UIM benefits for which he or she has paid premiums. These situations undermine § 10-4-609's goals of fully protecting people, and society, from underinsured motorists.

In its Opening Brief, USAA invokes Colorado's "made whole" statute, C.R.S. § 10-1-135(3)(d)(I), which presumes that injured persons who settle have been adequately compensated, to argue in favor of exhaustion provisions. *See USAA Open. Br.* at 51-52. However, the "made whole" statute cannot overcome the statewide policy of § 10-4-609 because the "made whole" statute provides only a "**rebuttable presumption**" that a settlement fully compensates an injured party.

C.R.S. § 10-1-135(3)(d)(I) (emphasis added). The myriad examples where an insured takes a below-limits settlement, such as due to their immediate medical or financial needs, or even the stress and economic barriers inherent in litigation, are exactly why the presumption is rebuttable. The rebuttable nature of the "made whole" presumption also makes its application anything but automatic; it's a factual question for the jury. *Cope v. Auto-Owners Ins. Co.*, No. 18-CV-0051-WJM-SKC, 2023 WL 8601370, at *7 (D. Colo. Dec. 12, 2023) ("Whether a plaintiff has been fully compensated for the bodily injuries he sustained in the accident is a question of fact for trial."). In contrast to the rebuttable, sometimes-applicable presumption that a settling injured party is "made whole," § 10-4-609 demands that *all* Colorado drivers be offered protection against underinsured motorists. Because the "made whole" presumption does not apply universally, it can't override the universal mandate of § 10-4-609.

Separately, the "made whole" doesn't apply in UM/UIM context because it is under the umbrella of § 10-1-135(3)(a)(I), which is specific to the context of reimbursement or subrogation. *See Cope*, 2023 WL 8601370, at *7 ("[T]he Court questions whether Defendant has demonstrated that the presumption cited above definitively applies in [the UM/UIM] context").

ii. Excess UM/UIM exhaustion provisions encourage excessive litigation, undermining sections 10-4-609 and 10-3-1101(2).

Colorado also endorses the public policy of "encouraging settlement and preventing unnecessary [insurance] litigation." C.R.S § 10-3-1101(2). Exhaustion provisions force insureds to litigate with their primary carriers because settling below primary policy limits risks forfeiture of their excess UM/UIM coverage. In this sense, exhaustion provisions put insureds in a lose-lose situation. Take, for example, a motorist whose injuries exceed the available liability and primary UM/UIM coverage limits. If the primary UM/UIM carrier, whose policy has an exhaustion provision, will only give a below-limits offer, the insured has two choices. She can accept the offer, forfeiting her excess UM/UIM coverage and letting her injuries go under-compensated. Or she can endure the time and expense of litigation with the primary carrier in the hopes of triggering the excess policy. Neither option is fair. If the excess UM/UIM policy didn't have an exhaustion provision, the insured would be more likely to accept a below limits offer because it does not forfeit her excess coverage.

Moreover, this litigious situation doesn't solely arise from an insured wanting their damages completely covered. The insured may be boxed in at the primary layer and need to litigate to the excess layer just to put a reasonable dent in their damages. This is the exact issue the legislature wanted to prevent:

> [O]ne thing that caught my eye was each of the insurance companies said, if you settle with another or if you allow another insurance company to pay, then you hereby release any ability to go after coverage under our policy. And necessarily what they were forcing us to do is take this to court, and force a judge to decide. Because if we settled with this insurance company over here, if you didn't read the fine print on this policy over here, you lost. All access to coverage under that policy. And that's the kind of situation we're trying to address here.

April 23, 2007, Colorado Senate Judiciary Committee hearing on SB 07-256. Exhaustion provisions create a strong incentive for the insured to litigate every policy layer, thereby increasing litigation contrary to Colorado public policy.

If an insured chooses to litigate the first layer of UM/UIM coverage, such necessarily delays access to the excess UM/UIM policy while the litigation plays out. An extended recovery time not only harms insureds by withholding excess benefits in the short term, but delays can cause the spoilation of necessary evidence as to the excess UM/UIM coverage, effectively eliminating *any* chance to later litigate with the excess carrier, should the need arise. Additionally, depending on the circumstances at play, the delay caused by the primary insurer could result in an insured to missing the controlling statutes of limitations for any claims against the excess carrier. Conceivably, insureds may need to slog through two sets of negotiations and lawsuits (liability, primary UM/UIM, and excess UM/UIM) to even have a *chance* of recovering their excess UM/UIM benefits.

Accordingly, not only do the delays of exhaustion provisions create impracticalities, in some instances they completely bar recovery. The Court should protect insureds from this dilatory and unnecessary exercise that—worst of all—can forfeit paid-for excess coverage.

b. *In the instant case, the Colorado Court of Appeals correctly applied the Tubbs holding to the excess UM/UIM context to promote the public policy of § 10-4-609.*

In *Tubbs* the Colorado Court of Appeals voided a provision in a primary UIM policy that required exhaustion of the tortfeasor's liability policy. 353 P.3d 924 (Colo. App. 2015). The *Tubbs* court relied on the unambiguous language of § 10-4-609(1)(c), defining UM/UIM benefits as covering "the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained." *Id.* at 926. The court explained, "whether the insured recovers the full amount or nothing at all from the liable party's insurer has no impact on the [primary] UIM insurer's obligation to pay benefits." *Id.* at 927. The *Tubbs* logic equally applies to the excess UM/UIM context.

The goal of § 10-4-609, to protect motorists from underinsured drivers, is not confined to the primary UM/UIM context. It applies equally to excess UM/UIM insurance. Regardless of whether the first layer of insurance is liability or primary UM/UIM, an exhaustion requirement still creates the same pitfalls of under-recovery

and delay. Other states to consider the issue have found as much. *See Nationwide Ins. Co. v. Schneider*, 960 A.2d 442, 450 (Pa. 2008) (rejecting the assertion that "public policy concerns do not pertain at the second-priority level of UM and UIM insurance coverage. It seems beyond reasonable dispute that settlements at the first-priority level of UM/UIM coverage can alleviate uncertainties and expense associated with litigation and afford prompt payment to injured persons."); *Metcalf v. State Farm Mut. Auto. Ins. Co.*, 944 S.W.2d 151, 153 (Ky. App. 1997) ("The appellant must be given the opportunity to prove his entitlement to coverage regardless of prior settlements. To hold otherwise would hinder the long standing policy of encouraging the settlement of disputes outside the litigation process.").

Here, the Court of Appeals' conclusion that "[t]he rationale behind *Tubbs*' rejection of exhaustion requirements in the liability insurance context applies equally well in the excess UIM insurance context" is well founded. *Wenzell v. United Servs. Auto. Ass'n*, 552 P.3d 1121, 1131 (Colo. App. 2024); *accord Ligotti v. Allstate Fire & Cas. Ins. Co.,* 694 F. Supp. 3d 1371, 1378 (D. Colo. 2023). Indeed, section 10-4-609(1)(c)'s directive that *all* UM/UIM insurance "shall cover the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained" does not differentiate between primary and excess UM/UIM

coverages. Rather, all UM/UIM insurance—primary and excess—covers the difference between the liability policy's limits and the insured's damages.

c. The first-party purchase of UM/UIM coverage creates unique protections for insureds, including the UM/UIM carrier's non-delegable duty to promptly investigate and pay claims.

An insured directly pays premiums to both of its primary and excess UM/UIM insurers for each layer of coverage. The insured is in contractual privity with all of its UM/UIM insurers. This contractual privity distinguishes UM/UIM insurance from a third-party's liability insurance, for which the injured insured hasn't paid a dime. Accordingly, just like primary UM/UIM coverage, excess UM/UIM insurance warrants heightened protection for the consumer because they have paid for it. *Accord Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 229 (Colo. 2001) (discussing courts' "heightened responsibility" to protect UM/UIM insureds). Moreover, the nature of all UM/UIM coverage is so important that "insurance provisions that operate to significantly dilute UIM coverage are unenforceable as against the public policy of ensuring that victims of uninsured motorists recover as if they had been injured by an insured driver." *Id.* at 230.

Indeed, treating all UM/UIM insurance as equally important is reflected in § 10-4-609's legislative history:

> [It's] consistent with the kind of ordinary language and expectations of Coloradans, that when they buy $100,000 in underinsured coverage, they

> expect they're going to get $100,000 on top of whatever coverage the person has who hits them.

Testimony from April 30, 2007, Colorado House Business Affairs and Labor Committee hearing on SB 07-256.

> The first section of the bill makes sure that if you buy underinsured motor carrier insurance that you actually get to use it.

Testimony from May 1, 2007, Colorado House of Representatives second reading of SB 07-256.

> [I]t's unfortunate when you have to sit down with somebody and you're going through the policies and you have to point out to them, well, actually, you thought you were getting your $50,000 and you thought you were getting your $100,000 for the coverage, but it doesn't apply under these circumstances. That's really the issue that I'm trying to get at with this bill."

Testimony from April 23, 2007, Colorado Senate Judiciary Committee hearing on SB 07-256.

"The need for prompt communication and investigation is obvious: besides the absence of peace of mind, the untimely adjustment of a claim exposes a claimant to additional loss of property." *Dunn v. Am. Fam. Ins.*, 251 P.3d 1232, 1238 (Colo. App. 2010); *see also Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 417 (Colo. 2004). When people purchase UM/UIM insurance, their premiums buy more than plain "coverage." Their premiums also buy a prompt, reasonable investigation of their claims. The promises of an insurance company's prompt, reasonable investigation are so sacred that the General Assembly codified them into

statute. C.R.S. § 10-3-1104(h)(III, IV, VI). If the primary layer UM/UIM coverage must first be exhausted before the excess UM/UIM carrier *even begins to investigate*, insured Coloradans will regularly be deprived of the prompt investigations for which they pay premiums.

For example, if the insured settles below the primary carrier's policy limits, then the excess carrier never investigates the claim—depriving insureds of their investigation and providing a windfall to the excess UM/UIM carrier who has accepted premiums and provided nothing in return. And even if the insured eventually exhausts the primary layer after an extended delay, the insured should not have to then wait for the excess carrier commence and complete a coverage investigation. Insureds pay to have UM/UIM coverage when they need it. They should not have to wait for an excess coverage investigation.

Opposing amici, NAMIC and APCIA, try turn this concept on its head, by arguing that excess UM/UIM insurers may end up investigating claims that it will never have to pay. However, for three reasons, insureds are the winner in the debate over whether insureds are entitled to prompt investigations and insurance payments, or whether excess carriers can delay their investigations. First, the insureds paid premiums for the excess carrier to investigate the claim. If excess UM/UIM carriers receive premiums from the insured, without ever investigating the claim, they

insureds will have been cheated. Second, statute requires excess carriers to promptly investigate and adjust the claim. C.R.S. § 10-3-1104(h)(III, IV, VI). Third, excess insurers have a non-delegable duty of good faith and fair dealing. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003). Whether the excess UM/UIM carrier conducts no investigation, or that investigation is simply delayed awaiting exhaustion of the primary UM/UIM layer, Colorado does not countenance an insurance company receiving taking premiums and then sitting back when it receives a claim, shirking any and all duties, in the hopes that it might not have to ultimately spend one cent.

In fact, one of the cases opposing amici relies on plainly endorses this principle, "[u]nder the amended statute, Allstate and Allied/Nationwide could have begun their analysis of UIM benefits owed without ever knowing what Ms. Cook's settlement was with Mr. Baker, even if it was below her $25,000 limit"—the exact opposite of an exhaustion provision. *Baker v. Allied Prop. & Cas. Ins. Co.*, 939 F. Supp. 2d 1091, 1110 (D. Colo. 2013); *see NAMIC-APCIA Amicus Br.* at 12-13.

Additionally, allowing the excess carrier to freeride on the work of the primary carrier also gives the insured less recourse if the primary carrier acts in bad faith. For example, if the primary carrier conducts an unreasonable claim investigation and offers a lowball settlement, the insured is essentially stuck at the primary layer if

there's an exhaustion provision at play. Whereas, without an exhaustion provision, the excess carrier conducts its own simultaneous investigation, which could lead to it paying the excess benefits—even if the primary carrier is acting in bad faith. Demonstrating this point are cases where the primary carrier acts in bad faith, so the excess carrier foots the bill and pursues subrogation from the primary carrier. *See Preferred Pro. Ins. Co. v. The Drs. Co.*, 419 P.3d 1020 (Colo. App. 2018); *Holyoke Mut. Ins. Co. in Salem v. Cincinnati Indem. Co.*, No. 18-CV-01853-STV, 2019 WL 2269728, *1 (D. Colo. May 28, 2019). It would be absurd if the insured could pay multiple premiums for multiple layers of UM/UIM, and then be completely hamstrung by a bad faith investigation of their claim at the primary layer.

The duty to investigate is important in and of itself. However, Colorado also requires insurance carriers to attempt to promptly, fairly, and equitably settle "claims in which liability has become reasonably clear." C.R.S. § 10-3-1104(h)(VI). To trigger its duty to settle, an insurer's liability doesn't have to be crystal clear, convincingly clear, or mathematically certain. Its liability must only be "reasonably clear." This reasonableness check intentionally protects policyholders from unfair claim denials, such as those requiring unreasonably high (often unduly burdensome and unnecessarily invasive) levels of proof from insureds before an insurer will agree to pay benefits. Exhaustion provisions in excess UM/UIM policies flip this edict on

its head by eviscerating the reasonableness check on UM/UIM excess claim handling, allowing excess insurers to shirk their duties based on a black-and-white exhaustion requirement. Exhaustion provisions in this context—whereby two insurance coverages can be tied to only one's claim adjustment—geometrically multiply this Court's risks and concerns about protecting vulnerable insureds. *See Clementi,* 16 P.3d at 229-30.

It's not difficult to imagine a scenario in which an insured has $100,000 worth of documented medical bills resulting from a car crash. The insured obtains the $25,000 limit of the tortfeasor's liability policy and submits claims to her primary and excess UM/UIM insurers. In this scenario, her primary UM/UIM coverage has a $25,000 limit and her excess UM/UIM coverage has a $50,000 limit. The primary carrier, for whatever reason (perhaps accusing the insured of having pre-existing injuries prior to the crash) only approves $20,000 in UM/UIM coverage. If excess UM/UIM exhaustion provisions are in place, despite having "reasonably clear" proof that its coverage is triggered, the excess UM/UIM layer can shirk its investigation and settlement duties. Such a result would be a windfall for insurance companies and a blow to everyday Coloradans.

Relatedly, excess insurers cannot avoid the duties imposed upon insurers by this Court's decisions in *State Farm Mut. Auto. Ins. Co. v. Fisher*, 418 P.3d 501, 506

(Colo. 2018). And *Fear v. GEICO Cas. Co.*, 560 P.3d 974, 982 (Colo. 2024). In *Fisher*, this Court found that an insurer must promptly pay covered medical expenses that are not subject to reasonable dispute even though other portions of an insurance claim may still be disputed. In *Fear*, this Court then clarified that the logic of *Fisher* also applies to covered non-economic benefits. These cases show how throughout the life of a claim an insurer must periodically pay out benefits. With exhaustion provisions, an excess UM/UIM carrier will never have to pay *any* benefits—even if those benefits would otherwise be undisputed and owed.

III. CONCLUSION

The Court should affirm the Colorado Court of Appeals and declare that exhaustion clauses in excess UM/UIM insurance policies are invalid and void as against Colorado public policy.

DATED this 30th day of July 2025.

Respectfully submitted,

LEVIN SITCOFF PC

s/Gideon S. Irving
Gideon S. Irving
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s/Max Lillich
Max Lillich, Anticipated JD 2027 *(*under supervision of Gideon S. Irving)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July 2025, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDER IN SUPPORT OF RESPONDENT** was served on all counsel of record via the Colorado Courts E-Filing System

s/ *Nicole R. Peterson*
Nicole R. Peterson