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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.	)	

AMENDED OPENING BRIEF OF PLAINTIFFS-BELOW, APPELLANTS

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DATED: July 11, 2016

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NATURE OF THE PROCEEDINGS

Plaintiff-Below, Appellant, Maria L. Dickerson, was seriously and permanently injured in a rollover car crash on June 23, 2013. After settling for the full $100,000 bodily injury liability policy limits of the tortfeasors, the at-fault driver and owner of the car she was operating, she and her husband, Charles L. Dickerson, made an underinsured motorists ("UIM") claim against her own auto insurer, Defendant-Below, Appellee, Nationwide Mutual Insurance Company ("Nationwide") which also had $100,000 policy limits, pursuant to an amendment to 18 Del.C. §3902, the uninsured and underinsured insurance coverage statute, which vitiated the requirement that in order to qualify for UIM benefits, one's own UIM limits had to be more than the bodily injury liability limits of the tortfeasor. In enacting the change, the Delaware General Assembly in the Synopsis to Senate Bill No. 61 that eventually became 79 Del. Laws 2013, Ch. 91 §1, specifically referenced an intent to overturn *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124 (Del.1997) that held that UIM limits equal to or less than the bodily injury liability limits of the tortfeasor, disqualified the victim-insured from the first party benefits for which premiums had been paid.

Nationwide denied the UIM claim on the basis that the remedial amendment to §3902 did not apply to her wreck, stating it was governed by the prior law.

Plaintiffs filed a declaratory judgment action on April 20, 2015 seeking a determination by the Superior Court that under the new legislation, Plaintiffs were not precluded from asserting their UIM claim, i.e., that they qualified for the benefit of the amendment to the UIM statute.

Nationwide, in lieu of filing an Answer to Plaintiffs' Complaint, filed a motion to dismiss for failure to state a claim under Superior Court Civil Rule 12(b)(6). Plaintiffs filed an opposition to that motion presenting matters outside the pleadings to, and not excluded by, the trial court, transforming the motion into one for summary judgment for disposition as provided in Civil Rule 56, as Civil Rule 12(b)(6) expressly provides. Plaintiffs then filed a motion for summary judgment incorporating by reference the arguments made and exhibits attached to their opposition to Nationwide's motion to dismiss, asking the Superior Court to decide the case on cross-motions for summary judgment because there were no disputes of material fact, only the issue of law of whether the amendment to §3902(b)(2) applied to Plaintiffs' UIM claim. In an opinion dated April 25, 2016 by the Honorable M. Jane Brady, the Superior Court, without oral argument, granted Nationwide's motion for summary judgment and denied that of Plaintiffs.

This appeal by Plaintiffs ensued.

STATEMENT OF FACTS

On June 23, 2013 at approximately 6:33 p.m., Plaintiff, Maria L. Dickerson, was operating a 2003 Toyota Camry northbound on State Route 1 in the left exit lane south of Exit 95 in Dover, Delaware. As she exited onto Exit 95, a 2010 Dodge Avenger owned by Robin A. Soloman and operated by Amane Nicole Hand Soloman, crossed over the painted median and turned in front of Plaintiff's Camry, causing Plaintiff to swerve, lose control and travel off the west edge of the roadway, striking a curb which caused the Camry to hit an embankment several times, ultimately causing the car to overturn. A-7-8. Plaintiff, Maria L. Dickerson, suffered numerous severe and permanent injuries.[1]

The automobile insurance company for the tortfeasors, Nationwide, paid the full bodily injury liability policy limits of $100,000. A-23-30.

On or about July 3, 2013, the Governor of the State of Delaware, the Honorable Jack Markell, signed into law an amendment to 18 Del.C. §3902(b)(2),

[1] Concussion, brain bleed, closed head injury, cervical spine injury (sprain/strain accompanied by bulging disc confirmed by MRI), open fractures of the 3 and 5 fingers of the left hand that required ORIF and closed reduction, respectively, left elbow dislocation, scalp wound requiring sutures, left shoulder rotator cuff tear requiring surgical decompression with distal clavicle and acromioplasty resection, surgical fusion of the left third finger as a result of malunion, surgical removal of pins from the left third finger, post-traumatic stress disorder, extensive lacerations, abrasions and contusions, use of a cervical collar for over three weeks, disabled from her job as a commissary store clerk/cashier at the Dover Air Force Base for over 9 months, returning to work only on April 6, 2014 with boardable medical expenses exceeding $159,000 (beyond the $100,000 in non-boardable PIP benefits). Her husband, Charles, who took time off from work (about three months - 440 hours) to care for his wife of 21 years, asserted a claim for lost consortium. A-49.

allowing a person's underinsured motorist coverage in their automobile policy to stack on top of the tortfeasor's policy without regard to the amount of coverage of the former, known as 79 Del. Laws 2013, Ch. 91 §1. A-14-16.

The purpose of this amendment, according to the Synopsis of Senate Bill No. 61 of the 147th General Assembly that was ultimately enacted and signed into law, was to allow innocent victims of motor vehicle collisions to access their own underinsured motorist benefits in circumstances where the victim's damages were greater than the amount of the at-fault driver's insurance coverage. This Court had previously ruled that if the innocent victim (UIM coverage) and the at-fault driver (bodily injury liability coverage) had the same policy limits or the victim's policy limits were less than the at-fault driver's, then the negligent driver was not considered to be "underinsured," even if the negligent driver's policy was inadequate to fully and fairly compensate the innocent victim. *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124 (Del.1997). As reflected in the Synopsis of Senate Bill No. 61, the amendment was intended to "...rectify these inequities". The legislative change overruled the *Williams* case that held where the UIM coverage was a mirror image of, or less than, the tortfeasor's coverage, the UIM coverage was not available to the victim.[2]

[2] Section 1. Amend §3902(b)(2), Title 18 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

79 Del. Laws 2013, Ch. 91 §2 states: "The provisions of this law shall apply to motor vehicle insurance ***policies*** issued and/or ***renewed*** six (6) months after enactment." (emphasis supplied). This is echoed in the Synopsis: "The provisions of the law will not affect existing insurance policies, and will apply only to ***renewing*** or new policies that become effective six (6) months after the law is in enacted." (emphasis supplied).

Plaintiffs' auto insurance policy (Nationwide's policy no. 5207A 574035) renewed on or about January 5, 2014, more than six (6) months after 79 Del. Laws

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(b) Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.

(2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident ~~total less than the limits provided by the uninsured motorist coverage~~ are less than the damages sustained by the insured. These limits shall be stated in the declaration sheet of the policy.

Section 2. The provisions of this law shall apply to motor vehicle insurance policies issued and/or renewed six (6) months after enactment.

SYNOPSIS

The purpose of this amendment is to allow innocent victims of motor vehicle collisions to access their own underinsured benefits in circumstances where the victim's damages are greater than the amount of the negligent driver's insurance policy limits. Delaware courts have ruled that if the innocent victim and the negligent driver have the same policy limit or the victim's policy limits are less than the negligent driver's, then the negligent driver is not considered "underinsured" even if the negligent driver's policy limit is adequate to compensate the innocent victims. This amendment will rectify these inequities. *Nationwide Mut. Ins. Co. v. Williams*, Del. Supr., 695 A.2d 1124 (1997).

The provisions of the law will not affect existing insurance policies, and will apply only to renewing or new policies that become effective six (6) months after the law is enacted.

2013, Ch. 91 was signed into law on July 3, 2013. A-37-42. In the declarations pages sent to Plaintiffs showing coverages, Nationwide termed this rollover of the auto policy on January 5, 2014 "Your Policy Renewal". A-38. This is the same Nationwide auto policy (no. 5207A 574035) that was in effect at the time of the crash. A-34-36.

On October 21, 2014, counsel sent a demand letter to Nationwide outlining the facts regarding liability and injuries, treatment and damages regarding their demand for the full $100,000 UIM policy limits that also addressed why the UIM claim should be considered under the statutory amendment to 18 Del.C. §3902(b)(2). A-48-60.

The demand letter also addressed perfection of the UIM claim beyond reference to the applicability of amended §3902(b)(2). Three affidavits of no other insurance, one executed by the at-fault driver and one each by the two owners, all dated September 26, 2014, were submitted by Plaintiffs. A-17-22. In addition, a certification of the tortfeasors' policy limits for bodily injury liability coverage of $100,000 each person/$300,000 each occurrence, was tendered. A-23-27. Finally, a copy of the Release of All Claims dated October 10, 2014 was provided to Nationwide as the UIM carrier. A-28-33.

By letter dated November 18, 2014, Nationwide acknowledged receipt of the demand letter with exhibits, stating that the UIM claim was denied on the basis that the prior version of the UIM statute governed, not the amended version. A-61.

Subsequently, on April 20, 2015, Plaintiffs filed suit against Nationwide in the Superior Court reciting in the First Cause of Action the facts surrounding the wreck, the basis of liability against the at-fault driver and owner, outlining Plaintiff's injuries and her husband's loss of consortium claim. A-7-11. The Second Cause of Action in that Complaint, however, sought a declaratory judgment pursuant to 10 Del.C. §6501, *et seq.*, that the provisions of amended 18 Del.C. §3902(b)(2), 79 Del. Laws 2013, Ch. 91, applied to Plaintiffs' claim for UIM benefits. A-11-13.

After agreeing by including matters outside the pleadings which were not excluded by the court, that the motion to dismiss filed by Nationwide for failure to state a claim was transformed into a motion for summary judgment under Civil Rule 56 and in view of Plaintiffs' own motion for summary judgment, the trial court resolved the matter as cross-motions for summary judgment. The Honorable M. Jane Brady granted the Nationwide's motion for summary judgment and denied Plaintiffs' in an Opinion dated April 25, 2016. See Opinion attached to this brief.

Thereafter, Plaintiffs filed this Appeal.

SUMMARY OF ARGUMENT

I. The version of 18 Del.C. §3902(b)(2) in effect before Senate Bill No. 61 was signed into law defined an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage." The amended version defines an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident are less than the damages sustained by the insured." The new version allows UIM coverage to stack on top of the tortfeasor's bodily injury liability coverage, regardless.

II. This Court held in *Nationwide Mut. Ins. Co. v. Williams* that if the innocent victim and the negligent driver had the same policy limits or the victim's policy limits were less than the negligent driver's, then the negligent driver was not considered "underinsured" even if the negligent driver's policy limit was inadequate to fully compensate the innocent victim. The Synopsis to Senate Bill No. 61 states that the purpose of the amendment was to allow innocent victims of motor vehicle collisions to access their own underinsured motorist benefits in circumstances where the victim's damages exceed the amount of the negligent driver's insurance policy limits. The Synopsis also states that the amendment "...will rectify these inequities."

III. Section 2 of Senate Bill No. 61 and hence 79 Del. Laws 2013, Ch. 91 §2 states: "The provisions of this law shall apply to motor vehicle ***insurance policies*** issued and/or ***renewed*** six (6) months after enactment." (emphasis supplied). The Synopsis to Senate Bill No. 61, further explains that "The provisions of the law will not affect existing insurance policies, and will apply only to ***renewing*** or new policies that become effective six (6) months after the law is enacted." (emphasis supplied). Since Plaintiffs' auto insurance policy with Nationwide (no. 5207A574035) renewed at least twice after the effective date of the amendment on January 3, 2014 (January 5, 2014 and again subsequently), the terms of the amendment apply to Plaintiffs' UIM claim. The General Assembly specifically referenced the critical date of application of the new law being the date of renewal of the policy, not the date of the underlying accident. Since Nationwide, in the declaration pages sent to Plaintiffs showing coverages, termed the rollover of the auto policy on January 5, 2014 "Your Policy Renewal", it should be estopped from denying here that this was a renewal policy to which the UIM amendment applied. The amendment is unambiguous in its terms regarding applicability. If the General Assembly wanted the reference point to be the date of the collision and injury, it could easily have said: "The provisions of this law apply only to ***accidents*** occurring after six (6) months following enactment," but it did not.

IV. Well recognized principles of judicial review of legislation support Plaintiffs' arguments. Courts should not interpret legislation to negate the statute's own stated purposes. In every case, courts must respect the role of the legislature and take care not to undo what it has done. The fair reading of legislation demands a fair understanding of the legislative plan. Where legislation is passed to effectuate certain policies, the courts should apply them accordingly. Plaintiffs only request this Court to apply the plain language of the statute as expressed in the legislation itself and as intended by the legislature.

V. A UIM claim is separate and distinct from a claim against a tortfeasor and has its own separate and distinct "date of birth." The UIM claim comes into existence only when four contingencies, rooted in statute and practicalities, are met. The Affidavits of No Other Insurance were dated September 26, 2014 and the certification of policy limits provided by Nationwide, as the tortfeasor's auto carrier, is dated July 11, 2014. The Release of All Claims, which showed that the policy limits were exhausted in the settlement, was dated October 10, 2014. Being the last act of the stated contingencies, the UIM claim did not arise until then.

VI. As the amendment to §3902(b)(2) is remedial, it is to be liberally construed to effectuate its purpose and suppress the designated evil. More specifically, automobile insurance laws are considered remedial and therefore accorded liberal application in order to give the broadest protection possible to

accident victims. The amendment should be viewed liberally to effectuate its stated purpose of rectifying the inequities suffered by UIM insureds under the *Williams* decision. Though Plaintiffs are not contending for retroactive application, Delaware recognizes that where a statutory amendment is remedial, it may apply retroactively when it relates to practice, procedure or remedies.

VII. A statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date. Where statutory language is unambiguous, courts are obligated to effectuate clear legislative intent. While courts do not favor retroactive legislation, the effect is impelled if, as here, the retrospective legislative intent is unmistakable.

VIII. The public policy behind 18 Del.C. §3902 is so strong that it is well recognized 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, seek to have the policy reformed to comply. The proposition that the UIM claim came into existence on the date of the accident, not the date the UIM claim was perfected, contravenes the letter and spirit of the amended law. That the accident here occurred before the legislative change is no impediment to application of the UIM coverage to comply with both the letter and spirit (public policy) of new §3902(b)(2). For these reasons, the trial court's reliance on Defendant's "occurrence" and "fortuity" arguments is misplaced.

IX. The rationale that coverage should comport with a reasonable expectations of the insured, not the insurer (as Defendant Nationwide contended below) has its genesis in the recognition that insurance policies are not agreements reached at arm's length by parties of equal bargaining power but are contracts of adhesion, far from being a truly consensual agreement. The Plaintiffs' reasonable expectations are that their UIM claim, which did not come into existence until after the effective date of the revised law, received the benefit of the remedial amendment. Holding otherwise, would work on them a forfeiture because they have paid premiums for the coverage but are being denied the benefit of it by their own insurer.

X. The purpose of a future effective date in legislation is to inform those affected by the legislation so that they may protect their rights and discharge their obligations. Here, there is a six (6) month grace period built into the amended law rendering it prospectively applicable to "new and/or ***renewed*** policies" (emphasis supplied) thereafter. The obvious purpose of the six month period was to allow insurance companies to make whatever actuarial determinations that might be necessary that could affect premiums. Defendant availed itself of this opportunity because the premium for the UM/UIM coverage in the January 5, 2014 renewal increased over that period, without a change in the policy limits.

XI. Where an automobile policy contains language that conflicts with statutes governing insurance, statutory provisions control. The interpretation by the

trial court conflicts with the express statutory language of when the UIM amendment is to take effect. Important public policy goals of the UM/UIM statute, like the PIP statute are: (A) to promote full compensation to all victims of automobile accidents; (B) to encourage the Delaware driving public to purchase more than the statutory minimum amount of automobile coverage. The trial court's interpretation of the amendment to §3902(b)(2) is inconsistent with these dual goals and purposes, as well as the express terms of the amendment, and should not be allowed to stand.

XII. *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.* and *Sload v. Nationwide Mut. Ins. Co.* provide no guidance on the issue now before this Court, because the UIM claims came into existence in both prior to the effective date of the amendment. In enacting the amendment to §3902(b)(2), the General Assembly has recognized the previous statute was being used by insurance companies to limit coverage in cases where the plaintiff was significantly injured and the liability coverage was not sufficient to provide fair compensation. Clearly, this was not intended by the framers of the original statute and was inconsistent with the intent of the law.

XIII. Taking into account the express language of the amendment regarding its applicability and the stated intent identified in the Synopsis, this Court should hold that the amended §3902(b)(2) applies to Plaintiffs' UIM claim, entitling them to proceed to make a claim under their $100,000 UIM coverage.

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 Plaintiff's 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. SCOPE OF REVIEW

Review on cross-motions for summary judgment is *de novo*. *Reserves Management Corp. v. R.T. Properties, LLC*, 80 A.3d 952, 955 (Del.2013).

B. MERITS

A. Introduction and Background.

18 Del.C. §3902, which covers both uninsured and underinsured motorists, was enacted to provide innocent victims of motor vehicle collisions a means of

recovering for injuries "inflicted by impecunious tortfeasors."[3] *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1236 (Del.2004); see also *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, 12 (Del.1995), citing *Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1201 (Del.1989). This objective is achieved by allowing a claim for UIM benefits where an operator of an underinsured motor vehicle causes the claimant bodily injury. *White v. Liberty Ins. Corp.*, 975 A.2d 786, 788 (Del.2009). The prerequisite to any UIM claim is to establish that the tortfeasor was operating an underinsured motor vehicle. *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124, 1126 (Del.1997). What constitutes an underinsured motor vehicle is defined in 18 Del.C. §3902(b)(2). The statute in effect before Senate Bill No. 61 was signed into law defined an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage." 18 Del.C. §3902(b)(2) (1995). The current, amended version of 18 Del.C. §3902(b)(2) defines an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident are less than the damages sustained by the insured."

[3] Strictly speaking, it is not part of the mandatory provisions of the Delaware automotive financial responsibility laws. Although auto insurers must offer UM/UIM coverage with policy limits at least equal to their bodily injury liability limits, insureds may opt out of the coverage altogether by executing a written waiver form. To that extent, it is voluntary coverage.

Having passed both Houses of the Delaware General Assembly, Governor Markell signed Senate Bill No. 61 of the 147th General Assembly into law on July 3, 2013. Pursuant to this amended version, UIM coverage is available so long as the tortfeasor's bodily injury liability limits were exhausted and were insufficient to fully compensate the injured party's injuries and damages. In other words, the new version applies regardless of the tortfeasor's liability policy limits.

B. Express statutory language and legislative intent.

The Synopsis states that the purpose of the amendment was to allow innocent victims of motor vehicle collisions to access their own underinsured motorist benefits in circumstances where the victim's damages are greater than the amount of the negligent driver's insurance policy limits. Prior decisional law from this Court determined that if the innocent victim and the negligent driver have the same policy limits or the victim's policy limits are less than the negligent driver's, then the negligent driver is not considered "underinsured", even if the negligent driver's policy limit is inadequate to fully compensate the innocent victim. The Synopsis specifically recited that the amendment "...will rectify these inequities," referring to *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124 (Del.1997).[4]

[4] A subsequent effort was made to overturn judicially *Williams* but this Court adhered to its prior ruling, citing *stare decisis*. *White v. Liberty Ins. Corp.*, 975 A.2d 786 (Del.2009). This left as the only remaining avenue to "rectify the[] inequities" of *Williams* being legislatively.

Section 2 of Senate Bill No. 61 and hence 79 Del. Laws 2013, Ch. 91 §2 states: "The provisions of this law shall apply to motor vehicle ***insurance policies*** issued and/or ***renewed*** six (6) months after enactment." (emphasis supplied). The Synopsis to Senate Bill No. 61, further explains that "The provisions of the law will not affect existing insurance policies, and will apply only to ***renewing*** or new policies that become effective six (6) months after the law is enacted." (emphasis supplied).

Plaintiffs' automobile insurance policy with Nationwide (No. 5207A 574035) renewed at least twice after the effective date of the amendment on January 3, 2014: on January 5, 2014 and again subsequently. The General Assembly referenced as the critical point of application of the new law being the ***date of renewal of the policy***, not the date of the underlying accident. Nationwide, in the declaration pages sent to Plaintiffs showing coverages, termed the rollover of the auto policy on January 5, 2014 "Your Policy Renewal", so it would be estopped from denying here that it was a renewal policy to which the UIM amendment applied.

The amendment is unambiguous regarding applicability. Nowhere in the amendment is applicability of its terms pegged to the date of the accident. The amendment explicitly references application to policies "...issued and/or ***renewed*** six (6) months after enactment." (emphasis supplied). If the General Assembly wanted the reference point to be the date of the collision it could have easily said:

"The provisions of this law apply only to ***accidents*** occurring after six (6) months following enactment." It did not.

King v. Burwell, 135 S.Ct. 2480 (2015) upheld The Patient Protection and Affordable Care Act ("Obamacare") in a decision by Chief Justice John Roberts. In so doing, several well settled principles of judicial review of legislation were reiterated, which apply with equal force to the case *sub judice*. "If the statutory language is plain, we must enforce it according to its terms." *Id.* at 2489. C.J. Roberts quoted from *New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973), "We cannot interpret federal statutes to negate their own stated purposes." *Id.* at 2493. The court continued, stating "But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan." *Id.* at 2496. Just as "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them" (*Id.* at 2496), the Delaware General Assembly was very explicit in identifying to which UIM claims the amendment to §3902(b)(2) applied. Plaintiffs only request this Court to apply the plain language of the statute as expressed in the legislation and intended by the legislature.

C. The UIM claim has a "date of birth" separate and distinct from the date of the underlying accident.

The UIM claim is separate and distinct from a claim against a tortfeasor and has its own separate and distinct "date of birth." The UIM claim only comes into existence when four contingencies are met. First,

> The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement for judgments. 18 Del.C. §3902(b)(3)

The second and third prerequisites before a UIM claim is "born" draw from practicalities. The UIM carrier wants proof that "...all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted...", so the UIM carrier requires what is known as an "Affidavit of No Other Insurance" in which the tortfeasor driver and, as appropriate, the owner of the vehicle involved, swear no other applicable liability insurance exists. The third prerequisite is an affidavit or certification of those policy limits and fourth and finally, proof that the case against the tortfeasor has concluded, such as by providing a copy of the release, if the claim is settled amicably or, if there is a litigated resolution, proof of final judgment and the amount. Only when these prerequisites are satisfied, does a UIM claim come into existence. The UIM claim did not arise until October 10, 2014, the date the Release of All Claims was executed. The Affidavits of No Other Insurance are dated September 26, 2014 and the Certification of Policy Limits provided by Nationwide, the tortfeasor's auto carrier, is dated July

11, 2014. Notably, the UIM claim did not come into being until ***after*** the Plaintiffs' auto policy with Nationwide renewed the second time (7/5/14) following the effective date of the amendment after the six (6) month grace period. The demand letter to Nationwide, as UIM carrier for Plaintiffs dated October 21, 2014, includes an articulation of why the amendment applies to the UIM claim with supporting documentation. Nationwide acknowledged receipt of the demand letter, but denied the claim asserting the former (1995) version of the UIM statute applied.

D. The amendment to §3902(b)(2) is remedial.

The stated purpose of the amendatory legislation was to "rectify the[] inequities" of the prior statutory and case law under *Williams*. Generally, remedial statutes are those that provide a remedy or improve or facilitate remedies already existing for the enforcement of rights and redress of injuries. Norman J. Singer, 3 *Sutherland Stat. Const.,* §60:1 at 264 (7th ed. 2009). Remedial statutes should be liberally construed to effectuate their purpose. 3 *Sutherland*, §60:1 at 250-252. More specifically, remedial statutes are liberally construed to suppress the evil and advance the remedy they embrace. 3 *Sutherland,* §60:1 at 250; see also, *In re Hart*, 806 A.2d 1179, 1183 (Del.Fam.Ct.2001). Automobile insurance laws are considered remedial and are therefore accorded liberal application. 3 *Sutherland,* §60:2 at 267. Auto insurance legislation is liberally applied, in general, to give the broadest protection possible to accident victims. 3 *Sutherland,* §60:1 at 257. Being remedial in nature,

the amendment to 18 Del.C. §3902(b)(2) should be liberally viewed to effectuate its purpose of rectifying the inequities suffered by UIM insureds under the *Williams* decision. Delaware recognizes that where a statutory amendment is remedial it may apply retroactively when it relates to practice, procedure or remedies. *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del.1993); *Mergenthaler v. Asbestos Corp. of America, Inc.,* 534 A.2d 272, 277 (Del.Super.1987); *State ex rel. Brady v. Pettinaro Enterprises,* 870 A.2d 513, 529 (Del.Ch.2005).

E. Plaintiffs are not asking for retroactive application of the amendment – only that it be applied as written and intended.

A statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date. 2 *Sutherland,* §41:1 at 385. This principle was recognized and applied in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)[5]. There, Maria Altmann, heir of the original owner of certain paintings sued the Republic of Austria and a state owned gallery, seeking return of paintings taken by the Nazis in violation of international law. Austria moved to dismiss but the U.S. District Court denied the motion. On appeal, the Ninth Circuit affirmed and remanded, denying rehearing. After granting certiorari, the U.S. Supreme Court held that the Foreign Sovereign Immunities Act

[5] This is the basis of the recent movie *Woman in Gold* starring Helen Mirren and Ryan Reynolds.

("FSIA") applies to conduct that occurred prior to its enactment and prior to the United States' 1952 adoption of the restrictive theory of sovereign immunity found at 28 USCA §1602, *et seq.* The high court rejected Austria's argument that to apply FSIA's terms to pre-enactment conduct amounted to impermissible retroactive application. The court stated that its prior decision in *Landgraph v. USI Film Products*, 511 U.S. 244 (1994), in which the court described the general presumption against retroactive application of a statute, does not govern absent clear congressional intent favoring that result. Noting that nothing in the FSIA or circumstances surrounding its enactment suggested that it should not be applied to the 1948 actions at stake, the court stated that the preamble contained clear evidence that Congress intended it to apply to pre-enactment conduct that provided that ***claims*** "...should *henceforth* be decided by [American] courts...in conformity with the principles set forth in this chapter." *Id.* at 697. "...[T]his language is unambiguous," the court said, continuing, "[i]mmunity 'claims' – not actions protected by immunity, but assertions of immunity to suits arising from those actions – are the relevant conduct regulated by the act and are 'henceforth' to be decided by the courts. Thus, Congress intended courts to resolve *all* such claims 'in conformity with FSIA principles' ***regardless of when the underlying conduct occurred.***" *Id.* at 697, 698 (emphasis supplied). The court concluded by emphasizing the narrowness of its decision. *Id.* at 700.

These principles have also been recognized and embraced by this Court. In *Price v. All American Engineering Co.*, 320 A.2d 336 (Del.1974) appeals were consolidated to determine the constitutionality of a statute providing additional workers comp benefits to persons permanently disabled. The Superior Court found the statute unconstitutional. Appellants were employees who were totally disabled before May 27, 1971, who argued that the clear intent of the statutory amendment was to increase weekly benefits to claimants totally disabled either before or after the date of enactment. Appellees, employers and workers comp insurers, asserted increasing benefits to appellants retroactively was unconstitutional, because a claimant's right to compensation became vested on the date of the injury and could not be reduced or enlarged by legislation enacted subsequent to that date. Reversing, this Court stated: "While courts do not favor retroactive legislation, effect is impelled if, as here, the retrospective legislative intent is unmistakable." *Id.* at 341 (footnotes omitted). This Court continued, stating "We are obligated to effectuate that clear legislative intent." *Id.* at 341. This is all Plaintiffs are asking in this appeal. That *Price* is analogous to the present case, is manifest.

By way of further examples, a law governing the conduct of trials is being applied prospectively when it is applied to a criminal trial occurring after the law's effective date regardless of when the underlying crime was committed. *People v. Ledesma*, 140 P.3d 657,664 (Cal.2006), cert. denied, 549 U.S. 1324 (2007).

Similarly, a federal law enacted reducing current food stamp benefits by amounts of previously inadvertently over-issued food stamps was not retroactive but prospective in its application. *Alexander v. Robinson*, 756 F.2d 1153, 1155 (5 Cir.1985). See also: *Com. v. Bruno*, 735 N.E.2 1222, 1229 (Mass.2000) where it was held that new criteria for civil commitments that included certain past sexual offense convictions operated prospectively, not retrospectively; *In re Sheneal W. Jr.*, 728 A.2d 544,550 (Conn.Super.1999) [alternative analysis of statute allowing termination of parental rights based on misconduct prior to enactment was prospective in its application, citing Singer, *Sutherland Stat. Const.*, §41.01 at 338 (5d ed. 1992)].

18 Del.C. §3902(a) requires uninsured motorist coverage in every auto policy written in Delaware unless rejected in writing by the insured, in an amount not less than the minimum limits for bodily injury and property damage required under the motorists financial responsibility laws of Delaware. 18 Del.C. §3902(b) requires every automobile insurer to offer up to $100,000 per person and $300,000 per accident or $300,000 single limit for such coverage not to exceed the limits of the bodily injury liability set forth in the basic policy. Section 3902(b)(2) makes the same applicable to underinsured motorists coverage. The public policy behind these provisions is so strong 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. *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.). Defendant Nationwide initially argued that Plaintiffs were seeking retroactive application of the amendment to 18 Del.C. §3902(b)(2), then in subsequent submissions below raised the argument that the policy in question was an "occurrence" policy citing the policy language "[t]he selected coverages in this policy apply only to occurrences while the policy is in force." Characterized either way, the proposition that the UIM claim came into existence on the date of the accident, not the date the UIM claim was perfected, contravenes the letter and policy of the amended law. Accordingly, that the accident here occurred before the legislative change is no impediment to application of the UIM coverage to comply with both the letter and spirit of new §3902(b)(2). For these reasons, the trial court's reliance on the Defendant's "occurrence" and "fortuity" arguments is misplaced.

F. The decision below does not comport with the reasonable expectations of the insureds, here the Plaintiffs.

For over four decades, this Court has recognized that the terms of an insurance contract are not bargained for as in the case of contracts generally and an insured is chargeable with its terms as a matter of business utility rather than because the insured has read or understood them, so the insurance contract should be read to

accord with the reasonable expectations of the purchaser, so far as its language shall permit. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del.1974). The rationale that coverage should comport with the reasonable expectations of the insured, not the insurer (as Defendant Nationwide contended below), has its genesis in the recognition that insurance policies are not agreements reached at arm's length by parties of equal bargaining power. On the contrary, the insurance policy is a contract of adhesion, far from a truly consensual agreement. *Id.*

The purpose of a future effective date in legislation is to inform those affected by the legislation before it becomes effective so that they may protect their rights and discharge their obligations. 2 *Sutherland,* §33:7 at 21. There is a six (6) month grace period built into the law rendering it prospectively applicable to "new and/or ***renewed*** policies" (emphasis supplied) thereafter. The obvious purpose of this six (6) month period was to allow insurance companies to make whatever actuarial determinations that might be necessary that could affect premiums. It is evident that Defendant availed itself of this opportunity because the premium for the UM/UIM coverage in the January 5, 2014 renewal ***increased*** over that of the prior (7/5/13-1/5/14) premium without a change in the policy limits. A-34, 41. Why else would the triggering date be pegged only to policies that were new or renewed after the six (6) month period without any reference whatsoever to the date of the accident? The Governor signed into law Senate Bill No. 61 on July 3, 2013. Six (6) months forward

from that date is January 3, 2014. Plaintiffs' auto policy ***renewed*** on January 5, 2014, more than six months after 79 Del. Laws 2013, Chapter 91 was enacted, thereby triggering the provisions of the amendment allowing stacking of UIM coverage in any amount on top of the tortfeasor's coverage.

In the amendment, the General Assembly provided the insurer the opportunity "...to adjuster (sic) premiums for the increased risk for policies issued or renewed..." (Defendant's Motion to Dismiss, paragraph 3) by establishing the six (6) month grace period, which it did. The amendment expressly applies to all policies ***renewed*** after expiration of the six (6) month period, meaning the policies after that date are reformed by law to allow stacking, regardless of the policy limits. If that is what the plain language of the law states, the Plaintiffs' reasonable expectations are that their UIM claim, which did not come into existence until after the effective date of the revised law, receives the benefit of the remedial amendment. To hold otherwise, would work on them (and others similarly situated) a forfeiture because they have paid premiums for the coverage but are being denied the benefit of it by their insurer. *Id.* at 347.

The argument asserted below by Defendant Nationwide, and accepted by the trial court, that the insurance policy in effect at the time of "birth" of the UIM claim was the same policy that existed on the date of the original accident is based on a faulty premise. As previously noted, §2 of 79 Del. Laws 2013 Ch. 91 states "The

provisions of this law shall apply to motor vehicle ***insurance policies*** issued and/or ***renewed*** six (6) months after enactment," (emphasis supplied) which is reiterated in the Synopsis. A policy of insurance cannot be at the same time existing and "renewed". In reading statutory language, the plain everyday meaning should be applied unless there is some implication otherwise.

Title 18, Chapter 39 of the Delaware Code relates to casualty insurance contracts and includes §3902, the UM/UIM statute. Section 3903(a)(2) states:

> "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term.

This Court in *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060, 1065 (Del.1984) said the statute clearly contemplated that a renewal was merely the automatic continuation of the preceding policy with minor exceptions, citing *Schock v. Penn Tp. Mut. Fire Ins. Ass'n*, 24 A.2d 741, 743 (Pa.Super.1942) where the court noted a renewal of a policy of insurance is, in effect, the new contract of insurance on essentially the same terms and conditions as the original policy. *Arms* held that it was the change in the basic legal relationship between the parties that connoted a new policy, rather than a mere renewal, and thus triggered the requirement of offering coverage under §3902(b). See also, *Clark v. Quaker City Ins. Co.*, 1999

WL 1442052 (Del.Super.) where the statutory definition above was applied with the result that the policy was not deemed to be a renewal policy because the putative renewal policy came from an entirely different insurer and was therefore not essentially the same in form and substance. Accord: *Guarantee Ins. Co. of Texas v. Boggs*, 527 S.W.2d 265 (Tex.Civ.App.1975) where it was held that the auto policy in question was not a renewal policy because the carrier for the preceding coverage and the subsequent coverage were different, thereby triggering the duty to offer UM coverage, without a prior rejection of such coverage controlling. This is consistent with the view of other jurisdictions with regard to the term "renewal" in the insurance context generally, and more specifically, in the UIM context. Thus, *Mitchell v. Liberty Mut. Ins. Co.*, 24 P.3d 711, 720 (Kan.2001) cited *Black's Law Dictionary*, 1299 (7th ed. 1999), defining renewal as: "1. the act of restoring or reestablishing. 2. The recreation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." It held that where the coverage is substantially identical and reestablishes the relationship between the parties, the policy is a renewal policy and does not trigger the insurer's duty to offer UIM coverage anew. Compare *Hartford Accident and Indemnity Co. v. Sheffield*, 375 So.2d 598, 599, 600 (Fla.App.1979) where it was held that automobile liability policy containing significantly lower liability limits than the preceding policy was not a "renewal" of

such preceding policy within the meaning of the statute providing that unless the insured requested uninsured motorist coverage in writing, the coverage need not be provided in the renewal policy if the insured had previously rejected such coverage.

What took place on January 5, 2014 with regard to Plaintiffs' Nationwide auto policy, if not renewal? If the General Assembly intended that existing policies meant the same thing as renewed policies, why draw that distinction in the language of the statutory amendment and in the explanatory Synopsis? The amendment is unmistakable on its face that the General Assembly intended the revised rules of stacking to apply to all policies that renewed after the six (6) month grace period. It must be kept in mind that Plaintiffs' auto policy renewed not just once, but at least twice, after the effective date (January 5, 2014 and July 7, 2014) with an increase in premium before the UIM claim came into existence. Plaintiffs only seek to have the unambiguous amendment applied according to its language. Defendant's argument below, adopted by the trial court, essentially rewrites the language of the amendment, as though applicability is triggered only if the accident post-dated the legislative changes. Since Plaintiffs' auto policy renewed at least twice after the amendment's effective date, Plaintiffs are entitled to have the benefit of its terms.

G. The policy language may not contravene the provisions of a statute.

It is well settled under Delaware law that where an automobile policy contains language that conflicts with statutes governing insurance, the statutory provisions control. *Bass v. Horizon Assurance Company*, 562 A.2d 1194 (Del.1989) (exclusion denying personal injury protection coverage to insured who was driving under the influence of alcohol was incompatible with no-fault statute and thus unenforceable); *Hudson v. State Farm Mutual Insurance Company*, 569 A.2d 1168 (Del.1990) (public policy of motor vehicle financial responsibility law required coverage for innocent passenger whose injuries resulted from intentional or reckless conduct of insured driver rendered exclusion to that effect unenforceable); *Progressive Northern Insurance Company v. Mohr,* 47 A.3d 492 (Del.2012) (statute required insurer to provide pedestrian personal injury protection benefits under a Delaware policy for insured who was injured as a pedestrian in Delaware by a Delaware-insured car notwithstanding conflicting policy language). *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del.1988) (a broad household exclusion that precluded any claim for bodily injury against the insured when brought by an insured's family member residing with the insured held impermissible as it was in direct conflict with 18 Del.C. §2118 and §3902); *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915 (Del.1997) (rejecting a modified household exclusion which limited the liability coverage for household members to the statutory minimum because it violated the public policy encouraging Delaware drivers to purchase more

than the statutory minimum); *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449 (Del.Super.1994) (named driver exclusion was "repugnant to the statutory requirements and clear public policy" when it excluded underinsured coverage only when the named driver was driving but not while he was a passenger or pedestrian).

The interpretation by the court below, as also contended by the Defendant, conflicts with the express statutory language of when the UIM amendment is to take effect. This interpretation is no different than a policy exclusion that runs counter to clear statutory terms, in that such conflict renders it unenforceable - meaning the statutory language and the underlying public policy are controlling. In *Mohr*, *supra*, the Superior Court held that the insurer's interpretation of the statute contravened the oft recognized public policy of Delaware that supports full compensation of car accident victims and encourages policy holders to purchase protection of higher than minimum coverage limits. Important public policy goals of the UM/UIM statute, like the PIP statute, are:

A. to promote "full compensation to all victims of automobile accidents." *Seeman*, supra at 918. *Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1382 (Del.1993); and

B. to encourage "the Delaware driving public to purchase more than the statutory minimum amount of automobile insurance coverage" *Seeman*, supra at 918.

The trial court acknowledged that Plaintiffs' statement of the law in this regard was accurate, though it was not found to be persuasive. The trial court's interpretation

of the amendment to §3902(b)(2) is inconsistent with these dual goals and purposes, as well as the express terms of the amendment, and should not be allowed to stand.

H. *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.* and *Sload v. Nationwide Mut. Ins. Co.* provide no guidance on the issue before this Court.

By letter dated April 20, 2016, just 5 days before the trial court issued its opinion on the cross motions for summary judgment, defense counsel forwarded a copy of the March 31, 2016 decision in *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1424788 (Del.Super.), contending that the decision is controlling of the issue before this Court because Judge Carpenter mentioned in passing that the prior version of §3902(b)(2) applied to the accident in question because it occurred in December, 2012. A- 62-63. The flaw in this reasoning is that the UIM claim there was "born" before the amendment went into effect.

In applying the prior version of that section, Judge Carpenter noted that the definition had been amended to provide that a vehicle is underinsured if the limits of all applicable policies "are less than the damages sustained by the insured." *Id.* at 3, footnote omitted. Continuing, the court said:

> "However, this language affects only those policies renewed or secured after the amendment's July 3, 2013 effective date, which is not the case here." *Id.* at 3, footnote omitted.

Setting aside the reference to the incorrect effective date, which would be six (6) months after being signed into law on July 3, 2013 by the Governor, it is evident that

which version of the statute applied was not an issue presented to the court nor briefed by the parties.[6] As such, it is clearly *obiter dictum* and does not represent a holding or provide any persuasive authority for the sole issue presented in this appeal.

This much is clear from Judge Carpenter's conclusion in *Moffitt-Ali* at 3:

> While the Court believes this is a legally correct decision under the law at the time of the accident, it finds comfort that the General Assembly has recognized the previous statute was being used by insurance companies to limit coverage in cases where the plaintiff was significantly injured and the liability coverage was not sufficient to provide fair compensation. Clearly this was not intended by the framers of the original statute and was inconsistent with the intent of the law. Fortunately the statute as changed will prevent such injustice from continuing. Unfortunately for Plaintiff the previous statute controls and State Farm's Motion must be granted.

Likewise, *Sload v. Nationwide Mut. Ins. Co.*, 723 A.2d 388 (Del.Super.) aff'd, 723 A.2d 398 (Del.1998) (TABLE), also cited in the April 20, 2016 letter to the trial court, is inapposite. *Sload* decided the same issue as that presented in *Moffitt-Ali,* i.e., can an insured access UIM coverage where the combined limits of liability coverages exceed the UIM limits, which is not the issue presented in this appeal. *Sload*, of course, was decided before the amendment, meaning, as with *Moffitt-Ali,* the UIM "date of birth" pre-dated the effective date. Neither *Moffitt-Ali* nor *Sload* provide any guidance with respect to the issue before this Court on this appeal.

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[6] Plaintiffs' counsel in this appeal confirmed as much through a telephone conversation with plaintiff's counsel in *Moffitt-Ali* (on appeal to this Court as No. 215, 2016) on June 15, 2016.

***

In sum, the parties and the trial court agreed there were no disputed material facts and the only question was the legal one of whether the amended or prior version of 18 Del.C. §3902(b)(2) applies to Plaintiffs' UIM claim. This Court reviews questions of law on cross motions for summary judgment *de novo*. Plaintiffs respectfully submit that the lower court erred in granting Nationwide's motion and denying Plaintiffs'. Taking into account the express language of the amendment regarding its applicability and the stated intent identified in the Synopsis, this Court should hold that the amended §3902(b)(2) applies to Plaintiffs' UIM claim entitling them to proceed to make a claim under their $100,000 coverage.

Respectfully Submitted,

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Case No. S15C-04-022 MJB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MARIA L. DICKERSON and CHARLES L. DICKERSON,	)	
Plaintiffs,	)	
v.	)	
	)	**C.A. No. S15C-04-022 MJB**
NATIONWIDE MUTUAL INSRUANCE COMPANY, A foreign corporation,	)	
Defendant.	)	

OPINION

Submitted: January 15, 2016
Decided: April 25, 2016

Upon Defendant's Motion for Summary Judgment, **GRANTED.**
Upon Plaintiff's Motion for Summary Judgment, **DENIED.**

Barry Guerke, Esquire, Parkowski, Guerke & Swayze, P.A., 116 W. Water Street, P.O. Box 598, Dover, Delaware 19903, *Attorney for Plainitff.*

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BRADY, J.

I. INTRODUCTION

This is an underinsured motorist claim ("UIM") brought by Maria and Charles Dickerson ("Plaintiffs") against Nationwide Mutual Insurance Company ("Defendant").[1] The parties do not dispute the underlying facts. On June 23, 2013, Maria Dickerson was operating a 2003 Toyota Camry, driving northbound on State Route 1 in the left exit lane south of Exit 95 in or near Dover, Delaware.[2] As Maria exited onto Exit 95, a 2010 Dodge Avenger owned by Robin A. Soloman ("Soloman") and operated by Amane Soloman ("Amane"), crossed over the painted median and turned in front of Maria's Camry causing Maria to swerve into the right lane of travel to avoid striking Amane.[3] Maria subsequently struck a curb which caused the Camry to strike an embankment several times and ultimately caused the car to overturn.[4]

The automobile insurance liability company for Soloman and Amane paid the full policy limits of $100,000, Plaintiffs' injuries and damages exceed the total amount paid.[5] In the present matter, Plaintiffs seek a declaratory judgment,[6] pursuant to 10 *Del. C.* § 6501, declaring that the provisions of the amended version of 18 *Del. C.* § 3902 apply to Plaintiffs' claim for UIM benefits.[7]

II. PROCEDURAL HISTORY

On April 20, 2015, Plaintiffs filed a Complaint[8] and on June 25, 2015, Defendant filed a Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be

[1] *See* Complaint, Item 1 (April 20, 2015).
[2] Complaint, Item 1, at *1-2 (April 20, 2015).
[3] Complaint, Item 1, at *1-2 (April 20, 2015).
[4] Complaint, Item 1, at *1-2 (April 20, 2015).
[5] Complaint, Item 1, at *4-5 (April 20, 2015).
[6] Although not specifically addressed by the parties, it appears from the complaint that if the version of 18 *Del. C.* § 3902 in effect at the time of the accident is applied Plaintiff cannot recover. *See* Complaint, Item 1, at *4-5 (April 20, 2015) (indicating that the tortfeasors' policy limit was $100,000 and Plaintiffs' uninsured/underinsured motorist coverage was $100,000/$300,000).
[7] Complaint, Item 1, at *7 (April 20, 2015).
[8] Complaint, Item 1 (April 20, 2015).

granted, pursuant to Superior Court Rule of Civil Procedure 12(b)(6).[9] On July 24, 2015, Plaintiffs filed a response to Defendant's Motion to Dismiss[10] and on July 28, 2015, Defendant filed a reply to Plaintiffs' response to the Motion to Dismiss.[11] On August 6, 2015, Plaintiffs filed a Motion for Summary Judgment, [12] which was amended on August 7, 2015.[13]

On August 13, 2015, Plaintiffs sent a letter to the Court arguing that Defendant's Motion to Dismiss had been converted into a Motion for Summary Judgment because "matters outside the pleadings have been presented to, and not excluded by, the Court."[14] Plaintiffs indicated that before the Court were cross motions for summary judgment.[15] On August 13, 2015, Defendant wrote a letter to the Court indicating that there was no objection to Plaintiffs' Motion for Summary Judgment being "considered as a Sur-Reply to the pending Motion to Dismiss."[16] Defendant further noted that "[i]f the Court prefers to have a separate response from defendant to that filing, then defendant agrees that both motions should be heard together."[17]

On January 7, 2016, the Court notified the parties that it intended to convert Defendant's Motion to Dismiss into a Motion for Summary Judgment.[18] The Court instructed the parties to submit any objection by February 5, 2016, and indicate whether either party wished to submit additional documents or argument.[19] On January 7, 2016, Plaintiffs informed the Court that it had no objection to converting Defendant's Motion to Dismiss into a Motion for Summary

[9] Def.'s Mot. to Dismiss, Item 5 (June 24, 2015).
[10] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8 (July 24, 2015).
[11] Def.'s Reply to Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 9 (July 28, 2015).
[12] Plaintiff's Motion for Summary Judgment, Item 10 (Aug. 6, 2015).
[13] Plaintiff's Amended Motion for Summary Judgment, Item 11 (Aug. 7, 2015).
[14] Letter from I Barry Guerke, Esquire, Item 13 (August 12, 2015).
[15] Letter from I Barry Guerke, Esquire, Item 13 (August 12, 2015).
[16] Letter from Lou Rizzo, Esquire, Item 14 (Aug. 13, 2015).
[17] Letter from Lou Rizzo, Esquire, Item 14 (Aug. 13, 2015).
[18] Letter from Judge Brady, Item 17 (Jan. 7, 2016).
[19] Letter from Judge Brady, Item 17 (Jan. 7, 2016).

Judgment and indicated that it had no further materials and argument to submit.[20] On January 12, 2016, Defendant informed the Court that it too had no objection and no further submissions.[21]

On January 15, 2016, the Court informed the parties that Defendant's Motion to Dismiss had been converted into a Motion for Summary Judgment and that the Court had taken the cross motions for summary judgment under advisement.[22] On April 20, 2016, the Court received correspondence from Defendant indicating that a recent decision of the Superior Court addressed similar issues to the ones presented in the instant matter.[23] Specifically, that this Court applied the previous version of 18 *Del. C.* § 3902 to an UIM claim resulting from an accident that occurred prior to the amendment.[24]

The provisions of 18 *Del. C.* § 3902 in effect at the time of the relevant collision ins this case provided that, in order for underinsured motorist coverage to be triggered, the plaintiff needed to have underinsured motorist coverage limits in excess of the tortfeasor's limits.[25] On July 3, 2013, the General Assembly amended 18 *Del. C.* § 3902. Under the amended version, underinsured motorist coverage is triggered so long as the tortfeasor's limits were exhausted and were insufficient to compensate plaintiff's full damages.[26] The new version does not require an accounting of the underinsured motorist coverage limits of the tortfeasor.[27] For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**.

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[20] Letter from I Barry Guerke, Esquire, Item 18, (Jan. 7, 2016).
[21] Letter from Lou Rizzo, Esquire, Item 19 (Jan. 12, 2016).
[22] Letter from Judge Brady, Item 20 (Jan. 15, 2016).
[23] Letter from Lou Rizzo, Esquire, Item 21 (April 20, 2016) (citing *Moffitt-Ali v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1424788, at *2 (Del. Super. Ct. Mar. 31, 2016)).
[24] Letter from Lou Rizzo, Esquire, Item 21 (April 20, 2016) (citing *Moffitt-Ali*, 2016 WL 1424788, at *2).
[25] *See* 18 *Del. C.* § 3902(b)(2) (1995).
[26] *See* 18 *Del. C.* § 3902(b)(2).
[27] *See id.*

III. Parties Contentions

A. Defendant's Contentions

Defendant argues that Plaintiffs' claim for UIM benefits should be governed by the previous version of 18 *Del. C.* § 3902.[28] Specifically, Defendant contends that "[t]he statute expressly provides for prospective application when it states: 'The provisions of this law shall apply to motor vehicle insurance policies issued and/or renewed six (6) months after enactment.'"[29] Defendant further argues that the policy under which Plaintiffs' claim is based falls into the category of "existing policies" which are not affected by the amendment.[30] Defendant notes that Plaintiffs subsequently renewed the policy, but argues that the claim is not being made under the renewed policy, but it is being made under the policy which existed at the time of the accident and is therefore subject to the previous version of 18 *Del. C.* § 3902.[31]

Defendant further argues that Plaintiffs are seeking to have the UIM statute retroactively applied to a policy that was priced, purchased, and issued under the prior statutory scheme for UIM benefits.[32] Defendant notes that Delaware courts disfavor retroactive application of statutory provisions unless it is unmistakable on the face of the statute that the legislature intended such an application.[33] Defendant further notes that Delaware courts have held that any doubt with regard to whether an amended statute was intended to operate retroactively should be resolved against such an application.[34]

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[28] *See* Def.'s Mot. to Dismiss, Item 5, at *1-2 (June 24, 2015).
[29] Def.'s Mot. to Dismiss, Item 5, at *3 (June 24, 2015).
[30] Def.'s Mot. to Dismiss, Item 5, at *3-4 (June 24, 2015).
[31] Def.'s Mot. to Dismiss, Item 5, at *3-4 (June 24, 2015).
[32] Def.'s Mot. to Dismiss, Item 5, at *4-5 (June 24, 2015).
[33] Def.'s Mot. to Dismiss, Item 5, at *4 (June 24, 2015) (citing *Price v. All American Eng'g Co.*, 320 A.2d 336 (Del. Super. Ct. 1974)).
[34] Def.'s Mot. to Dismiss, Item 5, at *4 (June 24, 2015) (citing *Chrysler Corp. v. State*, 457 A.2d 345, 351 (Del. 1983)).

Defendant argues that the Plaintiffs "confuse[] the concept of what plaintiff must ***prove*** in order to successfully recover UIM benefits with the concept of what ***triggers*** UIM coverage."[35] Specifically, Defendant contends that Plaintiffs must prove exhaustion of liability limits and damages in excess of those limits, whereas the coverage is triggered by the occurrence of the event.[36] Defendant argues that if the Court were to accept Plaintiffs' position, an injured party who has low or no UIM limits on his auto policy and who is involved in an accident with a tortfeasor who has low liability limits, can buy new insurance with high UIM limits and submit a claim under the new policy once the tortfeasor's limits have been exhausted.[37] Defendant argues that such a result is contrary to public policy and the general rule that "one cannot obtain insurance for those losses which are not fortuitous, in other words, for those losses of which the insured knows, plans, intends, or is aware."[38]

B. Plaintiffs' Contentions

Plaintiffs argue that they are not seeking retroactive application of the amended version of 18 *Del. C.* § 3902.[39] Specifically, Plaintiffs contend that a UIM claim is separate and distinct from a claim against the tortfeasor and that such a claim does not necessarily originate from the date of the accident.[40] Plaintiffs argue that a UIM claim "only comes into existence" when four contingencies are met: (1) the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted; (2) the UIM carrier received an Affidavit of No Other Insurance in which the tortfeasor driver and, as appropriate, the owner of the vehicle involved, swear no other applicable liability insurance

[35] Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9, at *2 (July 28, 2015) (emphasis in original).
[36] Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9, at *2 (July 28, 2015).
[37] Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9, at *3 (July 28, 2015).
[38] Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9, at *3 (July 28, 2015).
[39] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *1 (July 24, 2015).
[40] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *2 (July 24, 2015).

exists; (3) the UIM carrier receives an affidavit or certification of those policies; and (4) proof that the case against the tortfeasor has concluded, such as by providing a release or proof of final judgment and the amount.[41] Plaintiffs argue that the four contingencies were not satisfied until October 10, 2014, and therefore the UIM claim did not rise until after Plaintiffs' auto policy with Nationwide renewed for the second time and after expiration of the grace period found in the amended version of 18 *Del. C.* § 3902.[42]

Plaintiffs further argue that the amended version of 18 *Del. C.* § 3902 is unambiguous in its terms regarding applicability.[43] Specifically, Plaintiffs note that Senate Bill No. 61 provides that "[t]he provisions of this law shall apply to motor vehicle insurance policies issued and/or ***renewed*** six (6) months after enactment."[44] Plaintiffs argue that had the General Assembly intended the reference point to be the date of the collision and injury it would have expressly stated so.[45]

Plaintiffs contend that Defendant's reasonable expectation argument is without merit.[46] Specifically, Plaintiffs note that the Court should interpret the insurance coverage to comport with the insured's reasonable expectation and not the insurer because insurance policies are contracts of adhesion.[47] Plaintiffs argue that the reasonable expectation was that the UIM claim,

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[41] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *2 (July 24, 2015).
[42] Plaintiff notes that the Release of All Claims was executed on October 10, 2014, the Affidavits of No Other Insurance are dated September 26, 2014, and the Certification of Police Limits provided by Nationwide, the tortfeasor's auto carrier, is dated July 11, 2014. *See* Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *2-3 (July 24, 2015).
[43] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *3 (July 24, 2015)
[44] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *3 (July 24, 2015) (emphasis in original).
[45] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *3-4 (July 24, 2015).
[46] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *7 (July 24, 2015)
[47] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *7 (July 24, 2015) (citing *State Farm Mut Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974).

which Plaintiffs contend did not come into existence until after the effective date of the amended statute, receives the benefit of the remedial amendment.[48]

Plaintiffs note that they recently discovered that their insurance policy from the period of July 7, 2014 through and including July 5, 2015, made substantial changes from the preceding policy that had an original policy period of July 2014 through January 2015.[49] These changes, Plaintiffs submit, amounted to a new policy within the provision of section 2 of Senate Bill Number 61, which states, in pertinent part, "[t]he provisions of this law shall apply to motor vehicle insurance policies ***issued*** and/or renewed six (6) months after enactment."[50] Plaintiffs further contend that regardless of whether the policy was issued or renewed, the UIM claim did not come into existence until October 10, 2014, the date the Release of All Claims was executed, which makes the amendment to 18 *Del. C.* § 3902(b)(2) applicable.[51]

Plaintiffs further argue that Defendant's argument that the insurance policies are "occurrence" policies, does not control in this matter because under Delaware law where an automobile policy contains language that conflicts with statutes governing insurance, the statutory provisions and underlying public policy goals control.[52] Plaintiffs note that there are two important public policy goals of the UIM statute: (1) "to promote 'full compensation to all victims of automobile accidents'"; and (2) "to encourage 'the Delaware driving public to purchase more than the statutory minimum amount of automobile insurance coverage.'"[53]

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[48] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *7 (July 24, 2015).
[49] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *1-2 (Aug. 7, 2015).
[50] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *1-2 (Aug. 7, 2015) (citing 79 Del. Laws 2013 Ch. 91) (emphasis in original).
[51] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *1-2 (Aug. 7, 2015).
[52] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *2-3 (Aug. 7, 2015) (internal citations omitted).
[53] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *4 (Aug. 7, 2015) (citing *Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1382 (Del. 1993); *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915, 918 (Del. 1997)).

IV. ANALYSIS

A. Standard of Review

Generally, a "Motion for Summary Judgment is appropriate where the record indicates that there are no genuine issues of material fact and where, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to summary judgment as a matter of law."[54] The moving party "bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law."[55]

B. Applicable Law

18 *Del. C.* § 3902 was enacted to provide innocent victims of motor vehicle accidents a means of recovering for injuries "inflicted by impecunious tortfeasors."[56] It aims to achieve this objective by permitting "a claim for UIM benefits where an operator of an underinsured motor vehicle causes the claimant bodily injury."[57] The condition precedent to any UIM claim is to show that the tortfeasor was operating an underinsured motor vehicle.[58] This threshold question is governed by 18 *Del. C.* § 3902(b)(2), which was recently amended by the Delaware General Assemble.[59] The previous version of 18 *Del. C.* § 3902(b)(2) defined an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident *total less than the limits provided by the uninsured*

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[54] *Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4247767, at *3 (Del. Super. Ct. Aug. 27, 2014) (citing Del. Super. Ct Civ. R. 56(c)).
[55] *Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. Ct. May 31, 2013) (citing *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979)).
[56] *See Deptula v. Horace Mann Ins. Co.* 842 1235, 1236 (Del. 2004); *see also Hurst v. Nationwide Mut. Ins. Co.*, 652, A.2d 10, 12 (Del. 1995) (citing *Frank v. Horizon Assur. Co*, 553 A.2d 1199, 1201 (Del. 1989)).
[57] *See White v. Liberty Ins. Corp.*, 975 A.2d 786, 788 (Del. 2009) (citing 18 *Del. C.* § 3902(b)(1))).
[58] *See Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124, 1126 (Del. 1997) ("[T]he definition of underinsurance in Section 3902(b)(2) operates as a prerequisite to a right of recovery from the claimant's underinsurance motorist policy.") (citing *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d at 1378).
[59] *See* 18 *Del. C.* § 3902(b)(2) (1995).

motorist coverage."[60] The amended version of 18 *Del. C.* § 3902 defines an underinsured motor vehicle as one where "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident *are less than the damages sustained by the insured*."[61] Senate Bill No. 61, which amended 18 *Del. C.* § 3902, states in pertinent part, "[t]he provisions of the law will not affect existing insurance policies, and will apply only to renewing or new policies that become effective six (6) months after the law is enacted."[62] The synopsis of Senate Bill No. 61 further explains the legislative intent behind the bill by stating:

> The purpose of this amendment is to allow innocent victims of motor vehicle collisions to access their own underinsured benefits in circumstances where the victim's damages are greater than the amount of the negligent driver's insurance policy limits. Delaware Courts have ruled that if the innocent victim and the negligent driver have the same policy limit or the victim's policy limits are less than the negligent driver's, then the negligent driver is not considered 'underinsured' even if the negligent driver's policy limit is inadequate to compensate the innocent victims. This amendment will rectify these inequities.[63]

An insurer is not obligated to make any UIM payments "until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement for judgments."[64] As a practical matter, insurers require an insured to submit an Affidavit of No Other Insurance in which the tortfeasor driver and, where appropriate, the owner of the vehicle involved, swear no other applicable liability insurance exists. In addition, insurers require the insured to submit an affidavit or certification of those policy limits and submit proof that the case against the tortfeasor has concluded, if the claim is settled amicably, or proof of final judgment and the amount of same.

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[60] *Id.*
[61] 18 *Del. C.* § 3902(b)(2).
[62] 79 Laws 2013, ch. 91 § 1.
[63] *Id.*
[64] *See* 18 *Del. C.* § 3902(b)(3).

The Delaware Supreme Court in *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, stated that "victims of accidents caused by underinsured motorists must seek reimbursement for their full compensatory damages under their insurance *contracts* from their carriers. Although an insured claimant must often prove the elements of tortuous conduct, contract law may apply to his claim."[65] The Court went on to note that "parties could resolve the existence of coverage or the length of the statute of limitations before or without knowledge of the accident. On the other hand, damages and fault require knowledge of the accident and its results. While the former set of issues constitutes a contract action, tort law governs the latter set."[66] The Court held that "contract law governs only those aspects of the underinsured motorist claim that are not controlled by the resolution of facts arising from the accident."[67]

Under an "occurrence" insurance policy, an insured "is indemnified for acts or occurrences which take place within the policy period . . ."[68] The insurer's duty to indemnify the insured is "triggered by a determination that fortuitous bodily injury or property damage occurred during the policy period."[69] The general rule is that "one cannot obtain insurance for those losses which are not fortuitous, in other words, for those losses of which the insured knows, plans, intends, or is aware."[70] Delaware Courts have held that it is "contrary to public policy for an insurance company to knowingly assume the burden of a loss that occurred prior to making the contract."[71]

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[65] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010) (emphasis in original).
[66] *Id.* at 428-29.
[67] *Id.*
[68] *Playtex, Inc. v. Columbia Cas.*, 1993 WL 390469, at *9 (Del. Super. Ct. Sept. 20, 1993) (citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 59 (3d Cir. 1982)).
[69] *Id.* (citing *Restatement of Contracts* § 291 comment a (1932); *Peters Township School District v. Hartford Accident & Indem. Co.*, 833 F.2d 32 (3d Cir. 1987)).
[70] *Id.* (citing *Intermetal Mexicana v. Insurance Co. of North America*, 866 F.2d 71 (3d Cir. 1989)).
[71] *Id.* (citing *Burch v. Commonwealth County Mutual Ins. Co. Tex.*, 450 S.W. 2d 838, 840 (1970)).

C. Discussion

The parties do not dispute any material facts, rather, the parties disagree as to whether the amended or prior version of 18 *Del. C.* § 3902 applies to Plaintiffs' claim. The Court finds the undisputed facts are a sufficient basis for determining the legal issue, and, therefore, this case is ripe for summary judgment.

Plaintiffs argue that they are not seeking retroactive application of the amended version of 18 *Del. C.* § 3902, because they are submitting a UIM claim under the new policy issued on July 9, 2014, with a policy period of July 7, 2014 through January 5, 2015.[72] Plaintiffs further contend that the UIM claim did not come into existence until October 10, 2014, the date the Release of All Claims was executed, which makes the amendment to 18 *Del. C.* § 3902(b)(2) applicable.[73] Plaintiffs' arguments are unsupported by Delaware's case law and Plaintiffs' policy terms.

Plaintiffs argue that a UIM claim does not arise or come into existence until the UIM carrier receives an Affidavit of No Other Insurance, an affidavit or certification of those policies, and proof that the case against the tortfeasor has concluded.[74] Certainly, the obligation to pay does not arise until the carrier receives certain documentation, but the obligation is premised on the occurrence of the collision from which the claim originates. The law is settled, and Plaintiffs' policies expressly state, that the applicable policy is the one in effect at the time of the collision.[75]

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[72] *See* Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8 (July 24, 2015).
[73] *See* Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015).
[74] Plaintiffs' Opposition to Def.'s Motion to Dismiss, Item 8, at *2 (July 24, 2015).
[75] Both of Plaintiffs' policies at issue here expressly state, "[t]he selected coverages in this policy apply only to occurrences while the policy is in force." Insurance Policy, Exhibit A to Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015); *see also* Insurance Policy, Exhibit C to Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015).

Both of Plaintiffs' policies, relevant to review in the instant matter, are "occurrence" policies. Specifically, each policy expressly states, "[t]he selected coverages in this policy apply only to occurrences while the policy is in force."[76] By Plaintiffs' own admission, the policy issued on July 9, 2014, is a "new" policy within the provision of section 2 of Senate Bill Number 61,[77] and therefore was not "in force" when the accident occurred.[78] As a result, by the terms of the policy, it does not cover the accident in question.

The insurance policy in effect at the time of the accident was not renewed or issued six months following the amended version of 18 *Del. C.* § 3902. The insurance policy in effect at the time of the accident was an existing insurance policy as of the date 18 *Del. C.* § 3902 was amended. Such policies were expressly excluded from the amended statute's application.[79] Specifically, the General Assembly stated, "[t]he provisions of the law *will not affect existing insurance policies*, and will apply only to renewing or new policies that become effective six (6) months after the law is enacted."[80]

Plaintiffs acknowledge that the insurance policies at issue are "occurrence" policies, but argues such a distinction does not control because, under Delaware law, when an automobile policy contains language that conflicts with statutes governing insurance, the statutory provisions and underlying public policy goals control.[81] While Plaintiffs' statement of the law is accurate, Plaintiffs' argument is not persuasive. The version of 18 *Del. C.* § 3902 in effect at the time of the accident satisfied the underlying public policy goal "to encourage 'the Delaware driving

[76] Insurance Policy, Exhibit A to Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015); Insurance Policy, Exhibit C to Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015).
[77] *See* 79 Laws 2013, ch. 91 § 1.
[78] Plaintiff's insurance policy states that the policy period is from July 7, 2014 through January 5, 2015. Insurance Policy, Exhibit A to Def.'s Reply to Plaintiff's Opposition to Def.'s Mot. to Dismiss, Item 9 (July 28, 2015).
[79] *See* 79 Laws 2013, ch. 91 § 1.
[80] *Id.* (emphasis added).
[81] Plaintiff's Amended Mot. for Summary Judgment, Item 11, at *2-3 (Aug. 7, 2015) (internal citations omitted).

public to purchase more than the statutory minimum amount of automobile insurance coverage.'"[82] Further, by enforcing the policy in effect at the time of the accident, the Court's decision effects Delaware's public policy that insurance companies should not knowingly assume the burden of a loss that occurred prior to making the contract.[83]

Recently, this Court decided an issue similar to the one presented in the instant matter.[84] In *Moffitt-Ali*, the plaintiff filed a claim for UIM coverage relating to injuries sustained in a motor vehicle collision on December 2, 2012.[85] That Court noted that the definition for an underinsured motor vehicle had recently changed with an amendment to 18 *Del. C.* § 3902, but subsequent to the accident in question in that case.[86] The Court, referring to plaintiff's policy *in effect at the time of the accident*, determined that the amendment did not apply because the policy was not renewed or secured after the amendment's July 3, 2013 effective date.[87]

Moffitt-Ali is analogous to the instant case. The accident in question occurred prior to the amendment of 18 *Del. C.* § 3902. The policy at issue here, as in *Moffitt-Ali*, is the policy in effect at the time of the accident. This result is legally correct and consistent with both Delaware's case law and the expressed language of the previous version of 18 *Del. C.* § 3902 which referenced the policies in effect "at the time of the accident."[88]

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[82] *See Harris*, 632 A.2d at 1382; *see also Seeman*, 702 A.2d at 918.
[83] *Playtex, Inc.*, 1993 WL 390469, at *9 (citing *Burch*, 450 S.W. 2d at 840).
[84] *Moffitt-Ali*, 2016 WL 1424788, at *2.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] 18 *Del. C.* § 3902(b)(2) (1995) ("one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies *applicable at the time of the accident* are less than the damages sustained by the insured.") (emphasis added).

V. Conclusion

For these reasons, the Court finds that the amended version of 18 *Del. C.* § 3902 is inapplicable to Plaintiffs' UIM claim. As a result, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

M. Jane Brady

M. Jane Brady
Superior Court Judge