

Robert N. Feltoon (I.D. No. 58197)
Deborah J. Krabbendam (I.D. No. 41856)
Francesco P. Trapani (I.D. No. 209123)
Conrad O'Brien PC
1515 Market Street, 16th Fl.
Philadelphia, PA 19102
(215) 864-9600

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**PAMELA LOWE-FENICK AND JAMES
BOYLE, SR., ON BEHALF OF
THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED**

Plaintiffs,

v.

**PROGRESSIVE SPECIALTY INSURANCE
COMPANY**

Defendant.

Civil Action No: 2:09-CV-05515-TJS

**DEFENDANT PROGRESSIVE SPECIALTY INSURANCE COMPANY'S
ANSWER TO AMENDED CLASS ACTION COMPLAINT**

Defendant Progressive Specialty Insurance Company answers plaintiff's Class Action Complaint as follows.

1. Denies as stated. Defendant admits that 75 Pa. Cons. Stat. § 1799.1 provides for premium discounts relating to passive antitheft devices as defined in that section. The statutory requirements must be read as a whole and in context, and plaintiffs' characterizations of the statutory requirements are denied.

2. Defendant is without knowledge or information sufficient to form a belief as to what plaintiffs mean by the general allegation that “many” cars have an antitheft device as standard equipment, and that allegation is therefore denied. The remaining allegations of paragraph 2, including plaintiffs’ characterization of the statutory requirements, are denied.

3. Denies. Defendant incorporates its response to paragraphs 1 and 2, denies that it violated any requirements of the relevant statutes, denies that it has failed to provide antitheft device discounts when required to do so, and denies plaintiffs’ allegations regarding what it “knows or should know.”

4. Admits only that plaintiffs purport to file this case as a class action. Defendant incorporates its answers to paragraphs 1-3, denies that any class action is appropriate in this matter, denies that it failed to provide any required discount, and denies that plaintiffs or the purported class are entitled to any recovery.

5. Admits only that the complaint asserts the claims described in this paragraph. Defendant denies there is any basis for such claims and incorporates its answers to paragraphs 1-4. By way of further answer, the parties have filed a stipulation for voluntary dismissal, without prejudice, of the counts of the complaint alleging violation of Pennsylvania’s consumer protection law, fraudulent misrepresentation, and negligent misrepresentation.

6. Denies.

7. Admits.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Ms. Lowe-Fenick is a Pennsylvania resident. Defendant admits that Ms. Lowe-Fenick had a policy with defendant that insured the automobile described in paragraph 8, effective as of October 18, 2006; admits that Ms. Lowe-Fenick was charged and

paid premiums for comprehensive coverage; admits that the premium for comprehensive coverage for October 18, 2006 through April 18, 2007 was \$79.00; and admits that the premiums did not include a discount for an antitheft device. On information and belief, defendant admits Ms. Lowe-Fenick's car has an alarm system as manufacturer's standard equipment and denies that the alarm system is a passive antitheft device within the meaning of 75 Pa. Cons. Stat. § 1799.1.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Mr. Boyle is a Pennsylvania resident. Defendant admits that Mr. Boyle had a policy with defendant that insured the automobiles described in paragraph 9; admits that Mr. Boyle was charged and paid premiums for comprehensive coverage; admits that the premium for comprehensive coverage for December 12, 2009 through June 12, 2010 included a \$54.00 premium for comprehensive coverage on the Taurus and a \$58.00 premium for comprehensive coverage on the Grand Cherokee; and admits that the premiums did not include a discount for an antitheft device. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 and they are therefore denied.

10. Admits.

11. Denies as stated. Defendant admits that 75 Pa. Cons. Stat. § 1799.1 provides for premium discounts relating to passive antitheft devices as defined in that section and that this paragraph quotes a portion of § 1799.1. The statutory requirements must be read as a whole and in context, and plaintiffs' characterization of the statutory requirements is denied.

12. Defendant admits that this paragraph quotes the portion of § 1799.1 which defines "passive antitheft device."

13. Denies as stated. Defendant admits that 75 Pa. Cons. Stat. § 1791.1(c) provides for “Notice of premium discounts” and that this paragraph quotes § 1791.1(c). The statutory requirements must be read as a whole and in context, and plaintiffs’ characterization of the statutory requirements is denied.

14. The allegations of paragraph 14 consist primarily of generalizations and argument, and are denied as stated.

15. Defendant admits that plaintiffs had policies with defendant that insured their private passenger automobiles. On information and belief, defendant admits plaintiff Lowe-Fenick’s car had an alarm system as manufacturer’s standard equipment and denies that the alarm system is a passive antitheft device within the meaning of 75 Pa. Cons. Stat. § 1799.1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 and they are therefore denied. Defendant incorporates its answers to paragraphs 1-3.

16. Defendant admits that plaintiffs did not receive a discount for an antitheft device. Defendant denies the remaining averments of paragraph 16 and incorporates its answers to paragraphs 1-3 and 15.

17. Defendant admits that it did not request from the Commissioner of Insurance an exclusion from the provisions of 75 Pa. Cons. Stat. § 1799.1. Defendant further admits that it is subject to the requirements of § 1791.1(c). The statutory requirements must be read as a whole and in context, and plaintiffs’ characterization of the statutory requirements is denied. Defendant incorporates its answers to paragraphs 1-3.

18. Defendant admits it generally requires applicants for automobile insurance policies to provide the make, model and year of the vehicle to be insured. Defendant denies the remaining averments of paragraph 18 and incorporates its answers to paragraphs 1-3.

19. Denies. Defendant specifically denies that it is required to provide discounts without requiring input from applicants, denies that it concealed the availability of the discount, denies any allegation that the notices it provided were in any way inadequate or improper under the applicable statute, and incorporates its answers to paragraphs 1-3.

20-21. Admits only that plaintiffs purport to file this case as a class action. Defendant incorporates its answers to paragraphs 1-4, denies that any class action is appropriate in this matter, denies that any required discount was not provided, and denies that plaintiffs or the purported class are entitled to any recovery.

22. Defendant is without knowledge or information sufficient to form a belief as to the allegations regarding the number and geographical location of purported class members. Defendant denies the remaining averments of paragraph 22.

23. Denies. Defendant incorporates its answers to paragraphs 1-5.

24. Denies. Defendant incorporates its answers to paragraphs 1-5.

25. Denies. Defendant incorporates its answers to paragraphs 1-5.

26. Denies. Defendant incorporates its answers to paragraphs 1-5.

27. Denies. Defendant incorporates its answers to paragraphs 1-5.

28. Denies. Defendant incorporates its answers to paragraphs 1-5.

Count I

29. Defendant incorporates its answers to paragraphs 1-28.

30. On information and belief, defendant admits that cost containment was one of the legislature's expressed goals in enacting the MVFRL. Defendant denies that cost containment was the legislature's reason for the enactment of the specific provisions at issue in this case, and incorporates its answers to paragraphs 1-3.

31. Denies.

32. Defendant denies that plaintiffs and other members of the purported class were entitled under the MVFRL to antitheft discounts, admits that 75 Pa. Cons. Stat. § 1791.1(c) provides for "Notice of premium discounts," and incorporates its answers to paragraphs 1-3, 11 and 13.

33. Defendant admits plaintiffs did not receive an antitheft device discount. Defendant is without knowledge or information sufficient to form a belief as to whether it provided antitheft device discounts to other purported class members and the averments regarding other purported class members are therefore denied. Defendant denies all remaining averments of paragraph 33, and specifically denies that it failed to provide notice to policyholders that the discount was available.

34. Denies. Defendant incorporates its answers to paragraphs 1-3.

35. Denies. Defendant incorporates its answers to paragraphs 1-4.

36. Denies. Defendant incorporates its answers to paragraphs 1-4.

Count II

37. Defendant incorporates its answers to paragraphs 1-36.

38. Denies as stated. Defendant admits as a general matter that insurance contracts must be read with reference to applicable statutes. Defendant incorporates its answers to paragraphs 1, 11, 12 and 13.

39. Defendant denies that plaintiffs' cars were equipped with qualifying antitheft devices and is without knowledge or information sufficient to form a belief as to the truth of the allegation that other purported class members' automobiles were equipped with qualifying antitheft devices, and that allegation is therefore denied. Defendant denies the remaining averments of paragraph 39 and incorporates its answers to paragraphs 1-3.

40. Denies. Defendant incorporates its answers to paragraphs 1-3 and 11.

41. Denies. Defendant incorporates its answers to paragraphs 1-3, 13 and 32-33.

42. Denies. Defendant incorporates its answers to paragraphs 1-3.

43. Denies.

Count III

44. Defendant incorporates its answers to paragraphs 1-43.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45, and they are therefore denied.

46. Admits; defendant incorporates its answers to paragraphs 1-3.

47. Defendant admits it intended and understood that its insurance contracts would follow state law, and incorporates its answers to paragraphs 1-5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the state of mind of plaintiffs and other purported class members, and those allegations are therefore denied.

48. Denies. Defendant specifically denies that its written policies failed to conform to state law. Defendant incorporates its answers to paragraphs 1-3.

49. Denies. Defendant incorporates its answers to paragraphs 1-4.

50. Denies. Defendant incorporates its answers to paragraphs 1-4 and 48.

51. Denies. Defendant incorporates its answers to paragraphs 1-4 and 48.

52. Denies.

Count IV

53-62. The parties have filed a stipulation for voluntary dismissal of Count IV, without prejudice, and have agreed that no response to these paragraphs is required. Defendant incorporates its answers to paragraphs 1-52.

Count V

63-70. The parties have filed a stipulation for voluntary dismissal of Count V, without prejudice, and have agreed that no response to these paragraphs is required. Defendant incorporates its answers to paragraphs 1-62.

Count VI

71-75. The parties have filed a stipulation for voluntary dismissal of Count VI, without prejudice, and have agreed that no response to these paragraphs is required. Defendant incorporates its answers to paragraphs 1-70.

Jury Demand

Plaintiffs have no right to a jury trial for claims under Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL).

Request for Relief

WHEREFORE, defendant requests that judgment be entered in its favor and against plaintiffs, and that defendant be awarded its costs of suit, including reasonable attorneys' fees, as well as any other relief which the Court may deem equitable and just.

Affirmative Defenses

1. Plaintiffs' claims, and/or the claims of some or all putative class members, fail to

state a claim upon which relief can be granted.

2. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that the Pennsylvania Department of Insurance approved the relevant rates, rules and forms.

3. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred because the matters contained in the Complaint are within the primary jurisdiction of the Pennsylvania Insurance Department.

4. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred because Plaintiff and/or some or all of the putative class members have failed to exhaust administrative remedies.

5. Plaintiffs' purported class allegations are insufficient as a matter of law. Defendant specifically reserves the right to challenge the sufficiency of plaintiffs' purported class allegations, and the proposed class treatment of this action, at the appropriate stage of this action.

6. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that they are inconsistent with the plain language of the Motor Vehicle Financial Responsibility Law (MVFRL).

7. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that the relevant provisions of the MVFRL do not provide a private right of action and do not provide a remedy for the alleged violations, and the judiciary is without authority to create a remedy.

8. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that defendant provided the notice required by 75 Pa. Cons. Stat. §

1791.1(c).

9. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that defendant did not know, nor should it have known, whether the plaintiffs' vehicles, or any vehicles owned by putative class members, had passive antitheft devices that would qualify for a discount under Pennsylvania law.

10. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred on the ground that defendant did not breach plaintiffs' insurance contract, nor did defendant breach any putative class member's insurance contract.

11. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred because the policyholder is ultimately responsible for the accuracy and completeness of the information on an insurance application.

12. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred by the provisions contained in their respective contracts of insurance.

13. Defendant hereby incorporates all of the provisions, exclusions and conditions contained within the policies of insurance, including the policy applications, under which plaintiffs and/or the putative class members purport to sue. Applying these provisions, any recovery is barred or must be reduced accordingly.

14. Plaintiffs' claims, and/or the claims of some or all putative class members, may be barred by their failure to comply with exhaustion requirements of their policies of insurance, or other prerequisites for bringing suit in the respective policies at issue.

15. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred by the doctrine of waiver and/or forfeiture.

16. Plaintiffs' claims, and/or the claims of some or all putative class members, are

barred by the voluntary payment doctrine.

17. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred by the applicable statutes of limitation. Many putative class members' alleged claims will be time-barred under Pennsylvania law.

18. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred because any alleged injury suffered by plaintiffs did not result from or was not proximately caused by any act or omission or any wrongful conduct on the part of defendant.

19. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred by the doctrine of estoppel.

20. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred or should be reduced because plaintiffs and/or the putative class members failed to mitigate damages.

21. Plaintiffs and/or some or all of the putative class members have no standing to sue defendant with respect to the claims brought in plaintiffs' Complaint.

22. Plaintiffs' claims, and/or the claims of some or all putative class members, are barred because defendant breached no duty or other affirmative obligation.

23. Defendant may have additional defenses that cannot now be articulated due to the generality of plaintiffs' pleadings and the fact that discovery is still ongoing. In addition, in view of the parties' stipulation for the voluntary dismissal of Counts IV-VI, defendant has not asserted affirmative defenses to the claims set forth in those counts. Accordingly, defendant expressly reserves the right to supplement the foregoing and to plead any and all additional defenses available under the law.

WHEREFORE, defendant requests that judgment be entered in its favor and against plaintiffs, and that defendant be awarded its costs of suit, including reasonable attorneys' fees, as well as any other relief which the Court may deem equitable and just.

Dated: June 14, 2010

/s/ Robert N. Feltoon
Robert N. Feltoon (I.D. No. 58197)
Deborah J. Krabbendam (I.D. No. 41856)
Francesco P. Trapani (I.D. No. 209123)
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(215) 864-9600

Counsel for Defendant
Progressive Specialty Insurance Company

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2010, I served a copy of Defendant Progressive Specialty Insurance Company's Answer to Plaintiffs' Amended Class Action Complaint, which was filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and first class mail, as follows:

Ira Neil Richards
Kenneth Trujillo
Gary Goldstein
Trujillo, Rodriguez, & Richards, LLC
1717 Arch Street, Suite 3838
Philadelphia, PA 19103

Joseph E. Mariotti
Caputo & Mariotti, P.C.
730 Main Street
Moosic, PA 18507
jmariotti@verizon.net

Dated: June 14, 2010

/s/ Francesco P. Trapani
Francesco P. Trapani (I.D. No. 209123)
Conrad O'Brien PC
1515 Market Street, 16th Fl.
Philadelphia, PA 19102
(215) 523-8304