IN THE
SUPREME COURT OF ARIZONA

No. CV-23-0228-PR

Court of Appeals No. 1 CA-CV 22-0447

Maricopa County Superior Court
No. CV2020-006088

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

JACEY LEE ORLANDO,

Defendant-Appellant.

AMICUS BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

FILED WITH CONSENT OF THE PARTIES

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INTRODUCTION

Amicus curiae American Property Casualty Insurance Association ("APCIA") respectfully submits that this Court should grant the petition for review of plaintiff-appellee State Farm Mutual Automobile Insurance Company and reverse the opinion of Division One of the Arizona Court of Appeals. Whether an uninsured-motorist ("UM") or underinsured-motorist ("UIM") policy must cover injuries sustained while the insured rides off-road in an off-road vehicle is a pure issue of law that persists among state and federal courts around the country. The court of appeals' ruling—that a UIM policy must cover such injuries even though a UM policy need not—turns on its head the fundamental relationship of UM, UIM, and liability-coverage statutes by, among other things, driving a wedge between the statutes as to the types of vehicles subject to the acts, and by elevating UIM coverage in importance above the more fundamental UM coverage of which it is a variant. The court of appeals achieved this untenable result by attaching unwarranted significance to differences in wording that simply do not indicate any relevant legislative intent to require UIM coverage for off-road vehicles.

INTEREST OF THE *AMICUS CURIAE*[1]

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 63% of the U.S. property-casualty insurance market and write nearly $10 billion in premiums in the State of Arizona, including nearly $4.5 billion in automobile-insurance premiums.

On issues of importance to the insurance industry and its customers, APCIA advocates sound public policies in legislative and regulatory forums at the state and federal levels and files amicus briefs in significant cases before state and federal courts, including this Court. This advocacy includes support for open markets and regulatory standards that protect consumers and help foster a competitive and financially sound insurance market.

The issues presented are of particular interest to APCIA's members, which underwrite and issue automobile policies in Arizona and every other state across the country, and in doing so offer and provide UM and UIM coverage as mandated by each state's law and requested by policyholders. Requiring insurers to provide coverage under UIM policies for the risk of injury associated with the off-road use of off-road vehicles, which the

[1] Pursuant to ARCAP 16(a) and 16(b)(3), APCIA states that no counsel for any party has authored this brief in whole or in part, and no party has provided financial resources for the preparation of this brief.

insurers do not insure for liability or property damage under their policies, undermines insurers' ability to underwrite risks and provide cost-effective coverage for policyholders focused on injuries sustained on public roads—the kind of injuries for which mandated liability insurance and UM/UIM coverages have always been intended.

STATEMENT OF THE CASE

The basic facts are typical of coverage claims based on off-road vehicles. Jacey Lee Orlando was riding as a passenger on an all-terrain vehicle among California's Imperial Sand Dunes, not on a public road. One of the risks of driving ATVs off-road is rollover accidents, and Orlando was injured when the ATV rolled over in a single-vehicle accident. She recovered policy limits under the driver's third-party liability coverage, and then made a claim for UIM coverage on her State Farm policy, which insured her own car.

State Farm did what any insurer would do: it denied the UIM claim because its policy defined "underinsured motor vehicle" to exclude "a land motor vehicle" that is "designed for use primary off public roads except while on public roads." State Farm's coverage disclaimer cited *Chase v. State Farm Mutual Automobile Insurance Co.*, 131 Ariz. 461 (App. 1982), and *West American Insurance Co. v. Pirro*, 167 Ariz. 437 (App. 1990). To resolve the claim, State Farm ultimately sued for declaratory relief that its policy did not cover Orlando's injuries, and Orlando counterclaimed for breach of contract and bad faith.

The superior court granted summary judgment for State Farm, holding that the ATV was not an "underinsured motor vehicle" under State Farm's policy, and that Arizona's Uninsured/Underinsured Motorist Act, A.R.S. § 20-259.01, did not bar the policy's definition of "underinsured motor vehicle." The court also concluded that State Farm had not acted in bad faith.

The court of appeals affirmed summary judgment as to bad faith but reversed as to coverage. The court relied on a facial comparison of the statutory subsections as to UM and UIM coverage, A.R.S. § 20-259.01(E) and (G). The court found significant that the UM subsection includes the phrase "subject to the terms and conditions of that coverage" but the UIM subsection does not, and that the UM subsection refers to "the motor vehicle that caused the bodily injury or death" while the UIM statute refers to "the bodily injury or death resulting from the accident." Op. ¶ 10. The court held that the policy's UIM definition "cannot limit or bar UIM coverage based on the type of vehicle involved." Op. ¶ 20. The court further reasoned that this was the case because "[t]he UM statutory subsection provides that coverage may be 'subject to the terms and conditions of that coverage.'" Op. ¶ 17. Yet the court of appeals had previously held in *Chase* that the Financial Responsibility Act (now the Safety Responsibility Act) was "silent as to any requirement that insurance policies obtained to provide proof of financial responsibility also cover off-road accidents." *Chase*, 131 Ariz. at 465.

REASONS TO GRANT REVIEW

I. The petition raises an issue of statewide and national concern because accidents involving off-road vehicles—and insurance claims to cover injuries from those accidents—are common.

APCIA respectfully submits that the Court should grant review because there are conflicting decisions by the court of appeals, which most recently has incorrectly decided an important issue of law as to UIM coverage. ARCAP 23(d)(3). Put bluntly, off-road accidents involving ATVs and other off-road vehicles are nearly ubiquitous, and so are claims for UM or UIM coverage for resulting injuries under policies written for ordinary motor vehicles that are driven on public roads. As a result, the application of UM and UIM coverages to off-road accidents involving off-road vehicles is a matter of frequent litigation.

The backdrop here is unsurprising: the high number of ATV accidents and injuries that occur each year. Nationwide in 2022, ATVs, mopeds, minibikes, and similar vehicles accounted for 242,347 sports injuries, which is more than many other categories, including swimming (187,465), trampolines (123,014), snow skiing and snowboarding (66,633), and waterskiing, tubing, and surfing (21,180). *See Facts + Statistics: Sports Injuries*, Insurance Information Institute, https://www.iii.org/fact-statistic/facts-statistics-sports-injuries (last visited Dec. 4, 2023).

To cover such injuries from the use of ATVs and similar vehicles, insureds file claims each year. UM and UIM coverages in policies issued on ordinary household cars are a frequent target of claims. As a result,

"disputes … developed as to the use of the words 'automobile' or 'motor vehicle,'" including whether "any coverage referring to 'motor vehicles' refers only to vehicles as defined in the Uninsured/Underinsured Motorist or Financial Responsibility Act of a particular jurisdiction." *Couch on Insurance* § 123:22 (3d ed. 2023). This occurs even though many or even most policies contain language that, like the provision in State Farm's policy, bars coverage as to injuries from off-road accidents involving off-road vehicles.

Courts around the country have concluded that UIM coverages in policies intended for traditional-use motor vehicles do not apply to off-road accidents involving ATVs. *See, e.g.*, *Mannery v. Do*, No. 22-CV-4451, 2023 WL 2238069, at *4 (D.N.J. Feb. 27, 2023); *Maher v. United Ohio Ins. Co.*, 188 N.E.3d 212, 225 (Ohio App.), *appeal not allowed*, 190 N.E.3d 644 (Ohio 2022); *Lake v. State Farm Mut. Auto. Ins. Co.*, 110 P.3d 806, 807–08 (Wash. App. 2005); *Robertson v. Farm Bureau Mut. Ins. Co.*, No. C7-97-1865, 1998 WL 88621, at *2 (Minn. App. Mar. 3, 1998).

Where courts have concluded that UIM coverage does apply to injuries from off-road accidents involving ATVs or similar vehicles, they have done so because the policy language warrants such a result. *See, e.g.*, *Paskiewicz v. Am. Fam. Mut. Ins. Co.*, 834 N.W.2d 866, 868–69 (Wis. 2013); *Porter v. Buck*, 137 F. Supp. 3d 890, 896–97 (W.D. Va. 2015) (Virginia law). Or they have done so because the applicable state statute actually *defines* ATVs or similar vehicles as a "motor vehicle." *See, e.g.*, *Mut. Benefit Ins. Co. v. Natale*, 546

F. Supp. 3d 430, 438 (D. Md. 2021); *cf.* 75 Pa. Cons. Stat. §§ 7711.1(a), 7730(a) (2012) (requiring all ATVs and snowmobiles to be registered and insured).

Arizona features wide stretches of open terrain, and use of ATVs and other off-road vehicles is common. Whether Arizona's UIM statute requires insurers to cover claims from off-road accidents under policies issued to insure driving on public roads is thus a matter of statewide concern. If the court of appeals' decision were allowed to stand, it would wreak havoc on Arizona's auto-insurance marketplace, because the availability and affordability of coverage could be impacted as insurers are forced to recalculate premiums to account for what would undoubtedly be a massive increase in insured losses that are not contemplated by current policies.

II. The court of appeals created an untenable distinction between UM and UIM coverages that is divorced from financial-responsibility statutes and upends the history and structure of those coverages.

The court of appeals' opinion appears to be unprecedented in creating a divide between *the kinds of vehicles* covered by mandatory liability insurance and UM provisions on one hand, and UIM provisions on the other. The court held that UIM coverages must extend to injuries associated with off-road use of off-road vehicles, even though Arizona's Safety Responsibility Act does not require such insurance and the court had held in *Chase* and *Pirro* that UM coverage therefore need not extend to such accidents. The court's inexplicable distinction is at odds with the history and function of all three kinds of coverages nationally and in Arizona.

Statutes mandating liability insurance and addressing UM and UIM coverages are parts of an integrated approach to a common problem. While in "the early days of automobiles" there was not "much concern about uninsured drivers and the damage they could inflict," that changed over the course of the last century. *Couch on Insurance* § 122:1. "As the number of vehicles and people owning or using them have multiplied, and the social values changed (perhaps as a consequence), uninsured motorists became a considerable problem. The legislatures of most, if not all, jurisdictions have responded with laws addressing the problem." *Id.* (footnote omitted).

The legislatures' "response has generally been three-pronged":

(1) "Requirements that all or specified owners and/or drivers obtain liability insurance";

(2) "The introduction of a new kind of insurance, 'uninsured motorist' (UM) insurance"; and

(3) "State 'indemnification' funds to compensate victims" who were injured by uninsured motorists but lacked their own UM coverage.

Id. First introduced in the mid-1950s, UM coverage was "the most prominent of several legislative efforts to compensate victims of vehicular accidents caused by persons who do not carry liability insurance or have inadequate amounts of liability insurance." *Id.* § 122:2. Reflecting its foundational character, "[m]ost American jurisdictions presently have statutory

requirements that UM coverage be written into all or most policies of automobile insurance issued within the state." *Id.* (footnotes omitted).

Arizona law has followed this pattern, with mandated liability coverage and UM coverage forming mission-critical elements of the response to automobile-accident injuries. As this Court has chronicled, "[t]he legislature adopted the Financial Responsibility Act (currently, the Safety Responsibility Act) in 1951," in an effort "to protect drivers in the state against losses engendered by financially irresponsible owners or operators of motor vehicles." *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 253 (1989). When, "[i]n spite of the act's mandate, many automobile owners failed to purchase insurance," the Legislature enacted UM coverage in 1965. *Id.* At first, insureds had the right to reject UM coverage, but the Legislature "made such coverage mandatory" in 1972. *Id.* The Legislature "was concerned with the problem created by the negligent driver who had no insurance at all." *Harsha v. Fid. Gen. Ins. Co.*, 11 Ariz. App. 438, 440 (1970). At the time, the Legislature did not require insurers even to *offer* UIM coverage. Steven Plitt, *Arizona Liability Insurance Law* § 7.1, at 374 (1998).

More recently developed, UIM coverage "is a variant of uninsured motorist insurance" and allows the victim to collect the difference between the amount of the tortfeasor's liability insurance and the victim's UIM limits. *Couch on Insurance* § 122:3. "Historically, underinsured coverage is a *complement* to uninsured coverage." *Hathaway v. Standard Mut. Ins. Co.*, 673 N.E.2d 725, 726 (Ill. App. 1996) (emphasis added). "[A]fter the advent of

uninsured motorist coverage, it became apparent that uninsured motorist coverage alone was not enough to protect responsible drivers who were willing to pay appropriate premiums," so legislatures "require[d] insurance companies to offer underinsured motorist coverage." *Id.* UM provisions are more critical because they cover injuries caused by negligent drivers who did even not comply with the minimum requirements of mandatory liability insurance. In contrast, UIM provisions cover injuries caused by tortfeasors who did meet the minimum standards.

Bound together historically as a multipronged approach to a common problem, UM and UIM coverages have been understood as complementary to each other and to the underlying financial-responsibility statute. *See, e.g.*, *Sommerville v. Allstate Ins. Co.*, 65 So. 3d 558, 562 (Fla. Dist. App. 2011) (recognizing that "uninsured/underinsured motorist" coverage "is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage prescribed by the Financial Responsibility Law" (quotation omitted)); *Fed. Kemper Ins. Co. v. Brown*, 674 N.E.2d 1030, 1036 (Ind. App. 1997) (recognizing that "the public policy advanced by the Financial Responsibility Act has been complemented and bolstered by the requirement … that insurance companies offer uninsured/underinsured motorist coverage"); *Couch on Insurance* § 122:12 ("UM coverage is also interpreted in conjunction with the Financial Responsibility Acts and Compulsory Liability Insurance Laws in conjunction with its legislative purposes outlined above.").

Again, the same was true in Arizona: UIM was a variant of or supplement to UM coverage, and it was *less stringently enforced*. As this Court explained, "[i]n 1981, the legislature perceived inadequacies in UM insurance" because "[s]erious injuries are often caused by insured drivers with inadequate liability limits." *Wilson*, 162 Ariz. at 253–56. "The development of underinsured motorist coverage followed the development of uninsured motorist coverage and was based on experience with uninsured motorist coverage." *Higgins v. Fireman's Fund Ins. Co.*, 160 Ariz. 20, 22 (1989).

While the Legislature at first enacted mandatory UIM coverage, it amended the statute the following year so that insureds could reject the coverage. *Wilson*, 162 Ariz. at 254 n.3. At the time, in contrast, UM coverage remained mandatory. Nevertheless, as this Court acknowledged, "[o]bviously, mandatory offerings of UIM coverage, when accepted by the insured, are based on the same public policy" as UM insurance, i.e., "a reflection of public policy favoring indemnification of victims of negligent, financially irresponsible motorists." *Id.* at 254; *see Higgins*, 160 Ariz. at 22 ("[W]e believe the same public policy considerations apply to underinsured motorist coverage as to uninsured motorist coverage."). Whatever the functional differences between the liability-insurance mandate and the UM and UIM subsections, there has never been any daylight between them as to what constitutes a "motorist" or a "motor vehicle" for purposes of accomplishing that "same public policy."

Both the UM and UIM subsections are inextricably intertwined with the Safety Responsibility Act's required liability coverage. "The purpose of Arizona's Uninsured Motorist Act is to close the gap in protection created by the Uniform Motor Vehicle Safety Responsibility Act (A.R.S. § 28-4001 *et seq.*) by requiring insurance companies to offer UM coverage with every motor vehicle liability policy to cover an insured's injuries caused by an uninsured motorist. This legislative purpose also applies to UIM coverage." Steven Plitt, *supra*, at 374. Thus, this Court and the court of appeals have recognized "the complementary character of the [UM/UIM] legislation vis-a-vis the financial responsibility statutes," and "[t]he fact that other courts have harmonized the two types of legislation." *Harsha*, 11 Ariz. App. at 440, *quoted in State Farm Mut. Auto. Ins. Co. v. Eden*, 136 Ariz. 460, 461–62 (1983).

There is no indication in the legislative history of the Safety Responsibility Act or the UM and UIM subsections that the provisions were to be construed differently as to the *kind of motor vehicle being addressed*. Such a distinction would be at odds with the intended function of those three kinds of statutes. The court of appeal in *Chase* followed the analysis of the North Carolina Court of Appeals, which reflected the national approach in concluding that "uninsured motor vehicle" was "intended to include motor vehicles which should be insured under the Act but are not, and motor vehicles which, though not subject to compulsory insurance under the Act, are at some time operated on the public highways." *Autry ex rel. Autry v. Aetna Life & Cas. Ins. Co.*, 242 S.E.2d 172, 175 (N.C. App. 1978). "Only in these

instances is the uninsured motorists provision serving its intended purpose of complementing the original Act and furthering the financial protection accorded thereby to persons *injured by motor vehicles on the public highways*." *Id.* (emphasis added). In contrast, "interpreting the uninsured motorists provision so as to cover accidents involving motor vehicles not subject to compulsory insurance and which occur on private property … would result in absolute financial protection against injury by motor vehicle, a concept neither contemplated nor intended by the original Act." *Id.* The same is true in Arizona, and the same is true for both UM and UIM coverage.

III. The court of appeals' construction of the UM and UIM subsections is not supported by their text.

The court of appeals' holding cannot be sustained by the text of the UM and UIM subsections. The court focused on the phrase "subject to the terms and conditions of that coverage" in the UM subsection, A.R.S. § 20-259.01(E), without asking whether that provision was even intended to address the kind of "motor vehicle" accident covered. There is no indication in the text that this phrase referred to the type of motor vehicle whose operation caused the individual's injury, as opposed to myriad other coverage provisions that may govern how and when coverage claims must be brought. The court's analysis thus begs the question of what "motor vehicle" or (in the defined terms in the UM and UIM subsections) "motorist" even means, and whether it has a meaning different from that under the Safety Responsibility Act—contrary to what *Chase* decided.

The problematic nature of the court's textual analysis can be seen in its observation that "UM coverage provides for damages 'caused' by a 'motor vehicle' but UIM provides coverage for damages 'resulting from [an] accident,' without reference to a motor vehicle." Op. ¶ 10. It is difficult enough to contemplate the extension of UIM coverage to purely off-road motorized vehicles, like ATVs, golf carts, go-carts, and motorized skateboards. Any suggestion that the absence of a "reference to a motor vehicle" in a statute addressed to "[u]nderinsured *motorist* coverage" helps define the scope of vehicles covered would also open the door to *non*motorized vehicles, including bicycles, unicycles, and sleds. The court was simply finding meaning where there was none.

In any event, construing "subject to the terms and conditions of that coverage" as authorizing noncoverage of ATVs for purposes of UM provisions (as in *Chase* and *Pirro*), but not UIM provisions, would fly in the face of the long-established rule that only those UM exclusions specifically enumerated in A.R.S. § 20-259.01 are authorized. *See, e.g.*, *Calvert v. Farmers Ins. Co. of Ariz.*, 144 Ariz. 291, 295 (1985); *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 104 (1993). The court of appeals' decision below opens up opportunities for limiting UM coverage, but not UIM coverage, on the basis of a phrase that cannot mean what the court of appeals thought it meant.

In contrast, *Chase* and *Pirro* properly upheld the exclusion for off-road accidents involving ATVs and similar vehicles, not because it was an authorized exclusion from generally required coverage, but because off-road

accidents involving off-road vehicles were not within the statutory scheme to begin with. *Cf. Carguillo v. State Farm Mut. Auto. Ins. Co.*, 529 So. 2d 276, 278 (Fla. 1988) (failure of financial-responsibility act to include off-road vehicles within definition of "motor vehicle" provides appropriate basis for enforcing exclusion). That approach should be followed with respect to the Safety Responsibility Act, the UM subsection, *and* the UIM subsection.

CONCLUSION

The Court should grant review and reverse the court of appeals' decision.

DATED this 6th day of December, 2023.

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