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 8 UNITED STATES DISTRICT COURT  
 9 WESTERN DISTRICT OF WASHINGTON  
 AT TACOMA

10 Progressive Classic Insurance Co.,  
 11  
 12 Plaintiff,  
 13 v.  
 14 Michael Zupan, Personal Representative of  
 the Estate of John James Zupan,  
 15 Defendant.

No.

COMPLAINT FOR  
 DECLARATORY JUDGMENT

16  
 17 COMES NOW the Plaintiff, Progressive Classic Insurance Co., (hereinafter  
 18 “Progressive”), by and through its attorneys, Douglas F. Foley of Douglas Foley &  
 19 Associates, PLLC, and alleges as follows:

20 1. This action for Declaratory Judgment is one in which the United States District  
 21 Court is given original jurisdiction by reason of diversity of citizenship and the requisite  
 22 amount in controversy exceeds \$75,000 pursuant to Title 28, U.S.C. §1332.

23 2. Progressive Classic Insurance Co. is an Ohio corporation authorized to  
 24 transact the business of insurance in the State of Washington, whose principle place of  
 25 business is in the State of Ohio.  
 26

1           3.       Upon information and belief, at all times pertinent to this lawsuit, Defendant  
2 Michael Zupan, Personal Representative of the Estate of John James Zupan (“Zupan”), is a  
3 resident of the State of Oregon. The Estate of John Zupan is in probate under Clark County  
4 Superior Court in the State of Washington, Case No. 11-4-00687-6, and has appointed Zupan  
5 Enterprises, Inc., whose address is 7223 NE Hazel Dell Avenue, Vancouver, WA 98665 as  
6 the resident agent in Washington for the probate estate.

7           4.       Progressive insured Zupan under a Motor Cycle Insurance Policy, providing  
8 certain coverages subject to the terms, definitions, exclusions, limitations, and conditions  
9 contained in said insurance contract, which was in effect at all relevant times. A copy of the  
10 policy is attached as Exhibit “A.”

11           5.       Zupan deceased while riding a newly acquired 2009 BMW motorcycle in  
12 Portland, Oregon on August 30, 2011. Zupan had recently taken delivery of the 2009 BMW  
13 motorcycle and was riding the motorcycle home to his residence when he was hit and killed  
14 by a drunken driver. This lawsuit for declaratory relief involves underinsured motor vehicle  
15 (UIM) coverage under the Progressive policy.

16           6.       Zupan had several different motorcycles. Progressive insured a 1998 Honda  
17 Interceptor. The 1998 Honda was licensed in the State of Washington.

18           7.       Zupan owned a 2001 BMW that was insured by Foremost Insurance  
19 Company. The 2001 BMW was licensed in the State of Washington and was in operable  
20 condition. This bike was registered under license plate #7A4802 and VIN#  
21 WB10495A91ZE51998.

22           8.       Zupan owned additional motorcycles which, upon information and belief,  
23 were classic or show motorcycles.

24           9.       The pertinent definitions, coverages, and relevant exclusions for the Motor  
25 Cycle Policy on Progressive Form 5979 issued to defendant Zupan are, as follows:  
26

1            **“GENERAL DEFINITIONS**

2            The following definitions apply throughout the policy. Defined terms are  
3            printed in bold face type and have the same meaning whether in the singular,  
4            plural, or any other form.

5            1.        ‘**Additional motorcycle**’ means a **motorcycle you** become the owner  
6            of during the policy period that does not permanently replace a **motorcycle**  
7            shown on the **declarations page** if:

- 8            a.        **we** insure all other **motorcycles you** own;
- 9            b.        the **additional motorcycle** is not covered by any other insurance policy;
- 10           c.       **you** notify **us** within 30 days of becoming the owner of the **additional**  
11            **motorcycle**; and
- 12           d.       **you** pay any additional premium due.

13            \*\*\*

14            3.        ‘**Covered motorcycle**’ means:

- 15           a.        any **motorcycle** shown on the **declarations page** for the coverages  
16           applicable to that **motorcycle**;
- 17           b.        any **additional motorcycle**; and
- 18           c.        any **replacement motorcycle**.

19            \*\*\*

20            10.       ‘**Replacement motorcycle**’ means a **motorcycle**, including an **off-road**  
21            **vehicle**, that permanently replaces a **motorcycle** shown on the **declarations**  
22            **page**. A **replacement motorcycle** will have the same coverage as the  
23            **motorcycle** it replaces if the **replacement motorcycle** is not covered by any  
24            other insurance policy. However, if the **motorcycle** being replaced had  
25            coverage under Part IV – Damage To A Motorcycle, such coverage will apply  
26            to the **replacement motorcycle** only during the first 30 days after **you** become  
              the owner unless **you** notify **us** within that 30-day period that **you** want **us** to  
              extend coverage beyond the initial 30 days. If the **motorcycle** being replaced  
              did not have coverage under Part IV – Damage To A Motorcycle, such  
              coverage may be added, but the **replacement motorcycle** will have no  
              coverage under Part IV until **you** notify **us** of the **replacement motorcycle** and  
              ask **us** to add the coverage.

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**PART III – UNDERINSURED MOTORIST COVERAGE**

**INSURING AGREEMENT – UNDERINSURED MOTORIST BODILY**  
              **INJURY COVERAGE**

              If **you** pay the premium for this coverage, **we** will pay for damages that an  
              **insured person** is legally 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 an **accident**; and

1 3. arising out of the ownership, maintenance, or use of an **underinsured**  
2 **motor vehicle**.

3 \*\*\*

4 **EXCLUSIONS – READ THE FOLLOWING EXCLUSIONS**  
5 **CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL**  
6 **NOT BE AFFORDED UNDER THIS PART III.**

7 Coverage under this Part III will not apply:

8 1. to **bodily injury** sustained by any person while using or **occupying**:

9 \*\*\*

10 b. a motor vehicle that is owned by or available for the regular use of **you**  
11 or a **relative**. However, with respect to **bodily injury** to **you** or a **relative**, this  
12 exclusion does not apply to a **covered motorcycle** that is insured under this  
13 Part III.”

14 10. A justiciable controversy exists between the parties hereto. This controversy  
15 can be resolved by this Court through entry of its Judgment declaring the rights and liabilities  
16 of the parties alleged herein under the contracts of insurance alleged above.

17 11. There is no Part III UIM Coverage available for the decedent insured since the  
18 motorcycle that he was operating at the time of the accident does not qualify as a defined  
19 covered motorcycle as described in the Progressive Motorcycle Policy. For the 2009 BMW  
20 motorcycle to be classified as a covered motorcycle, all motorcycles owned by Zupan would  
21 need to be insured by Progressive.

22 12. Progressive did not insure all motorcycles owned by Zupan at the time of this  
23 loss. Zupan’s 2001 BMW motorcycle was insured by Foremost Insurance Company. As a  
24 result, the subject 2009 BMW motorcycle was not a covered motorcycle under the terms of  
25 the Progressive Motorcycle Policy

26 13. The Court should enter a Judgment wholly in favor of Progressive Classic  
Insurance Company declaring, adjudicating, and decreeing that Progressive is not obligated

1 to provide coverage to Zupan under the policy.

2 WHEREFORE, Progressive prays for relief as follows:

3 1. For Judgment against Defendant declaring that the contracts of insurance  
4 issued by Progressive does not obligate Progressive to provide coverage to the Estate of John  
5 Zupan.

6 2. For Progressive's costs and such other and further relief as may be deemed  
7 just and equitable.

8 DATED this 28<sup>TH</sup> day of February, 2012.

9  
10 Douglas Foley & Associates, PLLC

11  
12 By /S/ DOUGLAS F. FOLEY  
13 Douglas F. Foley, WSBA 13119  
14 *Attorneys for Plaintiff Progressive Classic*  
15 *Insurance Co.*

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