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THE IMPACT OF THE CIVIL UNION ACT ON THE PROVISION OF INSURANCE BENEFITS IN NEW JERSEY

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Introduction

On December 21, 2006, New Jersey joined Vermont and Connecticut to become the third state in the country to permit civil unions between same-sex couples and to confer upon civil union partners the same rights and benefits conferred upon married persons under state law.¹ The Civil Union Act (CUA), effective February 19, 2007, was enacted as directed in *Lewis v. Harris*, where the New Jersey Supreme Court held that under the equal protection guarantees of the New Jersey Constitution, same-sex couples must be afforded the same legal rights and benefits as married couples under civil marriage statutes, whether by "civil union" or "marriage."²

The Legislature responded by adopting the CUA, which is intended to provide civil union couples with the "same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."³ This expressly includes all benefits, protections and responsibilities granted under the "laws relating to insurance, health and pension benefits."⁴

New Jersey also joined a handful of other states when, in conjunction with the adoption of the CUA, the Legislature amended the state's Law Against Discrimination to include in its protections civil union partners from discrimination based on civil union status.⁵ 10:5-12.

Background

Effective July 10, 2004, New Jersey enacted a Domestic Partnership Act (DPA) to create a statewide domestic partnership registry in order to protect the rights of certain couples by extending to them a "subset" of the benefits of marriage.⁶ Under the DPA, unmarried, same-sex couples ages 18 years and older and opposite-sex couples ages 62 years and older could register as domestic partners. The DPA explicitly stated that same-sex couples could not marry.

Upon the enactment of the CUA, a same-sex couple who entered into a registered domestic partnership prior to February 19, 2007, the effective date of the Act, may remain domestic partners and continue to obtain the more limited rights and benefits accorded domestic partners, or may enter into a civil union. Domestic partnership does not convert automatically into a civil union, although entry into a civil union automatically terminates a domestic partnership. And, with the enactment of the CUA, the opportunity to register as domestic partners in New Jersey now is available only to same-sex or opposite-sex couples, ages 62 years and older.⁷

Unlike the DPA, which provides that domestic partner benefits are optional, the CUA mandates that "civil union couples *shall* have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."⁸

The Applicability of the CUA

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The CUA recognizes civil unions entered in New Jersey, as well as civil unions, same-sex marriages and certain domestic partnerships entered in other jurisdictions.⁹ Further, there are no residency requirements in order to enter into a civil union in New Jersey. If, however, an individual's state of residence is among the majority of states which has a so-called "defense of marriage" law, barring the marriage of same-sex couples, a New Jersey civil union of out-of-state residents is unlikely to be recognized in that state.

Moreover, the federal Defense of Marriage Act (DOMA) defines "marriage" as the union of one man and one woman and provides further that no state is required to give legal effect to a same-sex marriage permitted in another state---despite a state's obligation to recognize and give effect to marriages legally performed in other states under the Full Faith and Credit Clause of the United States Constitution.¹⁰ As a result, there is some confusion as to the interplay of state and federal laws.

To add to the confusion, rights governed exclusively by federal law, such as the Employment Retirement Income Security Act of 1974, as amended (ERISA), are unaffected by the CUA, meaning that federal law continues to apply. Under federal law, employers may elect whether and to what extent to add insurance coverage for domestic partners. Under New Jersey law, however, insurance policies that provide coverage for a spouse *must* provide coverage for a civil union partner. Thus, while it is clear that civil union partners have the same rights to insurance benefits as spouses under state law, the extent of those rights is not readily apparent when governed by federal law.

The Regulatory Response

New Jersey's Department of Banking and Insurance has not yet adopted regulations implementing the CUA. The Commissioner has, however, issued Bulletin 07-04, to inform all interested parties that:

- Beginning February 19, 2007, all plans that include dependent coverage should be amended or administered to provide coverage to civil union couples. Coverage should not be deferred until the plan renewal date. Carriers should provide an opportunity to employees to make an election to cover a dependent acquired through a civil union on or after February 19, 2007, in the same manner as provided to cover a dependent acquired through a marriage.
- The Act does not alter federal law, which confers marriage rights and privileges to opposite-sex married couples only.
- A contract that covers spouses will, as of February 19, 2007, cover civil union partners. For example, a group life contract that allows a covered employee to elect to buy life insurance or coverage for his or her spouse must be read as allowing an employee with a civil union partner to purchase coverage for his or her partner.
- Unlike the DPA, the CUA *requires* employers to add coverage for civil union partners.

Additionally, in response to numerous inquiries received, the Executive Director of New Jersey's Small Employer Health (SEH) Benefits Program issued Advisory Bulletin 07-SEH-01, to clarify that:

- While benefit mandates generally apply to inforce plans on the first renewal on or after the effective date of the mandate, the rights set forth in the CUA are effective on February 19, 2007. Thus, coverage should not be deferred until the plan renewal date, and as of February 19, 2007, carriers should provide an opportunity to employees to make an election to cover a dependent acquired through a civil union on or after February 19, 2007 in the same manner as that provided to cover a new spouse.
- Since federal law confers marriage rights and privileges to opposite-sex couples only, a civil union partner is not a qualified beneficiary under the Consolidated Omnibus Budget Reconciliation Act (COBRA), and the dissolution of a civil union is not a qualifying event under COBRA.

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However, New Jersey's "mini-COBRA" law applies to every health insurance policy or contract issued to a small employer in New Jersey and requires continued health coverage to be offered to the spouses of employees of small employers, as defined therein.¹¹ In the event of the dissolution of a civil union, the former civil union partner is entitled to elect continuation in the same manner as a former spouse in the event of a divorce. Continuation under New Jersey law typically is extended to small employers with fewer than 20 employees, because continuation rights are provided under COBRA to employers with 20 or more employees. COBRA does not apply to same-sex couples. Therefore, benefits will be provided to civil union couples by employers with 2-50 employees, but not to employers with over 50 employees.

- Although the DPA affords employers an option to elect whether to add coverage for domestic partners to their plan, the CUA does not.
- The SEH Board will be proposing amendments to the standard health benefits plans to address the requirements of the CUA. Until the proposed amendments have been adopted, the Conformity with Law provision contained in each of the standard plans ensures that all carriers may administer all plans in compliance with the CUA.

Presumably, all insurance policies and contracts issued in New Jersey are amended by operation of law to provide the same benefits for married persons and civil union partners. Whether New Jersey will require insurers to adopt mandatory Civil Unions Endorsements, or to refile forms to comply with law, like Vermont has done, or simply indicate that existing forms will be construed pursuant to the intent of the law, as Connecticut has done, remains to be seen.

Insurance "Benefits, Protections and Responsibilities" Under New Jersey Law

To the extent that New Jersey insurance laws address the "benefits, protections and responsibilities" of spouses, as stated, the CUA requires that these provisions apply equally to civil union partners. The Commissioner, in Bulletin 07-04, has advised insurers that the CUA requires that insurance coverage be offered to civil union partners in the same manner as offered to spouses. Although the CUA requires equal coverage for all insurance policies issued in the state, it is unlikely to withstand a challenge on ERISA preemption grounds, and Bulletin 07-04 recognizes that the Act does not alter federal law.

ERISA generally does not preempt insurance laws requiring carriers to provide particular benefits in policies issued within the state.¹² However, self-insured plans, which are financed by employers (rather than purchased from a state-regulated insurer), and unions are federally regulated. In such cases, ERISA preempts the application of state laws relating to employee benefit plans. Therefore, state insurance laws do not apply, and the terms of the plan, rather than state law, govern. Nonetheless, an employer with a self-insured plan electing not to cover civil union partners may be subject to a potential discrimination claim under state law.¹³

Moreover, while the CUA requires equal coverage for civil union partners where coverage for spouses is provided, New Jersey law does not require private employers to offer insurance to any employee, let alone the dependents of their employees. Although the CUA provides that laws relating to insurance and health benefits shall apply to civil union couples, no law, including the CUA, requires that dependents be covered. It should be assumed that where benefits are offered voluntarily, state law will apply, so that if spouses are covered, civil union partners must be covered as well.

Whether the cost of coverage must be the same for spouses and for civil union partners is an open issue. One of the insurance "benefits" married persons receive, for example, is lower automobile insurance rates. Civil union opponents claim an asserted negative impact on the insurance rates of heterosexual couples because of the risk characteristics of homosexuals. Despite the sturm und drang, Blue Cross/Blue Shield of Vermont

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advised Vermont's Civil Union Review Commission that civil unions have had such an "imperceptible impact," that it does not even track this data. Vermont has adopted regulations which permit rate differences where supported by relevant actuarial data or actual cost experience, but marketing discounts must be equally available.

In any event, there is no question that for individuals who live and work in New Jersey and are covered by medical, dental, vision and other policies issued by insurers authorized to do business in New Jersey, such policies and contracts must comply with the CUA. New Jersey residents employed by companies headquartered in states other than New Jersey, or insured by companies based in states other than New Jersey, reportedly have experienced some difficulties in obtaining insurance benefits for civil union partners. This is a potential concern, especially where a group policy is issued for delivery in a state which has enacted a defense of marriage law prohibiting the recognition of same-sex unions.

In sum, the specific impacts of the CUA on the provision of insurance in New Jersey, while not exhaustive, include the following:

- *Liability:* Where the "named insured" includes a spouse, it also must include a civil union partner, and all benefits extended to spouses must be extended to civil union partners.
- *Health:* Health insurers issuing policies under the state's insurance laws must offer coverage to civil union partners if coverage is offered to spouses. Most self-funded health plans, however, are likely to receive ERISA preemption. Further, benefits under New Jersey's "mini-COBRA" law are required for civil union partners for *all* small employers, so that civil union partners of employers of up to 50 employees will receive COBRA benefits under New Jersey law.
- *Life:* Life insurance policies with survivor benefit clauses typically are governed by state law, so that civil unions must be treated the same as marriage. (Annuities governed by federal law are excepted.)
- *Workers' Compensation:* Civil union partners expressly are entitled to workers' compensation benefits, including payment of back wages and survivors' benefits under the CUA.¹⁴
- *Title:* Civil union partners may own real estate in the same manner as husband and wife, including as tenants by the entirety. This raises important issues under state law for title insurers issuing affidavits of title, who should request civil union status, and for lenders, whose security interests could be impaired.

Finally, under the CUA, civil union partners have standing to sue for all causes of action related to or dependent upon spousal status, including actions for wrongful death, emotional distress, loss of consortium, and any and all other torts or actions under contracts reciting, related to, or dependent upon spousal status. This impacts the risks assumed by insurers as well as claims and claims handling procedures, among other matters.¹⁵

Conclusion

While the CUA broadly requires all state insurance, health and pension benefits granted to spouses be granted to civil union partners, the impact of federal law on such benefits must be evaluated. If insurance benefits are denied to a civil union partner on the basis of federal law, an insurer operating prudently should notify the civil union partner of the specific reason for the declination and maintain a record of such declination in the event of a market conduct examination or potential lawsuit.

Endnotes

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1. *N.J.S.A. 37:1-28 et seq.* An "Act Relating to Civil Unions" was adopted by Vermont effective January 1, 2000, *see Vt. Stat. Ann. tit. 15, § 1204(a)*, and by Connecticut in 2005, *see Conn. Gen. Stat. Ann § 46b-38nn*. As of the drafting of this article, New Hampshire legislation to allow civil unions was pending. *See HB 437 (2007)*.
2. 188 *N.J. 415 (2006)*. Connecticut was the first state to voluntarily adopt such legislation; Vermont, like New Jersey, acted in response to court decision. *See Baker v. State, 744 A.2d 864 (Vt. 1999)*.
3. *N.J.S.A. 37:1-31*.
4. *N.J.S.A. 37:1-32*.
5. *N.J.S.A.*
6. *N.J.S.A. 26:8A-1 et seq.*
7. *N.J.S.A. 26:8A-4.1*.
8. *N.J.S.A. 37:1-31 (emphasis added)*.
9. *N.J.S.A. 37:1-34*. In accordance with the CUA, New Jersey recognizes civil unions in Connecticut and Vermont, as well as government-sanctioned, same-sex relationships in Great Britain, New Zealand, Iceland and Sweden; same-sex marriages in Massachusetts (the only state to recognize same-sex marriages), Belgium, Canada, The Netherlands, South Africa and Spain; and domestic partnerships formed in California. It is the nature of the rights conferred, not the name of the relationship selected, which controls the benefits afforded under New Jersey law. *NJ Atty. Gen. Op. No. 3-2007 (Feb. 16, 2007)*. The Connecticut Attorney General concluded that the state would recognize civil unions and domestic partnerships, but *not* same-sex marriages because Connecticut's public policy does not permit same-sex marriages. *Conn. Atty. Gen. Op. No. 2005-004 (Sept. 20, 2005)*.
10. 28 *U.S.C. §1738C*. *See also 1 U.S.C. § 7*.
11. *N.J.S.A. 17B:27A-27*.
12. *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)* (Massachusetts statute requiring certain insurance policies, including group employee health care plans, to provide minimum mental health care benefits was not preempted by ERISA because law regulated insurers, not employers). *But see Egelhoff v. Egelhoff, 532 U.S. 141 (2001)* (suggesting that state laws regarding same-sex marriage would be preempted if they affect benefit plan administration).
13. In order to attempt to address this issue, some employers voluntarily have allowed employees to choose between a self-insured health plan, which is federally regulated, and a health maintenance organization, which covers civil union partners.
14. *See N.J.S.A. 37:1-32i; N.J.S.A. 34:15-1 et seq.*
15. *N.J.S.A. 37:1-32b*.