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In New Jersey, Timely Notice Provisions Can Trigger the Untimely Death of Insurance Coverage

By Robert D. Chesler, Steven J. Pudell and Janine M. Stanisz

The New Jersey Appellate Division recently examined the notice requirements provided in a claims-made insurance policy in *Templo Fuente De Vida Corp. v. National Union Fire Insurance Company of Pittsburgh, P.A.*, No. A-4516-12, 2014 N.J. Super. Unpub. Lexis 1303 (App. Div. June 6, 2014), and has once again made it more difficult for policyholders to secure insurance coverage when timely notice is at issue. It is a well-established approach in New Jersey, and everywhere else in the country, that with a claims-made policy, the policyholder must provide notice of a claim during the same policy period in which the policyholder received the claim. Otherwise, coverage is forfeited. New Jersey courts adhere to this principle even when the result is harsh. *Templo Fuente* takes this principle one giant step further.

In addition to requiring that policyholders notify insurance companies during the policy period of claims made against the policyholder, the typical claims-made policy also states that notice must be made "as soon as practicable." The "as soon as practicable" language has frequently been addressed by New Jersey courts in the context of occurrence-based policies rather than claims-made policies. Most notably, in *Cooper v. Government Employees Insurance Company*, 51 N.J. 86 (1968), the Supreme Court held that a court should only allow forfeiture of coverage under the phrase "as soon as practicable" in an occurrence-based policy if the insurance company could demonstrate that it had incurred appreciable prejudice.

Templo Fuente takes the phrase "as soon as practicable" and allows insurance companies to avoid their coverage obligations under a claims-made policy when, although the policyholder reported the claim during the correct policy period, it did not provide notice as soon as it could have been made. *Templo Fuente* inappropriately mixes and mismatches claims-made and occurrence policy concepts. As such it is a major setback for policyholders and those who give notice on their behalf, such as brokers and attorneys.

In *Templo Fuente*, the policy period was January 1, 2006, to January 1, 2007. The policyholders received a claim on or about February 21, 2006, and gave notice to its insurance company on August 28, 2006, well within

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the policy period. However, the trial court found that the notice was inexplicably six months late and therefore not "as soon as practicable." The Appellate Division affirmed the trial court decision and denied coverage, rejecting the argument that the insurance company could "only disclaim coverage if it can demonstrate that it was prejudiced by the insureds' failure to provide notice as soon as practicable."

The trial court relied chiefly on *Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc.*, 82 N.J. Super. 281 (App. Div. 1963), certif. denied 42 N.J. 501 (1964), in which the Appellate Division denied coverage because notice that was six months late was not "as soon as practicable." However, the court's reliance on Associated Metals is misplaced, as *Associated Metals* concerned an occurrence-based policy, not a claims-made policy. *Associated Metals* was overruled *sub silentio* by Cooper and is not good law.

The trial court and Appellate Division both mistakenly relied upon *Zuckerman v. National Union Fire Insurance Company*, 100 N.J. 304 (1985). *Zuckerman* is the leading decision that establishes that late notice under a claims-made policy results in a forfeiture of coverage. However, *Zuckerman* dealt with notice that was given after the policy had lapsed. It is well established that a policyholder forfeits coverage by first giving notice after the policy period. As *Zuckerman* dealt solely with notice provided after the policy expired, its application in cases where notice is provided during the policy period is unjustified. In addition, *Zuckerman* noted that the *Cooper* doctrine has "no application whatsoever to a 'claims made' policy" because "claims-made" policies were specifically written and sold to only cover claims made during that policy period. The court reasoned that allowing claims made after the policy period would in essence broaden, without payment of additional premiums, the coverage sold.

Many policyholders do not do a good job of giving notice, and many lose coverage for late notice under claims-made policies. *Templo Fuente* greatly increases that risk.

It's Now Illegal to Discriminate Against the Unemployed in New Jersey

By Bennett Pine

Joining New York City (see *Employment Law Insider Alert*, March 2013), Oregon and Washington, D.C., on July 1, 2014, New Jersey passed legislation to prohibit employment discrimination on

the basis of a job applicant's unemployment status. This expands existing New Jersey law — the first law on the subject — that prohibits employers from creating job postings or job advertisements that are limited to currently employed persons only. New Jersey Governor Chris Christie signed the original law in 2011 and is expected to approve the new legislation.

Purpose

New Jersey state Senators Peter Barnes and Jim Whelan, sponsors of the legislation, explain:

> The stigma of being unemployed can have a greater impact on whether or not someone gets an interview or a job offer than the person's qualifications or experience … Unfortunately, employers assume that a long break in employment is a reflection of the candidate's inability to effectively do the work rather than a byproduct of a bad economy. …
>
> Being unemployed can have serious financial and emotional effects on any individual, particularly if it is for a long length of time, leaving them with a constant feeling of hopelessness and defeat when looking for a job. This pressure is often compounded by the fact that the longer someone is unemployed the more difficult it is for them to reenter the workforce.

Who is Covered? The law applies to all private and public sector employers and employment agencies in New Jersey.

What is Prohibited? The new law protects the unemployed by banning employers from basing decisions with regard to hiring, compensation or the terms, conditions or privileges of employment on the fact that the applicant is, or has been, unemployed.

What is Permitted? Nothing in the law prohibits an employer from *considering*, and employers may still *inquire* about, the *circumstances* of an applicant's separation from prior employment.

In addition, employers may permissibly:

(i) base decisions and post advertisements identifying job-related qualifications, including a current and valid professional or occupational license or minimum level of education, training or experience;
(ii) limit the applicant pool or give preference to only those currently working for that employer; and
(iii) consider, or base compensation or terms and conditions of employment on, a person's actual amount of experience.

Remedies Available

Employers are liable for civil penalties of $1,000 for the first violation, $5,000 for the second violation and $10,000 for each

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subsequent violation, collectible by the New Jersey Department of Labor and Workforce Development.

There appears to be no private cause of action in New Jersey, unlike the New York City law.

What Should New Jersey Employers Do?

Clearly it would be prudent for employers to review all job advertisements and related materials and remove any language that states or suggests, in effect, that only currently employed individuals can apply or be considered.

Individuals who conduct job interviews should be made aware of the new law, and advised to eliminate job interview questions that focus on an applicant's present unemployed status. However, it certainly appears permissible to inquire about the reasons why the applicant left his/her last employment, and nothing prevents an employer from researching an applicant's background, employment history and criminal record. Of course, it is always advisable, as with all other employment discrimination protections, to focus the job interview and hiring process on the applicant's experience, training, education, skills and qualifications to perform the duties of the job, rather than questions encroaching on an individual's protected classification.

Up Next

Similar legislation is pending in 15 other states.

Conclusion

New Jersey employers should continue to make every effort to focus the job application process, and base hiring decisions, on the individual's education, skills, experience and other qualifications for the particular job sought, rather than on protected classifications or characteristics that are now extended to unemployment status.