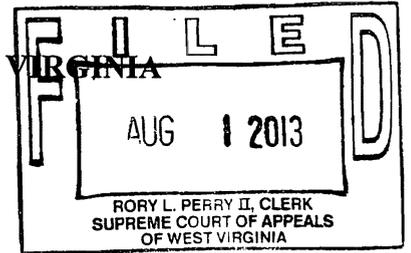


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**National Union Fire Insurance Company  
of Pittsburgh, Pa., Third-Party Defendant Below,  
Petitioner,**

v.

No. 13-0215

**Dan Cava, Steven Hall, and Dan's Car World,  
LLC, d/b/a Dan Cava's Toyota World,  
Third-Party Plaintiffs Below, Respondents.**

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**Petitioner's Reply Brief**

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Comes now the Petitioner National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), by counsel, and hereby files its Reply in support of Petitioner’s Brief. In support of its brief, National Union states as follows:

**ASSIGNMENTS OF ERROR**

National Union reiterates the five assignments of error set forth in its Petitioner’s Brief; however, for the purposes of this reply brief, National Union will address the Appellees responses to National Union’s reformulated assignments of error as they appear to be presented by Appellees in section “VII. Discussions”, paragraphs “B. – F.” in Brief of the Appellees, Dan Cava, Steven Hall and Dan’s Car World, LLC D/B/A Dan Cava’s Toyota World (“Appellees’ Brief”). As the Appellees have done little more than essentially restate and repackage their very same arguments (word for word) as contained in their response to National Union’s Motion for Summary Judgment in the court below, the task of responding in a cogent fashion is somewhat more difficult but not unmanageable. (A.R. 0440-0594)

**REBUTTAL OF APPELLEES’ STATEMENT OF FACTS**

National Union incorporates herein its Statement of the Case as set forth in its opening brief. However, in response to Appellees “Statement of Facts” set forth in the Appellees’ Brief, the National Union asserts that these asserted “facts” are disputed, many of which are devoid of support from the record below. Otherwise, it appears that Appellees Statement of Facts [sic] does not “contain a concise account of the procedural history of the case and a statement of facts of the case that are relevant to [Petitioner’s] assignment of error.” W. Va. R. App. P., Rule 10(c)(4). For example, the “facts” do not address issues of coverage under the Insuring Agreement section of the Policy. The “facts” asserted allege “ambiguities” not specifically identified by the Circuit Court. The “facts” asserted allege representations of the Appellees’

expectation of coverage, all without support. All of this was previously addressed and brought to the Circuit Court's attention in National Union's filing of Third Party Defendant, National Union Fire Insurance Company of Pittsburgh, PA's Objections to proposed Order of Third Party Plaintiffs, Granting Judgment, as a Matter of Law, with Respect to Insurance Coverage. (A.R. 0694 – 0704)

The essence of this matter is the Appellees failure to report a defined Claim under the "claims-made-and-reported" Policy at issue during the Policy Period in which the Claim was made, 2007. The Appellees go to great lengths to ignore the proverbial "elephant in the room" by not addressing their initial failure to comply with the terms of Insuring Agreement of the Policy (thereby initially establishing coverage) and by ignoring the clear definition of a Claim under the Policy.

### ARGUMENT

**A. Appellees Ignore the Fact That the Insuring Agreement was Never Triggered by a Claim Made and Reported During the Policy Period.**

Appellees argue in their brief that National Union has the burden to prove the application of exclusions in the Policy. Specifically, Appellees erroneously ignore the Policy's Insuring Agreement by focusing on the duty to defend and the principle that an insurer must prove facts necessary to exclude coverage. However, National Union denied Appellees' claim because Appellees failed to comply with the clear and conspicuous reporting terms of the Insuring Agreement as contained within the "claims-made-and-reported" Policy issued to Appellees. Moreover, the Circuit Court erroneously agreed with Appellees in this regard and found that coverage applied to Fluker's Claim against Appellees.

Although National Union addressed the Policy's exclusionary language in its Motion for Summary Judgment below, Appellees never met their initial burden of proving coverage under

the Policy's Insuring Agreement and the Circuit Court did not address any of the exclusionary language. As mentioned in National Union's brief, National Union denied coverage on the grounds that the Claim was not made and not reported during the Policy Period as mandated by the Policy's Insuring Agreement.

In an insurance coverage dispute such as this, the type of insurance coverage dispute at issue must first be determined so that the correct legal standard can be applied. Here, the initial dispute to be determined by this Court, before turning to other Policy conditions or exclusions, is whether the insured Appellees can prove that the terms of the **Insuring Agreement itself** were satisfied in order to trigger coverage for Fluker's Claim against the Appellees.

In its response brief, Appellees fail to address the requirements of the Policy's Insuring Agreement and the marked distinctions associated with a "claims-made-and-reported insurance policy." Additionally, Appellees expect this Court to find coverage based on Appellees' assertion of exclusionary Policy language (which was never even identified or addressed by Appellees or the Circuit Court's Order) and without regard to an initial finding of coverage under the Insuring Agreement.

In its Order, the Circuit Court stated that "[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." (A.R. 0717) Moore v. CNA Ins. Co., 214 W. Va. 286, 599 S.E.2d 709 (2004). The Court also noted that exclusionary policy language is strictly construed against insurers. (A.R. 0717) *See*, Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 73, 356 S.E.2d 488 (1987) *overruled on other grounds by* Potesta v. U.S. Fid. & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998). The Court further noted that an insurer's duty to defend is broader than the duty to indemnify and must be liberally construed when a question exists

regarding an insurer's obligations. (A.R. 0717) *See, Tackett v. Am. Motorist Ins. Co.*, 213 W Va. 524, 584 S.E.2d 158 (2003).

However, Appellees, and the Circuit Court, misconstrued the burden of proof at issue in this case. Although the insurer does bear the burden of proving exclusions, Appellees bear the burden of first proving coverage under the Policy's Insuring Agreement. National Union denied coverage because the basic requirements of the Insuring Agreement were not satisfied by Appellees. This Court has clearly held that the insured bears the initial burden of "prov[ing] both the existence of an applicable insurance contract and its material terms." Syl. pt. 1, Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire and Marine Ins. Co., 224 W. Va. 228, 682 S.E.2d 566 (2009). "It is only when the plaintiffs have established a *prima facie* case of coverage that the burden of production shifts to the defendants." Payne v. Weston, 195 W.Va. 502, 506, 466 S.E.2d 161, 165 (1995). Clearly, that burden was not met here as Appellees never initially established a *prima facie* case of coverage under the Insuring Agreement.

The first page of the Policy (Declarations) states, in pertinent part, conspicuously and in an all capitalized, bolded font that:

**COVERAGE WITHIN THIS POLICY IS GENERALLY LIMITED TO LOSS FROM CLAIMS FIRST MADE AGAINST INSURED DURING THE POLICY PERIOD AND REPORTED TO THE INSURER AS THE POLICY REQUIRES.**

(A.R. 0324) The Insuring Agreement of the Policy's EPL (Employment Practices Liability)

Coverage Section states as follows (in relevant part):

With respect to the Insuring Agreement and the Defense Provisions of this Clause 1, solely with respect to **Claims** first made during the **Policy Period** or the **Discovery Period** (if applicable), and reported to the **Insurer** pursuant to the terms of this policy, and subject to the other terms, conditions and limitations of this policy, this **EPL Coverage Section** affords the following coverage:

This **EPL Coverage Section** shall pay the **Loss** of an **Insured** arising from a **Claim** first made against such **Insured** for any **Wrongful Act**.

(A.R. 0353)

The Policy specifically defines the term **Claim** to include:

“(iii) [a]n administrative or regulatory investigation when conducted by the Equal Employment Opportunity Commission (“**EEOC**”), or similar state, local or foreign agency, which is commenced by the filing of a notice of charges, service of a complaint or similar document of which notice has been given to the Insured.”

(A.R. 0353) Within the Policy, the reporting of Claims as a condition precedent for coverage under the Policy is reiterated:

The **Insureds** shall, as a condition precedent to the obligations of the **Insurer** under this policy, give written notice to the **Insurer** of any **Claim** made against an **Insured** or a **Crisis Management Event** as soon as practicable after: (i) the **Company’s** Risk Manager or General Counsel (or equivalent position) first becomes aware of the **Claim**; or (ii) the **Crisis Management Event** commences[.]

(A.R. 0334)

Further, the Policy requires written notice of a claim during the Policy Period or 90 days thereafter. (A.R. 0334) Thus, the Insuring Agreement of the Policy is triggered only when a Claim, including any EEOC Charge, is made during the policy period and reported in accordance with the requirements of the Policy. Here, Appellees never proved that Fluker’s Claim against them was made and reported during the Policy Period to trigger coverage under the Insuring Agreement. In fact, it is clear from the record that Fluker’s Claim against Appellees was first made in July 2007, prior to the inception date of the Policy, when Fluker filed his EEOC Charge.

(A.R. 0543-0544) The EEOC Charge is defined as a “Claim” under the Policy. (A.R. 0353)

Because Appellees never proved that Fluker’s Claim against them was made and reported during the Policy Period to trigger coverage under the Insuring Agreement, an examination of

the exclusionary language of the Policy should not take precedence and National Union's burden to prove such exclusions is not triggered.

Moreover, even if Appellees meet their burden under the Insuring Agreement, exclusions do exist within the Policy, which apply to exclude coverage for the Claim made by Fluker against Appellees. In other words, even though Appellees were not initially entitled to coverage for Fluker's Complaint under the "claims made and reported" provision of the Insuring Agreement, coverage is also excluded under the Policy. Specifically, Exclusion 3(c) of the Policy would apply to preclude coverage for Fluker's Claim against Appellees.

Exclusions 3(c) of The Policy states as follows:

The insurer shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an **Insured**:

Alleging, arising out of, based upon or attributable to, as of the **Continuity Date**, any pending or prior: (i) litigation; or (ii) **EEOC** (or similar state, local or foreign agency) proceeding or investigation of which an **Insured** had notice, or alleging any **Wrongful Act** which is the same or **Related Wrongful Act** to that alleged in such pending or prior litigation or EEOC (or similar state, local or foreign agency) proceeding or investigation.

(A.R. 0356-0357)

Exclusion 3(c) excludes coverage for Claims that, as of February 27, 2009, allege or arise out of a prior EEOC investigation of which the insured had notice, or alleging any wrongful act (or related wrongful act) which is the same as that alleged in the prior EEOC investigation.

(A.R. 0344-0345) Clearly, Fluker's 2009 lawsuit alleged or arose out of the 2007 EEOC Charge of which Appellees had notice in 2007 and which alleged the same wrongful acts as those alleged in the EEOC Charge. Thus, even if Appellees had established coverage under the Insuring Agreement, coverage for Fluker's Claim is excluded by Exclusion 3(c). As a result, this

Court should reverse the Circuit Court's denial of summary judgment for National Union in regard to the coverage issues in this case.

**B. The Lindsay case is applicable to the instant case and Appellees' analysis of that case is misconstrued because the EEOC Charge and April 2009 lawsuit in the instant case constitute the same Claim as defined by the Policy.**

Appellees argue that the EEOC Charge and the April 2009 lawsuit are completely separate claims. They also attempt to distinguish the recent memorandum decision of Lindsay v. Attorneys Liab. Protection Soc'y, Inc., 2013 WL 1776465 (W. Va. April 25, 2013) by arguing that it does not support National Union's denial of coverage in the instant case. First, Appellees attempt to create an issue by stating that National Union did not appropriately cite the decision in its brief. However, National Union clearly indicated that the citation was a memorandum decision when it cited the case in its brief. Appellees are simply trying to distract this Court's attention from the fact they do not have a substantive argument to rebut the application of this Court's memorandum decision in Lindsay.

Second, Appellees argue that the Lindsay case is different because the policyholder in that case waited two years before notifying the insurer of the claim, and that in the instant case, Appellees immediately notified National Union of the filing of Fluker's April 3, 2009 Complaint. However, Appellees' argument is flawed because, as explained in National Union's brief and above, the 2007 EEOC Charge constituted a Claim under the Policy, yet Appellees failed to provide written notice to National Union of the Claim (the EEOC Charge) until April 2009 **after the lawsuit was filed**. Thus, this case is analogous to the Lindsay case in that Appellees did not notify National Union of a Claim for almost two years.

Appellees also argue that Lindsay is distinguishable because here Appellees are not seeking coverage for a lawsuit that was filed against them two years before the notice was

provided to National Union. They argue that the EEOC Charge filed in July 2007 is completely separate from the April 2009 lawsuit. However, Appellees' argument misconstrues the facts of this case and completely ignores the Policy's language and requirements. As explained in National Union's brief, the Policy precludes coverage under the Insuring Agreement for **claims not made and reported** during the policy period (a critical requirement of and "claims-made-and-reported" insurance policy).

The Claim was actually first made in July 2007 when Fluker filed his EEOC Charge, in which the allegations of the EEOC charge were essentially repeated in his April 2009 lawsuit. The July 2007 EEOC Charge included claims for wrongful termination, racial discrimination and retaliation in connection with the April 2007 employee altercation. The April 2009 lawsuit arises from the same transaction and/or occurrence and alleges the same wrongful conduct as alleged in the prior EEOC investigation.

The Circuit Court agreed that "the [EEOC] claim and the [civil lawsuit] arise from the same transaction and occurrence" yet then incongruently found "they constitute separate and distinct claims." (A.R. 0710) This is akin to saying "it's the same, but different." Nevertheless, the Policy contemplates this supposed distinction and easily reconciles it under the terms and conditions of Policy language defining "Wrongful Act" (something that the Circuit Court did not address).<sup>1</sup> Also, while the statute of limitations may have run on Mr. Fluker's EEOC Charge, it clearly did not preclude his civil action against the Appellee's for damages arising out of the same conduct. This is all the more reason that Appellees' were obligated to report the EEOC Charge as a Claim to their insurer, National Union. However, they did not. Regardless of the representation of Appellees that they are not seeking coverage for the 2007 EEOC Charge that

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<sup>1</sup> "Wrongful Act" means any actual or alleged (I) **Employment Practices Violation**, or (II) **Third Party Violation**. (A.R. 0356) Likewise, the definition of "Employment Practices Violation" is set forth in the Policy. (A.R. 0354)

was resolved, the Policy required them to report the EEOC Charge as a Claim to National Union. This case is, in fact, very similar to the Lindsay case and National Union correctly denied coverage. Accordingly, this Court should reverse the Circuit Court's finding that the April 2009 lawsuit was a new claim and rule that coverage does not apply.

**C. The Insurance Policy at Issue is Not Ambiguous.**

Appellees argue, and the District Court found, that the Policy at issue is ambiguous and must be construed in favor of coverage. However, Appellees **did not** argue, and the Circuit Court **did not** find that the Insuring Agreement of the Policy is ambiguous. In addition, neither Appellees nor the Circuit Court cited any section of the Policy as ambiguous. Instead, Appellees have misconstrued the Policy's exclusionary language, which does not even apply in this case because Appellees failed to prove they tendered the Claim in the manner required by the Insuring Agreement, to erroneously assert that the Policy is ambiguous.

Appellees, and the Circuit Court's Order, cite Tackett v. Am. Motorist Ins. Co., 213 W. Va. 524, 584 S.E.2d 158 (2003) in support of Appellees' assertion that an ambiguous policy must be construed in favor of the insured and that National Union must provide a defense under the Policy. However, Appellees' and the Circuit Court's reliance upon Tackett is misplaced. In fact, Tackett applies when a question of fact exists in regard to whether a claim is covered. Instead of pointing to Policy language they believe is ambiguous, Appellees cite only one part of one section of the Policy which they state is "particularly confusing." This section is related to the duty to defend, which is not relevant to this case, and states:

The Insurer does not assume any duty to defend; provided, however, the Named Entity may at its sole option tender to the Insurer the defense of a Claim for which coverage is provided by this EPL Coverage Section in accordance with Clause Six of this EPL Coverage Section. Regardless of whether the defense is so tendered, the Insurer shall advance Defense Costs of such Claim, excess of the applicable Retention amount, prior to its final disposition.

*See*, Brief of the Appellees, Dan Cava, Steven Hall and Dan's Car World, LLC D/B/A Dan Cava's Toyota World, at page 20.

First, the Policy at issue is not a "duty to defend" policy. Second, Appellees have taken this part of Section 6 completely out of context because this Section relates to the duty to defend after it is determined that coverage exists and in the limited situation where an insured has tendered a defense as described in Section 6, which did not happen here. Clearly, Section 6 of the Policy is not ambiguous. A duty to defend may exist only if coverage exists for Plaintiff Fluker's claims against Appellees. Third, the Insuring Agreement of the Policy states that "the Insurer shall, in accordance with and subject to Clause 6 of the EPL Coverage Section, advance Defense Costs of Such Claim prior to its final disposition." (A.R. 0353) Paragraph 6 also states that National Union does not assume any duty to defend. (A.R. 0359) Furthermore, the second paragraph of Clause 6 provides that National Union shall assume the defense, but only in limited situations which are set forth in that paragraph and which did not occur in this case. (A.R. 0359)

However, the Circuit Court failed to address Appellees initial burden of "prov[ing] both the existence of an applicable insurance contract and its material terms." Syl. pt. 1, Camden-Clark Mem'l Hosp. Ass'n, 224 W. Va. 228, 682 S.E.2d 566 (2009). This determination is to be made pursuant to the terms and conditions of Policy's Insuring Agreement. Appellees' failed to cite to the entire paragraph of the defense provision they believe is ambiguous and completely took it out of context as it clearly does not apply because Appellees failed to prove that they reported the Claim against them within the Policy period. Appellees' Brief completely fails to address this issue nor does the Circuit Court's Order address this initial coverage hurdle.

Without explanation or reason, the Circuit Court found that coverage applied and that "exclusionary language of the insurance policy" was to be "strictly construed" so as "the purpose

of providing indemnity not be defeated.” (A.R. 0693)<sup>2</sup> Likewise, the Circuit Court provided little guidance in its Order when it did not identify contradictory or otherwise “ambiguous” provisions within the Policy.<sup>3</sup> In fact, the Court did not cite to any section of the Policy that it deemed ambiguous.

Nevertheless, there is no coverage for the claims against Appellees for the reasons explained above and in National Union’s brief. Moreover, the policy clearly “states that the **Insureds** shall defend and contest any **Claim** made against them.” (A.R. 0266) There is nothing unclear or ambiguous about this language. It also cannot be unclear or ambiguous to a party that never presented any evidence of reading the Policy.<sup>4</sup> Thus, the Policy cannot be ambiguous and the Circuit Court erred in failing to grant National Union summary judgment in regard to the coverage issues. This Court should reverse that decision and find that no coverage exists.

**D. The Non-Existence of a Pending or Potential Claim at the time the Policy was Issued is Irrelevant Because Plaintiff Fluker Civil Complaint Alleges the Same Wrongful Acts of Wrongful Termination and Discrimination to those Alleged in the EEOC Charge.**

Appellees argue that, at the time of the February 2009 issuance of the Policy, there were no pending or potential claims because the EEOC Charge had been dismissed and the statute of limitations on that claim had expired. However, Appellees’ argument is completely irrelevant to the coverage issues in this case. As explained in National Union’s brief, the Insuring Agreement of the Policy’s EPL Coverage Section Policy provides coverage for a Claim, including any EEOC Charge, when the Claim is made during the Policy Period and reported in accordance with

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<sup>2</sup> The coverage for Appellees was not “excluded” by exclusionary provisions; rather coverage was not afforded as a result of Appellees failure to comply with the Insuring Agreement. (A.R. 0400)

<sup>3</sup> The Circuit Court did identify one provision within the Policy regarding the “duty to defend.”

<sup>4</sup> “A party to a contract has a duty to read the instrument.” Syl. pt. 4, Am. States Ins. Co. v. Surbaugh, 11-1186, 2013 WL 490809 (W. Va. Feb. 6, 2013).

the requirements of the Policy. (A.R. 0353) Clearly, Fluker's claims of wrongful termination, racial discrimination and retaliation in connection with the April 2007 employee altercation resulting in the EEOC Charge (and as later again alleged in Plaintiff Fluker's Complaint) was a Claim as defined by the Policy and thus were subject to the reporting requirement of the Policy.

The Policy specifically defines the term **Claim** to include:

“(iii) [a]n administrative or regulatory investigation when conducted by the Equal Employment Opportunity Commission (“EEOC”), or similar state, local or foreign agency, which is commenced by the filing of a notice of charges, service of a complaint or similar document of which notice has been given to the Insured.”

(A.R. 0353) It did not matter whether the EEOC Charge was pending at the time of the February 2009 Policy issuance or not. Further, it did not matter whether there were any potential claims at the time the Policy was issued. The Policy clearly required that, as a condition precedent to coverage, Appellees were required to provide written notice of the EEOC Charge as soon as practicable, which would have been after receipt of the EEOC Notice in August 2007, not after the filing of the 2009 lawsuit. However, Appellees failed to provide any such notice, written or otherwise.

**E. Appellees failed to meet their burden of establishing coverage under the Policy pursuant to the terms and conditions of the Insuring Agreement. Further, National Union was not Required to Show Prejudice Because the Policy at Issue was a “Claims-Made-and-Reported” Policy, Not an Occurrence Policy.**

In their Response, Appellees argue that the Circuit Court correctly ruled that Appellees were entitled to coverage because National Union did not show any prejudice from Appellees' failure to report to National Union that Fluker filed an EEOC Charge in 2007. However, this argument is flawed and the Circuit Court was incorrect because initially, the Circuit Court erred in finding coverage in direct contradiction to terms and conditions of the Insuring Agreement and

secondly, there is no prejudice requirement in regard to “claims-made and reported” policies like the Policy at issue herein. Appellees seek to distract this Court from recognizing Appellees contractual obligations under the “claims-made and-reported” requirements of this Policy. Appellees argue that National Union must show prejudice resulting from Appellees’ failure to report the EEOC Charge in order to deny coverage, yet Appellees admit that West Virginia courts have not addressed the issue of prejudice to an insurer in regard to “claims-made-and-reported” policies. Further, the cases relied upon by Appellees relate to completely different “occurrence” policies, not “claims-made and reported” policies (as herein), and have no bearing on the Policy at issue in this case.

While West Virginia courts have not specifically addressed this issue, this Court has clearly recognized the distinction between “occurrence” policies and “claims-made” policies. *See, Auber v. Jellen*, 196 W. Va. 168, 175, 469 S.E.2d 104, 111 (1996) (noting that an “occurrence” policy protects a policyholder from liability for any act done while the policy is in effect, whereas a ‘claims-made’ policy protects the holder only against claims made during the life of the policy.” *quoting* 7A J. Appleman, Insurance Law and Practice § 4503 at 90 (Berdal ed. 1979; Supp. 1995)). Moreover, the majority of courts that have addressed the notice-prejudice rule have held that, although it applies to late notice in occurrence policies, it does not apply to claims-made-and-reported policies when notice is given outside the policy period. In other words, most courts hold that insurers do not need to show prejudice in order to deny coverage based on late notice under “claims-made and reported” policies. *See, Driskill v. El Jamie Marine, Inc.*, No. 87-4136, 1988 WL 93606 (E.D. La. 1988); *MGIC Indem. Corp. v. Cent. Bank of Monroe, La.*, 838 F.2d 1382 (5<sup>th</sup> Cir. 1988) (stating that an insured’s failure to give notice of a claim when required to do so as a condition precedent to coverage, regardless of

whether the insurer shows actual prejudice, may bar recovery for such claims); Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174 F.3d 653, 569 (5<sup>th</sup> Cir. 1999) (stating the notice provision in a claims-made policy is an element of the covered risk, and to require an insurer to prove prejudice from untimely notice could result in an unbargained-for expansion of coverage); Burns v. Int'l Ins. Co., 929 F.2d 1422 (9<sup>th</sup> Cir. 1991); Am. Home Assur. Co. v. Int'l Ins. Co., 684 N.E.2d 14 (N.Y. App. 1997).

In Janjer Enters., Inc. v. Exec. Risk Indem. Inc., 97 Fed.Appx. 410, 200 WL 1011004 (4<sup>th</sup> Cir. 2004), the plaintiff company, Janjer, sued its insurer alleging a breach of contract due to the insurer's refusal to defend and indemnify Janjer in a sexual harassment lawsuit brought by a Janjer employee. Id. at \*41. In that case, Janjer had a "claims made plus reporting" employment practices liability policy rather than a strict "claims made" policy. The policy contained a notification of claim provision stating that "Janjer was required to provide [the insurer] with written notice of any claim first made against Janjer during the policy period 'as soon as practicable and in no event later than sixty . . . days after such Claim is first made.'" Id. at \*412.

In March 2001, Janjer received notice of an EEOC complaint filed by an employee stating she was subjected to gender discrimination. Id. at \*412. The EEOC issued a right-to-sue letter in August 2001. Id. In October 2001, the employee sued Janjer based on the misconduct alleged in the EEOC complaint. Id. Janjer then requested that the insurer defend and indemnify it against in the suit. Id. However, the insurer denied coverage, stating that the suit was related to the EEOC claim, which was considered under the policy to be first made in March 2001, and no written notice had been provided until October 2001; therefore, Janjer had failed to comply with the policy's notification of claim provision, which was considered necessary for coverage to be provided. Id. at \*412-413.

The United States District Court for the District of Maryland granted summary judgment to the insurer, finding that it did not have to show actual prejudice because the policy was a “claims-made and reporting” policy and was exempt from the state’s prejudice requirement. Id. at \*413. On appeal, the Fourth Circuit Court of Appeals affirmed the District Court’s ruling, finding that the policy was a “claims made and reporting” policy, which policies are not subject to the prejudice requirement, as opposed to a “claims made” policy, which only require that a claim be made against the insured during the policy period and which are subject to prejudice requirement. Id. at \*414-415. Thus, the Fourth Circuit held that the insurer properly disclaimed coverage under the policy. Id. at \*415.

In the instant case, the Policy at issue is also a “claims-made-and-reported” policy, not just a “claims made” policy. As mentioned in National Union’s brief, the Policy’s Insuring Agreement requires that a Claim be “first made during the Policy Period...and reported to the Insurer pursuant to the terms” of the Policy. Those “terms” include that in all events a Claim must be reported “(i) anytime during the Policy Period or during the Discovery Period (if applicable); or (ii) within ninety (90) days after the end of the Policy Period or the Discovery Period (if applicable).” (A.R. 0334) Similar to the facts in Janjer Enterprises, here Fluker’s Claim was not made on April 3, 2009 when he filed suit. His claim was made on July 20, 2007 when he filed his EEOC Charge. Thus, similar to the insurer in Janjer Enterprises, as the Claim herein was not made during the Policy Period, National Union properly disclaimed coverage pursuant to the Policy’s Insuring Agreement.

While Appellees appear to put great stock into both the notice prejudice rule and the Circuit Court’s finding below, this matter is not a “notice” issue, rather it is a compliance issue. The issue is the Appellees’ failure to comply with the Policy terms and conditions. Nevertheless,

if this Court were to adopt the rationale of the Circuit Court, it would be in the minority of jurisdictions. As indicated in National Union's brief, the majority of jurisdictions recognize that "claims-made-and-reported" policies are important in the insurance market. Furthermore, public policy dictates that a notice prejudice rule is not conducive to "claims-made-and-reported" policies. "The purpose of the reporting requirement is to define the scope of coverage by providing a certain date after which an insurer knows it is no longer liable under the policy, and for this reason such reporting requirements are strictly construed." Resolution Trust Corp. v. Ayo, 31 F.3d 285, 289 (5th Cir. 1994).

The reporting requirements in claims made policies allow insurers to "close [their] books" on a policy when it expires, which actuarial certainty allows the attainment of "a level of predictability unattainable under standard occurrence policies." Burns v. Int'l Ins. Co., 709 F.Supp. 187, 191 (N.D.Cal. 1989), *aff'd*, 929 F.2d 1422 (9<sup>th</sup> Cir. 1991). "This heightened predictability translates into significantly lower costs to consumers." Id. Consequently, "this enables an insurer to be more precise in calculating its necessary reserves and future premiums, among other things. The notice-prejudice rule is antithetical to this type of certainty and serves as a disincentive for insurers to offer this reduced-rate coverage." Id. If an insurer is unable to rely on this assumption that a claim will be made and reported within the policy period or soon thereafter, then the insurer will be unable to sell this type of policy and insureds will not have the benefit of such an insured-friendly insurance format. Moreover, an insurer that issues a "claims-made and reported" policy should not have to prove it was prejudiced by an insured's late notice in order to deny coverage because the duty to report the claim to the insurer (by way of "written notice" in this instance) (A.R. 0334) is a condition precedent to coverage and is specifically stated as part of the Policy's Insuring Agreement. Allowing insureds to provide report claims

beyond a stated policy period constitutes an unbargained-for expansion of coverage. Therefore, Appellees' argument that a notice prejudice provision applies is misplaced and this Court should reverse the Circuit Court's denial of summary judgment for National Union in regard to the coverage issues in this case.

**F. There is No Evidence that Appellees had a Reasonable Expectation of Coverage.**

Appellees also argue, and the Circuit Court found, that the doctrine of reasonable expectations applies in favor of coverage because the policy is ambiguous. First, the Policy language is not ambiguous, as explained above. Second, Appellees presented no evidence to the Circuit Court that they had any expectation, reasonable or otherwise, that coverage would apply to Plaintiff Fluker's claims against them. According to West Virginia case law, "the doctrine of reasonable expectations is that the objectively reasonable expectations of *applicants* and *intended beneficiaries* regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Syl. pt. 1 of Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987)(emphasis added).

Appellees were the applicants and intended beneficiaries of the insurance policy at issue. However, Appellees provided no evidence that they themselves had a reasonable expectation of coverage. Appellees cite portions of insurance agent Mark Pallotta's deposition testimony to support their argument that Appellees had a reasonable expectation of coverage. However, it is undisputed that Mr. Pallotta was neither an applicant nor intended beneficiary of the policy. The Appellees were the applicants and/or intended beneficiaries of the policy. Mr. Pallotta's expectations, reasonable or otherwise, are irrelevant. Moreover, Appellees have never alleged that Mr. Pallotta conveyed to either Dan Cava, or any other Appellee, any information that

created any expectation that the Policy covered Plaintiff Fluker's claims against them. There is also no evidence that Dan Cava, or any other Appellee, relied on any information within the Policy or as provided by Mr. Pallotta to create an expectation of coverage. Thus, there is simply no evidence that either Dan Cava or any other insured or intended beneficiary of the Policy had a reasonable expectation of coverage. Such an expectation, reasonable or otherwise, cannot consist solely of the expectations of an insurance agent. As a result, the Circuit Court erred in finding coverage and this Court should reverse that decision and find that no coverage exists.

**G. The Default Judgment Against Appellees is a Moot Issue and Does Not Estop National Union from Disclaiming Coverage.**

Appellees argue that the doctrine of estoppel prevents National Union from disclaiming coverage because Appellees properly provided notice of Plaintiff Fluker's civil lawsuit to National Union and a default judgment was entered against Appellees. However, the Circuit Court did not even address this issue in its Order and it is a completely moot issue. (A.R. 0709-0722) Clearly, Appellees have included such an argument as a result of their lack of substantive responses to the arguments National Union has presented in its appeal brief.

Appellees provided no evidence to the Circuit Court in support of their allegation that National Union took no further action until the default judgment was entered against Appellee. In fact, Appellees concede that National Union acknowledged receipt of the lawsuit in an April 7, 2009 letter. In that letter, claims representative John Favilla stated that a file had been established and that the matter was being assigned to an Analyst for further handling. (A.R. 0586) Thus, Appellees provided no evidence of a material misrepresentation to the Circuit Court and estoppel does not apply.

Finally, in Appellees' response brief, they assume and rely on the Circuit Court's incorrect ruling that coverage exists. However, as explained above and in National Union's

brief, Appellees never reported the EEOC Charge pursuant to the terms and conditions of the Policy for coverage to apply. Agent Pallotta even testified in his deposition that he was never provided with notice of the EEOC Charge by Dan Cava or Toyota World's listed risk manager, Greg Schillace. (A.R. 0058)

Again, this issue was not even included in the Circuit Court's Order. In fact, the Circuit Court specifically addressed and dismissed Appellees' argument stating that the default judgment had been set aside so there was "no harm no foul." (A.R. 0657) Thus, this argument is moot and this Court should reverse the decision of the Circuit Court and find that no coverage exists.

### CONCLUSION

For the reasons set forth herein as well as those set forth in National Union's Brief, and for other reasons that may be apparent, this Court should reverse the Circuit Court's January 24, 2013 Order denying National Union's motion for summary judgment and granting judgment as a matter of law in favor of Appellees. The matter should be remanded with instructions to enter summary judgment in favor of National Union.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**National Union Fire Insurance Company  
of Pittsburgh, Pa., Third-Party Defendant Below,  
Petitioner,**

v.

No. 13-0215

**Dan Cava, Steven Hall, and Dan's Car World,  
LLC, d/b/a Dan Cava's Toyota World,  
Third-Party Plaintiffs Below, Respondents.**

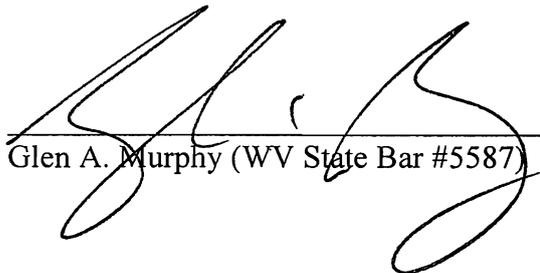
**CERTIFICATE OF SERVICE**

I, Glen A. Murphy, hereby certify that service of the foregoing **Petitioner's Reply Brief** has been made upon counsel of record by placing a true copy thereof in the regular course of the United States Mail, with postage prepaid, on this 1<sup>st</sup> day of August, 2013, addressed as follows:

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