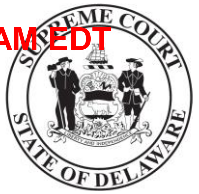
EFiled: Aug 23 2016 09:37AM EDT
Filing ID 59457364
Case Number 267,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARIA L. DICKERSON and CHARLES L. DICKERSON,	)	No. 267, 2016
Plaintiffs-Below/Appellants,	)	Court Below: Superior Court of the State of Delaware
v.	)	C.A. No. S15C-04-022 MJB
NATIONWIDE MUTUAL INSURANCE COMPANY, a foreign corporation,	)	
Defendant-Below/Appellee.	)	

REPLY BRIEF OF PLAINTIFFS-BELOW, APPELLANTS

I. BARRY GUERKE, ESQUIRE, BAR I.D. 360
PARKOWSKI, GUERKE & SWAYZE, P.A.
116 W. Water Street
P.O. Box 598
Dover, DE 19903-0598
(302) 678-3262
Attorneys for Plaintiffs-Below/Appellants

DATED: August 23, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

ARGUMENT 1

Should not the amendment to 18 Del.C. §3902(b)(2), the underinsured motorist statute found at 79 Del. Laws 2013, Ch. 91, formerly Senate Bill No. 61 of the 147th General Assembly, eliminating the requirement that a claimant needed to have underinsured motorists coverage limits in excess of the tortfeasor's bodily injury liability limits in order to access one's own UIM coverage, be applied as written and as intended by the Delaware Legislature? The question presented is preserved for review in the Plaintiffs' opposition to Nationwide's motion to dismiss, Plaintiffs' own motion for summary judgment and the trial court's decision dated April 25, 2016 treating the motions, and ruling on them, as cross-motions for summary judgment 1

Merits 1

TABLE OF CITATIONS

CASES

Bass v. Horizon Assurance Company
562 A.2d 1194 (Del.1989) 5

Clements v. Castle Mortgage Service Co., 382 A.2d 1367 (Del.Ch.1977) 2

Eskridge v. National Gen. Ins. Co.
1997 WL 127959 (Del.Super.) 5

Giuricich v. Emtrol Corp., 449 A.2d 232 (Del.1982) 2

Harris v. Prudential Prop. & Cas. Ins. Co.
632 A.2d 1380 (Del.1993) 5

Hudson v. State Farm Mutual Insurance Company
569 A.2d 1168 (Del.1990) 2

Knickerbocker Life Ins. Co. v. Norton, 96 U.S. 234 (1878) 2

Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.
2016 WL 1424788 (Del.Super) 7

Nationwide Gen. Ins. Co. v. Seeman
702 A.2d 915 (Del.1997) 5

O'Hanlon v. Hartford Acc. & Indem. Co.
522 F.Supp. 332 (D.Del.1981) 5

Price v. All American Engineering Co.
320 A.2d 336 (Del.1974) 6

Progressive Northern Insurance Company v. Mohr
47 A.3d 492 (Del.2012) 5

Republic of Austria v. Altmann
541 U.S. 677 (2004) 6

Rubick v. Security Instrument Corp., 766 A.2d 15 (Del.2000)................................2

State Farm Mut. Auto. Ins. Co. v. Arms
477 A.2d 1060 (Del.1984) 5

State Farm Mut. Auto. Ins. Co. v. Wagamon
541 A.2d 557 (Del.1988) 5

State Farm Mut. Auto. Ins. Co. v. Washington
641 A.2d 449 (Del.Super.1994)..5

Walsh v. State Farm Mut. Auto. Ins. Co.
624 F.Supp. 1093 (D.Del.1985)..5

STATUTES AND OTHER AUTHORITIES

18 Del.C. §3902 .... 1, 3, 5, 7

79 Del. Laws 2013, Ch. 91.. 1, 6

Senate Bill No. 61 of the 147th General Assembly..1

ARGUMENT

QUESTION PRESENTED

Should not the amendment to 18 Del.C. §3902(b)(2), the underinsured motorist statute found at 79 Del. Laws 2013, Ch. 91, formerly Senate Bill No. 61 of the 147th General Assembly, eliminating the requirement that a claimant needed to have underinsured motorists coverage limits in excess of the tortfeasor's bodily injury liability limits in order to access one's own UIM coverage, be applied as written and as intended by the Delaware Legislature? The question presented is preserved for review in the Plaintiffs' opposition to Nationwide's motion to dismiss, Plaintiffs' own motion for summary judgment and the trial court's decision dated April 25, 2016 treating the motions, and ruling on them, as cross-motions for summary judgment.

A. MERITS

Defendant Nationwide seeks an interpretation by this Court that 79 Del. Laws 2013, Ch. 91 amending 18 Del.C. §3902 should apply only to UIM claims arising from car accidents that occur after the effective date of the amendment, in contravention of the amendment's terms. However, it is well settled that a court will not engage in statutory construction unless an ambiguity exists, meaning that the statutory language in question is susceptible to more than one meaning. The goal is to ascertain and give effect to intent of the legislature. If the statute is unambiguous,

there is no room for interpretation and the plain meaning of the words controls.[1] The language of the amendment is unmistakably clear as to the circumstances to which it applies, specifically referencing the critical point of application being the date of renewal of the policy, not the date of the underlying accident, when it could have easily and simply said "The provisions of this law apply only to ***accidents*** occurring after six (6) months following enactment." Defendant attempts to create ambiguity where none exists by citing language in the automobile insurance policy it claims makes the date of the underlying accident the pivotal point for application of the amended law. This runs counter to both the letter and spirit of the amended statute.

Defendant correctly describes the two main methods employed by state legislatures across the nation regarding UIM as "offset" and "excess", noting that under prior law, Delaware utilized neither but an "unusual hybrid" (Answering Brief, p. 13), which not infrequently led to occasions where an insured was paying premiums for UIM coverage but unable to access such coverage because the UIM coverage was less than that of the tortfeasor or was a mirror image, resulting in a forfeiture which is never favored by the law.[2] This led to untoward situations where the insured paid premiums for coverage expected but when the insured needed it

---

[1] See generally, e.g., *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 18 (Del.2000); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del.1982).
[2] "Forfeitures are not favored by the law." *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234, 242 (1878), quoted in *Clements v. Castle Mortgage Service Co.*, 382 A. 2d 1367, 1371 (Del.Ch.1977).

most after a car accident, it was unavailable. This was the inequity recognized by the General Assembly and addressed in the amendment to §3902.

Though not defined in the policy, Defendant advances its "occurrence" argument, asserting that the underlying claim against the tortfeasor and the UIM claim both came into existence on the date of the accident. Engaging in nimble semantic gymnastics, Defendant claims: "Appellants' argument regarding the 'date of birth' of the UIM claim confuses the concept of what a claimant must ***prove*** in order to successfully recover UIM benefits with the concept of what ***triggers*** UIM coverage" (Answering Brief, p. 17; emphasis in original), apparently preferring the word "trigger" to Plaintiffs' "born on" terminology as to when the UIM claim comes into existence. There is no UIM claim in existence on the date of the accident because (1) it is unknown whether the tortfeasor's policy limits will be exhausted and (2) because the nature and extent of the insured's injuries are unknown, thus satisfying the "fortuity" element of the Defendant's argument. Using Defendant's preferred parlance, no UIM claim is "triggered" on the date of the accident.

Defendant admits Plaintiffs' auto policy renewed on January 5, 2014 in one breath, then in another it contends the UIM claim is being made under the policy that existed at the time of the accident with the tortfeasor.[3] Two points are relevant

[3] "Appellants correctly note that the policy at issue in this case did indeed renew on January 5, 2014 and Nationwide does not argue here that the UIM amendment is inapplicable to the renewed policy that went into effect on January 5, 2014." Answering Brief, p.16.

here. First, Nationwide did increase premiums, presumably taking advantage of the opportunity presented by the six month grace period "...to adjust premiums to take into account the increased risk for policies issued or renewed..." (Answering Brief, p.15) after the effective date of the amendment. Second, Defendant acknowledges the UIM claim was "triggered" after the six month period and after Plaintiffs' auto policy renewed on January 5, 2014,[4] satisfying the conditions established for making a UIM claim under the amended statute.

Four conditions must be met to establish a UIM claim: exhaustion of applicable liability coverages proven by affidavits of no other insurance, proof of the applicable policy limits established by an affidavit/certification of those coverages, conclusion of the claim against the tortfeasor proven by providing a copy of the release or final judgment and the amount and that the nature and extent of injuries and losses sustained by the insured exceed the tortfeasor's applicable limits. Once the last of the prerequisites is established, only then is the UIM claim perfected ("triggered") or come into existence. The UIM claim did not exist on September 26, 2014, the date of the Affidavits of No Other Insurance. Nor did it exist on July 11, 2014, the date of certification of the tortfeasor's bodily injury liability limits. The UIM claim only came into existence on October 10, 2014 when all of the predicates

[4] "The policy under which Appellants attempt to recover UIM benefits falls within the category of 'existing policies' which are not affected by the amendment." Answering Brief, p. 18.

to establish the UIM claim coalesced. By that date, the six month grace period established in the amendatory remedial legislation had passed and Plaintiffs' policy had renewed by Defendant's own admission, satisfying the express elements of applicability of the amendment.

Having said all of that, however, the short response to Defendant's "occurrence"/ "fortuity" argument is that the terms of the actual insurance legislation always trump contradictory policy language. This Court and the Superior Court have on numerous occasions held unenforceable auto policy terms that contravene the letter and spirit of Delaware statutes governing insurance.[5] So strong is the public policy behind §3902(b)(2) that where the insurer fails to comply with the duty to offer the insured the option of purchasing additional UM/UIM coverage, the insured may, at any time, including ***after*** the accident, have the policy reformed to comply.[6]

Defendant ridicules Plaintiffs' argument by positing an absurd extension on page 18 of the Answering Brief. But those facts are not this case. The U.S. Supreme

---

[5] *Bass v. Horizon Assurance Company*, 562 A.2d 1194 (Del.1989); *Hudson v. State Farm Mutual Insurance Company*, 569 A.2d 1168 (Del.1990); *Progressive Northern Insurance Company v. Mohr,* 47 A.3d 492 (Del.2012); *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del.1988); *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915 (Del.1997); *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449 (Del.Super.1994); *Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1382 (Del.1993).

[6] *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060 (Del.1984); *O'Hanlon v. Hartford Acc. & Indem. Co.*, 522 F.Supp. 332 (D.Del.1981). *Walsh v. State Farm Mut. Auto. Ins. Co.*, 624 F.Supp. 1093 (D.Del.1985); *Eskridge v. National Gen. Ins. Co.*, 1997 WL 127959 (Del.Super.).

Court had no difficulty finding the terms of the FSIA applied to conduct that occurred prior to its enactment, noting that the unambiguous language of the statute applied to immunity claims, not actions protected by immunity but assertions of the immunity to suits arising from those actions.[7] The court emphasized the narrowness of its holding.

Nor did this Court hesitate to enforce legislation increasing weekly benefits to workers comp claimants totally disabled before the date of enactment, noting such "...effect is impelled if, as here, the retrospective legislative intent is unmistakable."[8] From the explicit language in 79 Del. Laws 2013, Ch. 91 relating to circumstances where the amendment applies, supported by expressions in the Synopsis of the Bill, it is unmistakable that the General Assembly intended UIM claims that come into existence after the six month grace period and after the policy has renewed are covered. Delaware courts "...are obligated to effectuate that clear legislative intent"[9] Far from being silent or ambiguous on terms of applicability as asserted by Defendant, the language of 79 Del. Laws 2013, Ch. 91 §2 and the Synopsis leaves doubt which claims are embraced by the remedial amendment.

Defendant, in its Answering Brief on page 8, disagrees with the "insinuation" that prior law was being exploited to limit coverage and to prevent claimants from

---

[7] *Republic of Austria v. Altmann*, 541 US 677 (2004).
[8] *Price v. All American Engineering Co.*, 320 A.2d 331, 341 (Del.1974).
[9] *Id.* at 341.

receiving fair compensation. The quotation on page 34 of Plaintiffs' Opening Brief to which Defendant adverts, recognizing that the previous statute was being used by auto insurers to limit coverage where the insured was significantly injured but the liability coverage was not sufficient to provide fair compensation, a result not intended by the framers of the original statute and inconsistent with the intent of the law, is not from Plaintiffs but from Judge Carpenter of the Superior Court in *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1424788 at 3. This was also clearly recognized by the General Assembly when it addressed these inequities by enacting the amendment to §3902.

***

Plaintiffs respectfully submit that the lower court erred in granting Defendant's Motion for Summary Judgment and denying that of Plaintiffs. Based on the explicit language of the amendment regarding its applicability and the unmistakable intent identified in the Synopsis, Plaintiffs respectfully urge this Court to hold that the amended §3902(b)(2) applies to Plaintiffs' UIM claim entitling them to proceed against their own $100,000 coverage.

Respectfully Submitted,

PARKOWSKI, GUERKE & SWAYZE, P.A.

BY:

I. BARRY GUERKE, ESQUIRE (#360)
116 West Water Street
P.O. Box 598
Dover, DE 19903
(302) 678-3262
Attorney for Plaintiffs Below/Appellants

DATED: 8.23.16