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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

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

v.

Cynthia Scavens and Progressive Direct Insurance Company, Respondents.

BRIEF OF AMICUS CURIAE
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

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STATEMENT OF ISSUE ON APPEAL

- I. WHETHER THE CIRCUIT COURT CORRECTLY FOUND THAT A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE WAS MADE IN AN ONLINE PURCHASE OF AUTOMOBILE INSURANCE.

STATEMENT OF INTEREST

Property Casualty Insurers Association of America (“PCIAA”) is composed of approximately 1,000 member companies, representing a broad cross-section of insurers across the United States. PCIAA members write more than \$195 billion in annual premiums, constituting approximately 35% of the nation’s property casualty insurance. Member companies write approximately 42% of the U.S. automobile insurance market, 28% of the homeowners market, 33% of the commercial property and casualty market, and 35% of the private workers compensation market. PCIAA members write approximately 30.1% of the property casualty insurance market in South Carolina.

PCIAA is committed to promoting and protecting the viability of a competitive private insurance market for the benefit of consumers and insurers. To that end, PCIAA supports legislation and regulations that give consumers and insurers more choice and more flexibility in how insurance information is accessed, purchased, and serviced.

This appeal involves a question of the sufficiency of an electronic offer of underinsured motorist (UIM) coverage by an insurer to a consumer who selected and purchased an insurance policy via the internet.

Insurance plays a critical role in our civil justice system. It is beneficial to the insurance market for both consumers and insurers to be able to view, shop, and purchase insurance policies electronically via the world wide web. The law imposes certain requirements upon insurers to ensure that a meaningful offer of UIM coverage is made with the sale of each insurance policy, regardless if the sale is in person or online. Any

restriction on the ability of consumers to contract for insurance policies online or on the ability of insurers to satisfy the requirements of the meaningful offer statute in online transactions will have negative implications for consumers and for the insurance industry.

PCIAA submits this amicus curiae brief to provide perspective from the insurance industry and additional analysis of the policy considerations and potential ramifications of the Court's decision on the insurance market.

STATEMENT OF THE CASE

The parties to this appeal have outlined respective statements of the case. Rather than summarizing the facts as they are known to PCIAA, PCIAA instead adopts the Statement of the Case that has been submitted by the Respondent.

ARGUMENT

I. The Court should not issue an opinion that has a chilling effect on e-commerce in South Carolina.

The decision reached by the Court in this appeal will have a significant impact on the way in which insurers can offer and issue automobile policies in South Carolina. Currently, insurers who issue automobile policies in this state can do so via live agents, online transactions, or both. While reversing the trial court's ruling would not literally prevent insurers from continuing to operate through online platforms, it would have the practical effect of curbing such operations. Insurers would understandably be hesitant to issue automobile insurance policies online if a higher standard suddenly applied regarding the rejection form for optional coverages such as UIM. This chilling effect would signal the kind of retreat into outdated 20th Century practices that South Carolina should avoid.

For a constantly growing number of people, using the internet to research and purchase goods and services has become the norm. Google searches and mouse clicks have replaced telephone directories and window shopping. This new reality applies to everything from goods, such as clothes and electronics, to services, such as tax returns and even medical advice. There are numerous reasons for this transition to an internet-based marketplace, and a full discussion of them is beyond the scope of this brief. It is sufficient to say that the vast amount of options and information available on the internet, coupled with the convenience of “anytime, anywhere” access to goods and services, make online commerce the preference for a significant portion of the population, both in South Carolina and throughout the United States.

Given this established trend, it is not surprising that many consumers choose to obtain automobile insurance via websites developed and maintained by insurance carriers. These websites allow consumers to obtain quotes and apply for policies without having to consider such things as physical location or the time of day. The websites also give consumers the ability to spend as much time as they need when learning about the types of available coverages and the ways in which those coverages affect the total premium. By using the websites, the consumers have quick, direct access to all of that information and are then free to determine for themselves what coverages best suit their needs and budgets. Moreover, the use of websites logically aids consumers by leading to more competitive automobile insurance rates as a result of allowing insurers to keep expenses lower.

Even if one believes times were better when there were more person-to-person business transactions, those days have largely passed and are not likely to return. The

online marketplace is the new normal, and the types of services sought and obtained through the internet will only increase. Thus, the question is not whether to return to previous practices, but how to handle the ever-increasing role of the internet in the application for, and issuance of, insurance policies. The Court should evaluate the current issue on appeal with this backdrop in mind.

II. An electronic offer of UIM coverage satisfies South Carolina's statutory meaningful offer requirements.

At its core, this appeal is about whether South Carolina will have different standards for what constitutes a meaningful offer of UIM coverage depending on whether the applicant is meeting with a live agent or looking at a phone, tablet, or computer screen. The undisputed facts of the case plainly demonstrate this point. As discussed in the Respondent's Brief, the UIM rejection form that the Appellant Loretta Traynum signed is substantially identical to South Carolina's approved rejection form. Had a live agent handed the exact same form to Mrs. Traynum for her to sign, this would be an open-and-shut case for summary judgment. The well-established case law would not support any other result. The outcome should not be different simply because the insurer provided the UIM rejection form electronically rather than in person. Treating those two situations the same, as the Court should do, recognizes the reality that online transactions are now the functional equivalents of in-person dealings.

Significantly, the General Assembly has already acknowledged this to be true by enacting the Uniform Electronic Transactions Act (S.C. Code § 26-6-10, *et seq.*). This statute constitutes a directive by the legislature that electronic transactions, including those performed online, should have the same force and effect as older forms of business dealings. As such, the Act arguably controls the current issue on appeal. Creating higher

standards for the validity of online transactions goes against the letter and spirit of established South Carolina policy.

There can be no doubt that reversing the trial court's decision in this case would create a double-standard for what constitutes a meaningful offer of UIM coverage. The form that entitles an insurer to a presumption of a meaningful offer in one setting suddenly would not receive that presumption in another context. In other words, the focus would shift from the form itself, where it should be under South Carolina law, to the method of delivery (i.e. in person/on paper or via a website). In-person delivery of the form would lead to one result, while access through a website would lead to another. The internet option would be the subject of increased scrutiny for no legitimate reason. This would necessarily be the result if the Court accepts the Appellants' position.

Faced with such a rule disfavoring internet transactions, many automobile insurers who offer and issue policies online may be hesitant to do business in South Carolina. Doing so could subject those insurers to liability for coverages the insureds did not want – and did not pay for – even though the insurers used an approved and otherwise effective rejection form. The risk of incurring that type of unanticipated liability for optional coverages would likely hamper the insurers' ability to conduct actuarial analyses in order to evaluate potential exposures and set premiums accordingly. The resulting uncertainty may logically result in increased rates for South Carolina consumers, or reconsideration of offering coverage in the state altogether, either of which would have negative implications on South Carolinians.

The negative unintended consequences would not be limited to insurers and South Carolina consumers, however. South Carolina's courts would also find themselves faced

with increasing numbers of reformation cases seeking to add UIM coverage. The decision that the Appellants advocate would remove online transactions from the protections of the presumption established by S.C. Code §38-77-350(B). As a result, every automobile liability policy purchased online would be a potential target for a reformation claim under *State Farm Mut. Auto Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1986). Fact-specific inquiries would be necessary in such cases, and summary dispositions would be difficult for either side to obtain. The end result would be not only an increase in the number of reformation cases filed, but also an increase in the amount of court time required to resolve them. As the Respondent explained in its brief, this is clearly not the intention of the General Assembly. To the contrary, the legislature enacted §38-77-350(B) for the express purpose of limiting reformation cases. *See* Respondent's Brief, pp. 18-20.

III. The Court should affirm the granting of summary judgment to Respondent because a meaningful offer of UIM coverage was made to Appellant.

A. The Court should not base its decision on the idea that consumers are incapable of making informed decisions in online transactions.

Whether intentionally or not, the Appellants are asking this Court (and all South Carolina courts) to adopt a paternalistic approach to automobile insurance policies purchased and issued online. The Appellants' position presupposes a state full of unwary consumers who are not able to learn about UIM coverage and decide whether or not to purchase it without some sort of special emphasis or explanation. There are at least two fatal flaws with this assumption underlying the Appellants' position.

First, the Appellants have not presented any evidence that South Carolina consumers as a whole cannot understand and make informed decisions about UIM

coverage in an online setting. Even if one accepts the dubious proposition that Mrs. Traynum failed to grasp the significance of the online rejection form, this fact standing alone would not support the Appellants' policy-based argument. One instance does not provide the basis for a leap to the conclusion that all, or even most, South Carolina residents would have a similar problem.

Second, there is no record evidence to demonstrate that the old, traditional means of delivering the approved rejection form are more effective than online delivery. The Appellants seem to argue that in-person encounters allow the consumer to ask questions about UIM coverage, but such information is also available on the insurers' websites. The potential insured can ask a question in one setting, or click on a link for further information in the other. Nothing in the record suggests that one way works better than the other. Under either scenario, the onus for seeking any necessary clarification is on the consumer, and the ability to obtain that information is within his or her reach.

B. The facts of this case demonstrate that a meaningful offer of UIM coverage was made to and rejected by Mrs. Traynum in her online purchase of insurance.

Appellants' primary argument in this appeal concerns the process by which Respondent presented and offered UIM coverage to Mrs. Traynum. In other words, Appellants' challenge is to the procedure utilized by respondent's website, as opposed to the actual UIM offer form that was required by statute and presented to Mrs. Traynum. Despite Appellants' argument, the Court should find that a meaningful offer of UIM coverage was made, consistent with the requirements and protections of South Carolina law.

As presented in the parties' briefing, the facts reveal that during the selection of coverage and quote phase of the transaction in question, Mrs. Traynum affirmatively removed UIM coverage, which was included in the original quote by default. At this point in the transaction, Mrs. Traynum had the opportunity to read about UIM coverage via a hyperlink on Respondent's website in order to decide whether or not to include it with her purchase. For whatever reason, Mrs. Traynum removed UIM coverage from her quote and proceeded to the application stage of the process. *See* Respondent's Brief at pp. 5-6. As noted in Appellants' briefing, Mrs. Traynum chose Progressive because its quote was the lowest. *See* Appellants' Brief at p. 6. With that context in mind, the premium amount was necessarily affected (i.e., reduced) by Mrs. Traynum's removal of UIM coverage.

During the application phase, an offer of UIM coverage was made to Mrs. Traynum on an electronic form that, by all accounts, satisfies the statutory requirements of S.C. Code §38-77-350(A) and *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1986). The form contained an explanation of UIM coverage, and Mrs. Traynum had the opportunity to scroll through, save, print, and read the form for as little or long as she would like. Based on Mrs. Traynum's earlier removal of UIM coverage, the electronic, PDF form appearing on her computer screen noted that she specifically declined the offer of UIM coverage. The website instructed Mrs. Traynum to read and electronically sign the form, and she unquestionably signed the form. *See* Respondent's Brief at pp. 6-9.

Appellants' brief argues Mrs. Traynum did not actually read the form, despite the fact that the form contains a statement acknowledging she has read the form or had it read

to her. Whether or not Mrs. Traynum actually read the form before signing was entirely her decision. Neither the Respondent nor the Respondent's website could force her to actually read the form. The same is true if the transaction had occurred in person. In order to explain her actions, Appellants argue Mrs. Traynum did not see the offer of UIM coverage, which again is the result of her decision to not read the form before signing it because the offer and her selections were plainly there to be seen. The offer of UIM coverage contained on the form was not hidden, as argued by Appellants, as it was called out separately and placed squarely before Mrs. Traynum to read and sign, consistent with the requirements of the meaningful offer statutes. She had complete control over whether she read the form, and if so, for how long. Ultimately, it appears she chose not to read the form before signing it, and there is no reason to believe the transaction would have played out any differently in a live setting.

Given this factual background, the Court should find that a meaningful offer of UIM coverage was made to Mrs. Traynum in her online purchase of automobile insurance, which followed a reasonable process designed to advise the consumer of all available coverages and allow her to make informed decisions. The Court should reject Appellants' argument that Respondent's offer of UIM coverage was not meaningful because there was no meaningful interaction between the parties. Instead, the Court should hold Mrs. Traynum accountable for her decision to remove UIM coverage in her online purchase of insurance because she was provided ample opportunity to read about it, select it, or reject it. The transaction complied with South Carolina law, and the sole reason the transaction was not meaningful to Mrs. Traynum, as alleged by Appellants, is because of her decision to not to read the documents placed before her.

Online transactions, including the purchase of automobile insurance, are only as meaningful as each consumer desires, because each consumer can take as little or as long as desired to review and complete the transaction. What is meaningful to one person may be too little or too much for another. Respondent's procedure for offering and issuing automobile insurance online is designed to accommodate all consumers in this digital age by providing all necessary information at the fingertips of the consumers. As a result of this procedure, Mrs. Traynum was provided the opportunity to include UIM coverage at the quote phase, but removed it. Thereafter, during the application phase of the process, Mrs. Traynum electronically signed a statutorily-compliant UIM offer form acknowledging she was offered and rejected such coverage. Despite Appellants' argument that Mrs. Traynum did not actually read the forms presented to her, it is not unreasonable to hold her accountable for her decision to complete the process, reject UIM coverage, and electronically sign her name without taking advantage of the opportunities afforded to her. A meaningful offer of UIM coverage was made to Mrs. Traynum that satisfied the letter and spirit of South Carolina law.

CONCLUSION

It is undeniably a good idea to choose UIM coverage when getting an automobile liability policy. But people do not always follow good ideas, either in this context or in any other, and many people decide not to get UIM coverage. Granted, some of those who reject UIM coverage do so because they do not fully understand it, but most make a conscious, cost-based decision against having the coverage.¹ The General Assembly

¹ PCIAA notes that there is no incentive for insurers like Respondent to mislead consumers about UIM coverage, hide offers for such coverage, or "coax" consumers into rejecting such coverage. Rather, it benefits insurers to ensure that each consumer is

clearly wants South Carolinians to have the freedom to make that decision, whether right or wrong, and it further wants insurers to be able to rely on the validity of those rejections when they provide insureds with approved forms. The Appellants are asking this Court to decide the case in a way that would violate both of those legislative intentions.

South Carolina law protects insurers from having unintended (and unfunded) UIM coverage when the insurers comply with the provisions of S.C. Code §38-77-350(A). The language of the statute does not exempt policies issued online from that protection. Nor does it give any other indication that courts should treat online policies any differently. Thus, this Court should not adopt a rule that would subject online policies to stricter scrutiny than policies obtained through other means. Even if such a rule were warranted, which it is not, its proper source would be the General Assembly, not the courts.

It is not accurate to say that internet transactions are the future; they are the present. Those transactions already account for significant amounts of business, both in this state and elsewhere, and the numbers will only increase. Insurers have not created a new and unprecedented method for issuing policies. They have merely adapted to a format that ever-growing numbers of consumers expect and prefer. Policies issued online are now an established fact of life for insurers and insureds alike, and many insureds would not want it any other way. The Court should not limit or hamper the online option through its decision in this case.

advised of all possible coverages, understands all options, and makes informed decisions. In online transactions, consumers like Mrs. Traynum must take advantage of the opportunities afforded to do so.

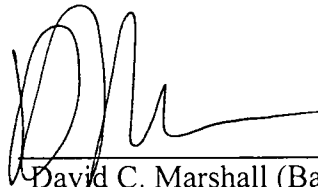
Neither the Respondent nor PCIAA is seeking preferential treatment for online insurance transactions. They merely ask that this Court apply the protections of §38-77-350 to those transactions in the same way that it applies the statute to insurance policies issued by other means. By doing this, the Court will reach a fair and just result that acknowledges the legitimacy of online insurance transactions. Any other result in this case would violate the clear intention of the General Assembly and would constitute an ill-advised attempt to retreat into the past.

Therefore, the Court should affirm the trial court's decision to grant summary judgment in the Respondent's favor.

Respectfully submitted,

November 17, 2015

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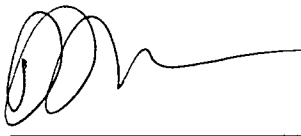
Cynthia Scavens and Progressive Direct Insurance Company, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF AMICUS CURIAE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

(Signature Page Follows)

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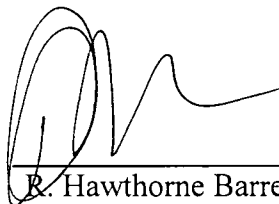
I certify this 18th day of November 2015 that I have served copies of the BRIEF OF AMICUS CURIAE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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