

NO. ~~24000-0~~

67693-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Janette Leding Ochoa,  
Petitioner,

v.

PROGRESSIVE CLASSIC INSURANCE CO., a foreign  
corporation; THE PROGRESSIVE CORPORATION, a foreign  
corporation and PROGRESSIVE CASUALTY INSURANCE  
COMPANY, a foreign corporation,

Respondents.

**STATEMENT OF GROUNDS FOR DIRECT REVIEW  
OF PETITIONER OCHOA**

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JANET OCHOA

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## **I. INTRODUCTION**

Janette Leding Ochoa, plaintiff in the trial court and petitioner in this Court, files this statement of grounds of direct review under RAP 4.2(a)(4).

## **II. NATURE OF CASE AND DECISION**

### **1. The Collision**

This is an underinsured motorist case (“UIM”). It arose on June 24, 1999, when Dawnell Smith failed to stop for a stop sign and T-boned Janette Ochoa’s vehicle. Ochoa suffered multiple injuries, including a fractured shoulder and broken nose.

Ms. Smith had no substantial assets but had a State Farm liability policy that covered her for \$50,000 per person. Realizing that her damages exceeded \$50,000, Ochoa also made a claim against her \$25,000 UIM coverage with Progressive. State Farm offered the liability limits. Progressive declined to buy out that settlement, but also declined to adjust any UIM claim.

The complication was over insurance on Smith’s employer, Domino’s Pizza, Eastside Express (“Domino’s Express”). Domino’s Express had its drivers, like Dawnell Smith, use their own vehicles for delivery. Domino’s Express was a covered party under a national insurance policy for Domino’s with Evanston Insurance

Company. The Evanston policy had \$1,500,000 in liability coverage for Domino's Eastside. But the drivers like Smith were not covered parties. The Evanston policy had to and did provide protection for non-owned vehicles operated by employees in the course and scope of their duties, but only to cover Domino's Eastside.

Progressive first suggested the Evanston policy protected Dawnell Smith, then later admitted to the contrary, but then claimed that because of joint and several liability the threshold for any UIM claim was the two policies combined – \$1,550,000 – even though the Evanston policy clearly did not cover Smith. Ochoa asserted from the start that her claims well exceeded \$50,000, but were not going to be anywhere near \$1,550,000.

## **2. The Litigation**

Ochoa began suit in Snohomish County against Domino's Express, Smith's employer. Unfortunately Ochoa also had to sue her former lawyer as well, because the lawyer had Ochoa sign a State Farm release for the \$50,000 limits with language that Domino's Express claimed released it as well. Because of the local lawyer defendant, the case was assigned to a visiting judge in King County, Mary Roberts.

In 2005, Progressive sought summary judgment, asking the trial judge to agree the \$1.5 million Evanston policy was part of the UIM threshold because the policy applied to Smith's car even though it would protect only Domino's Express. Therefore, Progressive argued, the Smith vehicle was not an underinsured motor vehicle under RCW 48.22.030(1) because Ochoa's damages did not exceed \$1.55 million from the Evanston policy plus the \$50,000 State Farm policy. See Progressive's Motion attached as Appendix A. Ochoa responded that the UIM floating layer was person oriented, not vehicle oriented, and that if either the driver or the employer were underinsured, UIM coverage applied. In *Finney v. Farmers*, 92 Wn.2d 748, 600 P.2d 1272 (1979), the Supreme Court examined RCW 48.22.030 which at the time required uninsured motorist coverage. Under tort law at that time both the driver and owner would virtually always be jointly and severally liable. See RCW 4.22.070 (enacted after *Finney* which made joint and several liability the exception rather than the rule). The wording of the statute, RCW 48.22.030 and its definition of an uninsured motor vehicle was not a model of clarity, just as the essentially identical definition of underinsured motor vehicle is not clear. RCW 48.22.030(1). The statute is at Appendix B. The Court in *Finney*

examined the public policies underlying the required UM coverage. The court noted that “[T]he statute was designed to protect innocent victims of uninsured negligent motorists, not to protect vehicles.” It then concluded, “[w]e are persuaded that the legislature intended to provide uninsured motorist protection where either one of the responsible parties lacks insurance coverage.” *Finney*, 92 Wn.2d at 752. The Supreme Court held that if either a responsible driver or an owner was uninsured, the vehicle was an uninsured motor vehicle. This was so even where another entity, in *Finney* it was the driver, did have adequate insurance from a liability policy applicable to the vehicle.

Ochoa further pointed to *Allstate Insurance Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). That case was expected to resolve any joint and several liability question that could have resulted from the amendment to RCW 48.22.030 to change it to underinsured, rather than uninsured coverage. In *Batacan*, one responsible defendant driver had enough insurance while the responsible driver of a second car did not. The UIM obligation was determined in UIM arbitration while the lawsuit against both parties was pending. The *Batacan* Court held the two drivers could not be jointly and severally liable because judgment could not be entered

against both – they were not amenable to judgment in the UIM arbitration. The Court expressly reserved ruling on the underinsured motorist threshold when joint and several liability claims do exist, yet the Court seemed to give guidance on the eventual outcome:

Whether liability coverages may be combined, and then set off, under the language of this policy is a question this court has yet to answer and one we need not answer today because there is no joint and several liability here "pursuant to RCW 4.22.070(1)"-- which would require actual judgment against both tortfeasors. *But see Finney v. Farmers Ins. Co.*, 92 Wash.2d 748, 751- 53, 600 P.2d 1272 (1979) (uninsured motorist coverage available where one jointly responsible person is insured but the other is not)

*Batacan*, 139 Wn.2d at 452.

The Honorable Mary Roberts expressed surprise there was no direct authority and denied the insurer's motion for summary judgment. Appendix C.

After long machinations by the employer and lawyer defendants and to avoid extensive litigation expenses that could not be recovered from either defendant, Ochoa settled her claims against Domino's Express and her previous lawyer for \$37,500, leaving only the Progressive defendants.

In the meantime the case was administratively transferred within King County to the Honorable Brian Gain. As trial against Progressive finally approached, Plaintiff moved for a summary judgment order affirmatively establishing the threshold of Progressive's UIM policy to be the \$50,000 liability limit actually applicable to Smith. That would focus the trial on three things: (1) the amount of Ochoa's injury claim; (2) a determination whether Progressive acted reasonably and in good faith when it continually claimed the UIM threshold was \$1,550,000; and (3) a determination of the amount of any additional damages Ochoa had suffered from any lack of good faith. In opposing the motion, Progressive again made its argument that since another policy applied to the vehicle (but not Smith), that no underinsured vehicle was involved. Progressive claimed that since this suit did not involve two vehicles, *Finney* and *Batacan* provided no guidance. Ochoa's Motion for partial summary judgment is Appendix D and Progressive's brief opposing is Appendix E.

On April 9, 2010, Judge Brian Gain denied Ochoa's motion. Appendix F. Ochoa moved for reconsideration. The motion also addressed concerns from oral argument and it is at Appendix G. Progressive's response is at Appendix H. Reconsideration was

denied. Appendix I. With both side's motions for summary judgment denied on a matter of statutory interpretation that is normally for the trial judge, the parties were uncertain what was to be tried. To resolve the uncertainty, Ochoa sought a pretrial conference that lead to the parties' stipulation to the basic facts of the collision, the claimed damages, and the applicable insurance on July 29, 2010. Ochoa continued to candidly stipulate her damages do not exceed \$1,550,000 but maintained that the proper UIM threshold was \$50,000. Appendix J. The Court then entered conclusions of law to the contrary – ruling that Ochoa's claims against Progressive should be dismissed because both policies are be combined for the UIM threshold that the UIM policyholder's damages must exceed. Appendix J, at Conclusion 1. The trial judge made clear appellate resolution was central to its decision. Conclusion 2.

Ochoa appeals from these conclusions of law and direction of dismissal. The notice of appeal is at Appendix K.

### **III. ISSUES PRESENTED FOR REVIEW**

Should a UIM claim exist under RCW 48.22.030 where damages exceed the amount of liability coverage protecting the driver or any other responsible entity?

Should the result be the same whether or not the responsible party's employer alleged to be jointly and severally liable has sufficient insurance applicable to the car, but the insurance does not protect the driver?

#### **IV. GROUNDS FOR DIRECT REVIEW: RAP 4.2(a)(4)**

This UIM issue is one of widespread public interest – for trial judges, the trial bar and ultimately the vast majority of the driving public. UIM coverage like other insurance is imbued with a public interest. *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 940 P.2d 252 (1997); *Britton v. Safeco Ins. Co. of America*, 104 Wn.2d 518, 707 P.2d 125 (1985); *Devany v. Farmers Ins. Co.*, 134 Wn. App. 204, 139 P.3d 352, review denied 160 Wash.2d 1011, 161 P.3d 1026 (2006).

In addition, UIM coverage must be mandatorily offered so it is very widespread in Washington. RCW 48.22.030 (2). There are a large combination of parties and differing liability insurance coverages involved in the many auto collisions that routinely occur across the state. The clients come to the offices of lawyers in every county. Trial judges everywhere are uncertain what the threshold is for these UIM cases, as is well illustrated by the two summary judgment orders by two different judges in the same county going

essentially opposite directions. Appendix C and F. Until the Supreme Court determines what the UIM threshold is under RCW 48.22.030 for jointly and severally liable parties, lawyers can feel pushed to a premature settlement a part of the tort claim, in order to destroy joint and several liability so the injured client may immediately avail themselves of UIM coverage. Such first party coverage is supposed to aid policyholders through quicker settlement or arbitration, if an arbitration provision exists, long before any trial with the defendants can occur and the current uncertainty frustrates this protection. Conversely lawyers can decide they are forced to wait until multi-party litigation is finished in order to make a UIM claim, again contrary to the desired function of the first party insurance. No matter what else, uncertainty often fosters inappropriately low settlements.

This issue has been ripe since first asserted by an insurer in *Allstate Ins. Co. v. Dejbod*, 63 Wn. App. 278, 818 P.2d 608 (1991). Eight years later the Supreme Court accepted review of this issue in *Allstate Insurance Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). However, since the initial ruling in *Batacan* was that joint and several liability of both drivers could not exist in a UIM arbitration, the UIM threshold issue was expressly reserved for

another day. *Id.* at 452 (“Whether liability coverages may be combined, and then set off, under the language of this policy is a question this court has yet to answer and one we need not answer today because there is no joint and several liability here.”)

The issue is also ultimately one of public policy since insurance is involved and the statute itself has no indisputable answer. These policy decisions are for the Supreme Court to decide.

This case squarely presents the issue of the joint and several UIM threshold in a setting where joint and several liability could not be destroyed by past or future settlement or by the procedural setting: the several liability statute specifies joint and several liability for agent and principle regardless of settlement with the agent. See RCW 4.22.070(1)(a).

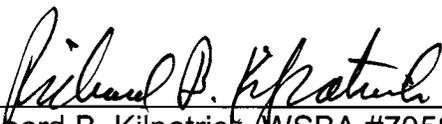
The parties are also both represented by experienced insurance counsel who can be expected to adequately brief and argue the issues, no doubt also being able to alert any potential amici that could assist the Court.

## **V. CONCLUSION**

This case is well situated to finish the work that twelve years ago this Court hoped to complete in *Batacan* in order to resolve the

issue of public policy and statewide importance. For the reasons stated above, the Court should accept direct review of this Superior Court decision.

DATED this 10<sup>th</sup> day of September, 2010.

  
Richard B. Kilpatrick, WSBA #7058  
Shannon M. Kilpatrick, WSBA #41495  
1750 -112 AVE NE #D-155  
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**CERTIFICATE OF SERVICE BY MAIL**

I, Charolette Mace, state that I am an employee of Richard B. Kilpatrick, PS, and that I mailed the foregoing **STATEMENT OF GROUNDS OF DIRECT REVIEW OF PETITIONER OCHOA** postage prepaid, via U.S. First Class mail on September 10, 2010, to the following:

Clerk of the Court  
Supreme Court of the State of WA      Original  
PO Box 40929  
Olympia, WA 98504-0929

*Counsel for Respondents:*  
Douglas Foley, Esq.      Copy  
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Vancouver, WA 98684

  
\_\_\_\_\_  
Charolette Mace  
*Paralegal*

# **APPENDIX A**

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1  
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4  
5  
6  
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF SNOHOMISH

9 JANETTE LEDING OCHOA,

10 Plaintiff,

11 v.

12 DOMINO'S PIZZA, INC., and DOMINO'S  
13 PIZZA, LLC, and EASTSIDE EXPRESS,  
14 INC., DOMINO'S PIZZA, BEN WELLS,  
individually, HAMMER & WELLS, INC.,  
15 P.S., PROGRESSIVE CLASSIC  
INSURANCE COMPANY., a foreign  
16 corporation, THE PROGRESSIVE  
CORPORATION, a foreign corporation, and  
17 PROGRESSIVE CASUALTY  
INSURANCE COMPANY, a foreign  
corporation,

18 Defendants.

No. 02 2 07712 7

DEFENDANT PROGRESSIVE'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

19 I. MOTION

20 Defendants Progressive Classic Insurance Company, The Progressive Corporation,  
21 and Progressive Casualty Insurance Company (hereinafter "Progressive"), by and through its  
22 attorneys, Douglas F. Foley of Bullivant Houser Bailey, hereby moves this Court for an  
23 Order granting Partial Summary Judgment that Progressive is entitled to a credit of 1.55  
24 million against the Plaintiff's damages, which sum constitutes the total of all liability policies  
25 applicable to Plaintiff's claim, before Progressive is liable to pay any UIM damages.  
26

1 In support of this Motion, Progressive also submits the Declaration of Patricia  
2 Baumann and attached exhibits, the Declaration of Douglas F. Foley and attached exhibits,  
3 the Court's records herein and the Memorandum below.

## 4 II. MEMORANDUM

### 5 A. Facts

6 In this case, Plaintiff's First Amended Complaint admits that on or about June 24,  
7 1999, the Plaintiff, Janette Leding Ochoa was driving a motor vehicle southbound on SR 203  
8 in Monroe, Snohomish County, Washington, when a motor vehicle operated by Dawnell  
9 Smith, "during the course of her employment with one or all of the pizza defendants,"  
10 collided with the Plaintiff. (First Amended Complaint ¶1.7. On March 21, 2001, the  
11 Plaintiff settled with Dawnell Smith and received, \$50,000, the limits of Smith's personal  
12 automobile insurance in exchange for a full release. (First Amended Complaint ¶1.9). On  
13 May 2, 2001, Dawnell Smith confirms with Progressive that she was delivering pizzas for the  
14 Monroe, Washington Domino's location at the time of the accident. (Declaration of Patricia  
15 Baumann). Progressive provided automobile coverage to Jose Ochoa which provided 25/50  
16 in UIM coverage (Declaration of Patricia Baumann; Exhibit "A" attached to Declaration of  
17 Patricia Baumann)

18 On July 26, 2004, Progressive propounded its First Set of Continuing Requests for  
19 Production of Documents to Domino's Pizza, Inc., and Domino's Pizza, LLC, and Eastside  
20 Express, Inc. Domino's Pizza. (Declaration of Douglas F. Foley; Exhibit "A" attached to  
21 Declaration of Douglas F. Foley). In response to Progressive's discovery request, on  
22 September 13, 2004, Domino's Pizza, LLC, and Eastside Express, Inc. Domino's Pizza  
23 provided a certified copy of Eastside Express, Inc.'s insurance contract with Evanston  
24 Insurance Company. (Declaration of Douglas F. Foley; Exhibit "B" attached to Declaration  
25 of Douglas F. Foley). In addition, Plaintiff has formally admitted that Ms. Smith was  
26 operating a motor vehicle that was not owned by Eastside Express, Inc. to deliver food on

1 behalf of Eastside Express, Inc. at the time of the accident. (Plaintiff's Response to Request  
2 for Admission No. 2; Exhibit "C" attached to Declaration of Douglas F. Foley).

3 On September 21, 2004, Progressive propounded its First Set of Continuing Requests  
4 for Admission to Plaintiff and Plaintiff provided her responses on September 30, 2004.  
5 (Declaration of Douglas F. Foley; Exhibit "C" attached to Declaration of Douglas F. Foley).

6  
7 **B. Summary Of Argument**

8 Washington law allows a UIM insurer to credit the full amount of the tortfeasor's  
9 liability coverage against the insured damages. The tortfeasor, Ms. Smith, has \$50,000 in  
10 personal automobile insurance. Additionally, the 1.5 million liability limits coverage from  
11 the Evanston Insurance Contract, Ms. Smith's employer, is fully available. As such,  
12 Progressive is entitled to a credit of 1.55 million against the Plaintiff's damages before being  
13 liable to pay any UIM benefits.

14  
15 **C. Memorandum Of Law**

16 **1. Standard of Review**

17 Civil Rule 56 (c) provides that summary judgment should be granted where:

18 "The pleadings \*\*\* together with the affidavits, if any show,  
19 that there is no genuine issue as to any material fact that the  
20 moving party is entitled to summary judgment as a matter of  
21 law."

22 The purpose of a Motion for Summary Judgment is to examine the sufficiency of the  
23 evidence supporting the Plaintiff's formal allegations so that unnecessary trials may be  
24 avoided where no genuine issue of material fact exists. *Island Air, Inc. v. LaBar*, 18  
25 Wn.App. 129, 136, 566 P.2d 972 (1977). A material fact is one upon which the outcome of  
26 litigation depends whole in part. *Id.* The party moving for summary judgment bear the  
initial burden of showing the absence of a genuine issue of material fact. *Young v. Key*

1 *Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

2 A non-moving party attempting to oppose summary judgment must submit competent  
3 evidence setting forth specific facts, as opposed to general conclusions, demonstrating a  
4 genuine issue of material fact. CR 56(e). If the non-moving party does not respond with  
5 evidence setting forth specific facts indicating a material issue of fact remains, summary  
6 judgment should be granted. *Id.* For the Plaintiff to avoid summary judgment here, she  
7 must, by affidavit or other extraneous material, show specific facts demonstrating that there  
8 is a genuine issue of fact for trial. *Plaisted v. Tangen*, 72 Wn.2d 259, 263, 432 P.2d 647  
9 (1967). Any affidavits permitted under CR 56(e) are evidentiary in nature. *Kirk v. Moe*, 114  
10 Wn.2d 550, 557, 789 P.2d 84 (1990). Ultimate facts or conclusions of fact are insufficient.  
11 *Id.*

12 **2. Washington Law Permits UIM Insurers To Credit The Full Amount Of**  
13 **The Tortfeasor's Liability Coverage Against The Insured's Damages.**

14 Progressive is entitled to a full set off in the full amount of all applicable liability  
15 coverages against the Plaintiff's damages before making UIM payments. According to RCW  
16 48.22.030, an underinsured motor vehicle is a vehicle by which the "\*\*\*\*sum of the limits of  
17 liability under all bodily injury or property damage liability bonds and insurance policies  
18 applicable to a covered person after an accident is less than the applicable damages which the  
19 covered person is legally entitled to recover." RCW 48.22.030.

20 Accordingly, liability insurance is deemed to be primary and UIM insurance is  
21 secondary and floats on top of all available coverage. *Dixie Insurance Co. v. Mello*, 75  
22 Wn.App. 328, 334, 877 P.2d 740 (1994), *rev. den.* 125 Wn.2d 1025, 890 P.2d 464, *citing* ,  
23 *Allstate v. Dejob*, 63 Wn.App. 278, 283-84, 818 P.2d 608 (1991). According to *Hamilton v.*  
24 *Farmers Insurance Company*, 107 Wn.2d 721, 726-27, 733 P.2d 213 (1987), "there are two  
25 conditions to underinsurance motorist coverage: (1) the 'covered person' must be legally  
26 entitled to recover damages; and (2) damages must exceed the limits of liability under all

1 other applicable insurance policies. The underinsured motorist coverage only applies when a  
2 tortfeasor's insurance coverage is insufficient to compensate the victim for his or her  
3 damages. *Id.*

4 The Plaintiff, not Progressive, has the burden of proof to demonstrate a lack of  
5 available insurance coverage. *Dixie Insurance Co. v. Mello*, 75 Wn.App. 328, 335, 877 P.2d  
6 740 (1994), *rev. den.* 125 Wn.2d 1025, 890 P.2d 464. The *Mello* court stated that "we are  
7 not alone in reaching our determination. Courts in almost all other states place the burden of  
8 demonstrating a lack of applicable insurance on the claimant. *Id.*, *citing*, John Ap.  
9 Appelman, *Insurance Law and Practice* §5087, at pg. 321-23 (1981); Alan I. Widiss,  
10 *Uninsured and Underinsured Motorist Insurance* §8.26, at pg. 419-20 (2<sup>nd</sup> ed. 1992). The  
11 tortfeasor can only overcome that burden by showing that the claimant used all "reasonable  
12 efforts" to determine if there were any other applicable liability insurance and the effort was  
13 unsuccessful. *Mello*, 75 Wn.App. at 336, *citing*, *Signal Ins. Co. v. Walden*, 10 Wn.App. 350,  
14 354, 517 P.2d 611 (1973), *rev. den.*, 83 Wn.2d 1013 (1974)

15 There are at least two insurance contracts applicable to the tortfeasor, Dawnell Smith.  
16 The first was her personal automobile insurance with State Farm, in which State Farm paid  
17 the Plaintiff the full coverage limits of \$50,000. The other applicable insurance contract was  
18 the insurance contract between Eastside Express, Inc. and Evanston Insurance Company.  
19 (Exhibit "B" attached to Declaration of Douglas F. Foley). That policy applies because (1)  
20 Ms. Smith's was working as an employee agent of the named insured, EastSide Express at  
21 the time of the loss; (2) Ms. Smith was driving a non-owned motor vehicle while used to  
22 deliver food; and (3) non-owned motor vehicles while used to deliver food are covered. That  
23 insurance contract states, in relevant part:

24 \*\*\*

25 **PART I- WORDS AND PHRASES WITH SPECIAL**  
26 **MEANING- READ THEM CAREFULLY**

\*\*\*

1           **“You” and “Your”** means the person or organization shown as  
2           the named insured in ITEM ONE of the declarations

3           \*\*\*

4           **“Auto”** means a non-owned motor vehicle, while used to  
5           deliver food on behalf of the Named Insured(s)

6           \*\*\*

7           **“Insured”** means any person or organization qualifying as an  
8           insured in the WHO IS INSURED section of the applicable  
9           insurance. Except with respect to our limit of liability, the  
10          insurance afforded applies separately to each insured who is  
11          seeking coverage or against whom a claims is made or suit is  
12          brought.

13          \*\*\*

## 14          **PART II- WHICH AUTOS ARE COVERED AUTOS**

15          The **“SCHEDULE OF COVERED LOCATIONS”** attached to  
16          the declarations shows the locations from which **auto(s)** as  
17          defined in D. above are covered.

18          \*\*\*

## 19          **PART IV- LIABILITY INSURANCE**

20          \*\*\*

### 21          **WHO IS INSURED**

22          You are an insured for any covered auto.

23          \*\*\*

24          In addition, the Declarations page states in relevant part:

25          \*\*\*

26          **NAMED INSURED: EAST SIDE EXPRESS, INC.**

          \*\*\*

**3. POLICY PERIOD: FROM APRIL 1, 1999 TO JUNE 1,**  
          **2000.**

          \*\*\*

1           **COVERAGE AND LIMIT OF LIABILITY: \$1,500,000**  
2           **COMBINED SINGLE LIMIT BODILY INJURY AND**  
3           **PROPERTY DAMAGE EACH ACCIDENT**

4           \*\*\*

5           **9. ENDORSEMENTS ATTACHED**

6           ADDITIONAL INSURED

7           SCHEDULE OF LOCATIONS

8           \*\*\*

9           ENDORSEMENT

10          \*\*\*

11          **SCHEDULE OF LOCATION**

12          \*\*\* the following location is scheduled under the captioned  
13          named insured.

14          \*\*\*

15          208 W. MAIN STREET, MONROE, WASHINGTON 98272,  
16          STORE #7050

17          \*\*\*

18          (Exhibit "B" attached to Foley Declaration)

19                It is apparent from the language contained in the insurance contract entered  
20                into between Eastside Express, Inc. and Evanston Insurance Company, that Ms. Smith's  
21                vehicle is clearly covered under this contract. First, the contract states that in terms of who is  
22                insured that "**you are an insured for any covered auto.**" "You" is defined as the named  
23                insured on the declarations page, which is Eastside Express, Inc. A "covered auto" is a "non-  
24                owned motor vehicle while used to deliver food on behalf of the named insureds."

25                Ms. Smith's vehicle was a non-owned motor vehicle (owned by Ms. Smith and not  
26                Eastside Express, Inc.) that she was using to deliver pizzas on behalf of Eastside Express,  
                  Inc. at the time of the accident. (Plaintiff's Response to Request for Admission No. 2;

1 Exhibit "C" attached to Declaration of Douglas F. Foley). Furthermore, the contract  
2 identifies the "schedule of coverage locations" for which coverage is provided. (Plaintiff's  
3 Response to Request for Admission No. 3; Exhibit "C" attached to Declaration of Douglas F.  
4 Foley). The Monroe, Washington store is listed on this schedule of locations. (Plaintiff's  
5 Response to Request for Admission No. 4; Exhibit "C" attached to Declaration of Douglas F.  
6 Foley). Additionally, Ms. Smith acknowledged to Progressive that at the time of the accident  
7 with the Plaintiff, she was delivering pizzas on behalf of Eastside Express, Inc.'s Monroe,  
8 Washington location. Furthermore, an "insured" is a person or organization that qualifies as  
9 an insured in the "who is insured" section of the contract. Eastside Express, Inc. clearly  
10 meets the definition of "who is insured" because it is an insured for any covered auto.  
11 Ms. Smith was an agent and employee of Eastside Express, Inc.

12 Therefore, the Evanston Insurance Company insurance contract clearly applies  
13 to Ms. Smith's vehicle. As such, the policy provides for 1.5 million in liability and personal  
14 property insurance. Thus, including the \$50,000 liability insurance that Ms. Smith had with  
15 her personal automobile insurer, State Farm, and the 1.5 million in liability coverage form  
16 the Evanston Insurance Company Insurance Contract, there is a total of 1.55 million in  
17 liability coverage applicable to the tortfeasor, Ms. Smith. Progressive is therefore entitled to  
18 a full credit of 1.55 million against the Plaintiff's damages before paying any UIM damages.

19 **3. Liability Coverage Should Be Construed Broadly To Favor Coverage**

20 The Evanston Insurance Company contract clearly provides coverage for Ms. Smith's  
21 vehicle. However, even if the court was to consider the contract to be somehow  
22 "ambiguous," the insurance contract should be construed broadly to provide coverage for  
23 Ms. Smith's vehicle.

24 Construction or interpretation of insurance contracts is a question of law.  
25 *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). The court  
26 will examine the insurance contract as a whole when construing or interpreting the insurance

1 contract. *Riley v. Viking Insurance Co.*, 46 Wn.App. 828, 829, 733 P.2d 556 , *rev. den.*, 108  
2 Wn.2d 1015 (1987), *citing*, *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106  
3 Wn.2d 901, 907, 726 P.2d 439 (1986). When interpreting an insurance contract it should be  
4 construed in a way that it would understood by an average insurance purchaser. *Emerson*,  
5 102 Wn.2d at 480, 687 P.2d 1139, *citing*, *Schroeder v. Royal Globe Inc.*, 99 Wn.2d 65, 68,  
6 659 P.2d (1983), modified on other grounds, 101 Wn.2d 830, 683 P.2d 186 (1984). In  
7 addition, insurance contracts should be given a reasonable, sensible, and fair interpretation  
8 consistent with the intent of the parties. *Thompson v. Grange Ind. Assn.*, 34 Wn.App. 151,  
9 660 P.2d 307, *rev. den.* 99 Wn.2d 1011 (1983).

10 In addition, Washington courts have consistently held that if an ambiguity  
11 exists in the insurance contract, the ambiguity must be construed in favor of the insured, even  
12 if the insurer intended another meaning. *Riley*, 46 Wn.App. at 830, 733 P.2d 556, *citing*, *E-Z*  
13 *Loader*, 106 Wn.2d at 907, 726 P.2d 439. Furthermore, the purpose of insurance is to  
14 provide coverage and interpretation of the insurance contracts should be in such way as to  
15 render the policy operative, rather than inoperative. *Schroeder*, 99 Wn.2d at 68, 659 P.2d  
16 509, modified on other grounds, 101 Wn.2d 830, 683 P.2d 186, *citing*, *Scales v. Skagit Cy.*  
17 *Med. Bur.*, 6 Wn.App. 68, 491 P.2d 1338 (1971).

18 More specifically, coverages contained in insurance contracts are to be  
19 construed liberally to provide coverage. *Riley*, 46 Wn.App. at 829, 733 P.2d 556, *rev. den.*,  
20 108 Wn.2d 1015, *citing*, *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wn.App. 32, 627 P.2d 152, *rev.*  
21 *den.*, 95 Wn.2d 1032 (1981). On the other hand, exclusionary clauses are to be strictly  
22 construed against the insurer. *Schroeder*, 99 Wn.2d at 68, 659 P.2d 509, modified on other  
23 grounds, 101 Wn.2d 830, 683 P.2d 186.

24 It is apparent from reading the entire Evanston Insurance Contract as a whole, that the  
25 intent of the contract was to provide coverage to vehicles that were delivering pizzas on  
26 behalf of any of the Eastside Express Inc., locations listed in the endorsements. Any other

1 interpretation would go against the numerous Washington cases that have held that insurance  
2 contracts should be interpreted by giving the contracts a fair and reasonable construction,  
3 consistent with the intent of the parties. If an ambiguity exists, the ambiguity should be  
4 construed against the insurer and in favor of the insured.

5 As such, the Evanston Insurance Contract provides coverage for Ms. Smith's vehicle,  
6 which is a "non-owned motor vehicle, while used to deliver food on behalf of" Eastside  
7 Express, Inc.

8 **III. CONCLUSION**

9 For the reasons set forth above, Progressive is entitled to summary judgment stating  
10 that it is entitled to a credit of 1.55 million against the Plaintiff's damages before being liable  
11 to pay any UIM benefits.

12  
13 DATED this 15<sup>th</sup> day of December, 2004.

14 BULLIVANT HOUSER BAILEY PC

15  
16 By   
17 Douglas F. Foley, WSBA #13119  
Katie D. Russell, WSBA #32867

18 Attorneys for Defendant Progressive  
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## **APPENDIX B**

West's RCWA **48.22.030**West's Revised Code of Washington Annotated CurrentnessTitle 48. Insurance (Refs & Annos)Chapter 48.22. Casualty Insurance (Refs & Annos)**48.22.030. Underinsured, hit-and-run, phantom vehicle coverage to be provided-- Purpose--Definitions--Exceptions--Conditions--Deductibles--Information on motorcycle or motor-driven cycle coverage--Intended victims**

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or

her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

#### CREDIT(S)

[2009 c 549 § 7106, eff. July 26, 2009; 2007 c 80 § 14, eff. July 22, 2007. Prior: 2006 c 187 § 1, eff. June 7, 2006; 2006 c 110 § 1, eff. June 7, 2006; 2006 c 25 § 17, eff. June 7, 2006; 2004 c 90 § 1, eff. June 10, 2004; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]

#### HISTORICAL AND STATUTORY NOTES

**Severability--1983 c 182:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 182 § 3.]

**Effective date--1981 c 150:** "This act shall take effect on September 1, 1981." [1981 c 150 § 3.]

# **APPENDIX C**

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**FILED**

MAY 17 2005

PAM L. DANIELS  
SNOHOMISH COUNTY CLERK  
EX-OFFICIO CLERK OF COURT

Visiting Judge Mary Roberts

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

DOMINO'S PIZZA, INC., and DOMINO'S  
PIZZA, LLC, and EASTSIDE EXPRESS,  
INC. DOMINO'S PIZZA, BEN WELLS,  
individually, HAMMER & WELLS, INC.,  
P.S., PROGRESSIVE CLASSIC  
INSURANCE CO., a foreign corporation,  
THE PROGRESSIVE CORPORATION, a  
foreign corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

ORDER REGARDING DEFENDANT  
PROGRESSIVE'S MOTION FOR  
SUMMARY JUDGMENT

THIS MATTER, having come on for hearing before the undersigned Judge  
of the above-entitled Court on April 15, 2005, and the Court having considered

ORDER REGARDING DEFENDANT PROGRESSIVE'S MOTION  
FOR SUMMARY JUDGMENT - ORDER REGARDING  
DEFENDANT PROGRESSIVE'S MOTION FOR SUMMARY  
JUDGMENT Page 1 of 2

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**Richard B. Kilpatrick, P.S.**  
9 Lake Bellevue Drive, #210  
Bellevue, WA 98005  
(425) 453-8161  
Fax: (425) 646-7769  
dickkilpat@earthlink.net

**ORIGINAL**

1 the records and files herein, including:

- 2 1. Progressive's Motion for Partial Summary Judgment
- 3 2. Plaintiff's Opposition to Progressive's Motion for Partial Summary Judgment, with attachments
- 4 3. Declaration of Richard B. Kilpatrick
- 5 4. Defendants Wells Joinder in Opposition
- 6 5. Progressive's Reply Brief

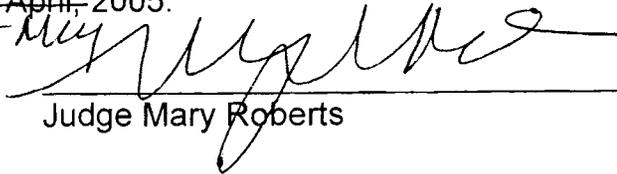
7 the Court having heard the argument of counsel, and the Court having been fully  
8 advised in the premises, IT IS, THEREFORE, HEREBY

9 ORDERED that Progressive's Motion for Summary Judgment is denied.

10 *This order shall replace the one signed on*  
*April 15, 2005 but inadvertently filed in*  
*the wrong court*

11 DONE IN COURT this 15<sup>th</sup> day of April, 2005.

12 *It is by order of*

13   
Judge Mary Roberts

14  
15 Presented by:

16   
Richard B. Kilpatrick

17 Attorney for Plaintiff  
18 WSBA #7058

# **APPENDIX D**

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Visiting Judge Brian Gain  
Hearing Date: April 2, 2010  
Hearing Time: 11:00 am  
*With Oral Argument*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA,

Plaintiff,

vs.

DOMINO'S PIZZA, INC., and DOMINO'S  
PIZZA, LLC, and EASTSIDE EXPRESS,  
INC. DOMINO'S PIZZA, BEN WELLS,  
individually, HAMMER & WELLS, INC.,  
P.S., PROGRESSIVE CLASSIC  
INSURANCE CO., a foreign corporation,  
THE PROGRESSIVE CORPORATION, a  
foreign corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT ESTABLISHING  
UNDERINSURED MOTORIST  
COVERAGE

**I. INTRODUCTION**

This should have been a simple case. In 1999, plaintiff Janette Ochoa was hit by, Dawnell Smith, a Domino's pizza delivery driver. The driver was not covered by her employer's policy. The driver's individual liability policy did not cover all Ochoa's damages,

1 thus making Smith underinsured. Ochoa recovered the driver's liability limits and turned to  
2 her own company, defendant Progressive Classic Insurance Company (Progressive) for  
3 her underinsured motorist (UIM) benefits. For years, Progressive has disingenuously  
4 claimed that UIM policy does not kick in until Ochoa recovers all of Smith's individual limits  
5 and Smith's employer's limits, despite Washington's clear policy refusing to pool different  
6 tortfeasors' liability limits before a UIM claim begins. Progressive has maintained this  
7 position despite having its summary judgment motion on the issue denied. Accordingly,  
8 Ochoa respectfully requests that this Court find that Progressive's UIM policy covers any  
9 damages beyond Smith's personal policy limits of \$50,000. Trial would then proceed to  
10 determine Ochoa's damages as a result of the collision, establish Progressive's bad faith  
11 and violation of the Consumer Protection Act (CPA), and assess the damages from the bad  
12 faith and violation of the CPA.

## 13 II. FACTUAL AND PROCEDURAL BACKGROUND

14 Janette Ochoa (then Janette Leding), was driving through Snohomish, Washington  
15 on June 24, 1999, when Dawnell Smith blew through a stop sign and t-boned Ochoa's  
16 vehicle. See Ex. 1 to Plf's Br. in Opp to Progressive's MSJ.<sup>1</sup> Smith was cited for failure to  
17 yield. *Id.* The collision was significant, and Ochoa suffered multiple injuries, including  
18 shoulder impingement syndrome that required surgery, a broken nose that required  
19 surgery, and back problems. Her medical special damages total over \$31,000. She has  
20 some permanent difficulties.

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22  
23 <sup>1</sup> Copies of any exhibits or pleadings previously filed in this case will be attached to this Court's working  
papers for easy reference.

1 Smith was driving her car as a Domino's pizza delivery driver, returning to the  
2 Snohomish Domino's, which was incorporated as Eastside Express, Inc. Eastside Express  
3 was insured with Evanston Insurance Company for \$1.5 million in liability coverage. See  
4 Ex. 3 to Plf's Br. in Opp to Progressive's MSJ. Eastside Express was the only named  
5 insured in its insurance policy – none of the delivery drivers, including Smith, were named  
6 in the policy.<sup>2</sup> *Id.* But Smith did have coverage under her State Farm personal auto policy  
7 for \$50,000. Because Ochoa's claim was worth significantly more than \$50,000, State  
8 Farm offered its \$50,000 policy limits in early 2001.

9 Ochoa was personally insured with Progressive, and her policy included  
10 underinsured motorist (UIM) coverage of \$25,000. See Ex. A to Baumann Decl in Supp of  
11 Progressive's MSJ, dated December 15, 2004. Prior to retaining this office, Ochoa's  
12 previous attorney, Ben Wells, notified Progressive on February 26, 2001, that Ochoa  
13 intended to accept the \$50,000 policy limits offer from State Farm and gave Progressive  
14 the option to "buy out" State Farm's position. Exhibit 1<sup>3</sup>. That letter also formally notified  
15 Progressive that Ochoa was filing a UIM claim. *Id.* Progressive declined the option to "buy  
16 out" State Farm's position. Exhibit 2. In early April 2001, Progressive wrote to Mr. Wells  
17 stating that it could not consider Ochoa's UIM claim "until we have completed our  
18 investigation regarding the available coverage." Exhibit 3. Progressive did not explain what  
19 its investigation entailed or how long it would take to complete. Mr. Wells withdrew from  
20 representation in mid-2001.

21 \_\_\_\_\_  
22 <sup>2</sup> For a more in-depth explanation of the Eastside Express policy and who it covers, see Section III. B. below.

23 <sup>3</sup> Unless otherwise noted, all exhibits are to the Declaration of Richard Kilpatrick in Support of Plaintiff's  
24 Motion for Partial Summary Judgment.

1 In early 2002, this office was retained to represent Ochoa. On February 19, 2002,  
2 this office wrote to Progressive to confirm that Progressive's position was that Ochoa had  
3 to pursue Domino's/Eastside Express instead of a UIM claim and explain why that position  
4 was not consistent with Washington law. Exhibit 4. Progressive did not respond for over  
5 three months, and when it finally did, it indicated only that it was attempting to track down a  
6 copy of the Domino's insurance policy. Exhibit 5.

7 On June 21, 2002, with the three year anniversary of her collision just a few days  
8 away, Ochoa filed suit against Domino's, Eastside Express, and her former attorney  
9 Hammer & Wells.<sup>4</sup> On June 24, 2002, Progressive wrote to this office, stating that because  
10 Domino's was vicariously liable for Smith's actions, there was no UIM coverage until Ochoa  
11 first exhausted both Smith's State Farm \$50,000 limits and Eastside Express's limits,  
12 erroneously referred to in the letter as \$500,000. Exhibit 6. Three days later, Progressive  
13 received an email from Eastside Express's insurer stating that while Eastside Express was  
14 vicariously liable, the delivery driver was not a named insured. Exhibit 7.

15 Despite several requests from this office to Progressive for a copy of the Eastside  
16 Express policy demonstrating that Smith was covered, it was never provided. Finally, after  
17 receiving a copy of the policy directly from Eastside Express, plaintiff's counsel wrote to  
18 Progressive in November 2002, five months after Progressive had refused the UIM claim,  
19 enclosed a copy of the Eastside Express's policy, and demanded immediate processing of  
20  
21

22 <sup>4</sup> Wells had to be included because the release he had the client sign for the driver's limits, ostensibly also  
23 released every other entity like the employer. Ochoa reached a settlement with Domino's, Eastside Express  
24 and Wells & Hammer, all of whom were dismissed in January 2006. Following the dismissal, only the  
25 Progressive defendants remain.

1 Ochoa's UIM claim. Ex. 2 to Plf's Opp to Progressive's MSJ. Despite its previous claims  
2 that the Eastside Express policy applied to the driver Smith, which was the basis for  
3 Progressive's earlier denial of Ochoa's UIM claim, Progressive wrote back, stating that it  
4 had never actually received a copy of the Domino's policy and that it would get back to  
5 plaintiff's counsel by the end of the week about the UIM claim. Exhibit 8.

6 On December 13, 2002, Progressive again refused Ochoa's UIM claim, stating that  
7 the Evanston policy limits must be exhausted first. Exhibit 9. This time, Progressive took  
8 the position that even though Smith was not a named insured, the Eastside Express policy  
9 provided coverage because the employer was covered when Smith was driving a non-  
10 owned motor vehicle. *Id.* In June 2004, the complaint was amended to add the Progressive  
11 defendants, along with allegations of insurance bad faith and breach of the CPA for  
12 Progressive's conduct in mishandling Ochoa's claim.

13 In December 2004, the Progressive defendants moved for summary judgment,  
14 arguing that because of joint and several liability the \$1.5 million Eastside Express limits  
15 were to be added to the driver's limits. On April 15, 2005, Judge Mary Roberts denied  
16 Progressive's motion. She determined Washington law looks separately to each  
17 responsible entity to see if it was underinsured, and the insurer cannot add up a  
18 combination of two tortfeasors' limits to avoid a UIM claim, as articulated by *Finney v.*  
19 *Farmers Insurance Co.*, 92 Wn.2d 748, 600 P.2d 1272 (1979), and reinforced by *Allstate*  
20 *Insurance Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). Plaintiff did not have time  
21 to make a counter-motion then, so as trial approaches she now moves for summary  
22 judgment and respectfully requests that this Court find that UIM coverage existed under  
23

1 Ochoa's Progressive policy for any damages caused by the 1999 collision above Smith's  
2 limits of \$50,000.

### 3 **III. ARGUMENT**

#### 4 **A. Summary**

5 Under Eastside Express's insurance policy with Evanston Insurance Company,  
6 Eastside Express was the only named insured and the only covered entity. Smith was not a  
7 named insured under that policy. Therefore, the Evanston policy covered only Eastside  
8 Express's liability, including its liability for the actions of its employee, Smith, in a non-  
9 owned vehicle. Smith was not covered individually by the Eastside Express policy. Had  
10 judgment been taken against Ms. Smith only the original \$50,000 personal policy would  
11 have paid. Further, even where there is actual coverage, unlike here, another insurer's  
12 refusal to cover and pay triggers UIM coverage under the Progressive policy, as well.

13 Because Smith was not covered by the Evanston policy, Progressive cannot pool  
14 the coverage of Eastside Express, a separate tortfeasor, to defeat UIM coverage. The  
15 pooling of the insurance limits of multiple tortfeasors is not allowed because Washington  
16 law looks to each individual tortfeasor for his or her coverage. Here, Smith was individually  
17 covered only by her State Farm \$50,000 personal policy, making her an underinsured  
18 motorist under state law. Thus, Progressive's UIM coverage kicks in after Smith's \$50,000  
19 policy, which has already been exhausted. Accordingly, Progressive should have agreed to  
20 pay for any damages above \$50,000 and has wrongfully denied Ochoa her UIM benefits for  
21 approximately the last eight years.

1           **B.     Eastside Express's Policy Covered only Eastside Express and did not**  
2           **Cover Smith.**

3           Everyone agrees that Smith's personal State Farm policy with \$50,000 limits  
4           protected Smith. Progressive has also disingenuously argued that the Evanston Insurance  
5           Company policy, purchased by Eastside Express, protected Smith. In its effort to make it  
6           appear that the Evanston policy protected Smith, Progressive continually mixes up the  
7           concepts of who is an insured with the question of what risks and vehicles will be covered  
8           for that insured. Here, by its plain language laid out below, the Evanston policy covered  
9           only the liability of Eastside Express, including its liability for its employees and non-owned  
10          vehicles, but there was no individual coverage for employees not named as insureds.

11          The simple basic fact of insurance law is that only the people or groups of people  
12          stated to be insureds are protected for their liability. *See Farmers Ins. Co. of Washington v.*  
13          *Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976) (noting that courts must interpret insurance  
14          contracts according to the intent of the parties and cannot impose obligations not in the  
15          insurance contract to begin with). An insurer will not pay judgments against others who are  
16          not insureds.

17          Insurance policies, like Eastside Express's Evanston policy, first identify who is  
18          covered as an insured. "Who is an insured" is a separate limitation on the coverage of  
19          every liability policy, it appears in a separate section of the policy, and is not modified by  
20          the other parts of the policy that identify the risks for which those insureds will be protected.  
21          Then for whatever insureds exist, the policy also identifies what risks will be covered.  
22          Regardless of which risks are taken on or rejected by the insurer, that insurer still covers  
23          only those risks with respect to the liability of the designated insureds.

1           Despite the tortured logic of Progressive, who is covered by the Evanston policy for  
2 this accident is very simple: only Eastside Express. On page 1, Part IV, the Evanston policy  
3 is very clear:

4           A. We will pay:

- 5                   1.     We will pay all sums the insured legally must pay...caused by an  
6                            accident and resulting from the ownership, maintenance or use of a  
7                            covered auto...

8           Ex. 3 to Plf's Opp to Progressive's MSJ (emphasis added). In other words, even a person  
9 using a covered auto must also be "the insured" before Evanston agreed to pay. On page  
10 2, the policy addressed who is an insured, separately in section D. It is creatively titled,  
11 "Who is an insured." The policy says: "You are an insured for any covered auto." *Id.* The  
12 term "You" was expressly defined on page 1 as "The person or organization shown as the  
13 named insured in ITEM ONE of the Declarations." *Id.* The organization shown in ITEM  
14 ONE of the Declarations page was --"Named insured: Eastside Express, Inc." *Id.* There are  
15 no other names.

16           Therefore, substituting the references creates: "D. Who is an insured: Eastside  
17 Express, Inc. is an insured for any covered autos." There are no general omnibus or  
18 additional insured clauses in this particular policy.

19           The Court may be familiar with the idea that many policies have "additional insured"  
20 clauses that create other groups of insureds beyond the named insured. Most family auto  
21 policies, for example, extend coverage to any person driving the covered auto with the  
22 named insured's permission. Those people are additional insureds, but only because the  
23 policy defines them as such. This commercial auto policy need not and did not have such  
24 additional insured definitions.

1 Many corporate insurance policies have additional insured coverages that make  
2 employees acting in the scope of their employment additional insureds. For example, the  
3 AIG insurance policy for the national Domino's has additional insured coverages. By a  
4 separate endorsement, that policy added "Employees as insureds while driving Non-owned  
5 vehicles" and even amended its "Who is an insured" provision to state "Owners of Non-  
6 owned autos are included as insureds." See Ex. 4 to Plf's Opp to Progressive's MSJ. Had  
7 Smith worked for the national Domino's, she would have been an insured under the AIG  
8 policy. But, Smith did not work for it, she worked for Eastside Express, Inc. The policy her  
9 employer paid for did not include such an additional insured endorsement, so we are left  
10 with the basic insuring language that simply does not extend coverage to drivers like Smith.

11 Progressive makes much of the fact that the vehicles covered by the Evanston  
12 policy include non-owned automobiles. But coverage for those non-owned automobiles  
13 extends that risk only for the named insured, Eastside Express, and does not change that  
14 Eastside Express is the only insured covered for those risks. The inclusion of non-owned  
15 cars means that Evanston will cover the claims made against Eastside Express (but not  
16 Smith) and it will have to pay any judgment entered against Eastside Express (but not  
17 Smith). Had the policy not extended its risks to non-owned cars, Evanston would not have  
18 to pay judgments against Eastside Express either.

19 Regardless, Evanston's policy promised to pay for only the insureds. Thus if Smith  
20 had not settled with Ochoa and was made a defendant in this suit, Evanston would not  
21 have paid any judgment against her. That \$1.5 million coverage does not protect the  
22 tortfeasor Smith individually; it protects Eastside Express and any liability it might have for  
23 the actions of its employees, including Smith.

1           Worse for Progressive, its policy language makes it clear that liability coverage  
2 denial is the same as no insurance, triggering UIM coverage. The Progressive policy  
3 defines an “Underinsured motor vehicle” as follows:

4           3.       “Underinsured motor vehicle” means a land motor vehicle or trailer of any  
5           \*\*\*\* type:

- 6                   b.       to which a liability bond or policy applies at the time of the accident, but  
7                            the bonding or insuring company:  
8                            i. denies coverage; or  
9                            ii. is or becomes insolvent.

10          Ex. A to Baumann Decl. in Supp of Progressive’s MSJ, at 21 (emphasis added). So, even if  
11 there was some good argument the Evanston policy should have extended coverage  
12 individually to the driver Smith, Evanston would have denied coverage based on the policy  
13 language, a decision that should have triggered UIM coverage under the Progressive  
14 policy.

15          Consequently, even if Progressive’s argument that Smith was an insured under the  
16 Evanston policy was somehow a winner, it was not supposed put the UIM insured in the  
17 middle of a coverage dispute between two insurers about the liability coverage. Rather  
18 Progressive was supposed to adjust the UIM claim, and then fight out the coverage battle  
19 with the liability company to get its money back. A UIM carrier is statutorily subrogated to  
20 recovery rights of its insureds in such instances. RCW 4.22.040.

21          In short, the Evanston policy clearly did not cover Smith individually. Even if  
22 somehow Progressive had a reasonable belief that there was coverage under the Evanston  
23 policy, Evanston would have denied coverage to Smith, which under the terms of the  
24 Progressive policy meant that Smith was an underinsured motorist, triggering Ochoa’s UIM  
25 coverage.

1           **C.     Despite Progressive’s Claims, Washington Law does not Allow Pooled**  
2           **Liability Coverage of Different Tortfeasors for UIM Purposes Because**  
3           **UIM Coverage is Person Oriented.**

4           The Washington courts have interpreted the underinsured motorist statute, RCW  
5 48.22.030, and the uninsured motorist statute before it, as focusing on the individual  
6 tortfeasor, not the vehicle. RCW 48.22.030(1) defines underinsured motor vehicles as a  
7 motor vehicle with no applicable liability insurance policy or the applicable liability policy is  
8 less than the damages than the injured party is legally entitled to recover. RCW  
9 48.22.030(2) provides that:

10           “No new policy ...shall be issued...unless coverage is provided...for the protection  
11 of persons insured thereunder who are legally entitled to recover damages from  
12 owners, *or* operators of underinsured motor vehicles...”

13 (Emphasis added). While not grammatically beautiful, this disjunctive “or” language places  
14 the focus on whether the liability coverage exceeds all of the damage an individual  
15 tortfeasor would owe, and that has been the consistent approach of the case law. For  
16 example, in *Mutual of Enumclaw Insurance Co. v. Grimstad-Hardy*, 71 Wn. App. 226, 203,  
17 857 P.2d 1064 (1993), Division 1 stated:

18           Automobile insurers must offer UIM coverage as provided in RCW 48.22.030. That  
19 statute was enacted by the Legislature in order to assure full compensation, within  
20 UIM policy limits, for insured parties injured by underinsured or uninsured  
21 tortfeasors. The Legislature sought to allow the insured to collect the same amount  
22 of damages under underinsured motorist coverage as if the responsible party had  
23 been insured with liability insurance with limits equal to the insured's UIM policy.

24 (emphasis added) (internal citations omitted); *see also Hamilton v. Farmers Ins. Co. of*  
25 *Washington*, 107 Wn.2d 721, 726, 733 P.2d 213 (1987) (“[t]he underinsured motorist  
coverage statute expressly requires underinsured motorist coverage to apply whenever a  
tortfeasor's insurance coverage is insufficient to compensate the victim for all damages

1 suffered”) (emphasis added). Thus the focus of Washington UIM law is squarely on each  
2 tortfeasor separately, whether the tortfeasor is the operator or the owner of the car.

3 The Washington Supreme Court also repudiated a request to “pool” coverage  
4 among two tortfeasors to reduce UIM coverage in *Allstate v. Batacan*, 139 Wn.2d 443, 986  
5 P.2d 823 (1999). In that case a truck had stalled in the middle of a highway. Batacan was  
6 passing when a third car, driven by Cantrill, struck the stalled truck pushing it into  
7 Batacans. The stalled driver, Kim, had no coverage, but the Cantrills had \$300,000.  
8 Batacan had an Allstate policy with UIM coverage. Allstate argued there was no UIM  
9 coverage for this accident because even though Kim had no coverage, the Cantrills’  
10 \$300,000 coverage was going to be available to Batacan. The Supreme Court rejected that  
11 approach:

12 “A UIM insurer can subtract a liability policy pursuant to RCW 48.22.030(1) if the  
13 person insured by the liability policy is liable to the injured claimant....” But Kim had  
14 no liability policy, and therefore there is nothing to subtract from Allstate’s obligation  
15 to compensate the Batacans for the damages Kim caused.

16 *Id.* at 451 (emphasis added) (quoting *Allstate Ins. Co. v. Dejbod*, 63 Wn. App. 278, 285,  
17 818 P.2d 608 (1991)). In other words, just because the Cantrills had coverage does not  
18 affect the fact that Kim had no coverage. Kim was still an uninsured driver and therefore,  
19 Allstate’s uninsured motorist coverage was triggered.

20 The same exact effect exists here. Just because the car was fully insured as to  
21 Eastside Express does not change the fact that for Smith, the operator, the car is  
22 underinsured. As the cases set out, the statute requires UIM coverage “whenever a  
23 tortfeasor’s insurance coverage is insufficient to compensate the victim for all damages.”

1 *Hamilton*, 107 Wn.2d at 726 (emphasis added). Neither the statute nor the cases say  
2 “whenever the sum of all insurance from every tortfeasor” is less than the damages.

3 Progressive tries to suggest that where joint and several liability exist, two liability  
4 policies must be pooled. That distinction has no basis or support in the case law and in fact  
5 the opposite is likely true. *Batacan* involved tortfeasors who were not all defendants so they  
6 were not jointly and severally liable, unlike the case here. As a result, the *Batacan* Court  
7 refused to address the joint and several issue. However, the Supreme Court also gave  
8 clear guidance to trial courts as to how such an argument should be dealt with if actually  
9 made. After reserving the question, the court indicated it would treat joint and several  
10 defendants in the same manner: “*But see Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 600  
11 P.2d 1272 (1979) (uninsured motorist coverage available where one jointly responsible  
12 person is insured but the other is not).” *Batacan*, 139 Wn.2d at 452.

13 *Finney* explicitly dealt with this very argument about insurance on joint and several  
14 defendants in the days of uninsured motorist (UM) coverage. In *Finney*, Farmers argued  
15 that the plaintiffs could recover under the UM policy only if both the owner and operator  
16 were uninsured. 92 Wn.2d at 751. The Washington Supreme Court rejected that pooling  
17 approach, holding that UM coverage kicks in when either the owner or operator of the  
18 vehicle was uninsured. *Id.* It noted that the purpose of the UM statute was to allow an  
19 injured party to recover those damages which would have been received had each  
20 responsible party been properly insured. *Id.* (citing *Touchette v. Northwestern Mut. Ins. Co.*,  
21 80 Wn.2d 327, 494 P.2d 479 (1972)). As a result, “[t]he insurance carrier which issued the  
22 policy stands, therefore, in the shoes of the uninsured motorist to the extent of the carrier's  
23 policy limits. The statute was designed to protect innocent victims of uninsured negligent

1 motorists, not to protect vehicles." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Bafus*, 77  
2 Wn.2d 720, 724, 466 P.2d 159, 161 (1970) & *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86  
3 Wn.2d 264, 543 P.2d 634 (1975)).<sup>5</sup>

4 The same logic in *Batacan* and *Finney* applies in the UIM context here. Janette  
5 Ochoa is exactly the type of person intended to be protected by the UIM statute – she was  
6 an injured person hurt by an underinsured motorist. If the driver Smith had a second layer  
7 of liability coverage, this claim would have long been over. Because Washington law looks  
8 to the individual tortfeasor, Eastside Express's policy cannot be pooled to prevent  
9 Progressive's UIM coverage from kicking in.

#### 10 IV. CONCLUSION

11 The Evanston policy did not protect the driver, Dawnell Smith. Even if it was  
12 supposed to, Evanston has uniformly taken the position that the policy does not extend to  
13 drivers and under Progressive's policy that also renders a vehicle underinsured. The  
14 liability coverage of Evanston, even though it protected Eastside Express regarding its  
15 exposure from that car, is irrelevant to the liability coverage available to Smith. The focus of  
16 our UIM law is to give the injured person the same coverage as she would have received

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17  
18 <sup>5</sup> Some insurers may create policy language requiring the coverage be triggered on a per car,  
19 "pooled" basis rather than per tortfeasor announced by our courts. Such clauses change nothing because the  
20 Supreme Court has repeatedly said clauses restricting or changing the kind of UIM coverage offered are  
21 against public policy and are void:

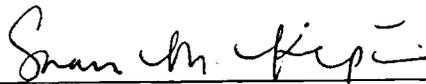
22 This also means that where the underinsured motorist endorsement does not provide  
23 protection to the extent mandated by the underinsured motorist statute, the offending portion  
24 of the policy is void and unenforceable. In other words, the Legislature has mandated a  
25 certain amount and kind of coverage; the insurer cannot avoid that obligation by a policy  
clause which has not been authorized by the Legislature.

26 *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 727, 733 P.2d 213 (1987) (footnote omitted) (citing  
27 *Britton v. Safeco Ins. Co. of Am.*, 104 Wash.2d 518, 531, 707 P.2d 125 (1985)).

1 had that tortfeasor carried as much additional liability insurance as the UIM policyholder  
2 did.

3 Either way Smith is underinsured for all amounts above \$50,000, which is the  
4 amount of her personal coverage. This Court should grant Ochoa's motion for summary  
5 judgment and find that there is UIM coverage for all damages in excess of \$50,000. The  
6 trial can move forward on how much Ochoa's damages exceed that amount, whether  
7 Progressive acted unreasonably in taking the coverage positions it did, what damages  
8 including aggravation and distress were caused by the failure to exercise good faith and  
9 from any breach of the Consumer Protection Act.

10 DATED: March 5, 2010

11  
12 

13 Richard Kilpatrick, WSBA #7058  
14 Shannon M. Kilpatrick, WSBA #41495  
15 Attorney for Plaintiff

# **APPENDIX E**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA,

Plaintiff,

v.

DOMINO'S PIZZA, INC., and DOMINO'S  
PIZZA, LLC, and EASTSIDE EXPRESS,  
INC., DOMINO'S PIZZA, BEN WELLS,  
individually, HAMMER & WELLS, INC.,  
P.S., PROGRESSIVE CLASSIC  
INSURANCE COMPANY., a foreign  
corporation, THE PROGRESSIVE  
CORPORATION, a foreign corporation, and  
PROGRESSIVE CASUALTY  
INSURANCE COMPANY, a foreign  
corporation,

Defendants.

No. 02 2 07712 7

DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

Defendant Progressive Classic Insurance Company (hereinafter "Progressive"), by  
and through Douglas F. Foley of Douglas Foley & Associates, PLLC, hereby files the  
following Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

In support of this Memorandum, Progressive also submits the Declaration of Patricia  
Baumann and attached exhibits, the Declaration of Douglas F. Foley and attached exhibits  
(previously filed with the Court), the Court's records herein and the Memorandum below.

These Declarations are part of the Court file as they were filed in December of 2004 in

1 support of Defendant Progressive's Motion for Partial Summary Judgment and are  
2 incorporated herein by reference. Progressive further submits the Declaration of Jerry  
3 Searles (filed herewith).

4 Progressive requests that the Court deny Plaintiff's Motion for Summary Judgment.  
5 Progressive is entitled to a credit of \$1,550,000 against the Plaintiff's damages, which sum  
6 constitutes the total of all liability policies applicable to Plaintiff's claim, before Progressive  
7 is liable to pay *any* UIM damages.

8 Washington law allows a UIM insurer to credit the full amount of the tortfeasor's  
9 liability coverage against the insured damages. The tortfeasor, Ms. Smith, has \$50,000 in  
10 personal automobile insurance. Additionally, the \$1.5 million liability limits coverage from  
11 the Evanston Insurance Contract, Ms. Smith's employer, is fully available. As such,  
12 Progressive is entitled to a credit of \$1.55 million against the Plaintiff's damages before  
13 being liable to pay any UIM benefits.

14 RCW 48.22.030 defines a *motor vehicle* as underinsured – not an individual, as the  
15 statute in pertinent part states:

16 **"(1) *Underinsured motor vehicle*" means a motor vehicle**  
17 ***with respect to the ownership, maintenance, or use of which***  
18 ***either no bodily injury or property damage liability bond or***  
19 ***insurance policy applies*** at the time of an accident, or with  
20 respect to which the sum of the limits of liability under all  
21 bodily injury or property damage liability bonds and insurance  
22 policies applicable to a covered person after an accident is less  
23 than the applicable damages which the covered person is legally  
24 entitled to recover. (Emphasis Supplied)

21 It is undisputed that the vehicle driven by Dawnell Smith for Eastside Express,  
22 Inc. was covered by a policy issued by the Evanston Insurance Company for the use  
23 as a pizza delivery vehicle. Plaintiff recovered \$25,000 from the Evanston policy for  
24 her injuries. The insurance follows the vehicle and is not dependent on the status of  
25 the driver under RCW 48.22.030.  
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**I. MEMORANDUM**

**A. Facts**

In this case, Plaintiff's First Amended Complaint admits that on or about June 24, 1999, the Plaintiff, Janette Leding Ochoa was driving a motor vehicle southbound on SR 203 in Monroe, Snohomish County, Washington, when a motor vehicle operated by Dawnell Smith, "during the course of her employment with one or all of the pizza defendants," collided with the Plaintiff. (First Amended Complaint ¶1.7) On March 21, 2001, the Plaintiff settled with Dawnell Smith and received, \$50,000, the limits of Smith's personal automobile insurance in exchange for a full release. (First Amended Complaint ¶1.9) On May 2, 2001, Dawnell Smith confirms with Progressive that she was delivering pizzas for the Monroe, Washington Domino's location at the time of the accident. (Baumann Declaration) Progressive provided automobile coverage to Jose Ochoa which provided 25/50 in UIM coverage (Baumann Declaration, Exhibit "A")

On July 26, 2004, Progressive propounded its First Set of Continuing Requests for Production of Documents to Domino's Pizza, Inc., and Domino's Pizza, LLC, and Eastside Express, Inc. Domino's Pizza. (Foley Declaration dated December 14, 2004, Exhibit "A") In response to Progressive's discovery request, on September 13, 2004, Domino's Pizza, LLC, and Eastside Express, Inc. Domino's Pizza provided a certified copy of Eastside Express, Inc.'s insurance contract with Evanston Insurance Company. (Foley Declaration dated December 14, 2004, Exhibit "B") In addition, Plaintiff has formally admitted that Ms. Smith was operating a motor vehicle that was not owned by Eastside Express, Inc. to deliver food on behalf of Eastside Express, Inc. at the time of the accident. (Plaintiff's Response to Request for Admission No. 2; Foley Declaration dated December 14, 2004, Exhibit "C")

1 On September 21, 2004, Progressive propounded its First Set of Continuing Requests  
2 for Admission to Plaintiff and Plaintiff provided her responses on September 30, 2004.  
3 (Foley Declaration dated December 14, 2004, Exhibit "C")

4 The pertinent facts and conclusions are summarized in the Declaration of Jerry  
5 Searles, and are set forth below:

6 **"Sequence of events"**

7 The automobile accident was reported to Progressive soon after  
8 the accident. On June 25, 1999, Eric Ogden, the Progressive  
9 claim handler, took statements from Janette Leding Ochoa, their  
10 insured, and Dawnell Smith covering the details of the accident.  
11 Ms. Smith was delivering pizza for Dominos Pizza at the time  
12 of the accident. The accident occurred when Ms. Smith pulled  
13 from a stop sign into the path of the Ochoa vehicle colliding  
14 with her. No excessive speed was involved. Ms. Smith was at  
15 fault. Ms. Smith was insured by State Farm and they begin to  
16 handle Ms. Ochoa's injury claim.

17 On July 7, 1999, Ben Wells, attorney for Ms. Ochoa, contacted  
18 Progressive to discuss the accident and her coverage. Personal  
19 Injury Protection (PIP) had not been purchased but there was  
20 Underinsured Motorist (UIM) coverage available for  
21 Ms. Ochoa, if it was triggered. In discussing the extent of  
22 Ms. Ochoa's injuries with Mr. Wells, it was determined that "It  
23 would be very unlikely the UIM coverage would be triggered as  
24 her injuries were not that severe."

25 There was no need for Progressive to keep their file open, so on  
26 November 14, 1999, it was closed to storage.

On February 26, 2001, a request was made for a copy of the  
Progressive policy covering the Ochoa's.

On March 1, 2001, Mr. Wells informed Progressive that he had  
made a \$135,000 demand and State Farm had offered their  
limits of \$50,000 for the injury. He wanted to open a UIM  
claim on behalf of his client and, further, asked if Progressive  
wanted to "buy out" the claim. Progressive asked Mr. Wells for  
some additional information.

By March 20, 2001, Progressive had the information they  
needed from Mr. Wells. The claim handler, Teri Eidson, called  
Mr. Wells but he was out of his office. She then faxed him a  
letter stating Progressive was not interested in "buying out"

1 State Farm's position. She also points out a coverage issue  
2 involving Dominos Pizza and asks if he has determined if there  
is coverage under Dominos' policy.

3 On March 21, 2001, Mr. Wells wrote Progressive informing  
4 them that based on their March 20<sup>th</sup> letter, he had settled with  
State Farm and was not aware of any liability against Dominos  
5 Pizza. He renewed his request to present a UIM claim.

6 Progressive proceeded with some additional investigation to  
7 resolve the UIM claim. They learned that Power Insurance was  
8 the insurance agent for the Dominos Ms. Smith was employed  
9 by and delivering for at the time of the accident. Contact was  
made with Power Insurance who referred them to Mike  
Karatsanos, the claims administrator for Dominos' insurer.  
Contact was made with Mr. Karatsanos to request a copy of the  
Dominos' insurance policy.

10 On April 9, 2001 Progressive called Mr. Wells to inform him of  
11 their progress. Powers Insurance said the Dominos' coverage  
12 would be secondary to State Farm. Mr. Wells understood that if  
there was coverage, his client would probably not have a UIM  
claim with Progressive.

13 Many calls were left for Mr. Karatsanos which were not  
14 returned. Other methods of contact also failed. Progressive's  
15 claim handler discussed the problem with her supervisor. They  
16 decided to call Mr. Wells to see if he was pursuing the claim  
17 against Dominos. She called Mr. Wells' office and learned he  
had withdrawn the UIM claim on behalf of his client,  
Ms. Ochoa. When asked the reason, she learned Mr. Wells felt  
Ms. Ochoa had been adequately compensated.

18 On March 13, 2002, Progressive learned that attorney Richard  
19 Kilpatrick was representing Ms. Ochoa. The same day,  
20 Progressive acknowledged Mr. Kilpatrick's involvement,  
leaving a message with his office. Progressive renewed their  
attempts to contact Mr. Karatsanos.

21 On May 31, 2002, Mr. Karatsanos responded to Progressive  
22 stating the claim was reported to them and they are looking into  
23 it. On June 14, 2002, Mr. Karatsanos again responded to  
Progressive stating, "It appears, at this time, that there are no  
coverage disputes."

24 On June 5, 2002, Pat Baumann (Progressive claim handler)  
25 wrote Mr. Kilpatrick recapping a May 31, 2002 conversation  
26 with him involving Ms. Ochoa's claim. There were questions  
about coverage and they were both attempting to obtain copies

1 of the Dominos' policy. She made it clear Progressive was not  
2 denying underinsured motorist coverage but rather trying to  
determine if there was additional liability coverage available.

3 On June 21, 2002, suit was filed by Mr. Kilpatrick against  
4 Dominos Pizza, Eastside Express and Ben Wells. Note:  
5 Eastside Express is a Dominos location, the named insured on  
6 the policy and Ms. Smith's employer at the time of the accident.

7 On June 25, 2002, Pat Baumann wrote Mr. Karatsanos in  
8 relation to the conversation they had on June 24, 2002. She  
9 recapped their conversation saying they had discussed the claim  
10 and he had advised her Dominos' coverage was \$500,000 and  
11 there was coverage for the accident. Further, the coverage was  
12 excess over the State Farm limits. On June 27, 2002, he  
13 responded, agreeing, and stating the limits will be sufficient to  
14 resolve the claim. This information was reported to  
15 Mr. Kilpatrick by Ms. Baumann.

16 On or about November 12, 2002, Progressive received a copy of  
17 the Dominos' policy. The liability limit was \$1,500,000. On  
18 December 13, 2002, Progressive, after reviewing the policies,  
19 wrote Mr. Kilpatrick to inform him of their coverage position.  
20 They concluded the automobile liability policy of Eastside  
21 Express came into play after the State Farm policy and before  
22 their UIM coverage."

23 Mr. Searles concluded that Progressive's position that the UIM floating layer of  
24 coverage was secondary to the Eastside Express, Inc. policy:

25 **"Conclusions**

26 It is my opinion, based on the materials provided, that the  
investigation performed by Progressive was appropriate and met  
insurance industry standards.

The conclusions reached and positions taken by Progressive  
were reasonable and met insurance standards.

Further, I agree with their position on the underinsured motorist  
coverage as it relates to Janette Leding Ochoa and her auto  
accident of June 24, 1999.

Jerry Searles CPCU"

1 Plaintiff recovered \$25,000 from the Evanston policy for her injuries. (See Foley  
2 Declaration dated March 22, 2010, Exhibit A, Pg. 143 Lines 6 - 23). This settlement with  
3 Evanston was confirmed by Plaintiff's counsel Richard Kilpatrick.

## 4 **II. MEMORANDUM OF LAW**

### 5 **A. Standard of Review.**

6 Civil Rule 56 (c) provides that summary judgment should be granted where:

7 "The pleadings \*\*\* together with the affidavits, if any show,  
8 that there is no genuine issue as to any material fact that the  
9 moving party is entitled to summary judgment as a matter of  
10 law."

11 The Court must consider all facts submitted and all reasonable inferences drawn from  
12 them in the light most favorable to the nonmoving party. *Denaxas v. Sandstone Court*, 148  
13 Wn.2d 654, 662, 63 P.3d 125 (2003). The Court should grant the motion only if, from all the  
14 evidence, reasonable persons could reach but one conclusion. *Id.*

### 15 **B. Washington Law Permits UIM Insurers To Credit The Full Amount Of The 16 Tortfeasor's Liability Coverage Against The Insured's Damages.**

17 Progressive is entitled to a full set off in the full amount of all applicable liability  
18 coverages against the Plaintiff's damages before making UIM payments. According to  
19 RCW 48.22.030, an underinsured motor vehicle is a vehicle by which the "\*\*\* sum of the  
20 limits of liability under all bodily injury or property damage liability bonds and insurance  
21 policies applicable to a covered person after an accident is less than the applicable damages  
22 which the covered person is legally entitled to recover."

23 RCW 48.22.030 defines a *motor vehicle* as underinsured – not an individual, as the  
24 statute in pertinent part states:

25 "(1) *Underinsured motor vehicle*" means a motor vehicle  
26 with respect to the ownership, maintenance, or use of which  
either no bodily injury or property damage liability bond or  
insurance policy applies at the time of an accident, or with  
respect to which the sum of the limits of liability under all

1           bodily injury or property damage liability bonds and insurance  
2           policies applicable to a covered person after an accident is less  
3           than the applicable damages which the covered person is legally  
4           entitled to recover. (Emphasis Supplied)

5           It is undisputed that the vehicle driven by Dawnell Smith for Eastside Express,  
6           Inc. was covered by a policy issued by the Evanston Insurance Company for the use  
7           as a pizza delivery vehicle. The statute does not require that an insurance policy for a  
8           vehicle be in the name of a named insured – what matters is whether the Evanston  
9           insurance policy applies for the use of the vehicle.

10           Accordingly, liability insurance is deemed to be primary and UIM insurance is  
11           secondary and floats on top of all available coverage. *Dixie Insurance Co. v. Mello*, 75  
12           Wn.App. 328, 334, 877 P.2d 740 (1994), *rev. den.* 125 Wn.2d 1025, 890 P.2d 464, *citing*,  
13           *Allstate v. Dejob*, 63 Wn.App. 278, 283-84, 818 P.2d 608 (1991). According to *Hamilton v.*  
14           *Farmers Insurance Company*, 107 Wn.2d 721, 726-27, 733 P.2d 213 (1987), “there are two  
15           conditions to underinsurance motorist coverage: (1) the ‘covered person’ must be legally  
16           entitled to recover damages; and (2) damages must exceed the limits of liability under all  
17           other applicable insurance policies. The underinsured motorist coverage only applies when a  
18           tortfeasor’s insurance coverage is insufficient to compensate the victim for his or her  
19           damages. *Id.*

20           The Plaintiff, not Progressive, has the burden of proof to demonstrate a lack of  
21           available insurance coverage. *Dixie Insurance Co. v. Mello*, 75 Wn.App. 328, 335, 877 P.2d  
22           740 (1994), *rev. den.* 125 Wn.2d 1025, 890 P.2d 464. The *Mello* court stated that “we are  
23           not alone in reaching our determination. Courts in almost all other states place the burden of  
24           demonstrating a lack of applicable insurance on the claimant.” *Id.*, *citing*, John Ap.  
25           Appelman, *Insurance Law and Practice* §5087, at pg. 321-23 (1981); Alan I. Widiss,  
26           *Uninsured and Underinsured Motorist Insurance* §8.26, at pg. 419-20 (2<sup>nd</sup> ed. 1992). The

1 tortfeasor can only overcome that burden by showing that the claimant used all “reasonable  
2 efforts” to determine if there were any other applicable liability insurance and the effort was  
3 unsuccessful. *Mello*, 75 Wn.App. at 336, citing, *Signal Ins. Co. v. Walden*, 10 Wn.App. 350,  
4 354, 517 P.2d 611 (1973), rev. den., 83 Wn.2d 1013 (1974)

5 There are at least two insurance contracts applicable to the tortfeasor, Dawnell Smith.  
6 The first was her personal automobile insurance with State Farm, in which State Farm paid  
7 the Plaintiff the full coverage limits of \$50,000. The other applicable insurance contract was  
8 the insurance contract between Eastside Express, Inc. and Evanston Insurance Company.  
9 (Foley Declaration, Exhibit “B”) That policy applies because (1) Ms. Smith’s was working  
10 as an employee agent of the named insured, Eastside Express at the time of the loss;  
11 (2) Ms. Smith was driving a non-owned motor vehicle while used to deliver food; and  
12 (3) non-owned motor vehicles while used to deliver food are covered. That insurance  
13 contract states, in relevant part:

14 **“PART I- WORDS AND PHRASES WITH SPECIAL**  
15 **MEANING- READ THEM CAREFULLY**

16 \*\*\*

17 **‘You’ and ‘Your’** means the person or organization shown as  
the named insured in ITEM ONE of the declarations

18 \*\*\*

19 **‘Auto’** means a non-owned motor vehicle, while used to deliver  
20 food on behalf of the Named Insured(s)

21 \*\*\*

22 **‘Insured’** means any person or organization qualifying as an  
23 insured in the WHO IS INSURED section of the applicable  
24 insurance. Except with respect to our limit of liability, the  
insurance afforded applies separately to each insured who is  
seeking coverage or against whom a claim is made or suit is  
brought.

25 \*\*\*

26

1                   **PART II- WHICH AUTOS ARE COVERED AUTOS**

2                   The 'SCHEDULE OF COVERED LOCATIONS' attached to  
3                   the declarations shows the locations from which **auto(s)** as  
4                   defined in D. above are covered.

5                   \*\*\*

6                   **PART IV- LIABILITY INSURANCE**

7                   \*\*\*

8                   **WHO IS INSURED**

9                   You are an insured for any covered auto.

10                  \*\*\*

11                  **PART V – CONDITIONS**

12                  **B.     OTHER INSURANCE**

13                  For any covered auto you don't own, the insurance provided by  
14                  this policy is excess over any other applicable insurance.”

15                  In addition, the Declarations page states in relevant part:

16                  **“NAMED INSURED: EAST SIDE EXPRESS, INC.**

17                  \*\*\*

18                  3.     **POLICY PERIOD: FROM APRIL 1, 1999 TO**  
19                  **JUNE 1, 2000.**

20                  \*\*\*

21                  **COVERAGE AND LIMIT OF LIABILITY: \$1,500,000**  
22                  **COMBINED SINGLE LIMIT BODILY INJURY AND**  
23                  **PROPERTY DAMAGE EACH ACCIDENT**

24                  \*\*\*

25                  **9.     ENDORSEMENTS ATTACHED**

26                  ADDITIONAL INSURED

                  SCHEDULE OF LOCATIONS

                  \*\*\*

                  ENDORSEMENT

1 \*\*\*

2 **SCHEDULE OF LOCATION**

3 \*\*\* the following location is scheduled under the captioned  
4 named insured.

5 \*\*\*

6 208 W. MAIN STREET, MONROE, WASHINGTON 98272,  
7 STORE #7050 \*\*\*" (Foley Declaration dated December 14,  
8 2004, Exhibit "B")

9 It is apparent from the language contained in the insurance contract entered into  
10 between Eastside Express, Inc. and Evanston Insurance Company, that Ms. Smith's vehicle  
11 is clearly covered under this contract. First, the contract states that in terms of who is insured  
12 that "you are an insured for any covered auto." "You" is defined as the named insured on  
13 the declarations page, which is Eastside Express, Inc. A "covered auto" is a "non-owned  
14 motor vehicle while used to deliver food on behalf of the named insureds."

15 Ms. Smith's vehicle was a non-owned motor vehicle (owned by Ms. Smith and not  
16 Eastside Express, Inc.) that she was using to deliver pizzas on behalf of Eastside Express,  
17 Inc. at the time of the accident. (Plaintiff's Response to Request for Admission No. 2; Foley  
18 Declaration dated December 14, 2004, Exhibit "C") Furthermore, the contract identifies the  
19 "schedule of coverage locations" for which coverage is provided. (Plaintiff's Response to  
20 Request for Admission No. 3; Foley Declaration dated December 14, 2004, Exhibit "C")  
21 The Monroe, Washington store is listed on this schedule of locations. (Plaintiff's Response  
22 to Request for Admission No. 4; Foley Declaration dated December 14, 2004, Exhibit "C")  
23 Additionally, Ms. Smith acknowledged to Progressive that at the time of the accident with  
24 the Plaintiff, she was delivering pizzas on behalf of Eastside Express, Inc.'s Monroe,  
25 Washington location. Furthermore, an "insured" is a person or organization that qualifies as  
26 an insured in the "who is insured" section of the contract. Eastside Express, Inc. clearly

1 meets the definition of “who is insured” because it is an insured for any covered auto.

2 Ms. Smith was an agent and employee of Eastside Express, Inc.

3       Therefore, the Evanston Insurance Company insurance contract clearly applies to  
4 Ms. Smith’s vehicle. As such, the policy provides for \$1.5 million in liability and personal  
5 property insurance. Thus, including the \$50,000 liability insurance that Ms. Smith had with  
6 her personal automobile insurer, State Farm, and the \$1.5 million in liability coverage form  
7 the Evanston Insurance Company Insurance Contract, there is a total of \$1.55 million in  
8 liability coverage applicable to the tortfeasor, Ms. Smith. Progressive is therefore entitled to  
9 a full credit of \$1.55 million against the Plaintiff’s damages before paying any UIM  
10 damages.

11 **C.     Liability Coverage Should Be Construed Broadly To Favor Coverage**

12       The Evanston Insurance Company contract clearly provides coverage for Ms. Smith’s  
13 vehicle. However, even if the court was to consider the contract to be somehow  
14 “ambiguous,” the insurance contract should be construed broadly to provide coverage for  
15 Ms. Smith’s vehicle.

16       Construction or interpretation of insurance contracts is a question of law. *State Farm*  
17 *Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). The Court will  
18 examine the insurance contract as a whole when construing or interpreting the insurance  
19 contract. *Riley v. Viking Insurance Co.*, 46 Wn.App. 828, 829, 733 P.2d 556 , *rev. den.*, 108  
20 Wn.2d 1015 (1987), *citing*, *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106  
21 Wn.2d 901, 907, 726 P.2d 439 (1986). When interpreting an insurance contract it should be  
22 construed in a way that it would be understood by an average insurance purchaser. *Emerson*,  
23 102 Wn.2d at 480, 687 P.2d 1139, *citing*, *Schroeder v. Royal Globe Inc.*, 99 Wn.2d 65, 68,  
24 659 P.2d (1983), modified on other grounds, 101 Wn.2d 830, 683 P.2d 186 (1984). In  
25 addition, insurance contracts should be given a reasonable, sensible, and fair interpretation  
26

1 consistent with the intent of the parties. *Thompson v. Grange Ind. Assn.*, 34 Wn.App. 151,  
2 660 P.2d 307, *rev. den.* 99 Wn.2d 1011 (1983).

3 In addition, Washington courts have consistently held that if an ambiguity exists in the  
4 insurance contract, the ambiguity must be construed in favor of the insured, even if the  
5 insurer intended another meaning. *Riley*, 46 Wn.App. at 830, 733 P.2d 556, *citing*, *E-Z*  
6 *Loader*, 106 Wn.2d at 907, 726 P.2d 439. Furthermore, the purpose of insurance is to  
7 provide coverage and interpretation of the insurance contracts should be in such way as to  
8 render the policy operative, rather than inoperative. *Schroeder*, 99 Wn.2d at 68, 659 P.2d  
9 509, modified on other grounds, 101 Wn.2d 830, 683 P.2d 186, *citing*, *Scales v. Skagit Cy.*  
10 *Med. Bur.*, 6 Wn.App. 68, 491 P.2d 1338 (1971).

11 More specifically, coverages contained in insurance contracts are to be construed  
12 liberally to provide coverage. *Riley*, 46 Wn.App. at 829, 733 P.2d 556, *rev. den.*, 108 Wn.2d  
13 1015, *citing*, *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wn.App. 32, 627 P.2d 152, *rev. den.*, 95  
14 Wn.2d 1032 (1981). On the other hand, exclusionary clauses are to be strictly construed  
15 against the insurer. *Schroeder*, 99 Wn.2d at 68, 659 P.2d 509, modified on other grounds,  
16 101 Wn.2d 830, 683 P.2d 186.

17 It is apparent from reading the entire Evanston Insurance Contract as a whole, that the  
18 intent of the contract was to provide coverage to vehicles that were delivering pizzas on  
19 behalf of any of the Eastside Express Inc., locations listed in the endorsements. Any other  
20 interpretation would go against the numerous Washington cases that have held that insurance  
21 contracts should be interpreted by giving the contracts a fair and reasonable construction,  
22 consistent with the intent of the parties. If an ambiguity exists, the ambiguity should be  
23 construed against the insurer and in favor of the insured.

24 As such, the Evanston Insurance Contract provides coverage for Ms. Smith's vehicle,  
25 which is a "non-owned motor vehicle, while used to deliver food on behalf of" Eastside  
26 Express, Inc.

1 **D. Response To Specific Arguments Raised By Plaintiff Ochoa.**

2 The purpose of UIM coverage is to provide insurance for the insured when not  
3 enough coverage is available or no insurance exists. The cases cited in Plaintiff's brief do  
4 not address the situation here where vicarious liability is present. Here there is coverage due  
5 to the Evanston policy on the vehicle. RCW 48.22.030(1) refers to the vehicle and not to the  
6 insured. The fact that Dawnell Smith, who delivered the pizza, is not a "named insured" is a  
7 red-herring under this subsection of the statute.  
8

9 Plaintiff's counsel in his brief states:

10 "The Washington courts have interpreted the underinsured  
11 motorist statute, RCW 48.22.030, and the uninsured motorist  
12 statute before it, as focusing on the individual tortfeasor, not the  
13 vehicle. RCW 48.22.030(1) defines underinsured motor  
vehicles as motor vehicle with no applicable liability insurance  
policy or the applicable liability policy is less than the damages  
than the injured party is legally entitled to recover."

14 The UIM status depends on the insured status of the vehicle, not the driver. This  
15 precise issue involving vicarious liability on the same vehicle has not been addressed in  
16 Washington, but has been litigated in other jurisdictions.<sup>1</sup> In *Mercury Ins. Co. v. Enter.*  
17 *Rent-A-Car Co.*, 80 Cal. App. 4th 41, 47-48 (Cal. App. 2d Dist. 2000) the court discussed the  
18 definition of "uninsured motor vehicle" under a similar statute:

19 "Mercury contends the law is unresolved regarding whether UM  
20 coverage is triggered solely on the status of the driver or

---

21 <sup>1</sup> See for example the comment by the Court in Court in a footnote in *Peirce v. Geico Ins. Co.*, 2009 U.S. Dist.  
LEXIS 108759 (W.D. Wash. 2009) where the court questioned whether UIM insurance would apply:

22 n2 As an initial matter, the Court questions whether UIM coverage is implicated by the facts of this case at all.  
23 Plaintiffs characterize their rights to UIM recovery as triggered by the determination -- made by Judge Coughenour -  
24 - "that Plaintiffs' recovery of third-party liability would be insufficient." Pltf's. Response, p. 6. But the "motorist" in  
25 this matter was Mr. Johnson -- there is no evidence presented that he was "underinsured," and no case authority cited  
26 in support of the theory that a finding of no liability on the part of an employer under a respondeat superior theory of  
recovery is the legal equivalent of a determination of "insufficient recovery" which would implicate UIM coverage  
under the injured party's policy. Defendant does not raise this issue, however, and the Court decides this motion on  
other grounds.

1 whether both the owner and driver must be uninsured for UM  
2 coverage to apply.

3 \*\*\*

4 However, another treatise defines an "uninsured motor vehicle"  
5 as including "one for which no bodily injury liability insurance  
6 is available." (Croskey et al., Cal. Practice Guide: Insurance  
7 Litigation (The Rutter Group 1999) P 6:1270, p. GG-15 (rev. #  
8 1, 1998), original italics.) That treatise opines: "UMC  
9 [uninsured motorists coverage] status depends on the insured  
10 status of the vehicle, not the driver. Thus, a vehicle that is  
11 insured cannot be regarded as 'uninsured' when driven by an  
12 uninsured person." (Id., at P 6:1280, p. GG-17 (rev. # 1 1998),  
13 original italics.) *We agree with this position and conclude that  
14 the rental vehicle involved in this action cannot be regarded as  
15 uninsured.*" (Emphasis Supplied)

16 In *O'Connell v. Auto-Owners Ins. Co.*, 425 N.W.2d 306, 308 (Minn. Ct. App. 1988)

17 the court was confronted with a similar situation where the plaintiff was labeling the vehicle  
18 as insured to collect under the policy and then arguing that it was "uninsured" for purposes of  
19 collection on the UIM coverage. The court found that there was insurance coverage on the  
20 vehicle and denied recovery:

21 "Appellant attempts to label the garbage truck as insured in  
22 order to recover from Sky-Hi's insurer and then define the truck  
23 as uninsured to recover from O'Connell's uninsured motorist  
24 provision. The statutory definition of "uninsured motor vehicle"  
25 and the facts of this case do not allow this result. The legislature  
26 defined "uninsured motor vehicle" as "a motor vehicle \* \* \* for  
which a plan of reparation security \* \* \* is not in effect." Minn.  
Stat. § 65B.49, subd. 4(3) (1978). Here, the garbage truck had  
insurance in effect and appellant received \$60,000 from Sky-  
Hi's insurer. The vehicle which was the cause of O'Connell's  
injury, the garbage truck, was not uninsured under the statute or  
the insurance policy issued by Auto Owners." (Emphasis  
Supplied).

27 Plaintiff cites the *Allstate v. Batacan*, 139 Wn. 2d 443, 986 P.2d 823 (1999) decision  
28 where the court denied an attempt to pool coverage from two different vehicles. Here we  
29 have one vehicle that is insured by two different policies. The *Batacan* decision can be  
30 distinguished because it does not address vicarious liability. Similarly, the *Finney v.*

1 *Farmers Inc. Co.*, 92 Wn. 2d 748, 600 P.2d 1272 (1979) decision can be distinguished for the  
2 same reasons.

3 Plaintiff recovered \$25,000 from the Evanston policy for her injuries. (See Foley  
4 Declaration dated March 22, 2010) There is no dispute that coverage applies. Plaintiff in the  
5 brief on page 4 states that Exhibit 7 is an email from Eastside Express's insurer. See  
6 Exhibit 7 to the Declaration of Richard Kilpatrick bate stamped document CF 0137 which is  
7 the email dated May 27, 2002 between Pat Baumann of Progressive and Michael Karatsanos.  
8 Mike Karatsanos is the claims administrator for Dominos' insurer. In this email, Michael  
9 Karatsanos is the claims administrator for Dominos' insurer. In this email, Michael  
10 Karatsanos states:

11 "There is vicarious exposure for the delivery driver who is not  
12 an insured. The limits, as indicated, will be sufficient to resolve  
13 this."

14 Similarly, the email from Michael Karatsanos to Pat Baumann at Progressive dated  
15 June 14, 2002 states:

16 "Claim was not reported until recently. It appears, at this time,  
17 that there are no coverage disputes."

18 Plaintiff's assertions in their brief that Evanston denied coverage are incorrect, and create an  
19 issue of fact sufficient to deny this motion for summary judgment.

20 For the reasons set forth above, Plaintiff's Motion for Summary Judgment should be  
21 denied. Progressive is entitled to a credit of \$1.55 million against the Plaintiff's damages  
22 before being liable to pay any UIM benefits.

23 ///

24 ///

25 ///



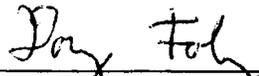
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**CERTIFICATE OF SERVICE**

I certify that, on the date indicated below, I caused a true copy of the foregoing document to be served by the means indicated:

Richard B. Kilpatrick      *Via e-mail and U.S. Mail*  
Attorney at Law  
1750 112<sup>th</sup> Avenue NE Suite D-155  
Bellevue, WA 98004

DATED this 22<sup>nd</sup> day of March, 2010.

  
\_\_\_\_\_  
Douglas F. Foley, WSP #13119

473/276

# **APPENDIX F**

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Visiting Judge Brian Gain

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA.

Plaintiff,

vs.

~~DOMINO'S PIZZA, INC., and DOMINO'S PIZZA, LLC, and FASTSIDE EXPRESS, INC. DOMINO'S PIZZA, BEN WELLS, individually, HAMMER & WELLS, INC., et al.~~  
PROGRESSIVE CLASSIC INSURANCE CO., a foreign corporation, THE PROGRESSIVE CORPORATION, a foreign corporation, and PROGRESSIVE CASUALTY INSURANCE COMPANY, a foreign corporation,

Defendants.

No.: 02-2-07712-7

~~(PROPOSED)~~

DENYING *AK*

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ESTABLISHING UNDERINSURED MOTORIST COVERAGE

THIS MATTER came on for hearing before the undersigned Judge of the above-entitled Court and the Court having considered the records and files herein, including:

1. Plaintiff's Note for Motion for Partial Summary Establishing Underinsured Motorist Coverage

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ESTABLISHING UNDERINSURED MOTORIST COVERAGE  
Page 1 of 2

**COPY ORIGINAL**

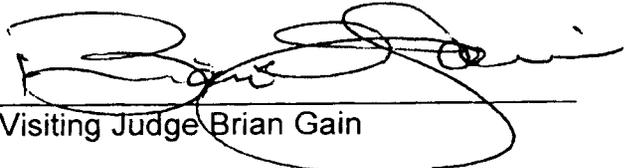
Richard B. Kilpatrick, P.S.  
1750 - 112<sup>th</sup> Ave. N.E., Ste. D-155  
Bellevue, WA 98004  
(425) 453-8161  
Fax: (425) 605-9540  
[Dick@triallawyersnw.com](mailto:Dick@triallawyersnw.com)

- 1 2. Plaintiff's Motion for Partial Summary Establishing Underinsured Motorist Coverage
- 2 3. Declaration of Richard B. Kilpatrick in Support of Plaintiff's Motion for Partial Summary Establishing Underinsured Motorist Coverage
- 3 4. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment
- 4 5. Declaration of Douglas Foley in Support of Defendant's Memorandum in Opposition
- 5 6. Declaration of Jerry Searles in Support of Defendant's Memorandum in Opposition
- 6 7. Declaration of Douglas Foley in Support of Progressive's Motion for Partial Summary Judgment, dated December 14, 2004
- 7 8. Declaration of Patricia Baumann in Support of Progressive's Motion for Partial Summary Judgment, dated December 15, 2004
- 8 9. Plaintiff's Reply in Support of Motion for Partial Summary Judgment re Underinsured Motorist Coverage

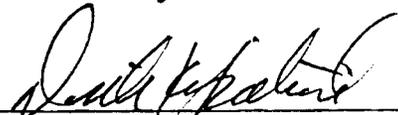
11 and the Court having heard the argument of counsel, and the Court having been fully  
 12 advised in the premises, and based on these findings, IT IS, THEREFORE, HEREBY

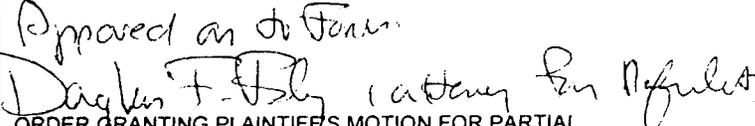
13 ORDERED that Plaintiff's Motion for Partial Summary Judgment Establishing  
 14 Underinsured Motorist Coverage is ~~GRANTED~~ **DENIED**; and ~~the underinsured motorist coverage~~  
 15 ~~shall be applied to all damages in excess of Smith's \$50,000 State Farm coverage.~~

16 DONE IN OPEN COURT this 9<sup>th</sup> day of April, 2010.

17   
 18 Visiting Judge Brian Gain

19 **Presented by:**

20   
 21 Richard B. Kilpatrick, WSBA #7058  
 22 Shannon M. Kilpatrick, WSBA #41495  
 22 Attorney for Plaintiff

23 *Approved on to Jones*  
 24   
 24 ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL  
 25 SUMMARY JUDGMENT ESTABLISHING UNDERINSURED  
 25 MOTORIST COVERAGE

**Richard B. Kilpatrick, P.S.**  
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# **APPENDIX G**

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Visiting Judge Brian Gain  
Hearing: April 27, 2010  
*Without Oral Argument*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

PROGRESSIVE CLASSIC INSURANCE  
CO., a foreign corporation, THE  
PROGRESSIVE CORPORATION, a foreign  
corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

MOTION FOR RECONSIDERATION RE  
DENIAL OF PLAINTIFF'S SUMMARY  
JUDGMENT MOTION ON UIM  
COVERAGE

**I. RELIEF REQUESTED**

Plaintiff respectfully requests the Court reconsider its ruling denying summary judgment regarding the UIM coverage that existed at the time of the collision. The Court's decision is contrary to Washington Supreme Court authority of the policy and the principles of the UIM statute, and the decision is contrary to clear Washington Supreme Court

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1 precedent on the very question involved. Plaintiff's counsel certainly apologizes for his role  
2 in allowing the issue to become so muddled and off-center, but when the issue is properly  
3 framed and understood the current ruling should be reconsidered and Plaintiff's motion  
4 granted.

## 5 **II. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT**

6 Progressive admits the driver of the car that hit Ochoa had inadequate liability  
7 insurance - if Ochoa's damages are proven to exceed \$50,000. The driver only had  
8 \$50,000, and Ochoa contended her claim exceeded \$100,000. Ochoa similarly admits the  
9 liability insurance for the employer of the driver, Eastside Express, was adequate.

10 Which limits count to determine whether this is an underinsured vehicle?  
11 Washington Supreme Court authority in *Finney v. Farmers*, 92 Wn.2d 748, 600 P.2d 1272  
12 (1979) expressly answered the question of which limits count. It held that if any one of the  
13 responsible entities does not have adequate liability coverage, then the vehicle is not  
14 properly insured. The fact that the vehicle is insured for sufficient liability limits on behalf of  
15 some other entity is irrelevant.

16 Under that clear precedent, Ochoa was hit by an underinsured vehicle because the  
17 driver only had limits of \$50,000. The damages for Ochoa claimed (at least arguably, if not  
18 clearly) exceeded that amount. Progressive should have advised that it owed every dollar  
19 over \$50,000 that the insured could prove as her damages (up to Progressive's total limit of  
20 \$25,000). The claim would then have properly moved on from UIM coverage to the value of  
21 the injury claim if Progressive disputed that. The value of an UIM claim is different than the  
22 coverage that exists for that value. The fact the employer of the driver had adequate limits  
23

1 covering the vehicle is irrelevant to coverage. Progressive certainly has its own set of  
2 values about how UIM coverage should best be handled, but it and this Court must respect  
3 appellate case law and, therefore, the Court should reconsider and grant summary  
4 judgment to Plaintiff. The holding in *Finney v. Farmers* alone is enough to end the issue  
5 here.

6       If further were needed, UIM coverage is to be liberally construed - not narrowly  
7 construed. It is to protect people, not vehicles. It is supposed to come out the same as if  
8 any other responsible entity had the same liability coverage applicable to them. If Smith  
9 had two layers of liability coverage, and Ochoa's claim was reasonably valued at over  
10 \$50,000, Ochoa would have had both Smith's first liability layer of \$50,000 and Smith's  
11 second layer of up to \$25,000 in her pocket to use in her life. Several years later the  
12 employer would have an offset from any award for that \$25,000 (along with the \$50,000)  
13 deducted from any award against the employer. The two tortfeasors would have borne the  
14 whole loss, and Ochoa would have had the full use of the \$25,000 all along. If Ochoa felt  
15 she had collected enough from the driver she need not have sued the employer at all.  
16 Under Progressive's approach, and as this Court has ruled, Ochoa never gets the use of  
17 the \$25,000 coverage she paid for to be insured for people like the driver Smith. As the  
18 Court has it now, the floating layer that is supposed to put the UIM insured and the injured  
19 plaintiff in the same place they would have been under the current ruling is never floated on  
20 top of the operator's liability coverage. This Court has in essence ruled the operators'  
21 limited liability coverage is ignored because of the liability coverage on the employer. In  
22 other words, both responsible entities have to be underinsured. That is 180 degrees  
23 contrary to the holding in *Finney v. Farmers*.

1 Progressive's argument falsely conflated the question of coverage with ideas about  
2 the later recoveries against the employer. The arguments were further adorned with false  
3 suggestions of double recovery, and contained irrelevant suggestions of some unity of  
4 interest between driver and employer. This conflation turns the real rule on its head. This  
5 Court is now in the position of having ruled that if any one of the responsible entities  
6 involved with the vehicle had adequate limits the vehicle is never underinsured. This is the  
7 opposite of case law. It is no coincidence Progressive did not produce a single case  
8 stating that because one entity's liability coverage for a vehicle was adequate the insurer  
9 gets to ignore that liability coverage for some other entity was inadequate. Yet that is what  
10 this Court has said by denying plaintiff's summary judgment.

11 The ruling on coverage does not ask the Court to address anything about what  
12 should have happened when/if Ochoa later received an award from the employer, Eastside  
13 Express. Those payments must be dealt with regarding causation and damages from the  
14 breach of contract or failure to act in good faith, but later payments have nothing to do with  
15 the initial UIM coverage. Yet Progressive artfully suggested that under plaintiff's position on  
16 coverage some windfall is inherently involved because of funds from Eastside Express (or  
17 the lawyer who impaired the claim against Eastside Express). This Court stated this had  
18 guided his decision because the legislature probably did not intend a windfall as part. But  
19 Plaintiff agrees no windfall was intended. Plaintiff's coverage argument creates no windfall  
20 in any way. Had Progressive acknowledged the law and its coverage at the time the claim  
21 came in (which was years before the employer finally settled) there would have been  
22 nothing to remotely label a "windfall." Tort law treatises make the employer jointly and  
23 severally responsible for the employees share or fault. RCW 4.22.070(a). Thus, the jointly

1 and severally liable employer receives a credit for all liability settlements by the employee -  
2 in this case \$50,000. The employer does not get credit for the 25,000 UIM because that is  
3 not paid by the other defendant – but that creates no windfall. That simply requires the at-  
4 fault defendant to pay the full remaining damages, and the UIM insurer receives any  
5 excess. The UIM statute grants Progressive subrogation for any of the excess from any  
6 responsible entity.

7 In the event of payment to an insured ...the insurer making such payment shall... be  
8 entitled to the proceeds of any settlement or judgment resulting from the exercise of  
9 any rights of recovery of such insured against any person or organization legally  
10 responsible for the bodily injury...

11 RCW 48.22.040(3).

12 The truth, disregarded by Progressive and thus the Court, is that had Progressive  
13 honored its coverage it would have been entitled to any excess from later settlements.  
14 There would be nothing to label "windfall." Progressive would have reasonably valued the  
15 injury and paid the amount it determined to exceed \$50,000. The insured could have  
16 decided whether to even file suit and pursue the employer or not. Progressive could have  
17 filed the suit if Ochoa did not. If Ochoa did sue, Eastside would have gotten a credit for the  
18 \$50,000 liability limit paid, but not the \$25,000 from Progressive. Eastside would thus owe  
19 the whole remainder of any verdict and Progressive would receive the excess up to the  
20 amount Progressive had paid. The insured does not get to keep any excess.

21 However, the insured is supposed to have been paid the UIM at the start and had  
22 the use of those funds to improve their lives until excess is awarded from the second  
23 tortfeasor. This is no different than PIP coverage in that respect. The insured may well  
24 recover medical bills from the tortfeasor years later and the PIP insurer reimbursed, but

1 what happens later to even things up does nothing to relieve the first party insurer's  
2 obligation to honor the coverage in the first place and pay the bills. Paying up front is what  
3 first party insurance does, including this UIM insurance.

4 The Court's ruling stands contrary to every policy and every principle for analyzing  
5 the UIM statute, and is directly contrary to the specific Supreme Court authority that if any  
6 entity has too little coverage then an underinsured vehicle is involved.

### 7 III. AUTHORITY AND ARGUMENT

#### 8 A. Coverage Question Already Decided by Supreme Court

9 The Supreme Court already definitively answered the coverage question presented  
10 here in *Finney v. Farmers*, 92 Wn.2d 748, 600 P.2d 1272 (1979). There the passenger in a  
11 car was killed. The driver had insurance; the owner did not. The passenger of the car had  
12 UM coverage from Farmers. A full copy of the *Finney* opinion is attached (attachment no.  
13 1)

14 Farmers argued that since the vehicle was insured on behalf of one responsible  
15 entity it was not an uninsured motor vehicle. ("Farmers contends plaintiffs can recover  
16 under the uninsured motorist clause of their policy only if both the owner and operator of  
17 the offending car are uninsured." *Id.* at 751) (*emphasis added*). That is the same argument  
18 Progressive makes here. It claims that because Eastside Express had coverage applicable  
19 to the auto it is not an underinsured motor vehicle - ignoring the small liability insurance for  
20 the driver. It in essence claims both have to be underinsured.

21 The plaintiff in *Finney* argued that if either responsible entity was uninsured it was an  
22 uninsured motor vehicle regardless of the other sufficient insurance on the car. ("Plaintiffs  
23

1 claim if the owner of a car is liable for its negligent use, and the owner does not have  
2 liability insurance, the car is 'uninsured' and the uninsured motorist clause applies in favor  
3 of the policyholder. We agree." *Id.* at 751).

4 As stated in the quote, the Court completely rejected the insurer's theory at every  
5 level. The Supreme Court stated, at page 752:

6 The statute is "to be liberally construed in order to provide broad protection against  
7 financially irresponsible motorists."

8 "The purpose of the statute is to allow an injured party to recover those damages  
9 which would have been received had the responsible party maintained [sufficient]  
10 liability insurance."

11 "The insurance carrier which issued the policy stands, therefore, in the shoes of the  
12 uninsured motorist to the extent of the carrier's policy limits."

13 "The statute was designed to protect innocent victims of uninsured negligent  
14 motorists, not to protect vehicles."

15 "Here there are two responsible parties, one of which was uninsured, the other  
16 underinsured. The use of the word "or" is disjunctive. We are persuaded that the  
17 legislature intended to provide uninsured motorist protection where either one of the  
18 responsible parties lacks insurance coverage. (*Emphasis added*)

19 Progressive suggested no rational basis that the result is any different after the  
20 threshold for the amount of the liability insurance was changed from uninsured motorist  
21 coverage to *underinsured* motorist coverage. That changes only the trigger insurance  
22 amount on the other entities, not how the trigger amount would be separately applied to  
23 each or both potentially responsible party. The use of the term "or" in the statute has not  
24 changed – it is still disjunctive to be applied separately to each responsible entity. Nothing  
25 has changed to require that all responsible entities must be underinsured. The purposes of  
the statute have not changed, nor the public policy, nor the analogy tools. The policy still

1 stands in the shoes of the underinsured motorist. The underinsured motorist here is the  
2 driver, not the employer.

3 The Supreme Court thus has already determined "the legislature intended to provide  
4 protection where either one of the responsible parties lacks [sufficient] insurance  
5 coverage." That is precisely why, when a suggestion the insurer may offset the combined  
6 limits of two entities came up under *Allstate Insurance Co. v. Batacan*, 139 Wn.2d 443, 986  
7 P.2d 823 (1999), that case was under underinsured motorist coverage. One entity had  
8 enough insurance and another did not, but they were not jointly and severally. While the  
9 matter technically was not in front of the Court it still said: "*But see Finney v. Farmers Ins.*  
10 *Co.*, 92 Wn.2d 748, 600 P.2d 1272 (1979) (uninsured motorist coverage available where  
11 one jointly responsible person is insured but the other is not)." *Batacan*, 139 Wn.2d at 452.  
12 The Supreme Court is saying ***Finney v. Farmers* already answered the question – the**  
13 **sufficiency of liability limits is looked at separately for each responsible entity**  
14 **regardless of the others coverage, even where they are connected together by joint**  
15 **and several liability.**

16 We hold that, where a negligent owner of an automobile is not covered by [sufficient]  
17 liability insurance, even though the operator does have [sufficient] insurance  
18 coverage, the motor vehicle is "uninsured" [or underinsured] for purposes of RCW  
19 48.22.030.

20 *Finney* at 752 (inserts added to reflect changed insurance threshold for  
21 underinsured motorist coverage). The driver here does not have sufficient coverage. The  
22 employer does. Ochoa was supposed to have UIM coverage for the responsibility of the  
23 operator which starts for the first dollar after \$50,000.

1           **B. Same Unity of Joint and Several between the Entities in Finney and Here**

2           Progressive attempted to obscure their argument with some indistinct talk about  
3 unitary parties. That does not survive any analysis. At the time of *Finney v. Farmers* the law  
4 imposed complete joint and several liability on both the responsible owner and responsible  
5 operator involved there. The law of joint and several was not changed in this state until  
6 much later in the Tort Reform Act of 1993. See notes at RCW 4.22.070. The employer and  
7 employee here are no different; they have joint and several liability with each other even  
8 under RCW 4.22.070(3). Regardless of the so called unity of relationship, Supreme Court  
9 still measured each entity separately for purposes of coverage. Progressive asked the  
10 Court to do the opposite here. Perhaps there is room for a policy debate on the Supreme  
11 Court's approach, but that is simply not the function of trial courts on issues the Supreme  
12 Court has already addressed. Progressive produced no coverage case that has ever done  
13 anything other than to say there is first party coverage when any one of the potential  
14 responsible parties does not have sufficient insurance.

15           **C. Windfall Claim Irrelevant and False**

16           That Progressive tried to further obscure the real argument with false claims of  
17 windfall simply reinforces that existing coverage law is squarely against them. There simply  
18 is no windfall. If the Court reviews the previous material it will see that Progressive never  
19 actually explained how any windfall occurs. It simply threw around numbers that were later  
20 recovered from other tortfeasors and implied plaintiff's position somehow requires or leads  
21 to a windfall. The summary of argument here well explains that is not how the system  
22 works under Plaintiffs coverage position. As set out by the Supreme Court and argued by  
23 Plaintiff, the UIM insurer acknowledges it owes any damages legally recoverable from the

1 driver that exceed the applicable liability limits for the driver. The insurer is supposed to  
2 assess liability and damages. Everyone here has admitted there was liability on the driver  
3 Smith. The insurer is then supposed to reasonably assess the damages and negotiate to  
4 pay the amount over the limits. If the policyholder later pursues a claim against the driver or  
5 another responsible entity, the UIM insurer is entitled to the excess of any ultimate recovery  
6 over the full value. RCW 48.22.040(3). A full copy is attached (attachment no. 2).

7 If the UIM insurer in good faith determines that damages do not exceed the  
8 underlying liability limits, the policyholder and the insurer either arbitrate or try the matter in  
9 court (either by a separate lawsuit or based on the outcome of the suit against the  
10 responsible driver). Either way, the insurer then owes the amount over the liability limits of  
11 the driver. The UIM insurer can pursue any other entity or the personal assets of the driver.  
12 If the policyholder pursues the claim the UIM insurer is entitled to any excess recovery until  
13 it is repaid. The legislature did not set up any windfall in the UIM legislation, plaintiff does  
14 not suggest it did, and acknowledging the coverage here does not create any windfall.

15 The legislature also did not authorize an insurer not paying at the outset because of  
16 some anticipatory reimbursement from another fully insured entity, or for the insurance  
17 company denying coverage under grounds not authorized in the statute or the case law.  
18 That is what Progressive has done.

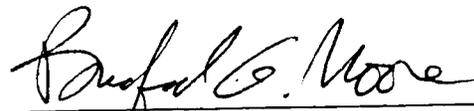
#### 19 **IV. PROPOSED ORDER**

20 An order accompanies this motion granting reconsideration and finding that  
21 Progressive had coverage for all of Ochoa's recoverable damages recoverable from the  
22  
23

1 driver Smith in excess of \$50,000 up to the Progressive limits of \$25,000 (i.e., where total  
2 damages would be \$75,000 or greater).

3 Other issues remain for trial, including the actual value of Ochoa's claim to see if it  
4 exceeds \$50,000, but the coverage claim has no disputed facts and must be decided by  
5 this Court as a matter of law.

6 Respectfully submitted, this 19<sup>th</sup> day of April, 2010.

7  
8 

9 Bradford Moore (WSBA #7707) for:  
10 Richard Kilpatrick, WSBA #7058  
11 Attorney for Plaintiff  
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**ATTACHMENT NO. 1**

Finney v. Farmers Ins. Co.Wash., 1979.  
Supreme Court of Washington, En Banc.

Ralph C. FINNEY and Charlene Finney,  
husband and wife, Individually, and Ralph  
C. Finney, Personal Representative of the  
Estate of Robin Colleen Finney,  
Respondents,

v.

FARMERS INSURANCE CO. of  
Washington, a corporation, and Mid-Century  
Insurance Company, a corporation,  
Petitioners,  
Aetna Casualty & Surety Co., Respondent.  
**No. 45946.**

Oct. 11, 1979.

Parents, whose daughter was killed in automobile collision, brought action to recover under two policies, which covered parents' two automobiles and which each contained uninsured motorist coverage of \$15,000 per each injury, and to recover additional damages for insurer's alleged bad faith in failing to negotiate or settle parents' uninsured motorist claim. Insurer filed third-party complaint joining alleged insurer of automobile in which daughter had been passenger at time of collision. The Superior Court, Yakima County, Carl L. Loy, J., dismissed third-party complaint, entered judgment for parents against their insurer for \$30,837.95 plus interest, and dismissed claim for additional damages. The Court of Appeals, 21 Wash.App. 601, 586 P.2d 519, affirmed. On insurer's petition for review, the Supreme Court, Dolliver, J., held that: (1) parents were entitled to recover under their uninsured motorist clause, even though operator of automobile in which daughter had been passenger at time of collision did have insurance coverage, where owner of the automobile was not covered by liability insurance, and (2) parents' covenant not to sue estate of negligent operator did not operate to release owner of the automobile.

Affirmed.

#### West Headnotes

#### [1] Insurance 217 2772

217 Insurance  
217XXII Coverage--Automobile  
Insurance  
217XXII(D) Uninsured or  
Underinsured Motorist Coverage  
217k2772 k. In General. Most  
Cited Cases  
(Formerly 217k467.51(1))

Purpose of statute requiring protection against uninsured motorists is to allow an injured party to recover those damages which would have been received had the responsible party maintained liability insurance. RCWA 48.22.030.

#### [2] Insurance 217 2786

217 Insurance  
217XXII Coverage--Automobile  
Insurance  
217XXII(D) Uninsured or  
Underinsured Motorist Coverage  
217k2785 Uninsured Motorists or  
Vehicles  
217k2786 k. In General. Most  
Cited Cases  
(Formerly 217k467.51(1))

Statute requiring protection against uninsured motorists was designed to protect innocent victims of uninsured negligent motorists, not to protect vehicles. RCWA 48.22.030.

#### [3] Insurance 217 2774

217 Insurance  
217XXII Coverage--Automobile  
Insurance  
217XXII(D) Uninsured or  
Underinsured Motorist Coverage  
217k2773 Mandatory Coverage  
217k2774 k. In General. Most  
Cited Cases  
(Formerly 217k130.5(1),  
217k467.51(2))  
Where an insurance policy does not provide protection against uninsured motorists as

*Finney v. Farmers*, 92 Wn.2d 748, 600 P.2d 1272 (1979)  
(Cite as: 92 Wash.2d 748, 600 P.2d 1272)

required by statute. offending portion of the policy is void and unenforceable. RCWA 48.22.030.

**[4] Insurance 217 ↪ 2772**

217 Insurance  
217XXII Coverage--Automobile  
Insurance

217XXII(D) Uninsured or  
Underinsured Motorist Coverage

217k2772 k. In General. Most  
Cited Cases

(Formerly 217k467.51(1))

Statute requiring protection against uninsured motorists does not contemplate piecemeal whittling away of liability for injuries caused by uninsured motorists. RCWA 48.22.030.

**[5] Insurance 217 ↪ 2786**

217 Insurance  
217XXII Coverage--Automobile  
Insurance

217XXII(D) Uninsured or  
Underinsured Motorist Coverage

217k2785 Uninsured Motorists or  
Vehicles

217k2786 k. In General. Most  
Cited Cases

(Formerly 217k467.51(7.1),  
217k467.51(7))

Where negligent owner of an automobile is not covered by liability insurance, even though the operator does have insurance coverage, the motor vehicle is "uninsured" for purposes of statute requiring protection against uninsured motorists. RCWA 48.22.030.

**[6] Insurance 217 ↪ 2786**

217 Insurance  
217XXII Coverage--Automobile  
Insurance

217XXII(D) Uninsured or  
Underinsured Motorist Coverage

217k2785 Uninsured Motorists or  
Vehicles

217k2786 k. In General. Most  
Cited Cases

(Formerly 217k467.51(7.1),  
217k467.51(7))

Parents of daughter killed in automobile collision were entitled to recover under uninsured motorist clause in their policy, even though operator of automobile in which daughter was riding had insurance coverage and settled with parents, where owner of the automobile was not covered by liability insurance. RCWA 48.22.030.

**[7] Automobiles 48A ↪ 242(6)**

48A Automobiles

48AV Injuries from Operation, or Use of  
Highway

48AV(B) Actions

48Ak241 Evidence

48Ak242 Presumptions and  
Burden of Proof

48Ak242(6) k. Status,  
Identity, Competency, or Scope of  
Employment of Operator. Most Cited Cases  
Where ownership of an automobile is  
admitted and owner is a passenger, there  
arises presumption that, at time of accident,  
driver was operating vehicle as agent or  
servant of the owner, and the owner is  
vicariously liable for driver's negligence.

**[8] Principal and Agent 308 ↪ 159(1)**

308 Principal and Agent

308III Rights and Liabilities as to Third  
Persons

308III(C) Unauthorized and Wrongful  
Acts

308k159 Negligence or Wrongful  
Acts of Agent

308k159(1) k. Rights and  
Liabilities of Principal. Most Cited Cases

**Principal and Agent 308 ↪ 159(2)**

308 Principal and Agent

308III Rights and Liabilities as to Third  
Persons

308III(C) Unauthorized and Wrongful

Acts

308k159 Negligence or Wrongful Acts of Agent

308k159(2) k. Liabilities of Agent. Most Cited Cases

While a principal and agent are not joint tortfeasors, they are jointly and severally liable for all damages suffered by a plaintiff who has been injured as result of the agent's negligence.

**[9] Release 331** ⚡37

331 Release

331III Construction and Operation

331k37 k. Covenant Not to Sue or Execute. Most Cited Cases

A covenant not to sue which expressly reserves all rights against an owner who is liable for driver's negligence does not operate to release that owner.

**[10] Death 117** ⚡25

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k20 Defenses

117k25 k. Satisfaction or Release. Most Cited Cases

Parents' covenant not to sue estate of deceased driver of automobile in which daughter had been passenger at time of collision resulting in her death did not operate to release owner of the automobile where the covenant expressly reserved all rights against the owner, who was liable for the driver's negligence.

**\*749 \*\*1274** Halverson, Applegate & McDonald, Walter G. Meyer, Jr., Yakima, for petitioners.

Fortier & Baker, Inc., P. S., Mark R. Fortier, G. William Baker, Gavin, Robinson, Kendrick & Mays, William H. Mays, Yakima, for respondents.

DOLLIVER, Judge.

Plaintiffs' daughter Robin was killed in a car

accident in 1973. The car in which she was riding was driven by Norman Cornelius, Jr., and owned by Randall Wood, who was also a passenger. The car crossed the center line and collided head on with another automobile. All three occupants of the subject car were killed; all three were minors. Two occupants of the other car were killed and five persons were seriously injured.

The Finneys were insured by Mid-Century Insurance Company, a member of Farmers Insurance Group. The Cornelius family was insured by State Farm Mutual Automobile Insurance Company, and the Wood family was insured by Aetna Casualty and Surety Company.

At the time of the accident, the car was registered to one Monty Bak. He had sold the car to Randall Wood 5 days before the accident. The certificate of title had been endorsed to Wood, but he had never completed a registration and ownership certificate.

**\*750** Plaintiffs instituted a wrongful death action against the estates of Norman Cornelius, Jr., and Randall Wood. A settlement and covenant not to sue was executed with the Cornelius estate. The \$15,000 payment to plaintiffs was made by State Farm which disbursed the total amount of the Cornelius policy to plaintiffs, the injured parties, and personal representatives of deceased occupants of the other car involved in the collision. The document expressly reserved all claims against the other parties. Judgment against Wood's estate was entered in the amount of \$45,837.95 after trial of the wrongful death action. Aetna denied coverage, so plaintiffs were never able to collect on the judgment.

Plaintiffs then instituted this action against Farmers to recover under the uninsured motorist provisions of two policies issued to them. They sought the maximum amount of the combined policies (\$30,000), plus funeral expenses, interest and attorney

fees. Farmers denied liability and filed a third-party complaint against Aetna. All parties moved for summary judgment. The trial court dismissed the third-party complaint and entered judgment for plaintiffs in the amount of \$30,837.95, plus interest. The Court of Appeals affirmed. *Finney v. Farmers Ins. Co.*, 21 Wash.App. 601, 586 P.2d 519 (1978). We granted Farmers' petition for review and consider two issues discussed in the opinion of the Court of Appeals. The remaining issues raised by petitioner either have been thoroughly and adequately addressed by the comprehensive opinion of the Court of Appeals or have been abandoned by petitioner for lack of citation of authority. In *re Marriage of Croley*, 91 Wash.2d 288, 588 P.2d 738 (1978). We affirm the decision of the trial court and the Court of Appeals.

Protection against uninsured motorists is required in this state. RCW 48.22.030 provides:

(N)o new policy or renewal . . . shall be . . . issued . . . unless coverage is provided therein . . . for the protection of persons . . . who are legally entitled to recover **\*751** damages from owners or operators of uninsured motor vehicles . . .

The statute does not define "uninsured motor vehicle", but Farmers' insurance policy defines it as:(A) land motor vehicle . . . with respect to the ownership, maintenance or use of which there is . . . no bodily injury liability insurance or bond applicable at the time of the accident . . .

**\*\*1275** The first question we consider is whether a vehicle is "uninsured" within the meaning of the statute and the policy where the operator has liability insurance, but the owner does not. Farmers contends plaintiffs can recover under the uninsured motorist clause of their policy only if both the owner and operator of the offending car are uninsured. Since Cornelius had insurance from State Farm, Farmers asserts that plaintiffs cannot recover under their

own policy. Plaintiffs claim if the owner of a car is liable for its negligent use, and the owner does not have liability insurance, the car is "uninsured" and the uninsured motorist clause applies in favor of the policyholder. We agree.

[1] We have previously held RCW 48.22.030 is to be liberally construed in order to provide broad protection against financially irresponsible motorists. *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash.2d 327, 494 P.2d 479 (1972). The purpose of the statute is to allow an injured party to recover those damages which would have been received had the responsible party maintained liability insurance. *Touchette v. Northwestern Mut. Ins. Co.*, supra.

The insurance carrier which issued the policy stands, therefore, in the shoes of the uninsured motorist to the extent of the carrier's policy limits.

*State Farm Mut. Auto. Ins. Co. v. Bafus*, 77 Wash.2d 720, 724, 466 P.2d 159, 161 (1970).

[2][3] The statute was designed to protect innocent victims of uninsured negligent motorists, not to protect vehicles. *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86 Wash.2d 264, 543 P.2d 634 (1975). Where an insurance policy does not provide the protection mandated by RCW 48.22.030, the **\*752** offending portion of the policy is void and unenforceable. *Touchette v. Northwestern Mut. Ins. Co.*, supra; *Federated American Ins. Co. v. Raynes*, 88 Wash.2d 439, 563 P.2d 815 (1977); *Grange Ins. Ass'n v. Great American Ins. Co.*, 89 Wash.2d 710, 575 P.2d 235 (1978).

[4] The statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists. *First Nat'l Ins. Co. of American v. Devine*, 211 So.2d 587, 589 (Fla.App.1968); *Touchette v. Northwestern Mut. Ins. Co.*, supra.

Farmers contends the case of *Strunk v. State Farm Mut. Auto. Ins. Co.*, 90 Wash.2d 210, 580 P.2d 622 (1978), is pertinent. In *Strunk*, we had occasion to consider the effect of the uninsured motorist statute where the owner/operator of the offending vehicle was underinsured; that is, where liability insurance was insufficient to compensate plaintiff for the injuries he suffered. We held the uninsured motorist statute did not apply to such a situation and that plaintiff was not entitled to recover under his uninsured motorist policy the difference between his damages and the owner/operator's insurance policy limits. We were aided in our conclusion by the legislative history of the statute. After the original statute was enacted, bills were introduced to extend uninsured motorist insurance requirements to cases in which the responsible motorist was underinsured. This, we said, was clear evidence of legislative intent that the statute as enacted did not extend to such situations.

There is no similar legislative history here, nor are we confronted with a factual situation in which the only responsible party was insured under a policy which extended coverage for the accident in question. Here there are two responsible parties, one of which was uninsured, the other underinsured. The use of the word "or" is disjunctive. 1A C. Sands, *Sutherland Statutory Construction* S 21.14 (4th ed. 1972). *Childers v. Childers*, 89 Wash.2d 592, 575 P.2d 201 (1978). We are persuaded that the legislature intended to provide uninsured motorist protection where \*753 either one of the responsible parties lacks insurance coverage.

In *Allstate Ins. Co. v. Chastain*, 251 So.2d 354 (Fla.App.1971), the court considered the issues raised in this case. The plaintiff was a passenger who was injured in a collision; the driver of the other car was at fault. The operator of that car was insured; the owner, who was liable under Florida's dangerous instrumentality doctrine, was not insured.\*\*1276 The plaintiff settled his

claim with the driver and obtained a judgment against the owner. He then instituted an action against his own insurance carrier under an uninsured motorist clause. The court held the automobile was uninsured and affirmed a trial court judgment for plaintiff. The Florida uninsured motorist statute is virtually identical to RCW 48.22.030, and contains the same "owners or operators" language with respect to uninsured motor vehicles. Fla.Stat.Annot., s 627.727. Although there is contrary authority, much of it is, as pointed out by the Florida court, distinguishable. In addition, we believe the *Chastain* holding represents the better rule in light of the purpose of RCW 48.22.030.

[5][6] We hold that, where a negligent owner of an automobile is not covered by liability insurance, even though the operator does have insurance coverage, the motor vehicle is "uninsured" for purposes of RCW 48.22.030. The uninsured motorist clause in plaintiffs' policy with Farmers provides protection to them, and they are entitled to recover under it.

Next we consider the settlement and covenant not to sue executed by plaintiffs with the *Cornelius* estate. Farmers contends the agreement, despite an express reservation of rights, also released Wood.

[7] Under Washington law, where the ownership of an automobile is admitted and the owner is a passenger, there arises a presumption that, at the time of an accident, the driver was operating the vehicle as the agent or servant of the owner. *Callen v. Coca Cola Bottling, Inc.*, 50 Wash.2d 180, 182, 310 P.2d 236 (1957); *Moffitt v. Krueger*, 11 Wash.2d \*754 658, 120 P.2d 512 (1941); *Blashfield*, *Automobile Law and Practice* ss 254.4, 254.31 (3d ed. 1966). The owner is vicariously liable for the driver's negligence. *Moffitt v. Krueger*, supra; *Coins v. Washington Motor Coach Co.*, 34 Wash.2d 1, 208 P.2d 143 (1949).

*Finney v. Farmers*, 92 Wn.2d 748, 600 P.2d 1272 (1979)  
(Cite as: **92 Wash.2d 748, 600 P.2d 1272**)

In *Mills v. Inter Island Tel. Co.*, 68 Wash.2d 820, 416 P.2d 115 (1966), we held that a covenant not to sue does not release a joint tort-feasor where there is no double recovery. There is no danger of double recovery here. Nonetheless, *Farmers* urges us to restrict the *Mills* rule to cases involving joint tort-feasors and to hold that where one tort-feasor is only vicariously liable, the covenant not to sue releases that tort-feasor. We decline *Farmers*' invitation.

[8][9][10] While a principal and agent are not joint tort-feasors, they are jointly and severally liable for all damages suffered by a plaintiff who has been injured as a result of the agent's negligence. *Wilson v. City of New York*, Sup., 131 N.Y.S.2d 47 (1954); *W. Seavey*, *Law of Agency* s 95 (1964). A covenant not to sue which expressly reserves all rights against an owner who is liable for the driver's negligence does not operate to release that owner. The intention of the parties and the holding of *Mills* should be honored in the factual situation presented by this case.

Affirmed.

UTTER, C. J., ROSELLINI, WRIGHT,  
BRACHTENBACH, HOROWITZ and  
WILLIAMS, JJ., and KERSHNER and NOE,  
JJ. Pro Tem., concur.  
Wash., 1979.

*Finney v. Farmers Ins. Co.*  
92 Wash.2d 748, 600 P.2d 1272

END OF DOCUMENT

## **ATTACHMENT NO. 2**

West's RCWA 48.22.040

West's Revised Code of Washington Annotated Currentness

Title 48. Insurance (Refs & Annos)

\*Chapter 48.22. Casualty Insurance (Refs & Annos)

**→48.22.040. Underinsured motor vehicle coverage where liability insurer is insolvent--  
-Extent of coverage--Rights of insurer upon making payment**

(1) The term "underinsured motor vehicles" with reference to coverage offered under any insurance policy regulated under this chapter shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

(2) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's underinsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

(3) In the event of payment to an insured under the coverage required by this chapter and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such insured against any person or organization legally responsible for the bodily injury, death, or property damage for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Whenever an insurer shall make payment under the coverage required by this section and which payment is occasioned by an insolvency, such insurer's right of recovery or reimbursement shall not include any rights against the insured of said insolvent insurer for any amounts which would have been paid by the insolvent insurer. Such paying insurer shall have the right to proceed directly against the insolvent insurer or its receiver, and in pursuance of such right such paying insurer shall possess any rights which the insured of the insolvent company might otherwise have had, if the insured of the insolvent insurer had personally made the payment.

CREDIT(S)

[1983 c 182 § 2; 1980 c 117 § 2; 1967 ex.s. c 95 § 3.]

HISTORICAL AND STATUTORY NOTES

**Severability--1983 c 182:** See note following RCW 48.22.030.

**Effective date--1980 c 117:** See note following RCW 48.22.030.

LAW REVIEW AND JOURNAL COMMENTARIES

Underinsured motorist statute: examining procedural issues. Lee M. Barns and Cheryl A. Smith, 17 Gonz.L.Rev. 269 (1982).

Washington underinsured motor vehicle insurance statute: Reading the legislature's mind. Dennis A. Dellwo and John S. Conniff, 23 Gonz.L.Rev. 235 (1987/88).

LIBRARY REFERENCES

# **APPENDIX H**

RECEIVED APR 28 2010

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF SNOHOMISH

9 JANETTE LEDING OCHOA,

10 Plaintiff,

11 v.

12 DOMINO'S PIZZA, INC., and DOMINO'S  
13 PIZZA, LLC, and EASTSIDE EXPRESS,  
14 INC., DOMINO'S PIZZA, BEN WELLS,  
15 individually, HAMMER & WELLS, INC.,  
16 P.S., PROGRESSIVE CLASSIC  
17 INSURANCE COMPANY., a foreign  
18 corporation, THE PROGRESSIVE  
19 CORPORATION, a foreign corporation, and  
20 PROGRESSIVE CASUALTY  
21 INSURANCE COMPANY, a foreign  
22 corporation,

23 Defendants.

No. 02 2 07712 7

DEFENDANT'S RESPONSE TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION

24 Defendant Progressive Classic Insurance Company (hereinafter "Progressive"), by  
25 and through Douglas F. Foley of Douglas Foley & Associates, PLLC, hereby submits the  
26 following response to Plaintiff's Motion for Reconsideration.

**I. PLAINTIFF'S MOTION SHOULD BE DENIED.**

27 Defendant requests that Plaintiff's motion be denied. This Court on April 9, 2010  
28 ruled in favor of Progressive denying Plaintiff's motion for summary judgment. A copy of  
29 the Court's Oral Ruling is attached as Exhibit 1. The opinion in pertinent part states:

30 "And I am satisfied that, logically, the Legislature, even though  
31 they may have thought about it, they intended the existence of

1 coverage from any source to be determined at the time of the  
2 accident. In this case, at the time of the accident, there was \$1.5  
3 million in – and I'm not sure what the term of art is, but  
basically the primary coverage, carrier coverage would have  
been that Eastside Insurance policy.

4 There was also UIM coverage. I am satisfied that, logically,  
5 unless the Legislature wants to change it, the only factor that  
6 affects whether that UIM coverage is – whether the plaintiff  
looks to the UIM coverage, the only factor that affects that is the  
ultimate amount of damages that they are, under the statute,  
legally entitled to." Exhibit 1, pgs. 2-3.

7 Thus, the tortfeasor, Ms. Smith, also has \$50,000 in personal automobile insurance.  
8 Additionally, the \$1.5 million liability limits coverage from the Evanston Insurance Contract,  
9 Ms. Smith's employer, is fully available. Progressive is entitled to a credit of \$1,550,000  
10 against the Plaintiff's damages, which sum constitutes the total of all liability policies  
11 applicable to Plaintiff's claim, before Progressive is liable to pay *any* UIM damages.

12 RCW 48.22.030 defines a *motor vehicle* as underinsured – not an individual, as the  
13 statute in pertinent part states:

14 "**(1) Underinsured motor vehicle" means a motor vehicle**  
15 **with respect to the ownership, maintenance, or use of which**  
16 **either no bodily injury or property damage liability bond or**  
17 **insurance policy applies** at the time of an accident, or with  
18 respect to which the sum of the limits of liability under all  
19 bodily injury or property damage liability bonds and insurance  
20 policies applicable to a covered person after an accident is less  
21 than the applicable damages which the covered person is legally  
22 entitled to recover. (Emphasis Supplied)

23 It is undisputed that the vehicle driven by Dawnell Smith for Eastside Express,  
24 Inc. was covered by a policy issued by the Evanston Insurance Company for the use  
25 as a pizza delivery vehicle. The insurance for the vehicle is applicable to Plaintiff's  
26 claim and is not dependent merely on the status of the driver under RCW 48.22.030.

There are no Washington decisions that support Plaintiff's position. *Finney v.*  
*Farmers*, 92 Wn. 2d 748, 600 P.2d 1272 (1979) decision can be easily distinguished as it

1 involves a for different set of facts. In *Finney*, it was contended by the insurer that the  
2 plaintiffs could recover under the uninsured motorist clause of their policy only if *both* the  
3 *owner* and *driver* of the offending car are uninsured. *Id.* at 1276. The insurance policies at  
4 issue in *Finney* for the owner and driver did *not* cover the *same* vehicle. The plaintiffs in  
5 *Finney* contended that if the owner of a car is liable for its negligent use, the car is  
6 “uninsured” and the uninsured motorist clause applies in favor of the policyholder. *Id.*

7         The facts in *Finney* involved the pooling of the insurance policies of the registered  
8 owner of the car and the driver. Unlike *Finney*, this case involves *one* vehicle that is covered  
9 by two different policies – there is no “pooling” of policies from drivers that owned separate  
10 vehicles. See *Allstate Insurance Co. v. Batacan*, 139 Wn. 3d 443, 986 P.2d 823 (1999)  
11 (insurance on a separate care is not applicable to an underinsured vehicle in a multi-car  
12 accident).

13         In summary, the UIM status under RCW 48.22.030(1) depends on the definition of an  
14 underinsured motor vehicle.<sup>1</sup> The vehicle was insured with the \$50,000 liability insurance  
15 that Ms. Smith had with her personal automobile insurer, State Farm, and the \$1.5 million in  
16 liability coverage from the Evanston Insurance Company, for a total of \$1.55 million in  
17 liability coverage that is available. Progressive is therefore entitled to a full credit of  
18 \$1.55 million.

19 ///

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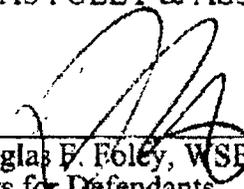
25 <sup>1</sup> The definition of a UIM vehicle was changed after *Finney*, by the Washington Legislature adding the “operation,  
26 maintenance or use” definition to determine whether a vehicle is underinsured. See *Strunk v. State Farm*, 90 Wn.2d  
210, 580 P.2d 622 (1978)

1 **II CONCLUSION**

2 For the reasons set forth above, Plaintiff's Motion for Reconsideration should be  
3 denied. Progressive is entitled to a credit of \$1.55 million against the Plaintiff's damages  
4 before being liable to pay any UIM benefits as the Court clearly has ruled.

5 DATED this 26<sup>th</sup> day of April, 2010.

6 DOUGLAS FOLEY & ASSOCIATES PLLC

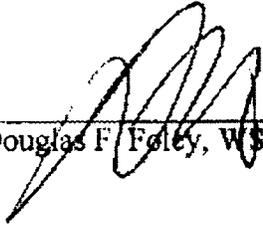
7  
8 By  \_\_\_\_\_  
9 Douglas E. Foley, WSPA #13119  
10 Attorneys for Defendants  
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1 **CERTIFICATE OF SERVICE**

2 I certify that, on the date indicated below, I caused a true copy of the foregoing  
3 document to be served by the means indicated:

4 Richard B. Kilpatrick *Via e-mail, Fax and U.S. Mail*  
5 Attorney at Law  
6 1750 112<sup>th</sup> Avenue NE Suite D-155  
7 Bellevue, WA 98004

8 DATED this 26<sup>th</sup> day of April, 2010.

9   
10 \_\_\_\_\_  
11 Douglas F. Foley, WSB #13119

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

JANETTE LEDING OCHOA,	)	SNOHOMISH COUNTY
Plaintiff,	)	CAUSE No. 07-2-07712-7
v.	)	
PROGRESSIVE CLASSIC	)	COURT'S ORAL RULING
INSURANCE CO., et al.,	)	
Defendant.	)	

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EXCERPT FROM THE VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE BRIAN GAIN

---

April 9, 2010  
Norm Maleng Regional Justice Center  
Kent, Washington

APPEARANCES:

FOR THE PLAINTIFF: RICHARD B. KILPATRICK  
Attorney at Law  
1750 112th Avenue Northeast  
Suite D-155  
Bellevue, Washington 98004

FOR THE DEFENDANTS: DOUGLAS FOLEY  
Attorney at Law  
13115 Northeast 4th Street  
Suite 260  
Vancouver, Washington 98684

REPORTED BY: BRIDGET O'DONNELL, RPR, CRR  
Official Court Reporter  
(206) 205-2530

## 1 EXCERPT FROM PROCEEDINGS

2 April 9, 2010

3 (After argument of counsel, the following commenced:)

4 THE COURT: Well, it's an interesting issue.

5 And, basically, and I say this in other contexts at  
6 various times, it's an example of where the Legislature  
7 doesn't write the statute in terms of all of the  
8 scenarios that might arise in everyday life. So, that  
9 being said, however, I am going to deny the motion for  
10 summary judgment. And let me just explain why.

11 The reason I asked you about when you figure out,  
12 under the statute, whether it's an underinsured motor  
13 vehicle, and I think that you both agreed and I think  
14 the statute is clear, it's at the time of the accident.

15 And I am satisfied that, logically, the  
16 Legislature, even though they may not have thought about  
17 it, they intended the existence of coverage from any  
18 source to be determined at the time of the accident. In  
19 this case, at the time of the accident, there was \$1.5  
20 million in -- and I'm not sure what the term of art is,  
21 but basically the primary coverage, carrier coverage  
22 would have been that Eastside Insurance policy.

23 There was also UIM coverage. I am satisfied  
24 that, logically, unless the Legislature wants to change  
25 it, the only factor that affects whether that UIM

1 coverage is -- whether the plaintiff looks to the UIM  
2 coverage, the only factor that affects that is the  
3 ultimate amount of damages that they are, under the  
4 statute, legally entitled to.

5         So I am satisfied -- and this may sound like an  
6 overly ridiculous example. If, in this type of case,  
7 the plaintiff settled under the Eastside policy for one  
8 dollar, then, according to the theory of the plaintiff,  
9 the UIM coverage would kick in and be responsible for up  
10 to the limits of the coverage.

11         I'm satisfied that that's not what the statute  
12 envisioned, nor is it logical to me. The UIM coverage,  
13 if the plaintiff chooses to settle for somewhat less  
14 than the coverage, then I am satisfied that unless the  
15 Legislature changes it, that does not mean that then  
16 they begin to look to the UIM coverage.

17         And, to me, it's just logical. And you probably  
18 need to address it to the Legislature or the appellate  
19 court. But I am satisfied that, at this point, I can't  
20 grant summary judgment. It just does not seem to be  
21 legally supportable.

22         MR. FOLEY: We'll submit an order.

23         Thank you, Your Honor.

24         THE COURT: And if you can confer and agree on an  
25 order, I will take a recess and sign it.

1 MR. FOLEY: Okay. Thank you, Your Honor.

2 MR. KILPATRICK: And I obviously confused part of  
3 this because some of what you are saying we're claiming  
4 we're not, and I will take a whack at reconsideration.  
5 But we'll get an order here.

6 THE COURT: Feel free. And if you think it is  
7 important and if you can't agree today on the order,  
8 then you can circulate it. That's fine.

9 MR. KILPATRICK: Sure. Well, we should be able  
10 to agree to something.

11 THE COURT: Okay.

12 MR. FOLEY: Thank you.

13 THE COURT: We will be in recess.

14 MR. FOLEY: Thank you.

15 (Court adjourned.)  
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## C E R T I F I C A T E

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2  
3 STATE OF WASHINGTON )  
4 COUNTY OF KING ) ss.  
5 )

6 I, Bridget O'Donnell, Official Court Reporter in  
7 this Court, do hereby certify that I was present and  
8 reported in Stenotypy the Excerpt from the Verbatim  
9 Report of Proceedings in the matter of OCHOA V.

10 PROGRESSIVE CLASSIC INSURANCE CO., ET AL, Snohomish  
11 County Cause No. 02-2-07712-7, before the Honorable  
12 Brian Gain, Superior Court Judge, in the City of Kent,  
13 State of Washington, on April 9, 2010;

14 That I have transcribed my Stenotype notes into  
15 typewritten form, and that the attached four pages  
16 represent a true and accurate transcription of said  
17 notes, and that I am certified to report Superior Court  
18 Proceedings in the State of Washington.

19 Wherefore, I have affixed my signature this 21st  
20 day of April, 2010.

21  
22  
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24 BRIDGET O'DONNELL, RPR, CRR  
25 Official Court Reporter

# **APPENDIX I**

C - Client

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

Janette Leding Ochoa  
Petitioner/Plaintiff(s),

No. 02-2-07712-7

~~SNOHOMISH COUNTY CASE~~

vs.

ORDER ON CIVIL MOTION

Progressive Et Al  
Respondent/Defendant(s).

ORIGINAL

The above-entitled Court, having heard a motion for reconsideration RE: Denial of Plaintiff's Summary Judgment;

IT IS HEREBY ORDERED that the motion for reconsideration is denied.

DATED: 5-10-10

  
\_\_\_\_\_  
JUDGE BRIAN GAIN

\_\_\_\_\_  
Attorney for Plaintiff(s)

\_\_\_\_\_  
Attorney for Defendant(s)

# **APPENDIX J**

**FILED**  
KING COUNTY SUPERIOR COURT

**JUL 29 2010**

SUPERIOR COURT CLERK  
**BEVERLY ANN ENEBRAD**  
DEPUTY

Visiting Judge Brian Gain

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

PROGRESSIVE CLASSIC INSURANCE  
CO., a foreign corporation, THE  
PROGRESSIVE CORPORATION, a foreign  
corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

**ORIGINAL  
COPY**

Following the Court's suggestion at the pre-trial conference held June 25, 2010, the parties presented agreed Findings of Fact to the Court on July 29, 2010 (except Progressive requested one addition to Findings 2 and one addition to Finding 18). The Court resolved those two requests *by ml*

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1 In order to obtain appellate guidance before conducting an expensive trial,  
2 the Court made the Conclusions of Law stated below.

3 I. FINDINGS OF FACT

4 1. The Plaintiff, Janette Leding Ochoa (hereinafter "Plaintiff"), was  
5 struck by an auto operated by Dawnell Smith (hereinafter "Smith") on June 24,  
1999 when Smith went through a stop sign.

6 2. Dawnell Smith was the only <sup>driver</sup> ~~person~~ at fault in the collision. *WPK*

7 3. Plaintiff suffered injuries in the collision and retained attorney Ben  
8 Wells of Wells & Hammer to represent her.

9 4. At the time of this accident, Smith was delivering pizza for  
10 Domino's Pizza, Eastside Express in her own vehicle.

11 5. Smith carried a State Farm Mutual Automobile Insurance Company  
12 policy that applied to this accident. It provided liability coverage in the amount  
of \$50,000 for each person and \$100,000 for each occurrence.

13 6. Evanston Insurance Company had a policy of insurance with limits  
14 of \$1,500,000 which insured Eastside Express, Inc. for its liability for any non-  
owned vehicle driven on the job by an employee of Eastside Express, Inc. *The*

15 7. The Evanston policy was applicable to the collision and the policy  
16 covered the vehicle Dawnell Smith was driving at the time of the incident since  
17 Dawnell Smith owned the vehicle and Dawnell Smith was operating the vehicle  
within the course and scope of her employment with Eastside Express. Dawnell  
Smith was not an insured under the Evanston policy.

18 8. Plaintiff Ochoa had a policy of insurance with Progressive Classic  
19 Insurance Company which included Underinsured Motorist coverage for  
20 Plaintiff in the amount of \$50,000. The complete policy is Exhibit B.

21 9. Ochoa made claims with Smith and Progressive.

1           10. On March 15, 2001, Plaintiff provided Progressive the opportunity  
2 to buy out the tentative settlement with Smith for the State Farm limits of  
\$50,000. Progressive declined by fax on March 20, 2001.

3           11. On March 21, 2001 Ben Wells had Ochoa sign a release provided  
4 by State Farm and settled all claims against Smith and State Farm for \$50,000.

5           12. On March 21, 2001 Wells wrote Progressive providing a copy of  
6 the State Farm settlement documents and renewed the UIM claim. After  
7 confirming the Evanston policy applied Progressive thereafter took the position  
8 that to have a UIM claim the value of Ochoa's damages had to exceed the  
amount of both the State Farm policy and the Evanston policy combined,  
regardless of whether the Evanston policy covered Smith as an insured.

9           13. Soon after providing the State Farm settlement information to  
10 Progressive, Wells wrote to Domino's Pizza Eastside Express to assert a claim  
for Ochoa. No offer was made.

11           14. Wells withdrew from Ochoa's representation by June 21, 2001

12           15. The release from State Farm Wells had Ochoa sign to settle with  
13 Smith had language that Domino's Pizza Eastside Express claimed released it  
14 from any claim. The Release is Exhibit C.

15           16. In June 2002 Ochoa sued and served Domino's Pizza Eastside  
16 Express. Attorney Ben Wells and Hammer & Wells were also named for any  
damages that may have been lost from Eastside Express by the release but the  
attorney and law firm were not served. Ochoa served Wells in February 2004.

17           17. When the dispute on the issue of the threshold for a UIM claim  
18 continued Plaintiff amended the complaint and added Progressive as a defendant  
19 in June 2004.

20           18. In January 2005 Ochoa settled her claims against Eastside Express  
21 for \$25,000 and against Ben Wells and Hammer & Wells for \$32,500 and both  
22 defendants were dismissed. Progressive was the only remaining defendant.  
Plaintiff's recovery at that point was \$107,500.

1 19. Ochoa has asserted the value of her damages always exceeded the  
2 \$50,000 limits available to her from the State Farm policy and that her damages  
3 most likely exceeded \$107,500. Ochoa always agreed and it is so found that her  
4 claims do not remotely exceed \$1,550,000.

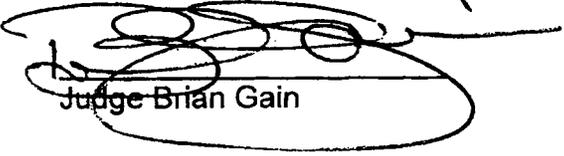
5 **II. CONCLUSIONS OF LAW**

6 1. The Evanston policy liability limit serves as an offset for the  
7 threshold for Ochoa's UIM claim regarding Dawnell Smith's liability.

8 2. The appellate resolution of this issue is central to either the  
9 necessity of any trial or one that is not useless. Pursuant to CR 54(b) there is no  
10 just reason for delay of entry of a final order.

11 3. The pending trial date is stricken and stayed, and any other the  
12 appropriate order regarding dismissal shall be entered.

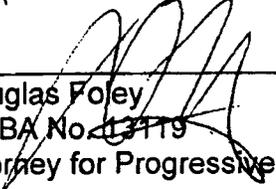
13 DATED this 29<sup>th</sup> day of July, 2010.

14   
15 Judge Brian Gain

16 *Findings agreed, conclusions of law are disputed.*  
*Richard B. Kilpatrick*

17 Richard B. Kilpatrick  
18 WSBA No. 7058  
19 Attorney for Plaintiff Ochoa

20 *Approved on the form.*

21   
22 Douglas Foley  
23 WSBA No. 13119  
24 Attorney for Progressive defendants

n



**Evanston Insurance Company**  
 SHAND MORAHAN PLAZA  
 EVANSTON, ILLINOIS 60201

Policy No.  
 Prev. No.  
 Prod. No.

NO800064-84  
 SK800265  
 24685

**DECLARATIONS - BUSINESS AUTOMOBILE LIABILITY**

**PIZZA DELIVERY INDUSTRY ASSOCIATION**

1. **NAMED INSURED:** EAST SIDE EXPRESS, INC.
2. **BUSINESS ADDRESS OF THE INSURED:**  
 4002 53<sup>RD</sup> ST.  
 TOCOMA, WA 98422
3. **POLICY PERIOD:** From April 1, 1999 To June 1, 2000  
 12:01 a.m. standard time at address of insured stated above.
4. **COVERAGE AND LIMIT OF LIABILITY:**  
 \$1,500,000 COMBINED SINGLE LIMIT BODILY INJURY  
 AND PROPERTY DAMAGE EACH ACCIDENT
5. **DEDUCTIBLE:** DRIVER'S INSURANCE OR \$500 DEDUCTIBLE, WHICHEVER IS GREATER
6. **OPERATIONS TO BE COVERED:** PIZZA DELIVERY
7. **RATE:** \$1,700.00 PER STORE
8. **PREMIUM FOR POLICY PERIOD:**

MINIMUM & DEPOSIT	\$19,839.00
POLICY FEE	\$ 50.00
SURPLUS LINES TAX 4.85%	\$ 964.62
9. **ENDORSEMENTS ATTACHED:**  
 ADDITIONAL INSURED  
 SCHEDULE OF LOCATIONS

ALL CLAIMS TO BE REPORTED DIRECTLY TO

Shand Morahan & Company, Inc.  
 Shand Morahan Plaza  
 Evanston, Illinois 60201  
 (847) 866-2800

\_\_\_\_\_  
 (Authorized Representative)



# Evanston Insurance Company

**MARKET.** EVANSTON, ILLINOIS

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## Endorsement

---

Named Insured:  
PIZZA DELIVERY INDUSTRY ASSOCIATION  
EAST SIDE EXPRESS, INC.

Policy No.: NO800064-84  
Endorsement No.: 1  
Effective Date: April 1, 1999

---

### ADDITIONAL INSURED

In consideration of the premium charged, it is understood and agreed that Domino's Pizza, Inc. is an additional insured hereunder but only with respect to claims and claim expenses arising from services indicated in Item 6 of the Declarations performed by the Named Insureds listed in Item 1 of the Declarations.

---

All other terms and conditions remain unchanged.

---

Authorized Representative



# Evanston Insurance Company

EVANSTON, ILLINOIS

## Endorsement

Named Insured:  
PIZZA DELIVERY INDUSTRY ASSOCIATION  
EAST SIDE EXPRESS, INC.

Policy No.: NO800064-84  
Endorsement No.: 2  
Effective Date: April 1, 1999

### SCHEDULE OF LOCATION

In consideration of the premium of \$19,839.00, it is understood and agreed that the following location is scheduled under the captioned named insured:

- |    |   |     |  |
|----|---|-----|--|
| 1. | 10575 NE 12 <sup>TH</sup> STREET<br>BELLEVUE, WA 98009<br>STORE# 7157         | 7.  | 500 NW MARKET<br>SEATTLE, WA 98107<br>STORE# 7148                    |
| 2. | 15920 NE 8 <sup>TH</sup> AVENUE, SUITE 5<br>BELLEVUE, WA 98007<br>STORE# 7130 | 8.  | 303 91 <sup>ST</sup> AVENUE N.E.<br>EVERETT, WA 98205<br>STORE# 7055 |
| 3. | 7639 27 <sup>TH</sup> AVENUE, S.E.<br>MERCER ISLAND, WA 98040<br>STORE# 7026  | 9.  | 208 W. MAIN STREET<br>MONROE, WA 98272<br>STORE# 7050                |
| 4. | 16690 REDMOND WAY<br>REDMOND, WA 98052<br>STORE# 7111                         | 10. | 22649 NE INGLEWOOD HILL<br>REDMOND, WA 98072<br>STORE# 7043          |
| 5. | 10023 HOLMAN ROAD NW<br>SEATTLE, WA 98177<br>STORE# 7140                      |     |  |
| 6. | 7320 35 <sup>TH</sup> STREET NE<br>SEATTLE, WA 98115<br>STORE# 7131           |     |  |

All other terms and conditions remain unchanged.

Authorized Representative



# Evanston Insurance Company

**MARKET.** EVANSTON, ILLINOIS

---

## Endorsement

---

Named Insured:  
PIZZA DELIVERY INDUSTRY ASSOCIATION  
EAST SIDE EXPRESS, INC.

Policy No.: NO800064-84  
Endorsement No.: 3  
Effective Date: April 1, 1999

---

### ADDITIONAL LOCATION

In consideration of the additional premium of \$1,983.90, it is understood and agreed that the following additional location has been added to this policy:

- 11. 15100 SE 38<sup>TH</sup> SPACE C  
BELLEVUE, WA 98006  
STORE# 7027

---

All other terms and conditions remain unchanged.

---

Authorized Representative

## Business Auto Policy (Ded)

In consideration of the payment of the premium, the undertaking of **you** to pay the deductible as described herein and in the amount stated in the declarations, in reliance upon the underwriting information submitted on behalf of **you**, and subject to the limits of liability shown in the Declarations, and subject to all the terms of this insurance, **we** agree with **you** as follows:

### PART I - WORDS AND PHRASES WITH SPECIAL MEANING - READ THEM CAREFULLY

The following words and phrases have special meaning throughout this policy and appear in boldface type when used:

- A. **"You"** and **"your"** mean the person or organization shown as the named insured in ITEM ONE of the declarations.
- B. **"We"**, **"us"** and **"our"** mean the company providing the insurance.
- C. **"Accident"** includes continuous or repeated exposure to the same conditions resulting in **bodily injury or property damage** the **Insured** neither expected nor intended.
- D. **"Auto"** means a non owned motor vehicle, while used to deliver food on behalf of the Named Insured(s).
- E. **"Bodily Injury"** means bodily injury, sickness or disease including death resulting from any of these.
- F. **"Insured"** means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to **our** limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.
- G. **"Loss"** means direct and accidental damage or loss.
- H. **"Property damage"** means damage to or loss of use of tangible property.

### PART II - WHICH AUTOS ARE COVERED AUTOS

- A. The "SCHEDULE OF COVERED LOCATIONS" attached to the declarations shows the locations from which **auto(s)** as defined in D. above are covered.

### PART III - WHERE AND WHEN THIS POLICY COVERS

We cover accidents or losses which occur during the policy period:

- A. In the United States of America, its territories or possessions, Puerto Rico or Canada, or
- B. While the covered **auto** is being transported between any of these places.

### PART IV - LIABILITY INSURANCE

#### A. WE WILL PAY.

- 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto, in excess of the deductible amount stated in the declarations.
- 2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for **bodily injury or property damage** not covered by this policy. We may investigate and settle any claim or suit as **we** consider appropriate. Our payment of the LIABILITY INSURANCE limit ends **our** duty to defend or settle.

**B. WE WILL ALSO PAY.**

In addition to our limit of liability, we will pay for the insured:

1. Up to \$250 for cost of bail bonds (including bonds for related traffic law violations) required because of an **accident we cover**. We do not have to furnish these bonds.
2. Premiums on appeal bonds in any suit we defend.
3. Premiums on bonds to release attachments in a suit we defend but only for bonds up to our limit of liability.
4. All costs taxed to the insured in a suit we defend.
5. All interest accruing after the entry of the judgment in a suit we defend. Our duty to pay interest ends when we pay or tender our limit of liability.
6. Up to \$50 a day for loss of earnings (but not other income) because of attendance at hearings or trials at our request.
7. Other reasonable expenses incurred at our request.

**C. WE WILL NOT COVER - EXCLUSIONS.**

This insurance does not apply to:

1. Liability assumed under any contract or agreement.
2. Any obligation for which the insured or his or her insurer may be held liable under any workers' compensation or disability benefits law or under any similar law.
3. Any obligation of the insured to indemnify another for damages resulting from bodily injury to the insured's employee.
4. Bodily injury to any fellow employee of the insured arising out of and in the course of his or her employment.
5. Bodily injury to any employee of the insured arising out of and in the course of his or her employment by the insured. However, this exclusion does not apply to bodily injury to domestic employees not entitled to workers' compensation benefits.
6. Property damage to property owned or transported by the insured or in the insured's care, custody or control.
7. Bodily injury or property damage resulting from the handling of property:
  - a. Before it is moved from the place where it is accepted by the insured for movement into or onto the covered auto, or
  - b. After it is moved from the covered auto to the place where it is finally delivered by the insured.
8. Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.
9. Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.

**D. WHO IS INSURED.**

1. You are an insured for any covered auto.

**E. OUR LIMIT OF LIABILITY.**

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the LIABILITY INSURANCE limit shown in the declarations excess of the deductible amount stated in the declarations.

2. All **bodily injury and property damage** resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one **accident**.

**F. DEDUCTIBLE.**

1. The deductible amount stated in the declarations shall be paid by **you** and shall be applicable to each **Accident** and shall include **loss** payments and claim expenses, whether or not **loss** payment is made.

Such amounts shall, upon written demand by **us**, be paid by **you** within ten (10) days. The total payments requested from **you** in respect of each **Accident** shall not exceed the deductible amount stated in the declarations.

The determination of **us** as to the reasonableness of the claim expenses shall be conclusive on **you**.

**G. OUT OF STATE EXTENSIONS OF COVERAGE.**

1. While a covered **auto** is away from the state where it is licensed **we** will:
  - a. Increase this policy's liability limits to meet those specified by a compulsory or financial responsibility law in the jurisdiction where the covered **auto** is being used.
  - b. Provide the minimum amounts and types of other coverages, such as "No-Fault", required of out of state vehicles by the jurisdiction where the covered **auto** is being used.
2. **We** will not pay anyone more than once for the same elements of loss because of these extensions.

**PART V- CONDITIONS**

The insurance provided by this policy is subject to the following conditions:

**A. YOUR DUTIES AFTER ACCIDENT OR LOSS.**

1. **You** must promptly notify **us** of any **accident** or **loss**. **You** must tell **us** how, when and where the **accident** or **loss** happened. **You** must assist in obtaining the names and addresses of any injured persons and witnesses.
2. Additionally, **you** must:
  - a. Cooperate with **us** in the investigation, settlement or defense of any claim or suit. No **insured** shall, except at his or her own cost, voluntarily make any payment, assume any obligation or incur any expense.
  - b. Immediately send **us** copies of any notices or legal papers received in connection with the **accident** or **loss**.
  - c. Submit at **our** expense and as often as **we** require to physical examinations by physicians **we** select.
  - d. Authorize **us** to obtain medical reports and other pertinent medical information.

**B. OTHER INSURANCE.**

1. For any covered **auto** **you** don't own, the insurance provided by this policy is excess over any other collectible insurance.
2. When two or more policies cover on the same basis, either excess or primary, **we** will pay only **our** share. **Our** share is the proportion that the limit of **our** policy bears to the total of the limits of all the policies covering on the same basis.

**C. OUR RIGHT TO RECOVER FROM OTHERS.**

If **we** make any payment, **we** are entitled to recover what **we** paid from other parties. Any

person to or for whom we make payment must transfer to us his or her rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.

**D. CHANGES.**

This policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us. If a change requires a premium adjustment, we will adjust the premium as of the effective date of change. If we revise this policy form to provide more coverage without additional premium charge your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

**E. TRANSFER OF YOUR INTEREST IN THIS POLICY.**

Your rights and duties under this policy may not be assigned without our written consent.

**F. CANCELLATIONS.**

This policy may be canceled by the Named Insured by surrender thereof to the Company or to Shand, Morahan & Company, Inc., Ten Parkway North, Deerfield, Illinois 60015 or by mailing to the aforementioned written notice stating when thereafter such cancellation shall be effective. If canceled by the Insured, the Company shall retain the customary short rate proportion of the premium.

This policy may be canceled by the Company or by Shand, Morahan & Company, Inc., by mailing to the Named Insured at the address stated in the Declarations, written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. However, if the Company cancels the policy because the Insured has failed to pay a premium or deductible when due, this policy may be canceled by the Company by mailing a written notice of cancellation to the Insured stating when, not less than ten (10) days thereafter, such cancellation shall be effective. The mailing of notice as aforementioned shall be sufficient notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice to the Named Insured by the Company, or Shand, Morahan & Company, Inc. shall be equivalent to mailing. If canceled by the company or Shand, Morahan & Company, Inc., earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter.

**G. Premium and Audit:** Upon expiration of this policy, the Insured shall furnish to the person(s) specified for the purpose in the Declarations, on behalf of the Company, with a statement of the Insured's actual total sales or other premium base as specified in Item 7 of the Declarations for the policy period. The actual earned premium shall be computed thereon at the premium rate stipulated in the Declarations. If the actual earned premium is more than the deposit premium the Insured shall pay the difference to the Company; if less, the Company shall refund the difference to the Insured except that the Company shall be entitled to the minimum premium as stated in the Declarations. The Company or its authorized representatives shall have the right to require of the Insured, at any time within the said policy period or one year thereafter, a sworn statement of the entire amount (or number) of such total sales or other premium base during the whole or any specified part of the said period, and the Insured shall furnish said statement within ten (10) days after request. The statement referred to shall be subject to verification and audit by a duly authorized representative of the Company, who shall have the right and opportunity to examine the books and records of the Insured as respects such total sales or other basis of premium, and such examination may be made at any time during the said period and within three (3) years thereafter. The rendering of any estimate or statement or the making of any previous settlement shall not bar the examination herein provided for, nor the Company's right to additional premium.

**H. Service of Suit:** It is agreed that in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Named Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of the Company's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United

States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon General Counsel, Legal Department, Shand Morahan & Company, Inc., Ten Parkway North, Deerfield, Illinois 60015 and that in any suit instituted against the Company upon this contract, the Company will abide by the final decision of such court or of any appellate court in the event of an appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefor, the Company hereby designates the Superintendent, Commissioner, or Director of Insurance or other official specified for that purpose in the statute, or his/her successor or successors in office, as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Named Insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above-named counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

**IN WITNESS WHEREOF**, the Company has caused this policy to be signed by its President and Secretary, but this policy shall not be valid unless countersigned on the Declarations page by a duly authorized representative of the Company.

---

Secretary

---

President

## **NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT (BROAD FORM)**

This endorsement modifies the provisions of this policy.

It is agreed that:

**1. This policy does not apply:**

- A. Under any Liability Coverage, to bodily injury or property damage
  - (1) with respect to which an Insured under this policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability; or
  - (2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
- B. Under any Medical Payments Coverage, or any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.
- C. Under any Liability Coverage, to bodily injury or property damage resulting from the hazardous properties of nuclear material, if
  - (1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of, an Insured or (b) has been discharged or dispersed therefrom;
  - (2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or
  - (3) the bodily injury or property damage arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

**2. As used in this endorsement:**

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or by-product material;

"source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

- (a) any nuclear reactor,
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste.

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

B

PROGRESSIVE DIRECT  
PO BOX 1088  
RANCHO CORDOVA CA 95741

00122

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

FOR POLICY NUMBER:  
30931541-0

Thank you for choosing Progressive.

Enclosed is your policy information. Please keep this with your important papers.

If you have any questions, please call us at:

Automated Billing Inquiry  
1-800-999-8781

24 Hour Policy Service  
1-800-888-7764

Immediate Response® claims service  
1-800-274-4499

**IF YOU HAVE AN ACCIDENT...**

Please call Progressive's Immediate Response® claims service right away (from the accident scene if possible) at **1-800-274-4499**.

A Progressive claim representative will assist you with these services 24 hours a day, 7 days a week:

- Arrange for rental vehicle
- Arrange for towing
- Dispatch claims representative to your accident location in the event of a serious injury or upon request
- Explain coverages and the claims process

I CERTIFY THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Kern  
DATE 1/21/10

PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 1088  
RANCHO CORDOVA, CA 95741-1088

PROGRESSIVE DIRECT  
PO BOX 1088  
RANCHO CORDOVA CA 95741

**PROGRESSIVE®**

24 Hour Policy Service 1-800-888-7764  
24 Hour Claims Service 1-800-274-4499  
Automated Billing Inquiry 1-800-999-8781

PERSONAL AUTO POLICY DECLARATIONS PAGE  
FOR NAMED INSURED:

00122

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251  
POLICY NUMBER: 30931541 - 0  
POLICY PERIOD: 10/15/98 TO 10/15/99

This policy incepts the later of:  
1. the time the application for insurance is executed on the first day of the policy period; or  
2. 12:01 a.m. on the first day of the policy period.  
This policy shall expire at 12:01 a.m. on the last day of the policy period.

The following coverages and limits apply to each described vehicle as shown below. Coverages are defined in the policy and are subject to the terms and conditions contained in the policy, including amendments and endorsements. No changes will be effective prior to the time changes are requested.

REASON FOR ISSUANCE: NEW BUSINESS

VEH #	YR	MAKE - MODEL	SERIAL NUMBER	STATED AMT	DRV #	LISTED DRIVERS	EXCLUDED	SR22	RATED
1	1994	GEO PRIZM/LSI	4D 1Y1SK5366RZ027420		1	JOSE OCHOA	NO	NO	NO
2					2	JANETTE LEDING	NO	NO	YES
3					3				
4					4				
					5				

COVERAGES AND LIMITS OF LIABILITY

PREMIUMS

THE COVERAGE IS APPLICABLE ONLY IF A PREMIUM IS INDICATED.

BODILY INJURY LIABILITY  
\$25,000 EACH PERSON - \$50,000 EACH ACCIDENT  
PROPERTY DAMAGE LIABILITY  
\$25,000 NO DEDUCTIBLE  
UNDERINSURED MOTORIST  
\$25,000 EACH PERSON - \$50,000 EACH ACCIDENT  
COMPREHENSIVE ACV LESS \$500 DEDUCTIBLE  
COLLISION OR UPSET ACV LESS \$500 DEDUCTIBLE

VEH #1	VEH #2	VEH #3	VEH #4	TOTAL
\$564				\$564
\$101				\$101
\$78				\$78
\$549				\$549

I CERTIFY THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
BY [Signature]  
DATE 1/21/10

SEE REVERSE PREMIUM BY VEHICLE

\$1,292

ATTACHMENTS IDENTIFIED BY FORM NO.  
9798WA(1096)

TOTAL POLICY PREMIUM \$1,322  
INCLUDES A NON-REFUNDABLE POLICY FEE OF \$30

UW 0002

ANY LOSS UNDER PART IV IS PAYABLE TO NAMED INSURED AND LIENHOLDER:

LIENHOLDER

VEH #1

VEH #2

BECU

PO BOX 97050

SEATTLE

WA 98124

VEH #3

VEH #4

ADDITIONAL INTEREST

FOR COMPANY USE ONLY

DISCOUNTS:	VEH 1	VEH 2	VEH 3	VEH 4
MULTIPLE CARS ON POLICY				
PREMIUM PAID IN FULL				
RESPONSIBLE DRIVER				
MATURE DRIVER COURSE				
DRIVER-SIDE AIRBAG				
DUAL AIRBAGS				
PASSIVE RESTRAINTS				
ASSOCIATION DISCOUNT				
SURCHARGES:				
VEHICLE USED FOR BUSINESS				

VEH	DR#	DR	PT.	CL.	TERR	LIAB	SYMBOL	COMP	COLL
1	2	23SF	05	30	02	02	08		
2									
3									
4									

VEH	DR#	AGE	SEX	M/S
1	2	23	F	S
2				
3				
4				

COMPANY 19  
 MARKET MIDDLE MARKET  
 LEVEL SUPER-SAVER  
 PAY PLAN 14  
 R/R 9710  
 FACTOR % 1.000  
 FORM 9606  
 ED. 0696  
 AGENT CODE IC 94548  
 PREV POL #  
 PRORATER

I CERTIFY THIS DOCUMENT TO BE  
 A TRUE AND ACCURATE COPY.

BY Debra New  
 DATE 1/21/10

E4 150320 WGV 98293 000

UW 0003



**Notice of Underwriting Decision & Information Practices**

Dear Progressive Customer,

In connection with your insurance transaction with us, we may collect or have collected consumer reports, such as driver history and credit reports, or personal or privileged information from the following consumer reporting agencies:

<b>Driver History Report:</b> Equifax Services Inc. Customer Service Center 1525 Windward Concourse Alpharetta, GA 30202 1-800-456-6004	<b>Home Ownership Report:</b> Metronet 360 East 22nd Street Lombard, IL 60148 1-800-456-6638	<b>Credit Report:</b> Trans Union P.O. Box 390 Springfield, PA 19064-0390 1-800-520-9444
--	--	--

In certain circumstances, the information contained in consumer reports, and other personal or privileged information subsequently collected by us, may be legally disclosed to third parties without your consent, but it is not our practice to do so.

This information is used to underwrite your insurance, and any rate increase or other adverse underwriting decision may, in part, be attributable to use of this information. No consumer reporting agency made any decision to take any adverse action with respect to your insurance transaction, and will be unable to provide the specific reasons why any such action was taken.

At your request, we will: (1) confirm whether a consumer report was requested; (2) if so, provide the name and address of the consumer reporting agency that furnished it; (3) provide you more detailed information regarding our collection, use, and disclosure of personal information, and your rights to access and correct such information; (4) provide the specific reasons for, and supporting information related to, any change to your policy; and (5) identify any third parties to whom we may have disclosed this information. You may request this information by writing to us or by calling us at **1-800-888-7764**.

You have the right to: (1) obtain information regarding the nature and substance of recorded personal information about you; (2) access this information; (3) dispute the accuracy or completeness and request the correction of this information; and (4) file a statement setting forth what you think is the correct information, and why you disagree with any refusal to correct the information. Also, for 60 days after you receive this notice, you may obtain a free copy of any consumer report resulting in any adverse action. To exercise any of these rights, simply call us or the appropriate consumer reporting agency identified above.

I CERTIFY THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Henry  
DATE 1/21/10

**NOTICE OF ADVERSE UNDERWRITING DECISION**

**Insured**           JOSE OCHOA  
**Policy Number**   30931541-0  
**Date:**             10/20/98

Washington law requires that we give you this notice. Please read it carefully.

The policy premium you were originally quoted was incorrect. We apologize for the error and any inconvenience it may have caused. We will be happy to serve your insurance needs, but if you do not wish to continue your policy at the revised correct premium, please notify us within 30 days of the date of this notice. We will cancel your policy based on the original quoted premium, unless the additional premium is due entirely to undisclosed violations.\* You will only be charged for the number of days your policy is in effect.

If we do not receive your request to cancel within 30 days of the date shown on this memo, your policy will continue at the revised correct premium as shown on your enclosed declarations page.

\*If the additional premium is due entirely to undisclosed violations, and you request to cancel your policy, the cancellation will be based upon the revised correct premium for the number of days your policy is in effect.



I CERTIFY THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Henry  
DATE 4/21/10

Agent: PROGRESSIVE DIRECT  
 PO BOX 1088  
 RANCHO CORDOVA CA  
 Date: 10/20/98  
 Named Insured: JOSE OCHOA  
 Policy: 30931541-0



Total policy premium is based on a variety of factors. The following information is presented to help you understand some of the specifics used in calculating the policy premium and to explain why your premium may be different from what was originally quoted.

We use the following sources of information to create and verify driving record:

1. Information provided on the insurance application
2. Motor Vehicle Reports (MVR) which are provided by state agencies
3. Claims History (CLUE) which is provided by Equifax

Source A = convictions/accidents reported on the insurance application  
 Source B = ADDITIONAL convictions/accidents found on MVR or CLUE

- Note that the points listed below are specific to Progressive and have no correlation to the point system used by the state agencies.

JOSE OCHOA				JANETTE LEDING			
CONVICTION/ACCIDENT	DATE	PTS	SRC	CONVICTION/ACCIDENT	DATE	PTS	SRC
SPEEDING-LOW	09/01/98	02	A	LEAVING THE SCENE	08/09/96	05	B
SPEEDING-LOW	07/18/97	01	B				
TRAFFIC DEVICE/SIGN	10/06/97	01	A				

CONVICTION/ACCIDENT	DATE	PTS	SRC	CONVICTION/ACCIDENT	DATE	PTS	SRC
---------------------	------	-----	-----	---------------------	------	-----	-----

CONVICTION/ACCIDENT      DATE      PTS      SRC      Contact Progressive at 1-800-888-7764 if you have any questions.

I CERTIFY THIS DOCUMENT TO BE  
 A TRUE AND ACCURATE COPY.  
 BY Debra Henry  
 DATE 1/21/10

DMGAP180 E4 WGV 98293 150320

Insurance Identification Card - WASHINGTON

**PROGRESSIVE®**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 1088  
RANCHO CORDOVA, CA 95741-1088

Name of Insured: Policy Number: AA 30931541-0

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

Original Issue Date: 10/15/98 Expiration Date: 10/15/99  
Additional Drivers: JANETTE LEDING

Year Make/Model Vehicle Identification Number  
1994 GEO PRIZM/LSI 4D 1Y1SK5366RZ027420

Form L6530 (6-96)

**IMPORTANT!**

**IF YOU ARE INVOLVED IN AN ACCIDENT:  
(REGARDLESS OF FAULT)**

1. At the accident scene, detach the Accident Information Card and give it to the driver of the other vehicle.
2. Ask the other driver to immediately call Progressive and report the accident.
3. Call Progressive immediately to report the accident.

here and put folded Accident Information and Insurance Identification card in the glove compartment of your vehicle.

**PROGRESSIVE®**

**ACCIDENT INFORMATION CARD**  
(Give to other driver at scene of accident)

**FOR IMMEDIATE ASSISTANCE CALL  
1-800-274-4499  
24 HOURS A DAY, 7 DAYS A WEEK**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 1088  
RANCHO CORDOVA, CA 95741-1088

Name of Insured:  
  
JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251  
  
Policy Number: AA 30931541-0

Original Issue Date: 10/15/98  
Expiration Date: 10/15/99

Insurance Identification Card - WASHINGTON

**PROGRESSIVE®**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 1088  
RANCHO CORDOVA, CA 95741-1088

Name of Insured: Policy Number: AA 30931541-0

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

Original Issue Date: 10/15/98 Expiration Date: 10/15/99  
Additional Drivers: JANETTE LEDING

Year Make/Model Vehicle Identification Number  
1994 GEO PRIZM/LSI 4D 1Y1SK5366RZ027420

Form L6530 (6-96)

Detach and keep copy of Insurance Identification Card with your records.

THIS COPY IS TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Henny  
DATE 1/21/10

PMWE0427981945L65301

UW 0007

Keep this card in your motor vehicle while in operation.

**Report all accidents immediately.**

**(24 hours a day, 7 days a week) to Progressive:**

**(1-800-274-4499)**

**Call us immediately so we can go to work for you.**

Instructions to the insured in case of accident or loss:

1. Obtain full names, addresses and license numbers of all persons involved and all witnesses.
2. Do not admit fault or discuss the accident with anyone except police or company representative.

Examine policy exclusions carefully. This form does not constitute any part of your insurance policy or bond.

Automated billing inquiries: 1-800-999-8781

Policy Service: 1-800-888-7764



Keep this card in your motor vehicle while in operation.

**Report all accidents immediately.**

**(24 hours a day, 7 days a week) to Progressive:**

**(1-800-274-4499)**

**Call us immediately so we can go to work for you.**

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Automated billing inquiries: 1-800-999-8781

Policy Service: 1-800-888-7764

THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Henry  
DATE 1/21/10



PROGRESSIVE DIRECT  
PO BOX 1088  
RANCHO CORDOVA CA 95741

24 Hour Policy Service 1-800-888-7764  
24 Hour Claims Service 1-800-274-4499  
Automated Billing Inquiry 1-800-999-8781  
PERSONAL AUTO POLICY DECLARATIONS PAGE  
FOR NAMED INSURED:

00112

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251  
POLICY NUMBER: 30931541 - 0  
POLICY PERIOD: 10/15/98 TO 10/15/99

This policy inception the later of:  
1. the time the application for insurance is executed on the first day of the policy period; or  
2. 12:01 a.m. on the first day of the policy period.  
This policy shall expire at 12:01 a.m. on the last day of the policy period.

The following coverages and limits apply to each described vehicle as shown below. Coverages are defined in the policy and are subject to the terms and conditions contained in the policy, including amendments and endorsements. No changes will be effective prior to the time changes are requested.

CONFIRMATION NUMBER # 2937A1541  
REASON FOR ISSUANCE: POLICY CHANGE, NO CHANGE IN PREMIUM  
THE FOLLOWING CHANGES WERE REQUESTED BY JOSE OCHOA ON 10/20/98 AT 09:06 PM EST  
EFFECTIVE ON 10/15/98: CHANGED INFO - VEH 1,94 GEO ; LOSS PAYEE CHANGED .

VEH#	YR	MAKE - MODEL	SERIAL NUMBER	STATED AMT	DRV#	LISTED DRIVERS	EXCLUDED	SR22	RATED
1	1994	GEO PRIZM/LSI	4D 1Y1SK5366RZ027420		1	JOSE OCHOA	NO	NO	NO
2					2	JANETTE LEDING	NO	NO	YES
3					3				
4					4				
					5				

COVERAGES AND LIMITS OF LIABILITY THE COVERAGE IS APPLICABLE ONLY IF A PREMIUM IS INDICATED.	PREMIUMS				
	VEH #1	VEH #2	VEH #3	VEH #4	TOTAL
BODILY INJURY LIABILITY \$25,000 EACH PERSON - \$50,000 EACH ACCIDENT	\$564				\$564
PROPERTY DAMAGE LIABILITY \$25,000 NO DEDUCTIBLE					
UNDERINSURED MOTORIST \$25,000 EACH PERSON - \$50,000 EACH ACCIDENT	\$101				\$101
COMPREHENSIVE ACV LESS \$500 DEDUCTIBLE	\$78				\$78
COLLISION OR UPSET ACV LESS \$500 DEDUCTIBLE	\$549				\$549
SEE REVERSE	PREMIUM BY VEHICLE	\$1,292			

COPIES OF THIS POLICY TO BE  
A TRUE AND ACCURATE COPY.  
BY Debra Heure  
DATE 1/21/10

ATTACHMENTS IDENTIFIED BY FORM NO.	TOTAL POLICY PREMIUM	\$1,292
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UW 0009

ANY LOSS UNDER PART IV IS PAYABLE TO NAMED INSURED AND LIENHOLDER:

LIENHOLDER

VEH #1

VEH #2

BECU  
PO BOX 58570  
TUKWILLA

WA 98138

VEH #3

VEH #4

ADDITIONAL INTEREST

FOR COMPANY USE ONLY

DISCOUNTS:	VEH 1	VEH 2	VEH 3	VEH 4
MULTIPLE CARS ON POLICY				
PREMIUM PAID IN FULL				
RESPONSIBLE DRIVER				
MATURE DRIVER COURSE				
DRIVER-SIDE AIRBAG				
DUAL AIRBAGS				
PASSIVE RESTRAINTS				
ASSOCIATION DISCOUNT				
SURCHARGES:				
VEHICLE USED FOR BUSINESS				



VEH	DR#	DR CL.	PT. CL.	TERR	LIAB	SYMBOL COMP	COLL
1	2	23SF	05	30	02	02	08
2							
3							
4							

COMPANY 19  
MARKET MIDDLE MARKET  
LEVEL SUPER-SAVER  
PAY PLAN 14  
R/R 9710  
FACTOR % 1.000  
FORM 9606  
ED. 0696  
AGENT CODE IC 94548  
PREV POL #  
PRORATER

VEH	DR#	AGE	DRIVER SEX	M/S
1	2	23	F	S
2				
3				
4				

IC 94548  
A VALID AND ASSURATE COPY.  
BY *Debra Henry*  
DATE 1/21/10



PROGRESSIVE DIRECT  
PO BOX 31686  
TAMPA FL 33631

24 Hour Policy Service 1-800-888-7764  
24 Hour Claims Service 1-800-274-4499  
Automated Billing Inquiry 1-800-999-8781  
PERSONAL AUTO POLICY DECLARATIONS PAGE  
FOR NAMED INSURED:

01980



JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251  
POLICY NUMBER: 30931541 - 0

POLICY PERIOD: 07/21/99 TO 10/15/99

This policy incept the later of:  
1. the time the application for insurance is executed on the first day of the policy period; or  
2. 12:01 a.m. on the first day of the policy period.  
This policy shall expire at 12:01 a.m. on the last day of the policy period.

The following coverages and limits apply to each described vehicle as shown below. Coverages are defined in the policy and are subject to the terms and conditions contained in the policy, including amendments and endorsements. No changes will be effective prior to the time changes are requested.

CONFIRMATION NUMBER # 202SA1541  
REASON FOR ISSUANCE: POLICY CHANGE, PREMIUM INCREASE \$137  
THE FOLLOWING CHANGES WERE REQUESTED BY JOSE OCHOA ON 07/21/99 AT 09:04 PM EST  
EF LIVE ON 07/21/99: ADDED VEH 1,99 CHRYS ; DELETED VEH 94 GEO ;  
AD LONAL INTEREST ADDED .

VEH#	YR	MAKE - MODEL	SERIAL NUMBER	STATED AMT	DRV#	LISTED DRIVERS	EXCLUDED	SR22	RATED
1	1999	CHRYSLER CIRRUS LXI 4D	1C3EJ56H6XN617675		1	JOSE OCHOA	NO	NO	NO
2					2	JANETTE LEDING	NO	NO	YES
3					3				
4					4				
					5				

COVERAGES AND LIMITS OF LIABILITY THE COVERAGE IS APPLICABLE ONLY IF A PREMIUM IS INDICATED.	PREMIUMS				
	VEH #1	VEH #2	VEH #3	VEH #4	TOTAL
BODILY INJURY LIABILITY \$100,000 EACH PERSON - \$300,000 EACH ACCIDENT	\$797				\$797
PROPERTY DAMAGE LIABILITY \$25,000 NO DEDUCTIBLE					
UNDERINSURED MOTORIST \$25,000 EACH PERSON - \$50,000 EACH ACCIDENT	\$101				\$101
COMPREHENSIVE ACV LESS \$500 DEDUCTIBLE	\$180				\$180
COLLISION OR UPSET ACV LESS \$500 DEDUCTIBLE	\$797				\$797
SEE REVERSE PREMIUM BY VEHICLE	\$1,875				
ATTACHMENTS IDENTIFIED BY FORM NO.	TOTAL POLICY PREMIUM				\$1,875

THIS POLICY IS TO BE  
AT THE INSURED'S SEPARATE COPY.  
BY *Debra Henry*  
DATE 11/21/10

UW 0011

ANY LOSS UNDER PART IV IS PAYABLE TO NAMED INSURED AND LIENHOLDER:

LIENHOLDER

VEH #1

VEH #2

SEA FIRST BANK  
PO BOX 3828  
SEATTLE WA 98124

VEH #3

VEH #4

ADDITIONAL INTEREST

SEA FIRST BANK  
PO BOX 3828  
SEATTLE WA 98124

FOR COMPANY USE ONLY

DISCOUNTS:	VEH 1	VEH 2	VEH 3	VEH 4
MULTIPLE CARS ON POLICY				
PREMIUM PAID IN FULL				
RESPONSIBLE DRIVER				
MATURE DRIVER COURSE				
DRIVER-SIDE AIRBAG				
DUAL AIRBAGS				
PASSIVE RESTRAINTS				
ASSOCIATION DISCOUNT				
SURCHARGES:				
VEHICLE USED FOR BUSINESS				



VEH	DR#	DR	PT.	CL.	TERR	LIAB	COMP	COLL
1	2	23SF	05		30	02	14	09
2								
3								
4								

COMPANY	19
MARKET	MIDDLE MARKET
LEVEL	SUPER-SAVER
PAY PLAN	14
R/R	9710
FACTOR %	0.236
FORM	9606
ED.	0696
AGENT CODE	IC 94548
PREV POL #	
PRORATER	

VEH	DR#	AGE	SEX	M/S
1	2	23	F	S
2				
3				
4				

THIS IS A COPY TO BE  
USED AS A REFERENCE COPY.  
BY *Debra Henry*  
DATE 1/21/10

E4 210931 SA1 99203 000

JOSE OCHOA  
30931541-0

Dear Insured:

Congratulations on the purchase of your new car! New cars represent a big investment. We want to make you aware that you may be eligible to purchase Loan/Lease Payoff Coverage. It is an optional vehicle damage coverage that can be purchased by purchasers of new model year vehicles who have Collision or Comprehensive Coverage for Damage to a Vehicle. This coverage provides payment of the unpaid loan balance when we pay the actual cash value on a total loss of the covered vehicle.

Sometimes, in the event of a total loss on a new car, the loan amount is actually greater than the actual cash value of the car. If you do not purchase this additional coverage, your insurance will not pay more than the cash value. You will be required to pay any remaining balance to your lender, lienholder, or leaseholder. Loan/Lease Payoff Coverage can help you to avoid or minimize this dilemma. In a total loss, Loan/Lease Payoff Coverage, subject to the limitations and conditions listed in your policy contract and endorsements, will pay the owner of a covered vehicle the greater of the loan or lease balance legally due, or the actual cash value of the vehicle.

If you are the first time owner of a new model year vehicle and are interested in getting a quote for this very affordable coverage, please contact your agent or call our customer service department at 1-800-888-7764 .

Thank you for choosing Progressive.

BY Debra Henry  
DATE 1/21/10

Insurance Identification Card - WASHINGTON

**PROGRESSIVE®**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 31686  
TAMPA, FL 33631-3686

**IMPORTANT!**

**IF YOU ARE INVOLVED IN AN ACCIDENT:  
(REGARDLESS OF FAULT)**

1. At the accident scene, detach the Accident Information Card and give it to the driver of the other vehicle.
2. Ask the other driver to immediately call Progressive and report the accident.
3. Call Progressive immediately to report the accident.

Name of Insured: Policy Number: AA 30931541-0

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

Original Issue Date: 10/15/98 Expiration Date: 10/15/99  
Additional Drivers: JANETTE LEDING

Year	Make/Model	Vehicle Identification Number
1999	CHRYSLER LXI 4D	1C3EJ56H6XN617675

Form L6530 (6-96)

here and put folded Accident Information and Insurance Identification card in the glove compartment of your vehicle.

**PROGRESSIVE®**

**ACCIDENT INFORMATION CARD**  
(Give to other driver at scene of accident)

**FOR IMMEDIATE ASSISTANCE CALL  
1-800-274-4499  
24 HOURS A DAY, 7 DAYS A WEEK**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 31686  
TAMPA, FL 33631-3686

Name of Insured:

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

Policy Number: AA 30931541-0

Original Issue Date: 10/15/98  
Expiration Date: 10/15/99

Detach and keep copy of Insurance Identification Card with your records.

Insurance Identification Card - WASHINGTON

**PROGRESSIVE®**

Name of Insurer:  
PROGRESSIVE CLASSIC INSURANCE COMPANY  
P.O. BOX 31686  
TAMPA, FL 33631-3686

Name of Insured: Policy Number: AA 30931541-0

JOSE OCHOA  
434 EVERGREEN PL  
GOLD BAR WA 98251

Original Issue Date: 10/15/98 Expiration Date: 10/15/99  
Additional Drivers: JANETTE LEDING

Year	Make/Model	Vehicle Identification Number
1999	CHRYSLER LXI 4D	1C3EJ56H6XN617675

RECEIVED BY: *Debra Acuna*  
DATE: 11/21/10

PMWE1006982405L65301

Form L6530 (6-96)

Keep this card in your motor vehicle while in operation.

**Report all accidents immediately.**

**(24 hours a day, 7 days a week) to Progressive:**

**(1-800-274-4499)**

**Call us immediately so we can go to work for you.**

Instructions to the insured **in case of accident or loss:**

1. Obtain full names, addresses and license numbers of all persons involved and all witnesses.
2. Do not admit fault or discuss the accident with anyone except police or company representative.

**Examine policy exclusions carefully. This form does not constitute any part of your insurance policy or bond.**

Automated billing inquiries: **1-800-999-8781**

Policy Service: **1-800-888-7764**

Keep this card in your motor vehicle while in operation.

**Report all accidents immediately.**

**(24 hours a day, 7 days a week) to Progressive:**

**(1-800-274-4499)**

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**Examine policy exclusions carefully. This form does not constitute any part of your insurance policy or bond.**

Automated billing inquiries: **1-800-999-8781**

Policy Service: **1-800-888-7764**



PLEASE PRINT OR TYPE  
FULL AND ACCURATE COPY.  
BY Debra Henry  
DATE 11/21/10

\*9606 898 46\*



**PROGRESSIVE®**

# WASHINGTON MOTOR VEHICLE POLICY

PROGRESSIVE AMERICAN INSURANCE COMPANY  
PROGRESSIVE CASUALTY INSURANCE COMPANY  
PROGRESSIVE NORTHWESTERN INSURANCE COMPANY  
PROGRESSIVE NORTHERN INSURANCE COMPANY  
PROGRESSIVE PREFERRED INSURANCE COMPANY  
PROGRESSIVE SPECIALTY INSURANCE COMPANY  
CLASSIC INSURANCE COMPANY

I CERTIFY THIS DOCUMENT TO BE  
A TRUE AND ACCURATE COPY.  
*Debra Chew*  
DATE 1/21/10

Form No. 9606 (06/96) WA  
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## WASHINGTON MOTOR VEHICLE POLICY

If you pay your premium when due, we agree to provide this insurance, subject to all the terms and provisions of this policy, and up to the Limits of Liability described in this policy and shown on the Declarations Page.

### YOUR DUTIES IN CASE OF AN ACCIDENT OR LOSS

#### Notice of Accident or Loss

If there is an accident or loss arising out of the ownership, maintenance or use of a vehicle, for which coverage may be provided under this policy, report it to us within twenty-four (24) hours or as soon as practicable by calling us at 1-800-274-4499.

You should report each accident or loss even if an insured person is not at fault.

The following accident information should be reported as it is obtained:

1. time;
2. place;
3. circumstances of the **accident** or **loss**;
4. names and addresses of any injured persons;
5. names and addresses of any witnesses; and
6. the license plate numbers of the vehicles involved.

You should also notify the police:

1. within seventy-two (72) hours if a phantom vehicle which has no physical contact with the insured person or the vehicle which the insured person is **occupying** at the time of the **accident** causes an **accident**, provided its operator and **owner** cannot be identified; and

2. within twenty-four (24) hours or as soon as practicable if:
  - i. a hit-and-run vehicle is involved; or
  - ii. theft or vandalism has occurred.

#### OTHER DUTIES

A person claiming coverage under this policy must:

1. cooperate with **us** in any matter concerning a claim or lawsuit;
2. provide any written proof of loss **we** may reasonably require;
3. allow **us** to take signed or recorded statements, including statements under oath, and answer all reasonable questions **we** may ask, when and as often as **we** may reasonably require;
4. promptly send **us** any and all legal papers relating to any claim or lawsuit;
5. attend hearings and trials as **we** require;
6. take reasonable steps after a **loss** to protect the **covered vehicle** or **non-owned vehicle** from further **loss**. **We** will pay reasonable expenses incurred in providing that protection. If **you** fail to do so, any further damages will not be covered under this policy;
7. allow **us** to inspect and appraise the damage to a **covered vehicle** or **non-owned vehicle** before its repair or disposal;
8. submit to medical examinations at **our** expense by doctors **we** select as often as **we** may reasonably require; and
9. authorize **us** to obtain medical and other records.

#### GENERAL DEFINITIONS

Except as otherwise defined in this policy, terms appearing in boldface will have the following meaning:

1. "**Accident**" means a sudden, unexpected, and unintended occurrence.

2. "**Bodily injury**" means bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease.
3. "**Business**" includes a trade, profession, or occupation.
4. "**Covered vehicle**" means:
  - a. any **vehicle** shown on the **Declarations Page**;
  - b. any additional **vehicle** on the date **you** become the **owner** if:
    - i. **you** acquire the **vehicle** during the policy period shown on the **Declarations Page**;
    - ii. **we** insure all vehicles **owned** by **you**; and
    - iii. no other insurance policy provides coverage for that **vehicle**.

For a **vehicle** **you** acquire in addition to any **vehicle** shown on the **Declarations Page**, **we** will provide the broadest coverage **we** provide for any **covered vehicle** shown on the **Declarations Page**. **We** will provide coverage for a period of thirty (30) days after **you** become the **owner**. **We** will not provide coverage after this thirty (30) day period, unless within this period **you** ask **us** to insure the **vehicle**;

- c. any replacement **vehicle** on the date **you** become the **owner** if:
  - i. **you** acquire the **vehicle** during the policy period shown on the **Declarations Page**;
  - ii. the **vehicle** that **you** acquire replaces one shown on the **Declarations Page**; and
  - iii. no other insurance policy provides coverage for that **vehicle**.

If the **vehicle** that **you** acquire replaces one shown on the **Declarations Page**, it will have the same coverage as the

**covered vehicle** it replaces. **You** must ask **us** to insure a replacement **vehicle** within thirty (30) days after **you** become the **owner** if **you** want to add or continue coverage under Part IV - Damage To A Vehicle; and

- d. any **trailer owned** by **you** while drawn by or attached to a **vehicle** described in a, b, or c above.
5. "**Declarations Page**" means the report from **us** listing:
  - a. the types of coverage **you** have elected;
  - b. the limit for each coverage;
  - c. the cost for each coverage;
  - d. the specified **vehicles** covered by this policy;
  - e. the types of coverage for each such **vehicle**; and
  - f. other information applicable to this policy.
6. "**Loss**" means sudden, direct, and accidental loss or damage.
7. "**Non-owned vehicle**" means any **vehicle** that is not **owned** by **you**, a **relative**, or the spouse of the named insured even if not residing in the same household as the named insured.
8. "**Occupying**" means in, on, entering, or exiting.
9. "**Owned**" means the person:
  - a. holds legal title to the **vehicle**;
  - b. has legal possession of the **vehicle** that is subject to a written security agreement with an original term of six (6) months or more; or
  - c. has legal possession of the **vehicle** that is leased to that person under a written agreement for a continuous period of six (6) months or more.

10. "**Owner**" means any person who, with respect to a **vehicle**:
  - a. holds legal title to the **vehicle**;
  - b. has legal possession of the **vehicle** that is subject to a written security agreement with an original term of six (6) months or more; or
  - c. has legal possession of the **vehicle** that is leased to that person under a written agreement for a continuous period of six (6) months or more.
11. "**Property damage**" means physical damage to, or destruction or loss of use of, tangible property.
12. "**Relative**" means a person residing in the same household as **you**, and related to **you** by blood, marriage, or adoption, including a ward, stepchild, or foster child. Unmarried dependent children temporarily away from home will be considered residents if:
  - a. they are under the age of twenty-five (25) years; and
  - b. they intend to continue to reside in **your** household.
13. "**Trailer**" means a vehicle designed to be towed on public roads by a **vehicle**. It includes a farm wagon or farm implement while being towed by a **vehicle**. It does not include a mobile home, or a trailer used as an office, store, display, or passenger conveyance.
14. "**Vehicle**" means a land motor vehicle:
  - a. of the private passenger, pickup body, or sedan delivery type;
  - b. designed for operation principally upon public roads;
  - c. with at least four (4) wheels; and
  - d. with a gross vehicle weight of 10,000 pounds or less.
15. "**We**", "**Us**", and "**Our**" mean the company providing the insurance, as shown on the **Declarations Page**.

16. "**You**" and "**Your**" mean the person shown as the named insured on the **Declarations Page**, and that person's spouse if residing in the same household.

## PART I - LIABILITY TO OTHERS

### **INSURING AGREEMENT - BODILY INJURY**

Subject to the Limits of Liability, if **you** pay a premium for **bodily injury** liability coverage, **we** will pay damages, other than punitive or exemplary damages, for **bodily injury** for which an **insured person** becomes legally responsible because of an **accident** arising out of the ownership, maintenance, or use of a **vehicle**.

### **INSURING AGREEMENT - PROPERTY DAMAGE**

Subject to the Limits of Liability, if **you** pay a premium for **property damage** liability coverage, **we** will pay damages, other than punitive or exemplary damages, for **property damage** for which an **insured person** becomes legally responsible because of an **accident** arising out of the ownership, maintenance, or use of a **vehicle**.

**We** will settle or defend, at **our** option, any claim for damages covered by this Part I.

### **ADDITIONAL DEFINITION**

When used in this Part I, "**insured person**" or "**insured persons**" means:

1. **you** or a **relative** with respect to an **accident** arising out of the ownership, maintenance, or use of a **covered vehicle**;
2. any person, with respect to an **accident** arising out of that person's use of a **covered vehicle** with the express or implied permission of **you** or a **relative**;
3. a **relative** with respect to an **accident** arising out of the maintenance or use of a **non-owned vehicle** with the express or implied permission of the **owner** of the **vehicle**;

4. **you** with respect to an **accident** arising out of the maintenance or use of any **vehicle** with the express or implied permission of the **owner** of the **vehicle**;
5. any person or organization with respect only to vicarious liability for an **accident** arising out of the use of a **covered vehicle** or **non-owned vehicle** by a person described in 1, 2, 3, or 4 above; and
6. any Additional Interest Insured designated by **you** in **your** application or by a change request agreed to by **us**, with respect to liability for an **accident** arising out of the use of a **covered vehicle** or **non-owned vehicle** by a person described in 1, 2, 3, or 4 above.

#### ADDITIONAL PAYMENTS

In addition to our Limit of Liability, **we** will pay for an **insured person**:

1. all expenses that **we** incur in the settlement of any claim or defense of any lawsuit;
2. interest accruing after entry of judgment, until **we** have paid or tendered that portion of the judgment which does not exceed our Limit of Liability. This does not apply if **we** have not been given notice of suit or the opportunity to defend an **insured person**;
3. premiums on appeal bonds or attachment bonds required in any lawsuit **we** defend. **We** have no duty to purchase bonds in an amount exceeding our Limit of Liability, and **we** have no duty to apply for or furnish these bonds;
4. up to \$250 for a bail bond required because of an **accident** arising out of the ownership, maintenance, or use of a **covered vehicle** or **non-owned vehicle**. **We** have no duty to apply for or furnish this bond; and
5. reasonable expenses, including loss of earnings up to \$50 a day, incurred at our request.

#### **EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART I.**

Coverage under this Part I, including our duty to defend, does not apply to:

1. **bodily injury or property damage** arising out of the ownership, maintenance, or use of a **vehicle** while being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools;
2. any liability assumed by an **insured person** under any contract or bailment;
3. **bodily injury** to an employee of an **insured person** arising out of or within the course of employment, except for domestic employees if benefits are neither paid nor required to be provided under workers' compensation, disability benefits, or similar laws;
4. **bodily injury or property damage** arising out of an **accident** involving a **vehicle** while being used by a person while employed or engaged in the **business** of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles. However, this exclusion does not apply to **you**, a **relative**, or an agent or employee of **you** or a **relative**, when using a **covered vehicle**;
5. **bodily injury or property damage** resulting from any pre-arranged or organized racing, speed or demolition contest, stunting activity, or in practice or preparation for any such contest or activity;
6. **bodily injury or property damage** due to nuclear reaction or radiation;

7. **bodily injury or property damage** for which insurance is afforded under a nuclear energy liability insurance contract;
8. any obligation for which the United States Government is liable under the Federal Tort Claims Act;
9. **bodily injury or property damage** caused by an intentional act of an **insured person** or at the direction of an **insured person**;
10. **property damage** to any property owned by, rented to, being transported by, used by, or in the charge of an **insured person**. However, this exclusion does not apply to a rented residence or a rented garage damaged by a **covered vehicle**;
11. **bodily injury or property damage** resulting from a **relative's** operation or use of a vehicle, other than a **covered vehicle, owned** by a person who resides with **you**; or
12. **bodily injury or property damage** resulting from **your** operation or use of a vehicle **owned by you**, other than a **covered vehicle**.

#### LIMITS OF LIABILITY

The Limit of Liability shown on the **Declarations Page** is the most **we** will pay regardless of the number of:

1. claims made;
2. **covered vehicles**;
3. **insured persons**;
4. lawsuits brought;
5. vehicles involved in an **accident**; or
6. premiums paid.

If the **Declarations Page** shows that "combined single limits" or "CSL" applies, the amount shown is the most **we** will pay for the aggregate of all damages resulting from any one (1) **accident**. **We** will apply the "each person" Limit of Liability for **bodily injury** as required by the law of the

state listed on **your** application as **your** residence. However, this provision does not change **our** total "each accident" Limit of Liability.

If **your Declarations Page** shows a split limit:

1. the amount shown for "each person" is the most **we** will pay for all damages due to a **bodily injury** to one (1) person;
2. subject to the "each person" limit, the amount shown for "each accident" is the most **we** will pay for all damages due to a **bodily injury** to two (2) or more persons in any one (1) **accident**; and
3. the amount shown for "property damage" is the most **we** will pay for the aggregate of all **property damage** for which an **insured person** becomes liable from any one (1) **accident**.

The **bodily injury** limit for "each person" includes the aggregate of claims made for such **bodily injury** and claims derived from such **bodily injury**, including, but not limited to, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

No one will be entitled to duplicate payments for the same elements of damages.

Any payment under this Part I to a person other than **you** or a **relative** shall be reduced by any payment to that person under Part III - Underinsured Motorist Coverage.

A **vehicle** and attached **trailer** are considered one (1) **vehicle**. Therefore, the Limits of Liability will not be increased for an **accident** involving a **vehicle** which has an attached **trailer**.

## FINANCIAL RESPONSIBILITY LAWS

When **we** certify this policy as proof of financial responsibility, this policy will comply with the law to the extent required. **You** must reimburse **us** if **we** make a payment that **we** would not have made if this policy was not certified as Proof of Financial Responsibility.

## OTHER INSURANCE

If there is other applicable liability insurance or bond, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits. Any insurance **we** provide for a **vehicle**, other than a **covered vehicle**, will be excess over any other collectible insurance, self-insurance, or bond.

## OUT-OF-STATE COVERAGE

If an **accident** to which this policy applies occurs in any state or province other than the one in which a **covered vehicle** is principally garaged, and the state or province has:

1. a financial responsibility or similar law requiring limits of liability for **bodily injury** or **property damage** higher than the Limits shown on the **Declarations Page**, this policy will provide the higher limit; or
2. a compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the non-resident uses a **vehicle** in that state or province, this policy will provide:
  - a. the required minimum amounts and types of coverage; or
  - b. any higher limit **you** have elected, provided **you** have paid the premium for higher limits.

## PART II - PERSONAL INJURY PROTECTION COVERAGE

### INSURING AGREEMENT

Subject to the Limits of Liability, if **you** pay a premium for Personal Injury Protection Coverage, **we** will pay the following benefits for losses or expenses incurred because of **bodily injury** sustained by an **insured person** caused by an **accident** and arising out of the ownership, operation, maintenance, or use of an **automobile**:

1. **medical and hospital benefits** to or on behalf of each **insured person**;
2. **income continuation benefits** to or on behalf of each **insured person** engaged in a remunerative occupation at the time of the **accident**;
3. benefits for **funeral expenses**; and
4. **loss of services benefits** to or on behalf of **you**.

### ADDITIONAL DEFINITIONS

When used in this Part II:

1. "**Automobile**" means a four-wheeled self-propelled land motor vehicle of the private passenger, station wagon, pickup body, utility, panel truck or sedan delivery type. It does not include a motor vehicle or trailer:
  - a. operated on rails or crawler treads;
  - b. located for use as a residence or premises; or
  - c. a farm type tractor or other self-propelled equipment designed for use principally off public roads while not on public roads.
2. "**Funeral expenses**" means payment for reasonable funeral expenses incurred because of **bodily injury** sustained by an **insured person** in the **accident**.
3. "**Income continuation benefits**" means payment of eighty-five percent (85%) of the **insured person's** loss of income from work

beginning fourteen (14) days after the date of the **accident** and ending:

- a. on the date which the **insured person** is reasonably able to perform the duties of his or her usual occupation;
- b. fifty-two (52) weeks from the fourteenth (14th) day after the date of the **accident**; or
- c. on the date of the **insured person's** death; whichever occurs first.

Income earned during the period **income continuation benefits** are being paid shall be deducted from **income continuation benefits**. **Income continuation benefits** shall be secondary to any employer-provided wage loss benefit plan, not including sick leave and vacation benefits.

4. "**Insured automobile**" means:

- a. any **automobile** shown on the **Declarations Page**;
- b. any additional **automobile** on the date **you** become the **owner** if:
  - i. **you** acquire the **automobile** during the policy period shown on the **Declarations Page**;
  - ii. **we** insure all vehicles **owned** by **you**; and
  - iii. no other insurance policy provides coverage for that **automobile**.

**We** will provide coverage for a period of thirty (30) days after **you** become the **owner**. **We** will not provide coverage after this thirty (30) day period, unless within this period **you** ask **us** to insure the **automobile**;
- c. any replacement **automobile** on the date **you** become the **owner** if:
  - i. **you** acquire the **automobile** during the policy period shown on the **Declarations Page**;
  - ii. the **automobile** that **you** acquire replaces one shown on the **Declarations Page**; and

- iii. no other insurance policy provides coverage for that **automobile**; and
- d. any **trailer owned** by **you** while used with an **automobile** described in a, b, or c above.

5. "**Insured person**" means:

- a. **you** or any **relative** sustaining **bodily injury** while using or **occupying** an **automobile**, or when struck by an **automobile** while not **occupying** an **automobile**; and
- b. any other person sustaining **bodily injury** while using or **occupying** the **insured automobile** with **your** permission or when struck by the **insured automobile** while not **occupying** an **automobile**.

6. "**Loss of services benefits**" means reimbursement for payment to persons other than members of **your** household for expenses reasonably incurred for essential services actually rendered in lieu of those **you** would have performed without income if **you** had not sustained **bodily injury** in the **accident**. **We** shall reimburse such expenses reasonably incurred beginning on the date of the **accident** and ending:
- a. on the date **you** are reasonably able to perform such services;
  - b. fifty-two (52) weeks from the date of the **accident**; or
  - c. on the date of **your** death; whichever occurs first.

7. "**Medical and hospital benefits**" means payment of the reasonable and necessary expenses incurred within three (3) years of the date of the **accident** for health care services provided by persons licensed by law to render such services and for pharmaceuticals, prosthetic devices, eyeglasses, and necessary ambulance, hospital, and professional nursing services. "**Medical and hospital benefits**" does not include expenses which are not reasonable and necessary. **We** may use any reliable service or reference

source in determining whether any expense is necessary or reasonable in the geographic area.

8. "**Relative**" means a person residing in the same household as **you**, and related to **you** by blood, marriage, or adoption, including a ward, stepchild, or foster child.

**EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART II.**

Coverage under this Part II does not apply to **bodily injury**:

1. to any person who intentionally causes their own **bodily injury**;
2. resulting from any pre-arranged or organized racing or speed contest, or in practice or preparation for any such contest;
3. due to war, whether or not declared, or to an act or condition incident to war;
4. resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;
5. to **you** or a **relative** while **occupying** an **automobile owned** by **you** but not shown on the **Declarations Page**;
6. to a **relative** while **occupying** an **automobile owned** by the **relative** but not shown on the **Declarations Page**; or
7. to any person who sustains **bodily injury** while using an **automobile** in the commission of a felony.

## LIMITS OF LIABILITY

**Our** Limits of Liability for losses or expenses incurred by or on behalf of one (1) **insured person** because of **bodily injury** sustained in any one (1) **accident** shall be as follows:

1. \$10,000 for **medical and hospital benefits**;
2. \$10,000 for **income continuation benefits** subject to a limit of \$200 per week. The total weekly amount which an **insured person** may receive under any workers' compensation, disability benefits or other income continuation benefit insurance and this Part II shall not exceed eighty-five percent (85%) of the **insured person's** weekly income at the time of the **accident**;
3. \$2,000 for **funeral expenses**; and
4. \$5,000 for **loss of services benefits** subject to a limit of \$40 per day, not to exceed \$200 per week.

**Our** Limits of Liability are the most **we** will pay for all losses and expenses incurred because of **bodily injury** to one (1) **insured person** sustained in one (1) **accident**, regardless of the number of:

1. claims made;
2. **insured automobiles or covered vehicles**;
3. **insured persons**;
4. lawsuits brought;
5. **automobiles** involved in an **accident**; or
6. premiums paid.

Any amount payable under this Part II shall be reduced by any amount paid or payable because of **bodily injury** under any of the following or similar laws:

1. workers' compensation law; or
2. medical or disability benefits law.

Payments under this Part II are limited to the amount of the actual loss or expense incurred.

## ADDITIONAL PERSONAL INJURY PROTECTION

If **you** pay a premium for Additional Personal Injury Protection, **we** agree with **you** that the Limits of Liability provision of this Part II is deleted and replaced by the following:

Our Limits of Liability for losses or expenses incurred by or on behalf of one (1) **insured person** because of **bodily injury** sustained in one (1) **accident** shall be as follows:

1. \$35,000 for **medical and hospital benefits**;
2. \$35,000 for **income continuation benefits** subject to a limit of the lesser of \$700 per week or eighty-five percent (85%) of the **insured person's** weekly income at the time of the **accident**;
3. \$2,000 for **funeral expenses**; and
4. \$40 per day for **loss of services benefits** for up to one (1) year from the date of the **accident**.

Our Limits of Liability are the most **we** will pay for all losses or expenses incurred because of **bodily injury** to one (1) **insured person** sustained in one (1) **accident**, regardless of the number of:

1. claims made;
2. **insured automobiles** or **covered vehicles**;
3. **insured persons**;
4. lawsuits brought;
5. **automobiles** involved in an **accident**; or
6. premiums paid.

Any amount payable under this Part II shall be reduced by any amount paid or payable because of **bodily injury** under any of the following or similar laws:

1. workers' compensation law; or
2. medical or disability benefits law.

Payments under this Part II are limited to the amount of the actual loss or expense incurred.

## OTHER INSURANCE

If there is other applicable **automobile** medical payments insurance or personal injury protection coverage for **medical and hospital benefits**, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** Limit of Liability for **medical and hospital benefits** bears to the total of all applicable limits. Any insurance that **we** provide for an **insured person** while using, **occupying**, or when struck by an **automobile**, other than an **insured automobile**, shall be excess over any other medical payments or personal injury protection coverage.

**Income continuation benefits** shall be secondary to any employer-provided wage loss benefit plan, not including sick leave and vacation benefits.

## APPORTIONMENT OF LEGAL EXPENSES

If **we** and an **insured person** both incur legal losses or expenses in recovering expenses which benefit both **us** and the **insured person**, whether incurred in an action for damages or otherwise, there shall be an equitable apportionment of such expenses.

## ARBITRATION

If **we** and an **insured person** have agreed to arbitration, the decision shall be made by an arbitrator agreed to by the parties. If the parties cannot agree on an arbitrator within thirty (30) days, then on joint application by **us** and the **insured person**, the arbitrator will be appointed by a court having jurisdiction. Unless both parties agree otherwise, arbitration will take place in the county in which the **insured person** resides. Local rules of procedure and evidence will apply. The written decision of the arbitrator shall be binding on the parties as to the amount of

benefits payable under this Part II. The arbitrator shall have no authority to award an amount in excess of the Limit of Liability.

#### SETOFF

No payment shall be made for **income continuation benefits** or **loss of services benefits** unless the **insured person** to or for whom such payment was made agrees, in writing, that the amount of such payment shall be applied toward the settlement of any claim or the satisfaction of any award entered in the favor of the **insured person** under Part III - Underinsured Motorist Coverage of this policy or under the uninsured or underinsured coverage of any other policy issued by **us** or any of **our** affiliates.

### PART III - UNDERINSURED MOTORIST COVERAGE

#### INSURING AGREEMENT - UNDERINSURED MOTORIST BODILY INJURY COVERAGE

Subject to the Limits of Liability, if **you** pay a premium for Underinsured Motorist Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is entitled to recover from the **owner** or operator of an **underinsured motor vehicle** because of **bodily injury**:

1. sustained by an **insured person**;
2. caused by **accident**; and
3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

#### INSURING AGREEMENT - UNDERINSURED MOTORIST PROPERTY DAMAGE COVERAGE

Subject to the Limits of Liability, if **you** pay a premium for Underinsured Motorist Property Damage Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is entitled to recover from the **owner** or operator of an **underinsured motor vehicle** due to **property damage**:

1. caused by **accident**; and

2. arising out of the ownership, maintenance or use of an **underinsured motor vehicle**.

Determination of whether an **insured person** is legally entitled to recover damages, and the amount of damages, will be made by agreement between the **insured person** and **us**. If no agreement is reached, the decision may be made by arbitration if **we** and the **insured person** agree to arbitration. If **we** and the **insured person** do not agree to arbitration, the disagreement may be resolved in a court of competent jurisdiction.

An **insured person** must notify **us** in writing at least thirty (30) days before entering into any settlement with the **owner** or operator of an **underinsured motor vehicle**, or that person's liability insurer. In order to preserve **our** right of subrogation, **we** may elect to pay any sum offered in settlement by, or on behalf of, the **owner** or operator of an **underinsured motor vehicle**. If **we** do this, **you** agree to assign to **us** all rights that **you** have against the **owner** or operator of an **underinsured motor vehicle**. However, **our** rights of recovery shall be limited to sums paid or payable by **us**, plus **our** proportionate share of any costs and interest awarded by a court with respect to the recovery of such sums. **We** shall be entitled to recovery only after the insured person has been fully compensated for damages arising out of the **accident**.

#### ADDITIONAL DEFINITIONS

When used in this Part III:

1. "Insured person" and "insured persons" mean:
  - a. **you** or a **relative**;
  - b. any person **occupying a covered vehicle**; and
  - c. any person who is entitled to recover damages covered by this Part III because of **bodily injury** sustained by a person described in a or b above.



3. a **non-owned vehicle** without the express or implied permission of the **owner**; or
4. a vehicle **owned** by **you** or a **relative**, other than a **covered vehicle**.

Coverage under this Part III will not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar laws:

1. workers' compensation law; or
2. disability benefits law.

Coverage under this Part III is not provided for **property damage**:

1. sustained while a **covered vehicle** is being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of magazines, newspapers, food or any other products. This exclusion does not apply to shared-expense car pools;
2. resulting from any pre-arranged or organized racing, speed or demolition contest, stunting activity or in practice or preparation for any such contest or activity;
3. due to nuclear reaction or radiation;
4. for which insurance is afforded under a nuclear energy liability insurance contract; or
5. to a **trailer**.

#### LIMITS OF LIABILITY

The Limit of Liability shown on the **Declarations Page** for the coverages under Part III is the most **we** will pay regardless of the number of:

1. claims made;
2. **covered vehicles**;
3. **insured persons**;
4. lawsuits brought;
5. vehicles involved in an **accident**; or
6. premiums paid.

If the **Declarations Page** shows that "combined single limits" or "CSL" applies, the amount shown is the most **we** will pay for the aggregate of all damages resulting from any one (1) **accident**.

**We** will apply the "each person" Limit of Liability for underinsured motorist coverage as required by the law of the state listed on **your** application as **your** residence. However, this provision does not change **our** total "each accident" Limit of Liability.

If **your Declarations Page** shows a split limit:

1. the amount shown for "each person" is the most **we** will pay for all damages due to a **bodily injury** to one (1) person;
2. subject to the "each person" limit, the amount shown for "each accident" is the most **we** will pay for all damages due to a **bodily injury** to two (2) or more persons in any one (1) **accident**; and
3. any amount shown for "property damage" is the most **we** will pay for the aggregate of all **property damage** caused by any one (1) **accident**.

The **bodily injury** Limit of Liability under this Part III for "each person" includes the aggregate of claims made for such **bodily injury** and all claims derived from such **bodily injury**, including, but not limited to, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

In determining the amount **we** will pay for **bodily injury** sustained by an **insured person** under this Part III, the amount of **bodily injury** damages which an **insured person** is entitled to recover under this Part III shall be reduced by the sum of:

1. the limits of liability under all **bodily injury** liability insurance, self-insurance, or bonds applicable to the **owner** or operator of the **underinsured motor vehicle**;
2. any sums paid by or for any other liable persons or organizations due to **bodily injury** to the **insured person**; and
3. any sums paid under Part II - Personal Injury Protection Coverage due to **bodily injury** to the **insured person**.

However, for **bodily injury** to any **insured person** other than **you** or a **relative**, **we** will not pay more than the Limits of Liability shown on the **Declarations Page** for coverage under this Part III, reduced by all sums paid under Part I - Liability To Others.

**Our** Limit of Liability under this Part III for **property damage** to a **covered vehicle** arising out of one (1) **accident** is the lowest of:

1. the actual cash value of the **covered vehicle** at the time of the **accident**, reduced by the applicable deductible and by its salvage value if **you** retain the salvage;
2. the amount necessary to repair or replace the **covered vehicle** with property of like kind and quality, reduced by the applicable deductible; and
3. any Limit of Liability shown on the **Declarations Page** for "property damage" under this Part III.

The applicable deductible for **property damage** under this Part III for an **accident** with a hit-and-run vehicle or a phantom vehicle is \$300. The applicable deductible for **property damage** under this Part III for all other **accidents** is \$100.

Payments for **property damage** under this Part III are subject to the following provisions:

1. no more than one (1) deductible shall be applied to any one (1) **accident**;
2. an adjustment for depreciation and physical condition will be made in determining the amount paid; and
3. the amount **we** will pay for **property damage** shall be reduced by:
  - a. the limits of liability under all **property damage** liability insurance, self-insurance, and bonds applicable to the **owner** or operator of the **underinsured motor vehicle**;
  - b. all sums paid by or on behalf of any other persons or organizations who may be legally responsible because of **property damage**; and

- c. all sums paid because of **property damage** under Part IV - Damage To A Vehicle.

Any payment made for **bodily injury** under this Part III to an **insured person** other than **you** or a **relative** shall reduce any amount that the person is entitled to recover under Part I - Liability To Others.

No one will be entitled to duplicate payments for the same elements of damages.

Any judgment for damages against an operator or **owner** of an **underinsured motor vehicle** which arises out of a lawsuit brought without **our** written consent is not binding on **us**.

#### **OTHER INSURANCE**

If there is other applicable underinsured motorist coverage, the total amount of underinsured benefits recoverable from all sources by an **insured person** shall not exceed the amount provided by the one (1) policy with the highest limit of liability. Any insurance **we** provide shall be excess over any other uninsured or underinsured motorist coverage, except for **bodily injury to you** or a **relative** when **occupying a covered vehicle**. If there is other applicable uninsured or underinsured motorist coverage, **we** will pay only **our** share of the total benefits recoverable from all sources. **Our** share is the proportion that **our** Limit of Liability bears to the total of all available coverage limits.

**We** will not pay for any damages which would duplicate any payment made for damages under other insurance.

If any **insured person** is injured while not **occupying** a motor vehicle, the coverage provided under this policy shall be excess to any uninsured or underinsured motorist coverage provided by a policy under which that **insured person** is a named insured. If **you** are injured while not **occupying** a motor vehicle, and are also a named

insured under any other policy, **our** coverage will pay the proportionate share that **our** limits bear to the total available uninsured or underinsured motorist coverage limits.

#### ARBITRATION

If **we** and an **insured person** have agreed to arbitration, the decision shall be made by an arbitrator agreed to by the parties. If the parties cannot agree on an arbitrator within thirty (30) days, then on joint application by **us** and the **insured person**, the arbitrator will be appointed by a court having jurisdiction.

**We** will pay the costs and fees of the arbitrator. Attorney fees and fees paid to medical and other expert witnesses are not expenses of arbitration, and each party will pay these expenses it incurs. Unless both parties agree otherwise, arbitration will take place in the county in which the **insured person** resides. Local rules of procedure and evidence will apply.

A decision by the arbitrator will be binding as to whether the **insured person** is legally entitled to recover damages under the applicable liability law, and the amount of damages. The arbitrator shall have no authority to award an amount in excess of the Limit of Liability.

### PART IV - DAMAGE TO A VEHICLE

#### INSURING AGREEMENT - COLLISION

If **you** pay a premium for collision coverage, **we** will pay for **loss** to a **covered vehicle, non-owned vehicle, or trailer**, when it collides with another object or overturns, subject to the Limits of Liability.

#### INSURING AGREEMENT - COMPREHENSIVE

If **you** pay a premium for comprehensive coverage, **we** will pay for comprehensive **loss** to

a **covered vehicle, non-owned vehicle, or trailer**, subject to the Limits of Liability.

A comprehensive **loss** is a **loss** to a **covered vehicle, non-owned vehicle, or trailer**, caused by any event other than collision, including, but not limited to, any of the following:

1. contact with an animal (including a bird);
2. explosion or earthquake;
3. fire;
4. malicious mischief or vandalism;
5. missiles or falling objects;
6. riot or civil commotion;
7. theft or larceny; or
8. windstorm, hail, water, or flood.

If **you** pay a premium for comprehensive coverage under this policy, **we** will pay **you** up to \$20 per day, but not more than a total of \$600 per **loss**, for:

1. transportation expenses incurred by **you** if a **covered vehicle** is stolen; or
2. loss of use damages that **you** are legally liable to pay if a **non-owned vehicle** is stolen.

Transportation expenses and loss of use damages coverage begins forty-eight (48) hours after **you** report the theft to **us**, and ends when the **covered vehicle** has been recovered and repaired, replaced, or if the **covered vehicle** is deemed by **us** to be a total loss or unrecoverable, forty-eight (48) hours after **we** make an offer to pay the lesser of the actual cash value of the **covered vehicle** or any Stated Amount Vehicle Coverage elected by **you**.

**You** must provide **us** written proof of **your** transportation expenses and loss of use damages.

Duplicate recovery for identical elements of damages is not permitted under this policy.

If **we** can pay the **loss** under either comprehensive or collision coverage, **we** will pay under the coverage where **you** collect the most.

## INSURING AGREEMENT - CUSTOM PARTS OR EQUIPMENT

We will pay for **loss to custom parts or equipment** resulting from any **loss** for which comprehensive or collision coverage is provided under the terms of this policy, subject to the Limit of Liability. All payments for **loss to custom parts or equipment** shall be reduced by the applicable deductible; but only one (1) deductible may be applied to a **loss** in an **accident** which is covered by this Part IV.

## ADDITIONAL DEFINITIONS

When used in this Part IV:

1. **"Custom parts or equipment"** means equipment, devices, accessories, enhancements, and changes, other than those which are original manufacturer installed, which alter the appearance or performance of a **vehicle**. This includes any electronic equipment, antennas, and other devices used exclusively to send or receive audio, visual, or data signals, or play back recorded media, other than those which are original manufacturer installed, that are permanently installed in a **covered vehicle** or **non-owned vehicle** using bolts or brackets, including slide-out brackets.
2. **"Non-owned vehicle"** means any **vehicle** that is not **owned** by **you**, a **relative**, a resident of **your** household, or the spouse of the named insured even if not residing in the same household as the named insured, while in the custody of, or being operated by, **you** or a **relative** with the express or implied permission of the **owner**. A **non-owned vehicle** will be provided the broadest coverage applicable to any **vehicle** shown on the **Declarations Page**.
3. **"Trailer"** means a vehicle, including a farm wagon or farm implement, designed to be towed on public roads, that is:

- a. **owned** by **you**; or
- b. not **owned** by **you**, while being towed by a **covered vehicle**.

**"Trailer"** does not include a mobile home, or a trailer used as an office, store, display, or passenger conveyance.

**EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART IV.**

Coverage under this Part IV does not apply for **loss**:

1. to a **covered vehicle, non-owned vehicle, or trailer**, while being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools;
2. to a **non-owned vehicle** or **trailer** rented by **you** or a **relative** if being maintained or used by a person while employed or engaged in any **business**;
3. to a **non-owned vehicle** or **trailer**, other than one rented by **you** or a **relative**, if being maintained or used by a person while employed or engaged in any **business** not described in exclusion 4 below. This exclusion does not apply to the use by **you** or any **relative** of a **non-owned vehicle** that is a private passenger **vehicle** or **trailer**;
4. to a **covered vehicle, non-owned vehicle, or trailer**, while being used or driven by a person while employed or engaged in the **business** of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles. However, this exclusion does not apply to **you**, a **relative**, or an agent or employee of **you** or a **relative**, when using a **covered vehicle**;

5. to a **covered vehicle** or **non-owned vehicle** resulting from any pre-arranged or organized racing, speed or demolition contest, stunting activity, or in practice or preparation for any such contest or activity;
6. to a **covered vehicle**, **non-owned vehicle**, or **trailer**, due to nuclear reaction or radiation;
7. to a **covered vehicle**, **non-owned vehicle**, or **trailer**, for which insurance is afforded under a nuclear energy liability insurance contract;
8. due to destruction or confiscation by governmental or civil authorities of a **covered vehicle**, **non-owned vehicle**, or **trailer**, because **you** or any **relative** engaged in illegal activities;
9. to a **covered vehicle**, **non-owned vehicle**, or **trailer**, caused by an intentional act of a person entitled to payment under this Part IV, or caused by an intentional act at the direction of a person entitled to payment, to the extent of that person's interest in the **covered vehicle**, **non-owned vehicle**, or **trailer**;
10. to a **covered vehicle**, **non-owned vehicle**, or **trailer**, that is due and confined to:
  - a. wear and tear;
  - b. freezing;
  - c. mechanical or electrical breakdown or failure; or
  - d. road damage to tires.

This exclusion does not apply if the damage results from the total theft of a **covered vehicle**, **non-owned vehicle**, or **trailer**;

11. due to theft or conversion of a **covered vehicle**, **non-owned vehicle**, or **trailer**:
  - a. by **you**, a **relative**, or any resident of **your** household;
  - b. prior to its delivery to **you** or a **relative**; or

- c. while in the care, custody, or control of anyone engaged in the **business** of selling the **vehicle** or **trailer**;
12. to tapes, compact discs, cassettes, and other recording or recorded media;
13. to any case or other container designed for use in storing or carrying tapes, compact discs, cassettes, or other recording or recorded media;
14. to any device used for the detection or location of radar, laser, or other speed measuring equipment or its transmissions;
15. to **custom parts or equipment** in excess of the applicable Limit of Liability; or
16. to a **covered vehicle**, **non-owned vehicle**, or **trailer**, for diminution of value.

#### LIMITS OF LIABILITY

1. The Limit of Liability for **loss** to a **covered vehicle**, **non-owned vehicle**, or **trailer** will be the lowest of:
  - a. the actual cash value of the stolen or damaged property at the time of the **loss**, reduced by the applicable deductible shown on the **Declarations Page**, and by its salvage value if **you** retain the salvage;
  - b. the amount necessary to repair or replace the stolen or damaged property with other property, reduced by the applicable deductible shown on the **Declarations Page**; or
  - c. any applicable Limit of Liability or Stated Amount Vehicle Coverage elected by **you**, reduced by its salvage value if **you** retain the salvage.

However, if the **loss** is to a **trailer**, the applicable Limit of Liability will be \$500.
2. Subject to Section 3 below, the Limit of Liability for **loss** to **custom parts or equipment** is the combined total of \$1,000, unless

**you** pay a premium for Additional Custom Parts Or Equipment Coverage, and it is shown on the **Declarations Page**.

Coverage for **custom parts or equipment** shall not cause any Limit of Liability under this Part IV to be increased to an amount in excess of the actual cash value of any stolen or damaged **vehicle**.

3. Payments for **loss** covered under Collision, Comprehensive, and Custom Parts Or Equipment are subject to the following provisions:

- a. no more than one (1) deductible shall be applied to any one (1) covered **loss**;
- b. if coverage applies to a **non-owned vehicle**, the highest deductible on any **covered vehicle** shall apply;
- c. if Stated Amount Vehicle Coverage is elected by **you**, that stated Limit of Liability will be the total Limit of Liability applicable for **loss** to a **covered vehicle** or **non-owned vehicle**, including its **custom parts or equipment**;
- d. an adjustment for depreciation and physical condition will be made in determining the Limit of Liability at the time of **loss**. Deductions for betterment and depreciation are permitted only for parts normally subject to repair and replacement during the useful life of the **vehicle**. Deductions for betterment and depreciation shall be limited to the lesser of an amount equal to the proportion that the expired life of the part to be repaired or replaced bears to the normal useful life of that part, or the amount by which the resale value of the **vehicle** is increased by the repair or replacement;
- e. in determining the amount necessary to repair damaged property to its pre-**loss** condition, **our** estimate will be based on:
  - i. the prevailing competitive labor rates charged in the area where the property is to be repaired, as reasonably determined by **us**; and

- ii. the cost of repair or replacement parts and equipment which may be new, refurbished, restored, or used, including, but not limited to:
  - a. original manufacturer parts or equipment; and
  - b. nonoriginal manufacturer parts or equipment;
- f. the actual cash value is determined by the market value, age and condition of the **vehicle** at the time the **loss** occurs; and
- g. any amount payable under this Part IV for **loss** to a **covered vehicle** shall be reduced by any amount paid for the same elements of **loss** under Part III - Underinsured Motorist Coverage.

4. If more than one (1) **vehicle** is shown on **your Declarations Page**, coverage will be provided as specified on the **Declarations Page** as to each **vehicle**.

#### **INSURING AGREEMENT - ADDITIONAL CUSTOM PARTS OR EQUIPMENT COVERAGE**

If **you** pay a premium for Additional Custom Parts Or Equipment Coverage, the Limit of Liability for **loss** to **custom parts or equipment** for this additional coverage will be the lowest of:

1. the actual cash value of such **custom parts or equipment**;
2. the declared value of such **custom parts or equipment**; or
3. the amount necessary to repair or replace such **custom parts or equipment**;

reduced by the applicable deductible.

Coverage for **custom parts or equipment** shall not cause any Limit of Liability under this Part IV to be increased to an amount in excess of the actual cash value of any stolen or damaged **vehicle**.

Any deductible amount will apply separately to each **loss**.

**INSURING AGREEMENT -  
EMERGENCY TOWING AND LABOR**

If **you** pay a premium for Emergency Towing And Labor coverage, **we** will pay for towing and labor costs incurred by **you** as a result of the disablement of a **covered vehicle** or **non-owned vehicle**, subject to the Limit of Liability shown on the **Declarations Page**, provided that:

1. the labor is performed at the place of disablement; and
2. the disablement does not occur at **your** residence.

**INSURING AGREEMENT -  
RENTAL REIMBURSEMENT COVERAGE**

If **you** pay a premium for Rental Reimbursement Coverage, **we** will reimburse up to \$20 each day for thirty (30) days for any one (1) **accident** for rental charges incurred by **you** when **you** rent a **vehicle** from a rental agency or vehicle repair shop due to a **loss** to a **covered vehicle**, other than a total theft, that is payable under this Part IV. Rental charges will be reimbursed beginning:

1. when the **covered vehicle** cannot be driven due to a **loss**; or
2. if the **covered vehicle** can be driven, when **you** deliver the **covered vehicle** to a vehicle repair shop for repairs due to the **loss**;

and ending when the **covered vehicle** has been repaired, replaced, or if the **covered vehicle** is deemed by **us** to be a total loss, forty-eight (48) hours after **we** make an offer to pay the actual cash value of the **covered vehicle**.

**You** must provide **us** written proof of **your** rental charges.

Duplicate recovery for identical elements of damages is not permitted under this policy.

**LOAN PAYOFF COVERAGE**

If **you** pay a premium for Loan Payoff Coverage and **we** determine the **covered vehicle** is a total loss, the Limit of Liability is amended, and will be the greater of:

1. the actual cash value of the stolen or damaged **covered vehicle** at the time of the **loss**, reduced by the applicable deductible shown on the **Declarations Page**, and by its salvage value if **you** retain the salvage; or
2. the amount of **your** loan balance as of the date of the total loss, on the indebtedness incurred by **you** in conjunction with the purchase of the **covered vehicle** when new, reduced by:
  - a. unearned interest;
  - b. collection and repossession expenses;
  - c. the applicable deductible shown on the **Declarations Page**;
  - d. unpaid finance charges or refunds due on such charges;
  - e. premium refunds due from credit insurance; and
  - f. the salvage value of the **covered vehicle** if **you** retain the salvage.

**PAYMENT OF LOSS**

At our expense, **we** may return any stolen property to **you** or to the address shown on the **Declarations Page**, with payment for any damage resulting from the theft. **We** may keep all or part of the property at the agreed or appraised value. **We** may settle any **loss** with **you** or the **owner** or lienholder of the property.

**NO BENEFIT TO BAILEE**

Coverage under this Part IV will not directly or indirectly benefit any carrier or other bailee for hire.

**LOSS PAYEE AGREEMENT**

1. **Loss** or damage, if any, under this policy shall be payable first to the loss payee or

mortgagee (hereinafter called "secured party"), and, second, to **you** as the interests of each may appear; PROVIDED, that, upon demand for separate settlement by the secured party, the amount of said **loss** shall be paid directly to the secured party to the extent of its interest.

2. This insurance as to the interest of the secured party shall not be invalidated by any act or neglect of **you** or **your** agents, employees or representatives, nor by any change in the title or ownership of **your covered vehicle**, PROVIDED, HOWEVER, that the conversion, embezzlement or secretion by **you** or **your** agents, employees or representatives is not covered under said policy unless specifically insured against and premiums paid therefor.
3. In applying the pro rate provisions of the policy, the amount payable to the secured party shall be reduced only to the extent of pro rate payments receivable by the secured party under other policies.
4. **We** reserve the right to cancel the policy at any time as provided by its terms, but in such case **we** shall mail to the secured party a notice stating when such cancellation shall become effective as to the interest of said secured party. The amount and form of such notice shall be not less than that required to be given **you**, by law or by the policy provisions, whichever is more favorable to the secured party.
5. If **you** fail to render proof of **loss** within the time granted in the policy conditions, such secured party shall provide written proof of **loss** to **us** within sixty (60) days after having knowledge of a **loss**, and, further, shall be subject to the provisions of the policy relating to appraisal and the time of payment and bringing suit.

6. Whenever **we** shall pay the secured party any sum for **loss** or damage under such policy and shall claim that, as to **you**, no liability exists, **we** shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all collateral held to secure the debt, or may, at its option, pay the secured party the whole principal due or to grow due on the mortgage or other security agreement, with interest, and shall thereupon receive a full assignment and transfer of the mortgage or other security agreement and of all collateral held to secure it; but no subrogation shall impair the right of the secured party to recover the full amount due it.
7. All terms and conditions of the policy remain unchanged except as herein specifically provided.
8. All notices sent to the secured party shall be sent to its last reported address, which must be stated in the policy.

#### **OTHER INSURANCE**

If there is other applicable insurance, **we** will pay only **our** share of the **loss**. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits of liability. However, any insurance that **we** provide for a **vehicle**, other than a **covered vehicle**, or for a non-owned **trailer**, will be excess over any other collectible source of recovery including, but not limited to:

1. any coverage provided by the **owner** of the **non-owned vehicle** or **trailer**; and
2. any other applicable physical damage insurance.

#### **APPRAISAL**

If **we** cannot agree with **you** on the amount of a **loss**, then **we** or **you** may demand an appraisal of the **loss**. If so, each party shall appoint a competent and impartial appraiser. The

appraisers will determine the amount of **loss**. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. A decision agreed to by any two will be binding. **You** will pay **your** appraiser's fees and expenses. **We** will pay **our** appraiser's fees and expenses. Payment of the umpire and all other expenses of the appraisal will be shared equally between **us** and **you**. Neither **we** nor **you** waive any rights under this policy by agreeing to an appraisal.

### GENERAL PROVISIONS

#### **POLICY PERIOD AND TERRITORY**

This policy applies only to **accidents** and **losses** occurring during the policy period shown on the **Declarations Page** and which occur within any state, territory, or possession of the United States of America, or any province of Canada, or while a **covered vehicle, non-owned vehicle, or trailer** is being transported between their ports.

#### **POLICY CHANGES**

This policy, **your** application for insurance (which is made a part of this policy as if attached hereto), and endorsements issued by **us** to this policy contain all the agreements between **you** and **us**. Subject to the following, its terms may not be changed or waived except by an endorsement issued by **us**.

The premium for each **vehicle** is based on information **we** have received from **you** or other sources. **You** agree to cooperate with **us** in determining if this information is correct and complete, and **you** will notify **us** if it changes during the policy period. If this information is incorrect, incomplete, or changes during the policy period, **we** may adjust **your** premium during the policy period, or take other appropriate action. To properly insure **your vehicle, you** must promptly notify **us** when:

1. **you** change **your** address;

2. any resident operators are added or deleted; or
3. **you** acquire an additional or replacement **vehicle**.

Changes that may result in a premium adjustment are contained in **our** rates and rules. These include, but are not limited to:

1. changes in the number, type, or use classification of **covered vehicles**;
2. changes in operators using **covered vehicles**, their ages, or marital status;
3. a **relative** obtaining a driver's license or operator's permit;
4. changes in the place of principal garaging of any **covered vehicle**;
5. changes in coverage, deductibles, or limits of liability; or
6. changes in rating territory or discount eligibility.

#### **TERMS OF POLICY CONFORMED TO STATUTES**

If any provision of this policy fails to conform with the legal requirements of the state listed on **your** application as **your** residence, the provision shall be deemed amended to conform with such legal requirements. All other provisions shall be given full force and effect. Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on **your** application as **your** residence.

#### **TRANSFER**

This policy may not be transferred to another person without **our** written consent. If **you** die, this policy will provide coverage until the end of the policy period for **your** legal representative, while acting as such, and for persons covered under this policy on the date of **your** death.

#### **FRAUD OR MISREPRESENTATION**

This policy was issued in reliance upon the information provided on **your** insurance application.

Notwithstanding anything to the contrary in this policy or on **your Declarations Page**, we may void coverage under this policy if **you** or an insured person have knowingly concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, at the time application was made or at any time during the policy period.

Notwithstanding anything to the contrary in this policy or on **your Declarations Page**, we may void this policy or deny coverage for an **accident** or **loss** if **you** or an insured person have knowingly concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.

**We** may void this policy for fraud or misrepresentation even after the occurrence of an **accident** or **loss**. This means that **we** will not be liable for any claims or damages which would otherwise be covered.

#### **PAYMENT OF PREMIUM**

If **your** initial premium payment is by check, draft, or any remittance other than cash, coverage under this policy is conditioned upon the check, draft, or remittance being honored upon presentment. Notwithstanding anything to the contrary in this policy or on **your Declarations Page**, if the check, draft, or remittance is not honored upon presentment, this policy may, at **our** option, be deemed void from its inception. This means that **we** will not be liable under this policy for any claims or damages which would otherwise be covered if the check, draft, or remittance had been honored upon presentment.

If **you** tender a check to **us** for any full or partial payment of **your** premium, other than **your** initial payment, and the check is returned to **us** because of insufficient funds, a closed account, or a stop payment, a service charge will be added to **your** account balance.

#### **CANCELLATION**

**You** may cancel this policy by calling or writing **us**, and stating the future date that **you** wish the cancellation to be effective.

**We** may cancel this policy by mailing a notice of cancellation to the named insured shown on the **Declarations Page** at the last known address appearing in **our** records.

If **you** do not pay the required premium for this policy when due, **we** may cancel this policy at any time.

**We** may cancel this policy for any reason within the first sixty (60) days of the policy period shown on the **Declarations Page**. After this policy is in effect for more than sixty (60) days, or if this is a renewal or continuation policy, **we** may cancel only for one (1) or more of the following reasons:

1. **you** do not pay the required premium for this policy when due; or
2. loss of driving privileges during the policy period, or, if this is a renewal policy, during the policy period or the one hundred eighty (180) days immediately preceding the effective date of renewal, through suspension or revocation of the operator's license of the named insured shown on the **Declarations Page**, or of any other operator who customarily operates a **covered vehicle**; or
3. any other reason specified by law.

**We** will mail notice of cancellation to the named insured shown on the **Declarations Page** at the last known address for the named insured appearing in **our** records. Notice will be mailed at least ten (10) days before the effective date of cancellation if this policy is cancelled due to:

- a. nonpayment of premium at any time during the policy period; or
- b. any reason within the first thirty (30) days of the policy period.

After this policy is in effect for more than thirty (30) days, or if this is a renewal or continuation policy, and **we** cancel this policy for any reason other than nonpayment of premium, notice will be mailed at least twenty (20) days before the effective date of cancellation.

If **we** have issued a policy evidenced by a written binder which contains a stated expiration date, no additional notice of cancellation or nonrenewal shall be required with regard to the coverage evidenced by the binder.

Upon cancellation, **you** may be entitled to a premium refund. **Our** making or offering of a refund is not a condition of cancellation. **We** charge a fully earned policy fee for each policy term.

If **we** cancel this policy for a reason other than nonpayment of premium, any refund of the premium and policy fee due will be computed on a daily pro-rata basis. The effective date of cancellation shown in a notice will be the end of the policy period.

If cancellation is at **your** request, or if cancellation is for nonpayment of premium, **you** will be charged a policy fee. Any refund due will be computed on a daily pro-rata basis after deduction of the policy fee. Earned premium is calculated on a daily basis.

#### **NONRENEWAL**

If **we** decide not to renew or continue this policy, **we** will mail notice of nonrenewal to the named insured shown on the **Declarations Page** at the last known address appearing in **our** records. Notice will be mailed at least twenty (20) days before the end of the policy period. If the policy period is other than one (1) year, **we** will have the right not to renew or continue this policy only at each anniversary of its original effective date or earlier if permitted by state law.

#### **PROOF OF NOTICE**

Proof of mailing of any notice will be sufficient proof of notice.

#### **COVERAGE CHANGES**

If **we** make a change which broadens a coverage **you** have under this edition of **your** policy, without additional charge, **you** will receive the broadened coverage. The broadened coverage applies on the date the coverage change is implemented in **your** state. This provision does not apply to a general program revision or **our** issuance of a subsequent edition of **your** policy. Otherwise, this policy can be changed only by endorsement issued by **us**.

#### **LEGAL ACTION AGAINST US**

**We** may not be sued unless there is full compliance with all the terms of this policy. **We** may not be sued for payment under Part I - Liability To Others until the obligation of an **insured person** to pay is finally determined either by final judgment against that person or by written agreement of the **insured person**, the claimant, and **us**. No one will have any right to make **us** a party to a lawsuit to determine the liability of an **insured person**.

#### **OUR RIGHTS TO RECOVER PAYMENT**

In the event of any payment under this policy, **we** are entitled to all the rights of recovery that the insured person to whom payment was made has against another. That insured person must sign and deliver to **us** any legal papers relating to that recovery, do whatever else is necessary to help **us** exercise those rights, and do nothing after an **accident** or **loss** to prejudice **our** rights.

However, **we** may not assert rights of recovery against:

1. any person who was using a **covered vehicle** with **your** express or implied permission

- for any payment made under Part IV - Damage To A Vehicle; or
2. the **owner** or operator of an **underinsured motor vehicle**, if the **insured person** under Part III - Underinsured Motorist Coverage provides **us** with written notice thirty (30) days prior to entering into a settlement that an offer of settlement has been made by, or on behalf of, the **owner** or operator of an **underinsured motor vehicle**, and **we** do not elect to pay to the **insured person** an amount equal to the amount offered in full settlement by, or on behalf of, the **owner** or operator of the **underinsured motor vehicle**.

When an insured person has been paid by **us** under this policy and also recovers from another person, entity, or organization, the amount recovered will be held by the insured person in trust for **us** and reimbursed to **us** to the extent of **our** payment. **We** shall be entitled to recovery only after the insured person has been fully compensated for damages arising out of the **accident**.

If recovery is made by an insured person under this policy from a responsible party without **our** written consent, the insured person's right to payment under Part II - Personal Injury Protection Coverage and Part IV - Damage To A Vehicle will no longer exist to the extent that **our** right of recovery against the responsible party has been adversely affected.

#### **BANKRUPTCY**

The bankruptcy or insolvency of an insured person will not relieve **us** of any obligations under this policy.

#### **NAMED DRIVER EXCLUSION**

If **you** have asked **us** to exclude any person from coverage under this Policy, then **we** will not provide coverage for any claim arising from an **accident** or **loss** involving a **covered vehicle** or **non-owned vehicle** that occurs while it is being

operated by the excluded person. THIS INCLUDES ANY CLAIM FOR DAMAGES MADE AGAINST YOU, A **RELATIVE**, OR ANY OTHER PERSON OR ORGANIZATION THAT IS VICARIOUSLY LIABLE FOR AN **ACCIDENT** ARISING OUT OF THE OPERATION OF A **COVERED VEHICLE** OR **NON-OWNED VEHICLE** BY THE EXCLUDED DRIVER.

#### **NAMED OPERATOR - NON-OWNED VEHICLE COVERAGE**

If you elect **Named Operator - Non-owned Vehicle Coverage**, you agree with **us** that this policy is amended as follows:

##### 1. **General Definitions:**

- a. The general policy definition of "**you**" and "**your**" is deleted and replaced by the following:

"**You**" and "**your**" mean the person shown as the named insured on the **Declarations Page**.

- b. The general policy definitions of "**covered vehicle**" and "**non-owned vehicle**" are deleted and replaced by the following:

"**Covered vehicle**" and "**non-owned vehicle**" mean any **vehicle** that is not **owned** by **you**, a **relative**, or **your** spouse, even if not residing in the same household as **you**.

##### 2. **Part I - Liability To Others**

- a. Additional Definition: When used in Part I, the definition of "**insured person**" and "**insured persons**" is deleted and replaced by the following:

"**Insured person**" and "**insured persons**" mean:

- i. **you**, when operating or using a **covered vehicle** or **non-owned vehicle**

with the express or implied permission of the **owner**; and

- ii. any person or organization with respect only to vicarious liability for an **accident** arising out of the use of a **covered vehicle** or **non-owned vehicle** by **you** with the express or implied permission of the **owner**.

- b. Exclusions: The following exclusion is deleted from Part I:

Coverage under this Part I, including our duty to defend, does not apply to:

**bodily injury** or **property damage** arising out of an **accident** involving a **vehicle** while being used by a person while employed or engaged in the **business** of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles. However, this exclusion does not apply to **you**, a **relative**, or an agent or employee of **you** or a **relative**, when using a **covered vehicle**;

and replaced by the following:

Coverage under this Part I, including our duty to defend, does not apply to:

**bodily injury** or **property damage** arising out of an **accident** involving a **vehicle** while being used by a person while employed or engaged in the **business** of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles.

- c. Other Insurance. The **Other Insurance** provision under Part I is deleted and replaced by the following:

#### **OTHER INSURANCE**

Any insurance **we** provide shall be excess over any other applicable liability insurance, self-insurance, or bond.

### **3. Part II - Personal Injury Protection Coverage**

- a. Additional Definitions: When used in Part II, the definition of "**insured person**" and "**insured persons**" is deleted and replaced by the following:

"**Insured person**" and "**insured persons**" mean **you**, when **you** sustain **bodily injury** while using or **occupying** an **automobile** other than one **owned** by **you** or a **relative**, or while not **occupying** an **automobile**.

- b. If **you** pay a premium for Personal Injury Protection Coverage, and it is shown on the **Declarations Page**, any insurance **we** provide shall be excess over any other similar insurance or self-insurance.

### **4. Part III - Underinsured Motorist Coverage**

If **you** pay a premium for Underinsured Motorist Coverage, and it is shown on the **Declarations Page**:

- a. When used in Part III, the Additional Definition of "**insured person**" and "**insured persons**" is deleted and replaced by the following:

"**Insured person**" and "**insured persons**" mean:

- i. **you**; and
  - ii. any person who is entitled to recover damages covered by Part III, because of **bodily injury to you**.
- b. The **Other Insurance** provision under Part III is deleted and replaced by the following:

#### **OTHER INSURANCE**

If there is other applicable underinsured motorist coverage, the total amount of

underinsured benefits recoverable from all sources by an **insured person** shall not exceed the amount provided by the one (1) policy with the highest limit of liability. If there is other applicable uninsured or underinsured motorist coverage, any insurance **we** provide shall be excess over any other collectible uninsured or underinsured motorist coverage. If there is other applicable uninsured or underinsured motorist coverage, **we** will pay only **our** share of the total benefits recoverable from all sources. **Our** share is the proportion that **our** Limit of Liability bears to the total of all available coverage limits.

**We** will not pay for any damages which would duplicate any payment made for damages under other insurance.

If **you** are injured while not **occupying** a motor vehicle, the coverage provided under this policy shall be excess to any uninsured or underinsured motorist coverage provided by a policy under which **you** are a named insured.

#### **BROADFORM NAMED OPERATOR COVERAGE**

If Broadform Named Operator Coverage has been elected, this policy provides coverage only to the first named insured shown on the **Declarations Page**. All definitions of "insured person" are deleted and replaced with:

**"Insured person"** means the first named insured shown on the **Declarations Page**.

**CAUTION:** If Broadform Named Operator Coverage has been elected, this policy does not provide any coverage to a spouse or **relative** of the first named insured, persons operating a **vehicle** with the permission of the named insured, or occupants of a **vehicle** operated by the named insured. However, this does not affect the rights of recovery under Part I of an occupant of a **vehicle** operated by the first named insured.

The following additional exclusions apply:

1. No coverage is provided for damages arising out of any **accident** or **loss** occurring while the named insured is operating a motorcycle, moped, all-terrain vehicle or motor home.
2. No coverage is provided for damages arising out of any **accident** or **loss** occurring while a **vehicle** is being used by the named insured in connection with a **business**.
3. No coverage is provided for damages arising out of any **accident** or **loss** occurring while the named insured is using a **vehicle** without the permission of the **owner**.
4. No coverage is provided to anyone other than the named insured when operating a **vehicle owned** by the named insured.

Any insurance **we** provide will be excess over any other collectible insurance, self-insurance, or bond.



Secretary



RELEASE

For the Sole Consideration of

Fifty Thousand & 00/100 Dollars,  
the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges

Doune Smith

her heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or, who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the

24th day of June, (year) 1999 at or near Monroe, WA.

This release expressly reserves all rights of the parties released to pursue their legal remedies, if any, against the undersigned, their heirs, executors, agents and assigns.

Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Undersigned hereby accepts draft or drafts as final payment of the consideration set forth above.

In Witness Whereof,

I have hereunto set my hand(s) and seal(s) this 21st day of March, (year) 2001

In presence of:

Christie Spurlack  
Witness

Signed X Janette Leding

PO Box 1546, Everett WA 98206  
Address

Signed X \_\_\_\_\_

HOLD HARMLESS AND INDEMNIFICATION AGREEMENT

As part of the consideration of our agreed settlement of the claims of the undersigned arising out of an accident which occurred on or about the 24th day of June 1997, at or near Medina, WA, Washington, and in further consideration of your not naming as payee on the settlement draft the persons or entities who may have a lien or claim to the settlement funds, the undersigned guarantee(s) that any and all persons, firms or corporations having or claiming to have liens under the statutes of the State of Washington for medical, dental, hospital, surgical, nursing or related services or facilities furnished to me, Janette XXe Leding, or any other type of lien claim rising out of the treatment and/or damages which are the subject matter of this claim, including all liens of the State of Washington, the United States or any other agency or department and any other government liens or subrogation claims, and any lien or subrogation rights of any kind or nature of any company or insurance company, will be paid and satisfied by the undersigned and the undersigned further agree(s) to hold State Farm Mutual Automobile Insurance Company and Danell Smith harmless and indemnify State Farm Mutual Automobile Insurance Company and Danell Smith from any claims and any expenses related thereto, including costs and reasonable attorney fees.

DATED this 21st day of March, 2001.

Janette Leding  
Sign Here

\_\_\_\_\_  
Spouse

# **APPENDIX K**

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Visiting Judge Brian Gain

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

PROGRESSIVE CLASSIC INSURANCE  
CO., a foreign corporation, THE  
PROGRESSIVE CORPORATION, a foreign  
corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

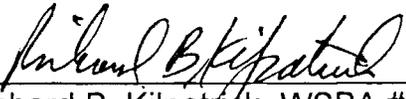
NOTICE OF DIRECT APPEAL TO THE  
SUPREME COURT

Plaintiff/Appellant hereby gives notice of appeal of the trial court's  
Conclusions of Law dated July 29, 2010 and the dismissal directed by those  
Conclusions of Law (copy attached).

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Appeal is taken to Supreme Court State of Washington.

DATED this 8-26 day of August, 2010.

  
Richard B. Kilpatrick, WSBA #7058  
Shannon M. Kilpatrick, WSBA #41495  
Attorneys for Janette Ochoa/Appellant



**FILED**  
KING COUNTY SUPERIOR COURT

JUL 29 2010

SUPERIOR COURT CLERK  
BEVERLY ANN ENEBRAD  
DEPUTY

Visiting Judge Brian Gain

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

JANETTE LEDING OCHOA

Plaintiff

vs.

PROGRESSIVE CLASSIC INSURANCE  
CO., a foreign corporation, THE  
PROGRESSIVE CORPORATION, a foreign  
corporation, and PROGRESSIVE  
CASUALTY INSURANCE COMPANY, a  
foreign corporation,

Defendants.

No.: 02-2-07712-7

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

**ORIGINAL COPY**

Following the Court's suggestion at the pre-trial conference held June 25, 2010, the parties presented agreed Findings of Fact to the Court on July 29, 2010 (except Progressive requested one addition to Findings 2 and one addition to Finding 18). The Court resolved those two requests *by pm*

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1 In order to obtain appellate guidance before conducting an expensive trial,  
2 the Court made the Conclusions of Law stated below.

3 I. FINDINGS OF FACT

4 1. The Plaintiff, Janette Leding Ochoa (hereinafter "Plaintiff"), was  
5 struck by an auto operated by Dawnell Smith (hereinafter "Smith") on June 24,  
1999 when Smith went through a stop sign.

6 2. Dawnell Smith was the only <sup>driver</sup> ~~person~~ at fault in the collision. *MM RAC 10*

7 3. Plaintiff suffered injuries in the collision and retained attorney Ben  
8 Wells of Wells & Hammer to represent her.

9 4. At the time of this accident, Smith was delivering pizza for  
Domino's Pizza, Eastside Express in her own vehicle.

10 5. Smith carried a State Farm Mutual Automobile Insurance Company  
11 policy that applied to this accident. It provided liability coverage in the amount  
12 of \$50,000 for each person and \$100,000 for each occurrence.

13 6. Evanston Insurance Company had a policy of insurance with limits  
14 of \$1,500,000 which insured Eastside Express, Inc. for its liability for any non-  
owned vehicle driven on the job by an employee of Eastside Express, Inc. *The*  
*Evanston policy is Exhibit A. TM*

15 7. The Evanston policy was applicable to the collision and the policy  
16 covered the vehicle Dawnell Smith was driving at the time of the incident since  
17 Dawnell Smith owned the vehicle and Dawnell Smith was operating the vehicle  
within the course and scope of her employment with Eastside Express. Dawnell  
Smith was not an insured under the Evanston policy.

18 8. Plaintiff Ochoa had a policy of insurance with Progressive Classic  
19 Insurance Company which included Underinsured Motorist coverage for  
20 Plaintiff in the amount of \$50,000. The complete policy is Exhibit B.

21 9. Ochoa made claims with Smith and Progressive.

1           10. On March 15, 2001, Plaintiff provided Progressive the opportunity  
2 to buy out the tentative settlement with Smith for the State Farm limits of  
\$50,000. Progressive declined by fax on March 20, 2001.

3           11. On March 21, 2001 Ben Wells had Ochoa sign a release provided  
4 by State Farm and settled all claims against Smith and State Farm for \$50,000.

5           12. On March 21, 2001 Wells wrote Progressive providing a copy of  
6 the State Farm settlement documents and renewed the UIM claim. After  
7 confirming the Evanston policy applied Progressive thereafter took the position  
8 that to have a UIM claim the value of Ochoa's damages had to exceed the  
amount of both the State Farm policy and the Evanston policy combined,  
regardless of whether the Evanston policy covered Smith as an insured.

9           13. Soon after providing the State Farm settlement information to  
10 Progressive, Wells wrote to Domino's Pizza Eastside Express to assert a claim  
for Ochoa. No offer was made.

11           14. Wells withdrew from Ochoa's representation by June 21, 2001

12           15. The release from State Farm Wells had Ochoa sign to settle with  
13 Smith had language that Domino's Pizza Eastside Express claimed released it  
14 from any claim. The Release is Exhibit C.

15           16. In June 2002 Ochoa sued and served Domino's Pizza Eastside  
16 Express. Attorney Ben Wells and Hammer & Wells were also named for any  
17 damages that may have been lost from Eastside Express by the release but the  
attorney and law firm were not served. Ochoa served Wells in February 2004.

18           17. When the dispute on the issue of the threshold for a UIM claim  
19 continued Plaintiff amended the complaint and added Progressive as a defendant  
in June 2004.

20           18. In January 2005 Ochoa settled her claims against Eastside Express  
21 for \$25,000 and against Ben Wells and Hammer & Wells for \$32,500 and both  
22 defendants were dismissed. Progressive was the only remaining defendant.  
Plaintiff's recovery at that point was \$107,500.

1 19. Ochoa has asserted the value of her damages always exceeded the  
2 \$50,000 limits available to her from the State Farm policy and that her damages  
3 most likely exceeded \$107,500. Ochoa always agreed and it is so found that her  
4 claims do not remotely exceed \$1,550,000.

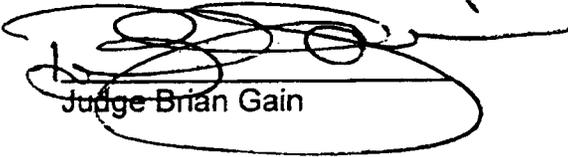
5 II. CONCLUSIONS OF LAW

6 1. The Evanston policy liability limit serves as an offset for the  
7 threshold for Ochoa's UIM claim regarding Dawnell Smith's liability.

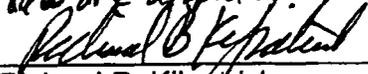
8 2. The appellate resolution of this issue is central to either the  
9 necessity of any trial or one that is not useless. Pursuant to CR 54(b) there is no  
10 just reason for delay of entry of a final order.

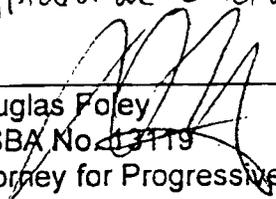
11 3. The pending trial date is stricken and stayed, and any other the  
12 appropriate order regarding dismissal shall be entered.

13 DATED this 29<sup>th</sup> day of July, 2010.

14   
15 Judge Brian Gain

16 *Findings agreed, conclusions of  
17 law are respected.*

18   
19 Richard B. Kilpatrick  
20 WSBA No. 7058  
21 Attorney for Plaintiff Ochoa

22 *Approved on the form:*  
23   
24 Douglas Foley  
25 WSBA No. 13119  
Attorney for Progressive defendants