

SUPERIOR COURT OF NEW JERSEY,
UNION COUNTY, LAW DIVISION
DOCKET NO.: UNN-L-2584-20

WESTFIELD AREA YMCA, YMCA OF
MADISON NEW JERSEY, D/B/A
MADISON AREA YMCA, LAKELAND
HILLS FAMILY YMCA, WYCKOFF
FAMILY YMCA, and WEST MORRIS
YMCA,

Plaintiffs,

vs.

THE NORTH RIVER INSURANCE
COMPANY, UNITED STATES FIRE
INSURANCE COMPANY, and
PHILADELPHIA INDEMNITY INSURANCE
COMPANY,

Defendants

CIVIL ACTION

**MEMORANDUM OF LAW ON BEHALF OF UNITED POLICYHOLDERS IN SUPPORT
OF ITS MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

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This Court should permit United Policyholders ("UP") to appear as *amicus curiae* because the participation of UP will assist the Court in connection with the issue of public interest raised by this appeal; the application is timely; and no party will suffer any prejudice if UP appears.

QUESTIONS PRESENTED

Whether regulatory estoppel should preclude enforcement of the virus and bacteria exclusions in light of those known misrepresentations by the insurance industry to state regulators when describing the scope of the pollution exclusion and the impact of the virus and bacteria exclusion on coverage provided by property policies.

BACKGROUND OF THE CASE

UP refers the Court to its proposed Amicus Brief, filed this same day, for a detailed recitation of the specific facts, which UP summarizes here.

The Insurance Services Office ("ISO") is an organization that drafts standard form policy language on behalf of the insurance industry. ISO often submits draft policy language to regulators for approval. Once draft language is approved, it effectively becomes standard across the insurance industry and, therefore, the insurance industry should be bound by the effect of ISO's misrepresentations to state regulators.

In July 2006, ISO submitted to state regulators a proposed virus and bacteria exclusion and a Circular explaining the exclusion and the reasons ISO submitted it for consideration. See, e.g., ISO Form CG 00 01 10 01, (2000), Ex. A, and ISO Circular (July 6, 2006), Ex. B to July 13, 2021 Certification of Nicholas M. Insua, Esq. The ISO July 2006 Circular stated that the pollution exclusion already excludes from coverage loss arising from "contaminants," but that the rising specter of a pandemic requires further attention to the exclusion of viruses and bacteria from coverage. The Circular's statement that the then-current pollution exclusions excluded from coverage viruses and bacteria, and proposed virus and bacteria exclusions offered only a clarification, was inaccurate and misleading. Numerous courts, including the New Jersey Supreme Court, had made clear that pollution exclusions apply only to traditional environmental pollution claims, and at least one court had explicitly ruled that bacteria does not fall within the pollution exclusion.

In particular, the New Jersey Supreme Court, more than a year before ISO submitted the exclusion to the New Jersey regulators, held that the pollution exclusion is limited to traditional environmental pollution claims. The July 2006 Circular, therefore, misrepresented to the regulators that virus and bacteria were already excluded from coverage, and that the proposed exclusion clarified as much. The Circular's representation that

it was a clarification of the existing exclusion was, therefore, inaccurate because viruses and bacteria did not fall within the scope of the pollution exclusion and that exclusion did not remove viruses and bacteria from coverage under New Jersey law.

The Circular misrepresented that the virus and bacteria exclusion was not a change in coverage; the new exclusion was a significant reduction in the coverage as it eliminated from coverage losses arising from both viral and bacterial contamination, which were not excluded by the pollution exclusion. In light of the Circular's misrepresentation, the doctrine of regulatory estoppel is applicable here to preclude the enforcement of the virus and bacteria exclusion. The Circular stated that the new exclusion was really just a clarification of the existing coverage available under the pollution exclusion, and the regulators relied on that representation in approving the exclusion and not requiring a change in premiums and rates. The regulators approved the exclusion that was presented as a clarification of existing coverage; therefore, the coverage that existed prior to the virus exclusion should be binding on the insurance industry that adopted the virus and bacteria exclusion in light of the fact that it was approved by regulators based on the 2006 submission.

THE MATTERS UP WISHES TO ADDRESS

UP wishes to address the application of regulatory estoppel to preclude enforcement of the virus and bacteria exclusions in light of ISO's misrepresentations to the New Jersey regulators that the virus and bacteria exclusion was merely a clarification that losses arising from viral and bacterial contamination were excluded from coverage by the pollution exclusion; to the contrary, multiple courts, including New Jersey's Supreme Court, confined the scope of the pollution exclusion to traditional environmental pollution. Such a limited application of the pollution exclusion would not cover viruses and bacteria. Thus, the virus and bacteria exclusions is a significant reduction in coverage, not a clarification of existing exclusions. ISO's contrary misrepresentation to the regulators should be subject to regulatory estoppel.

IDENTITY AND INTEREST OF AMICUS CUIRAE

UP is a highly respected national non-profit 501(c) (3) organization whose mission is to be a trustworthy and useful information resource and an effective voice for consumers of all kinds of insurance in all 50 states. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance who are seeking a policy or pursuing a claim for loss

reimbursement. Donations, foundation grants, and volunteer labor support the organization's work. No insurance companies underwrite or fund our programs. Our work is divided into three programs:

- *Roadmap to Recovery*[™] provides tools and resources for solving insurance problems after an accident, loss, illness, or other adverse event.
- *Roadmap to Preparedness* promotes disaster preparedness and insurance literacy through outreach and education in partnership with civic, faith based, business, and other non-profit associations.
- *Advocacy and Action* advances pro-consumer laws and public policy related to insurance matters.

UP speaks for a diverse range of policyholders from low income drivers to international energy companies to domestic manufacturers. We have filed more than 300 "friend of the court" briefs in state and federal cases and in U.S. Supreme Court matters. UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP serves Garden State residents on an ongoing basis. In addition to previous amicus briefs and the state-specific information aggregated on our website, (www.uphelp.org), UP

provided three years of services to New Jersey residents whose properties had been damaged or destroyed and needed insurance guidance after Superstorm Sandy. UP interfaces with the New Jersey Division of Banking and Insurance on matters related to policy sales and claims and consumer rights through mutual engagement in the proceedings of the National Association of Insurance Commissioners where UP serves as an official consumer representative. Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations, maintaining an online help library at uphelp.org/COVID. In addition, UP is presenting considerations to courts and regulators on the special rules of contract construction that are uniquely imperative in the context of insurance, and the irrefutable fact that insurers collected very substantial sums of money from businesses in return for the promise that if operations were interrupted insurers would provide a financial safety net. Yet with striking consistency, insurers are not delivering on those promises.

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of

our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives and the reasonable expectations of policyholders, and the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurance policies are adhesive in nature and their language is increasingly less standardized.¹ That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that

¹ Professor Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, University of Minnesota Law School, Published in *University of Chicago Law Review*, Vol. 77, 2011, Minnesota Legal Studies Research Paper No. 10-65. <https://chicagounbound.uchicago.edu/uclrev/vol78/iss4/3/>

data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles.

In addition to hosting disaster-relief workshops and clinics around the country and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders.² The gist of UP's presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.³ Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had never paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of

² See NAIC Special Session One: COVID-19: Lessons Learned (Aug. 10, 2020), <https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be>, and https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf (speakers' biographies); Amy Bach, Co-Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://www.uphelp.org/sites/default/files/attachments/8-12-20_bach_c_committee_final_3.pdf; Amy Bach, Co-Founder & Exec. Dir., UP, COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://content.naic.org/sites/default/files/national_meeting/Version%20%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf.

³ Richard P. Lewis, John N. Ellison, Luke E. Debevec, Here We Go Again: Virus Exclusion for COVID-19 and Insurers, NU PropertyCasualty360, April 7, 2020 <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442>.

a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991, UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. See *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the "classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."⁴ This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 *Cath. U.L. Rev.* 603, 608 (1984)).

⁴ *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

LEGAL ARGUMENT

I. PURSUANT TO NEW JERSEY COURT RULES, THIS MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* SHOULD BE GRANTED

An *amicus curiae* is "one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination." *Casey v. Male*, 63 N.J. Super. 255, 258 (N.J. Sup. Ct. 1960). An application to appear as *amicus curiae* shall be granted if the applicant's participation will assist in resolving an issue of public importance, the application is timely, and no party to the litigation will be unduly prejudiced. See N.J. Ct. R. 1:13-9 (2012). Moreover, in determining whether to grant an *amicus* application, courts consider whether the case has "broad implications," *Taxpayers Association v. Weymouth Township*, 80 N.J. 6, 17 (1976), or is of "general public interest." *Casey, supra*, 63 N.J. Super. at 259.

In accordance with these criteria, this request to appear as *amicus curiae* should be granted. *Westfield Area YMCA, et al. v. North River Ins. Co., et al.*, UNN-L-2584-20 involves a matter of public importance. Virus and bacteria exclusions are included in many property policies in New Jersey and the Court's decision will impact the ability of these policyholders to obtain coverage for which they paid premiums for business interruption losses suffered during the COVID-19 pandemic.

UP's motion for leave to participate as *amicus curiae* is timely, filed on the same day as opposition would otherwise be due on this motion. Finally, no party will be prejudiced by UP's participation. UP, therefore, respectfully requests leave to file an *amicus curiae* brief in this Court to inform the Court with respect to the interests of New Jersey policyholders.

CONCLUSION

For the reasons set forth above, UP respectfully requests that the Court grant UP's motion for leave to file and *amicus curiae* brief.

Dated: July 13, 2021

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