

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-26-10502

Stephanie A. Smith, on behalf of herself and all others similarly situated.....Appellant,
v.
Progressive Halcyon Insurance Company, n/k/a Progressive Direct Insurance Co., Progressive
Max, and Progressive Casualty Insurance.....Respondents.

RECORD ON APPEAL
Volume II

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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

**STEPHANIE A SMITH on behalf of
herself and all others similarly situated,**

Plaintiff,

v.

**PROGRESSIVE HALCYON
INSURANCE COMPANY, n/k/a
PROGRESSIVE DIRECT INSURANCE
CO., PROGRESSIVE MAX, and
PROGRESSIVE CASUALTY
INSURANCE,**

Defendants.

Case No. 2010-CP-26-10502

**REPLY MEMORANDUM IN
FURTHER SUPPORT DEFENDANTS'
MOTION FOR RECONSIDERATION
AND TO ALTER OR AMEND THE
COURT'S ORDER GRANTING CLASS
CERTIFICATION**

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CLERK OF COURT
HARRIS

Plaintiff's most recent supplemental memorandum regarding class certification ignores all of Progressive's arguments in support of its SCRCP 59(e) motion, except two. First, Plaintiff argues that she has met her burden of demonstrating commonality because, according to Plaintiff, Progressive does not use the Mitchell DecisionPoint system in determining whether its insureds' medical charges are "reasonable." Second, Plaintiff makes a tardy proposal to change the class definition – which Plaintiff drafted in the first place – to include only Progressive insureds "whose file or claim contains documentation or reference to health insurance." Plaintiff's first argument contradicts both the record evidence and South Carolina law. Plaintiff's second argument simply misses the point; her proposed change to the class definition would do nothing to remedy the definition's inadequacies because (1) it remains impossible to identify members of the purported class without individual evidentiary review, and (2) she fails to explain how a mere reference to health insurance in a claimant's file rectifies this problem.

In determining whether to reconsider its decision certifying the class, the Court ultimately only needs to answer one question: based on the evidence before it, by adjudicating Plaintiff's claims, can the Court efficiently resolve each and every other putative class member's claims? The answer to that question remains an emphatic "no." Accordingly, the Court should grant Progressive's motion under SCRCP 59(e) and should deny Plaintiff's motion to certify a class of individuals who did not receive a windfall reimbursement for medical bills they have no obligation to pay.

I. Plaintiff Has Not Met Her Burden Of Demonstrating Commonality.

Plaintiff has failed to prove, based on the evidence before the Court, that there are "sufficiently central" common questions among class members such that a class action would be a "better procedural mechanism for resolving th[is] litigation than . . . individual cases." *See* James F. Flanagan, South Carolina Civil Procedure § 23.B.3 (2010). According to the South Carolina Supreme Court, a plaintiff seeking class certification only meets this burden by demonstrating that "the class shares a *determinative* issue." *See Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 21-22, 577 S.E.2d 190, 201 (2003). The class Plaintiff proposes does not share such an issue.

Indeed, rather than explaining how she purportedly meets her burden, as articulated by the South Carolina Supreme Court and the leading scholar of South Carolina civil procedure, Plaintiff merely asserts that South Carolina courts take a "more expansive view of class actions than" federal courts. Pl.'s Br. at 2. Under this "more expansive view," Plaintiff contends that she "has easily met her burden on commonality," apparently because Progressive supposedly does not use the Mitchell DecisionPoint system to determine whether its insureds medical charges are "reasonable" before paying claims. *See id.* Plaintiff's argument has no basis in law or fact.

Whether South Carolina courts take a “more expansive view” of class actions than federal courts makes no difference. Plaintiff has not met her burden under South Carolina law. Moreover, Plaintiff does not – and cannot – dispute that because South Carolina’s SCRPC 23(a) is based on the Federal Rule of Civil Procedure 23(a), South Carolina courts “look to the construction placed on the Federal Rules of Civil Procedure” when there is no South Carolina law on point. *See Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330-31, 404 S.E.2d 200, 201 (1991); *see also Middleton v. SunStar Acceptance Corp.*, No. 98-CP-07-1131, 2000 WL 33385388, at *3 n.3 (S.C. Comm. Pl. Jan. 13, 2000) (“As the South Carolina Reporter’s Notes indicate, South Carolina’s Rule 23 is ‘drawn principally from Federal Rule 23. Citations to federal case law and the federal rules are based on the principal that interpretations of the federal rule provide guidance in interpreting the South Carolina rule absent material differences.’”) (internal citations omitted). As a result, the Court can and should consider federal precedent construing the commonality burden under Federal Rule 23(a), within the context of South Carolina courts’ construction of the same burden under SCRPC 23(a).

Under South Carolina law, as elucidated by persuasive federal precedent, Plaintiff has not met her burden of demonstrating commonality because the central issue in this case – whether Progressive properly paid a med-pay claimant less than the amount of her medical bills – is inherently individualized. As Progressive has explained, there are literally dozens of reasons why it might pay a med-pay claimant less than the amount of her medical bills. Adjudicating Plaintiff’s claim would not resolve the claims of those claimants; to the contrary, resolving those claims would require fact-intensive, individualized inquiries.

In an attempt to sidestep this fatal blow to her class certification motion, Plaintiff focuses on just one of these many potential reasons why a claimant might receive less than the amount of

her medical bills – a determination that the medical bill was “unreasonable.” Plaintiff asserts – in the face of the record evidence – that Progressive simply does not make such reasonableness determinations.¹ Pl.’s Br. at 3. But the corporate representative designated to testify on Progressive’s behalf regarding Mitchell DecisionPoint unequivocally and repeatedly stated just the opposite.² Specifically, Mr. Goodchild testified that:

- “The Mitchell software system . . . is used for bill audit,” Dep. Tr. of P. Goodchild (30(b)(6)) at 32:11-12;
- “[W]e would run this bill through our Mitchell audit system to determine what the price would be, if it needed to be repriced,” *id.* at 46:1-5 (discussing adjustment of a med-pay claim in South Carolina);
- “Mitchell DecisionPoint is a tool the adjuster uses to audit medical bills,” *id.* at 90:11-12.

The evidence is clear: in adjusting a med-pay claim, Progressive uses Mitchell DecisionPoint to audit the claim, which includes determining whether the charges for medical services were reasonable. Moreover, as demonstrated, there are dozens of other reasons authorized by the insurance agreements that Progressive properly might not pay a claimant’s medical bills in full. As a result, a classwide trial in this case would encompass hundreds of individual mini-trials to determine (i) why Progressive paid each class member less than the

¹ Progressive assumes that when Plaintiff’s references “usual and customary” charges,” *see* Pl.’s Br. at 2, she intends to refer to “reasonable” charges, which is the language that appears in the insurance policy at issue. Policy, Part II, Insuring Agreement (stating that Progressive “will pay the reasonable expenses incurred for necessary medical services”). The med-pay provision of the policy does not contain the phrase “usual and customary.” *See id.*

² Progressive previously demonstrated that Plaintiff’s assertion that “five adjusters” also testified that Progressive did not use Mitchell DecisionPoint in auditing claims for reasonableness is wrong. *See* Defs.’ Resp. to Pl.’s Supplemental Br. in Opp’n to Defs.’ Mot. for Reconsideration and to Alter or Amend the Court’s Order Granting Class Certification, filed June 4, 2013, at 3-4.

amount of the bills the class member received; and (ii) whether Progressive's rationale was appropriate under the policy and South Carolina law. That is not a trial in which a class action is the "better procedural mechanism" to resolve a dispute – *i.e.*, a trial in which the Court can resolve each and every one of the class members' claims simply by adjudicating Plaintiff's claims. *See* Flanagan § 23.B.3. Accordingly, the Court should grant Progressive's motion under SCRCP 59(e) and deny class certification.

II. Plaintiff's New Proposed Class Definition Is Equally Flawed

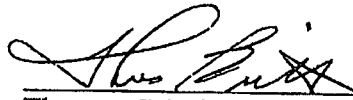
Plaintiff belatedly accepts the Court's invitation during the May 30, 2013 hearing to propose a new class definition that addresses the former definition's inadequacies. *See* Pl.'s Br. at 3-4. Plaintiff's proposed class would include Progressive insureds who submitted med-pay claims under South Carolina policies, who received payments from Progressive that were less than the amounts the insureds were charged, and – the newly added condition – "whose file or claim contains documentation or reference to health insurance." *Id.*

This newly proposed condition would accomplish none of the objectives the Court articulated during the May 30 hearing. It would not limit the class to individuals whose claims can be resolved by adjudicating Plaintiff's claims (*i.e.*, med-pay claimants who received payments less than the amounts of their medical bills because of third-party payor contracts). Moreover, on its face, the new definition would require the parties to sift through hundreds of insurance files to determine if there is a mere "reference" to health insurance in the file – apparently without any concern as to whether such "reference" reflects the ultimate reason why the medical bills were not paid in full.

Because Plaintiff's new proposed class definition – like her initial proposed definition – would require the Court to conduct "extensive factual inquir[ies]" to determine who even is a

member of the class, it is inadequate. *See Cuming v. South Carolina Lottery Comm'n*, No. 3:05-cv-03608-MBS, 2008 WL 906705, at *1 (D.S.C. Mar. 31, 2008). On that basis, the Court should deny class certification. *Id.* (denying class certification because the class definition was not “sufficiently definite so that it is administratively feasible for the [C]ourt to determine whether a particular individual is a member”) (citing 7A Charles Alan Wright, et al., *Federal Practice & Procedure* § 1760 (2d ed. 1986 & Supp. 2007)); *see also* Flanagan § 23.B.1 (“Many of the problems about the ‘class’ aspect of the representative suit are traceable to vague and ambiguous pleadings that make the class too expansive and difficult to determine its membership.”).

Respectfully submitted, this 17 day of July, 2013.



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Insurance Co., Progressive Max, and Progressive
Casualty Insurance Company*

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Stephanie A. Smith on behalf of herself
and all others similarly situated,

Plaintiff,

-vs-

Progressive Halcyon Insurance Company,
n/k/a Progressive Direct Insurance
Co., Progressive Max, and Progressive
Casualty Insurance Company,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2010-CP-26-10502

) **PLAINTIFF'S MOTION FOR**
) **RECONSIDERATION AND TO**
) **ALTER OR AMEND THE COURT'S**
) **ORDER DENYING CLASS**
) **CERTIFICATION**

FILED
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TO: THOMAS C. BRITTAIN, ESQ. and JEFFREY S. CASHDEN, ESQ.

YOU WILL PLEASE TAKE NOTICE, that the Plaintiff in the above-captioned matter, through her undersigned attorney, will move before the Presiding Judge of the Fifteenth Judicial Circuit, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, on the tenth (10th) day hereafter or as soon as counsel can be heard, to reconsider, alter or amend the Court's Order dated August 20, 2013 and that such amendment shall be allowed in the furtherance of justice. Plaintiff received notice of entry of the Order on August 28, 2013.

Plaintiff submits that the Court should reconsider, alter or amend the Order because it does not address issues raised in Plaintiff's briefs or oral argument, is beyond the matters Defendants raised at oral argument, considers evidence not part of the record and is inconsistent with evidence in the record and diametrically opposed to the prior Order of this Court. Said Motion is based upon the following grounds:

1. The Order is overly broad and reaching in that it encompasses issues not before the Court. Specifically, the Order makes a finding that the Plaintiff does not have a viable individual claim against the Defendants. The Court previously advised the parties that it would not consider the merits of the claims at the class certification phase.
2. The finding that the Plaintiff was not insured by, and did not otherwise have a relationship with any Progressive entity other than Progressive Max is overly broad, contrary to the evidence in the record, and was previously argued and decided.
3. The Order makes a finding that Progressive Adjuster Lange reviewed the Plaintiff's claim and decided which of Plaintiff's medical bills were to be paid based upon their reasonableness. The Affidavit upon which the Order is based, conflicts with her deposition testimony and constitutes sham testimony pursuant to Cothran v. Brown, 375 S.C. 120, 592 S.E.2d 929 (2004).
4. There is no evidence indicating Progressive reduces med pay claims based upon any of the 39 reasons listed in Defendants' Brief and adopted by the Order.
5. There is no evidence to support the finding that there are 39 policy related reasons for a reduction to a med pay claim when said reasons are pre-filters, prior to a determination of health insurance related reductions.
6. There is no evidence supporting the conclusion that the Plaintiff failed to offer evidence that the Progressive adjusters never made reductions based upon the unreasonableness or necessity of a med pay claim.
7. There is no evidence supporting the conclusion that Progressive makes an individual decision on the reasonableness of medical bills by using the Mitchell system. The testimony

cited for its conclusions is mischaracterized.

9. In reaching its erroneous conclusion, the Order misconstrues and misapplies South Carolina precedent on Rule 23.

10. The Order's finding that the Plaintiff does not meet the adequacy prong because she does not have a viable individual claim, was not an issue properly before the Court and is without evidentiary support. The Plaintiff has the same claims under the policy and statutes as the class members.

11. The finding that the Plaintiff does not meet the adequacy prong because she does not have a viable individual claim because she did not "incur" a medical expense per South Carolina common law is clearly erroneous, a misapplication of the law and not supported by evidence in the record. The Court improperly determined the facts of the claims at the class certification stage. The Court's decision is in error in light of the policy language, the statutes cited in the Second Amended Complaint, the collateral source rule, and Defendants' internal definition of "incur."

12. The finding that the Claimant is not an adequate class representative for any class members who might be insured with Progressive Casualty or Progressive Direct is erroneous, not supported by the record, and has already been argued and decided. It is undisputed that the face page of the Progressive policy is entitled Progressive Direct and that Progressive Casualty handles all the insurance business of Progressive Direct and Progressive Max.

13. The finding that it is undisputed that Progressive Max is the only insurance company that issued an insurance policy to the Plaintiff is inaccurate, and contrary to the evidence, and arguments of counsel. It is also contrary to the previously issued Class

Certification Order filed February 14, 2013 where the issue was discussed, argued, briefed and ruled upon.

14. There is no record evidence supporting the conclusion that the Plaintiff cannot be a class representative because she suffered no injury at the hands of Progressive Casualty or Progressive Direct. Again, the Court has improperly weighed the facts and adjudicated the merits of the claim at the class certification phase.

15. There is no record evidence supporting the finding that the Plaintiff has no standing to seek declaratory relief because she is not currently a policyholder. Under the South Carolina Declaratory Judgment Act, the Plaintiff has standing.

16. The Order erroneously finds the Plaintiff is an inadequate class representative because she is no longer a Progressive policyholder.

17. There is no evidentiary support for the finding that Plaintiff presented no evidence to prove the actual members of the class predominantly would be as a result of those insureds having third party payor contracts with their providers.

18. The Order finds the Plaintiff and the class do not share determinative issues because a claims reduction could be due to the "reasonableness" or "necessity" of a bill. The Order, in quoting the vast Progressive adjuster testimony that they did not recall ever reducing a bill because it was "unreasonable" or "unnecessary" makes the improbable opinion that the adjusters' failure to remember a single instance in tens of thousands of adjustments is not convincing because they did not categorically deny that they ever had. Such a position cannot logically stand and is not supported by the record. In addition, all class members share the common issues of statutory applications, policy language, and Progressive's Standard Operating

Procedure on reducing payments to pay only “same damage paid under health insurance.” In addition, there is no evidence that Defendants actually determine the reasonableness or necessity of a medical bill.

20. There is no record evidence supporting the finding that a jury/judge would have to determine, on an individual basis, whether Progressive reduced a payment for reasons of unreasonableness or necessity.

21. The Order erroneously states Plaintiff does not dispute that the 39 policy provisions cited by the Defense would be an individual issue that the Court could not resolve collectively when such statement is counter to the arguments posed within the record and was clearly disputed by the Plaintiff.

22. The Order lists 39 reasons found within the policy for reducing a med pay claim. These 39 possibilities are threshold coverage issues which, if present, would result in no claim being paid as opposed to a reduction. The Order misapplies the Plaintiff’s contention.

23. There is no record evidence to support the Order’s finding that there is a lack of commonality because the fact finder would have to delve into each class member’s unique circumstance to determine if they possess one of the 39 aforementioned reasons, when the 39 reasons would result in no payments as opposed to a reduced payment. The common questions concern reducing med pay payments due to health insurance.

24. There is no record evidence to support a finding of lack of commonality and the Order misapplies the Littlefield decision in this matter.

25. The Order is flawed in finding Plaintiff’s unjust enrichment claim does not implicate common issues because of the myriad of unique circumstances surrounding each class

member's claim when such a finding is not based upon and contrary to the evidence in the record.

26. The Order is flawed in finding the very nature of an unjust enrichment claim is unsuitable for resolution on a class wide basis because it requires an investigation into each class member's claim when such finding is contrary to the evidence in the record.

27. The Order erred in finding the bad faith and tortious interference claims do not impart common issues when such finding is not supported by the evidence in the record.

28. There is no evidence to support a finding that the Plaintiff lacks typicality.

29. The Court erred in finding the proposed class definition to be inadequate because of the need for individual inquiries for each class member. Such individual inquiries are not necessary when the Defendants use a systematic procedure (Standard Operating Procedure) to reduce the med pay bills for those insureds who have health insurance and computer codes for such reductions and such reductions are evident in the computer files.

30. There is no record evidence to support a finding of an overly broad class definition that includes Progressive Max, Direct, and Casualty.

31. There is no record evidence supporting the finding that the "EOB's contain detailed information about the reasons for payment reductions" and therefore, each claim would have to be manually reviewed. The only evidence in the record is that the codes speak for themselves; a code of X563 means the bill was written down for the sole reason of health insurance.

32. The Court erred in finding the only way to determine which claims were reduced for coded EOB's would be a manual claims by claims basis when such a finding is without evidentiary support in the record.

33. The Order erred in stating the Plaintiff does not dispute that the only way to identify class members would be a case by case basis when such argument was put forth as an alternative position.

34. The Order fails to determine if Plaintiff met her burden of proof with regard to numerosity, especially in light of Defendants' stipulation as to numerosity.

35. The Order fails to address how the six "common issues" found to be present in the Order Granting Class Certification dated February 4, 2013 are no longer applicable, especially in light of the finding in the February 4, 2013 Order that "a single common issue will suffice if it is important enough."

36. The Order fails to adequately state how or why the Plaintiff lacks typicality.

37. The Order omits any reference to the first factor in considering the adequacy of representation: that counsel must be qualified, experienced and generally able to conduct the proposed litigation.

38. The Order fails to reference the second factor in considering the adequacy of representation: that Plaintiff's claims must be sufficiently interrelated and not antagonistic to the class claim.

39. The Order fails to state whether the amount in controversy has been met.

40. The Order omits any reference to the Standard Operating Procedure for South Carolina insureds and erroneously finds that the application of such Standard Operating Procedure is not subject to class treatment.

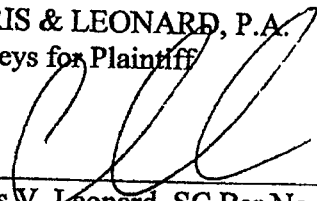
41. The Order errs in finding the class does not share a determinative issue. The Standard Operating Procedure of short paying med pay benefits due to health insurance is

common and determinative as to all class members.

42. The Order errs in not finding the prerequisites of Rule 23 have been met. The class is defined to address the determinative issues and such definition can be modified by the Court pursuant to Rule 23.

We hereby certify that prior to filing this motion, we have communicated, orally or in writing, with opposing counsel and/or have attempted in good faith to resolve this matter. We are therefore filing this motion.

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Dated: 9, 9, 13

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2010-CP-26-10502

Stephanie A. Smith on behalf of herself and all others similarly situated..... Appellant

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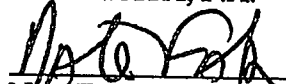
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HORRY COUNTY
2013 SEP 26 AM 10:55
MELANIE HUGGINS-WARD
CLERK OF COURT

NOTICE OF APPEAL

Stephanie A. Smith, on behalf of herself and all others similarly situated appeals the Order of the Honorable Larry B. Hyman dated August 20, 2013 in its entirety. Appellant received written notice of the Order on August 28, 2013.

September 26, 2013

NATE FATA, P.A.


Nate Fata

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ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

2010-CP-26-10502

STEPHANIE A. SMITH,)
INDIVIDUALLY AND AS CLASS)
REPRESENTATIVE ON BEHALF)
OF THOSE SIMILARLY)
SITUATED,)

Plaintiff,)

Transcript of Record

vs.)

October 31, 2012

PROGRESSIVE HALCYON)
INSURANCE COMPANY, N/K/A)
PROGRESSIVE DIRECT)
INSURANCE COMPANY,)
PROGRESSIVE CASUALTY)
INSURANCE COMPANY,)

Defendants.)

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Nate Fata, Esquire
Attorney for Plaintiff

Val H. Stieglitz, Esquire
Attorney for Defendant

Kay H. Richardson, CVR
Circuit Court Reporter

I N D E X

Pg.

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E X H I B I T S

No.

ID EV

(There were no exhibits marked during the hearing.)

1 (October 31, 2012)

2 THE COURT: All right. Whose motion is it?

3 MR. FATA: Your Honor, it's the Plaintiff's motion for
4 class certification. Thank you for allowing us to have this
5 heard today; I know we had some scheduling issues.

6 THE COURT: Okay.

7 MR. FATA: We appreciate it, Your Honor.

8 I would like to hand up a brief to the Court.

9 THE COURT: All right.

10 MR. FATA: So, Your Honor, if I could begin ---

11 THE COURT: All right.

12 MR. FATA: We're here for the motion for class
13 certification. This is a case involving Progressive and it's
14 under payment of medical insurance, medical payment benefits
15 under auto insurance policies in the State of South Carolina.
16 It's a South Carolina case. We filed this action a couple of
17 years ago and we've done extensive discovery and this is what
18 we've learned. Most of these facts, I'm gonna talk about, are
19 fairly undisputable. Progressive has several companies that
20 in 19 -- or in 2007 and '8, it decided that it wanted
21 Progressive Casualty, a sister company, to handle all of the
22 marketing and sales and premium collections for branded
23 carriers, like Progressive Direct, Progressive Max,
24 Progressive Northern and United Financial Casualty Company to
25 handle all of those administrative functions, the nuts and

1 bolts of the whole insurance business. Progressive Casualty
2 is the hub, it's gonna do everything under joint servicing
3 agreements. And we've attached as Exhibit A the -- kind of
4 the corporate chart that shows Progressive Casualty is gonna
5 adjust all the MedPay claims, it's gonna collect all the
6 premiums, it's going to write the checks back to the insureds,
7 it's gonna market, it's gonna manage everything all under
8 joint servicing agreements. Those joint servicing agreements
9 are attached as Exhibit B.

10 So, Progressive Casualty in 2007 and '8 starts to handle
11 all of the adjusting of the South Carolina MedPay claims and
12 it does that as part of its National MedPay Unit. The
13 National MedPay Unit run by Progressive Casualty is
14 headquartered in Jacksonville, Florida. And it has sixty or
15 seventy adjusters and about fourteen of those adjusters handle
16 a region pretty much the Eastern Seaboard region but a few
17 outlying states, fifteen states, and an adjuster is gonna
18 handle the MedPay claims that come in from those fifteen
19 states on this particular team that we're talking about,
20 Stephanie Smith's team. We deposed five adjusters, they all
21 said the same thing. They said we used one definition for
22 incurred for all states. To systematize its approach under
23 the National MedPay Unit, Progressive has adopted, and this is
24 one of the key questions, the definition of incurred and that
25 is restrictive and it's based on a Virginia statute and a

1 Massachusetts' policy definitional language section that is
2 not found in the South Carolina policy. The South Carolina
3 policies do not define medical expenses incurred which is what
4 the fight is about because Progressive takes the position that
5 if you have health insurance and you go to the doctor after a
6 wreck and you have a \$100 medical bill and you submit it to
7 your Blue Cross Blue Shield insurance carrier and there's a
8 contractual adjustment of \$30, which leaves an allowable
9 amount of \$70 which is then paid by you and Blue Cross Blue
10 Shield that you have not incurred that \$30, that contractual
11 adjustment was never incurred. The problem with that is there
12 is a statute that says there is no setoff for MedPay. And
13 effectively, the definition that's described by Progressive to
14 incurred is a setoff. It's -- Progressive is jumping into the
15 shoes of the health insurance carrier using that contractual
16 adjustment and saying well, Mr. Policyholder, you didn't incur
17 that. So, that is not set forth in the policy and we brought
18 the claims.

19 The Supreme Court of South Carolina a few months ago came
20 out with a decision on title insurance in which it said, title
21 insurance, this policy didn't define when the damages would be
22 measured and if it doesn't define when the damages would be
23 measured, the date of discovery of the title defect, or the
24 date of the purchase, we're gonna take the view most favorable
25 to the insured to define that measuring date. This is the

1 analogous situation, the medical expenses incurred is never in
2 the policy expressly defined when that would be measured. Our
3 position is when you go the doctor, you get treated, when you
4 leave, you have incurred medical expense whether you get the
5 bill six months from now or you get the bill tomorrow. On the
6 date of that search, you've incurred a liability. And so
7 regardless of whether you have a collateral source for Blue
8 Cross Blue Shield health insurance or your mother is gonna pay
9 for it or your cousin is gonna pay for it, you've incurred
10 that expense. On that day, that's your legal obligation. You
11 might discharge it by other means because you're paying
12 premiums but you have a legal obligation.

13 So, there's a statute that prevents, in South Carolina,
14 that prevents setoff. This is a setoff. The policy language
15 is the same for all of the insureds but Progressive Casualty,
16 under its umbrella is gonna treat everyone the same way
17 whether they're in Virginia, Massachusetts or in South
18 Carolina and our position is that you've treated this class of
19 South Carolinians, these insureds, the same way as you do
20 under the restrictive definition, then Virginia statute, cause
21 that's actually a statutory definition that we don't have in
22 South Carolina, as well as under the Massachusetts policy.

23 So, our burden today is to meet the elements of Rule 23.
24 And the first one is that we have to have a class
25 representative who can fairly and adequately protect the

1 interest of the class. Stephanie Smith has been through two
2 depositions; she's college educated; she understands the issue
3 over incurred; she has a \$10,000 MedPay benefit; and she was
4 not able to get her medical bills reimbursed. She got the
5 reduced amount based on health insurance that she pays
6 premiums for but she got that amount so she's out over \$1,000.
7 There are, in this case, another element is numerosity. The
8 Defendant, and we can put this on the record formally, but has
9 written a letter -- he will acknowledge this but he's not
10 contesting, the Defendant is not contesting numerosity in this
11 case for the motion hearing today. So, the class has to be so
12 numerous that joinder isn't practical. There are over a
13 thousand insureds in South Carolina whose claims were
14 addressed by Progressive Casualty. We have common questions
15 of fact. Progressive Casualty through its operation of the
16 National MedPay Unit in Jacksonville, Florida, has treated
17 everyone improperly. We have asked the Court in our first
18 cause of action out of five to declare that its treatment of
19 the insureds is improper and violates not only statutory law
20 but the South Carolina policies. All the policy languages --
21 all the policies in South Carolina have the same language on
22 incurred. So, there's no variation there. But the setoff,
23 using health insurance reductions is violative of the statute;
24 it's also violative of the policy. So, we're asking the Court
25 to declare Progressive Casualty violated its or those duties,

1 those contractual rights. And accordingly, the claims that
2 are coming in today -- if I get in a wreck today and I submit
3 my first doctor bill to Progressive today, under a MedPay
4 policy, my claim stays open for three years because I -- under
5 the policy after three years from the date of the accident, in
6 which I have services rendered -- medical services rendered to
7 submit bills for MedPay reimbursement. So, with that
8 declaratory relief that we're looking for is going to not only
9 address all of the short pay or the under payments that have
10 happened in the past during the class period but also going
11 forward, those persons who got in a wreck in 2011, their
12 window for submitting claims is not gonna close until 2014.
13 So, it's kind of a -- they're a class -- but they have ongoing
14 contractual rights that need to be addressed. That's why this
15 case is a little bit different than a lot of other cases where
16 you say, okay, you were overcharged, everyone was overcharged
17 for X, Y, Z from 2008 to 2010 and then we stopped the
18 practice, we don't have that, we have -- we have an ongoing
19 issue with current class members as they move through the --
20 into the future with the ongoing claims that the Court needs
21 to address. So, we can't just have the damages at trial that
22 says these are our damages; we need to also have a
23 declaration. These are our damages and for these class
24 members, you have the -- adjust them properly and not have a
25 setoff for health insurance.

1 The common questions are whether the National MedPay
2 Unit, Progressive Casualty's National MedPay Units, whether
3 they violated the common law, the policy language, the
4 statutory prohibition against setoff or subrogation. Also
5 Progressive Casualty doesn't send out a blank Proof of Loss
6 form and so one of our claims is that you're requiring Proof
7 of Loss from your insureds as set forth in the deposition
8 testimony of Liz Baynor (spelled phonetically) who runs the
9 entire National MedPay Unit, you require that but you don't
10 sent a blank Proof of Loss form. And there's a statute that
11 says if the carrier is gonna require that and there is no
12 Proof of Loss and the carrier does not send a blank Proof of
13 Loss form in twenty days, then the character, nature and
14 extent of the loss is deemed to be admitted because the
15 carrier failed to send a blank Proof of Loss form. So, again,
16 that's more of a declaratory relief element for the class as
17 part of the damages but their medical bills set forth the
18 nature and extent of character -- those were the terms used in
19 the statute -- for the MedPay benefit loss.

20 The deposition testimony from all of the adjusters are
21 that the only thing they do is look to see how much was paid
22 on a medical bill. The health insurance carrier paid \$50 and
23 that amount is gonna be reimbursed, if the insured also paid
24 \$20, then that amount would be reimbursed but that's it. And
25 there is no decision on the adjuster's behalf or by the

1 adjusters that, hey, that medical chart was too high, that's
2 out the ordinary for Horry County or for Richland County.
3 There is no individualized review by the adjusters as to what
4 was necessary, what procedure was necessary or what was not
5 necessary. No one does that. And they really can't because
6 it's part of the National MedPay Unit goal. They want to
7 systematize everything so those adjusters can handle one of
8 your fifteen or twenty states at a time using the same cookie-
9 cutter approach. So, it's very systematic.

10 This case, there is a common methodology for adjusting
11 claims that applies by these adjusters to all South
12 Carolinians in the same fashion. All of the data is loaded
13 into a computer system called Mitchell. The Mitchell system
14 has the amount of all the charges and then the deductions that
15 are taken with the net amount to the insureds. So, it's
16 easily a case where we can have the data to prove the damages
17 at trial. It's all systematized and that was the goal of the
18 National MedPay Unit. So for trial it's gonna be -- and we
19 already have some of the data as far as damages -- it's gonna
20 be more just pulling the data from the Mitchell DecisionPoint
21 System to see who had the reductions and what the amounts
22 were. And then going forward, we would have the declaratory
23 relief.

24 As far as typicality, sometimes, typicality, another
25 element, and the common issues are intertwined but Ms. Smith

1 is typical in that she was short paid. She has the same
2 policy language that all South Carolinians have; she's been
3 treated the same way. All the adjusters say we don't treat
4 anyone differently, we treat everyone the same way, we go
5 through the same process for everyone. So, it's -- as far as
6 I see it, as far as the elements of individualized issues,
7 there aren't any because, again, the approach is to not allow
8 the insured to get the benefits of the actual bill if there's
9 health insurance.

10 Now, this is a side point, in the rate making process, we
11 depose the rate maker, then the algorithm for making the rate,
12 an insured who has health insurance, that health insurance
13 factor is never taken into account for any premium. So,
14 Progressive is getting the windfall by having someone who has
15 health insurance get less than someone who does not have
16 health insurance. So, even on that kind of fundamental level,
17 when you make the rate, you're not distinguishing who has
18 health insurance and who doesn't; you're saying we're gonna
19 treat everyone the same way. So, an uninsured person is going
20 to get more money than an insured person at the end of the
21 day.

22 The amount in controversy is, I think, Item E in Rule 23,
23 that requires \$100 or more per class member. We have asked
24 for -- the numbers indicate that that's at least a thousand
25 dollars or that's the ballpark on the average loss. For those

1 people who don't meet their maximum or their cap, like
2 Stephanie Smith has \$10,000 MedPay coverage, she is never
3 gonna come close to meeting that, which was a good thing, but
4 on average it's a thousand dollars damages and then we've also
5 asked for the relief of punitive damages and attorney's fees
6 and interest as the Court might imagine. So, clearly, we
7 don't feel that that's an issue. Everyone on average is gonna
8 have at least that amount in controversy I'm sure.

9 I filed an affidavit. Ms. Smith has filed an affidavit.
10 As far as the ability for us to represent the class, we feel
11 that we're fairly able, Mr. Leonard and I, are fairly able to
12 represent the class. That's a part of one of the other
13 elements, we have adequacy of representation. We have
14 developed the factual scenario thus far and really, we have
15 not uncovered, Your Honor, any factual -- by deposition
16 testimony or otherwise, any factual deviations from this when
17 we've taken the deposition of five adjusters, the supervisor
18 of all those adjusters, and then the supervisor or the head of
19 the whole National MedPay Unit. But the key is, from our
20 prospective is that this National MedPay Unit run by
21 Progressive Casualty, it's doing things improperly, not
22 following the South Carolina law because it's trying to use
23 the best part of Virginia and Massachusetts policies and
24 applying it here when that violates the contract, the policies
25 of -- and we think the Court should address that in a

1 declaratory relief. And we think that's one of the
2 significant areas that should be addressed because it's going
3 to be an ongoing issue, which we don't find that fair.

4 If I could have a minute to talk to counsel? (Confers
5 with Mr. Leonard.)

6 I guess I could allow Mr. Stieglitz to respond but then
7 follow up, Your Honor?

8 THE COURT: Yes, sir.

9 MR. STIEGLITZ: Thank you, Your Honor.

10 THE COURT: Is this the company that has Flo doing the
11 commercials?

12 MR. STIEGLITZ: It is the company that has Flo ---

13 THE COURT: I will try to put that out of my mind.

14 MR. STIEGLITZ: Some people love Flo and I think some
15 people do not.

16 THE COURT: I'm a do-notter.

17 MR. STIEGLITZ: I will take that into account, Your
18 Honor.

19 Your Honor, the Plaintiff has just provided a very
20 simplified and simplistic rendition of the facts and the
21 background, the landscape in this case. There are a large
22 number of very thorny issues that are -- that are afloat in
23 this case when it comes to analyzing class -- the class
24 issues. They are laid out in detail in our brief. I would
25 ask the Court to take careful consideration of that brief as

1 to base its decision because there really are a number of
2 intricate factual legal issues that flow throughout here as
3 you kind of work through a Rule 23 analysis. And I'll -- Your
4 Honor, may I hand up a chart that ---

5 THE COURT: Certainly.

6 MR. STIEGLITZ: --- outlines the adjustment of a typical
7 medical bill. I will address this is just a moment, Your
8 Honor.

9 Your Honor, this case does involve the MedPay coverage of
10 auto policy that Progressive Max, a separate stand-alone
11 entity -- it's not just a branding feature; it is its own
12 company and that's established in the deposition of Michael
13 Uth(spelled phonetically), which is part of the submitted
14 materials. The Plaintiff had an auto policy with Progressive
15 Max for a period of time in February of 2009. There are other
16 Progressive entities that are separate corporate entities that
17 also sell insurance in South Carolina and elsewhere and they
18 do -- these entities utilize Progressive Casualty to adjust
19 their MedPay claims beginning in -- the testimony is beginning
20 in mid-2008. One thing that was -- that is a factor in here
21 which plays into the Rule 23 analysis is that there has been
22 testimony regarding adjustment policies and adjusting
23 protocols by the National Medical Unit from June '08 forward
24 but testimony is that prior to that time, MedPay claims were
25 adjusted at every state level and there's no testimony about

1 any common practice or what practice was used here or there or
2 whether there even was a common practice in South Carolina or
3 anywhere prior to June of '08. So, that, that introduces a
4 time element into the evaluation here. But various
5 Progressive entities sell insurance in South Carolina.
6 Progressive Max is one of them. You have Progressive Max, you
7 have Progressive Direct. While the Plaintiff made an effort
8 about a year ago to join Progressive Northern and United
9 Financial, two other Progressive related entities, as
10 defendants in the case. At that time, Your Honor denied that
11 motion on the grounds that the Plaintiff, Ms. Smith, only had
12 a contract with Progressive Max, not these entities that they
13 were attempting to introduce. Therefore, the feeling was that
14 she could not be an appropriate class representative for an
15 entity that she never had a policy with. That same rationale
16 would apply to the current Defendant, Progressive Direct,
17 which again the testimony is she never had a -- she had a --
18 never had a policy with them. She has a policy with one
19 Defendant.

20 Another issue the Court will have to weigh is whether she
21 can adequately serve as a representative for an entity or
22 policyholders of an entity that she never had a contract with.
23 And the Court authority answered that question with a no,
24 previously, but that will be a question here in the Rule 23
25 evaluation. Her policy -- there's no debate over what the

1 policy was and it's attached in the submissions in the record.
2 The policy provided reimbursement for reasonable medical
3 expenses incurred caused by an accident where you were treated
4 and submitted your bills within a three-year period and no
5 exclusions applied. So, it wasn't just send us the bills and
6 we will pay them. There are numerous conditions to coverage
7 and the testimony from the adjuster was -- in particularly
8 from the adjuster who handled this claim that the first thing
9 she does is determine coverage and then goes on to evaluating
10 the medical bills. And that's in her affidavit, too, that
11 once coverage is determined -- in other words, you know, are
12 you submitting bills that were caused by this accident, does
13 any exclusion apply, are you within the timeframe, that kind
14 of thing -- before all that is covered. Then she moves on to
15 evaluate the actual medical bills. Now, when she gets to
16 evaluating the medical bills, that's where this chart becomes
17 relevant. There are two typical scenarios that present
18 themselves to an adjuster in the MedPay Unit. One is a
19 situation where the insured has no private medical insurance.
20 And there are people like that out there. The other scenario
21 is where the insured has their own private medical insurance,
22 like the Plaintiff did in this case with Blue Cross, plenty of
23 people like that out there too. If you have no medical
24 insurance -- if I have no medical insurance and I go to Dr.
25 Jones, and he gives me a bill for \$500, I owe him the \$500. I

1 don't have any -- I don't have any insurance to help me pay
2 that, he's not discounting that bill because of any insurance
3 that's gonna pay that, I owe him \$500. In that scenario,
4 Progressive pays the insured \$500 because that is what the
5 insured incurred. She owes Dr. Jones 500 bucks. In the other
6 scenario, the Plaintiff's scenario here though, that's
7 different.

8 THE COURT: That's where the company has contracted a
9 discount and if the insured gets the benefit of the discount,
10 you just pay what the insured is out of pocket and the
11 insurance company.

12 MR. STIEGLITZ: And the insurance ---

13 THE COURT: You don't pay the discount.

14 MR. STIEGLITZ: And the insurance coverage, we don't pay
15 -- we don't pay the ---

16 THE COURT: I understand how it works.

17 MR. STIEGLITZ: --- all of that right there, we don't pay
18 the discount. Why not? Because the amount incurred, that's
19 not owed to anybody -- there's no obligation to pay that to
20 anybody. Now, the final part of their adjusting protocol, the
21 final part and I think a critical part that was not mentioned,
22 the testimony is that although they did not pay that 100 -- in
23 my example, \$100 insurance discount, if the doctor contests
24 that or if the doctor says -- comes back to, you know, Ms.
25 Jones and says you owe that, Progressive pays it. Progressive

1 does what is necessary to leave their insured not owing
2 anybody anything. So, while there is this kind of common
3 approach set forth in my chart here, the final piece of that
4 common approach is they don't leave anybody owing anything.
5 If Ms. Walters goes to her doctor and her doctor says, you
6 know, Ms. Walters, I got a -- I have to discount this bill for
7 the Blue Cross but I still -- I'm gonna still look to you for
8 paying part of that, then Ms. Walters comes back ---

9 THE COURT: You're just trying to prevent a windfall.

10 MR. STIEGLITZ: Because if -- why, because the
11 fundamental nature of insurance is compensatory, a ton of law
12 on that. You buy insurance for compensatory purposes not to
13 turn a profit, not to realize a windfall, not to win the
14 lottery.

15 Now, the final -- the most important part, the most
16 important element of that is the Plaintiff has talked about
17 Virginia and the Massachusetts statute and how our definition
18 of incurred was based on that, that's not entirely accurate
19 and, again it's in the materials. When the National Medical
20 Unit was formed in mid '08, Peter Goodchild, who -- one of the
21 medical managers there, undertook to develop, you know, an
22 approach.

23 THE COURT: Let me ask you this, What if the insured's
24 policy, private healthcare policy, does not have a subrogation
25 agreement in it or it's not subject because it is MedPay

1 subrogation -- I mean, isn't that a windfall in and of itself
2 to the insured, don't they get the money? The insurance
3 company doesn't get it back?

4 MR. STIEGLITZ: No, the insurance -- that's right, the
5 insurance company doesn't get it back, so you're right, it is
6 already a -- in terms of out of pocket, it is a windfall to
7 the insured but Progressive does that. Again, the testimony
8 -- they were asked about that in deposition. They do that
9 because we do have that statute in South Carolina that says
10 you can't setoff MedPay -- you know, MedPay benefits. So,
11 what they do -- so accordingly -- and again we cite the
12 testimony in the materials. Peter Goodchild said accordingly,
13 we interpret that to mean that we have to pay the insured for
14 whatever the insurance company pays, you know, pays the
15 provider and they know that that is a -- from out-of-pocket
16 standpoint, a windfall. But the setoff statute, I would note
17 has been held in two cases to apply to setting off the
18 tortfeasor's liability and we cite those cases too. I've got
19 them and I can hand them up. But the South Carolina Supreme
20 Court has said that set off statute is meant to apply to not
21 allowing a tortfeasor to realize a benefit from insurance that
22 his victim may be ---

23 THE COURT: That's the other insurance type situation.

24 MR. STIEGLITZ: Right. But I think one of the lynchpins,
25 Your Honor, on this fundamental question of whether she

1 incurred anything, a fundamental lynchpin is the fact that the
2 South Carolina Supreme Court has dealt with this issue in the
3 case of Gordon v. Fidelity and Casualty Company of New York in
4 1961, I'd cite it but if I may, I'll hand it up as well.

5 THE COURT: Okay.

6 MR. STIEGLITZ: In that case, Your Honor, the Plaintiff
7 had a MedPay policy, same as our case. The MedPay policy
8 provided reimbursement for reasonable medical expenses
9 incurred, same as our case. The insured was a soldier. He
10 got treated at a medical hospital for free because he was a
11 soldier. Then he filed a claim with his MedPay company saying
12 I want you to reimburse me for the value of these medical
13 services even though I didn't pay for them because I think I
14 incurred them. Well, the Supreme Court did two important
15 things. Number one, the Court held that the term incurred in
16 a policy is not ambiguous. The Court said there is no need
17 for construction of the term incurred, it's just plain, we
18 don't have to define it; it's not ambiguous. Secondly, the
19 Court said, this Plaintiff did not incur anything for his
20 treatment because he wasn't obligated to pay anybody anything.
21 So, our Supreme Court has given all of us guidance in terms of
22 how to construe the term incurred and you construe it with an
23 eye toward and on the basis of does the insured have an
24 obligation to pay anybody for the treatment they receive.

25 THE COURT: But doesn't that go to the merits of the case

1 rather than whether or not I should certify a class?

2 MR. STIEGLITZ: That's the -- a fair question and I would
3 say partly yes, partly no. It is a merits question. But it
4 is also -- it also goes to her adequacy as a class rep because
5 the law is that an individual that has no claim cannot serve
6 as a class representative.

7 THE COURT: You're saying the class would be better
8 represented by someone who had incurred these additional costs
9 but in that case, the company would've paid it all. So, that
10 would be a -- a moot plaintiff.

11 MR. STIEGLITZ: And Your Honor is right. That's one of
12 the anomalies here because the undisputed testimony is, if you
13 owe it, we pay it. We may not -- if Ms. Dickens -- if Ms.
14 Walters' doctor in Pickens comes back to her and says, ma'am,
15 we need you to pay what Blue Cross discounted, we need you to
16 pay that, we pay it, we pay it. So, there's no -- there's
17 nobody out there under the MedPay coverage -- they can't
18 identify one human being who at the end of the adjustment
19 process has been left owing a provider anything.

20 THE COURT: And in that case, you would have to have a
21 non-participating provider who said I don't acknowledge the
22 discount with Blue Cross and Blue Shield, I will accept Blue
23 Cross and Blue Shield, essentially.

24 MR. STIEGLITZ: And from not only -- not only ---

25 THE COURT: Because if you accept it, you agree to the

1 discounts, don't you?

2 MR. STIEGLITZ: That's exactly right.

3 THE COURT: Again, this is just a theoretical ---

4 MR. STIEGLITZ: Hypothetical ---

5 THE COURT: Hypothetical, theoretical plaintiff.

6 MR. STIEGLITZ: Right.

7 THE COURT: I mean, the only true plaintiff could be
8 someone in Ms. Smith's case -- situation, wouldn't it? Isn't
9 that what we're left with, only people in Ms. Smith's
10 situation.

11 MR. STIEGLITZ: No, because ---

12 THE COURT: I mean who else other than someone like Ms.
13 Smith would be an appropriate plaintiff? Because anyone else
14 would either have their entire bill paid because they didn't
15 have private health insurance and there was no discount ---

16 MR. STIEGLITZ: The only potential plaintiff would be
17 somebody who was left owing a doctor money, owing a provider
18 money, at the end of its process, which is not Ms. Smith. It
19 would have to be Ms. Walters in Pickens whose doctor said, Ms.
20 Walters, either I don't accept the discount or even though I
21 am a member of that network, I still am going to bill you and
22 look to you for that, you know, for that charge.

23 THE COURT: But he can't do that, can he, as a member of
24 the network?

25 MR. STIEGLITZ: No, that would be -- frankly, if that

1 were the plaintiff -- if that were the plaintiff in this case,
2 that would be -- create a set of problems. But that takes us
3 though ---

4 THE COURT: What about the situation where we have a
5 claimant who is like Ms. Smith and the carrier has taken
6 advantage of the discount, saying that that was not incurred
7 but, nevertheless, has paid the limits of its medical pay
8 policy, like she had \$10,000, and what do you do in a
9 situation where the company says, well, I've paid all my
10 limits even though I have taken advantage of the discount?

11 MR. STIEGLITZ: Well, I would believe if understand the
12 Plaintiff ---

13 THE COURT: That person is getting the advantage of
14 greater coverage, isn't it?

15 MR. STIEGLITZ: And one of the -- one of the attributes
16 or one of the results of the approach that Progressive takes
17 is it does preserve the coverage for people, particularly
18 those with lower limits. This goes frankly to the -- also to
19 the adequacy issue, kind of turning the Rule 23 requirements.
20 The discussion we just had goes to adequacy. Can the
21 Plaintiff who has no claim under the law of South Carolina as
22 articulated in the Gordon case, be a class rep for anybody if
23 she doesn't have a claim, issue number one, inadequacy.

24 Issue Number two on typicality, which goes more to
25 typicality, there is case law in South Carolina, well-

1 established case law, again cited in the brief, that talks
2 about how antagonism between the proposed plaintiff and the
3 proposed class if there's -- antagonism defined as a
4 difference with financial interest is a -- if they
5 disqualifier because then the plaintiff -- plaintiff's claims
6 aren't typical of the class. In the leading South Carolina
7 case involved a group of property owners who were challenging
8 a property assessment by homeowner property association. Some
9 of these homeowners were -- have oceanfront property and some
10 had marshland property. The class representative was in the
11 oceanfront owners' category. The Court held the way that
12 assessment would play out, it would play out differently from
13 the marsh owners and the oceanfront owners and, in fact, the
14 position taken by the oceanfront owner class rep could
15 actually adversely impact the marshfront owners and it's got
16 the financial -- the financial disconnect, you don't have
17 typicality and you can't be a class rep. Well, here, you've
18 got an interesting situation where -- and Ms. Baynor (spelled
19 phonetically) testified about this, again it's in the brief,
20 where you've got people of different coverage limits and so if
21 you've got a low ---

22 THE COURT: Typically it's a thousand dollars.

23 MR. STIEGLITZ: They run -- they're typical one is like
24 1,000, 2500, so it is a low type thing -- Ms. Smith had a
25 \$10,000 policy on the higher end. Well, if you utilize her

1 approach, if she wins this case hands down and her approach
2 becomes the new norm, then that approach will chew up the
3 policy limits of the lower limit folks where it will not
4 impact, you know, her at the 10,000 level or, you know, those
5 higher end folks. The lower end folks would -- their
6 financial interest would be conserve and coverage but if I get
7 in another wreck, okay, I've got \$800 reimbursement in this
8 wreck, I don't care that there's a \$400 insurer provided
9 discount out there because I never paid it anyway, so no skin
10 off my nose. But that's 400 more dollars that I've got if I
11 get in another wreck or if I have to go back to the doctor for
12 this, you know, for this wreck. I can get paid for those
13 bills. So, that kind of financial interest -- financial
14 conflict of interest, we think flooding throughout here,
15 frankly, that's another -- I made a little list of kind of
16 hard issues for the Court at the end of the day here. That's
17 another hard issue for the Court, I think, as to how does this
18 financial -- financial disparity, financial, you know,
19 difference in interest play into the typicality argument in
20 light of this South Carolina case law that says that's really
21 an issue. It also goes -- what we've been talking about also
22 goes to the individualized nature of the inquiry. You will
23 have to look at the, the individual policy limits of the
24 different class members. That does become a factor because
25 you may well have a bunch of people who say, whoa, whoa, now I

1 want you to -- I want to preserve my limits so if I have more
2 claims, I can get those paid. You may not care about that but
3 we care about that. So, you're gonna have to look at the
4 individual policy limits. You're also going to look -- in
5 light of the Gordon case, not that overruled good law,
6 perfectly good law, in light of that case, which says under --
7 which involved a MedPay policy with language just like ours,
8 which said you've incurred it -- this plaintiff didn't incur
9 it because he didn't -- wasn't obligated to pay it. That
10 takes you into needing to evaluate every claimant's claim to
11 see whether they were obligated for that unpaid insurer
12 discount because you may have a Ms. Walters in Pickens, who
13 for some reason is obligated to pay that. You may have a
14 bunch of other people, including Ms. Smith, who is not
15 obligated to pay it and so you -- but you can't tell without,
16 you know, getting into the blood and guts of each, of each
17 particular claim. So, I would suggest that's the big
18 individualized distinction here.

19 Another individualized distinction, which cuts against
20 the commonality prong is the fact -- and this is not just a --
21 and the Plaintiff doesn't claim it's just a submit-your-bill-
22 and-we'll-pay-whatever-it-is policy. This is a policy that
23 has conditions to coverage, exclusions, then we adjust your
24 bill. We don't have to look -- there are a variety of reasons
25 why an individual might get paid less than what they submit.

1 As you work through how the policy works -- what if I submit
2 duplicate bills? Well, they're not gonna pay both bills. I'd
3 be getting a reduction from what I submitted but for a reason
4 was tied to coverage. What if I submit bills that aren't
5 caused by an accident? All that's included in the, you know,
6 the adjustor said we have to verify coverage first -- I
7 verified conditions of coverage. If I submit bills that --
8 from a different accident, I'm not gonna get them paid. You
9 got to look at that. If I submit -- if I -- fit within an
10 exclusion, if I'm outside the time limit, you got walk through
11 all that where if a proposed class -- that takes me honestly
12 to another -- I think one of the bigger points here -- if you
13 look at the way they define their proposed class -- I think
14 this is real important factor for the Court. If you look at
15 how they define their proposed class, it would capture all of
16 those scenarios I just described which has nothing to do with
17 the -- with the plaintiff's situation, nothing to do with the
18 question of whether, you know, it's right or wrong to apply
19 that insurer -- to not reimburse that insurer discount because
20 they propose the everybody who got paid less than they
21 submitted is a member of their class. That cannot -- there is
22 no commonality there. And you would have to try to look at
23 each claim and try each claim, okay, why didn't you pay this
24 one? Well, it was a double bill; that kind of thing. At the
25 most, the most -- in terms of the people she's got common

1 characteristics with would be individuals who submitted claims
2 and received a -- and didn't get paid that, that discount
3 amount. That -- no other factor applied to her, we don't
4 contend that she was, you know, excluded -- we don't content
5 anything other than under the law we're not -- she didn't
6 incur that discount. Now, if we're wrong on that, if we're
7 wrong on that, she's only got that factor in common with other
8 people who got paid less because they didn't get paid insured
9 discounts. She's got -- that's not in common with the breadth
10 of the way they defined their proposed class. So, I think it
11 -- I think the Court's got to look really hard at the class
12 they're actually proposing to certify as against the facts
13 here and ask -- if the Court gets to that point of thinking,
14 okay, she has -- maybe she's incurred something, you know,
15 I'll -- I'm over that hurdle -- what kind of class ought to be
16 certified here? At that point, the Court's got to say, okay,
17 what is she really having -- what is the common
18 characteristic. And I think at that point, there's only that
19 one common characteristic, that she doesn't -- she didn't get
20 reduced because of these other non-related reasons. So, you
21 have to compare them -- you have to, you know, shape the class
22 accordingly. But I think there are a wide number -- just to
23 summarize, she's not adequate because under the law of South
24 Carolina, she doesn't have a claim. I think the Court's got
25 to look at that Gordon case and say, how does that case fit

1 with what they're trying to claim here. She's not typical
2 because she's got this antagonistic interest as between her, a
3 high policy holder, and other lower policy holders much like
4 that marshland/beachland -- beachfront situation.

5 There are way more individual issues under the way they
6 propose to approach their class and define it, way more
7 individual issues than common issues. There is testimony that
8 after the unit was formed in June '08, they began to apply the
9 methodology laid out in this chart but that's how you adjust
10 -- that's how you pay a medical bill and decide what to pay on
11 the medical bills. Before you get there, you ask are they
12 covered, any exclusions apply, is it a double bill, is it, you
13 know, caused by something else. All of those inquiries, sort
14 of backroom inquiries, pre-inquiries, before you get to
15 actually adjusting the bill, are individual in nature. Then,
16 you've got the \$100 issue. As the Court knows, you've got the
17 -- I think the twenty -- the fifth prong under Rule 23 is the
18 amount in controversy for each person it has to be over \$100.
19 Again, we cite case law in the brief, South Carolina case law
20 stating that it -- in looking at that situation, you don't
21 take attorney's fees and punitive damages into account for the
22 actual -- you know, actual damages. So, our view would be
23 that any -- if any class was certifiable, you would have to
24 exclude or could only include people whose reduction was \$100
25 or more and if you've got, you know, Ms. Walters in Pickens

1 who was reduced \$32, that doesn't meet the prong of Rule 23 --
2 five and again, that's not included in his proposed class
3 definition.

4 In our brief, we propose a definition that's the only
5 definition that would -- the only definition of people with
6 whom she would have anything in common and we would bring in
7 these other collateral type issues.

8 Finally, in terms of what I think are some of the hard
9 issues for the Court, we've talked about a couple of them. I
10 think one of them is this timing thing. If the testimony is
11 that this National Medical Unit only came into being in June
12 of 2008 and they only began to implement this, this protocol
13 then, how can -- how can you carry a class back -- how can you
14 show any kind of commonality prior to that time.

15 Secondly, the Plaintiff has five causes of action against
16 Progressive Max with whom she had a policy; Direct, with who
17 she had no relationship; Casualty, which adjusted her claim
18 under her Max policy. So, the Court has got to look at not
19 only each individual claim and say is this claim classable?
20 For example, is it a bad faith claim? We've got plenty of law
21 in South Carolina that says bad faith is a focus on the
22 individual handling of a particular claim and the question is
23 was that claim handled in a just and reasonable manner, that
24 kind of thing. That's inherently an individual inquiry.
25 There are allegations about fraud and deceit. Case law in

1 South Carolina says those are individual inquiries. You can't
2 -- you can't class up groups of people saying they were all
3 defrauded and they were all subject to deceit, all of their
4 claims were handled in bad faith. So, it seems to me the
5 Court has got to work through each claim and say is this even
6 a claim that can be classable. I think the answer in many
7 cases is no. We cite law in the brief, Your Honor, that with
8 respect to forward looking relief, a non-policyholder is not
9 an appropriate class rep. Why? Because she no longer has an
10 interest in the outcome. Undisputed was her -- she was only a
11 policy holder for a limited period of time. She's not now a
12 policy holder. So, again, we cite law that discusses the
13 point that if you don't have an interest in the going forward
14 nature of something -- she has an interest in what -- in
15 looking backward but in the going forward, if you don't have
16 in interest in that, you're not adequate or a typical class
17 rep for people who do have an interest going forward. So, I
18 think the Court's got to wrestle with that. Finally, the
19 Court has to wrestle -- we've alluded to this, the Court's got
20 to wrestle with the question of can she possibly be a class
21 rep for insureds of Progressive Direct, never had a policy. I
22 gather they're trying to -- they will attempt to bring in the
23 case policyholders from these other Progressive entities that
24 this Court has already said can't be joined because she's not
25 -- she was never a policyholder with those other entities.

1 So, it's almost like one of these multilayered checker/chess
2 boards where you've got a -- got to look at the different
3 claims: Are those claims classable; over what period of time,
4 is adequate, typical, you know, with regard to those claims;
5 were those claims introduced individualized elements -- you
6 know what defendants are properly brought within this class
7 and what in fact does she -- you know, and what in fact did
8 she -- in light of the fact that she had a contract with one,
9 no relationship with the other and her claim adjusted by --
10 adjusted by the third. And then you've got to filter all that
11 against the \$100 prong and figure out how that belongs if --
12 in any class definition.

13 So, we think -- we think there's a lot, a lot to chew on
14 honestly. And I guess that's why both parties have submitted
15 pretty lengthy briefs to the Court.

16 THE COURT: All right. I intend to take this under
17 advisement. Would you like to ---

18 MR. MASEL: Your Honor ---

19 THE COURT: --- respond briefly?

20 MR. MASEL: I would, Your Honor. Your Honor, there's a
21 couple of things. The Gordon case was first talked about, it
22 stands for the proposition that if somebody gets treated at a
23 facility where there is no charge such as a VA hospital then
24 you don't have a claim under the MedPay portion of your
25 policy. We have the direct opposite. We got treated by a

1 doctor and the bill was \$500. We incurred that liability at
2 that point. And then there was a subsequent payment by the
3 insurance company that discharged that obligation but that
4 doesn't mean we didn't incur it. The issue under the policy
5 is whether or when you measure incurred. And it's not clear
6 and they didn't define it in the policy. The policy itself
7 for Stephanie Smith is titled -- if you want to open up --
8 Progressive Direct, that's her first page. In the
9 underwriting section, it says your policy -- this is Bates
10 document 386 -- your policy is underwritten by Progressive Max
11 Insurance Company, Progressive Direct Insurance Company. So,
12 there are actually two insurance carriers that Progressive has
13 denominated as being the underwriter. So, we dispute the
14 policy is only with Progressive Max but it's both. And that
15 goes to the larger issue with Progressive Casualty being
16 overarching and having direct control over all elements of the
17 marketing flow of the underwriting and handling all the
18 claims. And that's why we do have a direct, a juridical link
19 to Progressive Casualty, the adjustment arm, and that's why
20 any claims that it adjusted through its National MedPay Unit
21 are the same as ours, the same as Stephanie Smith's which is
22 why we are typical of all of those claimants in South Carolina
23 regardless of which carrier they had. It's because
24 Progressive Casualty has interjected itself as the middle
25 person and it's responsible. And for that reason, any claims

1 that it adjusted in South Carolina should be adjudicated or
2 addressed by the Court. Now, the merits of the case, and
3 we've heard over and over again that Stephanie Smith doesn't
4 have any damages and therefore is not a suitable rep but
5 that's more the ultimate issue of one of the common questions
6 on how you define incurred.

7 So, if there were any claims that were paid by
8 Progressive Casualty, Progressive Casualty has already made
9 the decision that the insured incurred a liability. That's
10 already been -- we have class-wide proof. And any bill that
11 was reduced, that is class-wide proof that Progressive
12 Casualty has already said all of those reduced bills, they've
13 already -- that was a incurred obligation. The only issue is
14 what extent. If Progressive Casualty wants to say they will
15 reduce but not incur, they can try to argue that but we have
16 the proof by their own admission with a deduction, that --
17 those liabilities were already incurred; it's just a matter of
18 how much. And so while the Defendant might say that there are
19 some issues, some class-wide questions we have for each
20 individual class member, none of that came out in the
21 deposition testimony at all. And we have class-wide proof
22 that in fact acknowledges that there were liabilities that
23 were reduced. Now, if the Defendant wants to put on a trial,
24 it's testimony and proof that this person A or person C didn't
25 have that, then I guess they can do that. But going forward,

1 there is no and there has been no testimony, there's no
2 affidavit, that everything is treated differently once it gets
3 to Progressive Casualty, it's not and it can't be and that
4 wasn't the intent of the National MedPay Unit, which is why
5 we're here because we have a one shot at -- one-size-fits-all
6 approach which doesn't purport with South Carolina law.

7 As far as any antagonism, there is no antagonism if
8 Stephanie Smith represents going forward those claimants who
9 have open claims. Every claimant is gonna want the benefit
10 from its premium that it paid for the MedPay coverage. And to
11 save, possibly, your MedPay coverage, you know, the last \$500
12 for another wreck, that doesn't make any sense if you've been
13 underpaid. You're gonna want the money now. So, we don't
14 find any antagonism and it's -- the facts are totally
15 different than the Waller v Seabrook case.

16 There have been no other discounts under the adjusters --
17 all the adjusters we talked to -- no other reasons for
18 reducing other than health insurance. There's one provider
19 network that has very little to do with the South Carolinians
20 called Coventry but the bill gets inputted differently in the
21 computer system so it doesn't even show up as a discount. If
22 it's a \$100 charge under this group of doctors, it might be
23 put in a \$60. So, even from that standpoint, there is no
24 distinction, there is no other reason for discounting or
25 reducing the payments to the class.

1 As far as the scope of the class, Your Honor, we defined
2 it as all those persons who didn't reach their policy limits.
3 We don't want the Court to give more money under the policy
4 than the limits. We acknowledge that in our first complaint,
5 in our second complaint. So, we acknowledge that. That's not
6 what we want. We want up to those policy limits and we
7 disagree that the \$100 issue because we're seeking declaratory
8 relief and monetary damages. We don't believe that the \$100
9 issue comes into play. We believe under the Gardner-Newsome
10 case we can include punitive damages and attorney's fees
11 because in that case, the Supreme Court said, well, you're
12 attacking a dealer for charging \$99.50 to every car buyer but
13 under the Motor Vehicle Dealer Act, that amount could be
14 doubled for violation of bad acts, so therefore, you're over
15 the \$100 threshold because we have a \$199 at issue. So, we
16 think this case is more analogous to that reasoning under that
17 Supreme Court decision.

18 So, I don't know if the Court has any questions of me but
19 from a housekeeping standpoint, we would like to file the
20 briefs, however, many of the materials in the briefs are
21 designated confidential and so we'd like to file it under seal
22 so we're just -- I guess need the Court's direction or the
23 blessing of the Court in that regard. I did bring, I think an
24 envelope or two but I want ---

25 THE COURT: Well, I want the briefs out and how will I --

1 if you seal them now, how will I use them?

2 MR. FATA: Just -- I don't have any problem -- I think
3 that's a great idea but I mean for the court file downstairs,
4 Your Honor, with the Clerk of Court's Office, just filing the
5 brief under seal, just for the record. And I'll take any
6 direction from the Court that will advise me with. How should
7 we do that?

8 MR. STIEGLITZ: I only received the brief this morning.
9 What I might propose is let me get back to my office and have
10 a chance to actually look at the material they propose to file
11 under seal and I'll get back to Mr. Fata by the close of
12 business tomorrow on whether we have any objection to filing
13 the material or not.

14 THE COURT: Okay. All right. Okay. And I will take
15 this under advisement.

16 Thank you.

17 MR. STIEGLITZ: Oh, Your Honor, one final housekeeping
18 matter. We -- as Mr. Fata said, we did have an agreement that
19 we want to memorialize in the record. So, with your
20 indulgence, I might just read the agreement in the record.

21 THE COURT: All right.

22 MR. STIEGLITZ: The agreement reached on October 25th,
23 2012 between the parties as follows: Number one, Progressive
24 will not contest any aspect of the South Carolina Rules of
25 Civil Procedure 23(a)(1) numerosity element as it applies to

1 the Plaintiff's pending motion for class certification.
2 Progressive will not contend that applying the \$100
3 requirement of South Carolina Rules of Civil Procedure
4 23(a)(5) would cause the proposed class in a pending motion to
5 fail the numerosity element but reserve the right to assert
6 that persons who do not meet the requirements of South
7 Carolina Rules of Civil Procedure 23(a)(5) should not be
8 included in any class.

9 Number two, Plaintiff will withdraw her pending motion to
10 compel without prejudice.

11 Number three, the parties agree to confer in good faith
12 with a schedule to supplement certain interrogatory answers
13 consistent with the burden upon Progressive from legitimate
14 relevant needs of the case after the Court enters its order
15 for class certification. The parties reserve all rights in
16 the event that they are unable to reach an agreement upon
17 supplementation.

18 Number four, parties reserve all rights with respect to
19 matters not covered by the above agreement.

20 Number five, parties agree to note this agreement in the
21 record in a manner consistent with South Carolina Rules of
22 Civil Procedure 43(k).

23 And I might ask Plaintiff's counsel to confer that that
24 is our agreement?

25 THE COURT: Is that right?

1 MR. FATA: Yes, Your Honor.

2 THE COURT: All right. You want to file that?

3 MR. STIEGLITZ: I will do that, Your Honor.

4 THE COURT: Okay. Thank you very much.

5 All right, gentlemen, I will get back with you concerning
6 a ruling in this matter within the next -- next week I'm gonna
7 be in Greenville. It'll probably be the following week.

8 Okay?

9 MR. FATA: thank you, Your Honor.

10 MR. STIEGLITZ: Appreciate your patience, Your Honor.

11

12 (Adjourned.)

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ORIGINAL

SMITH, ET AL V PROGRESSIVE, ET AL - 2010-CP-26-10502
CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the motion hearing held in the case of Stephanie Smith, et al. versus Progressive, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on October 31, 2013.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson, CVR
Official Reporter

June 2, 2013.

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

2010-CP-26-10502

STEPHANIE A. SMITH,)
INDIVIDUALLY AND AS CLASS)
REPRESENTATIVE ON BEHALF)
OF THOSE SIMILARLY)
SITUATED,)

Plaintiffs,)

vs.)

Transcript of Record
(Motion Hearing)

May 29, 2013

PROGRESSIVE HALCYON)
INSURANCE COMPANY, N/K/A)
PROGRESSIVE DIRECT)
INSURANCE CO.,)
PROGRESSIVE MAX AND)
PROGRESSIVE CASUALTY)
INSURANCE COMPANY,)

Defendants.)

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Nate Fata, Esquire
Attorney for Plaintiff

Jeff S. Cashdan, Esquire
Thomas C. Brittain, Esquire
Attorney for Defendant

Kay H. Richardson, CVR
Circuit Court Reporter

1	<u>I N D E X</u>	
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3		
4	By The Court	3
5	By Mr. Cashdan	4
6	By Mr. Fata	17
7	By Mr. Cashdan	29
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9	By The Court	35
10	Certificate of Court Reporter	38

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E X H I B I T S

14 No.

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16 (There were no exhibits marked during the hearing.)

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1 (May 29, 2013)

2 THE COURT: All right. Whose motions do we have?

3 MR. BRITTAIN: Your Honor, this is Progressive's motion.

4 THE COURT: All right.

5 MR. BRITTAIN: And I have with me, Jeffrey Cashdan, King
6 & Spalding in Atlanta, Georgia.

7 THE COURT: All right.

8 MR. BRITTAIN: And also Zachary McEntyre who is sitting
9 back here; he's with King & Spalding, too. And Zoe Carlisle
10 who is in-house counsel for Progressive.

11 THE COURT: Okay.

12 MR. BRITTAIN: They have been substituted for Val
13 Stieglitz representing Progressive and they have been approved
14 by the South Carolina Supreme Court to participate here in
15 South Carolina pro hac vice.

16 THE COURT: Excellent.

17 MR. BRITTAIN: And that order has been signed by Judge
18 Culbertson.

19 THE COURT: Very well.

20 MR. BRITTAIN: And Mr. Cashdan, briefly, was born and
21 raised in Phoenix; he went to the University of Chicago Law
22 School. He's been practicing at King & Spalding for quite
23 some time, tries cases all over the country, had the privilege
24 of trying cases with Judge Bell.

25 Mr. McEntyre is from Mercer Law School. Ninety percent

1 of his practice is in class action lawsuits. They have
2 associated me and Preston to help them in connection with this
3 case in Horry County.

4 THE COURT: Okay.

5 MR. BRITTAIN: And I've introduced them to Mr. Fata and
6 Mr. Leonard. And, so, having said that, I'd like for him to
7 handle the Motion to Reconsider.

8 THE COURT: Very well. Okay.

9 Yes, sir.

10 MOTION FOR RECONSIDERATION:

11 MR. CASHDAN: Thank you, Your Honor. Would you like me
12 at the podium, Your Honor?

13 THE COURT: No, you may, but if you are more comfortable
14 there at the table that's just fine.

15 MR. CASHDAN: That's fine, Your Honor.

16 And, Your Honor, I know you've seen our papers that we
17 filed on Friday in support of our Motion for Reconsideration,
18 so I will not bore the Court by repeating it all.

19 This is a strange case, Your Honor, I think it's fair to
20 say. The Plaintiff in this case, as you know, suffered a car
21 accident and was injured and received medical treatment. Some
22 of the medical treatment she paid for out of her own pocket
23 and Progressive has reimbursed her one hundred percent of the
24 money she spent out of her own pocket for her medical
25 treatment.

1 THE COURT: Yes, sir. And the issue arises over what she
2 was actually charged and what the hospital's prevailing
3 charges were.

4 MR. CASHDAN: Correct, Your Honor. So, some of the
5 charges, some of the charges from the providers, healthcare
6 providers were paid by her healthcare insurer.

7 THE COURT: Health care insurance and there was a
8 reduction.

9 MR. CASHDAN: And a hundred percent of what they paid,
10 they actually paid, was reimbursed by Progressive to the
11 Plaintiff. So, the Plaintiff has already received everything
12 that's been paid whether she paid it or her healthcare insurer
13 paid it. And the dispute here is that she wants a more of a
14 windfall in our view, what she wants is the amount that was on
15 the original bill from the healthcare provider which she
16 didn't pay, the healthcare insurer didn't pay and nobody is
17 ever gonna have to pay but she wants that money and claims
18 that amount has been incurred. And as you know, the policy
19 language obligates Progressive to reimburse her for reasonable
20 and necessary medical expenses arising from the accident that
21 -- should that have been incurred. And so there's a dispute
22 about that and we think, as you know, that the South Carolina
23 Supreme Court has made it very clear that charges are incurred
24 if they're owed. We have a motion for summary judgment
25 pending on that issue. We also think that that affects her

1 ability to represent the class adequately because she has no
2 claim.

3 What I want to focus on today, Your Honor, in looking at
4 the class as it has been certified and kind of revisiting
5 that, is focusing on the issue of commonality and whether
6 there are common issues that are determinative in this case
7 for the class. Class is broadly defined as any of the
8 Progressive insureds for the entities at issue who submitted a
9 claim ---

10 THE COURT: Including the subsidiary companies.

11 MR. CASHDAN: Correct. Who submitted a claim, anyone
12 that submitted a claim to Progressive, those entities and the
13 claim was reduced and we have now -- that was put in for the
14 claim and was not paid in full. That's the class as proposed
15 by the Plaintiff and entered by the Court. And the problem is
16 that that class as defined does not share a common
17 determinative issue, which is the standard the Supreme Court
18 of South Carolina has set forth in numerous cases including
19 Gardner and the reason is as follows: Some of the people in
20 the class probably are like Ms. Smith. They had the medical
21 provider who billed them a certain amount, that amount was
22 reduced because of their health care insurers and Progressive
23 paid the amount that was actually owed and there's a
24 difference, a gap. But they're not all like that. Many of
25 the claims that are reduced are reduced for other reasons.

1 The most primary example would be if there's a determination
2 made that they're not necessary and reasonable expenses.

3 THE COURT: And I would imagine there are some that were
4 not reduced at all.

5 MR. CASHDAN: There may be some that were not reduced at
6 all. There were some that may've been reduced because
7 somebody hit the policy limits. There may've been some that
8 were reduced for ---

9 THE COURT: No policy.

10 MR. CASHDAN: No policy, it could be fraud, we've put in,
11 in our reconsideration motion, three pages of different
12 reasons why the amount that's submitted might've been reduced
13 pursuant to the terms of a policy. I think I know where the
14 disconnect now is between us the Plaintiff and it comes to me
15 when I look at the opposition to our motion for
16 reconsideration that Mr. Fata handed to us just a few minutes
17 ago when we came into court. The Plaintiffs say Progressive
18 asserts that there was no commonality because the fact finder
19 must make a determination as to whether the medical bills
20 submitted were reasonable and necessary under the policy.
21 Well, that's not what we say and that might be why we have a
22 disconnect. We're not saying that the commonality is not here
23 because this jury in this case will have to evaluate
24 everyone's claim as to whether they're reasonable and
25 necessary. What we're saying is that Mitchell, who applies

1 the -- as part of the underwriting process for Progressive --
2 what happens is the bill comes in and goes through Mitchell
3 who is an outside vendor, Mitchell then after doing some
4 underwriting, including looking at whether the costs were
5 reasonable and necessary, then submits it to our MedPay unit
6 in Florida to further evaluate under our policy. Mitchell
7 makes that determination and there may be a reduction in the
8 amount submitted that we then apply, we, Progressive, apply.
9 So, we're not suggesting the jury has to do it. The point is
10 that for each individual, determining why they didn't receive
11 their full amount, it may be for completely different reason
12 that Ms. Smith. So, if you look back at the Plaintiff's
13 submissions and the proposed order they submitted and look at
14 their common questions, most of them revolve around this
15 question of when was the bill -- when was the bill incurred,
16 when was the coverage amount incurred such that it has to be
17 reimbursed. But for those individuals who had their claimed
18 amount reduced in payment, who had the reduction for some
19 reason other than whether it was incurred or not, they have
20 nothing in common with Ms. Smith. And unfortunately for the
21 Plaintiffs, the only way we can determine who falls in which
22 category is to look at each individual file. There is no
23 place where Progressive summarily captures that information.
24 We can't push a button and sort out those whose claims were
25 reduced for the medical MedPay reduction and those whose

1 claims were reduced for one of the other three pages worth of
2 reasons. That's the problem with this class. That's the
3 problem with this case. And it's a very important practical
4 problem because what the Supreme Court of South Carolina has
5 directed courts to do for very practical reasons is to only
6 certify classes when the plaintiffs can show that the common
7 issue is determinative as to all so that the proceeding would
8 be efficient. What we don't want to have is a four-month
9 trial in this courthouse with every single person who claims
10 to be part of the class, has to get on the stand and explain
11 why was their claim reduced, is it the same as the reason why
12 Ms. Smith's claim was reduced and maybe sometimes they might
13 dispute it. There might be an example where Progressive
14 reduced the claim because it was not a reasonable and
15 necessary expense and the Plaintiff, the class member, might
16 dispute that or have that dispute in front of the jury here
17 just to get to the issue of whether she's like Ms. Smith.
18 That's a real practical problem and what the Supreme Court of
19 South Carolina has said is even when other aspects of the
20 class certification rule have been met, if there's not a
21 common determinative issue, you cannot certify the class
22 because it will lead to a highly inefficient process in this
23 court.

24 THE COURT: But counsel, do we really need to go that
25 far? Do we not answer the question of commonality when we

1 say, was the amount reduced, was the paid amount a reduced
2 amount for whatever reason, for whatever reason, no insurance,
3 there was insurance, the doctor reduced it -- for whatever
4 reason. If it was reduced, I mean, doesn't that define the
5 class for all people who had a reduction for any of the
6 reasons on the three pages.

7 MR. CASHDAN: It doesn't. Let me give you a good
8 example. Let's say I have a car accident, okay. In that car
9 accident, I break my arm, all right. Three weeks before the
10 car accident, I'd broken the thumb on the other hand for some
11 other reason. And I go to my doctor and I get my arm fixed
12 and my thumb fixed and I submit both of the bills to
13 Progressive and I say, please pay me for my arm and my thumb
14 because they all got hurt in the car accident. And
15 Progressive looks into it and says, the thumb wasn't part of
16 the car accident, that's not covered. I am in the Plaintiff's
17 class because my claim would have been reduced by Progressive.
18 I'm in the class even though my claim was reduced for a reason
19 that has nothing to do with the legal issue of Ms. Smith's
20 claim. Ms. Smith's claim is asking the question of when the
21 reason for the reduction is because the medical health insurer
22 has negotiated a better deal and that amount isn't actually
23 due, that's ---

24 THE COURT: But isn't that a question of a claim not
25 being covered as opposed to a covered claim that was paid by

1 Progressive but paid at a lower amount because there was a
2 reduction for whatever reason.

3 MR. CASHDAN: Sure. But there are lots of reasons why
4 the claim could be reduced that has nothing to do with the
5 legal dispute that brings us here today. The legal dispute
6 that has brought us to this court is whether a claim ---

7 THE COURT: But aren't these all MedPay claims?

8 MR. CASHDAN: They're all Med ---

9 THE COURT: Every one?

10 MR. CASHDAN: They are all MedPay claims but they're not
11 all being reduced for the same reason. The issue in this case
12 is whether Ms. Smith has incurred the charge when her medical
13 provider sent the bill.

14 THE COURT: And there's the issue right there.

15 MR. CASHDAN: Right.

16 THE COURT: Did you pay everything that was -- all
17 insured charges that were incurred or charged initially. You
18 know, you may've paid a lesser amount or the insured may've
19 paid a lesser amount but the issue is whether or not they had
20 a valid claim and you paid less than that claim. Isn't that
21 the real issue here?

22 MR. CASHDAN: No, I think the real issue, Your Honor, is
23 whether the claim that has been reduced, the payment that's
24 been reduced has been reduced properly because of
25 Progressive's view that it wasn't incurred yet or improperly

1 because of the Plaintiff's view that it was incurred at that
2 time. But there are some people, who have a reduction in the
3 amount that's paid where the fight is not over whether it was
4 incurred or not, we might agree it was incurred but we've
5 reduced it for some other reason under the policy.

6 THE COURT: And that person wouldn't be in the class ---

7 MR. CASHDAN: That person is in the class though because
8 the class is defined to include anybody, all insureds, who
9 submitted a claim and whose claims were adjusted and who did
10 not receive payment in the amount of the medical bills. But
11 there might be people who Progressive agrees incurred the
12 claim but the amount that they received was adjusted downward
13 for some other reason under the policy. Maybe it's because
14 Progressive made the decision that it was not a reasonable and
15 necessary charge.

16 THE COURT: And can't we fix that, though?

17 MR. CASHDAN: We can't. Here's why we can't fix that.
18 The best way to come up with to fix that would be to redefine
19 this class. So, take the class that the Plaintiffs have
20 proposed and throw it out and instead say, we're only gonna
21 limit the class to people who submitted claims, whose claims
22 were adjusted and who did not receive payment in the amount of
23 their medical bills because Progressive determined they had
24 not incurred the charge, you add that on, right? Here's the
25 problem, we don't have a way of indentifying those people

1 without actually looking at every file. And in some
2 instances, we have to actually talk to them. And let me tell
3 you why, because this is not a small problem. This problem
4 has come to light not simply at the beginning of the case, but
5 even -- was even brought more clearly into focus when you were
6 trying to identify, pursuant to your order, the addresses for
7 these people. So, that's really what focused us even more on
8 this issue. The problem is that in the Progressive file
9 system, we don't track claims by insureds, we track claim by
10 claim, they call them features. But in any event, somebody
11 sends in their claim and they have their medical bill and then
12 there's a reduction on the amount that's going to be paid.
13 It's that reduced amount that's entered into our system. It's
14 not the amount of the original bill. It's not entered in the
15 computer in any way, shape or form. So, for us to figure out,
16 number one, what's the difference between the amount billed
17 and the amount paid, we have to go into the file, physically
18 into the file and grab the paperwork and compare it. There
19 might be ten different bills that were submitted. We have to
20 get all of those and compare them. Then we have to ask the
21 question, why was it reduced. We can tell you how many claims
22 were reduced but we can't tell you why without looking at each
23 individual file. So, to figure out if the people that had
24 their claims reduced are like Ms. Smith or not, we have to
25 look at them individually. And the Supreme Court has said

1 those are the kinds of cases, practically, that are more
2 efficient to try separately than to try together as a class
3 action. Because if you try these together as a class action,
4 we're gonna spend the first set of days, weeks, months,
5 whatever it ends up being, figuring out who is in and who is
6 out of the class. The Plaintiffs can't even come up with a
7 damage number until they know who is in and who is out.

8 In their brief that we just got handed, the Plaintiffs
9 say the National MedPay Unit for Progressive has never
10 declined or reduced a claim based on the reasonable and
11 necessary clause within the policy. That's a little bit of
12 trickiness there, Your Honor, because what happens is
13 Mitchell, who was the third-party vendor involved in our
14 adjusting process, they make that determination before. And
15 the Plaintiffs know that because they deposed someone named
16 Robert Cole who works for Progressive who told them that and I
17 can read the deposition testimony into the record if you want,
18 Your Honor, that that's known. So, by the time it gets to the
19 National MedPay Unit, they're looking at a different issue.
20 But there is no doubt at all that this happens. Now, the
21 Plaintiffs rejoinder to us is to say, okay, well, there's this
22 group of people out there and some of them may qualify to be
23 part of our class and some may not but this is Progressive
24 just being hypothetical. Actually, the shoe is on the other
25 foot on that issue, Your Honor; it's the Plaintiffs' burden,

1 not our burden to show that this class is properly defined and
2 that the common issue is determinative. They're the ones that
3 are hypothetically telling you, everyone is the same; don't
4 worry about it, it's a common issue. It's their burden to
5 come into court with evidence that shows that the common issue
6 for these people is determinative and they share it. They
7 haven't done that. They've got Ms. Smith and then they've got
8 a group of people and we don't know why those people's claims
9 were reduced and what they're telling you is, oh, it's all the
10 same. It's not all the same. And we have to figure that out
11 and we haven't. Neither side has figured that out.

12 Under the law, the tie in that instance goes to the
13 Defendants because it's their burden of proof. They're the
14 ones who had to come into court and say, Your Honor, here is
15 the collection of people whose claims have been reduced and of
16 those people, fifty-eight percent of them, or whatever number
17 it is, share a claim with Ms. Smith because their claims were
18 reduced because they had their medical provider had an
19 insurance contract and a contract with an insurer it was
20 reduced because Progressive said the amount wasn't incurred.
21 They're just like Ms. Smith. If we answer Ms. Smith's claim,
22 we answer all their claims. But, they haven't done that.
23 They haven't done that because they didn't develop the record,
24 they didn't develop the evidence and because they know, they
25 know the only way to do that is gonna be to look at every file

1 that Progressive has individually and that's not what they
2 want to do. What they want to do is take Ms. Smith's claim,
3 her grab for money, she doesn't owe, nobody owes. She wants
4 to take that grab and they want to make it into a large class
5 action and then try to leverage that against Progressive. The
6 law doesn't let them do that. There's a real strict
7 governance of class actions in South Carolina. And the
8 Supreme Court has made it very plain, you have to satisfy all
9 the elements, every single one of them to get a class
10 certified. It's not enough to say that they're -- they're
11 typical and they're -- there's a lot of them and they're all
12 small claims. You have to satisfy every element and they
13 cannot meet the commonality here.

14 The other place where they fall short, Your Honor, is in
15 typicality. I'll just touch briefly on that. Ms. Smith does
16 not have a policy any more with Progressive. She's done. So,
17 while they claim that they want declaratory relief, looking at
18 the future, Ms. Smith doesn't care about the future with
19 Progressive. She doesn't care if the rates go up because
20 she's no longer paying those rates. She doesn't care how
21 people are treated in the future; she wants her money. This
22 is a real live important issue because some of the claimants
23 who might be dragged into this case, might be people who say,
24 listen, I want to save my coverage for when I really need it.
25 Don't call me up and give me \$100 that I never owed and then

1 tell me when I'm really injured I have no more coverage
2 because I've hit my limit. But Ms. Smith, she doesn't care
3 about that. She wants her money and she's done. And so, in
4 that sense, she's trying to represent people who are
5 absolutely not like her at all. Their current Progressive
6 insurers -- insureds, they care about what the policy says
7 today and in the future. Ms. Smith is the wrong person to
8 represent them in this class because it seeks to represent
9 people now and in the future and to seek declaratory relief
10 for the future. It's not the vehicle for Ms. Smith to get her
11 money.

12 Your Honor, unless you have any other questions, I'll sit
13 down.

14 THE COURT: Thank you.

15 Let me hear from Mr. Fata or Mr. Leonard, whoever will
16 argue.

17 MR. FATA: Thank you, Your Honor.

18 Your Honor, a couple of preliminary matters, we received
19 the Defendant's brief on Friday and we did try to file a brief
20 as fast as possible but that happened to be today and I can
21 hand up a copy of the brief for Your Honor.

22 Your Honor, Defendant's arguments are a rehash of what we
23 heard last fall. And I'd like to, because the focus is on the
24 commonality, commonality, I'd like to spend a little bit of
25 time as far the background. The Court may recall that the

1 National MedPay Unit is Progressive's way of handling all
2 these claims. It's MedPay Unit handles thirty-eight or forty
3 states. There's a team of fourteen adjusters that handle
4 South Carolina and fourteen other states. And the problem
5 Progressive has is that it has decided to streamline its
6 adjustment process for MedPay claims in Jacksonville, Florida
7 and to have these adjusters look at the policies and apply the
8 same definition of incurred to all the Progressive policies in
9 the fifteen states the same way, regardless of state law.
10 Virginia has a statute that says incurred means after they
11 would've been any health insurance benefits to write-down that
12 net sum. The South Carolina Code of Laws does not contain a
13 similar statutory provision. We have two other statutes at
14 issue in this case that are commonly shared with all class
15 members as far as the proof of loss requirement and as far as
16 no set off or subrogation. But more importantly on the
17 incurred level is one-size-fits-all allows Progressive,
18 through the National MedPay Unit to systematically and
19 uniformly address all the MedPay claims in the fifteen states
20 that one adjuster might handle. The standard operating
21 procedure that was part of the Plaintiff's memorandum in
22 support of class certification that was filed with the Court
23 is only about a paragraph long on how to adjust the claim for
24 MedPay. The only thing that is reviewed by Progressive is
25 what did the hospital charge and what was actually paid by the

1 health insurance carrier. So, that's it. In fact, there's a
2 quote in it that says we pay same damages as health insurance.
3 So, there's a conflation of damages and health insurance but
4 that's what Progressive does. That's the only way it can
5 systematically process all these MedPay claims and have some
6 type of uniformity.

7 So, what did we do, we talked about developing the record
8 in counsel's argument. We did develop the record. In the
9 order, the Court was very clear on all the testimony that was
10 induced from our trips to Jacksonville. We had three separate
11 trips to Jacksonville. The adjuster testified, I don't, I
12 don't look at anything other than what health insurance paid.
13 I put in three pieces of that into the computer system, that's
14 the total charge than what health insurance paid. And then I
15 know how much I need to send the insured and that's what
16 health insurance paid. All that information is already in the
17 computer system. There have been supervisors of the adjuster
18 in charge of the Smith file who testified that he is unaware
19 of any other write-downs. He's not aware of any incidents
20 where a bill was re-priced. That deposition testimony is
21 cited in the Court's order. We went through all the possible
22 exceptions and none of the adjusters, no one testified that,
23 yeah, we look at reasonable and necessary. So, Progressive is
24 arguing the hypothetical. What about this, Judge? But we
25 have developed the factual record. There is no deviation; in

1 fact, there can't be, because that would defeat the whole
2 purpose of the National MedPay Unit which is to systematize
3 processing all of these claims regardless of variations in
4 State law. So, as far as the Court's order, it is well
5 grounded on pages three and four and five that there are no
6 variations. The reductions come from the health insurance,
7 contractual adjustment or credits. That's where the
8 reductions come.

9 The class is defined. It's ascertainable. We had asked
10 in interrogatories, responses to which were in the Court's
11 file that we made part of our exhibits and it's clear that the
12 Defendant can identify those persons who had reduced bills.
13 Now, at some point, if the Defendant wants to raise an issue
14 that some of these bills were reduced for other reasons, then
15 I'm sure they can gather an affidavit to say that. But to
16 date, Your Honor, after three years, since 2010, we don't have
17 any affidavits from Progressive saying, you know, on these
18 sixteen examples, by the way, the bill was reduced for another
19 reason. There is nothing in the record by the Defendants that
20 show that any of these hypothetical arguments have any merit.
21 Instead, what we know is that there are common issues. We
22 have common statutes that apply to all the insureds and have
23 to be applied equally. We have common policy language that's
24 been interpreted a certain way. Well, that interpretation has
25 to be applied to all insureds. We can't pick and chose. And

1 so those are common issues that clearly need to be addressed
2 with the class action device.

3 Now, the claims process might result in some type of
4 argument by the Defendant and we'll deal with that at that
5 point. But for purposes of Rule 23, we're here to fulfill the
6 elements. Ms. Smith is a typical class representative. She
7 did have a policy from the two Defendants Direct and Max which
8 was adjusted by Progressive Casualty which operates the entire
9 insurance business under its joint servicing agreements. She
10 has direct connection to all three of those. She's just like
11 every other progressive insured that she seeks to represent
12 and if she was still a policy holder today, which is the big
13 reason that counsel gives to say she's atypical, I'm sure
14 counsel would say, well, Judge, if it was really that bad and
15 she really didn't like Progressive, why did she keep renewing
16 her policies because this case is drug out for three years and
17 she keeps sending us premiums. So, it's -- either way, she is
18 a typical class representative. She represents everyone that
19 has this policy that needs this issue addressed because
20 they're short paying on the MedPay. That's the Plaintiff's
21 position and that's what the Court articulated in the order
22 and substantiated. So, the theoretical arguments while they
23 might sound good, no one in Jacksonville testified to that.
24 And can the data be pulled, there is nothing in the record
25 that says the data cannot be pulled and we've had many

1 discovery disputes and we've reached an agreement that we
2 would talk about, you know, getting the data after this
3 hearing and how we can work that out. But, you know, in the
4 past, we have been given information in the supplemental
5 discovery responses about the number of features and there's
6 never been any type of disclaimer that these were done for
7 different reasons. These reductions were done for different
8 reasons. And there can't be because the standard operating
9 procedures by Progressive that are in the record don't allow
10 for that. And Progressive has been able to produce
11 spreadsheets showing the policy number, the amount charged,
12 and the amount reduced. We have all that. If there's no
13 coverage, there's not gonna be a reduction, there's just not
14 gonna be a payment. But if there is coverage, which all these
15 class members have that in common, there was a determination
16 of coverage because an amount was paid, it was just short.
17 There's obviously coverage. Progressive has already
18 determined that. If it wants to later argue that, well,
19 there's really no coverage, you know, that would be, I guess,
20 maybe something they could bring up at trial or we're gonna
21 ---

22 THE COURT: Mr. Fata, can you tell me a better way that
23 we could describe the class? My intention was to include in
24 this class all persons who received benefits in an amount less
25 than the billed amount for properly incurred medical costs.

1 That is costs that were the result of the automobile or the
2 accident of which they were involved. That's what I want.
3 That's where I was going with this. Now, I don't know whether
4 that's gonna be easily identifiable or that group is gonna be
5 easily identifiable. But that's what I intend to be in the
6 group, those persons who received a benefit in an amount less
7 than the billed amount for property incurred medical expenses.
8 And I use the word incurred, I wish I had a better word to use
9 because we seem to be hung up on that word. That's what I
10 said billed amounts.

11 MR. FATA: So, if we had ---

12 THE COURT: If it's a covered expense, medical expense,
13 and it was billed for one amount and the benefit they received
14 was less than that, it was reduced. That's the class that I
15 think we should be looking at.

16 MR. FATA: Your Honor, if there was a reduction from \$10
17 to \$7, wouldn't that automatically mean that it was covered?

18 THE COURT: Well, I don't know.

19 MR. FATA: Because that would be our position but I think
20 that's the objective way to -- as far as the class ---

21 THE COURT: I want to avoid inclusion in the group of
22 anyone who, as counsel said, might have had a pre-existing
23 injury or an unrelated injury or after the accident he breaks
24 his thumb the next week and while he's seeing the doctor, he
25 says how about, you know, set my thumb or take care of my

1 thumb here. And the doctor bills it as he properly should and
2 they submit that bill with the bill for the broken shoulder
3 that they received in the automobile accident. If Progressive
4 has excluded that, I think they properly did so and, you know,
5 I don't think you should be able to say that was a reduction
6 of the type that you're complaining of here in this lawsuit.

7 MR. FATA: In that scenario, Your Honor, then that
8 particular bill for the thumb, the thumb that's not related to
9 the accident, that particular bill would not have been paid
10 anything because Progressive would have determined that it's
11 unrelated, it's not part of the covered event.

12 THE COURT: But ---

13 MR. FATA: What I would suggest ---

14 THE COURT: Are you gonna look at it and say, okay,
15 here's a bill for \$500 which includes the thumb, we're only
16 gonna pay \$300 because, first of all, there's a reduction in
17 the amount because of your insurance company and we're gonna
18 also filter out everything related to the thumb and you look
19 at the difference in there and it's a greater number than what
20 we're looking at in this class.

21 MR. FATA: What I would say with that, Your Honor, is
22 that might be part of the claims process, it's a ---

23 THE COURT: What we're looking at is policy reductions.
24 What was the policy of the company for reducing this
25 particular medical expense. You know, you -- I don't want to

1 say incurred again -- you have a bill from a medical provider
2 it's for \$500 and for whatever reason, \$300 was paid and the
3 insured was reimbursed \$300. Well, if there is any reason
4 other than the fact that an insurance provider got the benefit
5 of a better deal, getting it reduced from 500 to 300, is there
6 any other reasons that -- I don't want those people in that
7 class. Now, I want to know if there's a way we can identify
8 the class that will include only those -- we know what we're
9 looking at. What we're looking at here is people who had
10 insurance, their insurance company got the benefit of a better
11 deal from the insurance provider and Progressive felt that
12 they only had to pay the amount that was accepted by the
13 medical provider. That's what we're looking at. I don't want
14 everything else in here. I don't -- that's what I want. We
15 know what we're looking at. I mean, can you think of any way
16 we could define this class any more specifically?

17 MR. FATA: If we include persons who submitted charges
18 and had health insurance and -- let me back up, if we had
19 persons who submitted claims and the charges were reduced in
20 some parts, there was some payment, then for sure that person
21 would be a class member. Maybe the amount of the bill at
22 issue would be addressed later. In other words, if that
23 person, if I have a thumb and a hand problem and the thumb is
24 not covered but the hand is, the bill is going to -- if it
25 would include the thumb and the hand and it is reduced, that

1 means I'm an insured person for at least the hand and that I'm
2 a class member, at least to some respect. So, there should be
3 ---

4 THE COURT: I think so.

5 MR. FATA: --- so there should be notice. So, I get that
6 if there's just the guy with a thumb that's not covered and
7 there's a submission for the thumb hospital bill and it's
8 denied and there's zero payment, then that person is not gonna
9 be part of the class because there wasn't reduction, there was
10 an elimination. There was no payment to that class member.

11 THE COURT: I understand.

12 MR. FATA: So, we do have a definable group with using
13 the persons who received a reduced amount but at least they
14 had received an amount. If you received a reduced amount,
15 then you're part of the class. And then, the extent of your
16 damages would be something for the trial and, quite frankly,
17 we don't have any testimony here today as to what really --
18 you know, we continue to dispute that this really happens at
19 Progressive's office and we could get into that for the
20 merits.

21 This case, Your Honor, from what I've gathered, there
22 might be, you know, a thousand people. It's not a 50,000
23 person class.

24 THE COURT: How you gonna handle those people whose
25 damages don't reach the statutory minimum?

1 MR. FATA: Your Honor, with the declaratory relief we're
2 asking, that's one of the components of Rule (e) -- or 23(e),
3 so -- because we're asking for declaratory relief, I think
4 that in itself takes it out of the \$100. But the average
5 reduction is well over \$1,000. Ms. Smith has at least \$2,000.
6 But the discovery responses that are in the record show that
7 clearly, that no matter which way you cut it, there might be 7
8 or 800 \$1,000 of reductions and there's three or four hundred
9 people. So, on average, I think we're well within that --
10 with all the other relief we're requesting as well.

11 But getting back to the class definition, if there has
12 been a reduction and a bill, then you're part of the class.
13 And whether, you know, you get everything you think you're
14 entitled to as a class member, that's something that we'll
15 have to ferret out and do some discovery on for trial. But
16 we're kind of conflating the damage model for trial with class
17 membership. And so objectively, coming up with objective
18 parameters, the National MedPay Unit of Progressive knows what
19 was the charged amount and what was the health insurance
20 allowed amount. That's entered into the system. That's
21 what's in the record. And because of that, there's no
22 variation ---

23 THE COURT: All right. Let me ask you, is that number,
24 that charged amount, a filtered charge amount -- I mean, when
25 you say, or when they refer to the charge amount, have they

1 already deducted out any charges that may have been made for
2 uncovered problems, like the thumb that was broken the next
3 week?

4 MR. FATA: There's nothing -- I'm not aware of any,
5 there's nothing in the record that says that. We ask all
6 kinds of questions and no one came up with an example or said,
7 well, we do this on certain occasions. There is no -- there
8 is a component of reasonable and necessary ---

9 THE COURT: I just wondered if that billed amount is the
10 covered amount.

11 MR. FATA: I would say, Your Honor, Progressive has
12 already determined that it was necessary. Part of the policy
13 ---

14 THE COURT: Okay, there we go. Now, we're getting
15 somewhere.

16 MR. FATA: --- is necessary. And I asked in the
17 deposition -- and this is in the order -- does anyone
18 determine reasonable and necessary? No, I don't know of
19 anyone. Anyone in your group, your team of fourteen other
20 adjusters? No, I don't know of anyone. So, you're unaware of
21 any instance that a bill was re-priced? No, I don't know that
22 either. Necessary meaning related to the collision, the
23 occurrence.

24 THE COURT: Right.

25 MR. FATA: That is part of the determination that is in

1 the policy and no one at Progressive testified that they do a
2 determination of reasonable or necessary and no one testified
3 that they knew anyone who did that at Progressive. The
4 supervisor said, we don't do that. And, again, I know I come
5 back to this but the ---

6 THE COURT: Well, does Mitchell do it?

7 MR. FATA: I'm not aware of Mitchell doing that. That
8 hadn't -- that wasn't in the record. The record, Your Honor,
9 does not have any testimony or affidavits from Mitchell that,
10 this is how we scan all the bills in. There's a manual input
11 of data by Dorothy Lane, this adjuster in the Smith file,
12 putting in all the charges and the putting in the health
13 insurance allowed amount.

14 THE COURT: Well, the problem here is obvious; if there's
15 no class, there's no action, because of the amounts involved.
16 Isn't that right?

17 MR. FATA: That's right. Small amounts, Your Honor.

18 THE COURT: Okay.

19 MR. CASHDAN: Your Honor, may I briefly respond?

20 THE COURT: Yes, sir.

21 MR. CASHDAN: Your Honor, first of all, with your
22 permission, I'll read something now and with your permission
23 will submit this in writing for the record.

24 THE COURT: Okay.

25 MR. CASHDAN: If you would just read from the June 1st,

1 2012 deposition of Robert Cole that Mr. Fata took. Question
2 -- now, Mr. Cole works in the Jacksonville unit.

3 THE COURT: Does he work for Mitchell or Progressive.

4 MR. CASHDAN: He works for Progressive.

5 THE COURT: Okay.

6 MR. CASHDAN: And he's asking about full price and --
7 what would be -- question, What would be the determining
8 factors as to whether it was or was not released at full
9 price? Answer, It has to go through Mitchell first to see if
10 it's either reduced by Coventry, which is Progressive's
11 system. It might even be the usual and customary code that
12 comes through. So, we usually wait until it goes through
13 Mitchell, we usually don't assume. And you'll see in the
14 testimony, what he's discussing is the fact that the people in
15 the Jacksonville unit don't make an assumption about what the
16 proper usual and customary is, that's what they employ
17 Mitchell for. So, it's a little bit too clever to say no one
18 at Progressive is doing that. This is somebody Mr. Fata
19 deposed from the Progressive Unit discussing the issue.

20 Now, you asked a question earlier, I think you had
21 exactly the right question, Your Honor, you were asking Mr.
22 Fata is there some way to distinguish between the amount
23 that's been submitted in the bills and the amount that's paid
24 and why there's that difference. Unfortunately, the answer is
25 yes if you look at every file individually. That's the

1 problem. And we're not guessing, this isn't speculation. Let
2 me read to you from the February 12th -- February 17th, 2012
3 discovery responses from Progressive which were submitted ---

4 THE COURT: How many people do you think are in this
5 class?

6 MR. CASHDAN: As properly defined, I'm not sure, hundreds
7 I would guess but maybe lower. Let me read -- this is --
8 these are the discovery requests that were actually put in the
9 record in the original briefing by both the Plaintiffs and by
10 the Defendants. And reading from the second supplemental
11 response, and this was a request that had to do with
12 identifying the amount of reductions, okay. And what the --
13 what Progressive said is, the Defendants further note that, as
14 also testified to by Mr. Silver, who is with Progressive, the
15 amount of the medical charges entered by the adjuster or claim
16 representative may differ from the gross amount charged by the
17 medical provider. That's the difference we're talking about.
18 The Defendants' computer bases contain and store data for the
19 amount -- for the charges as entered, what are we paying, but
20 not the gross amounts of the medical provider bills. The
21 gross amount of the medical provider charges could only be
22 determined by a manual review of the claim files involved and
23 manual review of each bill from each medical provider. So, in
24 other words, just to figure out the amount of the reduction,
25 we have to go back to the files because what Progressive does

1 is it enters into its system how much we're paying, not how
2 much the bill was for. So, just to figure out the difference,
3 we have to do a manual review. And then to your question,
4 Your Honor, then we can figure out why, why was there a
5 reduction. You could have an instance where somebody incurred
6 a \$1,000 charge and we all agree that it was incurred, a
7 \$1,000 charge for health care but it wasn't deemed necessary
8 and reasonable and so Progressive only paid \$600 of it. That
9 could happen. That would be a reduction. It would have
10 nothing to do with Ms. Smith's claim because there would be no
11 dispute that it was incurred. Our dispute with Mrs. Smith is
12 not about reasonable and necessary where applying that. So,
13 what are you gonna instruct the jury? What do you instruct
14 the jury when you want to conclude -- decide how to rule on
15 Ms. Smith's claim. And the question before the jury is, was
16 this charge incurred or not. What are you gonna do with those
17 people who everyone agrees the charge was incurred but it was
18 reduced because it wasn't deemed medically necessary or
19 reasonable. What are you gonna do with the class members who
20 have charges -- that have claims reduced when everyone agrees
21 they were incurred but they were reduced because they weren't
22 within three years of the accident or they weren't associated
23 with the accidents sufficiently or any of the other reasons
24 why Progressive can turn down a claim or reduce a claim even
25 when the claim has been incurred.

1 Now Progressive has a policy, if our insured is out of
2 pocket, we pay. So, if Ms. Smith had paid this extra amount,
3 we would've paid her back even if she didn't really owe it.
4 What we're talking about here are reductions that occurred
5 when nobody is out of pocket. That's what we're talking about
6 and that's the problem. So, when you ask Mr. Fata, how do you
7 identify these people; the only way you can identify them is
8 by an individual review of the file and you might even have to
9 put them on the stand to ask questions cause the file might
10 not be clear. Let's see, Progressive reduced this 200 on the
11 thumb injury, when did that thumb injury happen? Progressive
12 says it happened afterwards, is that true? That's what we're
13 talking about having in this court for every single class
14 member. Those instances are where the Supreme Court is saying
15 don't certify the class. I know your heartstrings are there
16 for the people who have individual claims that are very small
17 but what the Supreme Court says is, that's not enough. All of
18 the elements have to be satisfied. Each and every one of
19 them, because what we're concerned about here is not some
20 academic exercise in when is the class appropriate. We're
21 talking about the practicalities of really standing up in
22 court and trying a case and how efficient will it be.

23 The other thing I want to mention is Mr. Fata accuses us
24 of conflating the damages issue with the -- with the class
25 issues, we're not doing that at all. What we're saying here

1 is this class can't be ascertained with common determinative
2 people. People with common determinative issues, that's the
3 problem with this class. This isn't conflating damages. The
4 fact of the matter is he's got an awful time proving damages
5 on a class by basis as well which further demonstrates the
6 uncommon issues. But the problem here is we're not -- we just
7 don't know that most of these people look like Ms. Smith. And
8 whose fault is that? Well, I'm not gonna blame anyone. Maybe
9 it's Mr. Fata's fault because he didn't do the right
10 discovery. Maybe it's Progressive's fault. Who knows whose
11 fault it is; I'm new here. But what I do know is its
12 Plaintiff's burden. There's no disputing that. It is
13 Plaintiff's burden. And so, if we have a record that doesn't
14 allow the Court to know whether most class members are the
15 same, then that record requires denial of class certification.

16 Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. FATA: Your Honor, very briefly ---

19 THE COURT: All right.

20 MR. FATA: -- if I can respond. Plaintiff class would
21 object to any introduction of the new evidence like the Robert
22 Cole deposition. That wasn't before Your Honor in the fall
23 when we argued class certification. To introduce new evidence
24 at this point -- there were a couple of other items that were
25 attached to the memorandum, the Silver deposition, that was

1 Exhibit H to the most recent Defendants' memorandum; Exhibit G
2 -- it seems like we're going back to square one and we object
3 and we would move to strike those.

4 THE COURT: All right. That's noted. I'm gonna allow
5 it. Okay.

6 MR. FATA: Your Honor, one last thing. Progressive does
7 print out the amount charged and the allowed amount when it
8 adjusts a claim. So, it actually has the charged amount and
9 the amount allowed in its computer system, so we'll have ample
10 evidence at trial.

11 THE COURT: All right. What else do we have in this
12 particular case for today? I know there's several ---

13 MR. FATA: Your Honor, we have a scheduling order issued
14 with respect to the Court ordered certain matters to be
15 completed by -- mediation was to be completed by July 1st.
16 We're probably not in a position to do that. We talk about
17 mediation in August. So, we will need to have amended
18 scheduling order. We can talk and submit something to the
19 Court.

20 THE COURT: How about let me -- I want to take this under
21 advisement. I'll give you a ruling in the next probably three
22 weeks. And let's continue these other motions over to the
23 next term which will be in thirty days. Let me rule on this
24 before we address those matters. Okay?

25 MR. CASHDAN: Your Honor, one of the items being asked

1 for relief from was the deadline to give the Plaintiffs the
2 names and addresses of injured class members. We had filed a
3 motion asking to hold off on that until after you rule on this
4 particular motion. Can we ---

5 THE COURT: Yes. What kind of timeframe are we talking
6 about? What do I have now?

7 MR. CASHDAN: Nothing on ---

8 THE COURT: What's the deadline now on the scheduling
9 order?

10 MR. CASHDAN: The deadline now was, I think, was within
11 ten days of your class certification order. We filed the
12 motion before that and we had told the Plaintiffs' counsel
13 that we thought it was inefficient to gather up that
14 information until we knew if you were gonna reconsider ---

15 THE COURT: Well, I actually think that that's probably
16 not enough time even if I were order that -- or deny the
17 motion to reconsideration -- to reconsider. You're probably
18 gonna need a little more time than that. Wait until I hear --
19 you hear from me on this order and then I will probably give
20 you more like thirty days. Okay? All right.

21 MR. CASHDAN: Thank you, Your Honor.

22 MR. FATA: And that's something that Mr. Brittain and I
23 had already discussed.

24 MR. CASHDAN: And we have discussed with Mr. Fata that,
25 you know, our position is that once you rule on this motion

1 that's pending, Your Honor, we can talk about other issues,
2 and if we have to submit revised proposed schedule to you, we
3 can do that, Your Honor.

4 THE COURT: Okay. All right. Thank you, gentlemen.

5 MR. FATA: Thank you, Your Honor.

6 MR. CASHDAN: Thank you, Your Honor.

7

8 (Adjourned.)

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ORIGINAL

Smith v. Progressive - 2010-CP-26-10502
CERTIFICATE OF COURT REPORTER

38

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the motion hearing held in the case of Stephanie A. Smith v Progressive, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on May 29, 2013.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson, CVR
Official Reporter

November 1, 2013.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
) FIFTEENTH JUDICIAL CIRCUIT
) CIRCUIT CIVIL ACTION NO:
 COUNTY OF HORRY) 2010-CP-26-10502

STEPHANIE A. SMITH)
 on behalf of herself and)
 all others similarly)
 situated,)
 Plaintiff,)

-vs-

PROGRESSIVE HALCYON)
 INSURANCE COMPANY, n/k/a)
 PROGRESSIVE DIRECT INSURANCE)
 CO., and PROGRESSIVE MAX, AND)
 PROGRESSIVE CASUALTY)
 INSURANCE COMPANY,)
 Defendants.)

STATE OF FLORIDA)
 COUNTY OF DUVAL)

Plaintiff's Notice of taking 30(b)(6) Deposition:

DEPONENT: DOROTHY C. LANGE,
 Progressive Claims Representative

DATE TAKEN: August 3, 2011
 TIME: 9:30-1:43 p.m.
 LOCATION: Akerman Senterfitt
 50 North Laura Street
 Jacksonville, Florida

REPORTED BY: Cindee B. Deen, RPR, FPR
 Registered Professional Reporter

- - -

THE CAPTION COMPANY, INC.
 4560 Harbour North Court
 Jacksonville, Florida 32225
 (904) 642-4464 CindeeDeen@aol.com

COPY

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- - -

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08:40:36 1 A Northern California, north of Sacramento.

08:40:39 2 Q So in 1999, you moved from California to

08:40:42 3 Jacksonville and you finished your schooling, got a

08:40:46 4 Political Science degree from the University of North

08:40:49 5 Florida in 2002 --

08:40:51 6 A No, 2004.

08:40:53 7 Q 2004. Oh, you started --

08:40:56 8 A I started in 2002, full-time.

08:40:56 9 Q In 2004, you get your Political Science

08:40:58 10 degree; and then in 2005, February, you begin working

08:41:01 11 at Progressive?

08:41:02 12 A Correct. Yes.

08:41:03 13 Q And that's Progressive Casualty?

08:41:05 14 A I -- I'm not sure if it's Progressive

08:41:09 15 Casualty, but -- I'm not sure on that.

08:41:11 16 Q Before 2005, had you ever worked for an

08:41:15 17 insurance company?

08:41:16 18 A No.

08:41:16 19 Q Before 2005, had you ever adjusted claims?

08:41:20 20 A No.

08:41:21 21 Q Tell me your work or your employment at

08:41:32 22 Progressive. You came in the February of 2005, and

08:41:36 23 began -- what was your role, what was your title -- and

08:41:38 24 then, has that changed over the last six years?

08:41:42 25 A Yes. I started February of 2005, as a

1 A Following the policy.

2 Q Okay. And what's the policy? Is it called,
3 "The adjusting policy of Progressive?" Is it a
4 document? Is it a --

5 A A policy is -- is a contract that Progressive
6 has with its insured, and it's defined by each state or
7 state regulation.

8 Q So you were trained to follow the policy that
9 was at issue under any particular claim?

10 A Correct.

11 Q And to apply the policy, and in the claim
12 process, adjust the claim in accordance with the
13 policy?

14 MR. STIEGLITZ: Object to the form of the
15 question.

16 MR. FATA: You can answer.

17 BY MR. FATA:

18 A You kind of -- I'm sorry. Can you say it
19 again, because you put a lot in one sentence, so I'm
20 trying to follow.

21 Q Sure.

22 Were you trained to adjust MedPay claims in
23 accordance with the insurance policy language?

24 MR. STIEGLITZ: And, Nate, you're asking her
25 now in her personal capacity, not testifying on

1 follow the same -- I guess because I've been doing it
2 so long, I know in state of South Carolina what -- what
3 I am looking for in a claim.

4 Q Okay. But there are no -- you're unaware of
5 any written policy or guideline, by Progressive, that's
6 a guideline for South Carolina MedPay claims?

7 MR. STIEGLITZ: Nate, again, you're still
8 asking in the personal capacity?

9 MR. FATA: Yes.

10 A I would -- I don't know of a guideline, and
11 I'm not -- there's no guidelines to follow.

12 Q Are you aware of any document -- or let's
13 start there.

14 When you first started to handle South
15 Carolina MedPay claims, that was sometime after January
16 2008; right?

17 A Yes.

18 Q Okay. Where did you go, as far as a
19 reference point in Progressive, for guidance on
20 adjusting South Carolina MedPay claims?

21 A I pulled the policy.

22 Q Besides the policy, where did you go after
23 January 1, 2008, for any type of guidance on adjusting
24 MedPay claims?

25 A If I had any questions I would ask Peter

1 A Yes.

2 Q Okay. And so a claim is reported, MedPay
3 claim, to Progressive -- some way/somehow, you don't
4 know -- but at some point you are then contacted that
5 Mr. Insured has a MedPay claim: "Mrs. Lange, you have
6 been assigned this claim"?

7 A Yes.

8 Q Okay. From that point, you begin your
9 process?

10 A Yes.

11 Q Okay. And explain to me your process.

12 A I look at the state -- I look at the state
13 where it occurred. I look to see if we have any
14 coverage issues, and I look to see if subrogation is
15 allowed in that state.

16 I look to see if liability has been
17 determined, and then I review for the injuries.

18 Q What coverage issues do you review?

19 A It depends on the claim.

20 Q What is a MedPay claim?

21 A It could be anything, unlisted vehicle --

22 Q What?

23 A -- unlisted vehicle, unlisted driver,
24 somebody who's not a resident relative in our vehicle.
25 It could be a -- a fatality.

1 Other -- other issues could come up, I -- I
2 have to -- I have to look at that to see how I would
3 proceed with the policy that I'm looking -- or the
4 state that I'm looking at in that policy.

5 Q You mentioned "that" policy; for South
6 Carolina, what policies do you look at?

7 A I'm not -- I couldn't give you the exact form
8 edition, if that's what you are asking for?

9 Q No, I'm not --

10 A I don't -- there's boat policies. There's
11 auto policies. There's motorcycle policies. I -- I
12 don't know the form and editions of all of the
13 policies.

14 Q And you adjust for -- who do you do the
15 adjusting for, which Progressive companies for South
16 Carolina claims?

17 A I don't know the answer to that.

18 Q You don't know if it's Progressive Direct,
19 Progressive Motorcycle, Progressive ...

20 A No. I don't know. I review each claim
21 separately, and I don't look at that until it's there.

22 Q So the actual insurer is not important to you
23 for your claim adjusting?

24 MR. STIEGLITZ: Object to the form of the
25 question.

09:11:09 1 A Correct.

09:11:10 2 Q So if there are additional injuries or

09:11:14 3 additional treatment, who's going to put that data into

09:11:17 4 the system?

09:11:18 5 A It's not necessary for me to input that data

09:11:21 6 into the computer system.

09:11:24 7 Q And why not?

09:11:25 8 A My job is to make sure that the insured's

09:11:29 9 medical bills are -- are processed.

09:11:33 10 Q And how do you ensure that the insured's

09:11:36 11 medical bills are processed?

09:11:39 12 A I'm not understanding the question.

09:11:47 13 Q Your job is to ensure that the medical --

09:11:51 14 insured's medical bills are processed?

09:11:52 15 A Correct.

09:11:53 16 Q Okay. So, I'm saying, what do you do to make

09:11:58 17 sure that the insured's medical bills are processed?

09:12:03 18 MR. STIEGLITZ: So the question; what does

09:12:05 19 she, Dorothy Lange, do to make sure?

09:12:08 20 MR. FATA: Yes.

09:12:08 21 THE WITNESS: I ask the insured if I need to

09:12:12 22 get the medical bills or if they will be sending

09:12:14 23 them to me.

09:12:16 24 BY MR. FATA:

09:12:16 25 Q Is that the only thing you do in processing

09:12:22 1 the medical bills?

09:12:23 2 A Well, to get the medical bills, yes. I --

09:12:28 3 once received, I review the medical bills.

09:12:32 4 Q What do you review them for?

09:12:35 5 A If our insured paid them out of her own

09:12:38 6 pocket or if I needed to pay them.

09:12:49 7 Q Do you review the medical bills for any other

09:12:53 8 reason?

09:12:54 9 A No.

09:12:55 10 Q So the -- your job is to ensure that the

09:13:02 11 insured's medical bills are processed. And that

09:13:06 12 process requires you, as the adjuster, to review

09:13:11 13 medical bills and determine whether the medical bill

09:13:16 14 has been paid by the insured, or whether Progressive

09:13:20 15 needs to pay the medical provider?

09:13:23 16 A Correct.

09:13:24 17 MR. STIEGLITZ: Object to the form of that

09:13:26 18 question.

09:13:26 19 BY MR. FATA:

09:13:31 20 Q Are you, or do you, authorize the payment of

09:13:35 21 certain medical bills in the course of your processing

09:13:41 22 a MedPay claim?

09:13:47 23 A Do I authorize the payment? Yes.

09:13:50 24 Q Do you have a limitation on your

09:13:52 25 authorization -- no more than, you know, \$5,000?

09:17:16 1 not, I can ask the question.

09:17:19 2 I understand your comment about the 30(b)(6)

09:17:21 3 matter itself, but as far as having a --

09:17:25 4 BY MR. FATA:

09:17:25 5 Q Do you have a different process when you

09:17:28 6 handle a North Carolina claim?

09:17:31 7 A Me, personally?

09:17:35 8 Q Yes.

09:17:33 9 A Do I have a --

10 Q Yes.

09:17:34 11 A -- different process?

09:17:35 12 Q Yes. Yes.

09:17:35 13 A Me personally? No.

09:17:37 14 Q Do you have a different process when you

09:17:39 15 handle a New Mexico claim?

09:17:42 16 A Me personally? No.

09:17:43 17 Q Or a Connecticut claim?

09:17:46 18 A My job is to make sure that the insured's

09:17:49 19 bills are -- are -- are processed.

09:17:51 20 Q And that's your job for each of the 15 states

09:17:54 21 for which you adjust MedPay claims?

09:17:57 22 A Yes.

09:17:57 23 Q Okay. And your job is to -- we talked about

09:18:05 24 it -- review the medical bills and determine whether

09:18:08 25 they have been paid or whether they need to be paid?

09:18:13 1 MR. STIEGLITZ: Object to the form of the
09:18:15 2 question.
09:18:16 3 A Yes.
09:18:17 4 BY MR. FATA:
09:18:17 5 Q Okay. And if they've been paid, then what do
09:18:21 6 you do?
09:18:21 7 A Pay the insured directly.
09:18:24 8 Q Okay. If they have not been paid, what do
09:18:26 9 you do?
09:18:26 10 A Ask the insured how to process that medical
09:18:30 11 bill.
09:18:30 12 Q And if the insured says, "send me the money,"
09:18:33 13 what do you do?
09:18:36 14 A In the state of South Carolina?
09:18:38 15 Q Yes.
09:18:39 16 A I send them the money.
09:18:53 17 Q Do you have any medical training background?
09:18:57 18 A I went to nursing school for three semesters,
09:19:01 19 right out of high school.
09:19:03 20 Q Besides the nursing schooling that you did
09:19:07 21 after high school, did you have any subsequent or
09:19:09 22 follow-up medical training?
09:19:12 23 A Florida PIP. I took medical training
09:19:21 24 classes. I'm not sure of the names of the classes.
09:19:29 25 Q As part of your process for South Carolina

09:19:32 1 claims, do you determine whether a medical procedure
09:19:36 2 was unnecessary?
09:19:38 3 A No.
09:19:39 4 Q Who does that?
09:19:41 5 A A doctor who treats the insured.
09:19:44 6 Q So is there anyone at Progressive, that you
09:19:47 7 know of, that says, "Ah, that medical procedure wasn't
09:19:49 8 necessary for this insured?"
09:19:51 9 A I -- I can't answer that -- that question.
09:19:55 10 Q You can't tell me the name of anyone that
09:19:58 11 does that at Progressive, who says, "that medical
09:20:01 12 procedure was not necessary?"
09:20:04 13 A No, I can't. I can't tell you anybody who
09:20:10 14 does that.
09:20:30 15 Q What is -- you said your process for South
09:20:34 16 Carolina MedPay claims, that, you know, you review
09:20:37 17 medical bills to determine whether you need to pay them
09:20:40 18 or whether they have been paid.
09:20:43 19 And, I guess, like, along those lines, what
09:20:45 20 documentation do you request to make that
09:20:55 21 determination?
09:20:57 22 MR. STIEGLITZ: Individual inquiry again,
09:21:01 23 what does she, Dorothy Lange?
09:21:02 24 MR. FATA: Right, right.
25 A Medical bills.

09:25:36 1 A I -- I want to know the direction to handle
09:25:40 2 this -- this bill.
09:25:42 3 Q Right. Okay.
09:25:45 4 But when you first look at the bill, you're
09:25:48 5 trying to determine whether it's been paid or if it's
6 unpaid?
09:25:50 7 A Correct.
09:25:51 8 Q After you answer that question, "is it paid
09:25:53 9 or unpaid," do you then make the call to the insured to
09:25:57 10 say: "What do you want me to do, pay you, pay the
09:26:06 11 hospital"?
09:26:06 12 A Correct.
09:26:06 13 Q But that's kind of -- is there anything else
09:26:09 14 that you do, on decision making, for that medical bill?
09:26:14 15 A No.
09:26:14 16 Q So it sounds like usually your communications
09:26:19 17 with your insureds are fairly short: It's you need a
09:26:23 18 couple pieces of information on each medical bill,
09:26:28 19 right?
09:26:28 20 MR. STIEGLITZ: Object to the form of the
21 question.
09:26:29 22 BY MR. FATA:
09:26:29 23 Q You need to gather -- you need to review it,
09:26:32 24 paid or unpaid; call the insured, what do you want me
09:26:33 25 to do; and then you authorize the payment if it's under

09:27:32 1 statement/question.

09:27:33 2 MR. FATA: What did I get wrong in my

09:27:35 3 statement?

09:27:37 4 THE WITNESS: I -- I'm not -- I'm not sure

09:27:40 5 how to answer that. I don't know what you just

09:27:45 6 asked me.

09:27:55 7 BY MR. FATA:

09:27:55 8 Q Do you consult any sources when reviewing a

09:27:59 9 medical bill?

09:28:00 10 A No.

09:28:00 11 Q So you don't -- so if -- if my medical bill

09:28:04 12 was \$80,000, would you consult a source?

09:28:10 13 Let's say, "oh, that doesn't look right, it's

09:28:14 14 \$80,000," to the hospital?

09:28:15 15 A No.

09:28:16 16 Q Do you know of anyone at Progressive that

09:28:27 17 consults another source that would say, "Oh, that

09:28:30 18 \$80,000 hospital bill was too high"?

09:28:34 19 MR. STIEGLITZ: Object to the form of the

09:28:35 20 question.

21 A I can't answer that question.

09:28:38 22 BY MR. FATA:

09:28:38 23 Q So you don't know of anyone that you can tell

09:28:42 24 me today?

09:28:42 25 A I can't answer that question.

09:28:43 1 Q Because?

09:28:44 2 A I cannot answer that question.

09:28:45 3 Q Well, do you know of anyone or have you ever

09:28:48 4 met anyone at Progressive that performed that type of

09:28:52 5 task?

09:28:54 6 A No.

09:29:24 7 MR. STIEGLITZ: Nate, do you want take five

09:29:25 8 here?

09:29:25 9 MR. FATA: Sure.

09:40:17 10 (Brief recess held.)

09:40:22 11 BY MR. FATA:

09:40:22 12 Q Mrs. Lange, did you speak to anyone during

09:40:25 13 the break about your deposition testimony?

09:40:27 14 A No.

09:40:28 15 Q Okay. That was one of the things -- we're

09:40:29 16 really not supposed to do that during depositions, and,

09:40:32 17 if you do, then I get to ask you questions about it.

09:40:35 18 You work 9:00 to 5:00?

09:40:41 19 A No.

09:40:41 20 Q What are your hours?

09:40:42 21 A 7:30 to 6:00 p.m., Monday through Thursday.

09:40:45 22 Q Has that been the work schedule for the last

09:40:52 23 year or two?

09:40:55 24 A I'm -- I'm not sure how long I've had that

09:40:58 25 schedule.

1 questions in there. Can you rephrase that?

2 BY MR. FATA:

3 Q Simple question is: You, as the med claim
4 representative, are going to determine what is paid so
5 long as it's within your authority?

6 A Yes.

7 Q You are not going to take the direction from
8 Mitchell program and just say: "Okay, Mitchell told me
9 to pay X," your job is to determine what's to be paid?

10 A Yes.

11 Q Do you determine when to close a claim
12 without payment?

13 A Yes.

14 Q Okay. When do you close a claim without
15 payment? Is there a procedure or a process or a
16 Standard Operating Procedure Guideline for that?

17 A Yes, there's a standard operating procedure.
18 If we have no contact with our insured, that we can
19 close that claim.

20 Q Is there a time period?

21 A It varies.

22 Q And after the claim's been closed, if the
23 insured then picks up the phone and calls you, like a
24 month later, do you open the claim back up?

25 A Yes.

10:00:54 1 fairly consistent over the last three years while you
10:00:57 2 have been a MedPay representative?

10:01:00 3 MR. STIEGLITZ: Object to the form.

10:01:02 4 A I review all bills.

10:01:03 5 Q And you look to see what's been paid?

10:01:05 6 A Yes.

10:01:06 7 Q But you haven't changed your approach to
10:01:11 8 adjusting MedPay claims in South Carolina in the last
10:01:15 9 two years?

10:01:16 10 MR. STIEGLITZ: Object to form.

10:01:18 11 A No.

10:01:19 12 Q How did you determine what would be paid in
10:01:27 13 the Stephanie Smith, Ocean Ambulatory Surgery Center
10:01:30 14 medical bill?

10:01:31 15 MR. STIEGLITZ: Nate, do you have a copy of
10:01:32 16 that bill she could look at while she's answering
10:01:36 17 that question?

10:01:51 18 MR. FATA: Let me ask you a couple of
10:01:52 19 questions. We'll get what Val suggested.

10:01:50 20 BY MR. FATA:

10:01:50 21 Q Did you review anything before you came to
10:01:56 22 the deposition today?

10:01:58 23 A No, I didn't.

10:01:59 24 Q Did you review anything else?

10:02:00 25 A My computer file.

1 that action memorialized, or referenced, in these
2 claims notes?

3 A Yes.

4 Q Can you change the claim notes after the date
5 you did the activity and revise sections of the claim
6 notes one year later or six-months later?

7 A No.

8 Q So going back to my question: You thought it
9 would be helpful if you have the claim notes to address
10 Progressive Document 463, which is the Conway E. R.
11 Physician's medical bill?

12 A Yes.

13 Q Okay.

14 BY MR. FATA:

15 A The Conway E. R. Physicians bill?

16 Q Yes.

17 A On 7/8/2009, I made a call to that office.
18 And that provider would not release how much health
19 insurance was paid. So I paid the bill in full.

20 Q Why did you pay the bill?

21 A Because it was still outstanding.

22 Q So even though the health insurance might
23 have paid the Conway E. R. Physician, some portion, you
24 still processed this bill for payment?

25 MR. STIEGLITZ: Object to the form of the

1 question.

2 A Yes.

3 Q If you receive a medical bill, do you have so
4 many days that you are supposed to try to review the
5 bill and make a determination on whether it should be
6 paid in whole or in part or denied payment?

7 A State law?

8 Q No. Just your practice, what you do?

9 A I try to get in the bill as soon as possible
10 so our insured doesn't have any negative effects, and
11 make sure that bill has been has been paid as soon as I
12 can.

13 Q So usually within 30 days?

14 MR. STIEGLITZ: Object to the form.

15

16 A I cannot specifically say in how many days
17 each bill is completed.

18 Q Well, is there an outer limit -- sixty days,
19 ninety days?

20 A Me, personally?

21 Q Yes.

22 A I -- I try to get in the bill as soon as
23 possible.

24 Q Okay. That's not really my question. My
25 question is; do you kind of have an outer limit, like,

1 A Yes.

2 Q Now, if you looked at this medical bill from
3 the Conway Hospital, 464 -- Document 464, and the
4 information you want to see on it is the amount of the
5 charge and the prior payments.

6 A Yes.

7 Q Is there any other information you want to
8 look at on the medical bill?

9 A Balance due.

10 Q The balance due.

11 So those three pieces of information are
12 important to you?

13 A Yes.

14 Q Okay. Any other information on the bill
15 important to you?

16 A Make sure it's our insured.

17 Q Okay. Now, I'm going to -- I understand.
18 It's got to be your insured, and that's important. So
19 you want to make sure you have the right person. And
20 then you want to see if there's any prior payments, if
21 there's a balance due, and the amount of the total
22 charges?

23 A Yes.

24 Q And with those four pieces of information,
25 you're able to make a determination?

1 THE COURT REPORTER: 5.

2 (Plaintiff's Exhibit No. 5 marked for
3 identification.)

10:30:35 4 MR. FATA: Let me show you what's at 5.

10:30:38 5 Okay. That's Document --

10:30:38 6 (Document tendered.)

10:31:22 7 MR. STIEGLITZ: Nate, let me take a minute
10:31:24 8 and talk to her to discuss the pay log. We might
10:31:28 9 be able to clarify the pay log thing.

10:31:30 10 (Off-the-record discussion.)

10:36:06 11 MR. STIEGLITZ: Yeah. We're back on the
12 record.

10:36:07 13 (Back on the record.)

10:36:10 14 BY MR. FATA:

10:36:11 15 Q Take a look at this. I'm sorry. Take it
10:36:14 16 back. This September 9, 2009, letter, and it had the
10:36:18 17 medical payments details.

10:36:20 18 A Yes.

10:36:20 19 Q And it has -- what's the next page -- claim
10:36:24 20 payment detail?

10:36:25 21 A Yes.

10:36:25 22 Q And those are the two documents we have just
10:36:28 23 been discussing off the record?

10:36:29 24 A Yes.

10:36:29 25 Q And that's what you looked at on the computer

10:36:32 1 with your attorney?

10:36:32 2 A Yes.

10:36:33 3 Q Okay.

10:36:35 4 MR. FATA: So, Val, if you don't mind, we'll

10:36:35 5 get a photocopy of that and we'll just mark that

10:36:37 6 as an exhibit so just keep this to the side.

10:36:55 7 (Plaintiff's Exhibit No. 6 marked for

8 identification.)

9 BY MR. FATA:

10:37:18 10 Q In any of the medical bills that you

10:37:20 11 received, did you ever determine that any part of the

10:37:22 12 bill was unreasonable, too high, excessive?

10:37:29 13 A No.

10:37:29 14 Q What you determined was how much was paid and

10:37:34 15 if there is a balance left on that particular bill?

10:37:37 16 A Yes.

10:37:38 17 Q Did you talk to Charlie Leonard, counsel for

10:37:42 18 Ms. Smith, about the claim?

10:37:48 19 BY MR. FATA:

10:37:48 20 A I don't think so.

10:37:49 21 Q How about this -- and I know you're looking

10:37:51 22 at your notes, but I can ask you it this way:

10:37:52 23 Do you recall, today, anything that you and

10:37:55 24 Mr. Leonard might have talked about concerning the

10:37:58 25 Stephanie Smith claim?

10:37:59 1 A No.

10:37:59 2 Q Okay. And so if there is anything referenced

10:38:02 3 in your notes, that would probably be the best source

10:38:04 4 for you to refresh your memory.

10:38:07 5 A Yes.

10:38:08 6 Q Just take a look if there's anything in the

10:38:10 7 notes that is docket 302 through 308.

10:38:45 8 A My notes don't indicate that I spoke with

10:38:47 9 him.

10:38:48 10 BY MR. FATA:

10:38:49 11 Q So you don't have, again, any recollection of

10:38:51 12 any conversation you might or might not have had with

10:38:55 13 Mr. Leonard?

10:38:55 14 A Correct.

10:39:13 15 Q You're not aware, during your tenure at

10:39:16 16 Progressive, of any instance in which someone

10:39:19 17 determined that a charge for a medical provider service

10:39:22 18 was unreasonable?

10:39:25 19 A I can't answer that question.

10:39:27 20 Q Can you identify any situation or experience

10:39:31 21 where you heard or learned that a medical provider had

10:39:37 22 a charge that was determined by Progressive to be

10:39:41 23 excessive or high, too high?

10:39:43 24 MR. STIEGLITZ: You're asking her

10:39:45 25 individually?

10:39:47 1 MR. FATA: Yes.

2 MR. STIEGLITZ: Okay.

10:39:47 3 A I can't answer that question.

10:39:49 4 Q But you can't tell me any name of a person or

10:39:52 5 a situation today, can you?

10:39:54 6 A No.

10:39:54 7 Q Does the Claim Station system have a check

10:40:40 8 list for the determination of the amount of a medical

10:40:47 9 bill that should be paid?

10:40:50 10 A No.

10:40:51 11 Q And the Mitchell Decision software was used

10:40:57 12 for what purpose, by you and your job, adjusting MedPay

10:41:02 13 claims?

10:41:04 14 A Different reasons.

10:41:07 15 Q What are the reasons?

10:41:07 16 A Sometimes it's used as an information tool to

10:41:11 17 send out an explanation of benefits to our insured, to

10:41:16 18 let them know what we're issuing payment for, and to

10:41:20 19 let them know when we received the -- the -- the bill.

10:41:29 20 Q But it's not used -- Mitchell is not used in

10:41:32 21 determining the amount of what's going to be paid by

10:41:35 22 Progressive on a MedPay South Carolina claim?

10:41:40 23 MR. STIEGLITZ: Object to the form of the

10:41:41 24 question.

10:41:42 25 A Correct.

10:46:49 1 actual adjustment, might have balance owed; correct?

10:46:52 2 A Yes.

10:46:52 3 Q When you're looking at that document on the

10:46:56 4 screen, are you then going to type in pieces of that

10:46:58 5 information into the Claim Station?

10:47:01 6 MR. STIEGLITZ: Her personal practice?

10:47:03 7 MR. FATA: Yes.

10:47:03 8 No.

10:47:07 9 Q So how does the system know -- if you don't

10:47:11 10 type it in -- what the amount paid was?

10:47:15 11 A I use Mitchell to input an explanation of

10:47:21 12 benefits, to send out to our insured, with a draft in

10:47:24 13 the amount that the health insurance allowed, plus any

10:47:27 14 co-pays.

10:47:31 15 Q You say you use Mitchell?

10:47:33 16 A Yes.

10:47:33 17 Q And I am saying: Okay, so how did the

10:47:41 18 information go from that computer image of a medical

10:47:45 19 bill, the amount billed, the amount paid, the balance;

10:47:52 20 how does that get into Mitchell?

10:47:55 21 A I put that into Mitchell.

10:47:58 22 Q Okay. When do you put that into Mitchell,

10:48:00 23 when you cut the check?

10:48:02 24 A When the bill is received.

10:48:04 25 Q Okay. So you actually put some data into

1 Mitchell?

2 A The data that's on the bill.

3 Q Is the Mitchell -- is that a screen that you
4 have to complete?

5 A Yes.

6 Q Is it contained in those documents?

7 MR. STIEGLITZ: It might be easier if you'd
8 point to the Mitchell, the screen.

9 A I didn't use Mitchell for that claim.

10 Q And why not?

11 A Because at that time, I didn't need it. I
12 used my claim notes for what I was paying. Because
13 after the time in 2009, I issued my own drafts.

14 Q And so the draft did not come through the
15 Mitchell system?

16 A Drafts are not issued through Mitchell.

17 Q What changed between 2009 and present with
18 how you enter information or with respect to billed
19 amount, amount paid?

20 A Nothing.

21 Q So nothing's changed, but you mentioned you
22 didn't -- for this claim, you didn't use Mitchell?

23 A Correct.

24 Q Did you ever use Mitchell in June of 2009 or
25 July of 2009 or August 2009?

1 MR. STIEGLITZ: You mean "Dorothy Lange."

2 MR. FATA: Yes.

3 A Probably.

4 Q So how did you decide when to use Mitchell,
5 when not to use Mitchell, in 2009?

6 A I used to -- just would take a demand package
7 and input my claim note and issue a draft. I don't --
8 I don't -- I do not know any other -- I'm not sure what
9 specific question that you are getting at?

10 Q Do you still do that practice today, use your
11 claim notes and issue a draft yourself?

12 A No.

13 Q When did that change?

14 A I don't know the specific date.

15 Q What year did it change?

16 A Last year.

17 Q Sometime in 2010, maybe?

18 A Yes.

19 Q And now are you required to go through the
20 Mitchell system?

21 A Yes.

22 Q Prior to sometime in 2010, then you were not
23 required to use the Mitchell system?

24 A Correct.

25 Q Now, when using the Mitchell system, that you

10:50:53 1 used for probably a year or more, you have to input
10:50:56 2 certain data on the Mitchell template, and that data
10:51:01 3 is, with respect to the dollars, used as what, for any
10:51:05 4 particular medical bill for a MedPay claimant?

10:51:09 5 A Amount billed and amount allowed.

10:51:11 6 Q Amount billed and amount allowed.

10:51:16 7 And the amount billed is the, in my example
10:51:21 8 in the last hour, was the \$1,000 hospital bill?

10:51:23 9 A That's correct.

10:51:24 10 Q Okay. And what's the amount allowed?

10:51:26 11 A How much was paid.

10:51:33 12 Q So the field says: The amount allowed and
10:51:36 13 then you calculate what the amount paid was and put in
10:51:39 14 that number?

10:51:40 15 A From the bill?

10:51:41 16 Q Yes.

10:51:42 17 And the amount paid is the total of any and
10:51:46 18 all payments to the provider, whether it's from health
19 insurance or Medicare or Medicaid?

10:51:53 20 A Yes.

10:52:08 21 Q So you enter the hospital bill, total
10:52:15 22 charges, and then also enter in the amount allowed,
10:52:20 23 which is the amount paid from all sources to that
10:52:25 24 provider?

10:52:25 25 A Correct.

10:52:26 1 Q And those bills are the only two pieces of
10:52:29 2 information you enter into Mitchell's?

10:52:31 3 A Date of service, provider information. If
10:52:41 4 I'm paying the provider directly, it would be a Tax ID
10:52:46 5 number; the address of the provider, account number if
10:52:50 6 there is an account number and I'm paying the provider.

10:52:54 7 That is it.

10:53:04 8 Q And then it's your understanding that the
10:53:06 9 payment from Progressive will be the amount allowed?

10 10 A In your examples?

10:53:18 11 Q Yes.

10:53:18 12 A Yes.

10:53:20 13 Q Okay. Is there ever a situation that you can
10:53:25 14 recall where payment by Progressive, under MedPay
10:53:28 15 claim, was something other than the amount allowed?

10:53:31 16 A Yes, where the health insurance paid or if
10:53:35 17 there's been payments made.

10:55:14 18 (Plaintiff's Exhibit No. 7 marked for
10:55:15 19 identification.)

10:55:15 20 BY MR. FATA:

10:55:16 21 Q I'll show you what's been marked as Document
10:55:20 22 No. 7. It's Progressive Document 524.

10:55:19 23 (Documents tendered.)

10:55:25 24 What is this document?

10:55:41 25 A This is an Explanation of Benefits.

10:55:44 1 Q Okay. And what produced this? Is this part
10:55:47 2 of Mitchell?
10:55:49 3 A Yes.
10:55:50 4 Q And did you put in the amount charged?
10:56:02 5 A I can't tell if I input those documents.
10:56:09 6 Q Who else would've had access to input this
10:56:13 7 document. It says date at the bottom? 6/1/2009,
10:56:17 8 Adjuster Dorothy Lange."
10:56:18 9 Do you have to log in when you go to
10:56:19 10 Mitchell?
10:56:19 11 A Yes.
10:56:20 12 Q So that's kind of an indication that maybe
10:56:21 13 you logged in on June 1, 2009?
10:56:23 14 A Yeah --
10:56:23 15 MR. STIEGLITZ: Object to the form.
10:56:24 16 THE WITNESS: -- no.
10:56:25 17 BY MR. FATA:
10:56:25 18 Q What is that?
10:56:26 19 A That means I am the adjuster on that file.
10:56:29 20 Q Who else would have been involved with
10:56:35 21 putting this in the system?
10:56:39 22 A There's CP, clerical people, that input
10:56:55 23 medical bills. I'm not sure at this time who did that.
10:57:00 24 Q What do you mean by there are clerical people
10:57:03 25 that input medical bills?

10:57:05 1 A We have clerical staff that input medical
10:57:10 2 bills into the Mitchell.

10:57:24 3 Q Does the clerical staff input medical bills
10:57:28 4 into Mitchell as well as you can input medical bills
10:57:32 5 into Mitchell?

10:57:33 6 A Yes.

10:57:33 7 Q So both you and the clerical staff can input
10:57:37 8 medical bills into Mitchell?

10:57:39 9 A Yes.

10:57:39 10 Q Was this medical bill paid by Progressive or
10:57:44 11 was any amount paid by Progressive on this medical
10:57:48 12 bill?

10:57:57 13 A The numbers look familiar, but the provider,
10:58:01 14 I don't recognize that provider, so I would have to see
10:58:08 15 the list for the actual medical bills to answer that
10:58:10 16 question.

10:58:19 17 Q Okay. It doesn't -- in response to
10:58:23 18 interrogatories, I don't believe it's on your Exhibit
10:58:31 19 No. 2 -- number 9; want to take a look at that?

10:58:33 20 Do you see it on there, in the interrogatory
10:58:42 21 responses?

10:58:47 22 A Doctors Care for \$157 dollars, Progressive
10:58:52 23 paid \$103.74 dollars, \$157.

10:59:06 24 Q So this is for the Doctors Care bill?

10:59:14 25 A I can't be sure.

10:59:16 1 Q Why does it say: "Amount allowed, zero"?

10:59:23 2 A Because I didn't use Mitchell for this bill.

10:59:27 3 Q And you didn't type in the information into

10:59:39 4 Mitchell, the clerical staff did that?

10:59:41 5 A I cannot answer that question.

10:59:43 6 Q Well, did you type into any of the

10:59:46 7 information into Mitchell for Stephanie Smith's claim?

10:59:49 8 A For this document, No. 7?

10:59:50 9 Q Yes.

10:59:51 10 A I can't answer that question.

10:59:52 11 Q Why not?

10:59:53 12 A Because I can't see who -- who input this

10:59:56 13 document.

10:59:56 14 Q Where could you go to see that?

10:59:59 15 A Mitchell.

11:00:01 16 MR. FATA: Do we have a complete Mitchell

11:00:03 17 production? I don't know. If we do, maybe it's

11:00:03 18 in here.

11:00:09 19 MR. STIEGLITZ: Do you mean the actual

11:00:11 20 screen?

11:00:11 21 MR. FATA: Yeah.

11:00:11 22 MR. STIEGLITZ: -- like a Mitchell log for the

11:00:14 23 claim number, not that I -- it is a separate

11:00:20 24 system.

11:00:21 25 MR. FATA: We probably need that. Do you

11:11:46 1 A I'm guessing.

11:11:47 2 Q I don't know.

11:11:48 3 A I don't know either, but I'm not sure what

11:11:50 4 the actual --

11:11:52 5 Q Okay. Well, do you know what this

11:11:53 6 document -- this Exhibit No. 12, where does this come

11:11:57 7 from? Is this, like, in the, you know, Progressive

11:12:01 8 MedPay National MedPay Unit Bible on how to adjust the

11:12:08 9 MedPay claim, or --

11:12:09 10 A I'm not sure where this is located.

11:12:11 11 Q Have you seen or read this before?

11:12:13 12 A I have seen it and I have read it.

11:12:15 13 Q And where did you see it before?

11:12:17 14 A It was printed and handed to me.

11:12:19 15 Q And when was it printed and handed to you?

11:12:22 16 A I can't answer the question.

11:12:23 17 Q Was it within the last three months?

11:12:24 18 A No.

11:12:25 19 Q Was it within the last year?

11:12:27 20 A I'm -- I'm not sure on that.

11:12:31 21 Q Have you read it more than once?

11:12:35 22 A Probably not.

11:12:36 23 Q And so you don't know where this document

11:12:41 24 comes from?

11:12:42 25 It says, "Coverage, see general SOPs allowed

11:12:56 1 to recover for same damages paid under health
11:13:01 2 insurance."

11:13:01 3 What does that mean?

11:13:05 4 A We would pay what health insurance paid.

11:13:08 5 Q You would pay the damages under the health
11:13:11 6 insurance?

11:13:14 7 A I'm a little confused on the question.

11:13:17 8 Q It says: "Allowed to recover for same
11:13:19 9 damages paid under health insurance."

11:13:26 10 A Is that a question?

11:13:27 11 Q Yeah. Do you know what they mean by:
11:13:31 12 "Allowed to recover for same damages?"

11:13:31 13 MR. STIEGLITZ: Are you asking for a
11:13:32 14 personal --

11:13:33 15 MR. FATA: Yes.

11:13:34 16 MR. STIEGLITZ: -- not corporate opinion?

11:13:36 17 A I -- I don't know. I -- I'm not sure who
11:13:38 18 wrote that, and I don't know what they meant. I can't
11:13:41 19 answer that question.

11:13:46 20 Q And do you know where there's state specific
11:13:48 21 guidelines?

11:13:51 22 A Where?

11:13:52 23 Q Yes. Top of Exhibit No. 10.

11:13:55 24 It says: "State specific state and local
11:14:01 25 regulations listed under state specific guidelines."

1 A I'm not sure. I -- I -- I don't know the
2 answer to that.

3 Q What's VPNP?

4 A You're going to get me in trouble, I don't
5 know what that stands for.

6 Q Do you know what VPNP Network means?

7 MR. STIEGLITZ: Her personally, correct --
8 she individually knows it?

9 MR. FATA: Right, right.

10 A I -- I -- I'm going to get in trouble for
11 that question. VPNP is part of the First
12 Health/Coventry Network.

13 Progressive Insurance has a contract with the
14 First Health/Coventry Network to -- if our insured
15 treats at any provider within the First Health Network,
16 they have agreed to a contracted rate through that
17 network.

18 Q Contracted rate for what?

19 A Treatments.

20 Q And MedPay claims?

21 A Treatments.

22 Q Okay. So how did that come into play with
23 you adjusting the MedPay claim for someone that he's
24 going to treat at First Health/Coventry Network?

25 A Progressive insurance has a contract with the

1 First Health Network. If our insurer chooses to treat
2 at a facility that accepts the First Health/Coventry
3 Network, they have agreed to a lower rate for
4 treatment.

5 Q You still process the MedPay claims the same
6 way, even with that First Health/Coventry Network. If
7 an insured, a MedPay claimant, does go to a First
8 Health/Coventry Network provider and receives treatment
9 and maybe gets a bill of \$300, and \$200 of that is
10 actually paid.

11 You will still process the MedPay claim the
12 same way and send a check for \$200.

13 A Who paid that \$200?

14 Q The health insurance carrier. And \$100 each?

15 A Then, yes. I would process what was paid on
16 that claim.

17 Q By the health insurance carrier and by the
18 individual claimant?

19 A Whoever paid the medical bill, yes.

20 Q Does it make a difference if someone's -- for
21 your MedPay claim payments, does it make a difference
22 that someone is getting treated in the First
23 Health/Coventry Network?

24 A I -- I don't know. I'm a little confused on
25 the question.

1 A Okay.

2 Q -- what does that mean?

3 A The second bullet?

4 Q First bullet.

5 A Oh, first bullet.

6 That would mean if we went over our coverage
7 investigation, if our insured was in an unlisted
8 vehicle, that vehicle would be primary over our
9 vehicle; we would be secondary.

10 We have to investigate all coverage issues in
11 a -- in a MedPay claim.

12 Q Second bullet is ISO reports; what is an "ISO
13 report"?

14 A I don't know what "ISO" stands for, but It
15 means a report of any other claims that had been
16 reported.

17 Q To whom?

18 A I -- I don't know the answer to that.

19 Q And if the insured has any other outstanding
20 claims against any other person or insurance company?

21 MR. STIEGLITZ: Object to the form.

22 A Okay. Yes.

23 BY MR. FATA:

24 Q What's: "Coverage denials need two layers of
25 authority for approval," what is that?

1 network; do you know?

2 A I don't know what that is. I -- I don't know
3 the definition of what that's referring to.

4 Q Now, on this next "Balance billing
5 resolution".

6 "... The insured should be advised that the
7 billing dispute will be resolved without the need for
8 them to pay the balance to the provider."

9 So if there's a dispute between the insured
10 and, I guess, the MedPay analysis that you do, do you
11 advise them not to pay the balance to the provider?

12 MR. STIEGLITZ: Object to the form.

13 A I instruct them that I would pay the balance
14 to the provider.

15 Q In the event of a dispute?

16 A Yes.

17 Q Is that for any dispute?

18 A If the provider's balance -- if they are
19 saying that the insured owes the balance, we would pay
20 the balance.

21 Q Do you ever advise -- have you ever advised
22 insureds that there's no need to pay the balance to the
23 provider while there's a dispute?

24 A Me, personally?

25 Q Yes.

1 MR. STIEGLITZ: The same objection earlier:
2 I think the question is beyond the scope for her
3 to answer, not binding to the corporation.

4 BY MR. FATA:

5 Q What about Arkansas and Virginia?

6 A Arkansas statute provides a loss of income
7 and so does Virginia common law.

8 Q So in Stephanie Smith's claim, did you issue
9 the payment?

10 A Do you have a copy of the payment?

11 Q It would be on your billing notes?

12 A It would be on the payment log that I sent
13 with that letter. I sent a copy of the draft and a
14 copy of the payment log.

15 Yes, that.

16 Q I will show you what's been marked as
17 Exhibit 6, three pages.

18 (Documents tendered.)

19 A Yes, I issued that payment.

20 Q Okay. So what is the fatality in Stephanie
21 Smith's claim?

22 A There's no fatality.

23 Q Okay. Then why did you issue the payment?

24 A At this time I was allowed to issue payment.

25 Q So are we getting back to Mitchell, the

1 Mitchell system, and it was being adopted sometime
2 after the Stephanie Smith claim was adjusted by you.

3 And so now you have the claim representatives
4 to handle some of the payments?

5 A No. This payment had nothing do with
6 Mitchell.

7 Q So what happened between the time you issued
8 this payment, for Stephanie Smith in 2009, to today;
9 now, you only issue a payment if there is a death or if
10 there's a wage claim?

11 A A computer system is now to issue payments
12 directly to providers; if it goes directly to an
13 insured or an attorney, it goes through the claims
14 processor. If there's a fatality or lost wages, then I
15 can issue that payment.

16 Q And when did that change occur?

17 A Not sure of the exact date.

18 Q Well, how about a rough date, month; was it
19 within the last year?

20 A I'm not sure of the exact --

21 Q I'm not asking for the exact, is it within
22 the last year?

23 A Possibly.

24 Q And what's the computer system called?

25 A I just know it as the "Automatic Bill Paying

12:19:50 1 A What system?

12:19:51 2 Q Well, the computer automatically throws

12:19:54 3 someone into, "closed without payment" if there's no

12:19:57 4 activity on that claim, for, say, 60 or 90 days --

12:20:00 5 A No.

12:20:00 6 Q -- or do you actually have to type in

12:20:02 7 something or actually push a button and say basically:

12:20:05 8 I want to close this without payment because I haven't

12:20:07 9 been in contact for 60 days or 90 days?

12:20:11 10 A I have -- I'd have to physically close it.

12:20:13 11 Q You have to make sure it happens?

12 12 A Yes.

13 Q So it has to be a decision that you made?

14 A Yes.

12:20:50 15 Q So when reviewing the medical bills, you

12:20:57 16 don't look at the amount of the bill to see if it's

12:20:59 17 reasonable, you look to determine whether to make a

12:21:04 18 payment of a certain amount; you look at the payment

12:21:06 19 paid by all sources and the balance left to the

12:21:09 20 provider that's owing?

12:21:10 21 MR. STIEGLITZ: You're talking about her,

12:21:12 22 individually?

23 MR. FATA: Yes.

12:21:12 24 A Yes.

12:21:13 25 BY MR. FATA:

1 Q You understand what I am saying?

2 You look basically as to what was paid by all
3 sources and what's the balance, you take those two
4 parts, add them together, and that's basically what
5 you're going to conclude as the amount owed to the
6 insured or to the providers, depending on the insured's
7 direction?

8 A Yes.

9 Q Do you still do it that way today?

10 A Yes.

11 Q So nothing's changed on that front?

12 A Yes.

13 Q To your knowledge, does anyone in your team
14 do it different than that?

15 A I don't -- I can't answer that question.

16 Q Well, do you know or have you heard of anyone
17 doing it different than that?

18 A No.

19 Q Medicare or Medicaid have paid any amounts;
20 would that be included in your review as to what should
21 be paid under the policy?

22 A Yes.

23 Q So if Medicare paid \$100 and the insured paid
24 \$20, then you -- and there's no balance left, you would
25 pay -- make a checkout for \$120?

IN THE COURT OF COMMON PLEAS,
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR HORRY COUNTY, SOUTH CAROLINA

01:26:

CIVIL ACTION NO.: 2010-CP-26-10602

STEPHANIE A. SMITH, on behalf
of herself and all others
similarly situated,

Plaintiff,

vs.

PROGRESSIVE HALCYON INSURANCE
COMPANY, n/k/a PROGRESSIVE
DIRECT INSURANCE CO., and
PROGRESSIVE MAX, and
PROGRESSIVE CASUALTY,

Defendants.

STATE OF FLORIDA)

COUNTY OF DUVAL)

DEPOSITION OF DOROTHY LANGE,
taken pursuant to Plaintiff's Notice to
Continue 30(b)(6) Deposition of Defendants

DATE TAKEN:

Friday, June 1, 2012

TIME:

1:27 p.m. until 2:40 p.m.

LOCATION:

Offices of Akerman, Senterfitt, LLP
50 North Laura Street, Suite 3100
Jacksonville, Florida

REPORTED BY:

Theresea P. Taylor, RPR, CRR, CBC, CCP
Notary Public, State of Florida

- - -

THE CAPTION COMPANY, INC.
(904) 642-4464 - Fax (904) 642-9798 - Cell (904) 823-8179

CERTIFIED
COPY

000351

1 **APPEARANCES:**

2
3
4 **MR. CHARLES VANCE LEONARD, Esquire**
5 Harris & Leonard, PA
6 4615 Oleander Drive, Suite 202
7 Myrtle Beach, South Carolina 29577

8 and

9 **MR. NATALE FATA, Esquire**
10 Nate Fata, PA
11 Post Office Box 16620
12 Surfside Beach, South Carolina 29587
13 Appearing on behalf of the Plaintiff

14 **MR. VAL H. STIEGLITZ, III, Esquire**
15 Nexsen Pruet, LLC
16 Post Office Drawer 2426
17 Columbia, South Carolina 29202-2426
18 Appearing on behalf of the Defendant

19 **ALSO PRESENT:**

20 Kevin Peinkofer, Progressive
21
22
23
24
25

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I N D E X

PAGE

Dorothy Lange

Direct Examination by Mr. Leonard

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E X H I B I T S

FOR IDENTIFICATION

Exhibit No. 2

7

Exhibit No. 6

12

Exhibit No. 7

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1 that continues down to the next page. If you look at the 02:25:4
2 4/23/2009, 62310, inject spine CT; do you see that? 02:26:0

3 A Yes. 02:26:1

4 Q And where is it referenced in your Progressive 02:26:2
5 Explanation of Benefits, Exhibit 6? 02:26:2

6 A Line 16. 02:26:2

7 Q Line 16. And what credit did you give for that 02:26:3
8 amount charged? 02:26:4

9 A \$198. 02:26:4

10 Q And \$198 correlates to what? 02:26:4

11 A The BlueCross BlueShield payment on 5/15 of 2009, 02:26:4
12 Line 17 on the Progressive Explanation of Benefits. 02:26:5

13 Q Did you give any other credit for that April 02:26:5
14 23rd, 2009 entry for the inject spine CT? 02:27:0

15 A Line 20 on the Progressive Explanation of 02:27:1
16 Benefits, date of service 4/23/2009, CPT code M99999, 02:27:1
17 25.80, which reflects the balance in the column on the 02:27:2
18 Strand Regional Specialty Associates of patient balance. 02:27:2

19 Q So the 25.80 relates to the inject spine CT of 02:27:4
20 April 23rd 2009? 02:27:5

21 A There's a \$22 balance for the patient on 4/23 02:27:5
22 from the CPT code 62310. Included in the same encounter on 02:28:0
23 the same date of service, 4/23/2009, CPT code 77003, the 02:28:0
24 charge was 146 and the patient balance was 3.80. On 02:28:1
25 that CPT code, BlueCross BlueShield payment on 5/15 of 2009 02:28:1

1 also paid the co-pay amount and any payments by the insured 02:36
2 to the provider and any balance left on the bill owed to 02:36
3 the provider? 02:36

4 A Correct. 02:36

5 Q Were there any other payment options that you had 02:36
6 in processing claims for South Carolina insureds? 02:36

7 A No. 02:37

8 Q So we've pretty much talked about all of the 02:37
9 options you had while processing South Carolina medical 02:37
10 claims for med pay? 02:37

11 A Correct. 02:37

12 Q And on your Exhibit 6 explanation codes, that 02:37
13 column, you enter into Mitchell this X563 code? 02:37

14 A Correct. 02:37

15 Q And is that automatic? I mean do you always 02:37
16 enter it in when there's an amount charged if there's 02:37
17 health insurance involved so that then you can give credit 02:37
18 for the health insurance carrier payment on subsequent line 02:37
19 item entries? 02:37

20 A Ask the question again. 02:37

21 Q Why do you always type in X563 for amount 02:37
22 charged? 02:38

23 A To show that the patient's health insurance paid 02:38
24 the medical bills. 02:38

25 Q So when the patient has health insurance that's 02:38

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1 paying for part of the medical bill, you will also enter in 02:38
2 explanation code X563 for that particular entry? 02:38
3 A Correct. 02:38
4 Q Are there any other explanation codes that you 02:38
5 use? 02:38
6 A Yes. 02:38
7 Q Such as? 02:38
8 A There's a huge list and I don't know them all. 02:38
9 Q Just give me a few examples, three that come to 02:38
10 mind. 02:38
11 A X9090, which is coverage investigation. X9614 02:38
12 means we're pending contact. X202, benefits are exhausted. 02:38
13 Q If you make a payment to someone with health 02:38
14 insurance though, the explanation code is always going to 02:38
15 be X563? 02:39
16 A I can't answer that question. 02:39
17 Q Going back to Exhibit 6, if you look at the 02:39
18 explanation section in the second page of this Progressive 02:39
19 Explanation of Benefits, X563, The remaining portion of 02:39
20 this bill has been paid by the patient's healthcare 02:39
21 insurance. Do you see that? 02:39
22 A Correct. 02:39
23 Q Is that your language? 02:39
24 A No. 02:39
25 Q Is that just part of the Mitchell system that 02:39

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1 whenever you type in X563 this explanation, The remaining 02:39:4
2 portion of this bill has been paid by the patient's 02:39:4
3 healthcare insurance, that always comes up? 02:39:5

4 A Yes. When you type in X563 that whole sentence 02:39:5
5 comes up, yes. 02:39:5

6 MR. FATA: That's all of the questions I have at 02:40:0
7 this time. Thank you very much. 02:40:0

8 MR. STIEGLITZ: Let me take a little break for a 02:40:0
9 second here before we close the deposition. 02:40:1

10 (Recess held) 02:40:1

11 MR. STIEGLITZ: We have no questions. 02:40:1

12 (Taking of the deposition was concluded at
13 approximately 2:40 p.m.)

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1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF HORRY

3

4 STEPHANIE A. SMITH, on behalf of
herself and all others similarly
5 situated,

6 Plaintiffs,

7 vs.

Case No. 2010-CP-26-10502

8 PROGRESSIVE HALCYON INSURANCE COMPANY,
n/k/a PROGRESSIVE DIRECT INSURANCE CO.,
9 PROGRESSIVE MAX and PROGRESSIVE
CASUALTY INSURANCE COMPANY,

10

Defendants.

CERTIFIED COPY

11

12 D E P O S I T I O N

13 WITNESS: STEPHANIE A. SMITH

14 DATE: Tuesday, August 30th, 2011

15 TIME: 9:37 a.m.

16 LOCATION: Nate Fata, P.A.
The Courtyard, Suite 215
17 Surfside Beach, South Carolina

18 TAKEN BY: Attorneys for Defendants

19 REPORTED BY: TERESA J. F. BAUTZ
Registered Professional Reporter

20

21

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2

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14 1230 Main Street, Suite 700
Columbia, South Carolina 29201

15

16 - - -

17

18

19

20 (INDEX AT REAR OF TRANSCRIPT)

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1 STIPULATION: It is stipulated by
2 counsel that this deposition is being taken in
3 accordance with the South Carolina Rules of Civil
4 Procedure, and that the deponent does not waive
5 the right to read and sign the deposition
6 transcript.

7 - - - - -

8 STEPHANIE A. SMITH, being first duly
9 sworn, testified as follows:

10 EXAMINATION

11 BY MR. STIEGLITZ:

12 Q Ms. Smith, my name is Val Stieglitz.
13 I'm a lawyer in Columbia, and I represent the
14 Progressive Insurance Company entities that are
15 the defendants in this lawsuit that you've
16 brought. We're here today to take your
17 deposition, which is a procedure where I get to
18 ask you questions relevant to the lawsuit you've
19 brought, and you answer those questions.

20 If I ask you a question that you don't
21 really understand, if you would please ask me to
22 rephrase it or to clarify it for you so that I
23 can be sure that you give the answer that you
24 intend to give, if you'll do that for me.

25 If you have any questions or

8

1 A I did. College of Charleston and
2 Trident Tech --

3 Q Did you get a degree?

4 A -- for culinary in Charleston.

5 Q Okay. Did you get a degree?

6 A No.

7 Q Okay.

8 A I dropped out. I was studying
9 accounting.

10 Q When did you drop out?

11 A '88, right before I finished. I didn't
12 want to be an accountant.

13 Q What did you do after 1988 when you
14 dropped out?

15 A I went to culinary school.

16 Q Where did you go to culinary school.

17 A In California.

18 Q Okay.

19 A In Huntington Beach, sorry, art
20 institute.

21 Q Did you graduate there?

22 A No. I was just taking classes to become
23 a sous-chef, and then I did work study under four
24 different chefs.

25 Q When did you get out of the cheffing

1 business into your next job?

2 A I still am in the cheffing business.

3 Q Okay.

4 A In 2001 I closed my catering company.

5 Q You had a catering company?

6 A I did.

7 Q In California?

8 A Houston.

9 Q It was your own business?

10 A I'm sorry?

11 Q Was it your own business that you had?

12 A Yes. I had financial backers, though.

13 Q What was the name of that business?

14 A Post Oak Redwood Catering.

15 Q Okay. So if I'm following you, in 1988
16 you went to culinary school in California, you --

17 A Do you want me to give you a timeline of
18 my most --

19 Q Why don't you give me a timeline, yeah.

20 A To make it easy. Okay. After school I
21 moved to California in '88. In '90 I met my
22 future husband in California, and we moved to
23 Massachusetts in the summer of 91' so he could go
24 to law school. We separated in January of '93.
25 I relocated to South Beach, Miami, to run a

1 Q Okay. And I think you got private
2 health insurance through your employment; is that
3 correct?

4 A Yes, sir.

5 Q And that is with whom? Is that Blue
6 Cross Blue Shield?

7 A Blue Cross Blue Shield, yes, sir.

8 Q And you had that private health
9 insurance at the time of the accident that is the
10 subject of this lawsuit; right?

11 A Yes, sir.

12 Q Do you contribute to the cost of that
13 insurance, or does the company pay all your
14 premiums?

15 A No. I contribute.

16 Q Okay. Roughly how much do you pay?

17 A About \$35 a week.

18 Q And I take it that's just individual
19 coverage for you, no family coverage?

20 A Correct.

21 Q Have you ever filed any lawsuits before?

22 A Have I ever file lawsuits?

23 Q Right.

24 A No.

25 Q Okay. Have you ever made any claims for

12

1 any injuries that you, you know, claim you
2 incurred prior to the injuries of this lawsuit?

3 A Yes.

4 Q Okay. Tell me about those.

5 A I had just gotten out of a cast for
6 breaking my left ankle in Houston when I was in
7 another wreck and rebroke it. Not my fault.

8 Q How did you break it the first time?

9 A Playing flag football. Not the most
10 coordinated person, I know. I had just gotten
11 off crutches like that day. I was so mad.

12 Q And got in a car accident and broke the
13 same ankle again?

14 A Yes.

15 Q Roughly when would that have been?

16 A Oh, the Saab was new, so '98. I
17 couldn't drive it like two weeks after I got it
18 until I got out of the cast. It was a stick
19 shift.

20 Q And did you make a claim against the
21 other driver's insurance?

22 A Insurance, yeah. Yes, sir.

23 Q And did they pay?

24 A Yes, sir.

25 Q You didn't file a lawsuit, you just

1 against someone's insurance --

2 A No, sir.

3 Q Okay.

4 A I've been driving a long time and not
5 always well.

6 Q Things happen. Now, when the incident
7 involved in this lawsuit happened --

8 A Yes, sir.

9 Q -- did you have to make any reporting to
10 your employer, did you have to --

11 A Yes, sir.

12 Q -- report to HR or anything like that?

13 A Yes, sir.

14 Q What did you have to report to your
15 employer?

16 A I had to tell them what had happened,
17 take a drug and alcohol test.

18 Q Did you miss any time from work?

19 A I worked from home for a week.

20 Q Are you on a salary or?

21 A Commission.

22 Q Pure commission?

23 A Yes, sir.

24 Q So it's not like you have office hours
25 where you're supposed to be somewhere from nine

18

1 till five, you --

2 A No, sir. I work about 80 hours a week.

3 Q Do you have any disability insurance at
4 work?

5 A I think we do. I know I pay for it, so
6 yes, I must.

7 Q Did you file a claim for any disability
8 insurance --

9 A No, sir.

10 Q -- in connection with this accident?

11 A No, sir.

12 Q Okay. Who did you report to at Sysco
13 when you had this accident?

14 A First to my boss, Alan Troutman, and
15 then to Pete Garcia who is our safety manager.

16 Q Did you fill out papers and, you know,
17 file paperwork with them?

18 A Yes, sir. It's required.

19 Q Okay. Do you remember what those papers
20 were called?

21 A No. I think it's just an accident form
22 through Sysco. I hadn't started work yet that
23 day, I was just going to meet my boss for
24 breakfast before I started working. So I wasn't
25 actually on company time just yet.

1 Q Did you ever talk with anybody
2 associated with Progressive about your Med Pay
3 coverage?

4 A No, sir. Once I hired Mr. Leonard I
5 just let him take care of it.

6 Q Sure. And out of the amount that
7 Progressive paid on your Med Pay coverage, how
8 much did you receive?

9 A I don't recall.

10 Q Okay.

11 A It's been a while.

12 Q It has been a while. And am I right
13 that you did not receive a check personally from
14 Progressive, that whatever Progressive paid was
15 sent to your attorney and then processed through
16 his office; is that right, is that the way that
17 worked?

18 A Yes. Any money I got came from
19 Mr. Leonard.

20 Q Right. So your ultimate check would
21 have been a check from Mr. Leonard's law firm?

22 A I don't remember who it was from.

23 Q Okay. But not from Progressive?

24 A I don't remember.

25 Q Okay. And you don't recall the amount?

56

1 A I don't.

2 Q Did you deposit that check in your
3 Guaranty Bank account?

4 A I'm sure I did.

5 Q Okay. And what did you do with that
6 money?

7 A Reimbursed myself for some of the copays
8 and deductibles and paid more medical bills, paid
9 for the rental car.

10 Q Are you not aware of any copays or
11 deductibles on medical bills that were unpaid
12 after you received your Progressive Med Pay
13 money; correct?

14 A Not that I'm aware of. I believe I sent
15 out checks for all of it.

16 Q Yeah. And I guess you're probably
17 making a claim for the reimbursement of the
18 rental car charges in your lawsuit against the
19 other driver; or do you know? If you don't know,
20 just tell me you don't know.

21 A I'm not sure.

22 Q Okay.

23 MR. FATA: Bill?

24 MR. STIEGLITZ: Yes.

25 MR. FATA: Let me interject. You've got

72

1 Q Yes. Have you ever looked at the policy
2 to see if the word incurred is defined or not
3 defined in the policy?

4 A Have I looked at -- have I what? Have I
5 looked at the policy to see if the word
6 incurred --

7 Q Is defined. As we sit here today and I
8 ask you this question, are you aware of whether
9 the term incurred --

10 A Like is there a page from Webster's in
11 there?

12 Q No. It's just a simple question. As we
13 sit here today, are you aware of whether the term
14 incurred is defined or not defined in the policy?

15 A I have no idea whether it's defined in
16 the policy.

17 Q Okay. And if it's not defined in the
18 policy, would you think it was reasonable to look
19 to dictionary definitions of the word incurred?

20 MR. FATA: Object to the form, calls for
21 a legal conclusion. Answer to the best of your
22 ability.

23 THE WITNESS: I think if you don't know
24 what a word means, yes, you should look to the
25 dictionary.

1 BY MR. STIEGLITZ:

2 Q Okay.

3 A That's going to be the best possible
4 definition understood by the largest number of
5 people.

6 MR. STIEGLITZ: Off the record.

7 - - -

8 (Whereupon, an off-the-record discussion
9 was held.)

10 - - -

11 THE WITNESS: If I don't know what a
12 word means, I look it up in the dictionary.

13 BY MR. STIEGLITZ:

14 Q Sure, sure.

15 A I would hope most people do the same, I
16 would hope.

17 Q And that's a reasonable thing for people
18 to do, wouldn't you think?

19 A One would hope. We should all carry
20 dictionaries around with us for those that
21 forget.

22 MR. STIEGLITZ: Off the record.

23 - - -

24 (Whereupon, an off-the-record discussion
25 was held.)

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- - -

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- - -

N O E X H I B I T S T E N D E R E D

1 one.

2 Q So you are the man in charge or the person in
3 charge of supervising South Carolina med pay claims?

4 A Yes.

5 Q And that's for all Progressive Insurance
6 companies?

7 A For all med pay claims written by Progressive
8 Insurance.

9 Q In South Carolina?

10 A In South Carolina.

11 Q And you report to Elizabeth Zaner?

12 A I do.

13 Q And you're familiar with the day-to-day operation
14 of your team of adjusters who adjust med pay claims in
15 South Carolina?

16 A I am, yes.

17 Q And you have about 14 team members that are
18 adjusters of these South Carolina med pay claims?

19 A I do, 14 adjusters.

20 Q And has that been pretty constant since 2008,
21 that you've had about 14 or 15 adjusters?

22 A Yes.

23 Q And Dorothy Lange is one of your adjusters?

24 A She is.

25 Q The policy, which is Exhibit 1, Stephanie Smith

1	submitted medical bills?	10:56:19
2	A Rephrase that, I'm trying to figure it out.	10:56:21
3	Q If there is any -- if any payment has been made	10:56:26
4	to a med pay South Carolina insured, it was only after that	10:56:30
5	insured, that claimant, submitted a medical bill and	10:56:37
6	possibly other information?	10:56:41
7	A Right. They would submit an invoice or a medical	10:56:44
8	bill or something to show reimbursement.	10:56:48
9	Q And the medical bill is required, if you are	10:56:52
10	going to get a payment?	10:56:54
11	A Yes. To be reimbursed, we have to have knowledge	10:56:58
12	of what your actual bills are.	10:57:00
13	Q And that medical bill is the proof of, you know,	10:57:02
14	what you incurred?	10:57:05
15	A Correct. You are showing us what you -- you're	10:57:07
16	telling us this is what you've incurred as a result of the	10:57:09
17	accident, "I would like to be reimbursed."	10:57:12
18	Q And that medical bill is the proof of, you know,	10:57:15
19	how that person has been harmed or damaged?	10:57:19
20	A I don't know if it's the proof that they've been	10:57:25
21	harmed or damaged, but it's the proof that they've incurred	10:57:28
22	a medical expense.	10:57:31
23	Q That they have an expense?	10:57:32
24	A Correct.	10:57:35
25	Q All of your adjusters that you supervise taught	10:57:38

1 or instructed, they must receive medical bills before
2 processing a payment for any particular claim?

3 A Correct, yes.

4 Q And is it your experience that the insureds are
5 communicated by the adjusters, that they must -- the
6 insureds must submit some type of documentation, medical
7 bill or invoice, to document their loss for the med pay
8 claim?

9 A Yes, or we can tell them: "We can request the
10 bill for you."

11 Q Do you request medical bills from providers in
12 connection with med pay claims?

13 A Yes, we will in some cases.

14 Q What cases are those?

15 A Well, after we make contact with the insured
16 person, explain the benefits, find out their injuries,
17 where they've treated, we allow them if they want to submit
18 medical bills to us directly; or, if they want us to
19 contact the facility and secure the medical bills, we can
20 do that, as well.

21 Q As part of the records request by Progressive
22 handling a med pay claim in South Carolina, do you request
23 a claimant to submit explanation of benefits from health
24 insurance carriers?

25 A No, it's not required.

1	code, if there will be no repricing.	11:03:38
2	Q And who comes up with the amount allowed?	11:03:42
3	A That, I don't know.	11:03:45
4	Q Who would know?	11:03:46
5	A Probably Alina Wilkerson.	11:03:48
6	Q Who is Alina Wilkerson?	11:03:53
7	A She is a medical process liaison with Mitchell.	11:03:58
8	Q Does she work in the National Med Pay Unit?	11:04:06
9	A No, she does not.	11:04:08
10	Q Where does she work out of; is she from Florida?	11:04:10
11	A Cleveland, Ohio.	11:04:13
12	Q Is Mitchell a Progressive affiliate?	11:04:16
13	A Not that I am aware of.	11:04:20
14	Q Is Alina Wilkerson a Progressive employee or is	11:04:22
15	she a Mitchell software employee?	11:04:27
16	A She is a Progressive employee.	11:04:30
17	Q Elaine and not Helena?	11:04:32
18	A Alina, A-l-i-n-a.	11:04:33
19	Q Are you aware of any instance where a South	11:04:44
20	Carolina med pay claim got repriced or was repriced?	11:04:48
21	A Not a specific instance.	11:04:53
22	Q Are you aware of any med pay lawsuits involving	11:05:03
23	Progressive Insurance at any time, that were pending any	11:05:08
24	time in Florida?	11:05:10
25	A In Florida?	11:05:13

1 Q What happens when there is a reduction to a 11:08:50
2 doctor's bill? Say the bill is \$1,000 and Mitchell says: 11:09:02
3 "Well, I think it should be \$400;" you don't know how that 11:09:08
4 is calculated or determined; you don't know the nuts and 11:09:15
5 bolts of Mitchell programming? 11:09:18

6 But what happens, does the check just get spit 11:09:18
7 out or -- the Mitchell-allowed amount? 11:09:21

8 A The adjuster would approve that amount that was 11:09:23
9 allowed for payment, and they would issue that payment. 11:09:26

10 Q Is there any type of a denial letter for the 11:09:28
11 balance that's sent to the insured saying: "Hey, we are 11:09:32
12 only going to approve this much of your bill; we think the 11:09:36
13 usual, customary amount is \$400 and not \$1,000"? 11:09:40

14 A Yes, they are copied on the explanation of 11:09:42
15 benefits. It shows what we paid. 11:09:46

16 Q I understand it shows what you -- the EOBs that 11:09:52
17 Progressive sends explains how much is being paid, it 11:09:56
18 doesn't explain why there is a reduction. 11:09:58

19 A It will say on there the reason for the 11:10:02
20 reduction. 11:10:04

21 Q And what are the reasons for reduction that are 11:10:06
22 contained in the Progressive EOB? 11:10:12

23 A Well, if it was reduced or -- you know, reduced 11:10:16
24 or repriced for the amount for a voluntary network, it 11:10:21
25 would indicate on there that this provider is part of a 11:10:24

1 voluntary network and agreed-upon price.

2 If it's repriced for a usual, customary, it will
3 indicate on there: "Based on the amount charged, the usual
4 customary rate for this is -- has been reimbursed."

5 Q But it doesn't say: "We are denying the balance
6 of the charge"?

7 A We are not denying it. We are paying what we
8 feel we owe for the treatment, for the bill that was
9 submitted.

10 Q But how does that work when the insured has
11 incurred that bill? The doctor doesn't care what you say
12 is reasonable or customary, the \$1,000 bill still stands;
13 the doctor is going to put the insured in collections.

14 That bill is still going to accrue, right?

15 A Oh, now, if the doctor has put the collection
16 notices or they're not agreeing to that amount of the bill,
17 absolutely; then, we step in and pay that additional
18 amount, if we can't agree with the provider that that's the
19 amount that we owe.

20 If the provider disputes that amount that we paid
21 as fulfilling the insured's obligation, then we will pay
22 that additional amount.

23 Our goal is to make sure that the insured has no
24 obligation or no out-of-pockets, no collection notices
25 hanging over their head.

Peter Goodchild depo - individual

1 If they are being billed or they are being sent
2 collection notices, we would, by all means, step in and pay
3 that additional amount that the provider is saying that we
4 owed.

5 Q So the reasonable and customary analysis by
6 Mitchell is going to be trumped by a doctor who tells the
7 patient: "You still owe it, you still have this bill.
8 It's still \$1,000, I need you to pay the full thousand"?

9 In that case, Progressive is going to say:

10 "We'll pay the thousand dollars," whatever, just
11 to make sure that the insured does not get thrown into
12 collections, get dunning letters, or get a bad credit
13 score; correct?

14 A Correct. We don't want to leave the insured with
15 owing anybody any amount of a bill.

16 Q And that's the whole goal of the "incurred"
17 language?

18 A Right, for incurers [sic] to make sure that the
19 insured doesn't pay any out-of-pockets or any liability
20 that they may have, any financial obligation.

21 Q So, any liability that the insured has, you at
22 Progressive want to make sure that that liability in the
23 med pay format is discharged in full, so that there is no
24 more liability?

25 A That they have no more -- they owe no one else

Peter Goodchild depo - individual

1 any more money, that's what we want to make sure, that that
2 takes place up to their policy limit.

3 Q Correct.

4 So, when there is a conflict between the Mitchell
5 reduction of a doctor's bill and the insurer still is
6 having incurred that liability, the incurrence of that
7 liability is going to compel, motivate Progressive to pay
8 the doctor's bill, if there is some type of dispute with
9 the doctor and the insured and an outstanding balance?

10 A If the insured has incurred that amount of the
11 bill, we want to make sure that we fulfill our obligation
12 and pay for any bills that are incurred.

13 Q And that obligation is set forth in the policy?

14 A That is in the policy, yes.

15 Q And that's in all the South Carolina policies?

16 A Yes.

17 Q And Progressive treats all of the South Carolina
18 policyholders the same way when it comes to adjusting
19 claims, with respect to any Mitchell reduction amounts?

20 A Yes, we treat all of our insureds the same way
21 across the board.

22 Q And it doesn't matter which Progressive Insurance
23 company you are dealing with in South Carolina; if you have
24 med pay coverage through one of the Progressive Group
25 Insurance companies, you are going to be treated the same

Peter Goodchild depo - individual

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS,
) FIFTEENTH JUDICIAL CIRCUIT
 COUNTY OF HORRY) CIRCUIT CIVIL ACTION NO:
) 2010-CP-26-10502

STEPHANIE A. SMITH,)
 on behalf of herself)
 and all others)
 similarly situated,)

Plaintiff,)

-vs-)

PROGRESSIVE HALCYON)
 INSURANCE COMPANY, n/k/a)
 PROGRESSIVE DIRECT)
 INSURANCE CO., and)
 PROGRESSIVE MAX, AND)
 PROGRESSIVE CASUALTY)
 INSURANCE COMPANY,)

Defendants.)

STATE OF FLORIDA)
 COUNTY OF DUVAL)

DEPONENT: PETER GOODCHILD
 Progressive 30(b)(6) Designee

DATE TAKEN: October 19, 2011
 TIME: 9:00 - 10:47 a.m.
 LOCATION: Akerman Senterfitt
 50 North Laura Street
 Jacksonville, Florida

REPORTED BY: Cindee B. Deen, RPR, FPR
 Registered Professional Reporter

- - -

4560 Harbour North Court
 Jacksonville, Florida 32225
 CindeeDeen@aol.com

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I N D E X

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08:00:54

1 questions about your background, your history, work
2 history, educational experience.

3 Tell us, where do you work at this time?

4 A Right now I work for Progressive Insurance,
5 employed by Progressive Casualty Insurance Company.

6 Q And how long have you worked for Progressive
7 Casualty Insurance Company?

8 A Since 1999.

9 Q What have you done for Progressive Insurance
10 Casualty Company since 1999? What job titles have you had?

11 A Sure. I was hired in in May of 1999 as a Florida
12 PIP adjuster, handling Florida PIP claims.

13 Then I was promoted to a Team Leader in the
14 Florida PIP organization.

15 I was also a Florida PIP Manager within the
16 Florida PIP organization.

17 Then the National Medical Unit was formed in
18 2008, and at that time and currently I am a Medical
19 Supervisor in the National Medical Unit.

20 Q What are your job duties as a medical supervisor?

21 A I supervise a group, a team that handles some
22 specific states. Right now I have 14 members of my team
23 that I manage, along with the 15 states that we handle the
24 medical payments or the PIP portion of the policy.

25 Q What states do you -- are included in your 14 or

1 15 states that you supervise?

2 A It's South Carolina, North Carolina, Virginia,
3 New Hampshire, Connecticut, Vermont, Maine, Oklahoma,
4 Nebraska, West Virginia, Missouri, New Mexico,
5 Wyoming -- I believe that is 15.

6 Q And the National Med Pay Unit, you say, was
7 formed in 2008?

8 A Yes.

9 Q Previously, what was the process? There was no
10 National Med Pay Unit prior to 2008?

11 A No. It was a centralization of the National
12 Medical Unit of across the country of 35 total states to
13 handle medical payments in certain PIP states for that.

14 Prior to 2008, it was handled by the local
15 business units.

16 Q But, in 2008, Progressive kind of consolidated
17 and centralized for Medpay and PIP claims -- I guess a hub,
18 whereby in Jacksonville, Florida, which is where you are
19 located -- you would coordinate and supervise the
20 adjustment, or your team would, of Medpay claims or PIP
21 claims in your territory, in your states?

22 A Correct.

23 Q What Medpay claims are handled currently by your
24 group; is it the same 14 or 15 states that you've just
25 enumerated?

1	copy.	08:13:06
2	Q Are all documents scanned in --	08:13:11
3	A Yes.	08:13:16
4	Q -- that relate to a claim?	08:13:16
5	A Yes.	08:13:17
6	Q So, if anything is submitted to Progressive for a	08:13:17
7	Medpay claim, it is scanned in and electronically stored?	08:13:20
8	A Yes.	08:13:24
9	Q And that's been the case since 2008?	08:13:24
10	A Not all documents.	08:13:27
11	But, at the inception of the unit, it started	08:13:31
12	some of the documents that could be scanned in. And then,	08:13:36
13	now it's all documents that can be scanned in.	08:13:36
14	Q So, in the beginning of the National Med Pay	08:13:42
15	Unit, it was getting up to speed; so maybe not all the	08:13:44
16	documents were scanned in, but now over the last three	08:13:47
17	years they all are scanned in?	08:13:49
18	A Yes. Correct.	08:13:50
19	Q Are you familiar with Stephanie Smith's claim?	08:13:51
20	A I am, yes.	08:13:57
21	Q What documents did you look at in connection with	08:13:58
22	Stephanie Smith's claim, at any time?	08:14:02
23	A At any time? I looked at the Face Sheet notes.	08:14:04
24	I looked at the claims, the claim documents, and looked in	08:14:07
25	our Claim Station system that houses Stephanie	08:14:13

1 Q Is "incurred" defined in any of the Progressive
2 policies?

3 A It is, yes.

4 Q Where is it "incurred"? Where is it defined,
5 which policies?

6 A It's defined in a Virginia policy and a
7 Massachusetts policy; and that's the only two that I am
8 aware of.

9 Q And how is it defined in those policies?

10 A It is defined that "incurred" means what someone
11 has paid, what they paid out-of-pocket, a co-pay, a
12 deductible that they are responsible for. They use health
13 insurance. The amount paid by health insurance is the
14 "incurred" amount.

15 Q And the Virginia policy that defines "incurred"
16 and the Massachusetts policy that defines "incurred," were
17 those definitions in those respective Virginia and
18 Massachusetts policies for the last year, two years, or are
19 they recent inclusions, recent amendments?

20 A Well, the Virginia policy is actually a Virginia
21 statute, as well. And it has been there since I reviewed
22 the policy in 2008.

23 Q How about Massachusetts?

24 A The same thing.

25 Q It's by statute?

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1 A It's by statute, which the policy references the
2 statute.

3 Q You are not aware of any South Carolina policy
4 from any Progressive Insurance carrier that defines
5 "incurring"?

6 A I am not.

7 Q And do you apply your definition of "incurring" in
8 the adjustment process for all South Carolina policies that
9 are adjusted?

10 A Yes.

11 Q So it is pretty standard; your definition is
12 standardized so that each Progressive insured is going to
13 get the same definition from you, as far as what "incurring"
14 means?

15 A Correct.

16 Q You are not going to favor one insured over
17 another?

18 A Absolutely not.

19 Q Okay. So it really doesn't matter what policy
20 you have, if you're a Progressive insured in South
21 Carolina, the issue of what was incurred comes up in a
22 Medpay claim, it's going to be adjusted the same way under
23 your definition?

24 A Correct.

25 Q You talked about your definition of "incurring"

1 being what the insured person paid?

2 A Right, what they've paid; someone's paid that
3 amount on their behalf.

4 Q So it could be -- so "incurred" doesn't have to
5 actually mean what was paid by the insured, it could be
6 what was paid by the health insurance carrier?

7 A Yes.

8 Q So "incurred" is not specific to only the insured
9 under the Progressive policy?

10 A Well, it's what the insured is legally obligated
11 for or what they've expended.

12 Q As far as payment by the health insurance
13 company, though, how has the insured person, Progressive
14 insured, "incurred" that amount, if the health insurance
15 carrier paid the provider \$200?

16 A Well, in South Carolina, there is a statute that
17 prevents set-off. So, just because it is paid for by the
18 health insurance, doesn't -- you know, Stephanie Smith is
19 still allowed to recover under her medical payments policy
20 that she paid for.

21 So, at that point, she's also -- even though she
22 didn't pay that, herself, she paid for the health insurance
23 benefit, and the health insurance benefit paid that amount
24 on her behalf, that is something that she expended; she's
25 entitled to reimbursement of that medical cost.

1 Q And that's because you are not allowed to set-off
2 in South Carolina?

3 A Correct.

4 Q Regardless of what the health insurance carrier
5 paid on behalf of an insured, that doesn't get deducted --
6 that payment amount by the health insurance company doesn't
7 get deducted from what the Progressive insured's entitled
8 to recover from Progressive on the Medpay claim?

9 A Say that again?

10 Q I will try to reword it.

11 Because there is South Carolina law, like you
12 said, that doesn't allow for set-offs, Progressive does not
13 reduce the benefit payable to Stephanie Smith by the amount
14 that the health insurance carrier paid to the medical
15 provider?

16 A Her -- make sure I am clear:

17 The medical payments benefit under her
18 Progressive policy is not reduced?

19 Q Yes.

20 A No.

21 Q There's no reduction?

22 A No, absolutely not.

23 Q And you've always understood that to be the case
24 since you have been at the National Med Pay Unit?

25 A Correct.

1	billed, what was paid: What the named insured paid is not	08:50:36
2	a requirement to put in a Face Sheet note, that's something	08:50:39
3	that we would put into our Mitchell DecisionPoint	08:50:42
4	information.	08:50:46
5	Q Okay. So it's required, but it's in a different	08:50:47
6	platform?	08:50:49
7	A It's in a different platform.	08:50:50
8	Q It's in the Mitchell software program platform?	08:50:52
9	A Correct.	08:50:56
10	Q Just for the record, I don't think we talked	08:50:56
11	about it; we'll get into it a little bit later.	08:51:06
12	But there is the Mitchell software program, and	08:51:07
13	then there is the Claim Station software program, correct?	08:51:10
14	A Correct, two separate programs.	08:51:12
15	Q And, in general, the Mitchell software program	08:51:16
16	does what; does that include all of the data entry for the	08:51:17
17	medical bill, the amounts the health insurance carrier paid	08:51:21
18	amount, the named insured paid amount, and the balance?	08:51:25
19	A Well, the Mitchell is a tool that the adjusters	08:51:26
20	use as well. It's a place to store medical bills. It also	08:51:35
21	creates an Explanation of Benefits to explain what was	08:51:41
22	paid, what was billed.	08:51:45
23	And it's also used if you need to have a bill	08:51:48
24	reviewed for causation, it just checks it to make sure that	08:51:51
25	you are being billed for something that's related to an	08:51:57

1 auto accident.

08:52:01

2 Q Okay. So the Mitchell's software program is more
3 of the medical bill auditing, accounting software program;
4 and the Claims Station is more the claim itself and how
5 it's evolving, and the communications with the insured?

08:52:02

08:52:07

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08:52:18

6 A The Claim Station program is used to hold
7 information about the claim, itself: Personal information,
8 person's address, injury information, Face Sheet notes of
9 what's happening on the claim through the life of the
10 claim. It shows the payments that were made on the claim.

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11 The Mitchell software system, totally separate
12 system, is used for bill audit. It's also used to house
13 documents and to create explanation of benefits to be sent
14 out to our insureds, if needed.

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15 Q What kind of explanation of EOB, why would you
16 send an EOB to the insured?

08:52:56

08:52:56

17 A Just to explain what was paid.

08:53:01

18 Q And why it wasn't paid or --

08:53:02

19 A Yeah. And if something wasn't paid, explain why
20 it wasn't paid; or, if additional information is needed,
21 what else is needed.

08:53:06

08:53:11

08:53:14

22 Q Okay. So you have in front of you Exhibit 2,
23 which is the bill from Conway ER Physicians, the Claim
24 Station notes, Exhibit 3.

08:53:16

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25 Tell me what the total amount of the Conway ER

08:53:36

1 MR. STIEGLITZ: I'm going to object to form.

2 Calls for a legal conclusion.

3 You can answer it, if you can.

4 A I don't know what they would tell her her legal
5 obligation of the amount owed would be?

6 BY MR. FATA:

7 Q Have you been to a doctor's office?

8 A I have.

9 Q When you walk in there and you get a shot, when
10 you leave, do you believe you're legally obligated to pay
11 at least some amount to the doctor's office?

12 MR. STIEGLITZ: You are asking him for his
13 personal opinion?

14 MR. FATA: Yes.

15 A I couldn't tell you the last time I got a shot or
16 the last time I've been to the doctor, but -- I don't know.
17 Usually, I have a co-pay with my health insurance, if I
18 have a co-payment.

19 BY MR. FATA:

20 Q And you make the payment then?

21 A Yes.

22 Q So you know you're obligated, at least to some
23 extent, before you see the doctor or right after on your
24 way out the door that you've got to make some payment of
25 some type, or you're at least obligated to make a payment

1 on the date of service?

2 A Yeah. I would say that. That's fair.

3 Q So it might take the doctor's office 45 days to
4 send you a bill, right; it might take them longer?

5 A Who knows, yeah.

6 Q But you know that you're going to get a bill?

7 A I don't know about that.

8 Q Because --

9 A If I already paid my co-pay and they sent the
10 bill to my health insurance, what would they send me a bill
11 for?

12 Q If you've already -- if you did not have health
13 insurance and you go to the doctor's office, you get
14 treatment, sore throat, whatever, earache, and you leave
15 the doctor's office, do you believe you have a legal
16 obligation to pay some amount to that doctor's office?

17 MR. STIEGLITZ: And again, you are asking him
18 whether he, Peter Goodchild, would believe that to be
19 the case?

20 MR. FATA: Yes, yes.

21 A I have no idea. Luckily, thankfully, I have
22 always had health insurance.

23 BY MR. FATA:

24 Q Have you ever had a situation where you have gone
25 to the doctor's office, yourself, and something was not

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1 covered by insurance?

2 A No, I have not.

3 Q How about any of your family members?

4 A No.

5 Q Can you tell me the date this bill was incurred,
6 Plaintiff's Exhibit 2?

7 A I cannot.

8 Q What information would you need to determine when
9 the medical bill from Conway ER Physicians, when that
10 obligation was incurred by Stephanie Smith?

11 A She presented a bill to us and said: "Hey, I now
12 owe this bill."

13 Q So you are saying Stephanie Smith's obligation
14 only occurs to the medical provider when Stephanie Smith
15 presents the bill to Progressive?

16 A No. I have no idea what her obligation is to the
17 medical provider.

18 Q When does -- when in the adjustment process does
19 Progressive determine the date that the insured is legally
20 obligated to a medical provider?

21 A That's an interesting question, because I don't
22 know if we even know when a person is -- the date they
23 become legally obligated to pay a provider.

24 Q Are you aware of anything in Progressive's
25 systems or policies or procedures that is a determination

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1 of when an insured becomes legally obligated to a medical
2 provider in connection with the med pay claim?

3 A No. The date they become legally obligated to
4 pay a bill to a provider? We wouldn't know the actual
5 date.

6 Q So that never comes into the equation when
7 Progressive is adjusting med pay claims?

8 A No.

9 Q That's really a non-issue, as far as you are
10 concerned, in the adjustment process?

11 A In the adjustment process, no.

12 (Plaintiff's Exhibit No. 4 marked for
13 identification.)

14 BY MR. FATA:

15 Q Let me show you what's been marked as Plaintiff's
16 Exhibit 4. It is a DOCTORS CARE bill.

17 (Documents tendered.)

18 MR. STIEGLITZ: Peter, hand them down here to get
19 them marked.

20 THE WITNESS: Sure.

21 BY MR. FATA:

22 Q Do you see Exhibit Number 4?

23 A I do.

24 Q Again, let's go through how the amount paid is
25 calculated, who calculated it, and the reason for not

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1 A No. I appreciate that view.

09:11:55

2 But the person that has health insurance
3 available to them -- that consumer that has health
4 insurance and then auto insurance -- is actually -- they
5 are maximizing their benefits that are available to them.
6 They're able to use -- they are able to treat -- it's not
7 that we are paying less benefit. They are still allowed
8 that benefit.

09:11:58

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09:12:18

9 In this claim, Ms. Smith has \$10,000 in coverage
10 available to treat. She's actually, you know, doing
11 herself a service of maximizing her available benefits
12 based on her own personal injury.

09:12:20

09:12:21

09:12:23

09:12:27

13 Q But Progressive does not have to pay as much,
14 does it?

09:12:30

09:12:34

15 A Oh, we could pay the full up to the policy limit
16 of \$10,000 for treatment, if required, if Ms. Smith
17 required that treatment.

09:12:35

09:12:38

09:12:42

18 Q Let me ask it this way:

09:12:43

19 If you go back to the DOCTORS CARE bill, which is
20 Exhibit 4, if Stephanie Smith was uninsured by any health
21 insurance carrier, had absolutely no insurance, how much
22 would Progressive have paid on her med pay claim?

09:12:45

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23 A Well, that, I don't know.

09:13:03

24 Q Well, if the office charge was \$142 on 2/24/09,
25 and then there is a \$15 dressing charge --

09:13:07

09:13:10

1 A It would depend on what our system -- we would
2 run this bill through our Mitchell audit system to
3 determine what the price would be, if it needed to be
4 repriced.

5 If this provider was part of our network of
6 providers, if it needed to be repriced, we could do it at
7 that point; and that would be the amount that we would pay.

8 Q What's the "Network of Providers," is that the
9 VPNP Coventry?

10 A It's a Volunteer Coventry, First Health Network
11 of Providers that have agree-upon prices.

12 Q If the provider is not in that network of
13 providers, the Coventry, VPNP providers, and the bill was a
14 total of \$157 --

15 A Okay.

16 Q -- then what would Progressive have paid?

17 A If they are saying she owes, Stephanie Smith --

18 Q Yes.

19 A -- owes \$157 --

20 Q Yes.

21 A We would have paid \$157.

22 Q And, if she has health insurance, she is not
23 going to get paid \$157; she's going to get paid what she
24 got paid on this one, which is how much?

25 A 20, plus 83.74, plus 15; \$118.74.

1 the balance is?

2 A Correct. Plus, any co-pay or deductible that
3 they may have on their own personal insurance.

4 Q But you would agree that when we talked about the
5 word "incurred," that means the obligation of the health
6 insurance carrier, as well as the insured under the
7 Progressive policy?

8 A Right, someone paid on their behalf.

9 MR. STIEGLITZ: Nate, how about a five-minute
10 break?

11 MR. LAMB: Good with me.

12 MS. WEST: Sounds good to me.

13 (Recess held.)

14 (Exhibit No. 6 intentionally was marked as a non
15 exhibit.)

16 (Ms. West not present.)

17 (Mr. Lamb not present.)

18 DIRECT EXAMINATION (continued)

19 BY MR. FATA:

20 Q Mr. Goodchild, talk to me about years 2007 to
21 2008, whether Progressive had a different policy concerning
22 payments to persons who have had Medicaid or Medicare or
23 health insurance.

24 You kind of seem to qualify some of your answers
25 on that issue, as far as, like, after June 2008 to present,

1 the procedure was like this; how about before 2008, 2007 to
2 2008 window?

3 A Unfortunately, I don't know what it was between
4 2007 and June 2008.

5 When we consolidated the National Medical Unit,
6 it was in June of 2008 for South Carolina. That's when I
7 became involved, and I am not aware of any type of process
8 or handling prior to June of 2008.

9 Q Because prior to June of 2008, what were you
10 doing for Progressive?

11 A I was working in the Florida Medical PIP Unit.

12 Q So in 2008 is when you switched to South
13 Carolina?

14 A Well, that's when the unit was formed, is June
15 2008.

16 Q And when did you actually come over and get
17 involved with South Carolina med pay?

18 A That was June 2008.

19 Q So prior to June 2008, you did not have any
20 experience with South Carolina med pay issues?

21 A No, I did not.

22 Q Item 8, it's: "At any time from 2007 to present,
23 the internal documents, manuals, policies or guidelines
24 used in the adjustment of personal injury protection or med
25 pay claims under Progressive's South Carolina policies," is

1 Q So do Exhibit 9 and Exhibit 10 include the
2 universe of the Quick Fact Sheet that you mentioned earlier
3 and the National med pay Standard Operating Procedure, and
4 to be more detailed, two-page South Carolina Standard
5 Operating Procedure Lotus Notes documents that are used for
6 adjusting South Carolina med pay claims?

7 A It's not the universe of adjusting claims. They
8 are exactly what -- they're guidelines, they're standard
9 operating procedures.

10 Q Are there any other standard operating procedures
11 that you know of that relate to South Carolina med pay
12 claim adjustments?

13 A No, not that -- I am not aware of any.

14 Q So the documents you have in front of you are
15 what you are aware of as being the Standard Operating
16 Procedure -- South Carolina Standard Operating Procedure
17 for med pay claims and the Quick Fact Sheet for the South
18 Carolina med pay claims?

19 A Correct; that's what these are, yes.

20 Q You don't know of any other documents that are
21 similar in character or nature to Exhibits 9 or 10 with
22 regard to South Carolina med pay claim adjustment
23 processes?

24 A No.

25 Q And Exhibits 9 and 10 have been in existence for

1 or since 2008?

2 A We don't have a date on them.

3 I don't have an exact date, but it would be 2008,
4 early 2009 when they would have been created and stored
5 electronically on our database.

6 Q Were you involved in the creation of any part of
7 Exhibits 9 or 10?

8 A Yes, I was.

9 Q And what were you involved with in creating
10 Exhibit 9 or 10, what statutes or sections?

11 A I was involved in creating this Quick Fact Sheet
12 for South Carolina document, and I was also involved in
13 creating the South Carolina specific Standing Operating
14 Procedures for South Carolina.

15 Q And you have referenced the Quick Fact Sheet,
16 that's Exhibit 10, that you were involved in creating?

17 A Correct.

18 Q Who else was involved with you in creating
19 Exhibit 10?

20 A The information would have also been my
21 supervisor, Elizabeth Zaner.

22 Q And who else was involved with you in creating
23 the South Carolina specific SOP in Exhibit 9?

24 A That would also have been Elizabeth Zaner.

25 Q Anyone else?

1 A No.

2 Q So it's the same policy language; it's just a
3 different approach being taken by Progressive today as
4 compared to, say, December 2010 when it comes to this first
5 sentence in Exhibit 10, Document 541?

6 A Correct.

7 Q Other than that change, have there been any other
8 changes in the way the National Med Pay Unit has handled
9 South Carolina med pay claims?

10 A No, there has not.

11 Q So is it fair to say that the med pay claims have
12 been handled consistently since June 2008 to present with
13 the exception of what we already talked about in
14 Exhibit 10, as far as the Standard Operating Procedures and
15 the South Carolina procedures?

16 A Yes, they have been the same.

17 Q Is it fair to say that Progressive's definition
18 of "incurred" has remained the same as indicated on
19 Exhibit 10 on the first page from 2008, June-ish to
20 present?

21 A Yes, that is still the same.

22 Q Is it fair to say that none of the policies'
23 languages have changed since, to your knowledge, since June
24 2008 to present, with respect to the term "incurred?"

25 A No, I am not aware of any change.

1 Q So South Carolina is not like some other states
2 that doesn't allow the duplication of recovery for the same
3 medical bill?

4 A Right.

5 Q Has that always been your understanding since,
6 say, at least 2008?

7 A Yes. Since 2008, I've always understood South
8 Carolina allows recovery.

9 Q Going to Page 544, CWP of Med Pay, what is "CWP;"
10 is that "closed without payment"?

11 A "Closed without payment," yes.

12 Q So, if a medical bill is received by the
13 adjuster, how does that claim, then, get closed without
14 payment if there is a bill that's received?

15 A Either there is no coverage for the loss -- CWP
16 is closed without payment. Any time a claim is reported to
17 Progressive, we open up a feature for possible exposure,
18 that doesn't always mean there will be an exposure.

19 It could be no medical treatment involved, so the
20 feature would be CWP, closed without payment.

21 Q So CWP, if there is a medical bill in the file
22 but it's closed without payment, that would almost always
23 mean that there was no coverage available?

24 A Right. If we received a medical bill on a file
25 that was CWP, coverage must not have been available.

1 I mean, I am trying to think of a scenario. 10:14:4

2 Q Can you think of a scenario where you know there 10:14:4
3 is coverage and you receive a medical bill for the med pay 10:14:4
4 claim, but the claim is CWP'd? 10:14:51

5 A I can't think of one. 10:14:56

6 Q How about if you know there is coverage and you 10:15:02
7 receive a medical bill and you know there is Medicare, the 10:15:05
8 claimant has Medicare, will that trigger a CWP? 10:15:10

9 A No. 10:15:15

10 Q Because of the policy, there would be a payment 10:15:16
11 to Medicare? 10:15:18

12 A There would be a payment to someone. 10:15:19

13 Q Do all of the 14 or 15 adjusters in your group, 10:15:22
14 do they all go through a training program where, in part, 10:15:36
15 they review these fact, Quick Fact Sheet for South Carolina 10:15:39
16 and for the SOPs that we have marked as Exhibits 9 and 10? 10:15:45

17 A Yes, they would go through it at some point. 10:15:50

18 Q Are there any training manuals or guidelines that 10:15:52
19 were used to discuss what the term "incurred" means? 10:15:55

20 A Well, training as far as like one-on-one 10:15:59
21 training? 10:16:06

22 Q Or group -- any training whatsoever? 10:16:06

23 A Employee -- we have a training program that 10:16:08
24 someone goes through their initial training called Employee 10:16:12
25 Readiness Program. It's a six-week one-on-one handling 10:16:14

1 actual real claims.

2 And, as bills are submitted in, they're reviewed
3 with someone and trained at that point. You know, if I
4 received this bill, this is what I would do with this bill,
5 this is how I review this bill.

6 So there would be training at that point to
7 discuss if the question came up, you know: "How much do I
8 owe; how much do I pay on this bill?"

9 Q Are there any documentations or Lotus Notes on
10 training for the word "incurred"?

11 A Not that I am aware of.

12 Q We talked early on --

13 A Well, sorry. Let me take that back.

14 The Quick Fact Sheet does indicate what the word
15 "incurred" --

16 Q Let's go to that real fast. I believe that was
17 Exhibit 10.

18 A Yes.

19 Q First page.

20 A Page 541.

21 Q 541, excuse me.

22 And who came up with the definition "incurred"?

23 A It was a collaborative effort.

24 Q Who collaborated?

25 A Myself, Elizabeth Zaner, other supervisors.

1 Q Who are?

2 A Penny Grass, Shavonne Wiggs, Jaque Maddox, Doris
3 Kennedy (phonetic).

4 Q And when did that collaboration occur -- 2008,
5 2009?

6 A It would have been when we started the unit,
7 2008.

8 Q And what did you review when coming up with that
9 definition of "incurred" to the parenthetical's --

10 (Interruption at the deposition suite door.)

11 MR. FATA: Let's go off the record.

12 (Whereupon, a recess was held.)

13 BY MR. FATA:

14 Q Mr. Goodchild, back on the record.

15 We broke, and prior to the break, you were
16 talking about the collaboration that occurred with you and
17 other supervisors and your immediate supervisor, Elizabeth
18 Zaner, I believe several others, on the definition that is
19 reflected in Plaintiff's Exhibit 10, "incurred," correct?

20 A Yes.

21 Q Did you all get together and meet in the
22 conference room?

23 A I can't remember exactly how we collaborated
24 that.

25 Q Was it by e-mail or phone?

1 A I don't believe it would be by e-mail or phone,
2 since we are in the same office.

3 Q Did you take notes on the meeting?

4 A No.

5 Q Was there an agenda?

6 A No.

7 Q How long did this collaboration take? Was it
8 over a day, two days, a week, a month?

9 A I honestly can't remember.

10 Q Was it more than a day?

11 A I can't remember the time frame.

12 Q And there were five or six people or seven people
13 involved in the collaboration?

14 A Seven.

15 Q Those seven people, did you all come to an
16 agreement on what "incurred" meant after the collaboration?

17 A Yes.

18 Q And so, as a result of the collaboration,
19 everyone settled on "incurred" means this, and you wrote it
20 out on the first page of Exhibit 10?

21 A Correct.

22 Q And were you satisfied with that definition?

23 A Yes.

24 Q Did you talk about different ideas what
25 "incurred" meant in your collaboration with the others?

1 A Yes.

2 Q So there are seven people, and I imagine there
3 were some different thoughts on what the word meant,
4 "incurred"?

5 A We were all pretty -- we were all consistent with
6 what it meant.

7 Q Did anyone have any thoughts on what it meant
8 that didn't make it into your definition?

9 A No. Not that I can remember.

10 Q So you are testifying under oath that each of the
11 seven people had the exact same definition of "incurred"
12 that's reflected in Exhibit 10?

13 MR. STIEGLITZ: Object to the form. That's
14 mischaracterizing his prior testimony.

15 You can answer.

16 A To the best I can remember, I don't remember
17 anybody else disagreeing with that definition.

18 BY MR. FATA:

19 Q And the collaboration was to develop the word
20 "incurred" and come up with a definition for it, right?

21 A I mean, it wasn't a set -- when you say "the
22 intent to meet for a collaboration," it wasn't an intent of
23 collaboration; it was more of an informal setting, a
24 discussion, a gathering of all of the -- you know, the
25 facts from different sources.

1 Q And what sources did you gather facts from?

2 A Black's Law Dictionary, Barron Law Dictionary,
3 Google Internet searches, other states.

4 Q So were you in charge of getting those searches
5 done from those other reference sources, Black's Law
6 Dictionary, Google?

7 A Yes, not so much in charge, everybody was --
8 brought their own take on what they thought it would be.

9 Q And that's my point:

10 So were all of the definitions from Black's Law
11 Dictionary to Google identical?

12 A They were all similar, identical, consistent.
13 They were all consistent in the meaning of what "incurred"
14 meant.

15 Q Were they all identical?

16 A No, nothing is identical word for word.

17 Q Did some of the versions of the definition for
18 "incurred" vary among the sources you consulted?

19 A They vary word for word. But the overall
20 meaning, the end result of the meaning of the word, was
21 someone financially liable, what they paid out of pocket,
22 what they were responsible for, what they owed; it was all
23 the consistent theme in the research of the word
24 "incurred."

25 Q And everyone brought their own personal

1 experiences in the collaboration to develop the definition
2 that ultimately resolved it in Plaintiff's Exhibit 10,
3 correct?

4 A Right, and all of the years of experience of
5 claims adjusting.

6 Q No -- no South Carolina policies were consulted
7 when defining the word "incurred" on Exhibit 10, were they?

8 A Yes, they were reviewed.

9 Q What policies?

10 A Any South Carolina policy was reviewed to see if
11 there is any definition of the word "incurred."

12 Q And you realized that there wasn't any?

13 A There was not.

14 Q And what was the definition of "incurred" before
15 this collaborative effort?

16 A Not that -- I wouldn't know. To my knowledge, I
17 wouldn't know what that would be.

18 Q Was it different than what you've got written
19 down in Exhibit 10?

20 A Well, I don't know what it was prior to the
21 creation of the Med Pay Unit.

22 Q Well, what triggered the need to have the
23 definition of "incurred" written down internally on
24 Exhibit 10?

25 A After reviewing the policy, it says: "We owe

1 med pay adjusting, with respect to medical bills, payments
2 by others, balance bill issues; is that a fair
3 characterization of the two different software programs?

10:31:56

10:32:00

10:32:07

4 A I wouldn't characterize "Mitchell" as that.

10:32:09

5 "Claim Station" is where the claim information,
6 regarding the specific claim that's assigned a claim
7 number, housed the personal information, policy number,
8 policy limits, a diary system of what has occurred on the
9 claim that has occurred, payments. It's where payments go
10 out, Claim Station.

10:32:12

10:32:15

10:32:19

10:32:22

10:32:26

10:32:29

11 Now, Mitchell DecisionPoint is a tool the
12 adjuster uses to audit medical bills. And also used to
13 create the explanation of benefits, to house documents
14 within Mitchell DecisionPoint.

10:32:32

10:32:36

10:32:41

10:32:46

15 Q And the Mitchell system, how long has the
16 Mitchell system been used?

10:32:48

10:32:56

17 A We used it when I was part of Florida PIP
18 adjusting, so it's been around for quite a while -- prior
19 to 2008, prior to 2007.

10:32:57

10:33:03

10:33:07

20 Q Was it used in South Carolina in 2007 and '08?

10:33:10

21 A I know it was being used in 2008 when we started
22 the unit. Prior to 2008, I'm not sure if they used
23 Mitchell DecisionPoint.

10:33:15

10:33:18

10:33:22

24 Q And in 2011, today, is it still being used,
25 Mitchell?

10:33:24

10:33:26

1	MR. FATA: Let's take a short break, and we'll	10:36:41
2	wrap this up.	10:36:43
3	(Whereupon, a recess was held.)	10:39:24
4	(Ms. West not present.)	10:39:27
5	BY MR. FATA:	10:39:28
6	Q Mr. Goodchild, back on the record.	10:39:28
7	We were talking about the collaboration on the	10:39:30
8	definition of "incurred," and your supervisor, Liz Zaner,	10:39:32
9	asked you to head it up.	10:39:37
10	A No, she did not ask me to head that up.	10:39:39
11	Q How did it come about that --	10:39:44
12	A I asked -- I would ask: "What does the word	10:39:47
13	'incurred' mean"?	10:39:50
14	Q And ...	10:39:52
15	A There is no definition in the policy. There is	10:39:53
16	no definition in the statute of South Carolina --	10:39:57
17	Q Right.	10:39:57
18	A -- so we had to look at alternate sources.	10:39:59
19	Q So who did you ask?	10:40:02
20	A Well, I went to Black's Law, discussed with Liz.	10:40:03
21	Q Did you ever ask Liz Zaner, "What does 'incurred'	10:40:07
22	mean"?	10:40:10
23	A Yes.	10:40:10
24	Q How many times did you ask Liz Zaner "What did	10:40:11
25	'incurred' mean," more than three?	10:40:14

1	A	I honestly can't remember that; I don't -- it	10:40:22
2		wasn't -- yeah, it wasn't a month-long process.	10:40:24
3	Q	I understand.	10:40:28
4		Did you ever have any adjusters ask you what	10:40:29
5		"incurred" meant?	10:40:33
6	A	Yes.	10:40:33
7	Q	Was it more than five adjusters that asked you	10:40:34
8		what "incurred" meant, out of your 14 or 15?	10:40:38
9	A	Probably not.	10:40:43
10	Q	Three to five?	10:40:46
11	A	When we first started the unit, probably closer	10:40:48
12		to one or two.	10:40:52
13	Q	Were you asked what "incurred" meant on more than	10:40:53
14		one occasion?	10:40:56
15	A	By an adjuster?	10:40:57
16	Q	Yes.	10:40:59
17	MR. STIEGLITZ:	Are you talking over as long as	10:40:59
18		the unit has been in existence?	10:41:00
19	MR. FATA:	Yes.	10:41:02
20	MR. STIEGLITZ:	Oh, okay. So from	10:41:03
21		two thousand --	10:41:03
22	MR. FATA:	From --	10:41:03
23	MR. STIEGLITZ:	-- to the present?	10:41:04
24	MR. FATA:	'08?	10:41:05
25	THE WITNESS:	I'm sorry?	10:41:06

1	MR. STIEGLITZ: Go ahead.	10:41:06
2	THE WITNESS: I didn't mean to interrupt you	10:41:09
3	there.	10:41:11
4	A I mean, adjusters will ask just to confirm.	10:41:14
5	Like in this case, Stephanie Smith claim, Dorothy	10:41:18
6	did come to me once to say, you know: "Just reconfirming,	10:41:21
7	this is what I understand 'incurred' to mean."	10:41:24
8	So that does happen from time to time to make	10:41:28
9	sure that they are handling the claim correctly.	10:41:30
10	BY MR. FATA:	10:41:33
11	Q Okay. So on at least -- or on more than one	10:41:35
12	occasion an adjuster has come to you and asked you what	10:41:38
13	"incurred" meant?	10:41:41
14	A Yes.	10:41:41
15	Q And that was prior to you coming up with a	10:41:42
16	definition in the collaborative effort that's set forth in	10:41:44
17	Exhibit 10?	10:41:48
18	A Yes.	10:41:49
19	Q And you asked Liz Zaner, your supervisor, what	10:41:49
20	"incurred" meant on more than one occasion prior to the	10:41:54
21	collaborative effort, Exhibit 10, that definition?	10:41:56
22	A I can't go on record and say I honestly know it's	10:42:00
23	more than one or one time or how many times it was; I just	10:42:05
24	can't recall that far back, how many times I would ask her,	10:42:08
25	discuss that with her.	10:42:11

1 A Not that I can remember, if I asked her for
2 permission to do that.

3 Q Did she say it would be a good idea to do it?

4 A She would say: "Let's check some sources,
5 Black's Law dictionary" -- she also has dictionaries.

6 Q What were all of the sources that you reviewed in
7 coming up with the definition of "incurred"?

8 A I would use Black -- used Black's Law Dictionary,
9 Barron's Law Dictionary, Google search, other states.

10 Q Which states?

11 A Virginia, Massachusetts, and also Texas, also.

12 Q And these sources were not identical in their
13 definition, but you thought that they were fairly
14 consistent?

15 A They were all consistent with the overall message
16 of what "incurred," what the definition is and what our
17 process is today; they're consistent with that.

18 Q Did anyone ever mention that that's not how we
19 defined "incurred" before you came up with the definition?

20 A No.

21 Q Did you ever hear that?

22 A I had never heard that from an adjuster or
23 anybody within Progressive say that.

24 Q And you have 14, 15 adjusters underneath you that
25 you supervise?

STATE OF SOUTH CAROLINA,)
) SS:
COUNTY OF HORRY.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

STEPHANIE A. SMITH,)
)
Plaintiff,)
)
v.)
)
PROGRESSIVE HALCYON)
INSURANCE COMPANY, et al.,)
)
Defendants.)

Case No. 2010-CP-26-10502

- - -

Deposition of Michael D. Silver, taken by the
Plaintiff as if upon cross-examination before Dawn M.
Peck, a Stenographic Reporter and Notary Public within and
for the State of Ohio, at the offices of Baker &
Hostetler, LLP, 1900 East 9th Street, Suite 3200,
Cleveland, Ohio on Wednesday, the 6th day of July, 2011,
commencing at 9:30 a.m.

- - -

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18 ALSO PRESENT:

19 Jennifer West, Progressive's Corporate Legal
20 Department.
21
22
23
24
25

1 A. No. I think it's easier if we just work through
2 these so you can understand the population.

3 Q. I think I got the not at limits. Now, how many at
4 limits are there?

5 A. There were a total of 464 at limits. In 2007 there
6 were 30. 2008, 169. 2009, 166. And in 2010, 99.
7 So those two populations should total the 1,627.

8 Q. Okay. How many Progressive insureds in this time
9 period from 2007 until 2010 submitted claims under
10 PIP or Med Pay and did not receive the maximum
11 coverage, did not receive the limits, and had one or
12 more medical bills reduced as far as payment under
13 Med Pay or PIP?

14 A. Reduced or denied?

15 Q. Reduced or denied. And we'll separate each of those
16 out. And we can just go with reduced or with
17 denied.

18 A. We don't classify it that way. I just wanted to
19 make sure.

20 Q. How do you classify it?

21 A. We don't know whether it was necessarily reduced or
22 denied. We just know that the amount paid was not
23 the amount that was entered.

24 Q. Okay. The amount paid was not the amount entered.
25 So we'll use that.

- 1 have policy limits of \$2,000 and you had a \$10,000
2 bill, they're going to pay out \$2,000.
- 3 Q. Does the system require that if an amount is entered
4 as the billed amount, then there must be an amount
5 entered for the allowed amount?
- 6 A. I'm not familiar with the detailed operation of that
7 system.
- 8 Q. Who would be familiar with that system? I think
9 you're talking about Mitchell's Decision Point?
- 10 A. Mitchell's Decision Point.
- 11 Q. Who in your office or department runs that?
- 12 A. You would probably have to talk to the folks in our
13 National Medical Payments Unit.
- 14 Q. Is that where Mitchell's Decision Point is
15 headquartered? That software, big computer?
- 16 A. I honestly don't know. I'm sure it runs on lots of
17 servers around our enterprise, but has limited
18 access.
- 19 Q. Tell me for each of the years 2007, 2008, '09, and
20 '10, the number of persons who submitted claims and
21 they didn't receive the maximum policy limits for
22 Med Pay or PIP, and they received a payment that was
23 less than one or more of their medical bills? So
24 I'm looking more at the payment, if they received a
25 reduced payment on one or more of their medical

1 bills.

2 A. I don't have the ability to answer that question.

3 Q. And why not?

4 A. Because the payment does not directly connect to the
5 bill. The payment may comprise multiple bills from
6 a single provider.

7 Q. Let me ask you the question this way. For each year
8 beginning 2007 to present, the number of Progressive
9 insureds who submitted medical bills, one or more,
10 who did not receive the policy limits under Med Pay
11 or PIP, and who received payments for their claims
12 which are lower than or less than the total amount
13 of their medical bills they submitted?

14 A. Can you repeat that question?

15 Q. I'm trying to come up with a simple example.
16 Insured Joe sends in four medical bills, \$100, \$200,
17 \$300, \$400, and receives a check in the amount of
18 \$800 back even though he has sent bills in for
19 \$1,000. So we know that the bills total -- at some
20 point I think we talked about in the discovery, and
21 we'll get to this question, the total amount of
22 medical bills charged amount that were submitted by
23 insureds, and then I'm trying to look at the
24 payments made to the insureds. So if the total
25 bills submitted by Joe, the insured, is \$1,000 and

1 he receives only an \$800 check, although you might
2 not be able to tell which bill was reduced, you know
3 that the total amount received by the insured is
4 less than the total amount of medical charges?

5 A. I can only tell that information if the bill was
6 entered into our electronic systems, and that would
7 be the numbers that I had provided.

8 Q. The 1,651, 103, 111?

9 A. The 281 were the allowed amount, was less than the
10 entered amount, and the 570 that were closed without
11 payment.

12 Q. In the 570 those are outside of the 281?

13 A. Correct.

14 Q. So the 570 might have bills or charged amounts of X
15 dollars, but they were just simply closed?

16 A. Some portion of those 570 might, yes.

17 Q. And you don't have any other data on those 570?

18 A. I do have the billed amount. I do have responses
19 for 570, in response to Question 4.

20 Q. So let's go to Question 4. "For each calendar year
21 beginning 2007 to present, the total amount of all
22 medical bills submitted to you by insureds in the
23 State of South Carolina under the personal injury
24 protection or Med Pay provision of their respective
25 South Carolina Progressive policies and how that

1 For the 281 persons that we just talked about,
2 how would you go about determining for them their
3 total amount of medical bills submitted and their
4 total amount of payments received from Progressive?

5 A. That data would come from two different systems. So
6 the bills if they were in the Mitchell's System, we
7 would get the billed information from there. And
8 then the payment information would come from our
9 payment system, which is part of Claims Station.

10 Q. Do all bills have to go through the Mitchell's
11 System for a PIP or Med Pay claim?

12 A. I don't believe so.

13 Q. So if the bills don't go through the Mitchell's
14 System, then how would you get that data?

15 A. That would have to be a manual file review.

16 Q. Do you know in what situation a bill does not go
17 through Mitchell's System?

18 A. One case would be if the bill was in excess of the
19 limits, because there's a charge. As I understand
20 it, there's a charge for putting the bill into the
21 Mitchell's System. So if your bill is over your
22 limits, it wouldn't make sense to enter it to pay an
23 extra fee.

24 Q. And that's Mitchell's, the company that's licensing
25 the --