

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

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SC Court of Appeals

Loretta Traynum and Leonard Traynum..... Appellants,

v.

Cynthia Scavens and Progressive
Direct Insurance Company..... Respondents.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the Circuit Court properly applied South Carolina's Uniform Electronic Transactions Act by finding that an insurer enjoys a conclusive presumption of a meaningful offer of optional underinsured motorist coverage when an insured electronically signs an otherwise statutorily compliant offer form while purchasing an insurance policy from the company's website.

STATEMENT OF THE CASE

This appeal arises out of Appellants Loretta and Leonard Traynum's attempt to invalidate an electronic offer of optional underinsured motorist coverage that Loretta Traynum electronically signed while purchasing a policy of insurance from Progressive Direct Insurance Company's website. On October 29, 2010, Appellants filed a Complaint in the Aiken County Court of Common Pleas seeking a declaratory judgment against Progressive to reform the policy of insurance to include UIM coverage.¹ (R. pp. __-__). On October 31, 2013, the Honorable Doyet A. Early, III, entered summary judgment in Progressive's favor. (R. pp. __-__).

After discovery, Progressive and the Traynums filed cross-motions for summary judgment on November 14, 2012 and December 27, 2012, respectively. (R. pp. __-__). The Circuit Court heard arguments on the cross-motions on April 2, 2013 during breaks in a criminal trial. The Circuit Court initially entered an Order granting Appellant's motion for summary judgment and denying Progressive's motion on June 28, 2013. (R. pp. __ - __). Progressive received a copy of the order on July 2, 2013 and filed a Motion

¹ The Traynums also asserted a negligence claim against Cynthia Scavens, the at fault motorist. The Traynums entered into a Covenant Not to Execute with Scavens on October 4, 2010 and Progressive took over the defense of the underlying tort action as the purported UIM carrier. Scavens is not a participant in this appeal.

to Reconsider or, in the Alternative, Motion for Re-hearing on July 9, 2013. (R. pp. __ - __).

On August 26, 2013, the Circuit Court heard arguments on Progressive's Motion to Reconsider. After considering the briefs, exhibits and arguments, the Circuit Court found that Loretta Traynum received a meaningful written offer of optional UIM coverage when she purchased the policy from Progressive's website. Specifically, the Circuit Court found that Loretta Traynum signed an electronic offer form that fully complied with § 38-77-350(A). Moreover, because § 38-77-350(A) requires the use of a written offer form, the Circuit Court found that use of a § 38-77-350(A) offer form is commercially reasonable as a matter of law. Therefore, the Circuit Court granted Progressive's Motion to Reconsider, withdrew the June 28, 2013 Order Granting Plaintiffs' Motion for Summary Judgment, and granted Progressive's Motion for Summary Judgment. (R. pp. __ - __). The Traynums filed a Motion to Reconsider on November 15, 2013, which the Circuit Court denied on December 3, 2013. This appeal followed.

STATEMENT OF THE FACTS

On April 20, 2007, Traynum² logged onto her computer, accessed Progressive's website, and purchased a policy of automobile insurance from Progressive. (Tealeaf) (R. p. __ - __). During the purchasing process, Progressive presented a form titled "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form"). (Offer Form) (R. pp. __ - __). Traynum electronically signed the form, confirming her rejection of optional UIM coverage. (Kordes Dep. 51:9-16) (R. p. __, lines 9-16).

² When referred to in the singular in this brief, "Traynum" refers to Loretta Traynum.

A. Progressive's document retention system.

Progressive utilizes software to record purchases of insurance over the Internet. This system records the Web pages presented to an applicant during an online session while an applicant is quoting or purchasing a policy of insurance on Progressive's website. (Kordes Dep. 17:3-12) (R. p. __, lines 3-12). The recorded session, referred to as a "Tealeaf session," provides a copy of the screens Traynum saw, the last items she clicked and the data she entered on each page during her April 20, 2007 purchase. (Kordes Dep. 17:3-12) (R. p. __, lines 3-12). Progressive also uses a document retention system to archive electronically signed documents. If, and only if, a user such as Traynum electronically signs a policy form or application, the system permanently stores a PDF of the electronically signed document.³ (Kordes Dep. 51:9-16) (R. p. __, lines 9-16). Together, the Tealeaf session and the archived records give an accurate copy of the transaction that took place on April 20, 2007 when Traynum applied for and purchased her policy.

B. Progressive's website.

Progressive's website allows its users to save and exit a quote, and return to it later. Furthermore, in the quote phase, the user can customize her coverage to fit her comfort level. Each type of coverage includes a drop-down box with varying levels of coverage and corresponding premiums. (Tealeaf, 3) (R. p. _). Each type of coverage includes a hyperlink, a web-based standard using blue font and blue underline that, if

³ Portable Document Format (PDF) is a file format used to present documents in a consistent manner regardless of application software, hardware, or operating systems being used to view the document. This is the format required by the Federal Courts for electronically filed documents. Electronic Case Filing Policies and Procedures, 1.7, D.S.C.

clicked, leads the user to an explanation of that form of coverage.⁴ (Kordes Dep. 20:2-25:2) (R. p. __, line 2-p. __, line 2). Once the user is fully satisfied with the quoted coverage, the website leads her to the application phase.

Throughout both the quote process and the application process, there is no time limit for any particular stage. Because the transaction takes place online, the user can spend as much or as little time as she desires at any particular stage of the process. There are no customers waiting behind her and urging her to hurry up. There is no insurance agent waiting anxiously to get off to a lunch appointment. Although the website is capable of working as quickly as the user wants, she controls the pace of the transaction and can view the various pages and documents for as long as she wants.

Progressive's website walks the user through the quote and application process. At the application stage, important documents are presented in a PDF format as inset windows (not popups). By using PDFs, Progressive assures that computer users can see the important documents in the way they are intended to be presented just as if they were on paper. Additionally, the user can save the PDF for her records. Most importantly, the user can also print the PDF onto paper *before* signing the document. This gives the user the freedom to review her important policy documents on paper if she so desires. (Kordes Dep. 30:19-31:4) (R. pp. __, line 19-p. __, line 4). By using PDFs and separate webpages for important steps, Progressive presents important policy documents in a way that emphasizes each one while giving the user the flexibility to control both the format

⁴ Progressive has never contended that the hyperlink constituted its offer of optional coverage. Rather, Progressive's offering of the hyperlink for additional information is merely an example of going beyond the bare statutory requirements for a meaningful offer in order to provide a better and more informed experience for its customers.

in which she views the documents, and the level and duration of attention that she gives to each one.

C. Traynum completes the quote process.

Traynum began the quote process on Progressive's website sometime prior to April 20, 2007.⁵ (Kordes Dep. 20:8-15) (R. p. __, lines 8-15). During that previous quote, Progressive provided four pre-set options for coverage. (Kordes Dep. 23:11-23) (R. p. __, lines 11-23) (Tealeaf, 3) (R. p. __). Under the default option, Progressive recommended that Traynum purchase both uninsured (UM) and UIM coverage in amounts equal to her liability limits. (Kordes Dep. 25:11-25) (R. p. __, lines 11-25). During the previous online transaction, *Traynum declined the pre-set packages and used the drop-down boxes to change her quoted UIM limits from the default liability limits to \$0.00.* (Kordes Dep. 25:11-18) (R. p. __, lines 11-18).

After retrieving the previous quote during the online session in which she ultimately purchased insurance, Traynum had the opportunity to review and make changes to her selected coverages and chose to make some changes by increasing her deductible for collision and comprehensive coverages from \$500 to \$1,000. (Kordes Dep. 27:12-28:2) (R. p. __, line 12-p. __, line 2). Although Progressive provided separate hyperlinks for explanations of each type of coverage – including UM and UIM – Traynum chose not to click on any of those links. (Kordes Dep. 25:7-10) (R. p. __, lines 7-10). She also did not go back and return the UIM limits to the amount recommended by Progressive.

After finalizing her adjustments to her desired coverages, Traynum proceeded to a page requiring additional information such as the vehicle identification numbers for the

⁵ Because that initial quote did not result in a policy purchase, those sessions were not archived.

insured vehicles and lienholder information. (Tealeaf, 5). (R. p. __). Upon completing that page, she proceeded to the application signature page.

D. Traynum electronically signs the application.

Progressive's website provides a three-part process for completing policy purchases and requires the applicant to: 1) review and sign the application; 2) review and sign the Offer Form; and 3) pay for the policy. Each step is set out in a separate Web page solely dedicated to that particular stage. (Tealeaf, 6-9) (R. p. __). The first step included reviewing and electronically signing the policy application. (Tealeaf, 6). (R. p. __).

The top of the Application page bears a header stating: "Sign Your Policy Forms (1 of 2)." (Tealeaf, 6) (R. p. __). The entire application is set out in an inset window on the screen in a PDF format. (Kordes Dep. 29:25-30:22) (R. pp. __, line 25-p. __, line 22). As discussed above, Traynum could read the application on her screen or print it on paper and review the application. (Kordes Dep. 30:19-31:4) (R. pp. __, line 19-p. __, line 4). Her typewritten name appeared on the signature line of the PDF and showed Traynum exactly where she would be electronically signing the application. (Tealeaf, 6) (R. p. __). (Kordes Dep. 50:19-51:8) (R. p. __, line 19-p. __, line 8).

Traynum electronically signed the application by typing in her first and last name and clicking "Continue." By doing so, she confirmed that she was electronically signing the application and that she agreed to the terms of the application. After electronically signing the application, Traynum reached the offer of UM and optional UIM coverage.

E. Traynum electronically signs the Offer Form confirming her rejection of optional UIM coverage.

Progressive dedicated an entire screen solely for the purpose of conveying the offer of additional UM and optional UIM coverage. (Tealeaf, 7) (R. p. __). With the exception of the standard Progressive banner at the top of the screen, there were no hyperlinks or any distractions. (Tealeaf, 7) (R. p. __). Like the Application page, the top of the page began with a header providing:

Sign Your Policy Forms (2 of 2)	
Your Electronic Signature is Required Please read and electronically sign this document by entering your name in the form fields below and then clicking the "Continue" button.	Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options: Option 1 - set your monitor resolution to 800 x 600 Option 2 - Print this document (print in correct text size)

(Tealeaf, 7) (R. p. __). This header first indicated that it is the second policy signature page. (Tealeaf, 7) (R. p. __) ("Sign Your Policy Forms (2 of 2)"). The header instructed Traynum to read the Offer Form and electronically sign the document "by entering your name in the form fields below and then clicking the **"Continue"** button." (Tealeaf, 7) (R. p. __).

Below the header, the webpage provided a window containing a PDF of the entire Offer Form. (Offer Form) (R. p. __ - __) (Tealeaf, 7) (R. p. __). The Offer Form indicates Traynum's rejection of optional UIM coverage, including an "x" mark responding "No" to the question of whether she wished to purchase UIM coverage and her signature immediately thereafter. (Offer Form, 4) (R. p. __) (Tealeaf, 7) (R. p. __). The form also provides the Applicant's Acknowledgment, stating:

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and optional underinsured motorist coverage. I understand that the above explanations of these coverages are intended only to be brief

descriptions of additional uninsured motorist coverage and optional underinsured motorist coverage, and that payment of benefits under either of these coverage is subject both to the terms and conditions of my automobile insurance policy and the laws of the State of South Carolina.

My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.

(Offer Form, 5) (R. p. __).

As noted above, the PDF assures the Offer Form would appear the same on Traynum's screen regardless of her computer or monitor. Moreover, the document is printable, savable and searchable. (Tealeaf, 7) (R. p. __). Traynum could scroll through the entire document on her screen or print it out and review a paper copy. (Tealeaf, 7) (R. p. __). Importantly, there is no time limit for reviewing the document. Traynum can take as much or as little time as she wants to review the Offer Form, consider her coverage choices, and confirm her selections. She can go back at any time and return to her quote and make changes to her coverage selections before electronically signing the Offer Form. Although she is required to sign the form in order to proceed to the next part of the application, she has complete control over how long she spends reviewing the Offer Form and whether, if she first decides to make changes, she goes back and makes changes to her coverage selections after reading the form⁶.

Immediately below the Offer Form, Progressive provided the Electronic Signature Prompt, which states:

⁶ Had Traynum gone back and made any changes to her coverage selections, should would then have gone through the two-step electronic signature process discussed above, including electronically signing the Offer Form after having yet another opportunity to view, print and/or save it.

Policyholder Electronic Signature

I, (LORETTA TRAYNUM), represent that I am the person whose name appears on the signature line of the document presented above, and that I viewed the document at the recommended text size.

I acknowledge and agree to the statements, terms and conditions in the document above, and that by typing my name below and clicking the "Continue" button, I am electronically signing the document. This will have the same legal effect as signing the document with a written signature and shall be valid evidence of my intent and agreement to be bound.

I understand that if I do not electronically sign each document presented during this online session or do not make a payment before it ends, the application will not be effective and no insurance coverage will result.

<input type="text"/>	<input type="text"/>
First	Last

(Tealeaf, 7) (R. p. __). By placing the Policyholder Electronic Signature prompt below the Offer Form, Progressive made sure that an applicant had to see the Offer Form before entering her electronic signature. This was Progressive's electronic version of placing the Offer Form squarely in front of the applicant so she can, if she wishes, read it, print it on paper and read it, or save it to her computer so she can later view it, read it or print and read it at her leisure.

Traynum followed the electronic signature prompt, typed her first and last name and clicked "Continue." (Kordes Dep. 51:9-16) (R. p. __, lines 9-16). In doing so, she consented to the use of an electronic signature, acknowledged that the signature had the same legal effect as a written signature, and most importantly affirmed that she had viewed the Offer Form and agreed to its statements, terms, and conditions. (Tealeaf, 7) (R. p. __). Traynum could not obtain the insurance policy without first visiting this page and electronically signing the Offer Form. (Kordes Dep. 32:14-20; 51:9-16) (R. p. __, lines 14-20, p. __, lines 9-16) (Tealeaf, 7) (R. p. __).

F. Traynum completes the application process by electronically signing the electronic funds transfer form.

After electronically signing the Offer Form, Traynum proceeded to the payment screen. For a third time, Traynum gave her electronic signature, this time authorizing

Progressive to establish an electronic funds transfer to allow electronic payments for her premiums. (Tealeaf, 9) (R. p. __). Upon completing this signature and progressing to the confirmation page, her insurance purchase was complete and Progressive issued the policy according to the coverages and amounts selected by Traynum. Traynum had the opportunity at that time, once again, to print all of the insurance documents, including the Offer Form. (Tealeaf, 10) (R. p. __).

ARGUMENT

The Circuit Court correctly held that once an insured signs a completed Offer Form that complies with § 38-77-350(A), the insurer enjoys a conclusive presumption of a meaningful offer. The Traynums make no argument that the Offer Form failed to provide the information required by § 38-77-350(A). They also do not dispute whether the form was completed prior to her electronic signature. Lastly, they do not dispute that Traynum typed in her name and clicked “Continue.” Therefore, Progressive is entitled to the conclusive presumption of a meaningful offer and this Court should affirm.

Rather than pointing to any defect in either the Offer Form or the signature, the Traynums cling to antiquated ideas and caselaw that pre-date even § 38-77-350 to argue that the transaction does not satisfy §§ 38-77-350 and 38-77-160 because it took place online. However, a decade ago South Carolina adopted the Uniform Electronic Transactions Act (UETA), which mandates that electronic transactions be given the same legal effect as paper transactions. Because the process utilized by Progressive’s website mirrors paper offers that this Court and the Supreme Court have endorsed in the past, Traynum’s signature in this case must be given the exact same legal effect. Therefore, Progressive is entitled to the conclusive presumption of a meaningful offer.

I. Because Traynum signed a written Offer Form that complies with all requirements of § 38-77-350(A), Progressive is entitled a conclusive presumption of a meaningful offer.

Two things cannot be reasonably disputed in this case: 1) the Offer Form that Progressive presented to Traynum complies with all of the requirements of § 38-77-350(A); and 2) in response to the electronic signature prompt, Traynum typed in her first and last name and clicked “Continue.” South Carolina Code § 38-77-350(B) states in pertinent part that if a form satisfying § 38-77-350(A) “is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, *it is conclusively presumed that there was an informed, knowing selection of coverage . . .*.” S.C. Code § 38-77-350(B). Because Traynum signed the Offer Form after it was completed by Progressive’s website, Progressive is entitled to a conclusive presumption.

A. Progressive’s Offer Form is virtually identical to SCDI Form 2006 and satisfies all of the requirements of § 38-77-350(A).

Progressive’s Offer Form is virtually identical to the form promulgated by the South Carolina Department of Insurance in response to § 38-77-350(A). (Offer Form) (R. p. ___ - ___). (S.C. Dept. Ins. Bulletin No. 2006-03 (2006)). The Court of Appeals has specifically held that Form 2006 meets the requirements of § 38-77-350(A). Clinton v. West American Ins. Co., 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005) (“The South Carolina Court of Appeals has specifically held that the form used by West American, Form 2006, meets the requirements of § 38-77-350”); Cohen v. Progressive Northern Ins. Co., 402 S.C. 66, 73, 737 S.E.2d 869, 873 (Ct. App. 2013) (“We agree with the trial court that the form, which was prescribed by the South Carolina Department of Insurance . . . contained all of the information required under subsection 38-77-350(A) and *Wannamaker*.”). The Traynums did not argue before the Circuit Court and have not

argued before this Court that the information on the form itself fails to satisfy § 38-77-350(A).⁷ Therefore, the Circuit Court properly determined that the Offer Form satisfies all of the requirements of § 38-77-350(A).

B. Because the Uniform Electronic Transactions Act requires recognition of electronic communications, presentation of the Offer Form by Progressive's website constitutes a written offer by Progressive's agent.

The Internet has quickly become a cornerstone of commerce in South Carolina, the United States and throughout the developed world. What contracting parties once did via telephone and fax – which in retrospect were relatively burdensome and inefficient in comparison – they can now accomplish through automated interactions that simultaneously speed up the process while allowing a party to take all the time he or she needs to consider and complete the transaction. Recognizing the rapid increase of Internet users and the economic benefits of encouraging electronic transactions, the Uniform Law Commissioners promulgated the Uniform Electronic Transaction Act (UETA) in 1999. Since then, forty-seven states, the District of Columbia, and the U.S. Virgin Islands have all adopted the UETA.⁸ South Carolina's General Assembly adopted the UETA, effective July 16, 2004. 2004 Act No. 279, Section 1.

Three important provisions in the UETA require application of the § 38-77-350(B) conclusive presumption in this case. S.C. Code §§ 26-6-70, 26-6-80 and 26-6-140. Together, these provisions of the UETA provide that: 1) The Offer Form cannot be denied legal effect merely because it is in electronic form; 2) presentation of the offer

⁷ The Traynums did argue that § 38-77-350(A)(4) was not satisfied because Traynum's name was pre-filled on the signature lines of the form. However, as discussed below, her name was prefilled on the signature line and, as a result, she could see exactly what she was signing and where her signature would appear by completing the electronic signature prompt.

⁸ Legislative Fact Sheet- Electronic Transactions Act, Uniform Law Commission (March 11, 2014), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Electronic Transactions Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Electronic%20Transactions%20Act).

electronically satisfies a law requiring a record to be in writing; and 3) Progressive's website must be treated the same as an agent in a brick and mortar office.

First, § 26-6-70(A) provides: "[a] record or signature must not be denied legal effect or enforceability solely because it is in electronic form." S.C. Code § 26-6-70(A). Therefore, if Progressive's Offer Form otherwise satisfies § 38-77-350 (A) and (B), it cannot be denied legal effect merely because it was created electronically.

Second, § 26-6-70(C) provides: "An electronic record satisfies a law requiring a record to be in writing." S.C. Code § 26-6-70(C). Section 26-6-80 gives additional directions for electronic transactions where specific information must be conveyed:

(A) If parties agree to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record

(B) If another provision of law requires a record to be posed or displayed in a certain manner, be sent, communicated, or transmitted by a specified method, or contain information formatted in a certain manner, the record must:

- (1) be posed or displayed in the manner specified in the other law;
- (2) be sent, communicated, or transmitted by the method specified in the other law, except as otherwise provided in subsection (D)(2); and
- (3) contain the information formatted in the manner specified in the other law.

S.C. Code § 26-6-80. Progressive's presentation of the Offer Form satisfies each of these requirements. First, Traynum agreed to conduct the transaction electronically. Section

26-6-50(B) states that “Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the conduct of the parties.” By going online to purchase the policy, electronically signing the application and the Offer Form, and paying for the policy electronically, Traynum clearly indicated her desire to conduct the transaction electronically. Moreover, the text surrounding the data entry boxes in which Traynum provided her electronic signature stated: “I am electronically signing the document. This will have the same legal effect as signing the document with a written signature and shall be valid evidence of my intent and agreement to be bound.” (Tealeaf, 6, 7, and 9) (R. p. __). Therefore, she agreed to conduct the transaction by electronic means.

Second, the Offer Form was “capable of retention.” S.C. Code § 26-6-80(A). Although the statute only requires that the document be either savable or printable, Progressive gave Traynum the ability to do both. (Kordes Dep. 30:19-31:4) (R. pp. __, line 19-p. __, line 4); (Tealeaf, 7) (R. p. __).

Third, the Offer Form “contain[ed] the information formatted in the manner specified in the other law.” S.C. Code § 26-6-80(B). By using a PDF format, Progressive ensured that Traynum could view the Offer Form in precisely the same format, regardless of her computer or monitor, as if it were printed on paper and she was holding it in her hand. The header at the top of the screen instructed her to adjust her screen resolution to 800 x 600 or to print the Offer Form to assure that she viewed everything in the appropriate font. (Tealeaf 7) (R. p. __).

After Traynum indicated her agreement to purchase her policy electronically by using Progressive’s website rather than a local agent, Progressive presented the Offer

Form electronically in the same layout and format that it would have been if an agent had reached across a desk and handed it to her. Moreover, unlike an agent who may or may not allow Traynum to keep a copy of the form, Progressive's website allowed Traynum to save the document, print the document or do both. Therefore, Progressive's electronic presentation of the Offer Form satisfies the requirement of § 38-77-350(A) that the offer be presented in writing.

The third section from the UETA that requires application of the conclusive presumption to Progressive's Offer is § 26-6-140, which provides that: "In an automated transaction: . . . (2) a contract may be formed by the interaction of an electronic agent and an individual . . . including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance" S.C. Code § 26-6-140. The UETA defines an electronic agent as "a computer program or electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." S.C. Code § 26-6-20(6). In this case, Progressive's website acted as its electronic agent.

Section 38-77-350(A) requires insurers to provide a written offer form to insureds communicating the offer of optional coverages. Pursuant to the UETA, Progressive's website – acting as Progressive's agent – completed the Offer Form based upon Traynum's earlier selections of coverage and then presented the Offer Form to Traynum in a PDF format that was viewable on its own, printable and savable. Because Progressive's electronic Offer Form satisfies every component of the UETA, it must be

given the same legal effect as if a Progressive agent in a brick and mortar office had reached across the table and handed a copy of the Offer Form to Traynum in person.

C. Traynum’s electronic signature triggers the § 38-77-350(B) conclusive presumption and binds her to her rejection of optional coverage.

The Traynums also appear to concede that Traynum electronically signed the Offer Form.⁹ Section 38-77-350(B) provides in pertinent part: “If this form is signed by the named insured, after it has been completed by an insurance producer or representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage” S.C. Code § 38-77-350(B). As noted above, Progressive’s website – acting as its agent – completed the Offer Form prior to providing the form to Traynum for her review and signature. Because Progressive presented the Offer Form electronically and the entire transaction took place online, it only made sense that Progressive required an electronic signature.

Like the recognition of the electronic offer, the UETA also requires recognition of Traynum’s electronic signature. Specifically, § 26-6-70 provides that “An electronic signature satisfies a law requiring a signature” and “A . . . signature must not be denied legal effect or enforceability solely because it is in electronic form.” S.C. Code § 26-6-70(A) and (D). Section 26-6-90 states that an “electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner.” S.C. Code § 26-6-90(A). Also, the UETA defines “electronic signature” as “an electronic

⁹ Appellants state in their brief: “This was a form that Mrs. Traynum electronically signed and moved past.” (Appellant’s Br. p. 12); “When prompted for an electronic signature, Mrs. Traynum complied and hit “continue.” (Appellant’s Br. p. 13); “We know that *despite* the electronic execution of Progressive’s offer form, Progressive did not actually communicate a meaningful offer to Mrs. Traynum.” (Appellant’s Br. p. 15).

sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” S.C. Code § 26-6-20.

Everything about the transaction reveals Traynum’s intent to electronically sign the Offer Form. First, Progressive placed the Offer Form between the initial header indicating the need for her to read and electronically sign the Offer Form and the electronic signature prompt. (Tealeaf, 7) (R. p. __). This placement of the form removed any doubt about what she was signing. Second, Progressive instructed Traynum that by entering her name in the two name blocks and clicking the “Continue” button, she was electronically signing the document. (Tealeaf, 7) (R. p. __). Third, Progressive placed Traynum’s name on the signature lines on the Offer Form and, as a result, she was able to see what and where she was signing when she typed in her name and clicked “Continue.” This removes any doubt for the user about what terms, conditions or statements she is adopting. Fourth – and most importantly – Traynum typed in her first and last name and clicked “Continue” immediately below the “Policyholder Electronic Signature.” When she typed in her first and last name and clicked “Continue,” Traynum stated: 1) “I, (LORETTA TRAYNUM), represent that *I am the person whose name appears on the signature line of the document presented above*, and that I viewed the document”; 2) “I acknowledge and agree to the statements, terms and conditions in the document above, *and that by typing my name below and clicking the “Continue” button*, I am electronically signing this document.” (Tealeaf, 7). (R. p. __) (emphasis added).

It is undisputed that Traynum typed in her name and clicked “Continue.” Otherwise, the transaction would have terminated, the policy would never have issued, and Progressive’s document retention system would never have saved the PDF of the

completed Offer Form. It is also undisputed that the Offer Form was complete when she signed it. The “X” mark indicating her rejection of optional UIM coverage was filled-in and her name was on all three signature lines. After having an opportunity to review the Offer Form, print it and save it, Traynum electronically signed the form when she typed in her first and last name and clicked “Continue.” Because Traynum electronically signed the completed Offer Form, the Circuit Court properly applied the conclusive presumption and found a meaningful offer. To hold otherwise would ignore the statutory requirement of the UETA that electronic transactions receive the same legal treatment as paper transactions.

II. When the § 38-77-350(B) presumption applies, the Court is not required to conduct an independent Wannamaker analysis.

Despite the conclusive presumption established by § 38-77-350(B), the Traynums argue that this Court should look beyond the requisite elements of § 38-77-350 and apply an independent Wannamaker analysis. However, the entire purpose of the conclusive presumption in § 38-77-350(B) is to provide a safe harbor for insurers and avoid the need for a detailed Wannamaker analysis. Although Progressive’s offer satisfies Wannamaker, § 38-77-350(B) precludes the need for such an analysis.

South Carolina Code Annotated § 38-77-160 requires that an insurer offer, at the option of the insured, optional UIM coverage up to the limits of the insured’s liability coverage. Courts construing this language have held that an insurer must make a meaningful offer of UIM coverage. State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1986).

In response to Wannamaker, the General Assembly enacted § 38-77-350, which is a safe harbor provision creating a conclusive presumption that an informed, knowing

selection of UIM coverage was made when certain conditions are met. McDowell v. Travelers Prop. & Cas. Co., 357 S.C. 118, 122, 590 S.E.2d 514, 516 (Ct. App. 2003). Section (A) of § 38-77-350 established a written offer requirement and largely incorporated the Wannamaker standards. Section (B) then created a conclusive presumption for an insurer that utilizes a § 38-77-350(A) form and obtains a named insured's signature. The statute had two purposes. Section (A) aims to assure that insureds have an opportunity to read an explanation of coverage and confirm their coverage selections. Section (B), on the other hand, aims to reduce reformation claims where insureds had the Offer Form in front of them, signed the form and then regretted the decision after an accident.

The history of § 38-77-350 starkly reveals the legislative goal of reducing reformation claims. Over the years, the legislature has amended § 38-77-350 and other statutes in response to certain court decisions and, in every instance, the amendments have had the effect of restricting reformation claims and expanding the application of the conclusive presumption. In fact, § 38-77-350 has its genesis in responding to reformation cases. As the Supreme Court recognized in Grinnell Corp. v. Wood, 389 S.C. 350, 356, 698 S.E.2d 796, 799 (2010), the General Assembly originally enacted § 38-77-350 "in response to the Wannamaker decision."

Two of the cases cited in the Traynums' brief further reflect the General Assembly's persistent responsiveness in order to protect the conclusive presumption created by § 38-77-350(B). In Osborne v. Allstate Ins. Co., 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995), the Court of Appeals held that an Offer Form did not satisfy § 38-77-350(A) because it did not offer UIM coverage below the minimum limits. The General

Assembly responded by amending South Carolina Code § 38-73-470 to provide: “There is no requirement for an insurer or an agent to offer underinsured motorist coverage at limits less than the statutorily required bodily injury or property damage limits.” 1997 Act. No. 154.

Likewise, the Supreme Court in Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 263, 626 S.E.2d 6, 12 (2005), held that § 38-77-350(B) required the insured to personally mark his selection or rejection of optional UIM coverage. As the Director of the Department of Insurance states in Bulletin Number 2006-03: “The South Carolina General Assembly effectively reversed the *Floyd* decision with the enactment of 2006 S.C. Rat. No. 377, § 1 amending § 38-77-350. Effective June 14, 2006, an insurer or representative of the insurer may complete the form for the named insured.” (SCDI Bulletin No. 2006-03).

The General Assembly’s consistent protection of § 38-77-350(B)’s safe harbor function indicates the public policy goal of reducing reformation claims. Moreover, “[t]he Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.” Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008). If an insurer that complies with § 38-77-350(B) still must satisfy the Wannamaker requirements to show a meaningful offer, then § 38-77-350(B) is completely futile and meaningless. If the statute has any meaning at all, an insured’s signature on a completed Offer Form must end the analysis and protect the insurer from reformation claims.

III. Even if this Court applies a Wannamaker analysis, the Offer presented on Progressive's website far exceeds those requirements.

Because Traynum signed an Offer Form that satisfies every requirement of § 38-77-350, Progressive is entitled to a conclusive presumption of a meaningful offer. However, even if this Court moves beyond the conclusive presumption and considers the case under the factors set out in Wannamaker, Progressive's online offer far exceeds those requirements.

The Supreme Court in Wannamaker established four requirements for a meaningful offer:

- (1) the insurer's notification process must be commercially reasonable, whether oral or in writing;
- (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
- (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and
- (4) the insured must be told that optional coverages are available for an additional premium.

291 S.C. at 521, 354 S.E.2d at 556. Progressive's presentation of the § 38-77-350 Offer Form on its website – after Traynum elected to purchase her policy online – clears the four Wannamaker hurdles by a wide margin.

A. Progressive's use of a § 38-77-350(A) Offer Form is commercially reasonable as a matter of law.

The first Wannamaker factor requires that the offer be made in a commercially reasonable manner, whether oral or in writing. 291 S.C. at 521, 354 S.E.2d at 556. As noted above, the General Assembly responded to Wannamaker by requiring the use of a written offer form. In doing so, the General Assembly adopted the use of a written offer form as the preferred means of communicating a meaningful offer. Therefore, the Circuit Court properly held that use of a written § 38-77-350(A) offer form is commercially

reasonable as a matter of law. Moreover, because Traynum chose to purchase her policy online, it is only reasonable that Progressive would present its offer of optional coverage via that same electronic medium.

Because § 38-77-350(A) requires use of the written offer form, the Traynums' reliance on Dewart v. State Farm Mutual Automobile Insurance Company, 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1988), and Lopez v. National General Insurance Company, 308 S.C. 342, 417 S.E.2d 864 (1992), is completely misplaced. Both of those cases predate the enactment of § 38-77-350 wherein the General Assembly endorsed the use of the written offer form. In addition, a number of significant distinctions between Progressive's offer and those in Dewart and Lopez render both cases utterly useless for this Court's analysis.

First, this case deals with information transmitted during the application stage. Both Dewart and Lopez dealt with renewal notices, not applications. An insured's attention at the renewal of a policy will presumably be far lower than her attention level at the time that she is signing her application documents. Therefore, the insured is more likely to read documents provided at the purchase stage than those she receives in the mail with a renewal notice.

Second, Progressive presented the Offer Form on its own separate webpage that was fully dedicated to the Offer Form. There were no other documents or items to distract the insured from the importance of the Offer Form. Moreover, at the very top of the Offer Form webpage, the site instructs the insured to "read and **electronically sign**" the document. In Dewart and Lopez, the courts were concerned with the fact that the renewal notices – which they assumed the insured would at least look at – failed to direct

the insured's attention to the fliers that actually explained the coverages. Because the insured would be distracted by the important renewal notice, the insured may assume that all other items in the envelope were merely "junk mail" and fail to read them. By placing the Offer Form on its own dedicated web page, Progressive ensured that Traynum would have an opportunity to view the Offer Page without being distracted by any other policy documents.

Third, Progressive's website required Traynum to *sign* the form. Progressive designed the website so that Traynum could not obtain the policy without first stopping at the Offer Form page and signing the form. By requiring that Traynum take affirmative conduct by actually signing the form, Progressive made sure that she both had the opportunity to read the form and understood the form's significance. In contrast, the fliers in Dewart and Lopez did not require any affirmative action from the insured. There were no assurances that the insured even saw the fliers. Those problems do not exist in this case.

By placing the Offer Form on its own separate webpage and requiring the insured to take the affirmative action of signing the form, Progressive designed its website in a manner that was reasonably calculated to bring the Offer Form to the insured's attention. Traynum acknowledged receipt of the form and her agreement to its terms when she electronically signed the form, stating:

By my signature, *I acknowledge that I have read* – or I have had read to me – *the above explanations and offers of . . . coverage*

My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding

pages have been selected by me. *This is the type and amount of insurance coverage I wish to purchase.*

(Offer Form, p. 5) (R. p. ___) (emphasis added). Because this process has not only been endorsed but mandated by the General Assembly, Progressive's offer was commercially reasonable as a matter of law.

B. This Court in Cohen held that the § 38-77-350(A) Offer Form satisfies the second, third, and fourth Wannamaker requirements.

This Court in Cohen held:

The trial court also based its factual findings on the contents of the form Progressive used to make the offer. The court specifically found "the offer form fully satisfied the five requirements of § 38-77-350(A)" and "it also satisfied the four-element Wannamaker test." We agree with the trial court that the form, which was prescribed by the South Carolina Department of Insurance and includes language nearly identical to that endorsed by the supreme court in Bower, contained all of the information required under subsection 38-77-350(A) and Wannamaker.

402 S.C. at 73, 737 S.E.2d at 873. Progressive's Offer Form – like the offer form in Cohen – is nearly identical to SCDI Form 2006. Moreover, the Offer Form provides the same explanation of optional coverages, listing of available limits and corresponding premiums, and explanation that additional coverage is available for an additional cost. Because Progressive provided an Offer Form that contained all of the information requirements of both § 38-77-350(A) and Wannamaker and presented the Offer Form in a commercially reasonable manner that required Traynum to see the Offer Form and sign it before moving forward, the Circuit Court properly found a meaningful offer.

IV. Because the same offer would have satisfied § 38-77-350 and Wannamaker if communicated on paper, there is a meaningful offer as a matter of law.

South Carolina's appellate courts have recognized nearly identical offers as being meaningful in other cases. See Cohen, supra; Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 658 S.E.2d 106 (Ct. App. 2008); Wiegand v. United States Auto. Ass'n, 391 S.C. 159, 705 S.E.2d 432 (2011). The only difference between the offers in those cases and the offer in this case – aside from the application of the § 38-77-350(B) conclusive presumption – is that Progressive communicated this offer over the Internet. Because the UETA requires electronic transactions to be given the same effect as paper transactions, Progressive's offer in this case must be given the same legal effect as the offers in those other cases.

On appeal, Appellants do not appear to argue that the Offer Form fails to satisfy § 38-77-350(A) or that Traynum did not electronically sign the document. Rather, the vast majority of their brief focuses on the process – i.e., whether the presentation was commercially reasonable and reasonably aimed to bring the information to the insured's attention. Regardless of how the Traynums turn the phrase, they are arguing that the offer of optional coverage in this case should not be recognized because it took place during an electronic transaction.¹⁰ The exact same order of presentation of the Offer Form that took place on Traynum's computer screen takes place in insurance agencies across the State every day and South Carolina's appellate courts have repeatedly held that

¹⁰ Counsel for the Traynums ultimately conceded this at the arguments on the cross-motions for summary judgment, stating their position that an insurer is *never* entitled to the conclusive presumption of § 38-77-350(B) if the form is completed and presented in an automated transaction. (April 2, 2013 Hearing Transcript, 38:8-15) (R. p. __, lines 8-15). This would totally eliminate the application of the UETA to automobile insurance purchases. The UETA exempts certain transactions, but insurance transactions and offers of optional coverage are not exempted. To do as urged by Traynum would create a statutory exclusion not adopted by the legislature.

this order satisfies the statutory requirements of a meaningful offer. Because the UETA states that electronic transactions must be given the same legal effect as paper transactions, Progressive not only made a meaningful offer of optional coverage, but it is entitled to the statutory safe harbor protections of the conclusive presumption in § 38-77-350(B).

Traynum's Internet purchase followed a common sequence: 1) quote; 2) application; 3) Offer Form; and 4) payment. Whether she obtained her policy online, by phone or in person, she would have followed the same sequence.¹¹ In fact, the only other order of presentation that has been addressed by South Carolina's appellate courts would be 1) quote; 2) application; 3) payment; 4) Offer Form.

For example, in Cohen, this Court upheld the Circuit Court's determination of a meaningful offer communicated by the agent in person that followed the same sequence. The insured obtained a quote over the phone. 402 S.C. at 69, 737 S.E.2d at 870. Based upon the information obtained during the quote, the agent created "an application form using input from the client, and print[ed] it only after she and the client ha[d] discussed and agreed upon what types and limits of coverage he want[ed]." Id. at 69-70, 737 S.E.2d at 871. When the insured came into the agency, the agent presented the application first. Id. The insured then signed the application and the offer form.¹² Id. This Court held that this process conveyed a meaningful offer to the insured. Id. at 74, 737 S.E.2d at 873.

¹¹ In several cases, South Carolina's appellate courts have also recognized offers communicated after payment and issuance of the policy. For example, the Supreme Court in Wiegand, 391 S.C. at 161-62, 705 S.E.2d at 433, upheld an offer that was sent *10 years* after the inception of the policy.

¹² The agent entered the "x" marks indicating the rejection of optional coverage in Cohen. Because the offer in Cohen predated the General Assembly's amendments to § 38-77-350, the form was not "properly completed" and the insurer had to prove a meaningful offer under Wannamaker. Id. at 74, 737 S.E.2d at 873. Because the offer in this case post-dates the amendments to § 38-77-350, Progressive is entitled to the § 38-77-350(B) conclusive presumption.

Traynum's transaction was virtually identical, the only difference being that this same sequence occurred while she sat in front of her computer instead of at an agent's desk or office counter. She began her quote previously on Progressive's website. When she logged onto the website on April 20, 2007, she continued to play with her quote until she got it just how she wanted. Progressive's website – acting as its electronic agent – then electronically handed her the application for her review and signature. She signed the application and Progressive's website then handed her the Offer Form for her review and signature. She signed the Offer Form and then proceeded to pay for the policy.¹³ Progressive then issued the policy.

In other cases, South Carolina's appellate courts have found meaningful offers where the offers were communicated in writing *after* the policy was issued and without any oral communication with a live agent. For example, in Atkins, the insured either called to add a new vehicle to an existing policy or called to request a new policy.¹⁴ 376 S.C. at 628, 658 S.E.2d at 108. After the request, an agent mailed an offer form to the insured, which the insured then completed and signed. Id. Like Traynum here, the

¹³ In their Brief, Appellants state for the first time that Traynum only viewed the Offer Form page for 25 seconds. (Initial Br. of Appellants, pp. 7, 10, 12). There is no testimony in the record indicating the significance of the "viewtimes" on the Tealeaf recording. Therefore, this evidence is not properly before the Court. However, even if the Court considers this evidence, it is irrelevant. Section 38-77-350(A) only requires insurers to provide the written form to the insured. The insured has the autonomy to decide how much attention to pay to the form or whether to even read the form at all. Traynum is an internet-savvy user who uses the internet for banking, bill payments, purchases, travel arrangements, and insurance transactions and she had experience purchasing business liability insurance for her employer and personal insurance for her household. (Traynum Dep. 9:6-21; 10:24-11:19; 14-19) (R. pp. ___-___). Section 38-77-350(B) doesn't require the insured to have read the form, but only to have signed the form. In fact, the insured in Cohen testified that he signed the form without reading it. 402 S.C. at 70, 737 S.E.2d at 871. That did not prevent either the Circuit Court or the Court of Appeals in that case from recognizing the validity of the offer. Moreover, Traynum electronically signed the Applicant's Acknowledgment, which states "I acknowledge that I have read . . . the above explanations and offers of additional . . . coverage." (Offer Form, p. 5) (R. p. ___). Therefore, whether Traynum spent ten seconds or ten hours reviewing the form is irrelevant. Progressive designed the website so that she could spend as much time as she wanted looking at the Offer Form and it was up to her – based upon her own comfort level – to decide how much time she spent.

¹⁴ The Circuit Court's order was contradictory on this point. Atkins, 376 S.C. at 628, 658 S.E.2d at 108.

insured in Atkins admitted that he signed the form. Id. Like the analysis in Cohen, the parties agreed that the § 38-77-350(B) presumption did not apply to the offer in Atkins. Id. at 629, 658 S.E.2d at 108.

The insured in Atkins made essentially the same argument that the Traynums make in this case: “Atkins asserts the offer was not made in a commercially reasonable manner because [an agent] never spoke with him directly, instead mailing him a selection/rejection form.” Id. at 631, 658 S.E.2d at 109. This Court disagreed, holding that: “The use of mail is a reasonable method of communicating with the insured about important business transactions.” Id. Moreover, the insured chose to call the agent rather than going in and purchasing his coverage in person. “[I]t was apparently acceptable to him to read the automobile coverage selection/rejection form, sign every blank, and return it to the agent via the mail.” Id.; See also Wiegand, supra (upholding an offer that was mailed to the insured *10 years* after the policy inception); Jackson v. State Farm Mut. Auto. Ins. Co., 303 S.C. 321, 400 S.E.2d 492 (1991) (finding a meaningful offer conveyed as part of a premium renewal notice); Burch v. South Carolina Farm Bureau Mut. Ins. Co., 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002) (finding a meaningful offer on a form presented to the insured almost four years after originally purchasing insurance). Just as Atkins chose to conduct his business over the phone and by mail, Traynum chose to conduct her business online. Furthermore, in today’s technological environment, the use of the Internet to conduct business is a “reasonable method of communicating with the insured about important business transactions.” Atkins, 376 S.C. at 631, 658 S.E.2d at 109.

There are only two differences between the offer in Atkins and Progressive's Offer. First, although the policy in Atkins appears to have issued before the carrier even sent the offer form, Traynum's policy did not – and would not have issued – until she signed the Offer Form. Second, the transaction in this case occurred instantaneously. Rather than waiting several days for the form to come in the mail and then several more days for it to be returned, Progressive's website allowed an immediate interactive transaction wherein Progressive provided the Offer Form immediately after the application. Traynum had the opportunity review, print and save the form, then signed the form which was instantaneously returned to Progressive in order to issue the policy.

This Court can view the online transaction as comparable to an in-person transaction like the one in Cohen or a mail correspondence like the one in Atkins. Either way, Progressive's Offer must be given legal effect. Although Progressive believes that its process is at least as meaningful as an in-person transaction because of the immediacy and interactive nature of the transaction, the ultimate analysis is the same: (1) Did Progressive give Traynum an Offer Form that satisfied all requirements of § 38-77-350(A)?, and (2) Did Traynum sign the completed Offer Form? Because the answer to both questions is a resounding yes, the Circuit Court properly applied the conclusive presumption of § 38-77-350(B).

CONCLUSION

The UETA requires application of the conclusive presumption in this case. Progressive's online offer mirrors other offers that this Court and the Supreme Court have recognized as meaningful in previous cases. The use of Progressive's website merely serves as an additional medium for the same transfer of information. Although

advances in technology force courts and contracting parties to adapt to the way transactions are completed, the traditional meaningful offer analysis set out in § 38-77-350 remains largely unchanged. Progressive's website – acting as its agent – gave Traynum a written Offer Form that fully complied with the requirements of § 38-77-350(A). Traynum electronically signed the completed Offer Form. Therefore, the plain language of § 38-77-350(B) requires application of the conclusive presumption of a meaningful offer.

Furthermore, when the insurer gains the protections of § 38-77-350(B), there is no need for a Wannamaker analysis. However, even if the Court applies a Wannamaker analysis to Progressive's offer, Traynum received a meaningful offer. Traynum is responsible for her own conduct. She received the Offer Form, had all the time in the world to review it and to make or change her coverage decision, and then she signed the Offer Form by typing in her first and last name and clicking "Continue." In doing so, her actions triggered the conclusive presumption. Therefore, the Circuit Court's Order should be affirmed.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

RECEIVED

APR 04 2014

SC Court of Appeals


Loretta Traynum and Leonard Traynum..... Appellants,

v.

Cynthia Scavens and Progressive
Direct Insurance Company..... Respondents.

CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Respondent, certify that the Respondent's Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter on Loretta Traynum and Leonard Traynum by depositing a copy of it in the United States Mail, postage prepaid, on April 4, 2014, addressed to their attorneys of record, Tom Young, Jr., Esquire, Law Offices of Tom Young, Jr., P.C., 409 Park Avenue, SW, P.O. Box 651, Aiken, SC 29802 and L. Darby Plexico, III, Esquire, Brown & Brehmer, Post Office Box 7966, 1720 Main Street, Suite 201, Columbia, SC 29202.



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