CARLTON FIELDS

Your Online Insurance Sales Can Land You In Court

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Like it or not, insurers now need to market *and sell* consumer products online, but recent cases show that the legal framework for those activities is still being assembled. Some courts are distinctly bullish: in April, in *Traynum v. Scavens*, No. 2013-002797 (S. Car. April 20, 2016), South Carolina's Supreme Court refused to encumber online sales with new legal requirements, it declined to second-guess the design of an insurer's website and it even praised the Internet option as one that "benefits consumers." In March, though, *Negron v. Progressive Casualty Insurance Co.*, No. 14-577 (D.N.J. March 1, 2016), showed that automated sales can lead insurers into unexpected sources of exposure, and, more basically, that paternalism still has a heavy influence over insurance law. Courts have been disapproving of what auto insurers say to consumers, at least since the early days of no-fault. As insurers increasingly enter the electronic marketplace, they will find that courts already have ample resources to sustain lawsuits over online practices. **Make Him An Offer He Shouldn't Refuse** Automobile insurance statutes make some types of coverage mandatory for policies sold within a given state, but one-size-fits-all won't work for some coverages. For example, Personal Injury Protection (PIP) can be an important component of no-fault automobile policies, but it is less useful for policyholders who already have adequate health insurance. Statutes accommodate that complexity by requiring only that insurers "*offer*" PIP coverage, by permitting consumers to "*reject*" it or by allowing them to "*request*" lower limits or higher deductibles. Legislators use similar provisions to encourage purchases of coverages they deem beneficial, but have chosen not to require, such as uninsured/underinsured motorist (UIM) coverage. For decades, the courts charged with interpreting these statutes have expressed concern that consumers might fail to act in their own best interests when they respond to these mandatory "offers." As a result, courts have created a body of case law that demands not just an "offer," but what those cases call a "*meaningful offer*." *Kuchenmeister v. Illinois Farmers Insurance Co.*, 310 N.W.2d 86, 88 (Minn. 1981). In *Hastings v. United Pacific Insurance Co.*, 318 N.W.2d 849 (Minn. 1982), for example, the Supreme Court of Minnesota found four separate, unwritten requirements in the statutory mandate of an "offer." Fundamentally, an offer in Minnesota must "*intelligibly advise the insured of the nature of the optional coverage*." But it must also include specific details, such as the fact that the additional coverages may be had for only "a relatively modest increase in premiums." Of particular importance in the era of online sales, the court also ruled that the "notification *process*" must be "commercially

reasonable," whenever "the purported offer is made in other than face-to-face negotiations." *Romero v. Dairyland Insurance Co.*, 111 N.M. 154 (1990), illustrates the extent some courts have conflated a "meaningful" offer with a *persuasive* one. Under a regulation issued by New Mexico's Department of Insurance, a customer's rejection of UIM coverage must be signed and in writing, and the rejection must also be "made a part" of the policy that is delivered to the insured. In *Romero*, the state's Supreme Court interpreted this requirement as a kind of heuristic device for promoting UIM

> [A]n individual *may well reconsider* his or her rejection of [UIM] coverage. Providing affirmative evidence of the rejection of the coverage comports with a policy that any rejection of the coverage be knowingly and intelligently made. Any individual rejecting such coverage should ***remain** well informed as to that decision*.

Courts in a number of states with similar statutes have directly adopted the four-part, *Hastings* standard. *E.g., Mollena v. Fireman's Fund Insurance Co. of Hawaii Inc.*, 72 Haw. 314 (1991); *Overholt v. McDaniel*, 765 F.Supp. 20 (D.D.C. 1991); *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518 (1987); *Cloninger v. National General Insurance Co.*, 109 Ill.2d 419 (1985). Other courts have crafted similar demands for a "meaningful offer." *E.g., Lopez v. United Automobile Insurance Co.*, 274 P.3d 897 (Utah 2012) (insurer must provide "the information [customers] need to make an informed decision about ... UIM coverage"); *Banaszak v. Progressive Direct Insurance Co.*, 3 A.3d 1089 (Del. 2010) (rejection of coverage effective only where there has been an "adequate and meaningful" offer); *Linko v. Indemnity Insurance Co. of North America*, 90 Ohio St. 3d 445 (2000) (rejection of UIM requires "a brief description of the coverage, the premium for that coverage, and an express statement of the ... limits"); *Allstate Insurance Co. v. Parfrey*, 820 P.2d 905 (Colo. 1992) (offer must be "reasonably calculated to permit the potential purchaser to make an informed decision.") Only a small number of courts have bucked this trend. *Tallent v. National General Insurance Co.*, 185 Ariz. 266 (1996) (mandate of "offer" does not require insurer to "explain the nature of UIM coverage"); *Harlach v. Metropolitan Property and Liability Insurance Co.*, 221 Conn. 185 (1992) (no duty "to explain the terms of [the] offer or the advantages and disadvantages to procuring [UIM] coverage"); *Silver v. Slusher*, 770 P.2d 878 (Okla. 1988) (same). **The Past Is A Foreign Country** These rules were formulated during the horse-and-buggy era, when selling insurance involved quaint artifacts like carbon paper, fax machines and the U.S. Postal Service. That was then. In 2015, 71 percent of consumers who shopped for auto insurance did their shopping online. According to Gallup Inc., only 14 percent of consumers currently *purchase* insurance over the Internet — but that figure jumps to 27 percent among millennials. Even carriers that are reluctant to abandon traditional distribution networks will have to adapt to this trend. *Traynum v. Scavens* tested the effect of this new reality on the old rules. It arose in South Carolina, where an insurer's offer of UIM coverage is subject to the *Hastings* standards. In *Traynum*, a policyholder argued that an "offer" of UIM which might be "commercially reasonable" *on paper* can become *less* reasonable, if it's made over the Internet. The insured in *Traynum* bought her auto policy on the website of Progressive Direct Insurance Co., without speaking to or corresponding with any Progressive employee. As part of that process, she viewed a form in which she acknowledged that the insurer had offered her UIM

coverage, and that she had rejected it. She "signed" that form *electronically* — that is, she "clicked" a box accepting a form on which her name had been automatically printed. Under her state's version of the Uniform Electronic Transactions Act (UETA), S.C. Code Ann. §§ 26-6-70(D) (2007), this type of electronic signature "satisfies a law requiring a signature." The insured was later injured in an accident and suffered $175,000 in damages. The other driver was at fault, but could pay only the $100,000 liability limit of her own policy. The policyholder then brought a suit against her insurer, alleging that she had not received a "meaningful offer" for UIM coverage. She sought the usual remedy for violation of statutes governing optional coverages: reformation of the policy to add UIM. In that suit, the insured had to contend with a "safe harbor" statute, which creates a conclusive presumption of a meaningful offer, if the offer and rejection conform to standards issued by the Department of Insurance. S.C. Code Ann. § 38-77-350 (2015). It was undisputed that the online offer form the insured had signed electronically contained all the information that was required under the department's rules. To overcome the presumption, therefore, the insured had to argue that the *manner* in which she had received the offer form — the "notification *process*," to use the language of *Hastings* and *Wannamaker* — was so far from being "commercially reasonable" as to negate the written disclosures it contained. She tried to make that case in two different ways. One of these asserted that *the sequence and presentation of forms on the Internet can reduce, or even nullify, the value of the information they contain* — the way font size or location on a page might affect the intelligibility of disclosures on paper. In that vein, the insured complained (1) that the insurer's website asked customers to indicate whether they wished to select UIM coverage *before* they were given a chance to review the statutory disclosures; and (2) that the disclosures appeared only in an inset window, which customers had to enlarge to read. The insured also offered a set of arguments suggesting that an insurer's online "notification process" might be "commercially unreasonable," if it is unable to *accommodate the special needs of individual customers with respect to understanding insurance terminology.* She cited another UIM case, in which the South Carolina Supreme Court speculated that "[o]ne who is ignorant and unwary *might require more explanation* than a sophisticated applicant," *Ray v. Austin*, 388 S.C. 605, 613 (2010). She also cited language from the safe harbor statute, stating that the insured must sign a form rejecting UIM coverage "after it has been completed by an insurance producer or a representative of the insurer." S.C. Code Ann. § 38-77-350(B). Such language, she reasoned, assumed the level of interaction that occurs "within the normal context of a customer ... dealing face to face with an agent or over the phone with a live agent." Rather than being prepared "by a producer or a representative" who had probed her needs in a professional manner, the insured argued that *her* form had been "completed" only "*by plaintiff Traynum's uninformed online input.*" In ruling against the insured, the Supreme Court laid a heavy emphasis on the UETA and the policies underlying it — even suggesting that the UETA is a kind of legislative "endorse[ment]" of online sales. Rather than consider the specific defects in the notification process which the insured claimed to have identified, the court suggested that she had essentially assumed the risk of such defects when she decided to buy online — and that it is the

responsibility of consumers who need individualized attention to seek it out for themselves:

> [The insurer's] online communication of the offer of UIM coverage was effective *because* [the plaintiff] *agreed* to interact with Progressive electronically by choosing to purchase insurance through [the insurer's] website and she had the ability to download and save or print the offer form. [Additionally], despite [the] assertion that there was *no meaningful interaction* between [the plaintiff] and [the insurer], the *UETA ... expressly endorses this kind of transaction.* [The insurer's]website acted as the company's *electronic agent*, ... presenting [the offer form] to [the plaintiff] in a format that was easily viewable, printable and savable.

In conclusion, the court found that making insurers take additional precautions to make online offers "meaningful" would be bad public policy:

> [T]he ability to purchase insurance online *benefits consumers* by allowing them to shop from the comfort of their own homes and avoid the time constraints and pressures associated with face-to-face interactions with sales agents. We therefore decline to add to the statutory requirements ... and frustrate the purpose of the UETA by judicially engrafting an additional burden on those transactions.

What Could Go Wrong? As *Traynum* proves, courts can be persuaded that online sales practices are reasonable and fair. Other courts have reached the same conclusions. In *Barwick v. Government Employee Insurance Co.*, 2011 Ark. 128 (2011), for example, the policyholder argued that an electronic signature could not satisfy a statutory requirement that any rejection of no-fault coverage be "in writing" — an argument suggesting that the law's purpose was to focus consumers' attention through the physical act of signing their names, and that this purpose is frustrated by online transactions. Arkansas's Supreme Court found that this position was refuted by the express terms of the UETA. But future success on these issues is by no means guaranteed. For one thing, courts have not yet directly engaged the question of whether the Internet itself causes written sales materials to have a qualitatively different effect on consumers — in other words, whether the Internet can make shoppers "click happy." That term appeared in a 2009 report by the Division of Enforcement of the Federal Trade Commission, which described "exuberant Internet use" in these terms:

> [U]sers click through webpages quickly, without paying much attention because they want to complete a given transaction. ... [R]esearch [has found] that online shoppers "enter a seamless sequence of responses, a *flow state in which their sense of time and reality become distorted and their self-control is diminished*." As a result, ... *users do not read or understand the terms of agreements they enter online*.

It is not hard to imagine a court, on the basis of such research, concluding that special care is needed to make a "meaningful offer" on the Internet. Furthermore, even without accepting claims about a "flow state," courts have found that the sequence and presentation of forms on the Internet can be misleading, or even fraudulent. That was the headline from the decision last March in *Negron v.*

Progressive Casualty Insurance Co. **Bad Form** *Negron* is a qui tam action, asserting claims under the federal False Claims Act, 31 U.S.C. § 3729 et seq. It arises out of the interplay between automobile insurance policies and the Medicare and Medicaid programs. The Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b), provides that the individual health plans of Medicare recipients — including medical benefits under an automobile insurance policy — have primary responsibility for those patients' medical bills. Separate statutes similarly make Medicaid a secondary payer whenever other insurance is available. 42 U.S.C. §§ 1396k(a)(1), 1396a(a)(25). In New Jersey, automobile insurers must offer PIP coverage to their customers, but they must also offer, as an alternative, lower-priced policies that make the consumers' private health insurance the primary payer of medical bills arising out of auto accidents. Because of the federal statutes governing Medicare and Medicaid, however, individuals who receive health insurance exclusively through either of those programs are *ineligible for such policies*. N.J.A.C. 11:3-14.5. While shopping online, the plaintiff (technically, the "relator") in *Negron* was offered a choice between (1) a policy with PIP coverage or (2) a less expensive "health first" policy, which made her private health plan the primary payer. The online application did not expressly inform her that Medicare recipients were ineligible for health first coverage. Instead, a question mark appeared next to each option; clicking on the question mark opened a pop-up window with an explanation of the coverage. The explanation of the "PIP primary insurer" coverage, which the relator appears to have opened, included this statement:

> You should select "**Yes**" if:

- One or more drivers listed on the policy are on MEDICARE or MEDICAID **...**

> *Please note that many health insurers will NOT pay medical expenses associate[d] with injuries sustained in an automobile accident.* If you are uncertain about the scope of your health insurance coverage, please check with your health insurer

The relator was later involved in an auto accident, and her medical providers submitted claims under her health first policy. The claims were denied, on the ground that the policy made the relator's private health insurer responsible for her medical expenses. At least two of the providers thereafter submitted their bills to Medicare, and one of those bills was conditionally paid. The relator then initiated a qui tam action in federal court in New Jersey. In response to the insurer's motion to dismiss, the court found the relator had established a plausible claim that the insurer *knowingly caused "false or fraudulent" claims to be submitted to Medicare and Medicaid through the design of its online application.* In reaching that conclusion, the court did *not* find that the insurer had ever learned the relator was a Medicare enrollee. Instead, it found that the relator's allegations plausibly established that the insurer *should have* ascertained that fact, or *should have* prevented a Medicare enrollee from buying a policy without PIP coverage in the first place. And that finding rested, in large measure, on the fact that the court could think of ways in which the *online process* could have been designed to "prevent the sale of health first policies to Medicare and Medicaid enrollees or ... prevent

the submission of claims to Medicare or Medicaid" in connection with those policies. For example

> Defendants could have constructed their online application to prevent Medicare and Medicaid enrollees from purchasing health first policies ... through pop-up warnings, by requiring applicants to disclose the name of their health insurance carrier ... or by any number of other modifications ...

The court acknowledged that the application form advised Medicare recipients that they "should" select PIP coverage, but it had better ideas:

> [The insurer] could have ... *asked* whether the applicant was insured by Medicare or Medicaid, instead of putting this explanation in fine print. ... Perhaps more accurate language would ... advise applicants that they "must" [select PIP coverage].

Because the defendants had not initiated these modifications on their own, the court held, they were responsible for "remaining ignorant of the fact that the relator did not have qualifying health insurance" and that ignorance made them responsible for the submission of "false or fraudulent" bills to Medicare. *Negron* is a reminder that online sales can create exposures that go far beyond the reformation of individual policies: the court found that alleged defects in an online sales process can *render an insurer liable for actions that are **subsequently** committed by **other** parties* — not even the policyholder, but the policyholder's medical providers. That aspect of the decision recalls other recent efforts to impose on insurers a duty to anticipate the way in which their decisions will affect the future conduct of others. *Negron* also shows that some courts, unlike the one that decided *Traynum*, are fully prepared to second-guess the design of online sales processes and the effectiveness with which those processes convey sufficient information to the consumer. In that respect, *Negron* resembles *Estrada v. Progressive Direct Insurance Co.*, 53 F.Supp.3d 484 (D. Mass. 2014) — a putative class action, asserting claims under the Massachusetts Consumer Protection Act. The court in *Estrada* denied an insurer's motion for summary judgment on claims that the manner in which the insurer sold auto policies online had misled consumers into waiving available PIP coverage. **Murphy's Insurance Law** Even where courts do not accept direct challenges to the effectiveness of online processes, insurers can still suffer setbacks. In *Traynum*, there was little dispute about the details of the online sales process, because [R]ecords of all online transactions that result in a purchase ... are stored as *a series of images that preserve [the] website exactly as it appeared to the purchaser, screen by screen.* [The insurer] also maintains records of all electronic signatures, making it possible to *review everything the [plaintiff] saw and signed when she purchased the insurance policy* .. Other cases show the benefits of this type of record keeping. For example, in *Bonck v. White*, 115 So.3d 651 (La. Ct. App. 2013), a Louisiana insured challenged the effectiveness of her online waiver of certain UIM coverage. The Court of Appeal held that the insured's electronic signature was effective, under the Louisiana version of the UETA. But it nevertheless reversed an decision granting summary judgment to the insurer, because the plaintiff had submitted an affidavit in which she denied signing the waiver form, even electronically; because the waiver form was dated four days later than the initial application; and because the insurer did not

submit any records or affidavits to contest the plaintiff's claim or explain the apparent discrepancy. A similar failure of proof was behind the decision in *Springborn v. Allstate Insurance Co.*, No. 292064 (Mich. Ct. App. Oct. 7, 2010). The insurer in that case asserted that the policyholder had misrepresented her marital status in an online application. Reversing an award of summary judgment for the insurer, a Michigan Court of Appeals explained:

> [D]efendant offered a *printout* purporting to reflect what the plaintiff had entered when completing the online application, including the indication that the plaintiff represented herself as divorced. ... However, the defendant *did not submit any foundational testimony*, affidavits or other evidence to support the origin or authenticity of the printout, relying instead only on the assertion of its counsel.

Insurers must also take care to see that appropriate online procedures are not undermined by other aspects of the sale process. One of the cases consolidated in *Jordan v. Allstate Insurance Co.*, 149 N.M. 162 (2010), involved an online rejection of UIM coverage. As noted, New Mexico law requires that the rejection be "made a part" of the policy that is delivered to the insured. To satisfy that requirement, the policy stated that the application form was "expressly integrated" into it, but it did not include a copy of the actual form. Although the New Mexico Supreme Court held that the online rejection of UIM coverage complied with the applicable law, it affirmed an order reforming the plaintiff's policy, because

> [i]ncorporating an online application into an insurance policy via buried language toward the end of a generic 49 page policy does not allow for meaningful reconsideration of the decision to reject coverage.

In *Banaszak v. Progressive Direct Insurance Co.*, supra, the plaintiff completed an online application for information about motorcycle insurance, but he *bought* the policy during a telephone conversation with an agent. Because the agent was able to review the online application, he used it as the basis for his discussion: he observed, "There is no uninsured motorist or uninsured motorist property damage selected" and the plaintiff responded, "Okay." The application form was "prechecked" to reject UIM coverage. Thus, even though the insured had the opportunity to change the selection, the form might not have passed muster on its own. But it was also problematic that the agent relied on the electronic form, when he *could have* been offering and explaining UIM coverage in the way that agents traditionally do. In that sense, the online element might be seen as having impaired the traditional sales regimen. **Conclusion** While *Traynum* is encouraging, it offers no hard and fast rule to guaranty that an online sale process will "intelligibly advise the insured of the nature of the optional coverage." Still, some practices are likely to win favor with the courts to which unhappy policyholders will bring their challenges. An insurer is more likely to prevail in litigation if:

- Its website briefly explains the nature of each optional coverage in clear, non-technical language.
- The website makes clear the relative cost of accepting or rejecting each optional coverage — including the cost of coverage for additional insureds.

- The sale process makes this information available to the consumer at a stage in the transaction which occurs before he or she is asked to express a purchasing preference, even provisionally.
- The website instructs customers how to seek additional information from an agent or representative.
- The website allows customers to download, print or otherwise obtain a copy of information about the optional coverages, as well as any forms that the customer signs.
- The process automatically preserves the screens a customer has viewed, in sequence, together with any document the customer has signed.
- Policy documents and sales practices are reviewed and, if necessary, modified, to function properly in conjunction with the online process.

More generally, a website that works in one state won't necessarily work in another; insurers need to analyze the details of each state's laws and regulations before entering that state's online market. And in the course of designing or evaluating their own online sales processes, insurers can help themselves by thinking like a plaintiff: does this disclosure, or this sequence of screens, seem to encourage or discourage the selection of a particular coverage? Will the answer change, if it turns out the coverage has a poor loss ratio? Is there any way that the customer's selection or rejection of the coverage can have an impact on third parties? *Republished with permission by Law360 (subscription required). Originally published by PropertyCasualtyFocus.*

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