

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

RECEIVED

MAY 28 2014

SC Court of Appeals

Loretta Traynum and Leonard Traynum, ... Appellants,

v.

Cynthia Scavens and Progressive
Direct Insurance Co., ... Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this
08 day of June 2013

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Loretta Traynum and
Leonard Traynum,

Plaintiffs,

vs.

Cynthia Scavens and
Progressive Direct Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

Deputy Clerk

C/A No.: 2010-CP-02-02665

ORDER
GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

This matter comes before the court on opposing Motions for Summary Judgment. All parties agree, the facts are not in issue. Plaintiffs contend that Defendant Progressive ("Progressive") failed to make a meaningful offer of Underinsured Motorist Coverage ("UIM"), as required under South Carolina law. Conversely, Defendant Progressive contends its website meaningfully offered UIM coverage. After reviewing the undisputed facts, I determine that Progressive's website falls below the standards in *Wannamaker* for a meaningful offer of UIM coverage and does not satisfy the requirements under Section 38-77-350, thereby making it ineligible for the conclusive presumption of an informed decision.¹ Therefore Plaintiffs' motion for summary judgment is GRANTED.

This case presents the question of whether Defendant Progressive made a meaningful offer of UIM coverage in connection with an automobile insurance policy, policy number 172333470 (the "Policy"), which it issued to Loretta Traynum ("Plaintiff") via an online transaction in which Plaintiff had no interaction with a live person for Progressive.

¹ *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

On November 1, 2007, Plaintiff Loretta Traynum was driving her 2003 Chevy Trailblazer when she was in a wreck. Plaintiff sustained personal injuries as a proximate result of the wreck on that date (the "Wreck").

~~At the time of the wreck, Defendant Scavens was insured by Travelers with liability limits~~ of \$100,000 per person. Travelers tendered this amount to Plaintiff in exchange for a covenant not to execute. The parties have stipulated that Plaintiffs' damages from the wreck exceeded \$175,000 and that Progressive will pay the additional sum of \$75,000 to Plaintiffs if this Court reforms the Policy to include UIM coverage.

Traynum purchased her Policy over the Internet via Progressive's website. Traynum did not communicate verbally with any employee of Defendant Progressive but instead interacted with Defendant Progressive entirely online, through its website. As such, Plaintiff responded online to Defendant Progressive's questions as to optional coverages including UIM coverage. The electronic signature and electronic selections on the UIM offer form were generated by a computer based on Plaintiff's input and not by an agent or employee of Defendant Progressive.

On its webpage, Progressive listed UIM coverage immediately below standard liability coverage. And UIM was set to \$0.00 in coverage by default. The UIM label was also a hyperlink. All parties agree that Progressive has no record of the exact webpage that would have appeared upon clicking the hyperlink.

An explanation of UIM was also given in the final contract and was presented to the purchaser immediately before finalizing the contract in a scrollable inset window within the full web page. The purchaser had the option to print the document but did not. Finally, she clicked that she agreed to the terms.

Insurers must make a "meaningful offer" of optional UIM coverage. South Carolina courts have interpreted this legislative mandate as requiring an insurer to provide its insured "with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage."²

South Carolina Code Section 38-77-350 ("§38-77-350") allows insurers to use a form, which - if it complies with the following requirements and was properly completed and executed by the insured - would give rise to a presumption of an informed decision regarding acceptance or rejection of optional coverage:

(A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies.... The form, at a minimum, must provide for each optional coverage required to be offered:

- (1) a brief and concise *explanation* of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
- (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
- (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

(B) If this form is properly completed and executed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage

If an offer fails to comply with Section 38-77-350, the insurer is denied the presumption of an informed rejection; however, the insurer may nevertheless argue it made a meaningful offer

² *Hannamaker*, 291 S.C. at 521, 354 S.E.2d at 556.

under *Wannamaker*.³ Regardless, “[w]hether the analysis is focused primarily on the written form, the *Wannamaker* analysis, or both, the purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage ‘is for insureds to **know their options**, **and to make an informed decision** as to which amount of coverage will best suit their needs.’”⁴

Progressive fails to satisfy the requirements under § 38-77-350. First, no explanation was presented to the purchaser, only a mere hyperlink; second, the purchaser did not fill out the form herself because she provided the answers to the agent. A hyperlink is not an “explanation” but a mere offer of an explanation, and thus, an offer to offer an explanation. To say that a hyperlink amounts to an “explanation”, would be to say that an “offer of a meaningful offer” is enough. It is not. The website acted as Progressive’s agent. By asking the purchaser to select insurance amounts from drop-down lists, which were later inserted into a regular insurance form, fails to satisfy the requirement that the insured fill out the form herself. Moreover, she never saw the actual form, until the very end of the process. This offer fails to satisfy § 38-77-350, therefore the facts must be applied to *Wannamaker*.

In *Wannamaker*, the court adopted the following analysis applicable to the first two aspects of the transaction, which are obligations of the insurer:

1. the insurer must use a commercially reasonable notification process;
2. the offer must offer optional coverage with specific limits;
3. the offer must intelligibly explain the nature of the optional coverage; and

³ *Floyd v. Nationwide Ins. Co.*, 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005).

⁴ *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005), quoting *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005) (emphasis added).

4. the offer must advise the insured that optional coverages are available for an additional premium.⁵

It is the insurer's duty to comply with these standards in making an offer of UIM coverage. When an insurer makes a less than meaningful offer, an insured's rejection of UIM coverage is not an informed response that the courts will enforce. Stated differently, "a noncomplying offer has the legal effect of no offer at all."⁶

Under *Wannamaker*, the court said the notification process must be done in a commercially reasonable manner. To satisfy this aspect of the analysis, an insurer must employ both a reasonable *method of communication and* an approach that is "**reasonably calculated to bring the offer to the insured's attention.**"⁷ While the *Dewart* court recognized that use of mailings as a reasonable method to communicate with an insured, it also noted this fact alone did not demonstrate the insurer's process satisfied *Wannamaker*.⁸ Instead, it analyzed the circumstances under which the insurer presented the written offer of coverage to the insured (*i.e.*, inclusion with premium renewal notice). Here, Progressive included it on a webpage full of different hyperlinks and various insurance options.

Progressive argues that their hyperlink (and the webpage it lead to) was a meaningful offer. I disagree. Here, Progressive's hyperlink required the purchaser to inquire as to the explanation of UIM. By way of example, this would be similar to a person walking into an insurance agency with a knowledgeable agent (here, the website) and being asked if they wanted to purchase UIM coverage, without being offered an explanation of UIM. Here, the website

⁵ *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556

⁶ *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 1990.

⁷ *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 153-54, 370 S.E.2d 915, 917 (Ct. App. 1988).

⁸ In contrast, Plaintiff's argument on this issue rests solely on the fact that the *Dewart* decision predated Sec. 38-77-350. However, the plain language of Sec. 38-77-350 still contemplates that the form and coverages must be offered "pursuant to law."

knew what UIM was; however, it failed to present the explanation to the purchaser. Rather, it reversed the burden and placed it upon the purchaser. Requiring the purchaser to click the hyperlink is the same as requiring the purchaser to ask an in-store agent, "What is UIM?" South Carolina law requires that the agent offer an explanation of UIM, not merely wait to be asked what it is. To require the purchaser to ask about the optional coverage defeats the intent of the meaningful offer under *Wannamaker*.

The court in *Wannamaker* understood that a layman purchasing car insurance needed to be fully informed *before* they declined the optional coverage of UIM. In order for a meaningful offer to be made, there must be an "offer". The purchaser must be presented the option to purchase the additional coverage *and* an explanation of that coverage. Whether the purchaser decides to listen to or read that explanation is not something the law can require of the insurer. Nonetheless, the insurer must do his part. The "offer" must be presented to the purchaser. For example, the agent must read or show the explanation to the purchaser.

One might say that a hyperlink was sufficient to offer an explanation; however, the explanation or description of the coverage is the "meaningful" part of a "meaningful offer". If the purchaser is merely asked if he wants to purchase UIM coverage, without being given its explanation, the agent has failed the requirement under *Wannamaker*.

Moreover, one hyperlink on a page with tens of hyperlinks is effectively camouflaged and could not be reasonably calculated that the purchaser would see, much less click on and read. On a daily basis, Internet users are presented with hundreds upon hundreds of hyperlinks they do not click. So, unless the purchaser had a question about UIM coverage, there would be no reason for her to distinguish between hyperlink text and regular text. Thus, I find that the hyperlink method was not reasonably calculated to bring the offer to the insured's attention.

Furthermore, I find that the presence of a hyperlink is not an explanation. Here, assumedly, an explanation would have been presented but only after the purchaser clicked on the "Underinsured Motorist Coverage" hyperlink to inquire into the nature of the optional coverage.

~~However, here, there is no evidence one way or the other. Thus, in a light most favorable to the~~
nonmoving party, I will assume an explanation existed behind that hyperlink. Under *Wannamaker*, the insurer must offer the explanation to the purchaser. However, here, the insurer has shifted the burden to the purchaser, which goes against the core of *Wannamaker*. The purchaser has taken on some of the responsibility by choosing to purchase insurance online, rather than going to an insurance office in person. Nonetheless, the burden for making the offer and making sure the offer is presented to the purchaser, should remain with the insurer, notwithstanding the purchaser's ultimate decision to read or listen to the explanation.

It is possible to make a meaningful offer of UIM coverage on the Internet. The website could have prompted a pop-up window, an individual webpage for the selection of UIM, the explanation could have been displayed on the same coverage-selection page immediately below the drop-down menu for UIM coverage, or set the drop-down to default to selecting coverage. In the pop-up window or the separate page, Progressive could have given a detailed description of the optional coverage. Furthermore, if the purchaser were required to enter their name in a signature box, before being allowed to close the page, the insurer would have had all the more evidence that the purchaser was presented the "explanation" at the same time as she refused the coverage. If the drop-down had been defaulted to 25/50/25, in favor of purchasing coverage, then Progressive would have been given another opportunity to initiate a popup. For example, if the purchaser had tried to opt out of coverage, then the website could have prompted the pop-up

about UIM. For a trained web programmer, any or all of these methods would be simple to program.

Here, Progressive created a confusing environment to purchase insurance, thereby ~~exacerbating the purchaser's insurance purchasing inexperience. Thus, Progressive has failed to~~ satisfy the "commercially reasonable" notification requirement under *Wannamaker*.

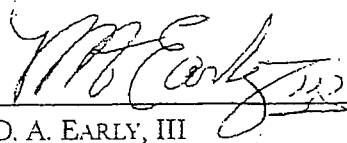
Finally, an explanation of UIM coverage existed in the final document, which was presented to the purchaser during the final phases of checkout. However, by this time in the purchasing process, the purchaser had already selected (or not selected) UIM coverage. The only way for the purchaser to change his mind at this point was to cancel his purchase and start over. Moreover, for a layman to weed out the explanation on a multipage document, is again a shift in the burden from the insurer to the purchaser. This falls far below the standard set in *Wannamaker*.

Upon reviewing all the evidence in a light most favorable to the nonmoving party, I find that Progressive failed to make a meaningful offer of UIM coverage, as defined under Section 38-77-350 and *Wannamaker*. Moreover, a webpage full of drop-down boxes does not satisfy the requirements under §38-77-350. A hyperlink and subsequently-opened webpage (notwithstanding its content) is insufficient to satisfy the requirements under *Wannamaker*.

Therefore, I hereby GRANT Plaintiffs' motion for summary judgment. As in *Wannamaker*, I find that the Plaintiff is entitled to UIM coverage by operation of law.

IT IS SO ORDERED!

June 25, 2013
Bamberg, SC


D. A. EARLY, III
Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

ORDER

NOV 05 2013

Liz Godard
C.C.C.P. & G. A., Aiken County, S.C.

Deputy Clerk

This matter comes before the Court upon Defendant Progressive Direct Insurance Company's Motion to Reconsider this Court's June 28, 2013 Order Granting Plaintiffs' Motion for Summary Judgment. A hearing was held on August 26, 2013. Appearing on behalf of the Plaintiffs was Tom Young, Esquire. Appearing on behalf of the Defendants was J.R. Murphy, Esquire. After reviewing the pleadings, submissions including legal memorandum, and hearing the able arguments of counsel, the Court grants Progressive Direct Insurance Company's Motion to Reconsider, hereby withdraws its June 28, 2013 Order Granting Plaintiffs' Motion for Summary Judgment, and grants Progressive Direct Insurance Company's Motion for Summary Judgment.

SUMMARY

This case presents the novel question of whether an insurer that sells a policy of automobile insurance to an individual through use of its website can rely upon an electronic offer of optional underinsured motorist (UIM) coverage in order to trigger the conclusive presumption of South Carolina Code Annotated § 38-77-350(B). Surprisingly, South Carolina's appellate courts have not addressed this issue. However, because South Carolina has adopted the Uniform Electronic Transactions Act, S.C. Code Ann. § 26-6-10 *et. seq.*, use of an electronic offer form

FILED

11.5.2013

Liz Godard
C.C.C.P. & G. S.

Deputy Clerk

9:30am

complies with the requirements of § 38-77-350(A) and an insured's electronic signature triggers the safe harbor protections of § 38-77-350(B).

FACTS

On April 20, 2007, Plaintiff Loretta Traynum went on her computer and purchased a policy of automobile liability insurance from Defendant Progressive through Progressive's website. Progressive uses a document retention system that allows it to recreate images of each screen that Traynum saw as she went through the application process. The parties do not contest that the recreated images accurately reflect Traynum's online transaction on April 20, 2007.

Progressive's website provided four preset packages providing various limits of liability and optional coverages ranging from the "minimum" package up to a "plus" package. At some point prior to April 20, 2007, Traynum went onto the Progressive website and obtained a quote. Because she did not purchase a policy at that time, Progressive's document retention system did not save that transaction for recreation, but Traynum pulled up that quote on April 20, 2007 to create the policy at issue in this case. The lowest amount of UIM limits provided under any of the four preset packages on Progressive's website defaulted to \$25,000/\$50,000. However, while obtaining the previous quote, Traynum declined the preset packages and chose to customize her coverage by reducing optional UIM coverage to zero.

After retrieving her prior quote, Traynum had the opportunity to review and make changes to her selected coverages and chose to make some changes to the quoted coverage by increasing her deductible for collision and comprehensive coverages from \$500 to \$1,000. For each type of coverage, Progressive provided a hyperlink, a web-based standard using blue font and a blue underline, that Traynum could click on to obtain an explanation of that type of coverage. Traynum chose not to click on any of those hyperlinks.

Once Traynum had finished customizing her policy, she proceeded to an information page and entered additional required information such as VIN numbers and vehicle lienholder information. From there, she came upon the first of three electronic signature pages. The page bore a header providing, "Sign Your Policy Forms (1 of 2)." In a box set out on the top of the screen, Progressive provided the following instructions: "**Your Electronic Signature is Required** Please read and **electronically sign** this document by entering your name in the form fields below and then clicking the "**Continue**" button." The box also instructed Traynum to either set her monitor to a specific resolution or print the document to ensure that it is displayed in the proper font, if required by state law.

Below the box, Progressive provided a full copy of the insurance application in a PDF format.¹ The application is printable and scrollable. In order to sign the application, Progressive provided an electronic signature prompt below the application form. That prompt provided:

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

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

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

¹ Portable Document Format (PDF) is a file format used to represent documents in a consistent manner regardless of application software, hardware, or operating systems being used to view the document. This is the format required by the Federal Courts for electronically filed documents. Electronic Case Filing Policies and Procedures, 1.7, D.S.C.

Underneath this prompt, Progressive provided two text boxes for Traynum to insert her first and then last name. Traynum typed her first and last name in the boxes and clicked "Continue," thereby consenting to the use of an electronic signature and electronically signing the application.

On the following webpage, Traynum reached the second of three signature pages and the one presently at issue before the Court. The layout of this page was identical to the application signature page. It provided a header stating "Sign Your Policy Forms (2 of 2)." It then provided the same box stating that her electronic signature was required, instructing her to read and electronically sign the document, and indicating that she could either set her monitor to a specific resolution or print the document to view it in the appropriate font, if required by law.

Below that box, Progressive presented a form titled "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form"). The Offer Form is substantively identical to the form promulgated by the South Carolina Department of Insurance pursuant to South Carolina Code Annotated § 38-77-350. See S.C. Dept. Ins. *Bulletin No. 2006-03* (2006). The web page included a full PDF of the Offer Form. Traynum had the ability to scroll through the entire form on her screen, save the form to her computer, and print the form out on paper.

The first two pages of the Offer Form provide an explanation of UM and UIM coverages and contact information for the South Carolina Department of Insurance Office of Consumer Affairs in case the applicant has any questions. The next two pages reflect Traynum's rejection of optional coverage and signatures confirming those rejections. The final page bears her signature under the applicant's acknowledgment. The form was completed by Progressive's website and software based upon Traynum's earlier selections of coverage. The form reflected

A handwritten signature in black ink, appearing to be "MKE" with a flourish underneath.

Traynum's rejection of optional UIM coverage. Also, because Traynum only purchased the minimum liability limits of \$25,000/\$50,000, the Offer Form reflected a rejection of additional uninsured motorist benefits. Traynum's typewritten name appears on each of the appropriate signature lines on the Offer Form.

Below the Offer Form, the website provides the same electronic signature prompt that was on the application page. It provides the same statement that Loretta Traynum represents that she is the person whose name appears on the signature lines of the Offer Form, that she viewed the Offer Form at the recommended text size, that she agrees to the terms and conditions of the Offer Form, and that by typing her name and clicking "Continue," she is electronically signing the document with the same effect as a written signature. Once again, the prompt indicates that if she fails to electronically sign, the application will not be effective and no coverage will result.

Traynum typed in her first and last name in the two boxes and clicked "Continue." In doing so, she electronically signed the Offer Form, including the applicant's acknowledgment, stating:

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and optional underinsured motorist coverage. I understand that the above explanations of these coverages are intended only to be brief descriptions of additional uninsured motorist coverage and optional underinsured motorist coverage, and that payment of benefits under either of these coverages is subject both to the terms and conditions of my automobile insurance policy and the laws of the State of South Carolina.

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



Traynum also electronically signed the page on the Offer Form indicating that she was rejecting optional UIM coverage.

After clicking "Continue," Traynum proceeded to the last signature page and authorized the use of an electronic funds transfer to allow electronic payments of her premium. After typing in her name and clicking "Continue" for a third time, the transaction was complete and Progressive issued the policy. Traynum also had the opportunity, once again, to print all of the insurance documents, including the Offer Form. Traynum did not communicate with any human representative of Progressive during this transaction, but dealt solely with Progressive's website through the use of her computer.

STANDARD OF REVIEW

An action for reformation of an insurance contract is in equity. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 440, 392 S.E.2d 472 (Ct. App. 1990). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Glasscock, Inc. v U.S. Fid. & Guar. Co.*, 348 S.C. 76, 79, 557 S.E.2d 689, 690 (Ct. App. 2001). In determining whether any triable issue of fact exists, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* at 79, 557 S.E.2d at 691.

LAW

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

In response to *Wannamaker*, the General Assembly enacted § 38-77-350, which is a safe harbor provision creating a conclusive presumption that an informed, knowing selection of UIM coverage was made when certain conditions are met. *McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 122, 590 S.E.2d 514, 516 (Ct. App. 2003). Section 38-77-350(A) provides:

(A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:

- (1) a brief and concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
- (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
- (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A). If a form that complies with § 38-77-350(A) is properly signed by the named insured after having been completed, § 38-77-350(B) creates a conclusive presumption that there was a meaningful offer.

In this case, the form signed by Traynum during her electronic transaction is effectively identical to the form promulgated by the South Carolina Department of Insurance, Form number 2006. The Court of Appeals has previously held that this form meets the requirements of § 38-77-350(A). *Clinton v. West American Ins. Co.*, 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005) ("The South Carolina Court of Appeals has specifically held that the form used by

WAE
#7

West American, Form 2006, meets the requirements of § 38-77-350.”); *Burch v. South Carolina Farm Bureau Mut. Ins. Co.*, 351 S.C. 342, 349, 569 S.E.2d 400, 404 (Ct. App. 2002); S.C. Dept. Ins. Bulletin No. 2006-03 (2006).

Plaintiffs argue that the Court's meaningful offer analysis must begin with whether the offer was presented in a commercially reasonable manner. See *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556. Relying upon the Court of Appeals' decision in *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 670 S.E.2d 815 (Ct. App. 1988), Plaintiffs argue that presenting the Offer Form electronically in between the application signature page and the electronic payment page is akin to the leaflet insert in a renewal statement that was at issue in that case. However, the offer at issue in *Dewart* was made before the General Assembly promulgated § 38-77-350, which requires use of a written form. More importantly, there were no assurances in the transaction in *Dewart* that the insured ever even saw or read the leaflet. On the other hand, § 38-77-350 requires that Traynum sign the form, which she did. Absent duress, it is difficult to imagine how an individual could sign a form without having had an opportunity to read it as well.

In addition, by requiring use of a written offer on a form approved by the Department of Insurance, the General Assembly made use of a written offer form commercially reasonable as a matter of law. See *Clinton*, 364 S.C. at 122, 611 S.E.2d at 526 (“The Offer was commercially reasonable, being made on a form approved by the South Carolina Department of Insurance in compliance with § 38-77-350 of the South Carolina Code of Laws.”). Therefore, when an offer form that satisfies the requirements of § 38-77-350(A) is used, there is no need to question whether use of the form was commercially reasonable. Because Progressive used a form that

was substantially identical to Form 2006, its Offer Form satisfies the requirements of § 38-77-350(A) and its use was commercially reasonable.

Plaintiffs also take issue with the order of presentation of the offer. Namely, Traynum adjusted her desired levels of UIM coverage in the quote phase before she reached the web page presenting the Offer Form. However, nothing in either the statutory language or appellate decisions interpreting §§ 38-77-160 and 38-77-350 establishes such a requirement. In fact, the appellate decisions have found meaningful offers in other situations where the offer was not presented until after coverage was selected. *See Atkins v. Horace Mann Ins. Co.*, 376 S.C. 625, 658 S.E.2d 106 (Ct. App. 2008) (meaningful offer conveyed after telephone transaction modifying coverage); *Wiegand v. United States Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) (meaningful offer conveyed on offer form presented 10 years after insurance purchase); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 303 S.C. 321, 400 S.E.2d 492 (1991) (meaningful offer conveyed as part of a premium renewal notice); *Burch v. South Carolina Farm Bureau Mut. Ins. Co.*, 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002) (meaningful offer conveyed on form presented to insured almost four years after originally purchasing insurance).

The General Assembly apparently anticipated that the written offer form would often be presented after the insurance purchase. Paragraph E of section 38-77-350 provides that, "[i]f the insured fails or refuses to return an executed offer form within thirty days to the insurer, the insurer shall add on uninsured and underinsured motorist coverages with the same limits as the insured's liability limits." S.C. Code Ann. § 38-77-350(E). If the offer form must be presented prior to the selection of coverage, there would be no need for paragraph E. Therefore, the insurer has no duty to present the written offer form before an insured makes her initial selection of coverages.

Now that the Plaintiffs' other arguments have been addressed, the key issue in this case is whether Progressive's presentation of the Offer Form and Traynum's electronic signature trigger the safe harbor provision of § 38-77-350(B). The answer is yes. Section 38-77-350(A) requires the use of a written form and § 38-77-350(B) provides that, once the form has been completed by an agent of the insurer and signed by the insured, the executed form creates a conclusive presumption of a meaningful offer. In 2004, the General Assembly enacted the Uniform Electronic Transactions Act ("UETA"). 2004 South Carolina Laws Act 279 (H.B. 4720). Section 26-6-60 of the UETA provides that the act "must be construed and applied to . . . facilitate electronic transactions consistent with other applicable law." S.C. Code Ann. § 26-6-60. The act also provides that "[a] record or signature must not be denied legal effect or enforceability solely because it is in electronic form." S.C. Code Ann. § 26-6-70(A). Therefore, Traynum's electronic signature cannot be denied its proper legal effect if the transaction otherwise comports with both the UETA and § 38-77-350.

South Carolina Code Annotated § 26-6-80 provides the relevant framework to determine if the transaction in this case satisfies the requirements of the UETA. It provides:

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

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

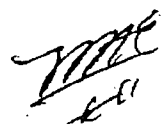
WAC
#10

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

(C) The electronic record is not enforceable against the recipient if a sender inhibits the ability of a recipient to store or print an electronic record.

S.C. Code Ann. § 26-6-80. The Court finds that Progressive's presentation of the Offer Form satisfies each of the requirements of § 26-6-80. First, by going online to purchase a policy of insurance and then by electronically signing the application and Offer Form, Traynum consented to conducting the insurance transaction through electronic means. Therefore, the written offer requirement of § 38-77-350(A) was satisfied when Progressive presented the form electronically. Furthermore, the Offer Form was "capable of retention" because Traynum could save and print the form. Furthermore, by instructing Traynum to either set her screen resolution or print the form, any requirement that the form be viewed as it was approved by the Department of Insurance was also satisfied.

Plaintiffs also contend that the conclusive presumption of § 38-77-350(B) does not apply because Traynum completed the form rather than an agent of Progressive. In 2006, the Supreme Court in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005), interpreted a prior version of § 38-77-350, which provided that: "If this form is properly **completed and executed by the named insured**" there was a conclusive presumption of a meaningful offer and a knowing selection or rejection of optional coverage. S.C. Code Ann. § 38-77-350(B) (2005) (emphasis added). The Supreme Court held that this meant that **only** the named insured could complete the offer form and, if an agent completed the form for the insured's signature, the



insurer did not gain the protections of § 38-77-350(B). "The South Carolina General Assembly effectively reversed the *Floyd* decision with the enactment of 2006 S.C. Rat. No. 377, §1, amending § 38-77-350." (S.C. Dept. Ins. *Bulletin No. 2006-03* (2006)). Under the amended statute – which was in effect on April 20, 2007 when Traynum applied for and purchased the insurance policy – § 38-77-350 provides that: "If this form *is signed by the named insured*, after it has been *completed by an insurance producer or representative of the insurer*, it is conclusively presumed there was an informed, knowing selection of coverage" S.C. Code Ann. § 38-77-350(B) (2007).

Plaintiffs make the novel argument that the amended version of § 38-77-350(B) now provides that only the *producer* can complete the form for the insured's signature. In other words, what the Supreme Court held in *Floyd* to be the only way to trigger the conclusive presumption of § 38-77-350(B) is no longer valid. The legislature's response to the *Floyd* decision does not indicate this intention.

However, even if Plaintiffs are correct that § 38-77-350(B) now requires that the form be completed by either a producer or representative of an insurance agent, that requirement is satisfied in this case. Section 26-6-140 of the UETA provides that:

In an automated transaction . . . a contract may be formed by the interaction of an electronic agent and an individual . . . including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

S.C. Code Ann. § 26-6-140. Section 26-6-20 of the UETA defines "electronic agent" as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." S.C. Code Ann. § 26-6-20(6). The parties do not dispute that no

individual person from Progressive participated in the online transaction. Therefore, this was an automated transaction between an electronic agent of Progressive and Traynum. Progressive's website acted as its "electronic agent" when it completed the Offer Form based upon her selections on the previous pages. Therefore, a "representative" of Progressive completed the form and Traynum signed the form.

"A record or signature must not be denied legal effect or enforceability solely because it is in electronic form." S.C. Code Ann. § 26-6-70(A). Traynum received and electronically signed the Offer Form presented by Progressive. The offer satisfies all of the requirements of § 38-77-350(A) and § 26-6-80. By signing the form, Traynum triggered the conclusive presumption § 38-77-350(B). Therefore, the safe harbor provisions in § 38-77-350 apply and Progressive enjoys a conclusive presumption of a meaningful offer of optional coverage.

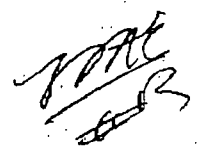
CONCLUSION

For the above-stated reasons, the Court finds that the § 38-77-350(B) conclusive presumption applies and Progressive is entitled to summary judgment. Traynum received the written offer form electronically in a manner capable of retention and then electronically signed the form after it was completed by an agent of Progressive. Furthermore, the form satisfies all of the requirements of § 38-77-350(A). Therefore, the presumption applies and Progressive is entitled to summary judgment.

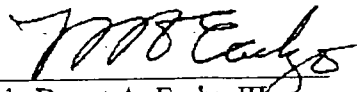
Therefore, it is ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Summary Judgment is GRANTED, Loretta Traynum received a meaningful offer of optional UIM coverage, which she rejected.

Furthermore, the Plaintiffs' Motion for Summary Judgment is denied.

It is so ORDERED.

A handwritten signature in dark ink, appearing to be "JAT" or similar, with a flourish underneath.

This the 31st day of October, 2013.

A handwritten signature in dark ink, appearing to read "Doyet A. Early, III". The signature is written in a cursive, somewhat stylized font.

The Honorable Doyet A. Early, III
Presiding Judge of the 2nd Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-02-02665

Lorella Traynum and Leonard Traynum

Cynthia Scavens and Progressive Direct
Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Reconsider is DENIED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

12-3-13
L. Hodges
SCCP & G.S.
Anita Knoepfle
Deputy Clerk

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Tommy C. [Signature]
Circuit Court Judge

0136
Judge Code

12-3-13
Date

For Clerk of Court Office Use Only

This judgment was entered on 12-3-13, and a copy mailed first class or placed in the appropriate attorney's box on 12-3-13, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Roy Young Jr. PO Box 651 Aiken, SC 29802

John Robert Murphy PO Box 6648 Columbia, SC 29260

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard

Court Reporter

Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Loretta Traynum and
Leonard Traynum,

Plaintiffs,

vs.

Cynthia Scavens and
Progressive Direct Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2010CP0202665

COMPLAINT
(jury trial requested)

COPY
ORIGINAL FILED

OCT 29 2010

AIKEN COUNTY
CLERK OF COURT

The Plaintiffs, above-named, complaining of the Defendants, above-named, do allege and show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. That the Plaintiff Loretta Traynum is a citizen and resident of the County of Aiken, State of South Carolina. She is lawfully married to Plaintiff Leonard Traynum and was on the date of the wreck described herein.
2. Plaintiffs are informed and believe that Defendant Cynthia Scavens is a resident of the Town of North Augusta, in the County of Aiken, State of South Carolina.
3. Plaintiffs are informed and believe that the Defendant Progressive Direct Insurance Company (hereinafter "Progressive") is the UIM carrier for Plaintiffs on the date of the wreck and is located in one of the 50 states while doing business in South Carolina.
4. That this Honorable Court has jurisdiction over the parties and the subject matter herein set forth.

FACTUAL ALLEGATIONS

5. The aforementioned paragraph of this Complaint is repeated as set forth herein verbatim.

6. On November 1, 2007, the Plaintiff Loretta Traynum was operating a 2003 Chevrolet Trailblazer SUV, licensed in South Carolina, VIN: 1GNDS135732103396, owned by her husband, Leonard Traynum.

7. On November 1, 2007, the Defendant Cynthia G. Scavens was operating a 2003 Hyundai licensed in South Carolina VIN: KMHWF25573A865032, owned by Cynthia Gailbreath Scavens.

8. On November 1, 2007, at 7:43 a.m., the Plaintiff Loretta Traynum was traveling West on Martintown Road (SC 230). Defendant was also traveling West on Martintown Road (SC 23) behind Plaintiff.

9. The Plaintiff Loretta Traynum stopped for the red light at the intersection of Martintown Road (SC 230) and Bolen Rd. (S-1936).

10. The Defendant failed to stop, stating that she had fallen asleep, and ran into the back of Plaintiff Loretta Traynum.

11. As a result of the aforesaid acts and omissions of the Defendant, the Plaintiffs suffered sustained actual damages and injuries as described herein.

FIRST CAUSE OF ACTION – NEGLIGENCE **(Defendant Scavens)**

12. Each of the aforementioned paragraphs of this Complaint is repeated as set forth herein verbatim.

13. The Defendant is individually liable to the Plaintiffs at the time and place above-mentioned for being negligent, grossly negligent, wanton, willful, and careless in one or more of the following particulars:

- a. In operating a motor vehicle, a dangerous instrumentality, or allowing a motor vehicle to be operated that was in a dangerous and/or unsafe condition;
- b. In failing to keep her automobile under proper control;
- c. In driving recklessly;
- d. In failing to apply or timely apply her brakes;
- e. In failing to yield to the Plaintiff Loretta Traynum's right-of-way;
- f. In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there prevailing.

14. Each and all of the aforementioned were the direct and proximate cause(s) of the damages and injuries suffered by the Plaintiffs herein, said acts being in violation of the statutory and common laws of the State of South Carolina.

DAMAGES AND INJURIES

15. Each of the aforementioned paragraphs of this Complaint is repeated as set forth herein verbatim.

16. As a direct and proximate result of the acts and/or omissions of the Defendant, the Plaintiffs have suffered injuries and damages. The Plaintiffs are seeking

monetary damages from the Defendant to compensate them for the following elements of damage:

- a. Past and future medical expenses;
- b. Past and future loss of earnings;
- c. Past and future pain and suffering;
- d. Past and future mental anguish;
- e. Past and future disfigurement;
- f. Past and future loss of insurability;
- g. Past and future loss of quality of life; and
- h. Other damages that will be shown at trial.

17. Further the Plaintiffs seek punitive damages herein to be determined in the discretion of the jury.

FOR A SECOND CAUSE OF ACTION – LOSS OF CONSORTIUM
(Defendant Scavens)

18. Each of the aforementioned paragraphs of this Complaint is repeated as set forth herein verbatim.

19. Plaintiff Leonard Traynum is the lawful husband of Plaintiff Loretta Traynum, and at all times mentioned herein, as a direct and proximate result of the negligence, recklessness, willfulness, wantonness and gross negligence of Defendant, has suffered and will in the future suffer a loss of the aid, comfort, society and consortium of his wife, Loretta Traynum, and is entitled to an award of actual damages in an amount to be determined by the Court at the trial of this action.

THIRD CAUSE OF ACTION-DECLARATORY JUDGMENT
(Defendant Progressive Direct Insurance Company)

20. This claim is brought pursuant to the South Carolina Uniform Declaratory Judgment Act as outlined in S.C. Code Ann. § 15-53-10 **et seq.**, for declarations of the rights, status and other legal relations of the parties, which are in dispute, under the policy of liability insurance issued by the Defendant Progressive to the Plaintiff Loretta Traynum for underinsured coverage.

UNDERLYING ACCIDENT AND CLAIMS

21. As described above herein, a wreck involving Plaintiffs and Defendant Scavens occurred on November 1, 2007.

22. As a result of the wreck, Plaintiffs made a claim against Defendant Scavens. This claim was settled by Defendant Scavens' liability insurance carrier, Travelers Insurance Company (hereinafter, "Travelers"), for the sum of \$100,000.00, representing the full amount of the Travelers' liability limits applicable to Plaintiffs' claims in exchange for which Plaintiffs have signed a covenant not to execute which allows them to pursue any claim for UIM coverage applicable to the wreck.

23. The Plaintiffs' damages exceed the sum of \$100,000.00.

INSURANCE POLICY IN ISSUE

24. At the time of the wreck, Progressive had in effect a motor vehicle insurance policy, policy number 172333470, naming Traynum as the named insured (hereinafter, the "Policy").

25. The Policy provided, among other things, bodily injury liability insurance ("BI") coverage to Traynum, with declared policy limits of \$25,000.00 per person, subject to terms and conditions included in the Policy and as allowed by law.

26. The Policy insured Plaintiff Traynum's vehicle in the wreck.

27. At the time of the wreck, Plaintiff was an "insured" under the Policy.

28. The Policy, as issued by Progressive, did not contain underinsured motorists ("UIM") coverage at the time of the wreck.

29. Prior to the wreck, Progressive via the internet, offered UIM coverage to Traynum and obtained a rejection form from Plaintiff Traynum. The form was not physically signed by Traynum at any time.

PARTIES' POSITIONS AND CONTROVERSIES REGARDING UIM COVERAGE

30. Relying upon the UIM rejection form, Progressive has denied that it provides UIM coverage for Plaintiffs' claims as a result of the wreck.

31. Progressive's offer of UIM coverage to Traynum was inadequate and did not satisfy the requirements of South Carolina law.

32. The UIM rejection form obtained by Progressive was inadequate, was completed in violation of the requirements of South Carolina law, and did not satisfy the requirements of South Carolina law.

33. Because Progressive's offer of UIM coverage and UIM rejection form did not satisfy the requirements of South Carolina law, the Policy should be reformed to include UIM coverage with limits of \$25,000.00 per person, the declared limits of BI coverage under the Policy. Further, Plaintiffs had two other cars at home covered

under the same policy and Plaintiffs should be able to stack UIM coverage from those two vehicles.

CLAIM FOR RELIEF

34. An actual and justiciable controversy exists amount the parties; therefore, a declaratory judgment is appropriate to assist the parties in understanding their rights and responsibilities under the Policy.

35. Pursuant to S.C. Code Ann. § 15-53-80 (1976, as amended), Plaintiffs have named Scavens as a party to this action inasmuch as she as an interest and may be affected by the outcome of this action.

36. Plaintiffs have been forced to prosecute this action to enforce their rights under the Policy and have incurred and continues to incur attorney's fees and litigation costs to do so; therefore, Plaintiffs are entitled to an award of attorney's fees and costs from Progressive.

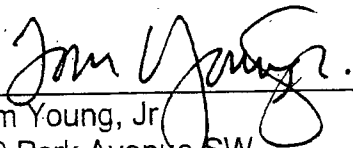
WHEREFORE, the Plaintiffs pray for the following:

1. for judgment against the Defendant in an amount of actual damages to be determined by the Court in a jury trial which is sufficient to compensate the Plaintiffs for the injuries suffered herein; punitive damages; the costs of this action; and for such other and further relief as this Court might deem just and proper.
2. for a declaratory judgment that Progressive provide \$25,000.00 in UIM coverage on the Plaintiffs' car in the wreck. Plaintiffs also seek attorney's fees, the costs of this action, and any other relief deemed appropriate by the Court (declaratory relief).

Jury Trial is demanded on the wreck claim and bench trial for the declaratory relief.

Respectfully submitted,

LAW OFFICES OF TOM YOUNG, JR., PC



Tom Young, Jr.
409 Park Avenue SW
Post Office Box 651
Aiken, SC 29802
(803) 649-0000 - Telephone
(803) 649-7005 - Fax
tyoung@tomyounglaw.com

ATTORNEYS FOR THE PLAINTIFFS

Aiken, South Carolina

October 29, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2010-CP-02-02665

**ANSWER ON BEHALF OF
DEFENDANTS**

**TO: TOM YOUNG, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO THE
PLAINTIFF ABOVE NAMED:**

The Defendant, Progressive Direct Insurance Company, answering on behalf of its itself
and appearing on behalf of Cynthia Scavens as a potential underinsured motorist carrier
pursuant to statute, would respectfully show unto the Court that:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation of the Plaintiff's Complaint not
hereinafter specifically admitted.
2. Paragraph one (1) is admitted upon information and belief.
3. Paragraph two (2) is admitted.
4. As to paragraph three (3), Progressive admits that it is an insurance carrier
authorized to transact business in South Carolina but denies that it provided underinsured
motorist coverage to the Plaintiffs, the same having been properly rejected by them when they
obtained their policy; otherwise, paragraph three (3) is denied.
5. Paragraph four (4) is admitted.



6. In response to paragraph five (5), Progressive reiterates its response to paragraphs one (1) through four (4) above as if fully set forth verbatim herein.

7. As to paragraphs six (6), seven (7), eight (8), nine (9), ten (10) and eleven (11), Progressive admits, upon information and belief, that on or about November 1, 2007, Loretta Traynum was involved in an automobile accident with Cynthia Scavens and as a result, sustained certain bodily injuries; otherwise, paragraph six (6) through eleven (11) are denied.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION

8. In response to paragraph twelve (12), Progressive reiterates its response in paragraphs one (1) through eleven (11) above as if fully set forth verbatim herein.

9. In response to paragraphs thirteen (13) and fourteen (14), Progressive denies that it is subject to this cause of action and otherwise denies paragraphs thirteen (13) and fourteen (14) as to Scavens.

10. In response to paragraph fifteen (15), Progressive reiterates its response to paragraphs one (1) through fourteen (14) above as if fully set forth verbatim herein.

11. Progressive is without sufficient knowledge and information as to the nature and extent of the Plaintiff's injuries and damages and therefore paragraph sixteen (16) is denied.

12. Paragraph seventeen (17) is denied.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION

13. In response to paragraph eighteen (18), Progressive reiterates its response in paragraphs one (1) through seventeen (17) above as if fully set forth verbatim herein.

14. As to paragraph nineteen (19), Progressive admits that Leonard Traynum is the husband of Loretta Traynum, but otherwise is without sufficient knowledge and information



as to the nature and extent of any injuries and damages sustained by Leonard Traynum or Loretta Traynum and therefore, paragraph nineteen (19) is denied.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION

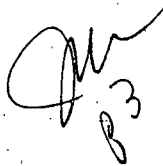
15. As to paragraph twenty (20), Progressive admits that the Third Cause of Action seeks a declaratory judgment regarding the existence of underinsured motorist coverage under a policy of insurance issued by Progressive to Plaintiffs; otherwise, paragraph twenty (20) is denied.

16. Paragraph twenty-one (21) is admitted upon information and belief.

17. As to paragraph twenty-two (22), Defendants admit that Plaintiffs have asserted a tort claim against Scavens and received \$100,000.00 from Scavens' liability insurance carrier; Progressive further admits that the settlement document signed by the Plaintiffs preserves their rights to pursue a claim for underinsured motorist coverage but Progressive would show that its policy does not provide any such underinsured motorist coverage; otherwise, paragraph twenty-two (22) is denied.

18. As to paragraph twenty-three (23), Progressive is informed and believes that Plaintiff's damages may exceed the sum of \$100,000.00.

19. As to paragraphs twenty-four (24), twenty-five (25) and twenty-six (26), Progressive admits that it issued policy 17233347-0 to Loretta Traynum and Progressive craves reference to its policy, application and rejection form for all the terms, provisions and conditions therein; otherwise, paragraphs twenty-four (24), twenty-five (25) and twenty-six (26) are denied.



20. As to paragraph twenty-seven (27), Progressive admits that Plaintiffs would qualify as insureds under the policy definition for any coverages provided by the policy; otherwise, paragraph twenty-seven (27) is denied.

21. Paragraph twenty-eight (28) is admitted (28).

22. As to paragraph twenty-nine (29), Progressive would show that Loretta Traynum applied for and obtained her policy via the internet and consented to the use of an electronic signature for all policy documents; otherwise, paragraph twenty-nine (29) is denied.

23. As to paragraph thirty (30), Progressive would show that underinsured motorist coverage was properly rejected and therefore its policy does not provide underinsured motorist coverage for the Plaintiffs' claims as a result of the November 1, 2007 accident with Defendant Scavens.

24. Paragraph thirty-one (31), thirty-two (32) and thirty-three (33) are denied.

25. As to paragraph thirty-four (34), Progressive denies that an actual controversy exists in that Progressive is entitled to a conclusive presumption that its policy does not provide underinsured motorist coverage to the Traynums for the accident of November 1, 2007 with Scavens; otherwise, paragraph thirty-four (34) is denied.

26. Paragraph thirty-five (35) is denied with respect to any declaratory relief but admitted, upon information and belief, that Scavens may be necessary to establish liability and damages in connection with the claim for underinsured motorist coverage, even though Progressive denies that any such underinsured motorist coverage is available to the Traynums in connection with this matter.

27. Paragraph thirty-six (36) is denied.

FOR A SECOND DEFENSE



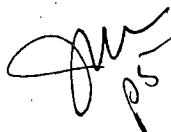
28. The Defendants would show, upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and, therefore, the Plaintiff's Complaint should be dismissed with costs.

FOR A THIRD DEFENSE

29. Progressive would show, upon information and belief, that the declaratory action and the claims for negligence against Scavens have been improperly joined and therefore, this matter should be dismissed or in the alternative severed for separate trials.

FOR A FOURTH DEFENSE

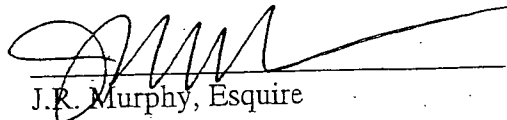
30. The Defendants would show, upon information and belief, that the Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendants could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because the Defendants can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiffs' claim for punitive damages violates this Defendants' right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendants' exercise of that right; the Plaintiffs' claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiffs' claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth



Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiffs' claim for punitive damages should be dismissed.

WHEREFORE, having fully answered, the Defendants pray that the Plaintiffs' Complaint be dismissed with costs.

MURPHY & GRANTLAND, P.A.



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(803) 782-4100

Attorneys for the Defendant Progressive
Direct Ins. Co.

Columbia, South Carolina
January 7, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

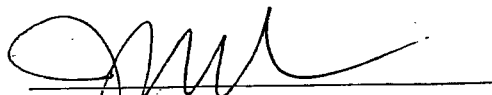
MOTION FOR SUMMARY JUDGMENT

TO: TOM YOUNG, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO THE PLAINTIFF ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, Progressive Direct Insurance Company, will move before the presiding judge of the Aiken County Court of Common Pleas at the Aiken County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order granting summary judgment in favor of the Defendant, Progressive Direct Insurance Company, on grounds that there is no genuine issue as to any material fact.

This Motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.

MURPHY & GRANTLAND, P.A.



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Attorneys for the Defendant Progressive
Direct Ins. Co.

Columbia, South Carolina
October 24, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

**MEMORANDUM FOR SUMMARY
JUDGMENT**

Progressive Direct Insurance Company ("Progressive") submits this Memorandum of Law in support of its Motion for Summary Judgment

SUMMARY

This is a declaratory action wherein Plaintiffs seek reformation of a policy issued by Progressive to Loretta Traynum ("Traynum") to include underinsured motorist (UIM) coverage. Traynum purchased the policy online via the Internet using a computer. During that online transaction, Progressive provided to Traynum a complete and proper copy of Progressive's standard South Carolina offer form for uninsured motorist (UM) and UIM coverage. Traynum electronically signed the form confirming her rejection of optional UIM coverage. Because South Carolina statutory law states that electronic signatures are treated with the same legal effect as handwritten signatures, Traynum's signature entitles Progressive to the statutory conclusive presumption that Traynum made a knowing and intelligent rejection of optional coverage.

FACTS

Traynum is a tech-savvy consumer who uses the Internet for banking, bill payments, purchases, travel arrangements, and for insurance quotes and procurement. (Traynum Dep. 14-

19, excerpts attached as Exhibit A). In the past, she was responsible for purchasing and maintaining business liability insurance for her employer. (Traynum Dep. 9:6-21). She has also taken care of insurance matters for her household for over twenty years. (Traynum Dep. 10:24-11:19).

On April 20, 2007, using her computer, Traynum went online and purchased a policy of automobile liability insurance from Progressive through Progressive's website. She purchased liability limits of \$25,000 per person, \$50,000 per accident, and \$25,000 for property damage. (Tealeaf, 4, attached as Exhibit B). These were the minimum allowable limits in South Carolina at the time. She electronically signed a form titled "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form") rejecting UIM coverage. (Offer Form, attached as Exhibit C). Traynum specifically wanted a policy that would meet the requirements of South Carolina law and satisfy her obligations to the lienholders on her vehicles. (Traynum Dep. 24:18-25). She only wanted to purchase what was necessary for compliance with state laws. (Traynum Dep. 24:6-17).

A. Progressive's document management and retention system

Progressive utilizes a document management system for purchases of insurance made through the Internet. This system is managed by Tealeaf Technology, Inc., an industry leader that provides a recording of everything that goes on during an online session while an applicant is quoting or purchasing a policy of insurance on Progressive's website.¹ (Kordes Dep. 17:3-12, excerpts attached as Exhibit D). It shows the exact screens she saw, the exact items she clicked, and everything she viewed on the website. (Kordes Dep. 17:3-12).

¹ The recording only shows the screens sent to Traynum's computer in a step-by-step manner. It provides an interactive screen shot of every individual page that Traynum went through during the online transaction.

In addition to providing a recording through Tealeaf, Progressive archives electronically signed documents. This system is managed by Iron Mountain, a document retention company. (Kordes Dep. 19:9-13). Together, the Tealeaf session and archived records give an accurate copy of the exact transaction that took place on April 20, 2007 when Traynum applied for and purchased her policy.

B. Traynum's online transaction

Traynum initially obtained a quote online from Progressive some time prior to April 20, 2007. (Kordes Dep. 20:8-15). After retrieving her quote when she went back online on April 20, 2007, Traynum had the opportunity to review and make changes to her selected coverages, and she chose to make some changes to the quoted coverage by increasing her deductible for collision and comprehensive coverages from \$500 to \$1,000. (Kordes Dep. 27:12-28:2). For each type of coverage, Progressive provided a hyperlink, a web-based standard using blue font and a blue underline, that Traynum could click on to obtain an explanation of that type of coverage. (Kordes Dep. 20:02-25:2). Traynum chose not to click on those links. (Kordes Dep. 25:7-10). After changing her coverage to increase the deductibles, Traynum proceeded to a page requiring additional information such as the vehicle identification numbers for the insured vehicles and lienholder information. (Tealeaf, 5).

Upon completing that page, Traynum proceeded to the application signature page. (Kordes Dep. 29:25-32:7). The application electronic signature page begins with a header, providing "Sign Your Policy Forms (1 of 2)." (Tealeaf, 6). Immediately below the header is the following box:

Sign Your Policy Forms (1 of 2)

Your Electronic Signature is Required

Please read and **electronically sign** this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

Option 1 - set your monitor resolution to 800 x 600

Option 2 - Print this document (print in correct text size)

(Tealeaf, 6). The box provides "Please read and **electronically sign** this document by entering your name in the fields below and then clicking the "Continue" button." (Tealeaf, 6). The page also prompts Traynum to either set her monitor resolution to 800 x 600 or print the application to ensure that the document is viewed in the appropriate font, if required by state law. (Tealeaf, 6).

In a window immediately below the box, Progressive displayed a complete PDF copy of the application, a hardcopy of which is attached as Exhibit E.² (Tealeaf, 6). Traynum could scroll through and review the entire application, including the acknowledgment at the end of the document that provided:

Applicant signature

I represent that I, LORETTA TRAYNUM, am the person identified as the named insured and the first driver in the Drivers and Resident Relatives section of this application. I acknowledge and agree to the statements contained within this application.

I also acknowledge and agree that by typing my name in the designated boxes on the screen below this form and clicking "Continue", I am electronically signing this application, which will have the same legal effect as the execution of this document by a written signature and shall be valid evidence of my intent and agreement to be bound by its terms.

I understand that my name already appears in the signature line below because I chose to electronically sign this application, and this application will be securely stored, as it is presented here, if I

² Portable Document Format (PDF) is a file format used to present documents in a consistent manner regardless of application software, hardware, or operating systems being used to view the document. This is the format required by the Federal Courts for electronically filed documents. Electronic Case Filing Policies and Procedures, 1.7, D.S.C.

purchase this policy. I also understand that if I do not electronically sign this application, it will not be processed.

Signature of Named Insured
X LORETTA TRAYNUM

Date
April 20, 2007

(Tealeaf, 6) (Application, 5-6).

Immediately below the window containing the complete application, is the following

Electronic Signature prompt:

Policyholder Electronic Signature

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

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

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

First

Last

(Tealeaf, 6). Traynum typed her first and last name in the boxes, thereby consenting to the use of an electronic signature and electronically signing the application. (Kordes Dep. 32:8-20).

After completing the application signature page and clicking "Continue," Traynum reached the offer of UM and optional UIM coverage. The layout of this page is identical to the application signature page. The top of the page bears a header providing "Sign Your Policy Forms (2 of 2)" and provides the same box as the previous page:

Sign Your Policy Forms (2 of 2)

Your Electronic Signature is Required

Please read and **electronically sign** this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

Option 1 - set your monitor resolution to 800 x 600

Option 2 - Print this document (print in correct text size)

(Tealeaf, 7). Once again, the box provides that an electronic signature is required and gives the option of printing the offer form. Below that box is a window containing a PDF of the entire Offer Form. (Offer Form) (Tealeaf, 7). The Offer Form indicates Traynum's rejection of optional UIM coverage and includes the signature line for Traynum to confirm this rejection. (Offer Form, 4). The form also provides the following acknowledgment:

IV. Applicant's acknowledgment

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and optional underinsured motorist coverage. I understand that the above explanations of these coverages are intended only to be brief descriptions of additional uninsured motorist coverage and optional underinsured motorist coverage, and that payment of benefits under either of these coverage is subject both to the terms and conditions of my automobile insurance policy and the laws of the State of South Carolina.

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

(Offer Form, 5). As with the application page, Traynum could scroll through the entire Offer Form on her screen. (Tealeaf, 7).

Immediately below the window containing the Offer Form is the same Electronic Signature prompt, which provides:

Policyholder Electronic Signature

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

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

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

First

Last

(Tealeaf 7). Traynum again typed her first and last name into the boxes. (Kordes Dep. 51:9-16).

In doing so, she consented to the use of an electronic signature, acknowledged that the signature had the same legal effect as a written signature and, most importantly, affirmed that she had viewed the Offer Form and agreed to its statements, terms and conditions. (Tealeaf, 7).

After electronically signing the Offer Form, Traynum proceeded to the payment screen. For a third time, Traynum gave her electronic signature authorizing Progressive to establish an electronic funds transfer to allow electronic payments for her premiums. (Tealeaf, 9). Upon completing this signature and proceeding to the next page, her insurance purchase was complete and Progressive issued the policy with the coverages and amounts selected by Traynum. Traynum also had the opportunity, once again, to print all of the insurance documents, including the Offer Form. (Tealeaf, 10).

ARGUMENT

I. Legal Standard

An action for reformation of an insurance contract is in equity. Dewart v. State Farm Mut. Auto. Ins. Co., 290 S.C. 150, 151, 370 S.E.2d 915, 915 (Ct. App. 1988). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Glasscock, Inc. v U.S. Fid. & Guar. Co., 348

S.C. 76, 79, 557 S.E.2d 689, 690 (Ct. App. 2001). In determining whether any triable issue of fact exists, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* at 79, 557 S.E.2d at 691.

II. Progressive is conclusively presumed to have made a meaningful offer of underinsured motorist coverage to Traynum.

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

In response to Wannamaker, the General Assembly enacted § 38-77-350(A), which is a safe harbor provision creating a conclusive presumption that an informed, knowing selection of UIM coverage was made. McDowell v. Travelers Prop. & Cas. Co., 357 S.C. 118, 122, 590 S.E.2d 514, 516 (Ct. App. 2003). Section 38-77-350(A) provides:

(A) The director or his designee shall approve a form which automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:

- (1) a brief and concise explanation of the coverage.
- (2) a list of available limits and the range of premiums for the limits,
- (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires,
- (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages,

- (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A) (Supp. 2005). If a form that complies with § 38-77-350(A) is properly signed by the named insured, § 38-77-350(B) creates a conclusive presumption that there was a meaningful offer.

A. Progressive's Offer Form satisfies the requirements of South Carolina Code § 38-77-350(A).

Progressive's offer form meets the five requirements of § 38-77-350(A). The form Progressive used is virtually identical to the South Carolina Department of Insurance Form Number 2006, which has been held to meet the requirements of section 38-77-350. Clinton v. West American Ins. Co., 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005); Burch v. South Carolina Farm bureau Mut. Ins. Co., 351 S.C. 342, 349, 569 S.E.2d 400, 404 (Ct. App. 2002); (S.C. Dept. Ins. Bulletin No. 2006-03 (2006), attached as Exhibit F).

Specifically, the form met the first requirement by providing, verbatim, the brief and concise explanation of coverage promulgated by the SCDOI in Form 2006. (Offer Form, 1-2); (S.C. Dept. Ins. Bulletin No. 2006-03 (2006)).

Progressive's form satisfied the second requirement by providing a full list of available limits and the range of premiums for the available limits. (Offer Form, 3-4). Because Traynum purchased only minimum liability coverage, the only available limit of UIM coverage was \$25,000/\$50,000/\$25,000. The increased premium listed for this coverage was \$188.00. (Offer Form, 4).

Progressive's form met the third requirement by providing a space for Traynum to mark whether she chose to accept or reject UIM coverage and a space for her to select limits of

coverage she desired. (Offer Form, 4). By electronically signing the form, Traynum indicated that the "no" marked adjacent to the question: "Do you wish to purchase underinsured motorist coverage?" accurately reflected her selection of coverage. (Offer Form, 4). Furthermore, she electronically signed below the statement: "If your answer is "no," then you must sign here." (Offer Form, 4).

Progressive's form satisfied the fourth requirement by providing a space for Traynum to sign acknowledging that she had been offered optional UIM coverage. (Offer Form, 4). Traynum electronically signed this acknowledgement. (Kordes Dep. 51:9-16).

Progressive's form met the fifth requirement by providing the contact information for the South Carolina Department of Insurance in case Traynum had questions. (Offer Form, 2). Therefore, the Offer Form Progressive provided to Traynum during her purchase of automobile liability insurance met all five requirements of § 38-77-350(A).

B. Traynum's electronic signature entitled Progressive to a conclusive presumption of an informed, knowing rejection of optional coverage.

Progressive's form meets the requirements of § 38-77-350(A) and Traynum signed the form electronically. Her signature on the form was valid under South Carolina's Uniform Electronic Transaction Act, S.C. Code § 26-6-10 *et. seq.*, and entitles Progressive to the statutory conclusive presumption under § 38-77-350(B). Under the SCETA, a contract, record, or signature "must not be denied legal effect or enforceability solely because it is in electronic form" or "an electronic record is used in its formation." S.C. Code § 26-6-70 (A) and (B). Furthermore, an electronic record satisfies a law requiring a record to be in writing and an electronic signature satisfies a law requiring a signature. S.C. Code § 26-6-70 (C) and (D).

Furthermore, the SCETA provides, "If parties agree to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another

person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.” S.C. Code § 26-6-80(A). Traynum had the opportunity to print the Offer Form both when she was first presented with and signed the form and after completing the insurance purchase. (Tealeaf, 7, and 10). Therefore, Progressive satisfied the offer requirement by providing the form to Traynum in an electronic form capable of retention by printing. S.C. Code § 26-6-80(A).

The Offer Form was completed by Traynum via an automated Internet transaction and then electronically signed. This procedure is no different than the procedure that federal courts use in the electronic filing of documents under the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000). When documents are filed, the signature is performed electronically and the filing time is automatically transposed onto the document. This is done without human interaction, yet it is still stamped and produced by the court for the records of filing parties.

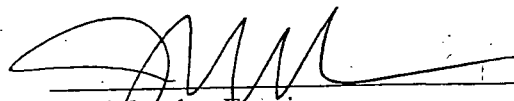
Likewise, since both South Carolina and federal law recognize electronic signature, Progressive’s online procedure satisfies the requirement that an insured “execute” the form contained in § 38-77-350(B). The statute does not require a face-to-face meeting or a manual “pen and ink” signature on the offer form. Instead, the use of an electronic signature recognizes the business of the insurance industry in the twenty-first century. Online and automated insurance applications are commonplace nowadays and insurers have adapted their procedures to make meaningful offers in those situations. See S.C. Dept. Ins. Bulletin No. 2003-05 (addressing the use of electronic signatures in connection with the business of insurance prior to the enactment of the SCETA).

Under South Carolina Code § 38-77-350(B), an insurer is conclusively presumed to have made a meaningful offer of UIM coverage if the requirements of § 38-77-350(A) are met and the named insured signs the form. Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 165, 705 S.E.2d 432, 435 (2011). Progressive's Offer Form satisfies all the requirements of § 38-77-350(A). Moreover, Traynum electronically signed the offer form indicating her rejection of optional coverage. Under the SCETA, presentation of the Offer Form electronically and Traynum's electronic signature have the exact same legal effect as if an agent physically handed the form to Traynum and Traynum physically signed the form using a pen. In the eyes of the law, the two are no different. Therefore, it is conclusively presumed that Traynum made an informed, knowing rejection of optional coverage.

CONCLUSION

For the above-stated reasons, Progressive respectfully requests that this Court rule that Progressive made a meaningful offer of optional underinsured motorist coverage. Traynum received the complete Offer Form and electronically signed the form. Therefore §§ 38-77-350(A) and (B) are satisfied and Progressive is entitled to a statutory conclusive presumption of a meaningful offer.

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Columbia, South Carolina
December 4, 2012

SessionList Replay-39147063

Viewable Pages

Page	URL	Gen Time	Net Time	RoundTrip	Bytes	Status	TimeStamp
5	htt...	0.125	N/A	N/A	7956	200	15:31:49.074
12	htt...	0.313	N/A	N/A	36254	200	15:31:53.136
13	htt...	<0.001	N/A	N/A	52315	200	15:31:53.777
16	htt...	2.453	N/A	N/A	53102	200	15:32:11.011
23	htt...	2.781	N/A	N/A	53102	200	15:33:48.352
26	htt...	1.265	N/A	N/A	69974	200	15:34:04.133
31	htt...	0.219	N/A	N/A	11953	200	15:51:12.700
37	htt...	0.188	N/A	N/A	11953	200	15:51:40.652
43	htt...	1.328	N/A	N/A	29488	200	15:52:06.308
51	htt...	0.219	N/A	N/A	10485	200	15:54:45.835
54	htt...	0.344	N/A	N/A	16082	200	15:55:26.725
61	htt...	0.188	N/A	N/A	1783	200	15:55:43.318
65	htt...	0.171	N/A	N/A	1766	200	16:00:39.095
69	htt...	0.328	N/A	N/A	4282	200	16:01:58.187



Events

- Event: F2 - Customer Driven Error Message (TextFound: Auto/Presentation/Images/img_alert.gif)
- Event: Homepage - SERVER_PORT EQ 443 (TextFound: 443)

Field Name	Type	Value
BehSet	Not Found	Auto.Script.Behavior
Beh	Not Found	Script.Provider
Additional	Not Found	IE

Thanks for coming back!

Before we get your rate, please check to see if your quote information is up to date. This quote was last viewed April 19, 2007.

Excluded drivers will not be covered. Drivers are not assigned to specific vehicles.

Quoted Drivers

☒ Navigation Control Display Value Add

a Driver

Loretta Traynum
 - traffic Incident ... [Edit](#) | [Remove](#)
 - traffic Incident ... [Edit](#) | [Remove](#)
 - traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Leonard Traynum
[Edit violations/accidents](#) [Edit](#) | [Remove](#)

Alisha Traynum
 - traffic Incident ... [Edit](#) | [Remove](#)
 - traffic Incident ... [Edit](#) | [Remove](#)
 - traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Natasha Traynum
 - traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Quoted Vehicles

☒ Navigation Control Display Value Add

a Vehicle

2003 Chevrolet Trailblazer [Edit](#) | [Remove](#)
 2006 Honda Civic Other [Edit](#) | [Remove](#)
 1994 Chevrolet Beretta [Edit](#) | [Remove](#)

Prior Insurance

☒ You can answer the below prior insurance questions for you or your spouse. You will want to choose the individual that has had the most continuous insurance coverage in the past three years.

Have you been insured with our company in the last 31 days ☒ Yes ☐ No

Are you currently insured today ☐ Yes ☒ No

In the past 3 years have you been without insurance for more than a month ☐ Yes ☒ No

Insurance Details

Recent policy expiration date / / ☒ please update

Desired policy start date / / 2007



Thanks for coming back!

Before we get your rate, please check to see if your quote information is up to date. This quote was last viewed April 19, 2007.

Excluded drivers will not be covered. Drivers are not assigned to specific vehicles.

Quoted Drivers

☒ Navigation Control Display Value Add

a Driver

Loretta Traynum
- traffic Incident ... [Edit](#) | [Remove](#)
- traffic Incident ... [Edit](#) | [Remove](#)
- traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Leonard Traynum
[Edit violations/accidents](#) [Edit](#) | [Remove](#)

Alisha Traynum
- traffic Incident ... [Edit](#) | [Remove](#)
- traffic Incident ... [Edit](#) | [Remove](#)
- traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Natasha Traynum
- traffic Incident ... [Edit](#) | [Remove](#)
[Edit violations/accidents](#)

Quoted Vehicles

☒ Navigation Control Display Value Add

a Vehicle

2003 Chevrolet Trailblazer [Edit](#) | [Remove](#)

2006 Honda Civic Other [Edit](#) | [Remove](#)

1994 Chevrolet Beretta [Edit](#) | [Remove](#)

Prior Insurance



You can answer the below prior insurance questions for you or your spouse. You will want to choose the individual that has had the most continuous insurance coverage in the past three years.

Have you been insured with our company in the last 31 days ☐ Yes ☒ No

Are you currently insured today ☐ Yes ☒ No

In the past 3 years have you been without insurance for more than a month ☐ Yes ☒ No

Insurance Details

Recent policy expiration date / / ☒ please update

Desired policy start date / /



[Save & Return Later](#)

59

☒ See packages side by side

☒ Minimum	☒ Economy	☒ Recommended	☒ Plus	☒ Custom
\$297.40 per month - or - \$1,600.00 paid in full	\$749.15 per month - or - \$3,902.00 paid in full	\$815.67 per month - or - \$4,232.00 paid in full	\$920.52 per month - or - \$4,777.00 paid in full	\$568.78 per month - or - \$3,004.00 paid in full

Policy Coverages

Bodily Injury and Property Damage	\$25,000 person/50,000 accident/25,000 property [\$1,503.00]
Uninsured Motorist (UM)	\$25,000 person/50,000 accident/25,000 property [\$130.00]
Underinsured Motorist (UIM)	No coverage [\$0.00]
Medical Payments	No coverage [\$0.00]

Vehicle #1 - 2003 CHEVROLET TRAILBLAZER

Comprehensive	\$500 Deductible (Full Glass) [\$152.00]
Collision	\$500 Deductible (Full Glass) [\$486.00]
Rental	\$30 per day (\$900 max) [\$34.00]
Roadside Assistance	No coverage [\$0.00]
Loan/Lease Payoff	No coverage [\$0.00]

Vehicle #2 - 2006 HONDA CIVIC OTHER

Comprehensive	\$500 Deductible (Full Glass) [\$172.00]
Collision	\$500 Deductible (Full Glass) [\$719.00]
Rental	\$30 per day (\$900 max) [\$34.00]
Roadside Assistance	No coverage [\$0.00]
Loan/Lease Payoff	No coverage [\$0.00]

Vehicle #3 - 1994 CHEVROLET BERETTA

Comprehensive	No coverage [\$0.00] Comp may be required. Why?
Collision	No coverage [\$0.00] Coll may be required. Why?
Rental	No coverage [\$0.00]
Roadside Assistance	No coverage [\$0.00]
Loan/Lease Payoff	No coverage [\$0.00]

Fee Information

Uninsured Motorists Fund fee	\$3.00
------------------------------	--------

Rate includes a one-time \$50 discount for

Quote #
1074

Drivers

Loretta	Edit Remove
Leonard	Edit Remove
Allisha	Edit Remove
Natasha	Edit Remove

☒ Add a Driver [Add a](#)

Driver

Violations

Vehicles

2003 Chev...	Edit Remove
2006 Honda	Edit Remove
1994 Chev...	Edit Remove

☒ Add a Vehicle [Add a](#)

Vehicle

Custom Parts and Equipment

☒ **Your credit information**
See how your credit information was used.

☒ **Your rate vs. the typical consumer's rate**
See how your rate compares with other people's.

☒ **Money saving tips**
You may be able to lower your rate with these tips.

☒ **Your discounts**
Homeowner, Multi car, Distant student, Sign Online

☒ About your coverage packages☒ See packages side by side☒ Minimum
\$297.40
per month
- or -
\$1,600.00
paid in full☒ Economy
\$749.15
per month
- or -
\$3,902.00
paid in full☒ Recommended
\$815.67
per month
- or -
\$4,232.00
paid in full☒ Plus
\$920.52
per month
- or -
\$4,772.00
paid in full☒ Custom
\$523.27
per month
- or -
\$2,772.00
paid in full**Policy Coverages**Bodily Injury and
Property Damage

\$25,000 person/50,000 accident/25,000 property [\$1,501.00]

Uninsured Motorist
(UM)

\$25,000 person/50,000 accident/25,000 property [\$130.00]

Underinsured Motorist
(UIM)

No coverage [\$0.00]

Medical Payments

No coverage [\$0.00]

Vehicle #1 - 2003 CHEVROLET TRAILBLAZERComprehensive

\$1,000 Deductible (Full Glass) [\$118.00]

Collision

\$1,000 Deductible (Full Glass) [\$404.00]

Rental

\$30 per day (\$900 max) [\$34.00]

Roadside Assistance

No coverage [\$0.00]

Loan/Lease Payoff

No coverage [\$0.00]

Vehicle #2 - 2006 HONDA CIVIC OTHERComprehensive

\$1,000 Deductible (Full Glass) [\$134.00]

Collision

\$1,000 Deductible (Full Glass) [\$602.00]

Rental

\$30 per day (\$900 max) [\$34.00]

Roadside Assistance

No coverage [\$0.00]

Loan/Lease Payoff

No coverage [\$0.00]

Vehicle #3 - 1994 CHEVROLET BERETTAComprehensive

No coverage [\$0.00] Comp may be required. Why?

Collision

No coverage [\$0.00] Coll may be required. Why?

Rental

No coverage [\$0.00]

Roadside Assistance

No coverage [\$0.00]

Loan/Lease Payoff

No coverage [\$0.00]

Fee Information

Uninsured Motorists

\$3.00

Fund fee



Quote #

1074

Drivers

Loretta	Edit	Remove
Leonard	Edit	Remove
Allisha	Edit	Remove
Natasha	Edit	Remove

☒ Add a Driver Add a**Driver****Violations****Vehicles**

2003 Chev...	Edit	Remove
2006 Honda	Edit	Remove
1994 Chev...	Edit	Remove

☒ Add a Vehicle Add a**Vehicle****Custom Parts and Equipment**☒ **Your credit information**

See how your credit information was used.

☒ **Your rate vs. the typical consumer's rate**

See how your rate compares with other people's.

☒ **Money saving tips**

You may be able to lower your rate with these tips.

☒ **Your discounts**

Homeowner, Multi car, Distant student, Sign Online

X X X X X X X

Additional Information

Policy

Desired policy start date 04 / 20 / 2007 mm/dd/yyyy

Home phone number 706 - 830 - 2070

Most Recent Car Insurance

Recent automobile insurance company

Drivers

Loretta Traynum

State licensed South Carolina

Leonard Traynum

State licensed South Carolina

Alisha Traynum

State licensed South Carolina

Natasha Traynum

State licensed South Carolina

Vehicles

2003 Chevrolet Trailblazer

Vehicle Identification Number (VIN)

Loan/Lease company name HOUSEHOLD AUTO FINANCE

FR4 reference number
(do not include dashes)

2006 Honda Civic Other

Vehicle Identification Number (VIN)

Loan/Lease company name AMERICAN HONDA FIN-AHFC(AUTO LOANS)

FR4 reference number
(do not include dashes)

1994 Chevrolet Beretta

Vehicle Identification Number (VIN)

FR4 reference number
(do not include dashes)

X
X
X
X
X

Quote#

51074

Mailing Address

Drivers

Loretta Traynum
Leonard Traynum
Alisha Traynum
Natasha Traynum

Vehicles

2003 Chevrolet Trailblazer
2006 Honda Civic Other
1994 Chevrolet Beretta

Coverages

[Policy Coverages](#)
[Vehicle Coverages](#)

X Printable Summary

Sign Your Policy Forms (1 of 2)

Your Electronic Signature is Required

Please read and electronically sign this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

Option 1 - set your monitor resolution to 800 x 600

Option 2 - Print this document (print in correct text size)



Application for Insurance

Please review and sign where indicated

PROGRESSIVE
DIRECT

Policyholder: LORETTA TRAYNUM
April 20, 2007

Policy and premium information

Insurance company:	Progressive Direct Insurance Co PO Box 31260 Tampa, FL 33631
Named Insured:	LORETTA TRAYNUM

8.50 x 11.00 in

**Policyholder Electronic Signature**

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

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

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

First

Last

NOTE: Any attempt to alter this screen or the terms of the document above will not be accepted.

Sign Your Policy Forms (2 of 2)

Your Electronic Signature is Required

Please read and electronically sign this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

- Option 1 - set your monitor resolution to 800 x 600
- Option 2 - Print this document (print in correct text size)



LORETTA TRAYNUM

Offer of additional uninsured motorist coverage and optional underinsured motorist coverage

I. Explanation of coverages

Automobile liability insurance coverage pays other motor vehicle drivers and their passengers for damages caused by you and for which you are legally responsible. There are two types of automobile liability insurance coverage: bodily injury and property damage. Bodily injury coverage pays for bodily injuries to others inflicted by your motor vehicle. Property damage coverage pays for damages which your motor vehicle causes to other motor vehicles or property.

Under South Carolina law, an insurance company may refuse to write your automobile liability insurance for a number of reasons. If an insurance company decides to write your automobile liability insurance coverage, however, it must provide at least \$25,000 of bodily injury coverage for each person whom you may injure in any single accident and \$50,000 of bodily injury coverage for two or more people whom you may injure in any single accident. The insurance company must also provide at least \$25,000 in property damage coverage for each accident you may cause. You may

8.50 x 11.00 in

1 of 5 85.8%



Policyholder Electronic Signature

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

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

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

First Last

NOTE: Any attempt to alter this screen or the terms of the document above will not be accepted.

Payment Information

Payment Plan Installments for future payments automatically withdrawn from your checking account.
[Select a different Payment Plan](#)

Policy Effective Date April 20, 2007

Today's Payment \$523.27

How do you want to make today's payment

- ☐ Charge my credit card ☒
- ☐ Withdraw from my checking account ☒
- ☐ Withdraw from my ☒ account

Future Payments 5 payments of \$521.15 automatically withdrawn from your checking account via [Electronic Funds Transfer \(EFT\)](#) on the due dates. \$1.00 installment fee per payment included.

☒ **IMPORTANT - PLEASE READ**

You are authorizing your first installment to be withdrawn from your checking account via [EFT](#) on the payment due date.

To continue paying your bill by EFT through this account, you must sign and return the EFT authorization form we will be sending to you by U.S. mail.



Quote#

1074

Mailing Address

[Add an alternate address](#)

Drivers

Loretta Traynum
Leonard Traynum
Alisha Traynum
Natasha Traynum

Vehicles

2003 Chevrolet Trailblazer
[Add Additional Interest](#)
2006 Honda Civic Other
[Add Additional Interest](#)
1994 Chevrolet Beretta
[Add Additional Interest](#)

Coverages

[Policy Coverages](#)
[Vehicle Coverages](#)

☒ **Printable Summary**



Sign Your Policy Forms (3 of 3)

☒ If you use the **BACK** button to return to the payment information page, you are still required to sign - or resign - the appropriate forms.

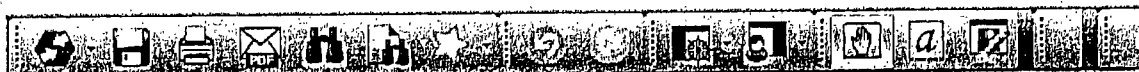
Your Electronic Signature is Required

Please read and **electronically sign** this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

Option 1 - set your monitor resolution to 800 x 600

Option 2 - **Print this document** (print in correct text size)



LORERTA TRAYNUN

Electronic funds transfer (EFT) authorization

I authorize Progressive Direct Insurance Co and its corporate and mutual company affiliates ("Company") to initiate scheduled deductions from the bank account, identified below, for payment of premium on the insurance policy issued to me by Company, and any renewals thereof, and to initiate credit entries to my account to correct any erroneous deductions or provide a refund of premium. I authorize the financial institution identified by the routing number below to accept and post entries to my account. I represent that I am the owner and/or an authorized signer on the account.

I understand that this authorization allows Company to adjust the scheduled deductions to reflect any premium changes. Company agrees that it shall notify me at least ten (10) days prior to making any deduction that will be less than the previous deduction by more than \$1,000, or that will be greater than the previous deduction.

I understand that Company will not send me a bill before scheduled deductions are made and that it is my responsibility to ensure sufficient funds are in my account at the time of each scheduled deduction. I also understand

8.50 x 11.00 in



I represent that I am the person whose name appears on the signature line of the document presented above, and that I viewed the document at the recommended browser resolution and Adobe view size. I acknowledge and agree to the statements, terms and conditions in the document above, and that by typing my name below and clicking "Buy Now", I am electronically signing the document, which will have the same legal effect as the execution of the document by a written signature and shall be valid evidence of my intent and agreement to be bound.

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

First

Last

NOTE: Any attempt to alter this screen or the terms of the document above will not be accepted.



Your Purchase is Complete

☒ Your Policy Information

Policy number 13470
Policy effective date Friday April 20, 2007 11:55 AM (ET)
Today's payment \$523.27
Total policy premium \$3,129.00 [View your payment schedule](#)

NOTE: Your insurance premium will be the same as quoted on our application summary if you have accurately disclosed all requested information. Incorrect information may lead to a higher rate.

☒ Watch Your Mail

You will receive a packet in the mail containing:

- ☒ A detailed description of your policy
- ☒ Your ID card.

Print Your Paperwork

[Temporary
ID Cards](#)

[Temporary
Declarations
Page](#)

[Your application](#)

[Uninsured/Underinsured
Motorist](#)

[Authorization for
Electronic Funds
Transfer](#)

[Verification of
coverage](#)

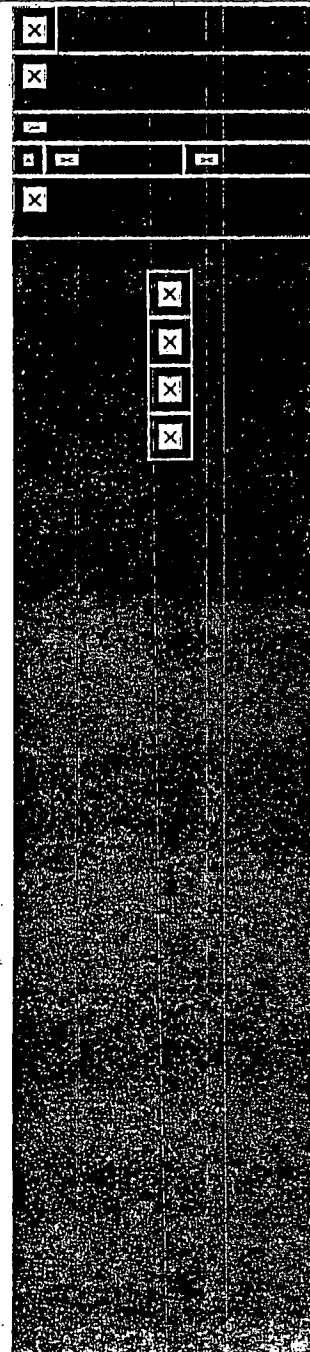
[Fax your
paperwork](#)

☒ Manage Your Policy Online. It's Easy!

Start by setting up your user account to access your policy documents now.

User ID 1347 (your policy number)
Password GIVE + first five digits of your Social Security number (example GIVE12345)

☒ ACCESS MY POLICY



PROGRESSIVE
DIRECT

Policy number: 347-0
April 20, 2007
Policy period: Apr 20, 2007 - Oct 20, 2007

Insurance ID Cards
Keep these cards in
your vehicle

If you are in an accident, call Progressive. Our

8.50 x 11.00 in

Insurance Identification Card
South Carolina

Progressive Direct Insurance Co

Policy period: Apr 20, 2007 to Oct 20, 2007
Policy number: 347-0

Named Insured

LORETTA TRAYNUM

Vehicles

Year	Make
2003	CHEVROLET
2006	HONDA
1994	CHEVROLET

Model
TRAILBLAZER
CIVIC OTHER
BERETTA

Vehicle Identification No.

Coverage under this policy meets South Carolina's minimum financial responsibility requirements. This card must be carried in your vehicle for production on demand.

Insurance Identification Card
South Carolina

Progressive Direct Insurance Co

Policy period: Apr 20, 2007 to Oct 20, 2007
Policy number: 347-0

PROGRESSIVE
DIRECT



Close Window

Payment Schedule Details

All payments include a \$1.00 installment fee.

Payments	Amount Due	Due Date
Down Payment	\$523.27	Today
2	\$521.15	5/20/2007
3	\$521.15	6/20/2007
4	\$521.15	7/20/2007
5	\$521.15	8/20/2007
6	\$521.13	9/20/2007
TOTAL:	\$3,129.00	

Close Window

Offer of additional uninsured motorist coverage and optional underinsured motorist coverage

I. Explanation of coverages

Automobile liability insurance coverage pays other motor vehicle drivers and their passengers for damages caused by you and for which you are legally responsible. There are two types of automobile liability insurance coverage: bodily injury and property damage. Bodily injury coverage pays for bodily injuries to others inflicted by your motor vehicle. Property damage coverage pays for damages which your motor vehicle causes to other motor vehicles or property.

Under South Carolina law, an insurance company may refuse to write your automobile liability insurance for a number of reasons. If an insurance company decides to write your automobile liability insurance coverage, however, it must provide at least \$25,000 of bodily injury coverage for each person whom you may injure in any single accident and \$50,000 of bodily injury coverage for two or more people whom you may injure in any single accident. The insurance company must also provide at least \$25,000 in property damage coverage for each accident you may cause. You may have seen these limits described as \$25,000/\$50,000/\$25,000 or 25-50-25. These limits are commonly-known as minimum limits. In order to drive your automobile upon the roads of this State, you must have at least these minimum limits of insurance, unless you post a satisfactory bond or pay a \$550 fee to drive uninsured. There is no requirement that an insurance company offer higher than minimum limits of automobile liability insurance coverage. If your insurance company does offer more than the minimum limits, you will be required to pay an additional premium for those increased limits of protection.

An insurer that writes your automobile liability insurance coverage must also offer two additional coverages which will protect you in the event you are damaged in an automobile accident by an at-fault driver who either has no automobile insurance or whose automobile insurance liability limits are less than your damages in that accident. These coverages are termed additional uninsured motorist coverage and optional underinsured motorist coverage, respectively. You may also see them referred to as UM and/or UIM. If you decide to purchase either of these coverages, you will be required to pay an additional premium for each of these coverages.

Uninsured motorist coverage compensates you, or other persons insured under your automobile insurance policy, for amounts which you may be legally entitled to collect as damages from an owner or operator of an at-fault uninsured motor vehicle. An uninsured motor vehicle is a motor vehicle which either has no liability insurance coverage or is operated by a hit-and-run driver. By law, your automobile insurance policy automatically provides uninsured motorist coverage of \$25,000/\$50,000/\$25,000. There is a \$200 deductible for property damage claims.

You also have the right to buy additional uninsured motorist coverage, in various limits, up to the limits of the liability coverage which you have purchased. The limits of additional uninsured motorist coverage which your insurance company is authorized to write and for which you are eligible are shown on this form, together with the additional premium for those increased limits. You may not purchase uninsured motorist coverage with limits in excess of your liability limits.

Underinsured motorist coverage compensates you, or other persons insured under your automobile insurance policy, for amounts which you legally may be entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle which is covered by some form of liability insurance, but which is insufficient to fully compensate you for your damages.

Your automobile insurance policy does not automatically provide any underinsured motorist coverage. However, you have the right to buy, and your insurance company is required to offer, optional underinsured motorist coverage in various limits up to the limits of liability coverage you have purchased. The limits of optional underinsured motorist coverage which your insurer is authorized to write and for which you are eligible are shown on this form, together with the additional premium for those limits. You may not purchase underinsured motorist coverage with limits in excess of your liability limits.

If you reject optional underinsured or additional uninsured motorist coverages shown on this form and if you are involved in an automobile accident that is not your fault, this form may be used by your insurance company as evidence against you if you make a claim for additional uninsured motorist coverage or optional underinsured motorist coverage.

If you do not complete this Form and return it to your insurance company or insurance agent within 30 days, your insurance company is required by law to add additional uninsured motorist coverage and optional underinsured motorist coverage, in the same limits as your automobile liability insurance, to your automobile insurance policy. You will be required to pay an additional premium for each of these two coverages and your policy may be canceled for non-payment of that additional premium.

EXHIBIT

C

In the future, if you wish to increase or to decrease your limits of additional uninsured motorist coverage or optional underinsured motorist coverage, you must then contact either your insurance agent or your insurance company. You will not be presented with another copy of this form by your insurance agent or insurance company upon the renewal of your automobile liability insurance policy. You will not be presented with another copy of this form by your insurance agent or current insurance company when you extend, change, supersede, or replace your automobile liability insurance policy.

Please read this form carefully. Your insurance agent or your insurance company must answer any questions which you may have. If you have any further questions, you may contact the Department of Insurance at:

Office of Consumer Services

South Carolina Department of Insurance

300 Arbor Lake Drive, Suite 1200, Columbia, SC 29223

Post Office Box 100105 Columbia, South Carolina 29202-3105

(803) 737-6180

(800) 768-3467 E-Mail Address: CnsmMail@doi.sc.us

II. Offer of additional uninsured motorist coverage

Limits of Coverage

\$25,000/\$50,000/\$25,000

Amounts of Increased Premium

Minimum limits of uninsured motorist coverage are automatically provided by your insurance policy.

\$50,000/\$100,000/\$25,000

n/a

\$50,000/\$100,000/\$50,000

n/a

\$100,000/\$300,000/\$50,000

n/a

\$100,000/\$300,000/\$100,000

n/a

\$250,000/\$500,000/\$100,000

n/a

\$100,000 Combined Single Limit (each accident)

n/a

\$300,000 Combined Single Limit (each accident)

n/a

\$500,000 Combined Single Limit (each accident)

n/a

To obtain the uninsured motorist premium amounts for adding or removing vehicles, please contact us.

Do you wish to purchase additional uninsured motorist coverage?

Yes _____ No X

If your answer is "no," then you must sign here.

Your Signature

X LORETTA TRAYNUM

If your answer is "yes," then specify the limits which you desire. These limits cannot exceed your automobile insurance liability limits.

I select _____ / _____ / _____ split limits; or

I select _____ Combined Single Limit

III. Offer of underinsured motorist coverage

Limits of Coverage

Amounts of Increased Premium

\$25,000/\$50,000/\$25,000

\$188.00

\$50,000/\$100,000/\$25,000

n/a

\$50,000/\$100,000/\$50,000

n/a

\$100,000/\$300,000/\$50,000

n/a

\$100,000/\$300,000/\$100,000

n/a

250,000/\$500,000/\$100,000

n/a

\$100,000 Combined Single Limit (each accident)

n/a

\$300,000 Combined Single Limit (each accident)

n/a

\$500,000 Combined Single Limit (each accident)

n/a

To obtain the underinsured motorist premium amounts for adding or removing vehicles, please contact us.

Do you wish to purchase underinsured motorist coverage?

Yes _____ No X

If your answer is "no," then you must sign here.

Your Signature**X** LORETTA TRAYNUM

If your answer is "yes," then specify the limits which you desire. These limits cannot exceed your automobile insurance liability limits.

I select _____ / _____ / _____ split limits; or

I select _____ Combined Single Limit

IV. Applicant's acknowledgment

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and optional underinsured motorist coverage. I understand that the above explanations of these coverages are intended only to be brief descriptions of additional uninsured motorist coverage and optional underinsured motorist coverage, and that payment of benefits under either of these coverage is subject both to the terms and conditions of my automobile insurance policy and the laws of the State of South Carolina.

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

Type or Print Your Name: LORETTA TRAYNUM

Your Address:

Your Signature

Today's Date

X LORETTA TRAYNUM April 20, 2007

Form 2006 SC (08/06)

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Loretta Traynum and
Leonard Traynum,

Plaintiffs,

vs.

Cynthia Scavens and
Progressive Direct Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-02665

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

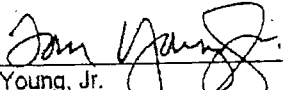
Plaintiffs, by and through their undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, hereby move the Court to enter summary judgment in their favor and against Defendant Progressive Direct Insurance Company as to all of the Plaintiffs' claims.

Plaintiffs' Motion is based on the following: Defendant is not entitled to the presumption that a meaningful offer was made. As a result, the law requires a Wannamaker analysis. Based on the facts herein, Defendant's offer of UIM coverage does not meet all factors of the Wannamaker test.

Accordingly, summary judgment is appropriate. Plaintiffs' Motion will be supported by a memorandum of law to be provided before the hearing.

Respectfully submitted this 27 day of December, 2012.

12-27-12
[Signature]
IK, CP, & GS.
Anita Knoepfle
Deputy Clerk



Tom Young, Jr.
Law Offices of Tom Young, Jr., PC
409 Park Avenue, SW
Post Office Box 651
Aiken, SC 29802
Telephone: 803-649-0000
Facsimile: 803-649-7005
tyoung@tomyounglaw.com
Attorney for Plaintiffs

Aiken, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

**REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT BY PROGRESSIVE**

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

Progressive Direct Insurance Company ("Progressive") respectfully submits this Reply:

Plaintiffs' primary argument relies upon their belief that Progressive did not participate in the completion of the Offer Form in which Loretta Traynum rejected optional coverage. This fatally flawed premise fails on two equally independent but conclusive points. First, Plaintiffs misconstrue the transaction that took place because Progressive – acting through its electronic agent – *did* participate in the transaction and *completed* the Offer Form for Traynum's signature. Second, South Carolina Code § 38-77-350(B) does *not* require that the producer complete the application for the insurer to gain the protections of the conclusive presumption.

A. Progressive completed the offer form through its electronic agent and Loretta Traynum electronically signed the completed offer form.

The South Carolina Uniform Electronic Transactions Act (SCETA) expressly provides that it "must be construed and applied to: (1) facilitate electronic transactions consistent with other applicable law" S.C. Code Ann. § 26-6-60(1). Section 26-6-140 of the SCETA provides in pertinent part:

In an automated transaction:

* * *

- (2) a contract may be formed by the *interaction of an electronic agent and an individual*, acting on the individual's own behalf or for another person, including by an *interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance*; and
- (3) the terms of the contract are determined by the substantive law applicable to it.

S.C. Code Ann. § 26-6-140 (emphasis added). The SCETA defines "electronic agent" as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." S.C. Code Ann. § 26-6-20. Section 26-6-80(A) provides that a law requiring a person to provide or deliver information in writing to another person as part of a transaction "is satisfied if the information is provided, sent or delivered in an electronic record capable of retention by the recipient at the time of receipt." S.C. Code Ann. § 26-6-80(A). Traynum had the option to print the Offer Form both when she first viewed it and after she completed the transaction. (Kordes Dep. 52:3-17, excerpts attached as Exhibit A); (Tealeaf, 7, as Exhibit B).

Plaintiff asserts that an insurer can only obtain the protections of § 38-77-350(B)'s conclusive presumption if the "producer or a representative of the insurer" completes the Offer Form for the insured's signature. Assuming for the sake of argument that Plaintiff correctly states the legislature's intent in amending section 350(B), Progressive is still entitled to the protections of the conclusive presumption because its website acted as its electronic agent and completed the Offer Form for Traynum's signature.¹

¹ Progressive's website consists of hardware (servers, computers, etc.) and software (programs, code, etc.). The interface that Traynum dealt with on the Progressive website was created, designed and maintained by Progressive

Although Traynum portrays the transaction as one where she completed and signed the form all by herself, Traynum actually submitted the coverages she desired online to Progressive through the website. Progressive's website then produced a quote, application, and Offer Form reflecting those selections. Importantly, Traynum did not physically type in the information to complete her application or the Offer Form. The process was not a "fill-in-the-blank" process. Rather, Traynum answered a number of questions and clicked her desired types and levels of coverage using her computer's "mouse". With that information, Progressive's website – acting as Progressive's electronic agent under § 26-6-140 – produced the application and Offer Form for Traynum's review and electronic signature. The process is no different than when a customer enters a local insurance agency and tells the agent what coverages he or she desires and the agent then inputs those coverages into his computer, which will then produce a quote, application, and Offer Form reflecting those selections for the customer's signature. The same transaction takes place over the telephone with either a live agent or through an automated system, with the application and rejection form then mailed to the insured for a "wet" signature. Progressive's website acted as the "agent" in the transaction, completed the Offer Form, and presented it to Traynum for her electronic signature. Traynum then signed the completed form. Therefore, the form was completed by a representative of the insurer prior to being signed by Traynum and Progressive satisfied the precise language of section 38-77-350(B).

Treatment of Progressive's website as Progressive's electronic agent not only promotes the legislature's directive that the SCETA be construed to facilitate online transactions, but it also fits neatly into the definition of "producer" set forth in South Carolina Code § 38-43-10, which provides that a producer is one who:

employees, including Mr. Kordes. For ease of reference, this combination of technology created by Progressive employees and at their direction will simply be referred to as the "website."

- (1) sells . . . or negotiates insurance on behalf of an insurer;
- (2) takes or transmits . . . an application for insurance or a policy of insurance to or from an insurer;
- (3) advertises or otherwise gives notice that he will receive or transmit insurance applications or policies;
- (4) receives or delivers a policy of insurance of an insurer;
- (5) receives, collects, or transmits any premium of insurance; or
- (6) performs any other act in the making of an insurance contract for or with an insurer . . . whether these acts are done by an employee of an insurer or at the instance or request of an insurer.

S.C. Code Ann. § 38-43-10. Paragraph six is a catchall provision. Even if Progressive's website did not meet any of the first five paragraphs, it certainly falls under the catchall provision of paragraph six. However, the Progressive website meets *every* definition of a producer. Specifically, the Progressive website (1) sells the policy; negotiates by allowing the applicant to adjust desired coverages and obtain a quote; (2) takes and transmits the application; (3) gives notice and advertises that it will receive or transmit insurance applications or policies; (4) receives and transmits insurance applications and delivers the policy; and (5) receives premiums electronically. Therefore, Progressive's website – acting as its producer or other representative – completed the Offer Form, which was signed by Traynum. The transaction fully satisfies section 350(B) and the conclusive presumption resolves the only question in this case. There was a meaningful offer and a valid rejection of optional coverage.

B. Requiring that the insured personally complete the form would result in absurdity and ignores the clear legislative intent of the 2006 Amendment.

In 2006, the South Carolina legislature responded to the Supreme Court's decision in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005) by amending South Carolina Code § 38-77-350 to provide that an offer form bearing the named insured's signature is valid and entitles the carrier to the statutory conclusive presumption regardless of whether the named insured personally filled out the form. The Supreme Court in *Floyd* held that, under the

former version of the statute, the offer form was only properly completed if the insured personally filled out the form. The General Assembly then amended § 38-77-350(B) by providing that the form is also properly completed if the agent or producer completes the form. However, Plaintiffs argue that under the amended statute, an insurance agent **must** fill out the form. Therefore, the approach adopted by the Supreme Court in *Floyd* as the only way to satisfy § 38-77-350(B) – under Plaintiffs interpretation – is now completely invalid. Plaintiffs go too far.

§ 38-77-350 was amended by Act No. 395 of 2006. The Act was titled: “An act to amend § 38-77-350, Code of Laws of South Carolina, 1976, relating to the form to be used when optional automobile insurance coverages are offered to an insured, so as to provide that the form **must not necessarily be completed by the insured**, but must be signed by the insured to be used as evidence of informed selection;” (emphasis added).

The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. Moreover, “[a] statute should not be construed by concentrating on an isolated phrase.” The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.

Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008)

(internal citations omitted).

South Carolina courts have “endorsed the propriety of discerning legislative intent from the title of an Act.” *Demas v. Convention Motors Inns*, 268 S.C. 186, 190, 232 S.E.2d 724, 726 (1977) (citing *McMillen Feed Mills, Inc. v. Mayer*, 265 S.C. 500, 220 S.E.2d 221 (1975)); see also *Duvall*, 377 S.C. at 46 S.E.2d at 130 (finding that title of the act providing that the amendment was “to clarify the contribution requirements” of § 9-1-1020 indicated that the

purpose of the act was to clarify rather than change the law); *Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 549 S.E.2d 243 (2001) (using title of an Act to determine legislative intent). The title of the Act provides that the purpose of the amendment is “to provide that the form must not *necessarily* be completed by the insured” (emphasis added). The purpose is not to make forms that are filled out by the named insured ineffective, but rather to expand the group that can fill out the form to include the producing agent or a representative of the insurer as long as the form is ultimately signed by the named insured.

Not only does the title of the act reveal the legislature’s intent, but Plaintiffs’ interpretation of the amendment creates an absurd result. If statutory language is plain and unambiguous, courts must enforce the plain and clear meaning of the words used. *In re Manigo*, 398 S.C. 149, 157, 728 S.E.2d 32, 36 (2012) (citation omitted): “But if applying the plain language would lead to an absurd result, [courts] will interpret the words in such a way as to escape that absurdity.” *Id.* “A merely conjectural absurdity is not enough; the result must be so patently absurd that it is clear that the General Assembly could not have intended such a result.” *Id.*

Read in light of the title of the Act and the history of the amendment (*Floyd*), requiring that the form be completed by the agent would lead to an absurd result. First, the amendment to § 38-77-350(A)(3) does not require the producer to complete the form. § 38-77-350(A) (3) was modified to require “a space ~~for the insured~~ to mark whether the insured chooses to accept or reject the coverage and a space ~~for the insured~~ to select state the limits of coverage ~~he~~ the insured desires.” Importantly, if the Legislature intended *only* producing agents and insurance representatives to complete the forms, presumably sub-part (A)(3) would use the same language used in subparagraph (B) by replacing “for the insured” with “for an insurance producer or a

representative of the insurer.” Because the Legislature merely deleted “for the insured,” it clearly intended to **expand** the potential group of individuals who could fill out the form, not simply replace insureds with agents.

Absurdity also results if the **only** way to validly complete the offer form under *Floyd* and the prior version of the statute – requiring that the named insured complete the form – would suddenly become **invalid** under the amendment. The Supreme Court in *Floyd*, held:

In imposing these requirements, the Legislature apparently recognized that an insured person who is required to personally complete an offer form inevitably will find it necessary to seek further explanation from the insurance agent when he or she is unable to complete the form due to a lack of knowledge or understanding of the concepts of UM and UIM coverages. We agree with Plaintiffs that such a result is more likely to accomplish the important goal of adequately informing insured persons about coverage options, enabling them to make an informed decision of which type and amount of coverage will best suit their needs.

367 S.C. at 263, 626 S.E.2 at 12 (citation omitted). Because the purpose of the statute – both before and after the 2006 amendments – is to ensure that the insured receives a meaningful offer, it is completely absurd to invalidate an offer form that was completed by the insured rather than the agent. The Supreme Court held that this is the **preferred** method for enabling informed decisions. The General Assembly did not act to **prevent** the insured from completing the form. In response to the narrow reading of the statute in *Floyd*, the General Assembly acted promptly to **expand** the safe harbor provision to its original intent. Completion by the insured still bears stronger indicia of a meaningful offer than completion by the agent. Therefore, holding that such a practice precludes application of the conclusive presumption flies in the face of the legislative intent and results in absurdity.

C. Plaintiffs’ other arguments.

Plaintiff also cites *Dewart*, a 1988 Court of Appeals case, and *Lopez*, a 1992 Supreme Court case both of which dealt with offers provided as inserts or pamphlets delivered with renewal notices. See *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1998); *Lopez v. National General Ins. Co.*, 308 S.C. 342, 417 S.E.2d 864 (1992). However, neither of those cases address § 38-77-350 because the offers predated that statute. The legislature has specifically provided that a form complying with § 38-77-350(A) is not only reasonable, but mandatory. Therefore, neither of those cases is remotely applicable.

Plaintiff also cites to *Grinnell Corp. v. Wood*, 378 S.C. 458, 663 S.E.2d 61, 68-69 (Ct. App. 2008) for the proposition that it is axiomatic that a form that fails the requirements of § 38-77-350(A) also fails to meet the requirements of *Wannamaker*. However, the contrary is also true. An offer form that completely satisfies the requirements of § 38-77-350(A), without any other evidence, *satisfies* the requirements of *Wannamaker* and § 38-77-160. The General Assembly expressed this intent in its adoption of the conclusive presumption in § 38-77-350(B). Moreover, unlike the substantive flaws in the written form in *Grinnell*, Plaintiff fails to identify a single deficiency in the form presented to, and signed by, Loretta Traynum in this case.

Traynum had an opportunity to, separately, view the Offer Form and/or print the form for her records prior to electronically signing it. She did so in a separate signature block specifically stating that she had read the form, understood the coverages as explained, and that the form reflected the type and amount of insurance she desired. (Offer Form, 5). This was not a mere pamphlet or insert. Rather, it was a nearly identical form to Form 2006 promulgated by the Department of Insurance in compliance with § 38-77-350(A). (S.C. Dept. Ins. *Bulletin No.* 2007-03 (2006)). Regardless of what other forms may comply with § 38-77-350(A) and *Wannamaker*, there is no serious argument that Form 2006 fails to satisfy both and South

Carolina courts have so held on numerous occasions. See *Clinton v. West American Ins. Co.*, 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005); *Burch v. South Carolina Farm Bureau Mut. Ins. Co.*, 351 S.C. 342, 349, 569 S.E.2d 400, 404 (Ct. App. 2002). Plaintiffs do not point to a single deficiency in the content of the Offer Form because the form fully satisfies the requirements of § 38-77-350(A). Therefore, Progressive is entitled to the conclusive presumption of a meaningful offer.

Plaintiff also takes issue with the timing of Progressive's presentation of the Offer Form. However, Traynum had the opportunity to read about UIM coverage when she initially elected not to purchase such coverage. The description for UIM coverage was provided via a blue underlined hyperlink directly beside the drop-down box where she selected her level of UIM coverage. (Kordes Dep. 20:2-25:2); (Tealeaf, 3-4). Traynum cannot now claim that she was unaware of the hyperlink because she clicked on a similar hyperlink (blue underlined text) to obtain her temporary ID cards and payment schedule after completing her transaction. (Kordes Dep. 60:1-9); (Tealeaf, 10). Moreover, presentation of the Offer Form after the insured has already completed the insurance quote and selected her coverages is a common practice that was specifically approved by the Court of Appeals in *Atkins v. Horace Mann Ins. Co.*, 376 S.C. 625, 631, 658 S.E.2d 106, 109 (Ct. App. 2008) (holding that it was commercially reasonable for an agent to mail the offer form to an insured after he purchased coverage for a new vehicle even though the agent gave no verbal explanation of the optional coverages at the time they were declined or in conjunction with the offer form). The *Atkins* case also stands for the proposition that even if an insurer is not entitled to the conclusive presumption, the insured's signature on a form that otherwise complies with § 38-77-350(A) can satisfy the meaningful offer requirements under *Wannamaker*. See also *Cohen v. Progressive Northern Ins. Co.*, __ S.E.2d __, 2013 WL

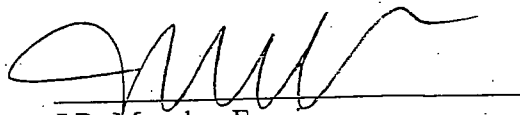
519664 (Ct. App. Feb. 13, 2013) (holding that insurer could still meet burden of proving meaningful offer with an offer form even if it was completed by the agent in violation of the former version of § 38-77-350(B)).

Plaintiff also appears to argue that Progressive must provide an explanation of optional coverage more than once during the same transaction. No statutory or common law has ever required such burdensome and duplicative conduct from insurers and there is no support to be found in the statutory provisions. Put simply, once is enough.

CONCLUSION

The legislature created a safe harbor in § 38-77-350(A) and (B) to protect insurers from an insured's remorse at not purchasing additional coverage prior to an accident. *McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 122, 590 S.E.2d 514, 516 (Ct. App. 2003). Progressive's offer form fully satisfies § 38-77-350(A), was completed by its electronic agent, and was signed by Traynum satisfying § 38-77-350(B). Therefore, the statutory conclusive presumption of a meaningful offer applies and Progressive is entitled to summary judgment.

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March 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Loretta Traynum and
Leonard Traynum,

Plaintiffs,

vs.

Cynthia Scavens and
Progressive Direct Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-02-02665

**AMENDED
MEMORANDUM SUPPORTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND OPPOSING DEFENDANT
PROGRESSIVE'S MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

Pursuant to the South Carolina Rules of Civil Procedure, Plaintiffs submit this Memorandum in Support of their Motion for Summary Judgment and Opposing Defendant Progressive's Motion for Summary Judgment.¹

UNDISPUTED FACTS

This case presents the question of whether Defendant Progressive ("Progressive") made a meaningful offer of underinsured motorists ("UIM") coverage in connection with an automobile insurance policy, policy number 172333470 (the "Policy"), which it issued to Loretta Traynum ("Plaintiff") via an online transaction in which Plaintiff had no interaction with a live person for Progressive.

On November 1, 2007, Plaintiff Loretta Traynum was driving her 2003 Chevy Trailblazer when she was in a wreck. (Complaint ¶ 6; Answer ¶ 7). Plaintiff sustained

¹ While there are cross motions for summary judgment pending, it is possible for this Court to deny both motions and find that there are genuine issues of material fact.

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personal injuries as a proximate result of the wreck on that date (the "Wreck"). (Complaint ¶ 11; Answer ¶ 7).

At the time of the Wreck, Defendant Scavens was insured by Travelers with liability limits of \$100,000 per person. (Complaint ¶ 22; Answer ¶ 17). Travelers tendered this amount to Plaintiff in exchange for a covenant not to execute. (Complaint ¶ 22; Reply ¶ 17). The parties have stipulated that Plaintiffs' damages from the wreck exceed \$175,000 and that Defendant Progressive will pay the additional sum of \$75,000 to Plaintiffs if this Court reforms the Policy to include UIM coverage. (Stipulation as to Damages, Forthcoming from Counsel).

Traynum purchased the Policy over the internet via Progressive's website. (Kordes Deposition, p. 13).² Traynum did not communicate verbally with any employee of Defendant Progressive but instead interacted with Defendant Progressive entirely online through the website. (Progressive's RRFA ¶ 7). As such, Plaintiff responded online to Defendant Progressive's questions as to optional coverages including UIM coverage. (Progressive's RRFA ¶ 3). The electronic signature and electronic selections on the UIM offer form were generated by a computer based on Plaintiff's input and not by an agent or employee of Defendant Progressive. (Progressive's RRFA ¶¶ 2-4; Kordes Deposition, pp. 13, 47, 60).

ARGUMENT

I. South Carolina Law Regarding "Meaningful Offers" of UIM Coverage.

Since 1978, South Carolina Code section 38-77-160 (or its predecessor, section 56-9-831) has required insurers to offer UIM coverage to insureds, for purchase at their option. South Carolina courts have interpreted this legislative mandate as requiring an

² Charles Kordes was Progressive's Rule 30(b)(6) designee. His deposition is attached as Ex. 1.

insurer to provide its insured "with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

Courts have frequently addressed insurers' attempts to deny UIM coverage based on the claim they satisfied their statutory duty of making a "meaningful offer" and obtained an informed rejection of the optional coverage. In doing so, the courts have focused on three aspects of the optional coverage transaction: (1) the insurer's communication of the offer to the insured; (2) the content of the offer; and (3) the insured's response to the offer.

Thus, in the seminal *Wannamaker* decision, the court adopted the following analysis applicable to the first two aspects of the transaction, which are obligations of the insurer:

- (1) the insurer must use a commercially reasonable notification process (which addresses the first aspect – communication of the offer);
- (2) the offer must offer optional coverage with specific limits (which relates to the second aspect – content of the offer);
- (3) the offer must intelligibly explain the nature of the optional coverage (which also relates to the second aspect – content of the offer); and
- (4) the offer must advise the insured that optional coverages are available for an additional premium (which also relates to the second aspect – content of the offer).

Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556 (notations in parentheses added for purposes herein).

Because it is the insurer's duty to comply with these standards in making an offer of UIM coverage, when an insurer makes a less than meaningful offer, an insured's rejection of UIM coverage is not an informed response that the courts will enforce. Stated

differently, "a noncomplying offer has the legal effect of no offer at all." *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990).³

The Legislature sought to clarify the second and third aspects of the optional coverage transaction (content of the offer and insured's response) by enacting S.C. Code Ann. § 38-77-350 (1976, as amended). Subsequently, the statute was amended in 2006 after the Supreme Court's decision in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005) where the Court held that the insurance carrier was not entitled to the conclusive presumption under Section 38-77-350 where the named insured herself did not complete the offer form. After the 2006 amendment, Section 38-77-350 allows insurers to use a form which – if it complies with the following requirements and was properly completed and executed by the insured – would give rise to a presumption of an informed decision regarding acceptance or rejection of optional coverage:

(A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies.... The form, at a minimum, must provide for each optional coverage required to be offered:

- (1) a brief and concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
- (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;

³ Courts have recognized a limited exception to this conclusion if the insured is a sophisticated purchaser of insurance such as a commercial insured's professional risk manager – experienced in dealing with vehicle insurance coverage and fully aware of the nature and purpose of UIM coverage – purchasing coverage for a fleet of company vehicles. *McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003). Here, there should be no dispute that Plaintiff was not sophisticated in the purchase of insurance coverage.

(5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

(B) If this form is properly completed and executed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage

Section 38-77-350 addresses the content of the offer (the second part of the optional coverage transaction) in subsection (A) and the insured's response to the offer (the third part of the optional coverage transaction) in subsection (B), with reference to subsections (A)(3) and (A)(4).

If an offer fails to comply with Section 38-77-350, the insurer is denied the presumption of an informed rejection; however, the insurer may nevertheless argue it made a meaningful offer under *Wannamaker*. *Floyd v. Nationwide Ins. Co.*, 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005). Regardless, "[w]hether the analysis is focused primarily on the written form, the *Wannamaker* analysis, or both, ***the purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'***" *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005), quoting *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)(emphasis added).

Thus, when Plaintiff purchased coverage from Progressive, the analytical framework to determine whether Progressive may validly deny coverage based upon the Plaintiff's rejection of the purported offer of UIM coverage should be the following:

- Did the insurer use a "commercially reasonable" notification process to communicate the offer to the insured, per the first prong of the *Wannamaker* analysis?
 - If not, the offer was not meaningful.
 - If so, did the offer contain the required elements of Section 38-77-350(A) and did the named insured sign the properly completed form after it was completed by an insurance producer or a representative of the insurer per Section 38-77-350(B)?
 - If so, the insurer is presumed to have obtained an informed rejection.
 - If not, did the offer satisfy prongs 2, 3, and 4 of the *Wannamaker* analysis?
 - If not, the offer was not meaningful.
 - If so, did the insured reject the coverage?

II. **Progressive's Motion for Summary Judgment Should Fail Because Progressive Did Not Make a Meaningful Offer of UIM Coverage to Plaintiff**

A. **Communication of the Offer: Progressive's notification process was not "commercially reasonable"**

To satisfy this aspect of the analysis, an insurer must employ both a reasonable *method* of communication *and* an approach that is "reasonably calculated to bring the offer to the insured's attention." *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 153-54, 370 S.E.2d 915, 917 (Ct. App. 1988). While the *Dewart* court recognized that use of the mails is a reasonable method to communicate with an insured, it also noted this fact alone did not demonstrate the insurer's process satisfied *Wannamaker*.⁴ Instead, it analyzed the circumstances under which the insurer presented the written offer of coverage to the insured (*i.e.*, inclusion with premium renewal notice).

⁴ In contrast, Plaintiff's argument on this issue rests solely on the fact that the *Dewart* decision predated Sec. 38-77-350. (Progressive's Memorandum, p. 8). However, the plain language of Sec. 38-77-350 still contemplates that the form and coverages must be offered "pursuant to law."

Here, Progressive's overall process was not reasonably calculated to inform Plaintiff of her UIM coverage options.⁵ Notably, Plaintiff testified in her deposition that she did not understand how insurance limits worked at the time of the April 2007 online session:

I thought whatever damage you incurred in an accident, you would be paid regardless. I didn't understand the insurance. I didn't. Maybe – I mean, I just didn't understand it. I didn't. My understanding of insurance is you were in an accident and got hurt and you were paid for whatever damages were incurred. (L. Traynum Depo., p. 62, ll. 13-18)(Ex. 3 hereto.)

In spite of Plaintiff's lack of knowledge, the process here involved her being asked to select UIM coverage before Progressive attempted to show her the critical UIM offer form located in an inset window at a later screen during the online session. Plaintiff only could see the critical offer form IF she enlarged the inset window and read it on her own AFTER her selections were made on a previous screen earlier in the online session. There was nothing in the later screen designed by Progressive to alert her to the critical nature of the content of the form.

Progressive's method of conveyance failed to bring the critical offer form language to Plaintiff's attention. Our appellate courts recognize that where the insurer is required to make a meaningful offer of UIM coverage, **"one who is ignorant and unwary might require more explanation than a sophisticated applicant."** *Ray v. Austin*, 388 S.C. 605, 613, 698 S.E.2d 208 (2010); quoting *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 376, 415 S.E.2d 406, 409 (Ct. App. 1992)(emphasis added). Importantly, this transaction did not occur within the normal context of a

⁵ Plaintiffs do not argue that the use of the internet is per se commercially unreasonable. Rather, Plaintiffs' argument is that the format, sequence, and language used by Progressive was insufficient to meet its burden.

customer being in a local insurance agency dealing face to face with an agent or over the phone with a live agent.⁶ This fact alone necessitates the need for Progressive to convey the critical information in a manner that would bring it to the attention of Plaintiff so that she would know her options and be able to make an informed decision. That did not happen here. Progressive could easily have designed the online session such that Traynum would be presented the content of the offer form in a screen before she was asked to make any UIM selections.

Further, after making such a presentation, Progressive could have then required Plaintiff to indicate that she had read and understood the explanations of coverage before she made her selections. However, Progressive did not and in failing to do so, Progressive created a confusing situation rather than reasonably communicating the offer to Plaintiff. Based on the above, this Court should find that Progressive failed to make an offer by a commercially reasonable method.

B. Content of the Offer Form: Progressive's Purported Offer Does Not Meet the Requirements of 38-77-350(A).

South Carolina Code § 38-77-350(A)(4) requires that the insurer's offer form provide "a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages." That did not happen here. Plaintiff did not sign the form itself. Her name was entered on the offer form before she allegedly typed her name for the purported electronic signature box. Further, the acknowledgement language for the electronic signature box did not state that she acknowledged being offered the optional coverages.

⁶ In *Cohen v. Progressive Northern Ins. Co.*, __ S.E.2d __, 2013 WL519664 (Ct. App. Feb. 13, 2013), the Court of Appeals noted its approval with the trial court's finding that the "the notification process was commercially reasonable" based on the agent's personal explanation in conjunction with the content of the form that was used.

C. Insured's Response: Even if the Court Finds Section 38-77-350(A) satisfied, Defendant Progressive's Offer Form Was Not Completed in Compliance with Section 38-77-350(B)

"The insurer bears the burden of establishing that it made a meaningful offer."
Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 348-49, 608 S.E.2d 569, 571 (2005).

An insurer may satisfy this burden of proof by demonstrating strict compliance with S.C. Code Ann. § 38-77-350 (Supp. 2008). S.C. Code Sec. 38-77-350 states as follows:

(B) If this form is signed by the named insured, **after it has been completed by an insurance producer⁷ or a representative of the insurer**, it is conclusively presumed that there was an informed, knowing selection of coverage (emphasis added)

An offer form is not "properly completed and executed by the named insured" so as to trigger the presumption under Section 38-77-350, unless it is completed consistently with the "plain and unambiguous terms of the statute". *Floyd v. Nationwide*, 367 S.C. at 263, 626 S.E.2d at 12. (interpreting statute before the 2006 changes). Thus, under the current statute, unless a form "has been completed by an insurance producer or a representative of the insurer," it does not trigger the statutory presumption.

1. Progressive's argument as to absurdity is misplaced.

Progressive argues in its brief that this Court's holding the insurance producer or the representative of the insurer must complete the form as a necessary step toward

⁷ An insurance "producer" is defined as: "A person who: (1) sells, solicits, or negotiates insurance on behalf of an insurer; (2) takes or transmits other than for himself an application for insurance or a policy of insurance to or from an insurer; (3) advertises or otherwise gives notice that he will receive or transmit insurance applications or policies; (4) receives or delivers a policy of insurance of an insurer; (5) receives, collects, or transmits any premium of insurance; or (6) performs any other act in the making of an insurance contract for or with an insurer, other than for himself; whether these acts are done by an employee of an insurer or at the instance or request of an insurer...." S.C. Code Ann. § 38-43-10 (Supp. 2008).

triggering the conclusive presumption will lead to an absurd result. (See Progressive's Memo, pp. 4-7). It is undisputed that the legislature changed the statute after the *Floyd* decision. Regardless of how Progressive spins the practical effect of the plain language, the language is clear: to trigger the presumption, there has to be completion by the insurance producer or the representative of the insurer. Where the language of the statute is clear, "the words used in a statute must be given their ordinary meaning." *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012); "Where language is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning." *Jennings v. Jennings*, Op. No. 27177 (S.C. Sup.Ct. filed October 12, 2012)(Shearouse Ad. Sh. No. 36 at 18).

Further, in footnote 2 in *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011), the Supreme Court noted that "In 2006, the statute was amended so that the presumption applies if the form was completed by an insurance producer or representative of the insurer and the insured only signed the form."

Here, it is undisputed the UIM offer form was not completed by Defendant Progressive, its producer, or its representative. (RRFA ¶¶ 2-4; Kordes Deposition, pp. 13, 47, 60). Rather, it was allegedly completed by Plaintiff Traynum's uninformed online input. Progressive should not be allowed to deviate from the statute's plain language and trigger the presumption.

Finally, there is not an absurd result reached because (1) the legislature intended for the insured to be involved in the selection process and (2) such a construction avoids having the insured complete a form that she does not understand or where she cannot ask questions of an agent or insurance representative. Simply put, the

amendment insures that the insured has the benefit of input from the carrier.

2. The Uniform Electronic Transactions Act (UETA) does not apply to the transaction at issue under the facts herein.

Defendant Progressive cannot rely on the Uniform Electronic Transactions Act, S.C. Code Ann. Section 26-6-10, (hereinafter "UETA") to prove compliance with Section 38-77-350(B). The plain language of the UETA precludes the Defendant Progressive from asserting that its website acted as an agent who properly completed the Section 38-77-350(A) form. Section 26-6-60(1) states that "[t]his chapter must be construed and applied to: (1) facilitate electronic transactions **consistent with other applicable law**" (emphasis added). Any analysis under the UETA, in regards to this particular issue, should properly cease after reading Section 26-6-60(1). Under Section 26-6-60(1), the "other applicable law" at issue is the insurance law of Section 38-77-160, Section 38-77-350, and *Wannamaker*. "Consistent with" indicates that the language of the UETA defers to this law, and intends to further transactions only as long as those transactions are conducted in compliance with the requirements of that law.

Here, the UETA should not allow Progressive to have an "electronic agent" meet the "an insurance producer or a representative of the insurer" requirement. Surely, the legislature did not intend for the website to be the "insurance producer or representative of the insurer" for as critical a transaction as the conveyance of a UIM offer. Rather, the legislature contemplated an actual communication between the parties, and an algorithm that simply reads a computer keystroke is insufficient. Progressive should not

be able to use a computer-based approach to circumvent the requirements and safeguards of the statute. Thus, the UETA should not apply in this scenario.⁸

3. Plaintiff's alleged electronic signature – even if valid – is not dispositive.

Even if the Court finds that the electronic signature is valid, that fact alone is not dispositive. The appellate courts of South Carolina have recognized that the “law requiring meaningful offers of UM and UIM coverage developed to protect insureds.” *South Carolina Farm Bureau Mut. Ins. Co. v. Jenkins*, Unpublished Opinion No. 2011-UP-136 (S.C. Ct. App. Apr. 5, 2011). In *Farm Bureau v. Jenkins*, the insurer argued that the insured should be bound by the document that he signed. The court disagreed holding that “although it seems contrary to basic contract principles, the law requiring meaningful offers of UM and UIM coverage has developed to protect insureds. Without a meaningful offer, there can be no operative acceptance.” *Id.* Thus, the elements of a meaningful offer must be met in addition to getting the insured's signature.

4. There must be strict compliance to trigger the conclusive presumption under Section 38-77-350(B).

Even if the Court finds Progressive's arguments under the ETA persuasive, Progressive cannot meet the strict compliance requirements for the conclusive presumption. Black's Law Dictionary defines “conclusive presumption” as “a presumption that cannot be overcome by **any** additional evidence or argument.” *Black's Law Dictionary* 1305 (9th ed. 2009). This legal definition indicates that precise compliance with the plain language of the statute is necessary to give the most just

⁸ How can the “signature” on the offer form be the Plaintiff's but the check marks be Progressive's where they are all allegedly created the same way – through Plaintiff's input? Progressive cannot have it both ways.

meaning to the law and the legislative intent.⁹ Where strict compliance is necessary to trigger the presumption, Progressive should not be able to boot strap its way to the presumption using a novel and crafty argument that the website is its agent for purposes of compliance with Section 38-77-350(B). Rather, this Court should recognize that the case law surrounding meaningful offers of UIM coverage and the 2006 changes to Section 38-77-350 suggest that the General Assembly meant for there to be actual communication between the parties so that the consumer is informed to select or reject coverage.

D. Content of the Offer and *Wannamaker*. Progressive fails to meet two of the four factors.

Even when an insurer fails to comply with Section 38-77-350 and is denied the presumption of an informed rejection, it may still argue it made a "meaningful offer" under *State Farm v. Wannamaker*. See *Floyd*, 367 S.C. at 264, 626 S.E.2d at 12. In *Wannamaker*, the South Carolina Supreme Court adopted the following factors to determine whether an offer was "meaningful":

- (1) the insurer must use a commercially reasonable notification process;
- (2) the offer must offer optional coverage with specific limits;
- (3) the offer must intelligibly explain the nature of the optional coverage; and
- (4) the offer must advise the insured that optional coverages are available for an additional premium.

Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556 (hereinafter, the "*Wannamaker* analysis").

⁹ The Supreme Court recognized that Sec. 38-77-350 requires strict compliance when it wrote in 2010 that "The failure to comply strictly with section 38-77-350(A) when offering UIM coverage does not automatically require judicial reformation of the policy to include such coverage. *Grinnell Corp. v. Wood*, 389 S.C. 350, 357, 698 S.E.2d 796, 799 (2010). "Rather, even where an [insurer] is not entitled to the presumption that it made a meaningful offer, it may prove the sufficiency of its offer by showing that it complied with *Wannamaker*. *Id.* at 357, 698 S.E.2d 799-800."

1. Progressive's Purported Offer Failed to Intelligibly Explain the Optional Coverage.

In *Dewart v. State Farm Mut. Automobile Ins. Co.*, 296 S.C. 150, 370 S.E.2d 915 (Ct.App. 1988), State Farm sent Dewart a premium renewal notice and a separate three page insert entitled "Important Information ... Offer Of—Coverage U, Coverage W." The insert was intended to explain UIM coverage and to offer it to the insured. Dewart did not add UIM coverage when she renewed the policy. She did not read the insert. Dewart was later in a wreck and brought suit to reform the policy to include UIM coverage. State Farm denied. The *Dewart* Court ruled in favor of Dewart noting as follows:

Wannamaker requires the insurer to give an intelligible explanation of underinsured motorist coverage in such a manner that the insured can make an informed decision to accept or reject additional coverage. This means the necessary information must be conveyed **in a format and in language** that make it readily understandable to a person of common intelligence. . . .

The **format** State Farm used in this instance was not reasonably calculated to draw attention to the explanation of underinsured motorist coverage. . . . It is common knowledge that bills received in the mail are often accompanied by leaflets, brochures, booklets, or other insertions known as "junk mail." These insertions are used by credit card companies, oil companies, utility companies, insurance companies, merchandisers, and others to inundate the customer with offers and advertisements wholly unrelated to the bill itself. Many recipients of these "stuffers" undoubtedly ignore and discard them as a matter of routine. In order for State Farm's insert not to be ignored as such "junk mail," it was incumbent upon the company, as its own internal policy recognized, to include something on the renewal notice alerting the insured to read the insert. Placing critical information in two documents, **without directing the insured to read both**, was not a method reasonably calculated to draw the insured's attention to the nature of the offer. On the contrary, **by splitting the information into separate documents without alerting the insured, State Farm conveyed the offer in a manner likely to keep the insured from finding an important explanation needed to understand it and to make an informed decision. This alone was sufficient to fail the Wannamaker test.** We need not go further to determine whether the language in the insert provided a complete and readily understandable explanation of the optional coverage. *Id.* at 917-918 (emphasis added).

Similarly, in *Lopez v. National Gen. Ins. Co.*, 308 S.C. 342, 417 S.E.2d 864 (1992), the South Carolina Supreme Court ruled the insurance carrier did not meet the *Wannamaker* test using a an analysis like in *Dewart*. In *Lopez*, the carrier's premium renewal notice was enclosed with several inserts including paperwork offering and defining UIM coverage. The Supreme Court held as follows:

Although the renewal notice mailed by National referred to uninsured and underinsured coverage, **there was nothing to alert the insured's that the explanatory insert was enclosed with the notice.** Additionally, the renewal notice contained a reference to an increase in coverage, which could be construed as underinsured coverage. Under prevailing South Carolina law, we hold that National failed to satisfy the third prong of the test for a meaningful offer of coverage. *Id.* at 347 (emphasis added).

Here, like in *Dewart* and in *Lopez*, there are deficiencies in Progressive's purported offer. First, Plaintiff was required to select both (1) whether she wanted UIM coverage and (2) the amount of such coverage on a screen BEFORE any language was provided on any subsequent screen attempting to explain to her what the UIM coverage was and what it was intended to cover. Progressive admits that the explanations of coverage were not provided before she selected the coverages. (Kordes depo., p. 46).

Second, there was no language telling Plaintiff that if she did not agree with her selection that she made several pages before, then she should/could go back and change those selections after she was presented the explanation of coverage. Notably, Progressive admits that it could have designed the computer program such that the explanation of coverage language preceded any page on which the insured was required to make a selection as to UIM coverage. (See Kordes depo., pp. 19, 45-47.)

Third, the purported offer form, when it did appear, was stuck inside a box on the

screen which required Plaintiff to scroll through it to read the "fine print" on the computer screen. Progressive's placing the critical information inside a box in fine print is similar to including it as a "stuffer" or "insert" which both the *Dewart* and *Lopez* courts recognized as insufficient being ignored and discarded.

Fourth, at the time of the UIM selection, there was nothing to alert the Plaintiff that explanatory language for the UIM coverage was available at a different part of the online session. Practically, the critical information was split into separate documents without alerting the Plaintiff at the time of the selection. This similarity makes Progressive's offer nearly exactly like the purported offers found insufficient in *Dewart* and *Lopez*.

Fifth, later in the online session, Progressive used language in a separate highlighted box ("**IMPORTANT - PLEASE READ**") to emphasize to the Plaintiff how important it was for her to read and to understand the insert relating to her automatic draft for the premium payment to Progressive from Plaintiff's checking account. This same type of box alerting her to the importance of the UIM rejection was not used.¹⁰

Sixth, as of December 8, 2010 in online sessions, Progressive offered explanatory language at the time of the UIM selection in a separate box for a prospective insured. Notably, Progressive used a question mark next to the Underinsured Motorist selection with a link through the question mark to language purporting to explain UIM coverage. (E. 2 -- December 8, 2010 sample session, pp. 8-10).¹¹ While not conceding that this change in December 2010 would allow

¹⁰ Plaintiff has the Progressive Tea Leaf Session on a disk. Plaintiff has been unable to print the pages of the tea leaf session and will bring the disk to the hearing if the pages cannot be printed in a format that is legible for the Court.

¹¹ Progressive presented this Exhibit at Loretta Traynum's deposition. According to Progressive, the system constantly changes. (Kordes depo., p. 15).

Progressive's December 2010 offer to meet this prong of the *Wannamaker* test, Plaintiff contends that the use of the question mark is an improvement from the format that Progressive used in the April 2007 online session with Plaintiff herein.

Seventh, the "policyholder signature box" does not have the same language as the "applicant's acknowledgment" on the actual offer form which is located on the inset screen of the online session. Neither plaintiff nor another insured sees that language if she does not scroll down. In fact, Progressive concedes that the electronic signature box has no reference to UIM coverage. (Kordes depo., p. 48).

Eighth, at the time in the online session when Plaintiff was required to "sign" to verify her coverage selections, Progressive provided nothing to explain what UIM coverage was. (See Kordes depo., pp. 35-38).

Ninth, when Progressive attempted to present the critical UIM offer language after the coverage selections were made, Progressive emphasized that Plaintiff should "sign" the document by putting "electronically sign" in bold type. However, Progressive did not emphasize in bold type or in any other way "please read."

Finally, when Plaintiff entered her payment information, there was nothing to alert her that she had not purchased UIM coverage based on what she had selected when she chose her coverages and based on the "electronic signature" she provided for the purported offer.¹² (Kordes depo, p. 54). The absence of such notification is another indication that Progressive's purported offer did not meet the *Wannamaker* requirements.

¹² Progressive stated multiple times in the Rule 30(B)(6) deposition that it could design the online session any way it wanted and that Plaintiff's failure to complete each successive page would end the session. (Kordes depo, pp. 45, 47.)

2. Progressive's notification process was not commercially reasonable.

See this argument made herein on pages six through eight.

All of the above demonstrate that Progressive did not meet its burden under *Wannamaker* to provide facts and information (1) in a format and (2) in language necessary for the Plaintiff to be adequately informed to make a knowledgeable and informed decision on automobile coverage at the time that she made her selection. Progressive, through the format and method used in the online session, simply did not do enough to draw the Plaintiff's attention to the critical language which the Plaintiff had to read and understand before she could make a knowing and informed rejection of UIM coverage.

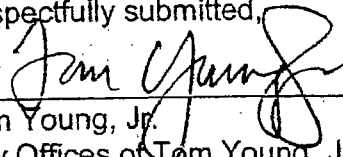
When an insurer fails to make a meaningful offer, an insured's rejection of UIM coverage is not an informed response the courts will enforce. Stated differently, "a noncomplying offer has the legal effect of no offer at all." *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). Under these circumstances, this Court should reform the policy to include UIM coverage with limits equal to the liability limits.

Conclusion on Next Page

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court issue an Order denying Defendant Progressive's Motion for Summary Judgment and granting Plaintiffs' Motion for Summary Judgment declaring that Defendant Progressive failed to make a meaningful offer of UIM coverage to Plaintiff Traynum.

Respectfully submitted,



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March 18, 2013

Attorneys for the Plaintiffs

Aiken, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

**MOTION TO RECONSIDER OR, IN THE
ALTERNATIVE, MOTION FOR RE-
HEARING**

Progressive Direct Ins. Co.,

Defendants.

**TO: TOM YOUNG, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO THE
PLAINTIFF ABOVE NAMED:**

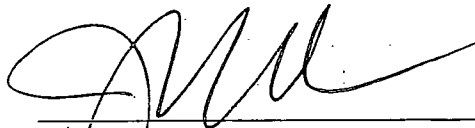
Defendant Progressive Direct Ins. Co., by and through its undersigned counsel, hereby moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the cross-motions for Summary Judgment and the Court's Order granting Plaintiffs' Motion for Summary Judgment. This Court signed the Order on June 25, 2013, granting Plaintiffs' Loretta Traynum and Leonard Traynum's Motion for Summary Judgment. The Order was filed on June 28, 2013 and Progressive Direct Ins. Co. ("Progressive") received written notice of the entry of the Order on July 2, 2013. Therefore, this motion is timely pursuant to Rule 59(e), SCRCF.

Progressive respectfully asks that the Court reconsider its Order granting summary judgment for two reasons. First, the Order makes erroneous factual determinations that are not supported in the record. Second, the Order applies the incorrect legal standards by requiring that: 1) the form be completed by the named insured; 2) the offer form be presented before the named insured makes her coverage selections; 3) Progressive provide more than one explanation of optional coverage; and 4) Progressive provide the explanation of coverage form separate and

apart from the form promulgated by the Department of Insurance in response to South Carolina Code Annotated Section 38-77-350. Alternatively, Progressive moves for rehearing of the cross-motions on the ground that the Court heard arguments on this motion in a disjointed fashion during brief recesses from a complicated criminal trial and therefore was unable to fully hear and consider the arguments presented by Progressive.

For the above-stated reasons, Progressive respectfully moves for reconsideration of the cross-motions for summary judgment and for entry of an Order granting Progressive's Motion for Summary Judgment and denying Plaintiffs' motion. This motion will be supplemented and is supported by the affidavits, depositions, discovery responses, arguments, memoranda of law, and other such documents as appropriate.

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Columbia, South Carolina
July 9, 2013

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

CIVIL ACTION NO: 2010-CP-02-02665

Loretta Traynum and Leonard Traynum,

Plaintiffs,

v.

Cynthia Scavens and Progressive Direct Ins.
Co.,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER OR, IN THE
ALTERNATIVE, MOTION FOR RE-
HEARING 8/21/13**

L. J. [Signature]
C.C.P. & S.
Oranum [Signature]
Deputy Clerk

Defendant Progressive Direct Insurance Company, by and through its undersigned counsel, hereby submits this memorandum of law in support of its Motion to Reconsider or, in the Alternative, Motion for Re-Hearing. This motion relates to this Court's Order of June 25, 2013 wherein the Court granted Plaintiffs' Motion for Summary Judgment and reformed the insurance policy to include underinsured motorist coverage.

UNDISPUTED FACTS

On April 20, 2007, Traynum used her computer to purchase a policy of automobile liability insurance from Progressive through Progressive's website.¹ She purchased liability limits of \$25,000 per person, \$50,000 per accident, and \$25,000 for property damage. (Tealeaf, 4, attached as Exhibit A). These were the minimum allowable limits in South Carolina at the time. She electronically signed a form titled "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form") rejecting underinsured motorist ("UIM") coverage. (Offer Form, attached as Exhibit B). Traynum specifically wanted a policy that would meet the requirements of South Carolina law and satisfy her obligations to the

¹ A more in depth statement of the facts is set out in Progressive's Memorandum in Support of its Motion for Summary Judgment.

lienholders on her vehicles. (Traynum Dep. 24:18-25, excerpts attached as Exhibit C). She admits that she only wanted to purchase what was necessary for compliance with state laws. (Traynum Dep. 24:6-17).

Traynum initially obtained a quote online from Progressive some time prior to April 20, 2007. (Kordes Dep. 20:8-15, excerpts attached as Exhibit D). In the previous quote, Progressive provided four pre-set options for coverage. (Kordes Dep. 23:11-23). Those options included "minimum," "economy," "recommended," and "plus." (Kordes Dep. 23:11-23) (Tealeaf, 3). Under the default option, Progressive recommended that Traynum purchase both uninsured (UM) and UIM coverage in amounts that equaled her liability limits. (Kordes Dep. 25:11-25). In the previous quote, Traynum declined the pre-set packages and changed the UIM limits from the default liability limits to \$0.00. (Kordes Dep. 25:11-18). After retrieving her quote during her online session, Traynum had the opportunity to review and make changes to her selected coverages and chose to make some changes to the quoted coverage by increasing her deductible for collision and comprehensive coverages from \$500 to \$1,000. (Kordes Dep. 27:12-28:2). Although not required by South Carolina law, Progressive provided a hyperlink, a web-based standard using blue font and a blue underline, that Traynum could click on to obtain an explanation of each type of coverage while she was adjusting her coverage amounts. (Kordes Dep. 20:02-25:2). Traynum chose not to click on those links. (Kordes Dep. 25:7-10). After changing her coverage to increase the deductibles, Traynum proceeded to a page requiring additional information such as the VIN numbers for the insured vehicles and lienholder information. (Tealeaf, 5).

Upon completing that page, Traynum proceeded to the application signature page and electronically signed that page. (Kordes Dep. 29:25-32:7) (Tealeaf, 6) (Application, 1-6,

attached as Exhibit E). Traynum electronically signed the application, including the acknowledgment at the end of the application, stating:

Applicant signature

I represent that I, LORETTA TRAYNUM, am the person identified as the named insured and the first driver in the Drivers and Resident Relatives section of this application. I acknowledge and agree to the statements contained within this application.

I also acknowledge and agree that by typing my name in the designated boxes on the screen below this form and clicking "Continue", I am electronically signing this application, which will have the same legal effect as the execution of this document by a written signature and shall be valid evidence of my intent and agreement to be bound by its terms.

I understand that my name already appears in the signature line below because I chose to electronically sign this application, and this application will be securely stored, as it is presented here, if I purchase this policy. I also understand that if I do not electronically sign this application, it will not be processed.

Signature of Named Insured
X LORETTA TRAYNUM

Date
April 20, 2007

(Tealeaf, 6) (Application, 5-6).

Traynum signed the application by typing her first and last name in the electronic signature boxes, thereby consenting to the use of an electronic signature and electronically signing the application. (Kordes Dep. 32:8-20) (Tealeaf, 6). This signature did not complete the transaction and no policy of insurance issued until Traynum completed the next two pages during her online session.

After electronically signing the application signature page by typing her name in the electronic signature box and clicking "Continue," Traynum reached the offer of UM and optional UIM coverage. The Offer Form was set out in a separate webpage fully dedicated to providing the required offer of optional coverage. (Tealeaf, 7). With the exception of the standard Progressive banner at the top of the screen, there are no additional hyperlinks or any distractions.

(Tealeaf, 7). The webpage only included the Offer Form (which follows Form 2006 promulgated by the S.C. Dept. of Insurance), instructions for electronically signing the form, and the electronic signature statement and box. (Tealeaf, 7). The top of the page bore a header titled, "Sign Your Policy Forms (2 of 2)," and provided:

Sign Your Policy Forms (2 of 2)

Your Electronic Signature is Required

Please read and electronically sign this document by entering your name in the form fields below and then clicking the "Continue" button.

Your state may require insurance documents to be displayed in a particular font. To ensure this there are two options:

Option 1 - set your monitor resolution to 800 x 600

Option 2 - Print this document (print in correct text size)

(Tealeaf, 7). This header instructed Traynum to read the Offer Form and electronically sign "by entering your name in the form field below and then clicking the 'Continue' button." (Tealeaf, 7). The header also informed Traynum that she should either set her monitor resolution to 800 x 600 or print the Offer Form to ensure that she viewed the document in the correct text size. (Tealeaf, 7).

Below that box, the webpage included a window containing a PDF of the entire Offer Form. (Offer Form) (Tealeaf, 7). The PDF is printable, savable, and searchable. (Tealeaf, 7). Traynum could also scroll through the entire document on her screen. (Tealeaf, 7). The Offer Form indicates Traynum's rejection of optional UIM coverage and includes the signature line for Traynum to confirm this rejection. (Offer Form, 4). The form also provides the following acknowledgment:

IV. Applicant's acknowledgment

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

both to the terms and conditions of my automobile insurance policy and the laws of the State of South Carolina.

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

(Offer Form, 5).

Immediately below the window containing the Offer Form is an Electronic Signature prompt, which provides:

Policyholder Electronic Signature

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

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

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

First

Last

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

After electronically signing the Offer Form, Traynum proceeded to the payment screen. For a third time, Traynum gave her electronic signature, this time authorizing Progressive to establish an electronic funds transfer to allow electronic payments for her premiums. (Tealeaf, 9). Upon completing this signature and progressing to the next page, her insurance purchase was

complete and Progressive issued the policy according to the coverages and amounts selected by Traynum. Traynum also had the opportunity, once again, to print all of the insurance documents, including the Offer Form. (Tealeaf, 10).

PROCEDURAL HISTORY

Plaintiffs filed a summons and complaint on October 29, 2010, naming Progressive and Cynthia Scavens as defendants. Scavens' carrier tendered its liability limits in exchange for a covenant not to execute and Progressive, as the UIM carrier, assumed control of the defense on April 1, 2011. Progressive filed a Motion for Summary Judgment on November 16, 2012, and Plaintiffs filed a cross Motion for Summary Judgment on December 27, 2012. The Court held a hearing on the cross-motions on April 2, 2013, at the Aiken County Courthouse. The Court heard arguments on the motion during breaks in a complicated criminal matter. The Court's Order granting Plaintiffs' motion for summary judgment was filed on June 25, 2013. Progressive received written notice of the entry of the Order on July 2, 2013, and this motion timely followed.

ARGUMENT

A party may file a motion to reconsider under Rule 59(e) when it believes the court has misunderstood, failed to fully consider, or failed to rule on an issue and the party wished the court to reconsider or rule on it. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). On the other hand, a party must move to reconsider when an issue is raised, but not ruled upon by the court. *Id.* The motion allows "a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* at 22, 602 S.E.2d at 779.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 799 (2010) (citation omitted). When considering a motion for summary judgment, the court must view all evidence and reasonable inferences in the light most favorable to the non-moving party. *Id.*

I. The Court's June 25, 2013 Order makes independent factual determinations that are inconsistent with the record.

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony" *Bishop v. City of Columbia*, 401 S.C. 651, 657, 738 S.E.2d 255, 258 (Ct. App. 2013) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)). Respectfully, the Court made a number of factual determinations in its June 25 Order that are not in the record and that are actually inconsistent with the testimony and exhibits presented in the cross-motions for summary judgment.

First, the Order finds that the default amount of UIM coverage on the Progressive website was \$0.00. (Order, p. 2). Charles Kordes, Progressive's 30(b)(6) designee testified in his deposition that Progressive always sets the default UIM limits equal to the liability limits. (Kordes Dep. 25:11-25). On April 20, 2007 – when Traynum purchased the policy – she pulled up a quote that she previously adjusted. (Kordes Dep. 20:8-15). During that previous online quote session, she declined the default UIM limits that equaled the liability limits and instead she changed the amount to \$0.00. Progressive never set the default to \$0.00. Rather, Traynum made this change to her quoted coverage.

Second, the Order finds that Traynum only "clicked that she agreed to the terms" of the contract and the Offer Form. (Order, p. 2). Traynum did not simply click to indicate her agreement to the policy and the Offer Form. She typed in her name in an electronic signature

box. (Tealeaf, 6-7). She had to type her name on three separate pages in three separate signature blocks. First, she typed her name agreeing to the contents of the insurance application. (Tealeaf, 6). She then – on a separate webpage – typed her name and electronically signed the Offer Form. (Tealeaf, 7). She then – on a third webpage – typed her name and electronically signed the electronic funds transfer authorization. (Tealeaf, 9). She could not proceed to the next page or complete the insurance purchase without typing in her name and, thereby, electronically signing each separate form. (Kordes Dep. 32:8-20).

Third, the Order finds that Progressive failed to present an explanation of coverage and only provided a hyperlink. (Order, p. 4). Progressive provided a full explanation of coverage that is a verbatim recitation of the explanation promulgated by the South Carolina Department of Insurance in Form 2006. (Offer Form, 1-2) (S.C. Dept. Ins. *Bulletin No.* 2006-03 (2006)). Progressive provided the explanation as part of the Offer Form in a completely separate webpage. It is undisputed that Traynum viewed this page because the policy would not have issued unless she reached the offer page and electronically signed the Offer Form. In addition to providing the required offer form, Progressive *also* provided an optional hyperlink for Traynum to obtain an explanation of optional coverage earlier in the selection process. (Tealeaf, 3) (Kordes Dep. 24:15-25:2). It is not Progressive's contention that the hyperlink was the offer. The hyperlink is merely an example of Progressive going above and beyond the bare minimum requirements of the law. Progressive already met that minimum requirement by providing the required offer in a separate webpage as part of the Offer Form. Traynum received the Offer Form and was required to sign the Offer Form – which included the required explanations – before completing the online transaction. (Kordes Dep. 32:8-20).

Fourth, the Order finds that "Progressive included [the offer] on a webpage full of different hyperlinks and various insurance options." (Order, p. 5). In fact, however, Progressive provided the Offer Form on a separate webpage solely dedicated to conveying the information on the Offer Form and confirming Traynum's agreement to the information on the Offer Form. (Tealeaf, 7). The only coverages addressed on this webpage were UM and UIM coverage. (Offer Form).

Fifth, the Order provides a list of possible alternative means by which Progressive could have conveyed a meaningful offer. (Order, pp. 7-8). The paragraph concludes that, "[f]or a trained web programmer, any or all of these methods would be simple to program." (Order, p. 8). Neither party has presented any expert or other testimony of alternative methods that Progressive could have utilized to convey the offer. Moreover, neither party has presented any expert or other testimony regarding what is or is not possible for a "trained web programmer." This discussion is not based upon any evidence or arguments presented in the record and appears to be an independent factual determination by the Court. Although Rule 201 of the *South Carolina Rules of Evidence* permits a Court to take judicial notice of adjudicative facts, those facts must be "generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See Rule 201, SCRE. Importantly, "[t]his rule does not allow a judge to take judicial notice of a fact merely because it is within his personal knowledge" Notes, Rule 201, SCRE.

Based upon the discussion on pages seven and eight of the Court's Order, these factual determinations appear to have influenced the Court's decision. For example, the Order suggests that Progressive should have defaulted the UIM drop-down menu to 25/50/25. (Order, p. 7). In

fact, Progressive did default UIM coverage to match the liability limits and it was Traynum who modified the UIM coverage amount. Also, the Order suggests that Progressive should have required Traynum to enter her name in a signature box. (Order, p. 7). Again, Progressive did just that – it required Traynum to type her name into the signature box to electronically sign the Offer Form. Therefore, based upon the undisputed facts in the record, the Order should be amended to accurately reflect these facts.

II. The June 25, 2013 Order applies the wrong legal standards and creates a higher burden for Progressive than applicable under the statutes and caselaw.

The Court applies a number of legal standards that are inconsistent with both South Carolina Code Section 38-77-350 and the caselaw interpreting this statutory provision. When the proper standards are applied, Progressive fully complied with § 38-77-350(a) and (b) and, therefore, is entitled to a conclusive presumption that it made a meaningful offer of optional coverage.

A. The General Assembly specifically rejected the Supreme Court's decision in *Floyd* by amending § 38-77-350 to clarify that the form can be completed by an agent of the insurer as long as it is signed by the named insured.

The Order states that Progressive failed to satisfy the requirements under § 38-77-350 for two reasons. First, the Order states that “no explanation was presented to the purchaser, only a mere hyperlink.” (Order, p. 4). As discussed above, this statement is factually incorrect as the undisputed evidence in the record demonstrates because Progressive provided a full explanation of optional coverage in the Offer Form. (Tealeaf, 7) (Offer Form, 1-2). Second, the Order states, because Progressive’s website – acting as its agent – completed the form based upon Traynum’s selections, Progressive “fails to satisfy the requirement that the insured fill out the form herself.” (Order, p. 4). This is not the applicable standard for an offer conveyed in 2007.

The Supreme Court, in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005) interpreted a *prior* version of § 38-77-350, which provided that: "If this form is properly *completed and executed by the named insured*" there was a conclusive presumption of a meaningful offer and a knowing selection or rejection of optional coverage. S.C. Code Ann. § 38-77-350(B) (2005). "The South Carolina General Assembly effectively reversed the *Floyd* decision with the enactment of 2006 S.C. Rat. No. 377, §1, amending § 38-77-350." (S.C. Dept. Ins. *Bulletin No.* 2006-03 (2006). Under the amended statute – which was in effect on April 20, 2007 when Traynum applied for and purchased the insurance policy – § 38-77-350 provides that: "If this form is *signed by the named insured*, after it has been *completed by an insurance producer or representative of the insurer*, it is conclusively presumed there was an informed, knowing selection of coverage" S.C. Code Ann. § 38-77-350(B) (2007). Under the amended version of the statute that was in effect when Traynum purchased the Progressive policy, the named insured merely has to *sign* the form after it has been completed by either the named insured *or* the insurance agent.

Progressive's website acted as its electronic agent and completed the Offer Form. See S.C. Code Ann. § 26-6-140 (providing that a contract may be formed by an interaction between an electronic agent and an individual). It is undisputed that Traynum electronically signed the form. Pursuant to South Carolina Code Sections 26-6-70 and 26-6-80, her electronic signature has the same legal effect as if she signed a paper document with pen and ink. This transaction satisfies the literal language of § 38-77-350 because it was completed by Progressive's agent and then signed by the named insured. Importantly, once an insurer satisfies the requirements of § 38-77-350(B), the analysis stops. A statutory conclusive presumption applies and there is no

need for the Court to move on to the *Wannamaker* analysis. Progressive is entitled to a conclusive presumption of a meaningful offer pursuant to § 38-77-350.

B. Neither § 38-77-160 nor § 38-77-350 require an insurer to present the Offer Form before the insured selects coverage and numerous appellate decisions hold that an insurer can make a meaningful offer long after the insurance purchase.

The Court's Order holds that Progressive failed to make a meaningful offer because it did not present the Offer Form to Traynum until after she initially changed her UIM limits to \$0.00. (Order, pp. 6, 8). Nothing in either the statutory language or appellate decisions interpreting §§ 38-77-160 and 38-77-350 establishes such a requirement. In fact, the appellate decisions hold that the Offer Form can be presented at *any* time and thereby bind the insured.

For example, in *Atkins v. Horace Mann Ins. Co.*, 376 S.C. 625, 658 S.E.2d 106 (Ct. App. 2008), the insured added a second vehicle to his existing insurance policy on December 27, 2000. *After adding the vehicle*, an agent for the insurer mailed an offer form to the insured. *Id.* at 628-629, 658 S.E.2d at 108. The insured completed and signed the form and returned it to the insurer without any oral explanation or directions.² However, even though the offer and explanation of optional coverage came *after* the insured purchased coverage, the trial court and the Court of Appeals both held that the insurer made a meaningful offer. *Id.* at 631-32, 658 S.E.2d at 109-10. Importantly, the offer was made in a commercially reasonable manner even though it was presented after the insured had already made his initial coverage selections. *Id.*

Likewise in *Wiegand v. United States Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011), the insurer did not send the offer form until *10 years* after the insured purchased insurance. The insurer mailed the offer form to the insured who completed and signed the form before returning it to his insurer. *Id.* at 161-62, 705 S.E.2d at 433. Based upon his receipt and completion of the

² Because the offer was made prior to the 2005 amendment to § 38-77-350, the insured, not the insurer, had to both complete and sign the offer form in order for the statutory conclusive presumption to apply.

offer form, the Supreme Court applied the statutory conclusive presumption from § 38-77-350(B) and found that the insurer made a meaningful offer. *Id.* at 166, 705 S.E.2d at 435-36. See also *Jackson v. State Farm Mut. Auto. Ins. Co.*, 303 S.C. 321, 400 S.E.2d 492 (1991) (finding a meaningful offer conveyed as part of a premium renewal notice); *Burch v. South Carolina Farm Bureau Mut. Ins. Co.*, 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002) (finding a meaningful offer conveyed on a form presented to the insured almost four years after originally purchasing insurance).

The statutes and applicable caselaw do not require that the insured sign or even see the Offer Form before selecting coverage. In fact, the general practice is for the Offer Form to be presented to and signed by the insured along with the insurance application after the insured has obtained a quote and selected his or her desired coverages. Through the cases cited above and numerous others, the Supreme Court and Court of Appeals have validated this practice. Importantly, nothing prevented Traynum, upon reviewing the Offer Form, from going back and changing her coverage selections to increase her UIM coverage. However, she did not increase her coverage. Rather, she signed the form confirming her desire to obtain a policy that met the minimum requirements of South Carolina law. (Traynum Dep. 24:6-25). Pursuant to § 38-77-350(B), Traynum is bound by her signature and the policy should not be reformed.

C. Because the General Assembly requires insurers to use a form that comports with § 38-77-350, providing an explanation as part of the form must be commercially reasonable.

The Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), set forth a list of requirements that insurers must satisfy in order to make a meaningful offer pursuant to § 38-77-160. One of those requirements is that the offer must be made in a commercially reasonable manner. *Id.* In response to *Wannamaker*, the General

Assembly enacted a safe harbor provision in § 38-77-350. If insurers satisfy the requirements of § 38-77-350, there is a conclusive presumption of a meaningful offer.

Pursuant to § 38-77-350, insurers *must* use the form described in § 38-77-350(A) and approved by the Department of Insurance. By enacting § 38-77-350, the General Assembly expressed its intent that use of a written offer form is commercially reasonable and the preferred method by which to convey an explanation of optional coverage. The Department of Insurance promulgated Form 2006 in compliance with § 38-77-350 and Form 2006 has been held to meet the requirements of § 38-77-350. See *Clinton v. West American Ins. Co.*, 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005) ("The South Carolina Court of Appeals has specifically held that the form used by West American, Form 2006, meets the requirements of § 38-77-350."); *Burch*, 351 S.C. at 349, 569 S.E.2d at 404; see also S.C. Dept. Ins. *Bulletin No.* 2006-03 (2006). Progressive's Offer Form is virtually identical to Form 2006 and therefore satisfies the requirements of § 38-77-350.

The Court's Order states that "for a layman to weed out the explanation on a multipage document, is again a shift in the burden from the insurer to the purchaser." (Order, p. 8). Respectfully, Progressive provided the explanation of optional coverage on the first two pages of an Offer Form that was substantively identical to the form promulgated by the Department of Insurance pursuant to statute. This same explanation was upheld by the Court in *Clinton*. 364 S.C. at 117-118, 611 S.E.2d at 524. Moreover, the Court of Appeals in *Clinton* specifically held that use of the offer form was commercially reasonable. *Id.* at 122, 611 S.E.2d at 526 ("The Offer was commercially reasonable, being made on a form approved by the South Carolina Department of Insurance in compliance with § 38-77-350 of the South Carolina Code of Laws."). Because the explanation is on the first two pages of the document, Traynum did not have to weed

out the information. The form was readily available for her to read or even to print or save to her own computer in the requisite font size. Moreover, by electronically signing this very form, Traynum represented to Progressive that she did in fact know the contents of the explanation. (Tealeaf, 7) (Offer Form, 5) ("By my signature, I acknowledge that I have read – or I have had read to me – the above explanation and offers of additional uninsured motorist coverage and optional underinsured motorist coverage.").

Because Progressive provided an explanation of optional coverages on an Offer Form that was substantially identical to the form promulgated by the Department of Insurance pursuant to § 38-77-350, the offer was commercially reasonable. Both the form and the explanation provided therein have been specifically approved by the Court of Appeals. Moreover, pursuant to South Carolina Code Section 26-6-80, presentation of the form electronically on a separate webpage satisfies the written offer requirement of § 38-77-350. Specifically, § 26-6-80 provides that "[i]f parties agree to conduct a transaction by electronic means and a law requires a person to provide . . . information in writing to another person, the requirement is satisfied if the information is provided . . . in an electronic record capable of retention by the recipient at the time of receipt."). Progressive presented the form in electronic format and Traynum could not only read it, but she could also print or save the form. (Tealeaf, 7). Therefore, Progressive made a valid written offer of optional UIM coverage which Traynum knowingly rejected.

III. Alternatively, Progressive requests that the Court withdraw the June 25, 2013 Order and re-hear the cross-motions for summary judgment.

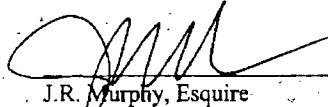
The Court heard arguments on the cross-motions for summary judgment under less-than-ideal conditions. At the time of the hearing, the Court was enthralled in the middle of a complex and high profile criminal trial. Arguments on the cross-motions were split-up in between different breaks in the criminal trial. Due to the disjointed nature of the hearing and the Court's

factual determinations that are inconsistent with the record, Progressive requests that the Court withdraw its June 25, 2013 Order and set a new hearing date to hear arguments on the cross-motions anew in the event it is inclined to deny Progressive's motion to reconsider.

CONCLUSION

For the reasons stated above, the June 25, 2013 Order granting Plaintiffs' Motion for Summary Judgment should be withdrawn or amended. The factual determinations in the Order are inconsistent with the testimony and exhibits presented in the cross-motions for summary judgment. Based on the undisputed facts in the record, Progressive made a meaningful offer of optional coverage. Moreover, the Court applied the wrong legal standards to Progressive's offer. Progressive's provision of the offer in a form that was substantially identical to Form 2006 before issuing the policy of insurance fully satisfied the requirements of § 38-77-350(A). Because Traynum electronically signed the form after it was completed by Progressive's electronic agent, Progressive is entitled to a conclusive presumption that it made a meaningful offer pursuant to § 38-77-350(B). Therefore, the June 25, 2013 Order should be withdrawn and summary judgment entered in favor of Progressive.

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August 20, 2013

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Loretta Traynum and
Leonard Traynum,

Plaintiffs,

vs.

Cynthia Scavens and
Progressive Direct Insurance
Company,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-02-~~665~~ 02665

MOTION TO RECONSIDER

MOTION TO RECONSIDER

Plaintiffs, by and through their undersigned counsel, hereby move pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the cross-motions for Summary Judgment and the Court's Order granting Defendants' Motion and Denying Plaintiffs' Motion. The Order was filed on November 5, 2013 and Plaintiff's counsel received written notice of the entry of the Order on November 13, 2013. Therefore, this motion is timely.

Plaintiffs respectfully ask this Court to reconsider its Order granting Summary Judgment for several reasons as follows:

A. Erroneous Factual Determinations

The Order makes erroneous factual determinations that are not supported by the record. These factual determinations include the following:

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AIKEN COUNTY
CLERK OF COURT

(1) The Order states that there was an explanation of UIM coverage available to Plaintiff by way of a hyperlink. (Order, p. 2) The record does not support this. Rather, Progressive has no record of the webpage, if any, that would have appeared upon clicking the hyperlink. At some point between Plaintiff's purchase in April 2007 and December 2010, Progressive changed its webpage to show a question mark in a bubble for prospective purchasers to click if more information as to UIM coverage was desired. If the bubbled question mark was clicked, an explanation of UIM coverage appeared. Progressive did not have the bubbled question mark available when Plaintiff purchased her coverage in April 2007.;

(2) The Order states that Traynum's name appeared as an electronic signature on multiple documents including the UIM offer form *after* she typed her name indicating that she electronically signed the application. (Order, p. 4; p. 6). The record does not support this. Instead, the record establishes that Plaintiff's name appeared on the UIM offer form *before* Plaintiff typed her name in the acknowledgment box on the screen. That acknowledgement box was different from the box on the form. In other words, Progressive's website populated the signature line on the offer form with Plaintiff's name before she typed her name in the separate acknowledgement box. Progressive copied her typed name to the form and there is no evidence in the record that Plaintiff intended to sign the offer form itself. Progressive has the burden to show that Plaintiff intended to sign and did sign the offer form. They cannot do that here and the record does not support such a finding.;

(3) The Order suggests that the "applicant's acknowledgement" from the UIM offer form was something that Plaintiff saw and electronically signed. (Order, p. 5). The record

does not support that. Rather, the inset window did not require Plaintiff to scroll to the bottom before proceeding further. Plaintiff's name appeared on the UIM offer form before Plaintiff typed her name in the acknowledgment box. The acknowledgement language for the electronic signature box did not state Plaintiff acknowledged being offered the UIM optional coverage. The language for the electronic signature box was not the same language that appeared on the UIM offer form itself.;

(4) The Order states that the use of the UIM offer form itself makes the offer of UIM coverage commercially reasonable. (Order, pp. 7-8). This is not consistent with the latest appellate case in this area of the law. In *Cohen v. Progressive Northern Ins. Co.*, 402 S.C. 66, 737 S.E.2d 869 (Ct. App. 2013), the Court of Appeals noted its approval with the trial court's finding that the "the notification process was commercially reasonable" based on the agent's personal explanation in conjunction with the content of the form that was used. Thus, the Court of Appeals has tied the reasonableness of the offer form to the use of the form *in combination with* the agent's explanation of coverage to the prospective insured. That did not happen here.;

(5) The Order states that S.C. Code § 38-77-350 requires Traynum to sign the form. The Order then finds that Traynum signed the form. The record shows that this is not true – Traynum did not physically sign the form. Rather, as stated above, the form was populated with Traynum's typed name before she typed her name in another place to provide an electronic signature for the form.

(6) The Court's Order attempts to distinguish this case from *Dewart v. State Farm Mut. Auto Ins. Co.*, 296 S.C. 150, 670 S.E.2d 815 (Ct. App. 1988)(where the insured never "saw or read the leaflet"), but the record shows that like the insured in *Dewart*, Traynum

never saw or read her offer form because nothing required to have to scroll through the form before progressing to the next page. This case is not materially different from *Dewart* and it is inaccurate to distinguish this case from *Dewart* on the grounds and findings stated in the Order.

B. Conclusive Presumption Should Not Apply Under The Facts

Under these facts, the Court's Order incorrectly applies the law in ruling that the conclusive presumption under S.C. Code § 38-77-350(B) applies. S.C. Code § 38-77-350 states as follows:

(B) If this form is signed by the named insured, **after it has been completed by an insurance producer¹ or a representative of the insurer**, it is conclusively presumed that there was an informed, knowing selection of coverage (emphasis added)

In *Floyd v. Nationwide Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005), our Supreme Court held that an offer form is not "properly completed and executed by the named insured" so as to trigger the presumption under § 38-77-350 unless it is completed consistently with the "plain and unambiguous terms of the statute". *Id.* 367 S.C. at 263, 626 S.E.2d at 12 (interpreting statute before the 2006 changes). Thus, under the current statute, unless a form "has been completed by an insurance producer or a representative of the insurer," it does not trigger the statutory presumption.

Here, it is undisputed the UIM offer form was not completed by Progressive, its producer, or its representative. The Plaintiff completed this form, and she did so by

¹ An insurance "producer" is defined as: "A person who: (1) sells, solicits, or negotiates insurance on behalf of an insurer; (2) takes or transmits other than for himself an application for insurance or a policy of insurance to or from an insurer; (3) advertises or otherwise gives notice that he will receive or transmit insurance applications or policies; (4) receives or delivers a policy of insurance of an insurer; (5) receives, collects, or transmits any premium of insurance; or (6) performs any other act in the making of an insurance contract for or with an insurer, other than for himself; whether these acts are done by an employee of an insurer or at the instance or request of an insurer...." S.C. Code § 38-43-10 (Supp. 2008).

providing her uninformed responses during an on-line process. This is not sufficient to trigger the statutory presumption and this result is not an absurd result. The language of the statute indicates that the legislature intended for the insurer to be involved in the selection process. This is the construction that avoids the absurd result. The contrary view would grant an automatic win to an insurance company despite the fact that it put its insured in a situation where she must complete a form that she does not understand and cannot ask questions of an agent or insurance representative whether in person, over the phone, or via the internet.

C. Sec. 38-77-350 By Its Plain Language Contemplates a Live Agent Being Present Either By Phone, In person, or Over the Internet

The Defendant suggests that this construction is novel but it is not. A close reading of 38-77-350 shows that the legislature refers to the presence of an insurance agent being involved in the process. First, Sec. 38-77-350(A) mandates that the form must have a mailing address and telephone number for the Department of Insurance "if the applicant has questions that the insurance agent is unable to answer." S.C. Code Sec. 38-77-350(A)(5). The inclusion of this language in the mandatory section shows that the legislature contemplated an insurance agent being involved in both making and explaining the offer. This same policy concern drove the decision in *Floyd*.

Second, Sec. 38-77-350(B) provides a conclusive presumption and absolute protection from liability for the carrier and the insurance agent if the "form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer." This language is plain; it says that the form has to be completed by the insurer and not the prospective insured as a necessary step toward

the presumption. Again, this suggests legislative intent that there be interaction between an agent and the applicant either by phone, in person, or by live chat over the internet.

Third, and most importantly, Sec. 38-77-350(D) states that "compliance with this section satisfies the insurer and the agent's duty to ***explain and offer*** optional coverages . . ." (emphasis added.) This language again suggests that the legislature contemplated an agent being present either in person, by phone, or by live chat over the internet so that there would be an explanation and an offer made. This construction is consistent with the standard that the insurer has to make a meaningful offer so that the insured can know his or her options and make an informed decision. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005), quoting *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005).

D. The Electronic Transactions Act Cannot Be Used Under These Facts to Reach the Conclusive Presumption

The Court incorrectly rules that the Defendant can use the Uniform Electronic Transactions Act, S.C. Code § 26-6-10, (hereinafter "UETA") to prove compliance with § 38-77-350(B). The plain language of the UETA precludes Progressive from asserting that its website acted as an agent who properly completed the § 38-77-350(A) form. First, § 26-6-60(1) states that "[t]his chapter must be construed and applied to: (1) facilitate electronic transactions consistent with other applicable law" (emphasis added). Any analysis under the UETA, as to this particular issue, should cease after reading §

26-6-60(1).² Under § 26-6-60(1), the “other applicable law” at issue is the insurance law of § 38-77-160, § 38-77-350, and *Wannamaker*. The use of the term “consistent with” indicates that the language of the UETA defers to this law, and intends to further transactions only as long as those transactions are conducted in compliance with the requirements of that law. As noted earlier, Plaintiff was required both to make her selections of UIM coverage and to verify those selections before Progressive attempted to provide her any information to explain UIM coverage.

Second, S.C. Code § 26-6-80(B) mandates that the provisions of § 38-77-160; § 38-77-350; and *Wannamaker* must still be followed in communicating UIM information to an online customer like the Plaintiff.³ This means again that the insurer must use both a reasonable *method* of communication *and* an approach that is “reasonably calculated to bring the offer to the insured’s attention.” *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 153-54, 370 S.E.2d 915, 917 (Ct. App. 1988). While the *Dewart* court recognized that mailing is a reasonable method of communicating with an insured, it also noted the fact of mailing alone did not demonstrate the insurer’s notification process was commercially reasonable.⁴ Instead, it analyzed the circumstances under which the insurer presented the written offer of coverage to the insured (*i.e.*, inclusion with premium renewal notice).

² S.C. Code § 26-6-30(D) also states that transactions subject to the UETA are “subject to other applicable substantive law.”

³ S.C. Code § 26-6-80(B)(2) says “If another provision of law requires a record to be . . . *communicated* . . . in a certain manner the record must be . . . *communicated* . . . by the method specified in the other law.”

⁴ Progressive argues that the *Dewart* decision is inapplicable because it predated Sec. 38-77-350 and the internet. However, the plain language of both S.C. Code § 38-77-160 and § 38-77-350 contemplate that the form and coverages must be offered “pursuant to law.” S.C. Code § 38-77-350.

The same analysis applies here. While the use of the internet can be a reasonable method of communicating such a transaction, Progressive's overall process was not reasonably calculated to inform Plaintiff of her UIM coverage options.⁵ Notably, Plaintiff testified in her deposition that she did not understand how insurance limits worked at the time of the April 2007 online session:

I thought whatever damage you incurred in an accident, you would be paid regardless. I didn't understand the insurance. I didn't. Maybe – I mean, I just didn't understand it. I didn't. My understanding of insurance is you were in an accident and got hurt and you were paid for whatever damages were incurred. (L. Traynum Depo., p. 62, ll. 13-18)

Third, the Court's Order agrees with Progressive's position that its website "completed" the offer form thus satisfying the requirements of § 38-77-350(B) that the insurer's agent complete the form. This position is erroneous based on § 26-6-90(A) of the UETA which says that the marks on an electronic record like the offer form here are the customer's marks – not the company's marks. Viewed in the light most favorable to Progressive, this means that the online selections on the offer form are those of the Plaintiff and not Progressive's agent. As such, this is another reason why Progressive cannot trigger the presumption under § 38-77-350(B).⁶

E. The Court's Order Incorrectly Dismisses the Requirement in the Law that the Offer Must be Commercially Reasonable

⁵ This Court should not find and Plaintiffs do not argue that the use of the internet is per se commercially unreasonable. Instead, the argument is that Progressive has not met its burden of proof in light of the format, sequence, and language used over the internet *and* the fact that there was no communication with a live insurance representative is insufficient to meet its burden.

⁶ The Court's Order even states that if Sec. 38-77-350(B) requires the form to be completed by the insurance producer or representative of the insurer, that is satisfied because "electronic agent" made the marks on the Offer Form to complete it. This holding defies logic because the marks on the form itself made by the computer cannot be the insurer's on some lines and Traynum's on other lines. All of these marks are made the same way.

The Court's Order states that using the offer form by itself makes the entire transaction commercially reasonable. This is not consistent with the case law or the statutes. Both S.C. Code § 38-77-160 and § 38-77-350 require that the form and coverages must be "offered pursuant to law." S.C. Code § 38-77-350. In terms of how the offer is made, the case law states that the insurer must use both a reasonable *method* of communication *and* an approach that is "reasonably calculated to bring the offer to the insured's attention." *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 153-54, 370 S.E.2d 915, 917 (Ct. App. 1988). Further, the most recent appellate court decision in this area found that the offer was commercially reasonable because the form was approved by the Department of Insurance and the insurance agent explained the coverages to the insured. *Cohen v. Progressive Northern Ins. Co.*, 402 S.C. 66, 737 S.E.2d 869 (Ct. App. 2013).

The effect of this Order if it becomes the law of the case will be allow insurers to satisfy their statutory obligation to make a meaningful offer including an explanation of UIM coverage by simply getting a signature on a form even where no explanation has been provided.

F. The Court's Order Not Consistent with Longstanding Intent and Views Associated with UIM Statutes

The Order is not consistent with longstanding legislative intent and the appellate courts' view associated with UIM statutes. In particular, "UIM . . . statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the legislature." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) *citing Gunnels v.*

American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d. 822, 824 (1968). Further, our appellate courts' view in UIM meaningful offer cases is that "insureds are to know their options and to make an informed decision as to which amount of coverage will best suit their needs." *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005), *quoting Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005)(emphasis added).

G. The Court Failed to Rule on any Wannamaker factors

Finally, the Court failed to rule on several issues raised including whether the transaction at issue met any of the *Wannamaker* factors.

H. The Court's Order Shifts the Burden to the Insured Rather than the Insurer

The insurer has the burden to make a meaningful of UIM coverage. The reality of the Court's Order is that it places the burden of finding out what UIM coverage is and making a decision about that coverage on the insured. That is not the law of this state and is another ground for this Court to reconsider its decision.

I. The Court's First Order was Correctly Decided

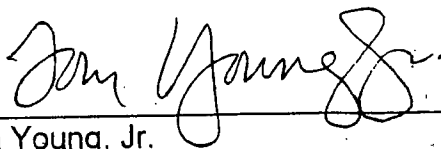
The Court's June 25, 2013 Order was correctly decided and the conclusions of law made therein should be adopted again by this Court.

CONCLUSION

Accordingly, Plaintiffs respectfully move for reconsideration of the cross-motions for summary judgment and for entry of an Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' motion. This motion will be supplemented and is supported by the affidavits, depositions, discovery responses, arguments, memoranda of law, and other such documents as appropriate. Plaintiffs request rehearing, if

appropriate in the Court's discretion, since the Court has changed its decision and the important tea leaf sessions were not available to be viewed in the August 26, 2013 hearing in Richland County.

Respectfully submitted,

A handwritten signature in cursive script, reading "Tom Young, Jr.", positioned above a horizontal line.

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Attorneys for Plaintiffs

November 15, 2013

State of South Carolina
County of Aiken

Court of Common Pleas
2010-CP-02-02665

Loretta Traynum, et al.,
Plaintiffs
vs.

Cynthia Scavens, et al.,
Defendants

Transcript of Record

April 2, 2013
Barnwell, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

Tom Young, Jr., Esq.
Attorney for the Plaintiff

John R. Murphy, Esq.
Attorney for the Defendants

Lisa H. Davenport, RPR
Official Court Reporter

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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(None offered)

1 (Whereupon, on April 2, 2013 the following
2 proceedings were held:)

3 MR. YOUNG: May it please the Court, Your Honor.

4 THE COURT: We're on a tight schedule; so y'all get
5 straight to the point.

6 MR. YOUNG: This case is -- involves an internet
7 purchase of underinsured motorist coverage -- insurance
8 coverage in which there was alleged rejection of
9 underinsured motorist coverage. We have handed up to the
10 Court what we believe is the proper analysis for the Court
11 in view of the case law and we think that what happened
12 here is -- was not a meaningful offer in view of the cases
13 from the court because, first of all, we think that the
14 court first has to look at whether or not there was a
15 commercially-reasonable notification process to
16 communicate the offer to the insured. If that was not
17 done, then the offer was not meaningful.

18 If that was done, then the court has to analyze the
19 transaction in the context of Section 38-77-350 both A and
20 B and if the insured -- if the insurance company -- they
21 have the burden of proof -- they can show they met both A
22 and B, then it is presumed that they have an informed
23 rejection. If they did not, then they can still carry
24 their burden by meeting the *Wannamaker test* and that would
25 *specifically be the remaining elements of the test prongs*

1 two, three, and four.

2 Our position, Your Honor, is that this analysis --
3 the focus is on the communication and the content and the
4 response and our position is that as far as the
5 communication which is the first prong of the test as to
6 whether or not it was a commercially-reasonable
7 notification, that did not happen here. There's two
8 aspects that have to be met and one is that there has to
9 be a reasonable method of communication and, number two,
10 there has to be an approach that is reasonably calculated
11 to bring the offer to the insured's attention.

12 In this case on April 20, 2007 Ms. Traynum went
13 online and she purchased the insurance from Progressive
14 for three cars in her family. There was -- she was
15 required to make her selection of underinsured motorist
16 coverage before she was ever shown any language that
17 explained to her what the coverage was and she was also
18 required to verify that coverage before she was shown any
19 language to explain what that coverage was.

20 I know that we're short on time. We actually have
21 brought the actual Tealeaf session which we could show the
22 Court which would actually show you real time what she saw
23 in the internet session, but we don't believe that what
24 she saw was sufficient. The form that was provided online
25 was presented in a separate screen and a pop-up window.

1 Again, that was provided to her only after she had
2 selected and denied the coverage and verified her
3 selections and then 30(b)(6) witness for Progressive even
4 admitted when we deposed them that she would have to
5 search for the explanation, and if you think about this
6 transaction in the context of what normally happens when
7 you go to your insurance agent's office, the insurance --
8 the insured is not having to search for the explanation of
9 coverage.

10 The cases say and the *Ray versus Austin* case mentions
11 what the two most important things that have to occur are
12 and first is that the insured has to know their options,
13 and, number two, that the insured has to be able to make
14 an informed decision as to which amount of coverage would
15 best suit their needs and our position is as to what
16 happened here in terms of how they communicated this to
17 her on the online session, they did not do it in such a
18 way that she was able to know what her options were and so
19 that she could make an informed decision.

20 In fact, in her deposition she stated that she did
21 not even know what -- she didn't understand what
22 underinsured coverage was. She thought if you were in a
23 car wreck that the insurance company paid and that was in
24 -- that's referenced in our brief as to what she said. It
25 is page 62 of her deposition.

1 If you find that the method of communication was
2 commercially reasonable, we can still win the case because
3 they have to show that they met 350(a) and 350(b). We
4 specifically don't think they can meet 350(a). There's
5 five sections to 350(a) -- 350(a)1 through 5. We don't
6 think they can meet 350(a)(4). That one is the one that
7 requires that that the form -- they have to show that they
8 got a signature where there was a space for the insured to
9 sign that acknowledges that the insured has been offered
10 the optional coverage.

11 In this case she never actually signed the purported
12 offer form. It was shown in a separate screen during the
13 online session again after all this other had taken place,
14 after she had made a selection, after she had verified her
15 selections and it was only seen if she went into the
16 separate screen and scrolled down through it. Then where
17 they have the actual part that they wanted her to, quote,
18 unquote, sign, it didn't track the language that's on the
19 actual form itself.

20 If -- they -- their 30(b)(6) witness said that she
21 typed her name into the acknowledgment box in the internet
22 screen, but not in the actual form itself and so she
23 didn't actually sign the form. Her name was already on
24 the form itself -- the actual rejection form. It was
25 already on it before she actually saw it.

1 I may be losing you, but what I want you to
2 understand is that before she ever gets to where she could
3 possibly pull it up to look at it her name is already
4 showing up on the actual form and her name on the form is
5 technically her signature; so it was already there before
6 she ever even saw it.

7 And, so, we don't think they can meet 350(a)(4), but
8 even if they meet 350(a)(4) they still can't meet 350(b)
9 and 350(b) is the section that the General Assembly
10 amended in 2006 after the *Floyd* decision from the Supreme
11 Court and our position is that the plain language of
12 350(b) says that they cannot get the presumption -- the
13 conclusive presumption -- unless there is -- a form was
14 completed by insurance producer or the representative of
15 the insured and they've admitted that didn't happen here.

16 She had no communication with a live person
17 whatsoever. All she did was go online to their website
18 and fill this stuff out based on the screens as they
19 presented them to her on April 20, 2007 and in the *Wiegand*
20 decision -- I think it is a 2009 case from the Supreme
21 Court, Footnote Two -- the Court says that the presumption
22 applies where the insurance agent or the representative of
23 the insurer fills out the form. Before the amendment at
24 the time of the *Floyd* decision the presumption applied
25 where the named insured filled out the form, but in the

1 *Floyd* case the named insured didn't fill it out. The
2 agent filled it out and the Supreme Court answered the
3 District Court question and said you can't get the
4 presumption unless the named insured fills it out.

5 So, the insurance companies came back to the General
6 Assembly in '06 and had the statute amended, but the plain
7 language of the statute -- I mean, if you look at 350(b)
8 it says that the presumption applies where there's --
9 where it's been completed by the insurance producer or the
10 representative of the insurer. It does not say that they
11 get the presumption if the named insured filled it out.

12 Again, in this case the computer is filling out the
13 form based on what she is selecting earlier in the
14 transaction. ~~Again, we don't think that's sufficient~~
15 ~~because when she's making the selections they haven't~~
16 ~~informed her as to what the coverages are to explain to~~
17 ~~her what they are.~~ They argue that this will lead to an
18 absurd result, but we don't think -- we think that that is
19 not accurate because the legislature intended for the
20 insurer to be involved in this selection process so that
21 the insured would know their options and would be able to
22 make an informed decision.

23 Here the form was completed arguably by her based on
24 what she selected earlier in the process when she was not
25 informed. It was based on her uninformed online input and

1 we think that construing the language this way would be
2 consistent with the legislative intent; so we don't think
3 they can prevail because they don't get the 350(b)
4 presumption.

5 Now they argue that the Electronic Transaction Act
6 law which was passed in 2004 -- the Uniformed Electronic
7 Transactions Act will allow them to overcome some of the
8 obstacles that I have pointed out so far in my argument
9 and outlined in my Brief. They argue that Uniformed
10 Electronic Transactions Act will allow the actual website
11 itself to be the insurance agent or the producer of the
12 agent or the producer of the insurance company which will
13 allow them to get the presumption under 350(b).

14 We don't think that is a reasonable interpretation of
15 the law because the plain language of the Uniformed
16 Electronic Transactions Act actually says that the chapter
17 has to be applied consistent with other law and our
18 position here would be that the other law would be the
19 *Wannamaker* decision would be the other parts of 350 or the
20 parts of 350 as well as 38-77-160 and because the
21 transaction -- the overall transaction has not been
22 conducted in compliance with those laws, the UETA cannot
23 step in and provide a loophole and allow them to bootstrap
24 into getting this presumption.

25 They argue, well, there's an electronic signature and

1 that should be dispositive. Well, we have a recent
2 case -- it's an unpublished case where Judge Few wrote it
3 in the unanimous Court of Appeals *Farm Bureau versus*
4 *Jenkins* in 2011 in which he says that when you look at the
5 meaningful offers in the underinsured motorist context
6 that just because you have a signature that is not
7 dispositive because unless you have a meaningful offer you
8 cannot have an operative acceptance for which that
9 signature stands for. So, the signature itself is not
10 dispositive.

11 We also think that their argument that somehow the
12 this website allows them to trigger the presumption should
13 fail because the fact that there is a conclusive
14 presumption itself requires that there be strict
15 compliance with the statute. If you read Blacks Law
16 Dictionary it says conclusive presumption is one that can
17 not be overcome by any evidence or argument and the
18 *Grinnell* decision from the Supreme Court recognized that
19 strict compliance is necessary in order to trigger the
20 presumption and so they should not be able to use
21 electronic agent to circumvent the legislative intent.

22 Now, even if you find that there was a
23 commercially-reasonable method of communication, which we
24 don't think there was, and then you find that they meet
25 350(a) and -- or they don't meet 350(a) and they don't

1 meet 350(b) which we agree with those positions, they can
2 still win if they can show you that they meet the other
3 elements of the *Wannamaker* test and as laid out in our
4 Brief we do not think they can meet the *Wannamaker* test
5 and, Your Honor, you're familiar with that because it goes
6 back many, many years back when the Court came out in the
7 mid-1980's with the *Wannamaker* decision, but we don't
8 think they can meet *Wannamaker* here, and, in particular,
9 we don't think they can meet the prong about intelligibly
10 advising the insured of the optional coverage and then the
11 other part of the *Wannamaker* test which is the
12 commercially-reasonable method of conveyance.

13 In particular we reference the *Dewart* and *Lopez*
14 cases. Now they say in their brief that they don't think
15 those cases even apply here. We would respectfully
16 disagree. The reason that we would is because most of the
17 cases talk about a transaction that occurred whether it
18 was in a rejection of coverage in the context of someone
19 who is talking to an agent or talking to an agent's
20 representative and they have some communication with a
21 live person.

22 The *Dewar* case and the *Lopez* case and the *Zeigler*
23 case which is a progeny of those two cases, they talk
24 about a failure to meet a meaningful offer standard in the
25 *Wannamaker* test where there was no communication with an

1 agent. In those cases there was communication made
2 through the mail and in particular in the *Dewar* case the
3 Court said that what State Farm did -- and that was the
4 insurance company in that case -- that they didn't meet
5 the intelligibly-advised or the commercially-reasonable
6 notification method and it's on page 14 of our Brief where
7 we quote the language and they talk about how the format
8 that State Farm used in the instance was not reasonably
9 calculated to draw the attention to the explanation of
10 underinsured motorist coverage. It did not direct the
11 insured to read both documents.

12 They said that they sent them this -- the paperwork
13 to fill out what they wanted and then they sent them in a
14 separate inclusion with it the actual explanation of
15 coverage and the Court said that because they didn't
16 reference one another that the insured could easily get
17 confused; that it could be considered like a leaflet or
18 some kind of junk mail that the person might not know that
19 one was -- that the explanation needed to be read and
20 understood in order to understand what to do with the
21 selections.

22 In here we think it's similar -- even though this
23 happened over the internet, it's similar because there's
24 no live person that's communicating with the insured and
25 what they've done here is effectively done exactly what

1 the insurance company did in *Dewart* and *Lopez* -- those two
2 cases -- and that they have sent these screens where they
3 have -- which is like the mailer. They've sent these
4 screens and they've asked her to make these selections but
5 then they don't provide her the necessary critical
6 language that she has to understand on this five-page
7 form. It's in a separate inset window.

8 After she's already reviewed everything and after
9 she's made selections, then she gets this window where it
10 says in unbold type, Please read, and then she has to go
11 in and scroll through it all and her name is already typed
12 on it and then at the bottom it has an acknowledgment that
13 she is supposed to type her name in and says that she
14 agrees to the terms and conditions of the document in the
15 inset window and even the acknowledgment language they use
16 that she has to type her name into is not consistent with
17 what's on the actual form itself.

18 Now the actual form itself and you may -- I
19 anticipated a question from you about this, but the actual
20 form itself that they have on the inset window is -- I
21 don't know if we have a specific problem with the form
22 itself. It is almost identical to what the Department of
23 Insurance approved after the 2006 amendment that the
24 General Assembly passed in the wake of the *Floyd* decision,
25 but our position is just that the way they've conveyed

1 this information to her is not commercially reasonable and
2 that the -- all the circumstances surrounding what is
3 conveyed does not intelligibly advise her so that she can
4 make an informed decision knowing her options so that she
5 can make that informed decision.

6 So, there's ten different things that we point out in
7 the Brief that we think are failed under that analysis and
8 I'll be glad to take any questions.

9 THE COURT: Well, I feel like we're having to rush
10 through this thing and it's real important. I've got
11 probably another hour on this case. They've got to argue.
12 Arguments can't be that long. Charge is not that long.
13 Then I can give y'all as much time as you need while
14 they're deliberating and all into the afternoon. I just
15 can't hold them up any longer than I'm holding them -- the
16 jury, anyway.

17 Unless y'all got other things to do this afternoon or
18 I can -- I am available tomorrow or Thursday for you or
19 Friday.

20 MR. YOUNG: I don't mind waiting until you're ready
21 today.

22 THE COURT: I'm ready right now. I just got a jury
23 waiting.

24 MR. YOUNG: I understand that.

25 THE COURT: You know I always accommodate y'all. I

1 don't want to mess up your schedule. I am available to
2 finish it up today, see you tomorrow, Thursday, or Friday.

3 MR. MURPHY: I could do it Friday because I have a
4 mediation with a bunch of parties in Florence, but I could
5 come back. I do have to be back in Columbia at 5:30. I
6 don't think it'd be a problem if you want us to wait
7 around I'd be happy to.

8 THE COURT: I just don't want to impose on you.

9 MR. MURPHY: But knowing how things are and sometimes
10 they take longer than we thought, I'd be glad to come back
11 tomorrow morning or stick around today.

12 THE COURT: You and Tom talk. I'll do it however you
13 want to do it. I hate this, but I suspect we'll be
14 through by 1 o'clock, hopefully. They're not going to
15 lunch. I am bringing lunch in. We're going to have lunch
16 in. We got about two little short witnesses on reply and
17 argue and charge. I would think by 12:30 or 1. If we see
18 it is going to be a lot longer, then we can tell you.

19 One of you can use my chambers or you both can use my
20 chambers. The telephone is back there. It is quiet.
21 There is a desk back there. Adam can show you that.
22 We'll get to you as quick as I can or you have the option
23 you can come to Bamberg in the morning or we can do it
24 when I am in Aiken on Thursday or be back over here
25 Thursday afternoon.

1 (Whereupon, a break was taken.)

2 MR. MURPHY: May it please the Court, Your Honor. I
3 am here representing Progressive is what is the first
4 internet-only insurance application and rejection of UIM
5 coverage that I've appeared for in court and so I'd like
6 to in brevity try to walk the Court through this because
7 it is something new for the courts.

8 THE COURT: Well, Mr. Murphy, I've known you a long
9 time. Brevity is not one of your ---

10 MR. MURPHY: You'd be surprised, but I have to be
11 thorough to make sure that we get ---

12 THE COURT: Well, it's an interesting case,
13 interesting concept, and both of you have written
14 excellent memos.

15 MR. MURPHY: It is very interesting. You know, the
16 kids today, they pay for their Starbucks with their
17 iPhones and so they do things a lot differently than
18 perhaps ---

19 THE COURT: I won a contest yesterday with my IPAD
20 with the help of my law clerk. It is amazing. You can do
21 everything you want to with the things.

22 MR. MURPHY: You can and in many ways this
23 transaction is superior to the traditional one which I'll
24 get to in just a moment, but what Progressive is asking
25 this Court is to give them the conclusive presumption

1 based on the fact that a written offer form bearing the
2 insured's electronic signature entitles Progressive to a
3 conclusive presumption.

4 THE COURT: Let me ask you this before we get too
5 much further. Are there really any factual issues in
6 dispute? I mean, is this something we need to develop a
7 huge record on or is the facts pretty much undisputed and
8 it's just a matter of interpreting the facts and applying
9 those facts to the law?

10 MR. MURPHY: In my opinion it is the latter, Your
11 Honor, because I believe that how the computer system
12 operated on the day that Ms. Traynor made this purchase is
13 undisputed. Charlie Cordis (Phonetic) was deposed as the
14 30(b)(6) representative. He is the designer at the time
15 or at least he was and he oversaw the web-based marketing
16 function for Progressive and I think he walked through it
17 and then the actual session itself and the actual PDF
18 documents that were created by the session have all been
19 submitted. I don't think there is any dispute as to that.

20 THE COURT: Obviously, Plaintiff is probably of the
21 same opinion because you moved for summary judgment saying
22 there is no issues of fact.

23 MR. YOUNG: That's correct, Your Honor, and one of
24 the interesting things about this case is when they
25 actually deposed the Plaintiff the documents they brought

1 to the deposition to show her, to cross-examine her at her
2 deposition it ended up that they were not what she
3 actually saw on the computer screen during the online
4 session. It was only after we submitted a 30(b)(6)
5 deposition notice with those documents as an exhibit that
6 Progressive notified Mr. Murphy that what they had
7 provided to him before he deposed her was actually not the
8 accurate documents.

9 THE COURT: Well, where does that leave us as far as
10 factual dispute?

11 MR. MURPHY: They're immaterial. He is just pointing
12 that out. What happened is I met with someone and they
13 did a dummy session and did a new purchase in her name.
14 They didn't realize that actually the actual session had
15 been saved in what's called a Tealeaf session and then the
16 actual PDF documents that appear in these windows -- the
17 application and rejection form -- are actually stored in
18 what's called a titanium pipe. So, the actual session and
19 the actual documents are in front of the Court. The dummy
20 documents that I had made for a bad deposition of her, but
21 they're immaterial to the issue in this case.

22 MR. YOUNG: I would not say that you should
23 completely dismiss those documents because they were
24 created in December of 2010 and there actually are
25 improvements to what they're doing that we argue further

1 -- they're improvements in terms of the method they're
2 communicating the offer.

3 THE COURT: I guess my simple question is this. Are
4 we at a point where y'all are not really fussing over the
5 factual issues? They're not really -- the facts are not
6 in dispute. It is just a matter of how we apply the facts
7 to the law and I can decide it as a matter of summary
8 judgment or do we need to have a trial?

9 MR. YOUNG: I don't think we need to have a trial.

10 MR. MURPHY: I agree with that.

11 THE COURT: You know, you ask a lawyer a simple
12 question sometimes...

13 MR. MURPHY: Yes, sir. Your Honor, Ms. Traynum was
14 able to obtain her quote, review her application and the
15 actual offer form as PDF documents, make the payment,
16 receive her ID cards and print them out along with her
17 payment schedule on the internet session, and what we've
18 submitted are the records of this actual transaction.

19 Now, the first thing is the Plaintiff is an
20 insurance-savvy consumer. She purchased personal
21 insurance for many years and also business insurance at
22 her place of employment. She also admitted that she was a
23 technologically-savvy person and uses the computer
24 regularly to do banking, to pay bills, make reservations,
25 and to purchase insurance.

1 What she did on this occasion was she came on and
2 referenced a prior quote. She had made at least one prior
3 internet session to obtain the quote. She created the
4 custom option when she got to this page which we have
5 submitted. She didn't choose one of the prepackaged
6 options which all include UIM coverage. She customized
7 her own package and she chose liability and uninsured
8 motorist coverage in the statutory minimum amount. She
9 did not choose underinsured motorist or medical payments.
10 She did purchase comprehensive and collision for the two
11 vehicles on which she owed money, but on her 1994 she did
12 not choose those coverages.

13 She then modified later in the session these
14 deductibles to further reduce her premium on comp and
15 collision. She then electronically signed all three -- or
16 three different documents -- the first of which being the
17 application, the second of which being the rejection form.

18 THE COURT: Hold on a second, now.

19 MR. MURPHY: Okay. Those are contained inside that
20 sleeve. Those are all the exhibits and then the color
21 copies are in that other sleeve, Your Honor. She also was
22 able to utilize the hyperlinks which are indicated as any
23 computer person knows with the blue and underlined which
24 was standard at the time back in '07 to view and print her
25 ID cards and to print her payment schedule.

1 Interestingly, she did not use the hyperlink to get the
2 further description of any of the coverages shown on the
3 policy.

4 Now, when it came time for her after providing the
5 general information and making coverage selections and
6 providing personal information for the drivers and the
7 vehicles, she then was presented with this screen which is
8 where she began to sign electronically her policy forms.
9 You'll note that it says in different color and larger
10 font, Your electronic signature is required, and that you
11 can either display this document in a very easy-to-follow
12 window and a PDF document which is nothing out of the
13 ordinary or use a hyperlink to print the document before
14 you move forward.

15 Then down below, Policyholder electronic signature,
16 and then it indicates that she is the person whose name
17 appears above and on the signature line of the documents
18 presented. This is done in PDF with the name already
19 typed on the PDF but not here on the computer screen so
20 that this document cannot be changed or altered. It's
21 either accepted as is or start over, and, so, to go
22 forward she has to type in her first and last name
23 identically as how she's already entered and how it
24 already appears on the PDF document. She did that for the
25 application.

1 She then went to the screen that shows the offer
2 form. Now, this offer form is fully compliant with South
3 Carolina Section 38-77-358.

4 THE COURT: I think your Brief says it's almost
5 identical.

6 MR. MURPHY: It virtually is. It's been ruled on
7 numerous times. It has the same warning or notice up here
8 that your signature is required. It indicates it can be
9 viewed on the monitor in the window for the PDF or it
10 could be printed. She chose not to print it. We don't
11 know whether she viewed it or not. Then she was required
12 like she was with the application to come in and type her
13 name to verify that the signature that appeared already in
14 typewritten form on the PDF version of the offer form was
15 indeed her signature and that she agreed to the statement
16 terms and conditions in the documents and that is being
17 challenged as not being commercially reasonable or being
18 as good as seeing an agent in person.

19 I would like to tell the Court why it is even better
20 than seeing an agent in person. The first thing is that
21 there's no time limit. There is no agent in a hurry to
22 get out the door for another appointment. An insured can
23 review this document for as long as they would like to.
24 They can print it. They can come back tomorrow. That is
25 fully superior to the arguments I hear from the agent

1 rushed me through it and didn't show it to me.

2 THE COURT: Hold on one second, please. Let me take
3 this verdict real quick. I want to be able to give you my
4 full attention.

5 (Whereupon, a break was taken.)

6 THE COURT: All right. Mr. Murphy, we left off and
7 you're telling me how this is so much better than we had
8 before as far as informed.

9 MR. MURPHY: Yes, Your Honor, in a number of ways.

10 THE COURT: Informed decision is what I was trying to
11 say.

12 MR. MURPHY: First of all, there is the ability to
13 get the question answered correctly through the hyperlink
14 on the application and the information-giving page of the
15 website. She chose not to avail herself of that, but she
16 had purchased other minimum-limits-only policies in the
17 past and so when she comes through and navigates the
18 forms, she's instructed as to how she can review or print
19 the actual documents themselves and that typing her name
20 on the screen will confirm the printed signature that
21 already appears on the PDF document itself and she did
22 this not once, not twice, but three times, and then she
23 did avail herself of hyperlinks to print her ID cards
24 right there on the spot instead of waiting for them in the
25 mail and to print her payment schedule so she would know

1 when the payments were due that she could also
2 electronically provide.

3 Now some of the arguments as to why this is not valid
4 failed in my view miserably. The first and foremost is
5 the fact that there was no live agent. Well, the
6 Uniformed Electronic Transaction Act makes it very, very
7 clear in Section 26-6-140 that in Subsection Two a
8 contract may be formed by the interaction of an electronic
9 agent and an individual acting on the individual's own
10 behalf or for another person including by an interaction
11 in which the individual performs actions that the
12 individual is free to refuse to perform -- she was free
13 not to type her name in -- and in which the individual
14 knows or has reason to know will cause the electronic
15 agent to complete the transaction or performance -- and
16 this says that it will be completed if you type your name
17 in; so that the website that Progressive offers customers
18 like Ms. Traynum satisfies Section 140 of the Electronic
19 Transaction Act in compliance with 38-77-350(b) because
20 the website electronically does what an agent used to do
21 by hand and then recently an agent does combination by
22 hand and electronically by taking the same information
23 orally, whether in person or on the phone, typing it on to
24 an agent-only website which is the first advancement from
25 writing it out on the old, you know, triplicate forms by

1 hand, and then presenting these very documents that they
2 printed off their own printer in the agency office or that
3 were printed at the headquarters and mailed to the insured
4 for signature. So, that certainly satisfies the
5 requirement under 38-77-350(b) that the form be executed
6 by a producer or by the insurer which it was in
7 conjunction with the insured filling that out.

8 I would like to just point out two cases which really
9 address all of the alleged flaws asserted by Plaintiff in
10 this case. One is the *Atkins versus Horace Mann* case that
11 I believe you were the trial judge on. One was the recent
12 case of *Cohen versus Progressive* that I represented
13 Progressive in as well -- published decision -- and then
14 compare them to what went on here.

15 In *Cohen* the quote was given over the phone the day
16 before the documents were signed. In *Atkins* the addition
17 of the policy vehicle changes were done over the phone
18 presumably at least one day and more likely several days
19 before the forms were presented because they were mailed
20 in that case. In *Cohen* the person came into the agency
21 the next day.

22 Traynum -- it was within moments of providing the
23 information to where the documents were then presented to
24 Ms. Traynum for review -- not the next day, not after two
25 or three days of mailing from Tampa, but on the computer

1 at the same time. She didn't even have to get up out of
2 her seat. In both *Cohen* and *Atkins* there was no evidence
3 of any oral explanation of coverage either at the time the
4 selection was made or at any time thereafter, but instead
5 all the explanation that was given to the insured was
6 given in the written form, and, so, what we have -- the
7 only thing we have that's different in this case is that
8 instead of an agent handing someone a form and saying sign
9 here or receiving something in the mail not knowing what
10 it was and looking around for the signature, we have the
11 insured who's in control of how she reviews the document,
12 of when she affixes her electronic signature signifying
13 that her name as already typed in through the website and
14 the software design is, in fact, her signature, and she's
15 agreeing to the document that appears in that window.

16 This is not really anything difficult. It is very
17 consumer-friendly. It is the way that all insurance
18 transactions are probably going to be done by my kids
19 within the next five or ten years, if not sooner the way
20 things are changing.

21 This document appearing in a window where your
22 signature is told to be required and where you can't go
23 forward without signing it clearly differentiates this
24 from the cases from the 1980's where there was an insert
25 stuffed in an envelope that could have been dropped in the

1 trash. It required no response. It didn't require you to
2 send something back and what they did was they put an
3 explanation on one page and then they just said sign this
4 page or renew your premium. That's before this form came
5 out where all of the carriers are using it to be uniform.
6 So, those cases really have no application at all. This
7 was a printable and fully-readable document that contained
8 both the explanation and the signature on the same page.

9 The timing and sequence of it -- you'll note that
10 Section 38-77-350 is focused on the content. The cases
11 from *Progressive versus Leachman* on down are focused on
12 the information that is available to the insured. There
13 is no requirement of any specific timing. There is no
14 requirement as to any specific sequence and there is no
15 requirement that the insured voice an understanding; only
16 that they be provided the information that is the
17 legislature has said must meet these five things and this
18 form contains all five of those things.

19 Ms. Traynum, above all else, should not be heard to
20 complain. She wasn't misled by an agent's erroneous oral
21 explanation that might have contradicted this. She wasn't
22 rushed through it. She wasn't told just sign this page
23 but don't look at these three pages. Every action that
24 occurred with her taking out this policy was initiated by
25 her at her pace based on the information available. If

1 she did have questions, she could have called a toll free
2 number. She could have used a hyperlink. She could have
3 quit and gone to a local agent. She, obviously, was
4 confident in her ability and she provided herself with the
5 same policy that she had bought in the past -- a
6 street-legal minimum-limits policy with no UIM coverage.

7 The only change that she made -- so she, obviously,
8 was capable of making changes -- was to increase her
9 deductibles which have the effect of lowering the premium.
10 She chose the custom selection which required her to not
11 accept a selection that contained UIM; so she had to
12 affirmatively choose not to have it. It wasn't forced on
13 her by Progressive. They would be happy to sell that
14 coverage for the premium quoted.

15 So, I would submit that this process that results in
16 a properly content-proper execution-proper via electronic
17 signatures which are allowable under our state statute
18 fully complies with 38-77-350. That statute requires
19 insurers to use a written form in situations like this
20 with new applicants and it is more than what the law
21 requires. It is more consumer friendly than some
22 traditional approaches. It is the way of the future and
23 it is binding upon Ms. Traynum in this case.

24 THE COURT: Senator?

25 MR. YOUNG: May it please the Court, Your Honor. The

1 first thing is that he references the *Cohen* case which is
2 the most recent case from the Court of Appeals or the
3 Supreme Court on any of these issues.

4 THE COURT: None of them are dealing with electronic
5 filing.

6 MR. YOUNG: It's not. They're not, but the defense
7 -- I mean, the insurance carrier makes a big deal about in
8 *Cohen* it says there was no evidence of an oral explanation
9 of coverage and that's not accurate because the case says
10 in the actual recitation of the facts -- Judge Few wrote
11 the opinion. It says, Based on Thomason's -- and Thomason
12 was the agent -- Based on Thomason's personal explanation
13 and on the content of the form Trial Court found the
14 notification process was commercially reasonable, and then
15 it says, We find the evidence described above reasonably
16 supports the Trial Court's finding that it met the
17 *Wannamaker* test and, therefore, there was a meaningful
18 offer made in compliance with Section 38-77-160.

19 So, they clearly said there was an explanation in the
20 *Cohen* case and that is significant in our case because,
21 again, we are challenging this whole process based on the
22 commercially-reasonable notification process.

23 THE COURT: Are you saying there is no way to do it
24 electronically?

25 MR. YOUNG: No. I am not saying that. The next

1 thing I wanted to say is there is a way to do this
2 electronically. I am saying that the way they've done it
3 in 2007 -- and you got to remember this was done in April
4 of 2007 -- they didn't meet their burden. They have -- it
5 is their burden to show this Court that they met all the
6 prongs and they've not done that and that's something that
7 we need to keep in mind is that if you just look at what
8 they brought to her deposition which was printed off on
9 December of 2010, what they've done and this is ---

10 THE COURT: Didn't y'all all agree that what they
11 brought to the deposition was not what was shown to her?

12 MR. YOUNG: That's correct, but what they've done is
13 on the 2010 version they make a big deal -- they've
14 mentioned several times about the hyperlink she could have
15 clicked on which is this thing right here -- the
16 underinsured motorist -- and what they have not told you
17 is that they cannot tell -- they have the burden of proof.
18 Their 30(b)(6) witness Progressive testified that they
19 cannot tell us what she would have seen if she had clicked
20 that.

21 THE COURT: Well, click it now. What would we see?

22 MR. YOUNG: You don't see anything.

23 THE COURT: Is that because yours is messed up or is
24 it because ---

25 MR. YOUNG: This is the actual Tealeaf session they

1 produced on a disk. This shows the day she was on there,
2 the time of day, how long she was on this screen, and when
3 you click on it it doesn't do anything. What they
4 testified -- the 30(b)(6) witness testified that he cannot
5 tell us what that document would -- what she would have
6 seen.

7 So, even though there is a hyperlink there, we don't
8 know what she would have seen if she had clicked on it and
9 that's the whole point is that the Court -- all these
10 cases talk about how they've got to give the insured this
11 information so that they can know their options and make
12 an informed decision. She should not have to search for
13 this information so that she knows her options.

14 THE COURT: Where would it be? If you got a
15 hyperlink, you just click on it and it goes straight to
16 it.

17 MR. YOUNG: But we don't know what it would have gone
18 to. That's my point. They have the burden of proof.
19 They cannot tell us what she would have seen.

20 THE COURT: What are you showing me now?

21 MR. YOUNG: This is what she actually saw on the
22 computer.

23 THE COURT: If I was her and this was the same policy
24 that's what I would be looking at?

25 MR. YOUNG: This is what you'd be looking at.

1 THE COURT: If I wanted to know about underinsured I
2 would go and click on that.

3 MR. YOUNG: Right.

4 THE COURT: And it wouldn't show you anything.

5 MR. YOUNG: It wouldn't show you anything.

6 THE COURT: Is that right, Mr. Murphy?

7 MR. MURPHY: That's not right. The Tealeaf session
8 does not keep that. The hyperlinks may have changed
9 slightly. That's why Mr. Corbin said he can't say it's
10 exactly the same, but Progressive is not relying on that
11 as their offer of description of the coverage. It's in
12 the form itself and the language in the form has already
13 been ruled upon by our appellate courts numerous times.
14 That's just extra.

15 That's like the agent gives you the brief description
16 if someone hits you and they don't have enough coverage it
17 could give you extra coverage. I've seen the current one,
18 but what he was saying is I can't tell you exactly what it
19 was in 2007 because it might have changed.

20 THE COURT: What you're telling me that
21 notwithstanding that it doesn't show anything, you've got
22 enough information here to get you across the hurdle.

23 MR. MURPHY: The legislature only requires that they
24 be shown one time and it be shown in a written form that
25 complies with 358. It is shown here in the third from the

1 bottom paragraph of what we marked as Exhibit C -- the PDF
2 of the form itself -- underinsured motorists coverage
3 compensates you whether other persons insured under an
4 automobile policy, la dee da. That's the only one that's
5 required. This is just extra. Just like if an agent is
6 asked the question and orally says something, that's
7 extra, but you only have to give it one time and in one
8 place and that's in the form.

9 That's just to show that there is an ability to get
10 some at that time, get a brief explanation, but then
11 you're confirming the full explanation -- the explanation
12 that's been adopted and accepted by the courts in the form
13 itself. You can't get around not having the form.

14 THE COURT: So you're saying that the form is there;
15 this would just be additional information.

16 MR. MURPHY: Absolutely.

17 MR. YOUNG: The 30(b)(6) was just on the hyperlink.

18 THE COURT: Well, let's assume the hyperlink doesn't
19 show us anything. Does the form not elsewhere have what
20 Mr. Murphy is saying complies with the statute?

21 MR. YOUNG: The form -- the next screen that she saw
22 is what's called the slide 31 and this is where the actual
23 -- her -- in this window -- and for some reason it doesn't
24 show up on the disk unless we have an internet link.

25 THE COURT: But it shows up on Mr. Murphy's exhibits,

1 does it not?

2 MR. YOUNG: Right, but for some reason it doesn't
3 show up unless there is an internet link, but anyway in
4 here is where they would have had the first of the two
5 things that they were wanting her to electronically sign
6 and that is where they show her what she's selected and
7 the point I've tried to make all throughout the argument
8 today is that they are asking her to select the coverages
9 and then to verify the coverage that she has selected
10 before they ever make any attempt whatsoever to give her
11 the critical information about the UIM explanation and in
12 -- she was on this screen for just a few -- we know that
13 on the screen here which is the one -- this is the Sign
14 Your Policy Form 202. It says your signature is required.
15 This is the one that's five pages and we know that from
16 the time that's shown down here she was actually on this
17 screen before she typed in her name down there and moved
18 to the next one about 15 seconds.

19 So that's consistent with what I have been trying to
20 say about the *Dewart* case and *Lopez* case is that she
21 treated this like it was some insert that came in the mail
22 like happened in *Dewart* and *Lopez*. She didn't realize
23 this was something that was absolutely critical for her to
24 understand in terms of the selections and verifications of
25 coverage that she had previously made and then what's even

1 more important is if we go to the next screen -- and his
2 blow-ups don't show you this. They have here on the next
3 screen, Important, Please Read in bold type and they want
4 her to make sure that she reads this other page which is
5 on the next one about the electronic transfer
6 authorization. They want her to make sure she knows that
7 she understands that they're going to be electronically
8 debiting her account. She was on this page for about two
9 an a half minutes.

10 My point is they made a significant distinction here
11 in terms of the attention they're trying to draw to this
12 document and this is where they're making sure they get
13 paid versus -- go to the previous one -- versus what they
14 did here. All they did is say your signature is required.
15 Then down here at the bottom where they're saying this is
16 the acknowledgment that is sufficient for the form, but
17 this language here doesn't even track what's on the form.

18 And, so, again, we're not attacking the actual
19 content of the form itself with the exception of the fact
20 that her signature that's on the form that shows up in the
21 PDF window was already on the document before she ever saw
22 it. I wanted to make sure you understood that from when
23 we argued it before is that the computer is putting that
24 -- putting her name on that document before she ever
25 actually sees it and they're relying upon her name on that

1 document to be her signature. My point is that it's
2 already on there before she ever even sees it.

3 THE COURT: How does it get on there?

4 MR. YOUNG: The computer puts it on there earlier in
5 the process. When she's putting her name in and she sees
6 these -- she sees these coverage selections, but, you
7 know, what's so different about this from what happened if
8 I went in to an insurance agent's office is that there is
9 not anybody here or even on the phone like in the *Atkins*
10 case or in the *Cohen* case talking to the agent. In the
11 *Cohen* case the Court said the agent explained to the
12 insured ---

13 THE COURT: Well, if we have to have an agent
14 present, then we're not going to have electronic filing,
15 are we?

16 MR. YOUNG: I mean, I am not saying that we
17 absolutely have to have that every time because the Court
18 has said that you can actually mail this stuff out, but
19 what you got to do is send it out in such a way that it
20 draws the insured's attention to it so that they
21 understand it and so then they can be able to make the
22 informed decision after they know their options and she
23 testified in her deposition that she didn't understand
24 what insurance was -- I mean, that she didn't understand
25 that -- she thought -- at her deposition she said -- it's

1 in our Brief -- that she thought that if she was in a
2 wreck --

3 THE COURT: She'd get paid.

4 MR. YOUNG: -- that she would be paid regardless.
5 She didn't understand the insurance. She just didn't
6 understand it.

7 THE COURT: Well, if that's her understanding, she
8 doesn't understand it.

9 MR. YOUNG: And that's the whole point is that if
10 there was no -- this process was designed not to keep her
11 -- to keep -- the way it transpired is she did not know
12 what -- I mean, she had to search for the information and
13 the cases say that you shouldn't have to search. That's
14 why they have this form that the person sees and it says
15 in the acknowledgment that I have read or have had read to
16 me the above explanations of coverage about underinsured
17 motorist coverage and in this case she didn't have it read
18 to her and she didn't ---

19 THE COURT: Well, there is no way for it to be read
20 to her if she's on the computer.

21 MR. YOUNG: And she also did not, apparently, know
22 that she needed to read it and understand it because there
23 is nothing on here, what they have, that tells her that
24 she needs to make sure she needs to read and understand it
25 before she goes to the next page and they don't give her

1 any of this until after she's made her selections of
2 coverage and after she's even verified her selections of
3 coverage and what they have not done is they want you to
4 give them the conclusive presumption and my point under
5 350(b) is that they can't get the conclusive presumption
6 if the form is not filled out by the agent or a
7 representative of the insurance company.

8 THE COURT: So you're saying that any electronic
9 filing they will not be entitled to.

10 MR. YOUNG: That's correct. The plain language of
11 the statute says you cannot get -- I mean, it says it has
12 to be by the agent or representative of the insurance
13 carrier. That didn't happen here. It's undisputed that
14 she didn't communicate with anybody.

15 THE COURT: Well, then under your argument did
16 anybody who files electronically and purchases
17 electronically, they can have it reformed at any time and
18 have it set aside if the agent wasn't involved.

19 MR. YOUNG: No. They can still show that they meet
20 the *Wannamaker* test, but the way the statute reads in the
21 plain language it says that the conclusive presumption
22 applies only if ---

23 THE COURT: You read it to me earlier.

24 MR. YOUNG: It says, If the form is signed by the
25 name insured after it has been completed by the insurance

1 producer or representative insurer, is conclusively
2 presumed there was informed knowing selection of coverage.

3 THE COURT: You can't get the presumption
4 electronically without the agent being there.

5 MR. YOUNG: The only way that you're going to be able
6 to get a conclusive presumption with an internet purchase
7 is if the statute has changed because the statute is very
8 clear and that's what was in the *Floyd* case. Through the
9 *Floyd* case the District Court certified to the Supreme
10 Court at the time of *Floyd* it said the presumption applied
11 only if it was signed by the name or filled out by the
12 named insured and in *Floyd* the insurance agent filled the
13 form out and so the Supreme Court said the plain language
14 says you can't get the presumption unless it's filled out
15 by the named insured.

16 THE COURT: What do you say to that, Mr. Murphy? The
17 statute says what it says.

18 MR. MURPHY: It has to be read in conjunction with
19 the Electronic Transaction Act. He is saying she didn't
20 type her name in there. Well, then who did it? Either
21 she did it or she didn't do it. She didn't do it directly
22 on ---

23 THE COURT: But he's saying the conclusive
24 presumption that has to be explained by the agent and
25 that's what the statute says.

1 MR. MURPHY: It doesn't say that. It says -- there
2 are two reasons, Your Honor. First of all, the
3 electronic ---

4 THE COURT: It's got to say what it says.

5 MR. MURPHY: It says by a representative of the
6 insurer. It doesn't say a human being and the Electronic
7 Transfer Act in this day and age we live in allows for the
8 interaction of an electronic agent. That satisfies the
9 language of the statute in its plain common-sense meaning
10 and not leading to an absurdity in reading these two
11 together. The Electronic Transaction Act says that this
12 must be construed to facilitate electronic transactions
13 consistent with other applicable law.

14 So, the fact that it recognizes the electronic agent
15 and another statute requires something to be done by the
16 insurance representative they have to be construed
17 harmoniously to facilitate the transaction and not the
18 negate the transaction. We're trying trying to make it
19 easier for people to do this; not harder. This is
20 nonsense.

21 Secondly, the statute was changed and so was section
22 A and I would submit and we put this in our Brief that if
23 indeed no one from Progressive had a part in filling out
24 this form which I think we've already figured out
25 technologically is not accurate, but if that's the

1 argument that Ms. Traynum did it all there are two major
2 problems. First of all, if *Floyd* said that's the
3 preferred method, what the legislature did and it must be
4 construed this way was to try to expand the protections of
5 350(b) for situations when the agent did it and not the
6 insured without taking away the preferred method of the
7 insured filling it out. That would be absurd and you
8 can't construe the modification of that statute in such a
9 way.

10 They argued, argued, argued that the forerunner
11 really was not in my view limited to just the insured, but
12 that's how the Supreme Court interpreted it and then the
13 legislature comes back to expand it, not to limit it to
14 someone else, but to say either or is what they were
15 attempting to do. That's how it should be interpreted,
16 but that doesn't matter because this satisfies the
17 newly-written statute completely by the terms of the
18 Electronic Transaction Act, and then, lastly, if this was
19 not partly transacted with Progressive -- they want to go
20 on record and say that -- well, then there is no policy.
21 She just got on her own computer and made up a policy and
22 we'll just void the whole policy. I don't think they want
23 that argument; so I think that's kind of nonsensical.

24 The point I would make about the signature is her
25 typed name as you see it appears in the exhibit itself,

1 the actual PDF, and it appears on pages four and five
2 signifying the rejection and signifying the
3 acknowledgment. The name appeared there at the time she
4 got to this screen and had the access to this document.
5 However, if she would have exited the computer at that
6 point that document would not exist. It could only be
7 verified by her typing in her name here; so what she's
8 doing is she's acknowledging the terms, the statements,
9 and the conditions in this document. So to say that
10 because the actual South Carolina statutory acknowledgment
11 language is only here and not here, she is adopting all of
12 it by typing in her name. So whatever appears in this
13 document, her typed-written name here verifies that that
14 is her selection; that that is the same.

15 If we were here and we had the same thing -- the
16 agent told me nothing but handed me this form to sign and
17 I signed it with a pen and it had wet ink on it, would we
18 even be arguing about this case? We wouldn't be arguing
19 about this. It would be tough luck. You didn't read the
20 form. You didn't ask the agent a question.

21 Well, it's no different when you do it on the
22 internet. She had more opportunities to make an informed
23 decision, but the key is she did have the opportunity to
24 make an informed decision and she wouldn't be the first
25 person to change her mind after the fact of an accident,

1 but the question is was she given adequate information at
2 the time and she was.

3 THE COURT: All right. Gentlemen, thank you. You
4 have made my latter part of the day very interesting to
5 say the least. We'll take it under advisement. We'll try
6 to get something out. It won't be in the next day or two,
7 but it'll be timely. Thank you both for excellent
8 presentation.

9 (End of Transcript of Record.)
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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Aiken	)	2010-CP-02-2665
	)	
	)	
LORETTA TRAYNUM AND LEONARD	)	
TRAYUM,	)	
	)	
PLAINTIFFS,	)	
	)	
VS.	)	TRANSCRIPT OF RECORD
	)	
CYNTHIA SCAVENS AND	)	
PROGRESSIVE DIRECT INSURANCE,	)	
	)	
DEFENDANTS,	)	

August 26th, 2013
Columbia, South Carolina

BEFORE:

Page 1

THE HONORABLE DOYET EARLY, JUDGE.

APPEARANCES:

TOM YOUNG, ESQ.

Attorney for the Plaintiff

J.R. MURPHY, ESQ.

Attorney for the Defendant

KAREN AMBROZIAK

Official Court Reporter

C O N T E N T S

Traynum vs Progressive.txt
INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 MR. MURPHY: Thank you, Your Honor. I appreciate you
2 working us in. I know it's on a Monday and being up here,
3 but we are here on a case that is pending --

4 THE COURT: I am familiar with the case.

5 MR. MURPHY: I know you are familiar. Well, your
6 Honor, we had moved to ask you to alter or amend the
7 judgment that you entered earlier this summer and

8 primarily would like to ask you to reverse your ruling on
9 it and rule that a meaningful offer was made.

10 But in doing so, if the Court will indulge me, I'd
11 like to just review the process that -- that is in the
12 record because there were some statements factually in the
13 order that made me think perhaps that between the multiple
14 interruptions we had when we had the criminal trial going
15 on in Barnwell and the time that perhaps at the time some
16 things were a little unclear so...

17 THE COURT: And, you know, I've read back over it --

18 MR. MURPHY: Yes, sir.

19 THE COURT: -- and you may very well be correct.

20 MR. MURPHY: Well, the first thing that I would like

*21 to mention to Your Honor is that -- just a general

22 overview, and that is that this was an internet -- an

23 internet sales transaction that was initiated and

24 completed solely by Ms. Traynum who described herself as

25 an experienced and savvy consumer of insurance and of

¶ 4

1 internet technology beyond the field of just insurance.

2 She used the internet in this case to obtain a quote

3 to come back on a subsequent date and finalize her

4 purchase and then do the steps necessary to complete that

5 purchase, and in the -- the jargon that Progressive uses,

6 there were two types of documents, for lack of a better

7 word, that we will be referring to: One is tea leaf

8 session, which are screen shots of what Ms. Traynum

9 actually saw and what she actually did during her internet

10 session.

11 The other were the saving of the PDF documents known

Traynum vs Progressive.txt
12 as the titanium pipe so --

13 THE COURT: I hate to interrupt.

14 MR. MURPHY: Yes.

15 THE COURT: I forgot to tell you before we started,

16 I'm giving you both 15 minutes. I've heard this case --

17 MR. MURPHY: Yes, sir.

18 THE COURT: -- pretty much. So use your 15 minutes

19 however you want to.

20 MR. MURPHY: Yes, sir.

21 So I would ask the Court to begin with the actual PDF

22 document that is attached that is a selection rejection

23 form.

24 It is virtually and may be perhaps identical to the

25 form that is promulgated by the South Carolina Department

1 of Insurance. It was completed consistent with the
2 application, and it was electronically signed by
3 Ms. Traynum.

4 If she had gone to an agent's office and signed her
5 name on the same form, then there would be no question
6 that Progressive would have been entitled to a conclusive
7 presumption because the form in content satisfies all of
8 the requirements of 350(a), and the use of the electronic
9 signature satisfies the current version of 350(b) in which
10 the form must be completed and executed.

11 I think be completed by the representative, in this
12 case, the technology on the website initiated by the
13 insured themselves, and then she electronically signed it.

14 So for that reason, the form itself is all that needs
15 to be inquired of in this case. This is not a wannamaker
16 case. This is a statutory case under 350.

17 The legislative intent behind 350 is stated
18 separately from the original Meaningful Offer Statute 160,
19 and it was to reduce the number of claims. It was to
20 broaden the protections and give more protection to the
21 insurance company and to end these meaningful offer cases.

22 Then, Your Honor, in this case, Ms. Traynum doing
23 over the internet what 20 years ago people only did in
24 person in a process that's equal to or even better for the
25 consumer than in person, because I've had many times of

1 the end person agent giving a fuzzy definition of
2 underinsured motorist coverage orally and then presenting
3 the actual paper form in some manner where they just may
4 have said, "sign this" and didn't really give the person
5 all of the sheets -- I had that testified to -- or giving

6 them time. You know, I've heard this: "The agents seem
7 like they're in a rush."

8 On the internet, after Ms. Traynum didn't pick the
9 Progressive preselected, all of which include UIM -- the
10 earlier order indicated that it defaulted to zero. It was
11 customized to zero.

12 All of the defaults, the minimum, the economy, the
13 recommended and the plus all contain underinsured motorist
14 coverage. That was undisputed.

15 Just like in an agent's office where you might get a
16 quote over the phone or you might get a quote in person,
17 and then you agree to purchase those coverages, the agent
18 then prepares the application either by hand in the old
19 days or now probably by keying into the computer, and they
20 present those two -- and they will fill out the rejection

Traynum vs Progressive.txt
21 form. - Then they will present those two documents to you.

22 In this case, they were presented in this format on
23 the computer. They were warned that their signature was
24 required.

25 There is a PDF box which could be full screen sized.

7

1 It did not have to remain in the box. It could have been
2 printed. It could have been downloaded, and then it
3 required the electronic signature at the bottom of the
4 page making sure that the person had to scan across the
5 document and down to the bottom.

6 So that was done with the application the same as an
7 agent handing the application across the table and telling
8 you that you have to sign. Then the next screen that the
9 insured comes to, if that is done correctly has the same

10 type of warnings, the same type of options to change the
11 resolution, print the document, full size it on the screen
12 and take it out of the PDF box, and then the signature by
13 typing in the first and last name as the insured had
14 already identified themselves early in the process.

15 That is superior to the agent because it allows the
16 person to take all of the time they want to, and it seemed
17 as if the earlier order found that the timing of it failed
18 to satisfy the statute, but the statute does not put a
19 sequence on how these events are done.

20 I believe that that is the typical sequence from the
21 traditional approach. Then we have the telephone, the
22 1-800, USAA became big on this -- it was one of the
23 leaders.

24 In that situation, you would make selections, perhaps
25 without any oral explanation of any coverage, and then the

1 form would have to be mailed to you, maybe faxed to you,
2 but you would have it.

3 In fact, in one of the cases that Your Honor was the
4 trial judge, Adkins vs. Forest Mann, the two distinctives
5 were present. There was no oral explanation of coverage.
6 It was transacted by phone. The form was mailed.

7 The insured signed the form on his own and mailed it
8 back, and the Court of Appeals affirmed the ruling at
9 trial that that was a meaningful offer.

10 what the order seemed to confuse was the hyperlink in
11 the quote phase as being the only offer of coverage.

12 Progressive did not argue that. The offer of coverage is
13 contained in this form. That's what 38-77-350 requires,
14 an insurer must use a written form with a new policy.

15 In the Clinton case and several others have said that
16 the use of a written form is commercially reasonable
17 satisfying Wannamaker, and that's only if the conclusive
18 presumption doesn't apply.

19 So in this case, you have a uniform sequence of the
20 transaction. You have a uniform explanation between a PDF
21 that cannot be changed, and a hyperlink -- if you -- if
22 someone said, "UIM, what's that?" Sometimes they ask the
23 agent that. Many times they don't.

24 It's a uniform presentation that has plenty of
25 options that are easy to follow and printing it -- if all

9 9

1 else fails, print this document -- and it is self-paced.

2 No one gets in a rush. No one is forced to only just sign

3 this page, handing them something that's been flipped over

4 and stapled, and they sign it not having access to it.

5 They have to scroll through that. They can scroll

6 through that if they choose to, and they can full size it.

7 So the transaction when compared to the traditional types

8 and ways that people purchased insurance, this is really

9 preferable.

10 Of course, this is the way people do business. Even

11 today I checked a credit card account, bank account, made

12 plane reservations because I have to Chicago in two weeks.

13 I did all of that at my computer.

14 That's the way people transact business, and it

15 really is preferable because of the uniformity of it, and

16 people are able to get information if they need it.

17 They're always able to stop, cancel out.

18 I've checked plane reservations for flights many

19 times. If I'm not actually flying, I just cancel out.

20 Those will take it, but to actually have the policy

21 issued, the person has to follow those instructions.

22 Progressive would submit that that is not only

23 meaningful, but it is preferable to the traditional

24 methods that were approved by our appellate courts even

25 recently in the Adkins case, in a case that I handled,

‡ 10

1 Cohen vs. Progressive. It just came out from the Court of

2 Appeals earlier this year.

3 So there was not a default of zero. There was

4 actually -- if the system defaulted, it defaulted with the

5 coverage, and she had to change it. That was testified

6 and undisputed in the record.

7 She may have selected the coverage before she got to

8 the form, but I would urge the Court that that is similar
9 to every other type of transaction from the traditional
10 in-office meeting with an agent where the forms are
11 printed out or filled out last.

12 The agent is not going to waste his time filling out
13 a form until the person makes their decisions or over the
14 phone. In fact, the statute has a notice requirement that
15 a person has up to 30 days to send the form back in or the
16 coverage will be added.

17 So the legislator is -- if there is any intention at
18 all in sequencing, it's obvious that the form can be done
19 at a later time. It does not have to be presented prior
20 to the selection.

21 If the legislature had wanted that, they could have
22 mandated the sequence. It seems, in light of the case
23 law, and in light of the statute that the content of the
Page 17

24 offer is what the focus is because it's designed to give
25 sufficient or adequate information so an insured can make

¶ 11

1 an intelligent decision.

2 Use of this written form, which complies with the
3 existing case law and the SCDI form 2006 satisfies that.

4 As you can see --

5 THE COURT: You're at about 12 minutes, I think.

6 MR. MURPHY: Okay.

7 And as you can see, the offer form was not on the
8 page with a number of hyperlinks. It was on its own page.

9 It was not -- this is not the offer.

10 This hyperlink is just an additional, a little icing.

11 The form itself is on its own page, and there were some

12 web programming steps that the Court mentioned would have

13 been easy and able to do.

14 In fact, I would submit on page seven of the order

15 that Progressive did that. Progressive could have given a

16 detailed description of the optional coverage in a pop-up

17 window or a separate page. That's exactly what this is.

18 If the purchaser had been required to put their name in a

19 signature box before being allowed to close the page, the

20 insurer would have all the more evidence the person was

21 presentment the explanation. That's what this is.

22 And if the drop down had been defaulted in favor of

23 purchasing coverage, then Progressive would have been

24 given another opportunity to initiate, and the evidence

25 actually was that the defaults were not zero but, in fact,

1 had UIM coverage.

2 So for those reasons, Your Honor, we would ask the
3 Court to alter its ruling and rule in favor of Progressive
4 on that.

5 THE COURT: Thank you.

6 Senator Young.

7 MR. YOUNG: Thank you, Your Honor. May it please the
8 Court.

9 we, obviously, think the Court was correct in its
10 original ruling, and there's -- there's a couple things
11 that --

12 THE COURT: Tom, I'll tell you the truth. I always
13 tell you truth. I shouldn't preface it as saying that.
14 This presented a unique task for me, and I struggled with
15 the thing, quite honestly.

16 Quite honestly, when I got Mr. Murphy's motion to

17 reconsider, I still struggled with it. I'm not quite sure
18 I did the right thing, Senator Young. The more I looked
19 at it, the more I struggled. So help me with your
20 position.

21 MR. YOUNG: Well, again, I mean, this is --

22 THE COURT: I went back and reread the cases. I
23 reread my order and reread the motion to reconsider, and I
24 may have been wrong.

25 MR. YOUNG: Well --

♀ 13

1 THE COURT: To be honest with you.

2 MR. YOUNG: We brought our original amended memo --

3 THE COURT: All right.

4 MR. YOUNG: Just for you to have again.

5 THE COURT: All right.

Page 21

6 MR. YOUNG: It addresses a lot of the same arguments
7 that Progressive made today in it. I didn't do a memo in
8 reply to his memo from last week. I didn't get it until
9 late Wednesday when I got back to the office, but in any
10 event, there's two things that the Court -- that we ask
11 you to just consider from the very get go, and that is
12 that the cases regardless of the analysis whether you're
13 looking at Wannamaker or whether you're looking at 350,
14 all of the cases say that the Court has to do a couple of
15 things. That is you have to keep in mind that the purpose
16 of the meaningful offer law is to make sure that the
17 insured, number one, knows their options; and number two,
18 they're able to make an informed decision as to coverage.
19 That's just basic elementary premise that all of this
20 is based on. Then the cases say, the Grinnell case in

21 particular says that all of the law with respect to the
22 meaningful offer of UIM must be applied so as to
23 effectuate its stated purpose.

24 And so keeping that in mind, we think -- we offered
25 this stuff to the Court back in April. We think that the

¶ 14

1 proper analysis for looking at these issues is this
2 flowchart which we provided to the Court again in April.

3 What this shows is that before you even get to
4 Wannamaker and before you even get to 350, the Court has
5 to answer the question, "Did the insured use a
6 commercially reasonable notification process to
7 communicate the offer to the insured?"

8 That is -- the first question has to be asked in each
9 analysis. The basis of that, genesis of that, is in 160

10 and in 350.

11 So the analysis that takes place in applying that is
12 similar to what happened in the Duarte case which the Court
13 in your order, you do a lot, and you analyze it.

14 You show that they have to have a reasonable method
15 of communication, which the internet -- I mean, I'm not
16 here to argue that the internet is not a reasonable method
17 of communication, but the second prong of that test is
18 that they have to have an approach that's reasonably
19 calculated to bring the offer to the insured's attention.

20 This is where the Duarte case is instructive, and this
21 is where the Court had it correct. This is where it
22 doesn't matter what's on the form. If they didn't convey
23 it in such a way so that it brings it to her attention,
24 then it doesn't matter if the form is correct.

25 If you answer that they didn't do this thing in a

1 commercially reasonable notification process, then that
2 ends the inquiry and the offer was not meaningful.

3 If you find that she did somehow have it brought to
4 her attention, then you look to see whether or not they
5 meet the 350 question. So if so, did the offer contain
6 the required elements of 350(a) and did the named insured
7 sign the properly completed form. They want you to rule
8 that they get the conclusive presumption in this case.

9 The statute says that it has to be completed by the
10 agent or the producer, either one -- or by the insurer,
11 and they want you to find that because the computer system
12 completes the form on their website, that satisfies the
13 statute or the conclusive presumption.

14 This Court knows that in order to have a conclusive
Page 25

15 presumption, that there has to be -- they have to follow
16 the very strict intent of the black letter law and that
17 notably, the Electronic Transactions Act in South Carolina
18 was passed in 2004.

19 The latest change to 350 took place in 2006, and in
20 2006, a General Assembly in response to the Floyd
21 decision -- Floyd was a case where the agent filled in
22 part of the form, and the Supreme Court on a certified
23 question answered and said, "You can't get the conclusive
24 presumption because the statute at the time required the
25 insured to fill out the form and then sign it to get the

¶ 16

1 conclusive presumption."

2 So the legislature changed the statute to say that if

3 the agent fills out the form and the insured signs it

4 after they fill it out, then you can get the conclusive

5 presumption.

6 well, they have admitted here in the requests for

7 admissions and in the 30(b)(6) depositions multiple times

8 that no one from Progressive filled this form out.

9 So they shouldn't get the conclusive presumption, but

10 even if you find that there might be some way that they

11 can comply with 350(b) which is whether or not the

12 agent -- or whether or not the form is completed by the

13 insurance company, which we say it's not and they have

14 admitted it was not -- they still can't meet the

15 requirements of 350(a) which is that the insured actually

16 signed the form.

17 Here it is undisputed that when they -- on this

18 document here, which is the offer form, they admitted in

19 the 30(b)(6) deposition that her name, which is her
20 electronic signature, appears on this document before she
21 even gets to this page.

22 They have already put -- the computer already puts it
23 on a signature line. The 30(b)(6) witness said it's on
24 the document itself as her signature before she even gets
25 to down here to type in her name.

♀ 17

1 So -- and the statute says that the named insured has
2 to sign the form. They can't -- it's their burden. They
3 have to show that they meet all of the requirements of the
4 statute.

5 They're the ones with the burden, not us. They have
6 admitted that this document is not signed by her, and it
7 was our -- it already had her name on it before she even

8 got to this.

9 Now, Mr. Murphy also told you that in looking at
10 these two documents, in order for the insured to get to
11 this part here where she would type her name in, that she
12 has to scroll through the entire document, that's not
13 correct.

14 If we were able to pull up on the computer and show
15 you like we did in Barnwell, if you see right here this
16 little column, this is where you click this.

17 Then you can scroll through the document, but if you
18 don't click this, and you just go from up here to down
19 here, you don't get to see any of this stuff. So it's
20 not --

21 THE COURT: Now, we're creating all kind of factual
22 issues, aren't we? I mean, he says it did. You say it
23 didn't.

24 MR. YOUNG: well, it's undisputed that --

25 MR. MURPHY: I did not intend to argue that she had

7 18

1 to. I just said she had the opportunity to.

2 THE COURT: Okay.

3 MR. MURPHY: Just like in an agent's office, you can

4 read it or not read it.

5 THE COURT: I see.

6 MR. YOUNG: Thank you.

7 well, her name is already on the form before she even

8 gets to the page because the computer has filled it out,

9 but more importantly is that when -- when she is over here

10 on this page and she has got underinsured motorist

11 coverage and she decides no coverage, there is nothing

12 here that tells her what underinsured motorist coverage

13 is.

14 There's nothing here that tells her, you know, stop.

15 You know, the same thing that would happen in an insurance

16 office when an agent is sitting there and the agent is

17 telling him -- the most recent case before the courts is

18 the Cohen case from February of this year.

19 In the Cohen case, Judge Few goes through, and he

20 talks about how the Court found that there was a

21 meaningful offer. And he talks specifically about all of

22 the things that the agent did to advise the insured as to

23 what the underinsured motorist coverage was and the

24 process that was involved in selecting it so that the

25 insured would have -- would be informed, which is as you

‡ 19

1 recall, the thing that I told you that we have got to keep
2 in mind and looked in all of this is that the courts say
3 the insured has to know their options, and they have to be
4 able to make an informed decision.

5 In here, there is nothing on this page that will
6 allow her to make an informed decision and know her
7 options at the time that she is required to make the
8 underinsured motorist selection, and you made that finding
9 in your order. We submit that it was correct.

10 Now, what we do know is that since this was filled
11 out in 2007, they have gone in and they have made
12 improvements to this. They actually now have a question
13 mark on this particular page that's next to underinsured
14 motorist coverage that if you click on it, it's Exhibit 2
15 to our memo.

16 Exhibit 2 goes through, and it shows -- it explains

17 to you what underinsured motorist coverage is, but again,
18 it's their burden. They don't have it in this document in
19 2007, and they -- they improved it since 2007.

20 The -- going back to the analysis, if you -- if you
21 find that they don't get conclusive presumption and they
22 can't meet the requirements of 350, they can still win if
23 they can carry their burden under the Wannamaker case,
24 okay, but it's their burden.

25 Our position is that they can't carry two of the four

‡ 20

1 elements of the Wannamaker test. Number one, they can't
2 show that they intelligibly advised this lady as to the
3 operational coverage.

4 The Duart case is particularly instructive about
5 that. They even have -- and if I can pull it up on the

Page 33

6 computer -- I'm not sure he's got a -- he doesn't seem to
7 have it.

8 There's a subsequent document to this one which is
9 where they do the electronic fund transfer. They actually
10 have her sign a form after she passes this page where they
11 want her bank information so they can do an EFT.

12 They've got down at the bottom before they get to the
13 form that she electronically signed, it has got in bold
14 type all caps "please read". It tells her she needs to
15 understand that they're about to debit her bank account if
16 she signs the next document.

17 They don't tell her anything in similar language
18 to -- in such bold type on this -- in this underinsured
19 context. They don't do it here, and they certainly don't
20 do it over here where she is required to make this

21 selection of coverage.

22 We also don't think -- and our brief goes into a
23 number of other ways that we don't think that they can
24 carry their burden on intelligibly advising.

25 Then again, another part of the four-part test they

21

1 can't meet is whether or not they made a commercially
2 reasonable notification to her as to the optional
3 coverage.

4 Our position is that they do not because the method
5 of conveyance is not utilized in such a way as to have an
6 approach that is reasonably calculated to bring the offer
7 to her attention.

8 She said in her deposition that she didn't understand
9 the insurance coverage. Let's see. I quoted it on page

10 seven of our brief.

11 "I thought whatever damage you incurred in an
12 accident, you would be paid regardless. I didn't
13 understand the insurance. I didn't. Maybe -- I mean, I
14 just didn't understand it. I didn't. My understanding of
15 insurance is if you were in an accident and got hurt, you
16 would be paid for whatever damages were incurred."

17 This lady did not understand what underinsured
18 motorist coverage was. She was trying to find coverage
19 for her and her family that would meet her budget, but she
20 did not know that the underinsured coverage was something
21 that the insurance company had an obligation to make sure
22 that she understood what it was and that she was
23 affirmatively rejecting it at the time that she purchased
24 the coverage.

25 They have a burden to show you that at the time she

1 made the selection, that they -- that they did the things

2 that they were required to do, and they don't do it here.

3 There is nothing here that tells her that she rejecting

4 something that she has got to understand.

5 It's the same thing if you go into an agent's office

6 and the agent just sits there, sits there and --

7 THE COURT: Son, you have got about two minutes.

8 MR. YOUNG: And if you're -- if you're the agent and

9 I'm the insured and I come in and I say, "Agent Early, I

10 want to purchase insurance from you for my car," and you

11 sit there and you just hand me the documents. You don't

12 tell me anything about it, and you expect me to decide

13 whether or not I'm going to purchase UIM, whether or not

14 I'm going to have additional UM, whatever it may be, and

15 you just sit there and you don't say anything. That's not
16 the way it works in the real world.

17 THE COURT: Well, are you telling me that there is no
18 way to make a meaningful offer by way of internet?

19 MR. YOUNG: No, sir. I'm telling you that there are
20 ways they can do that. You even pointed out some things
21 in your order -- they also, their 30(b)(6) witness, they
22 stated that you don't have a basis for you to make some of
23 the findings you did with respect to what they could have
24 done.

25 The 30(b)(6) witness said at least twice in the

23

1 deposition that they could have done this thing in any way
2 that they wanted to do it. They could have changed the

3 sequence of pages, but they decided at the time that they

4 were going to do it this certain way.

5 They could have added certain things that would alert

6 her at the time that she rejects or decides that she is

7 not going to get the UIM. They could have added some

8 stuff there. In fact, we know they did in 2010 that if

9 you came to this screen in 2010, that there would be a

10 question mark here, and it would be clicking.

11 It's Exhibit 2 to our brief, and it would show you

12 what it is that you're rejecting and how UIM works. So

13 there are ways that they could have -- they could have had

14 a pop-up window where somebody from Progressive, looks

15 like an agent, comes up and like one of these little

16 windows and says -- just like an agent would in an office,

17 "This is what underinsured motorist coverage is. This is

18 why you might want to consider getting it."

19 They could have done any of these things, but they
20 didn't do it. It's their burden, and they have to show
21 that they meet all of these requirements in this analysis.
22 what they want you to do, again, is to find that she
23 signed an electronic signature. They had an electric
24 agent. They get the presumption, end of story. That's
25 what they want you to say. That's not the analysis.

¶ 24

1 They have got to show just getting out of the gate
2 that they conveyed this stuff to her so she can make an
3 intelligent decision. They can't do that.

4 Thank you.

5 THE COURT: All right. Thank you, Mr. Murphy. I'm
6 going to give you five minutes.

7 MR. MURPHY: Okay. Thank you, Your Honor.

8 I'm not sure exactly what the argument is against me.

9 If it's that the insured filled out the form, the -- South
10 Carolina code 26-6-80 talks about making an agreement
11 electronically.

12 If there was no involvement at Progressive, then
13 there was no policy. So that's kind of a ludicrous
14 argument.

15 The statute in effect for meaningful offers does
16 allow the insurance representative which has to
17 contemplate a website to prepare the form.

18 Ms. Traynum's signature was created by her typing in
19 her name. It did not already appear there. She had to
20 type it to verify it, whether if your name is printed
21 there and you sign over the top of it, it would be no
22 different.

23 If you're familiar with the SCDI form and the
Page 41

24 acknowledgment under Section 4 -- and we have the actual

25 form here -- has a place where the applicant's name is put

25

1 in there.

2 Usually, the agents even used to fill all of that

3 out, and you just sign over the top of it. So that's not

4 really the argument there.

5 I would say, in the actual screen shots or in our

6 attachments and where you actually sign the electronic

7 fund transfer, it is a PDF formatted exactly like this.

8 There is a note on the prior page, and it says,

9 "Please read." It says, "You're getting ready to

10 authorize us to withdraw from your bank account."

11 It doesn't require a signature there. It then -- the

12 next screen, it shows a PDF exact -- I didn't blow it up,

13 but it is in our materials.

14 Then, lastly, the reliance on the Duart case is

15 really out of time. This is from the 1980s. That was a

16 flier stuck in an envelope that didn't require a

17 signature, did not contain the entire form.

18 I could not get my hands on what was in the State

19 Farm envelope. I didn't get any, and I was a State Farm

20 insured. I don't have it. But it was basically -- they

21 tried to send in a little flier that told you what

22 underinsured was that satisfied their meaningful offer

23 requirement.

24 That is way different. If they sent you a form with

25 your premium renewal notice and you actually signed it.

7 26

1 saying you had read it and sent it back, I don't think
2 Duart would have been decided in favor of the insured.
3 That's what you're being asked to do in this case, to
4 disregard someone who had the complete opportunity to read
5 the form.

6 They signed it electronically instead of manually
7 with a pen and paper, and it's the way that this is being
8 done. This is a very important case for Progressive but
9 for all of the insurance companies in South Carolina and
10 across the country that are doing business in this modern
11 way. It's important for the consumers of insurance
12 because of the ease with which they can do this.

13 They will have to take off time from work to do all
14 types of business. This -- even though there might be
15 some slight changes.

16 You know, to argue that a question mark instead of an

17 underlined blue word, I don't think anybody who uses the
18 computer would not realize that when a fist comes up with
19 a finger pointing out of it on that blue line that that's
20 a hyperlink. I mean, that's just standard computer
21 squarely.

22 In fact, we use a question mark now or FAQ. You
23 know, you see those. Those are just style points, but
24 they don't do anything differently, and again, that was an
25 option that she chose not to utilize.

27

1 But Progressive is not required to make her utilize
2 that because Progressive made her acknowledge that she had
3 either read this form, printed it and then by typing in
4 her name, she was signing it.

5 The law has always recognized that when you sign a
Page 45

6 written document, you're bound by the contents. The
7 legislature recognized it by making someone's signature on
8 a form that was prepared by the insurance representative
9 to conclusively establish that the meaningful offer was
10 made, and that's what we're asking the Court to rule in
11 this case.

12 THE COURT: Thank you both very much.

13 Once again, I'll take it under advisement.

14 MR. YOUNG: Your Honor, would you consider if we were
15 to -- would you're be okay if we were to just submit
16 proposed orders to you for your consideration?

17 THE COURT: That would be fine. How long do you
18 need?

19 MR. YOUNG: I mean, I don't --

20 THE COURT: You might as well take a month because

21 it's going to take me a while --

22 MR. YOUNG: Okay.

23 THE COURT: -- to plow back through this stuff.

24 MR. YOUNG: All right.

25 THE COURT: All right. That's fine.

‡ 28

1 MR. YOUNG: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded.)

3

4

5

6

7

8

9

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF AIKEN)
4)
5 Loretta Traynum and) C/A No. 2010-CP-02-665
6 Leonard Traynum,)
7 Plaintiffs,)
8)
9 -vs-)
10)
11 Cynthia Scavens and)
12 Progressive Direct)
13 Insurance Company,)
14 Defendants.)

15
16 Wednesday, July 11, 2012

17 Washington, DC

18 Deposition of CHARLES KORDES called for
19 examination by counsel for the Plaintiff, pursuant
20 to notice, held at the offices of Nelson Mullins
21 Riley & Scarborough, LLP, 101 Constitution Avenue,
22 NW, Suite 900, Washington, DC, beginning at
23 9:46 a.m., before Bonnie Marcus Olachea, a notary
24 public in and for the District of Columbia, when
25 were present on behalf of the respective parties:

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C O N T E N T S

EXAMINATION OF CHARLES KORDES

BY MR. YOUNG: 4

BY MR. MURPHY: 65

E X H I B I T S

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Exhibit 1	Plaintiff's Third Amended	4
	Notice of Deposition	

1 Tell me what is the purpose of the Tea
2 Leaf Session documents?

3 A. So a Tea Leaf Session is a recording
4 of everything that goes on during a session as
5 someone is quoting or furnishing a policy at
6 progressive.com. So in this particular case
7 this is a recording of Ms. Traynum's
8 interactions on her website on April 20, 2007.
9 The exact screens that she saw, the exact items
10 she clicked, the exact -- you know, anything
11 that she, she viewed on our web site was
12 recorded as part of this session.

13 Q. All right. And why does Progressive
14 use the Tea Leaf Session?

15 A. We use these Tea Leaf sessions for
16 multiple reasons. One is to -- if we have
17 issues on the website we would diagnose them
18 through the use of Tea Leaf sessions. We use
19 more recent Tea Leaf sessions.

20 We also use them to review quotes to
21 see what consumers did in cases like where the
22 consumers claim that they've done something
23 differently than what we have recorded.

24 Q. When did Progressive start using a Tea
25 Leaf Session?

1 to provide web recordings. So many companies
2 across, you know, the U.S. use them. And then
3 for the archival process of Tea Leaf sessions we
4 use Iron Mountain.

5 Q. You use?

6 A. Iron Mountain.

7 Q. Iron Mountain is a company that
8 records archives?

9 A. Iron Mountain is a company that
10 archives items for companies. So they're a
11 document retention company. And there are
12 people at Progressive that could provide you
13 details of that archival process.

14 Q. All right. Now, as far as the actual
15 pages that we've seen -- that we see in this Tea
16 Leaf Session that Mrs. Traynum saw on April 20,
17 2007, it's my understanding from your testimony
18 that the team for which you are now the manager,
19 that team designed these pages; is that correct?

20 A. It's correct.

21 Q. And then is it fair to say that
22 someone at Progressive approved the design of
23 each page?

24 A. That's correct.

25 Q. And also approved its use for

1 prospective insureds in South Carolina?

2 A. That's correct.

3 Q. Now, do you know who decided the
4 sequence in which each screen would come up like
5 in this session that Ms. Traynum had?

6 A. It was -- it was me, the team that I'm
7 now responsible for, but at that time.

8 Q. All right. So let's talk about this
9 first page. Tell me what this is.

10 A. So this first page is a retrieval
11 page. So what this indicates is that it is
12 actually pulling up a quote that Ms. Traynum had
13 done before. And that quote was accessed on
14 April 19, 2007. That's right here at the top of
15 the screen.

16 And because she is retrieving a prior
17 quote there is displayed information that was in
18 that quote that she is retrieving. So you can
19 see here it's retrieving that -- the original
20 quote had three drivers -- or sorry, four
21 drivers: Loretta Traynum, Leonard Traynum,
22 Alisha Traynum, and Natasha Traynum.

23 The accidents that she has indicated
24 for each of those drivers with the ability to
25 edit or remove these drivers, as well as the

1 three vehicles that she put it on the policy,
2 which are a Chevy Trailblazer, a Honda Civic,
3 and a Chevy Beretta. This information would
4 only have been accessible if she had entered the
5 quote information, her last name, her ZIP code,
6 her Social Security Number in order to be able
7 to access it.

8 Q. All right. Now, I notice at the
9 bottom or as you get down toward the bottom of
10 the screen it has prior insurance?

11 A. Yes. So after you review the
12 information that was already in the quote we ask
13 additional information about prior insurance
14 which is needed in order to generate a quote.

15 The reason we ask this on a retrieval
16 is because between the day that the original
17 quote was done and the day that they're not
18 accessing the quote their insurance, you know,
19 situation could have changed. Their policy
20 could have lapsed or something like that. So we
21 re-ask information on here so these three
22 specific questions.

23 Q. So it's fair to say those three
24 questions under prior insurance were asked again
25 on April 20?

1 A. That's correct.

2 Q. And then under insurance details it
3 says, Desired policy start date, and someone has
4 entered 04-20-2007?

5 A. Yes.

6 Q. And so what this tells us is that she
7 entered that, that date. This is what she
8 entered for her policy start date, correct?

9 A. That's correct.

10 Q. Now, let me ask this question before
11 we start looking at the next pages. You said
12 that this is a retrieval of a quote that she was
13 provided on April 19.

14 Is there a Tea Leaf Session for the
15 April 19 quote?

16 A. There is not.

17 Q. Why is that?

18 A. We only save and archive Tea Leaf
19 sessions for policies that are sold, and we
20 don't save quotes that are unsold.

21 Q. Okay. It says the quote was last
22 viewed on April 19, 2007.

23 Is that the only time it was viewed,
24 or could it have been viewed multiple times
25 before that?

1 A. I don't -- I have no idea how many
2 times it was accessed or viewed.

3 Q. So, it's fair to say that this
4 information that's recorded in the Tea Leaf
5 Session will not tell us how many times that
6 she's looked at it before April 20. It will
7 only tell us the last time she looked at it?

8 A. Yeah. That's correct.

9 Q. All right. The second page, what's on
10 this page?

11 A. So this page is what we call the rate
12 coverage page, which basically shows options
13 that the consumer has around their price that
14 they can purchase insurance. So there are four
15 tabs on this page that represent four different
16 packages of coverages. Those are minimum,
17 economy, recommended, plus. And then if the
18 consumer enters that they would like -- outside
19 of our packaging they get a fifth tab, which is
20 this custom tab.

21 In this case we're on the custom tab
22 because Ms. Traynum has opted to change the
23 coverages from what we would recommend.

24 Q. Did she change it on April 20 or did
25 she change it some date before that?

1 A. She changed it some day before that.
2 And she changes it on April 20, as what we see
3 on the next page.

4 Q. So on Page 3 you can see she's changed
5 it again?

6 A. Correct. So she's still gaining with
7 her coverages at that time.

8 Q. All right. So what, what can you tell
9 about Page 2 other than that she has a custom
10 selection of policy coverages?

11 A. It goes through the coverages for each
12 that are policy level, as well as the coverages
13 for each vehicle in, in detail. And I'm happy
14 to walk through that with you if you'd like.

15 Q. All right. Now is there a -- on this
16 Page 2 is this where she makes a selection for
17 underinsured motorist coverage?

18 A. That's correct. It is right here.
19 It's the third item down under policy coverages.

20 Q. Is there anything on this page to
21 explain what UIM coverage is?

22 A. Yes. All of these are links, which is
23 a web standard as you can kind of see across all
24 of the web in general. A blue underline on
25 coverage is a link. And she can click on

1 underinsured motorist and get information about
2 that coverage in the state of South Carolina.

3 Q. Where would you see what that
4 information is?

5 A. She did not click on it so I don't
6 have it in the Tea Leaf Session.

7 Q. Did she click -- can you tell if she
8 clicked on any of these types of coverages to
9 see what they were?

10 A. I can and she did not.

11 Q. Can you tell what Progressive would
12 have recommended for policy coverages?

13 A. I know for a fact that Progressive, as
14 long as we've done coverage packaging, which is
15 prior to even 2007, recommends that the
16 underinsured motorist and uninsured motorist
17 coverages match the liability limits. So she
18 has taken that off.

19 Q. How do we know that was recommended on
20 hers, what you just said?

21 A. Progressive has always recommended
22 that. We have documentation to that.

23 Q. Where would that documentation be?

24 A. I have it in PowerPoints and company
25 records.

1 Q. Now, would there have been something
2 in the quote for the recommended coverage that
3 would have explained to her what underinsured
4 motorist coverage was?

5 A. There is always the accessibility of
6 the link to explain what underinsured motorist
7 coverage is.

8 Q. But it requires the person to actually
9 click on it and look for it?

10 A. To search for it, right. That is
11 correct.

12 Q. What would pop up for the explanation
13 do you know?

14 A. I could not tell you what would pop up
15 in 2007 because again I don't keep archives of
16 that. She didn't click on it so I don't have it
17 in this session.

18 Q. Who would be able to tell us what
19 would have clicked, popped up?

20 A. I don't know if anyone would be able
21 to tell you what popped up in the click, but we
22 certainly could tell you what it says today.

23 Q. So, is your testimony that Progressive
24 cannot tell us today what the explanation of
25 coverage would have looked like had she clicked

1 the UIM -- the blue UIM link to see what it was
2 in April of 2007?

3 A. I cannot because she did not click it.

4 Q. And so that's not retained anywhere by
5 the company?

6 A. It would be -- if there was another
7 consumer who clicked on it during 2007, it would
8 be in that session.

9 Q. Okay. Let's look at the next page,
10 third page.

11 A. Okay.

12 Q. Now you said there was something on
13 here that she changed?

14 A. Yes. If you see here -- well, go back
15 to the prior page so you can see. Keep notice
16 of the Chevy Trail Blazer. She would change the
17 deductibles for comprehensive and collision from
18 a 500 with full glass to a thousand with full
19 glass. She made this change for both the Chevy
20 TrailBlazer and the Honda Civic and I'll show
21 you that.

22 So 500 on the -- on the first page for
23 the Honda Civic, and a thousand on the second
24 page with the Honda Civic. She did not make any
25 changes to the Chevy Beretta which doesn't have

1 any coverage. And, you know, most likely she's
2 doing this in order to lower her policy premium.

3 Q. All right. Now on this particular
4 page is this where she signs to confirm her
5 selections of coverage?

6 A. No. This is not the page where she
7 does that.

8 Q. All right. Now where does she sign to
9 confirm her selections of coverage?

10 A. She signs that two pages later when
11 she signs her application for insurance.

12 Q. What's the next page after this one?

13 A. The next page after this one is the
14 additional information page. I think I'm
15 missing one.

16 Q. Let's go off the record.

17 (Discussion off the record.)

18 BY MR. YOUNG:

19 Q. Okay. So this is now -- this is the
20 third page of Attachment 2, the Tea Leaf
21 Session?

22 A. I think it's the fourth. I believe
23 it's the fourth. One, two, three -- it's the
24 fourth page. So you've got the retrieval page
25 that we discussed. You've got the first

1 iteration of the rates coverage page.

2 Q. Oh, sorry. All right. So it's the
3 fourth page, okay?

4 So we have on here where she has put
5 the phone numbers and the license information?

6 A. Yes. So on this page we require that
7 -- again, the policy date that she entered on
8 the first page that we discussed so 4/20/2007.
9 She has to enter her home phone number, which
10 she's entered here which I won't read. You
11 don't need it.

12 She's asked for her most recent car
13 insurance company, and there's not a required
14 field so she did not fill it out. She has to
15 enter a driver's license state for each driver
16 that's included on the policy, as well as a VIN
17 and release company name for each vehicle that's
18 on the policy. And she has entered those except
19 for the Chevy Beretta, which she only has a VIN
20 because there is no lienholder on it.

21 And then she's asked for a shared --
22 she gets shared secret questions here so she can
23 sign her policy forms online. We don't record
24 these because they are secret.

25 Q. Okay. All right. So once she does

1 that page she goes to the fifth page, which is
2 what page? What happens on the fifth page?

3 A. The fifth page is the first of two
4 pages. There are -- called signer policy forms.
5 And this page is very explicit about what the
6 customer has to do. So your electronic
7 signature is required.

8 And it says, "Please read and
9 mechanically sign this document by entering your
10 name in the form field below and clicking the
11 continue button."

12 And then it has a notice to the side
13 of that. It says, "Your state may require
14 insurance documents to be displayed in a
15 particular font. To insure that they are, here
16 are two options. One is to set your monitor to
17 a resolution of 800 by 600, and Option 2 is to
18 print this document."

19 Below that in a window a PDF is
20 generated that is the application for insurance
21 in which the customer can scroll and view the
22 entire document that she is signing.

23 And the application for car insurance
24 is -- goes through all of the line coverages
25 that she's purchasing, all of the information

1 that she entered for underwriting, and, you
2 know, all of the coverage in detail, as well as
3 discounts, driving history, and prior insurance
4 information, and the lienholder's.

5 And then finally there is the
6 verification of content in which what she's
7 signing is, you know, declaring the statements.
8 And we go through the policy in detail because
9 it's what's in the Titanium Pipe documents.

10 But then finally on the page is the
11 policyholder electronic signature which says
12 that she represents that she is the person whose
13 name appears on the signature line of the
14 document above, and that she has reviewed the
15 document at the recommended text tied, which are
16 the two options that were presented at the top
17 of the page.

18 She's acknowledging and agreeing to
19 the statements, terms and conditions in the
20 document above. And that by typing her name in
21 the box below and clicking the continue button,
22 she is electronically signing the document. And
23 that will have the same legal effect as signing
24 the document with a written signature and shall
25 be valid evidence of her intent and agreement to

1 be bound.

2 She understands that if she does not
3 electronically sign these documents presented
4 during the online session or does not make
5 payment before it ends the application will not
6 be effective and no insurance coverage will
7 result.

8 Q. Now, her name does not appear in that
9 box.

10 A. That's correct.

11 Q. Why is that?

12 A. Because she has to type her name
13 there.

14 Q. Did she type her name?

15 A. She did.

16 Q. How do we know she typed her name?

17 A. The documents would not be created in
18 the Titanium Pipe and she would not have been
19 able to purchase the policy if she did not type
20 her name there.

21 Q. Why is her name not showing there in
22 the Tea Leaf Session like, like all the other
23 information in the previous pages in the boxes
24 where she typed information?

25 A. Because again we don't keep that

1 signing documents online indicating that they've
2 read something, but they really haven't read it?

3 A. No.

4 Q. Now, the name on the -- if you look at
5 the document in the window --

6 Q. Yes.

7 Q. -- Mrs. Traynum's name is on the
8 document?

9 A. That's correct.

10 Q. At what point in this Tea Leaf Session
11 did the name appear on the document?

12 A. The name appears on the document when
13 the document is generated as this page is
14 requested through the Titanium Pipe.

15 Q. So, does her name appear on the
16 document before or after she types in her name
17 on the signature line on this page?

18 A. It appears before.

19 Q. So when she comes to this page, this
20 Page 5 of the Tea Leaf Session, her signature is
21 already showing or her name -- her typed
22 signature is already showing on this document?

23 A. Correct.

24 Q. Even before she's even read anything
25 on this page?

1 A. And it says that here. See, it says,
2 "I, Loretta Traynum, represent that I am the
3 person whose name appears on the signature line
4 of the document presented above."

5 So we indicate that your name is on
6 the document above in the very first line of the
7 policyholder electronic signature segment, which
8 she then signs.

9 Q. Tell me again to be clear how do you
10 know that she's actually signed this if her name
11 appears on the document anyway?

12 A. Because the document would not exist
13 in the Titanium Pipe if Ms. Traynum had not
14 typed her name there. And she could not have
15 started her policy or have gotten past this page
16 if she did not type her name in that box.

17 (Discussion off the record.)

18 BY MR. YOUNG:

19 Q. Okay. Let's go back up to the top
20 again. On the right-hand side there's this
21 language about your state may require insurance
22 documents to be displayed in a different font
23 and some additional things related to that.

24 Did South Carolina require a
25 particular font?

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 2 COUNTY OF AIKEN) C.A. NO. 2010-CP-02-02665
 3
 4
 5 Loretta Traynum and)
 Leonard Traynum,)
)
 6 Plaintiffs,) Deposition of
)
 7 vs.) LORETTA TRAYNUM
)
 8 Cynthia Scavens and) July 20, 2011
 Progressive Direct Insurance)
 9 Company,)
)
 10 Defendants.)
)

11
 12
 13 Deposition on oral examination of Loretta Traynum,
 14 reported by Kimberly T. Power, Court Reporter and Notary
 15 Public in and for the State of South Carolina; pursuant
 16 to Rule 30 of the South Carolina Rules of Civil
 17 Procedure; said deposition taken at the Law Offices of
 18 Tom Young, Jr., PC, 409 Park Avenue SW, Aiken, South
 19 Carolina, on Wednesday, July 20, 2011, commencing at the
 20 hour of 2:20 p.m.
 21
 22
 23
 24
 25

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ALSO PRESENT: Leonard Traynum

1 A. Yes, sir.

2 Q. Okay. Where do you work?

3 A. I work at -- I work for H&R Block.

4 Q. How long have you been with them?

5 A. A year.

6 Q. Who else have you worked for in and around, I
7 guess, North Augusta most of your life?

8 A. I worked for Apex Food Service. I worked for
9 them for about 22 years.

10 Q. What did you do for them?

11 A. I was an administrative assistant. And in the
12 last five years, I was a general manager.

13 Q. Now, what do they do?

14 A. It was a franchise for Church's Fried Chicken.

15 Q. All right. And so you kind of ran the
16 business side of it?

17 A. For the last five years I did.

18 Q. Were you responsible for procuring and
19 maintaining insurance for the franchise for either auto
20 or business liability insurance?

21 A. Business liability.

22 Q. Did you do that through a local agent or a
23 broker?

24 A. Yes.

25 Q. Who did you use to do that?

LORETTA TRAYNUM

1 A. Jay Weigle.

2 Q. How do you spell his last name?

3 A. W-E-I-G-L-E.

4 Q. And is he in North Augusta?

5 A. Yes.

6 Q. Has he ever been your insurance agent for any
7 of your personal insurance needs?

8 A. Yes, he has.

9 Q. What type of personal insurance has he sold
10 for you?

11 A. Automobile.

12 Q. Was that before you went to Progressive and
13 got the policy that we're here about today?

14 A. No, this was after the accident.

15 Q. After the accident?

16 A. Yes.

17 Q. Did you have insurance agents that you had
18 used over the years for your personal and household
19 insurance prior to your accident?

20 A. Yes.

21 Q. Who had you used? I guess you were born --
22 tell me your date of birth.

23 A. ■/■/63.

24 Q. And so about the time you graduate from high
25 school, getting married, the crossover from being a kid

1 besides State Farm, if you recall?

2 A. I can't recall.

3 Q. Now, over the years do you feel like you've
4 had a good understanding of the different types of
5 insurance that you've had in place for your family both
6 for autos and for your homes?

7 A. No.

8 Q. Do you feel like you ever got good
9 explanations or information from any of the agents you
10 dealt with over the years?

11 A. After the accident I have, yes.

12 Q. Was there anything that you learned after the
13 accident that was difficult for you to understand or was
14 it -- or were you able to comprehend the issues and the
15 topics?

16 A. I understood it after it was explained to me,
17 yes.

18 Q. So, for example, this case is about
19 underinsured motorist coverage; is that right?

20 A. That's correct.

21 Q. You understand what underinsured motorist
22 coverage is as we sit here today, correct?

23 A. I do today, yes.

24 Q. Is that because Mr. Weigle explained it to
25 you?

LORETTA TRAYNUM

1 A. Yes.

2 Q. Now, did anyone in the past with GEICO or
3 Allstate or any other insurance company ever explain it
4 to you?

5 A. Not that I can remember, no.

6 Q. Did you ever read any documents that explained
7 what underinsured motorist coverage was before your
8 accident?

9 A. No.

10 Q. Did you sign some documents with GEICO or
11 Allstate regarding underinsured motorist coverage even
12 though you may not have read the documents?

13 A. I don't remember that.

14 Q. Did you ever have underinsured motorist
15 coverage on your auto policies before the policy with
16 Progressive?

17 A. I don't remember.

18 Q. Now, let me ask you a little bit about your
19 use of the internet because we're -- a lot of people
20 are -- the least person you would least likely think was
21 savvy is and the people -- some young person you think
22 would be is not. Do you regularly use the internet to do
23 banking or arrange travel or other types of services or
24 goods that you might purchase or use?

25 A. I do.

1 Q. Tell me the types of things you use the
2 internet for in a commercial-type sense.

3 A. I use it for -- for banking.

4 Q. So you review your statement online?

5 A. I do.

6 Q. How long have you been doing that?

7 A. I can't tell you how long I've been doing it.

8 Q. Were you doing it before your accident?

9 A. Yes.

10 Q. And when you bank online, do you set up -- do
11 you actually make payments directly? Do you set up
12 accounts for auto draft or electronic fund transfer
13 payments?

14 A. Unh-unh. No. Not electronic fund payments,
15 no.

16 Q. You don't pay any like your phone bill or
17 utilities bill or water bill, you don't pay that with an
18 automatic withdrawal?

19 A. No.

20 Q. You write checks still?

21 A. No. I do it, but it's not automatic. I can
22 go on the site --

23 Q. You manually do it?

24 A. Yes, yes.

25 Q. I'm sorry. I interrupted you. I'm sorry.

1 A. Go ahead.

2 Q. In other words, you don't do it auto draft.
3 When you get notice that it's time for a bill to be paid,
4 you actually manually go in and pay that bill?

5 A. Yes.

6 Q. And you would do that every month?

7 A. Not every month.

8 Q. If it's a monthly bill?

9 A. No. Sometimes I take it to them and sometimes
10 I do it online. Whatever is more convenient at the time.

11 Q. I got you. So would that go for -- what type
12 of bills would you pay online manually from time to time?
13 Your water bill?

14 A. My water bill.

15 Q. Your power bill?

16 A. No, not my power bill.

17 Q. Phone bill?

18 A. Cell phone, yeah.

19 Q. Cell phone. Do y'all still have a land line?

20 A. Yes.

21 Q. Do you pay that online sometimes?

22 A. Uh-huh.

23 Q. How about any credit card bills or loans or
24 anything, do you sometimes pay those online?

25 A. Credit card bills, yes.

1 Q. And I assume that to do that you have to have
2 some sort of passwords and there's some requirement to
3 fill in and double check it, put -- designate which
4 account it's going to be paid from, that type thing?

5 A. There are passwords, yes.

6 Q. What bank are you with that you do this
7 through?

8 A. Right now I'm with Regions Bank.

9 Q. Have you used the internet with other banks as
10 well?

11 A. Yes.

12 Q. What are some of those banks?

13 A. SRP.

14 Q. Is that a credit union?

15 A. Yes.

16 Q. Any others?

17 A. No.

18 Q. Now, do you use the internet for other things
19 like purchasing, you know, products, you know, eBay or
20 buying things from different Web sites that are shipped
21 to you instead of having to go to the store?

22 A. I have bought from eBay, yes.

23 Q. What about other types of online retailers,
24 Amazon or just anybody? It might be any -- I mean,
25 there's so many different --

LORETTA TRAYNUM

1 A. Yes, Amazon.

2 Q. Okay. So you -- you do buy products on the
3 internet and I guess, again, you have to go through a
4 transaction to designate what you want to purchase and
5 then to make arrangement to pay for it electronically?

6 A. That's correct.

7 Q. Okay. Now, do you do any other type of
8 business over the internet other than purchasing of goods
9 and doing some of your banking online?

10 A. No.

11 Q. You ever arrange travel or airline tickets or
12 hotel reservations or anything like that online?

13 A. I have, yes.

14 Q. Would that be all of the above, like hotels
15 and airline?

16 A. Yes.

17 Q. Do you ever do things like redeem frequent
18 flyer or any type of membership rewards type points from
19 a credit card or a Hilton Honors or anything like
20 that?

21 A. No.

22 Q. But you have arranged for travel or lodging
23 reservations, those types of things, over the internet?

24 A. Yes.

25 Q. Now, tell me what prompted you to seek out a

1 quote and apply for a policy with Progressive for your
2 autos.

3 A. At the time I think we were -- I was looking
4 for a change from GEICO.

5 Q. All right. Was there anything particular
6 about why you were changing from GEICO?

7 A. Yes.

8 Q. What was that?

9 A. My daughter had been in an accident and my
10 vehicle was -- I thought was totaled, but they said it
11 was not and the repair took a year.

12 Q. Okay.

13 A. And so at that point I thought it was time for
14 us to make a change.

15 Q. That is not an uncommon event that predates a
16 change of companies. I just went through that with my
17 son. And probably because the letter I sent them had my
18 name on it twice, they decided maybe it was totaled. But
19 I've had that happen. Okay. So you just were displeased
20 with their service from a collision claim and decided you
21 would shop and get a different policy?

22 A. That's correct.

23 Q. Now, what did you do during the shopping phase
24 of the new policy in terms of did you get multiple quotes
25 or did you just decide to go one place and go with what

1 you saw there?

2 A. I got multiple quotes.

3 Q. Now, what was the method that you used to get
4 the quotes, and who did you get them from?

5 A. I used the internet, and I'm not sure whether
6 I went to a bank where they gave me a list of quotes or
7 whether I pulled up Progressive alone. I'm not sure how
8 I came upon Progressive. However, it was the better
9 quote for us at the time.

10 Q. Now, did you get some other quotes just over
11 the computer, do you think?

12 A. Yes.

13 Q. Do you remember what company Web site you went
14 to to try to get a quote?

15 A. I don't remember.

16 Q. But it was more than one?

17 A. Yes.

18 Q. And what type of thing was required for you to
19 at least get a quote and get an idea about what it might
20 cost? What information did you have to provide on these
21 internet sessions?

22 A. The number of people being insured and the DMV
23 record.

24 Q. Your driving records?

25 A. Yes.

1 Q. Did you have to plug-in, like the age, make,
2 and model of the vehicles?

3 A. Yes.

4 Q. Would you have to put in like the VINs and
5 stuff like that to get a quote or not to get a quote?

6 A. Not to get a quote.

7 Q. Just like the year, make, and model, like a
8 2003 Chevy Tahoe or whatever it was?

9 A. That's correct.

10 Q. Okay. And then the names and ages of the
11 household residents and drivers?

12 A. Yes.

13 Q. And was there four of you driving at that
14 time? Do you have two daughters?

15 A. Yes. I have three daughters, but only two
16 driving.

17 Q. Two. Okay. And so you did that with more
18 than one company other than Progressive?

19 A. Yes.

20 Q. And then after you would work your way through
21 their Web site with that, the quote procedure or whatever
22 that they required, and then you would get a ballpark
23 idea on what they would charge you for a six month
24 policy?

25 A. That's correct.

1 Q. So did you go to Progressive's Web site and
2 get a quote and do all of that before you decided to go
3 ahead and apply for and purchase the policy?

4 A. Ask that question again.

5 Q. I guess my point is, you got multiple quotes.
6 But when you went to Progressive and got a quote, did you
7 say -- was that like the third one and say, this is much
8 better, I'm going to go ahead and purchase the policy?
9 Or did you get the quotes, think about it a week or two,
10 and decide I'm going to go with Progressive?

11 A. Because I'm not sure how I did it at first,
12 I'm not sure if there was bank of insurance companies and
13 I put up my information and quotes came up or whether I
14 went to the Progressive site alone. So I'm not sure.

15 Q. When you say bank Web sites, they would
16 compare for you --

17 A. Exactly.

18 Q. You would type in what you want and it would
19 show you, what, three or four companies will do for that?

20 A. Exactly. So I think I made a choice out of a
21 bank of insurance companies and Progressive was the
22 better choice as far as the premium amount and I chose
23 that.

24 Q. And so from one Web site that compared all the
25 different quotes, you made the selection and then you

1 Q. You can remember the Web site that precisely
2 that --

3 A. There was nothing -- there was no links
4 elsewhere on that that said help or -- there was
5 description of the insurance, the towing, rental, and all
6 of that and they were yes, no, yes, no. There were no
7 other.

8 Q. You're absolutely positive there were no links
9 on that Web site to get more information?

10 A. There were no links to get more information.

11 Q. How do you remember that?

12 A. Because I'm just looking at this page in my
13 head, no links. I don't remember there being any links
14 there.

15 Q. Not remembering any links is different than
16 there not being any. And my question is, do you not
17 remember any?

18 A. I did not see any links there.

19 Q. But if they were there, you couldn't dispute
20 that. You're just saying you didn't see it when you went
21 through?

22 A. I did not see any link.

23 Q. And I will tell you, you didn't click on
24 anything to get more information than what --

25 A. There was nothing for me to click on.

1 A. No.

2 Q. -- for you to sign after you completed the
3 application online in April of 2007?

4 A. No.

5 Q. Did Progressive send you anything in the mail
6 that you were required to sign and return to Progressive?

7 A. No.

8 Q. Before this wreck that you were in in November
9 of 2007 in which you were injured, did you understand
10 what -- to what level your damages for personal injury
11 would be paid if you were in an accident if it was not
12 your fault? What was your understanding of that?

13 A. I thought whatever damage you incurred in an
14 accident, you would be paid regardless. I didn't
15 understand the insurance. I didn't. Maybe -- I mean, I
16 just didn't understand it. I didn't. My understanding
17 of insurance is you were in an accident and got hurt and
18 you were paid for whatever damages were incurred.

19 MR. YOUNG: That's all the questions I have.

20 MR. MURPHY: Nothing further.

21 (The deposition concluded at 3:52 p.m.)
22
23
24
25

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

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SC Court of Appeals

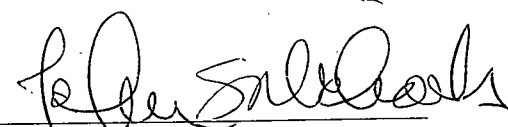
Loretta Traynum and Leonard Traynum, ... Appellants,

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Cynthia Scavens and Progressive
Direct Insurance Co., ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



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May 27, 2014

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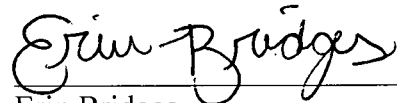
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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Record on Appeal* by mailing copies of
the same by United States Mail with first class postage prepaid to the following address:

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May 28, 2014



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