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 WESTFIELD AREA YMCA, YMCA OF) SUPERIOR COURT OF NEW JERSEY
 MADISON NEW JERSEY, INC., D/B/A) UNION COUNTY LAW DIVISION
 MADISON AREA YMCA, LAKELAND HILLS) Docket No. UNN-L-_____
 FAMILY YMCA, WYCKOFF FAMILY YMCA,)
 INC., and WEST MORRIS AREA YMCA,) Civil Action
)
 Plaintiffs,) COMPLAINT AND JURY DEMAND
)
 v.)
)
 THE NORTH RIVER INSURANCE COMPANY,)
 UNITED STATES FIRE INSURANCE)
 COMPANY, and PHILADELPHIA INSURANCE)
 COMPANY,)
)
 Defendants.)
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Plaintiffs Westfield Area YMCA (the “Westfield Y”), 220 Clark Street, Westfield NJ 07090, YMCA of Madison New Jersey, Inc. d/b/a Madison Area YMCA (the “Madison Y”), 111 Kings Road, Madison, NJ 07940, Lakeland Hills Family YMCA (the “Lakeland Hills Y”), 100 Fanny Road, Mountain Lakes, NJ 07046, Wyckoff Family YMCA, Inc. (the “Wyckoff Y”), 691 Wyckoff Avenue, Wyckoff, NJ 07481, and West Morris Area YMCA (the “West Morris Y”), 14 Dover Chester Road, Randolph, NJ 07869 (collectively, “the YMCAs”) by their attorneys, for their Complaint against Defendants North River Insurance Company (“North River”), 305 Madison Avenue, Morristown, NJ 07960, United States Fire Insurance Company (“US Fire”), 305 Madison Avenue, Morristown, NJ 07960, and Philadelphia Indemnity Insurance Company, (“Philadelphia”), One Bala Plaza, Suite 100, Bala Cynwyd, PA 19004 (collectively, “the

Insurers”), allege as follows:

THE PARTIES

1. The Westfield Y is a New Jersey non-profit youth and community service organization that owns, and/or operates out of, twenty-two covered facilities in Union County New Jersey.

2. The Madison Y is a New Jersey non-profit youth and community service organization that owns, and/or operates out of, seven covered facilities in Morris County New Jersey.

3. The Lakeland Hills Y is a non-profit youth and community service organization that owns, and/or operates out of, seven covered facilities in Morris County, NJ.

4. The Wyckoff Y is a New Jersey non-profit youth and community service organization that owns, and/or operates out of, thirty-one facilities in Bergen County.

5. The West Morris Y is a New Jersey non-profit youth and community service organization that owns, and/or operates out of, eleven covered facilities in Morris County New Jersey.

6. The YMCAs’ respective facilities are all premises that are covered by the insurance policies in dispute (collectively, “the Insured Properties”).

7. North River is a New Jersey commercial property and casualty insurance company. North River issued in its name a commercial package property insurance policy to the Westfield Y. The North River policy is in dispute in this action.

8. US Fire is, upon information and belief, a Delaware commercial property and casualty insurance company. US Fire issued in its name commercial package property insurance

policies to the Madison Y, the West Morris Y, and the Lakeland Hills Y. Those policies are in dispute in this action.

9. Philadelphia is, upon information and belief, a Pennsylvania commercial property and casualty insurance company. Philadelphia issued in its name a commercial package property insurance policy to the Wyckoff Y. That policy is in dispute in this action.

10. Collectively, the insurance policies issued by North River, US Fire, and Philadelphia are referred to as “the Policies.”

JURISDICTION AND VENUE

11. This Court has original jurisdiction of this action because it is an action at law with more than \$15,000 at issue; Defendants engaged in or carried out business in New Jersey, including the sale of the Policies, to New Jersey residents, (2) there is a nexus between such business and this action; Defendants engaged in, and continue to engage in, substantial business activity in New Jersey.

12. Venue is proper in this Court under *R. 4:3-2(a)(3)* because the Westfield Y is a resident of this County.

THE EVENTS GIVING RISE TO THIS ACTION

13. The YMCAs are non-profit service organizations with a mission to promote youth development, healthy living, and social responsibility in the many New Jersey communities they serve. The YMCAs use the physical facilities that they own and in which they operate to deliver a variety of programs and services that directly promote their organizational missions.

14. Among many other programs and services, the YMCAs variously provide child care, early childhood education, summer youth camps, youth and teen sports programs and instruction in aquatics, basketball, soccer, volleyball, tennis, track, performing arts, youth and teen

counseling, health and wellness classes for older adults and people coping with disease or disability, personal training, and physical fitness at their state-of-the art health and fitness facilities.

15. The YMCAs also provide a variety of health, wellness, and enrichment services to their communities at non-owned locations that are Insured Properties.

The Insurers, the Policies, and the Regulatory Approval Process

16. The Insurers entered into “all risks” contracts of insurance with the YMCAs in which they promised, in return for the payment of substantial annual premiums, to protect the YMCAs from losses and catastrophes, including the interruption or closure of their business operations due to the physical loss of use, loss of functionality, or loss of access to their respective facilities.

17. The YMCAs have made claims for coverage relating to business income losses caused by a covered interruption of their business operations.

18. The Policies are written on standard forms that were drafted by an insurance industry trade association known as the Insurance Services Office (“ISO”).

19. ISO drafts standard insurance forms that are then used nationwide by the Insurers and issued to their policyholders, including the YMCAs, on a take-it-or-leave-it basis.

20. ISO must seek, on behalf of its member insurance companies (including the Insurers), the approval of the various state insurance commissioners across the country, including the Commissioner of the New Jersey Department of Banking and Insurance (“DOBI”), before its member companies may include a new policy form or a new coverage exclusion in any insurance policy that the member insurance company, including the Insurers, sell to their policyholders.

21. The New Jersey Supreme Court has held that, when the insurance industry either fails to disclose the intended effect of an exclusionary clause, or misstates the intended effect of

such a clause in the industry’s representations to state Departments of Insurance, “the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.” *Morton Int’l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 134 N.J. 1, 79–80, 629 A.2d 831, 876 (1993).

22. The foregoing rule has become known as New Jersey’s “regulatory estoppel doctrine.”

23. The regulatory estoppel doctrine is based on the premise that “[a] basic role of the Commissioner of Insurance is ‘to protect the interests of policy holders’ and to assure that ‘insurance companies provide reasonable, equitable and fair treatment to the insuring public.’” *Id.* at 75, 629 A.2d at 874.

24. The Policies provide the following grant of coverage:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

25. The courts of New Jersey have had numerous opportunities to interpret the phrase “physical loss of or damage to” in the standard form coverage grant that appears in the Policies.

26. For example, the Appellate Division has observed that, since the policy term “‘physical’ can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided.” *Customized Distribution Services v. Zurich Ins. Co.*, 373 N.J.Super. 480, 487–88, 862 A.2d 560 (App. Div. 2004), *certif. denied*, 183 N.J. 214, 871 A.2d 91 (2005).

27. The Appellate Division has specifically found that the term “physical damage” as it appears in a commercial property policy is ambiguous: “The fact that the term ‘physical damage’ is capable of at least two different reasonable interpretations convinces us that it is ambiguous.

And well-established precedent teaches that such an ambiguous provision must be construed favorably to the insured.” *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 541, 968 A.2d 724, 735 (App. Div. 2009).

28. In connection with business interruption coverage of the kind at issue here, the Appellate Division has cited with approval decisions from other jurisdictions that have held that “‘physical damage’ is not restricted to the physical destruction or harm” but that the phrase also “includes loss of access, loss of use, and loss of functionality.” *Id.* at 543, 968 A.2d at 736.

29. A release of ammonia that caused the evacuation of a building for several days because it was unsafe has been held to have inflicted direct physical loss of or damage to the facility “because the ammonia physically rendered the facility unusable for a period of time.” *Gregory Packaging v. Travelers Property Casualty Co. of America*, Civ. No. 2:12-CV-04418 (WHW) (CLW) (D.N.J 2014).

30. Thus, the phrase “physical loss of or damage to Covered Property” includes, under New Jersey law, “loss of access, loss of use, and loss of functionality.”

31. The Policies further provide: “Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.”

32. Accordingly, the Policies provide coverage to the YMCAs for claims that involve the physical loss of, the loss of access to, the loss of use of, or the loss of functionality of their facilities, as long as an exclusion in coverage does not clearly and unambiguously apply to the circumstances of the loss.

33. North River issued policy no. 5068982574 to the Westfield Y covering the period December 31, 2019 to December 31, 2020. The limit of liability for business interruption losses under the policy issued to the Westfield Y is \$11,239,164.

34. US Fire issued policy no. 5068982079 to the Madison Y for the period December 31, 2019 to December 31, 2020. The limit of liability for business interruption losses under the policy issued to the Madison Y is \$12,041,460.

35. US Fire issued policy no. 5068961856 to the Lakeland Hills Y for the period December 31, 2019 to December 31, 2020. The limit of liability for business interruption losses under the policy issued to the Lakeland Hills Y is \$4,000,000.

36. US Fire issued policy no. 5068980099 to the West Morris Y for the period January 1, 2020 to January 1, 2021. The limit of liability for business interruption losses under the policy issued to the West Morris Y is \$5,150,000.

37. Philadelphia issued policy no. PHPK1798455 to the Wyckoff Y for the period April 1, 2018 to April 1, 2019. Philadelphia also issued policy no. PHPK1963036 to the Wyckoff Y for the period April 1, 2019 to April 1, 2020. The limit of liability for business interruption losses under the policies issued to the Wyckoff Y is \$16,583,000.

38. The Policies provide coverage under a standard Business Income (and Extra Expense) Coverage Form.

39. The Policies define covered “Business Income” as:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

40. The Policies contain a Food Contamination and Communicable Disease Coverage Endorsement that provides as follows:

If one or more of the described premises in the above Schedule is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of “food contamination” or “communicable disease”, we will pay:

(a) The loss of Business Income you sustain due to the necessary “suspension” of your “operations” as a result of the “food contamination” or “communicable disease”. The coverage for Business Income will begin 24 hours after you receive notice of the closing from the Board of Health or any other governmental authority.

41. Under this Endorsement, “communicable disease” means “any disease that is transmissible by infection or contagion through contact with humans or animals, or through bodily fluids, contaminated objects, airborne inhalation or a similar agent.”

42. This Endorsement has a sub-limit of liability of \$100,000 for each insured location and an annual aggregate for all locations of \$250,000.

43. The 2019-2020 coronavirus pandemic has caused substantial physical loss of and/or damage to property throughout the world, including in New Jersey.

New Jersey’s Executive Order Shutdown

44. The coronavirus is highly contagious and is transmitted through the airborne inhalation of aerosolized virus spores that are 0.125 microns in diameter.

45. Infection with the coronavirus can cause a suite of serious respiratory, circulatory, and neurological maladies known as COVID-19.

46. According to the World Health Organization (“WHO”), the coronavirus “spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks . . . People can catch COVID-19 if they breathe in these droplets from a person infected with the virus . . .” World Health Organization, *How does COVID-19 spread?*, Q&A on coronaviruses (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-acoronaviruses>.

47. Also, according to WHO, “droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these

objects or surfaces, then touching their eyes, nose or mouth.” *Id.*

48. A team of researchers from UCLA, Princeton University, the National Institute of Allergy and Infectious Diseases, and the Centers for Disease Control and Prevention (“CDC”) reported in the March 17, 2020 edition of the New England Journal of Medicine that the virus can persist on plastic and stainless steel surfaces for up to seventy-two hours. Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, NEW ENG. J. MED. (Mar. 17, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

49. While scientists, doctors, epidemiologists, and virologists admit that there is much about COVID-19 that is yet unknown, the pandemic has caused wide-spread illness and death throughout the United States and the world.

50. China, Italy, France, Spain, and other countries have implemented the cleaning and fumigating of public areas prior to allowing them to re-open due to the intrusion of the coronavirus.

51. The CDC has issued guidelines for the cleaning and disinfecting of surfaces before businesses should reopen to the public. In accordance with the CDC guidance:

Examples of frequently touched surfaces and objects that will need routine disinfection following reopening are:

- tables,
- doorknobs,
- light switches,
- countertops,
- handles,
- desks,
- phones,
- keyboards,

- toilets,
- faucets and sinks,
- gas pump handles,
- touch screens, and
- ATM machines.

<https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>

52. With only one or two exceptions, the surfaces and objects listed in the CDC guidance are present at the Insured Properties and will need to be cleaned and disinfected for the remediation and prevention of the spread of the coronavirus before they may reopen to the public, and regularly for an unknown period after reopening.

53. On March 9, 2020, New Jersey Governor Philip D. Murphy issued Executive Order No. 103, which provided in part:

I authorize and empower the State Director of Emergency Management, who is the Superintendent of State Police, in conjunction with the Commissioner of DOH, to take any such emergency measures as the State Director may determine necessary, including the implementation of the State Emergency Operations Plan and directing the activation of county and municipal emergency operations plans, in order to fully and adequately protect the health, safety and welfare of the citizens of the State of New Jersey from any actual or potential threat or danger that may exist from the possible exposure to COVID-19.

Executive Order No. 103, March 9, 2020. (Emphasis added.)

54. Thus, Executive Order No. 103 recognizes that there was, as of March 9, 2020, an “actual” or a “potential” threat that existed from the “possible exposure” to the communicable disease known as COVID-19 that is caused by contamination and/or infection from the coronavirus.

55. Executive Orders signed by Governor Murphy after March 9, 2020 closed all non-essential for-profit and non-profit businesses in New Jersey. Those Executive Orders required the

closing of the YMCAs.

56. Executive Order No. 104 closed “[a]ll public, private, and parochial preschool program premises” as of March 18, 2020. The YMCAs conduct preschool programs on their Insured Properties.

57. Executive Order No. 104 also closed all “[g]yms, fitness centers and classes.” Thus, Executive Order No. 104 closed the YMCA Insured Properties completely as of March 18, 2020.

58. On March 21, 2020, the Governor signed Executive Order No. 107. That Executive Order, among other things, provided: “The brick-and-mortar premises of all non-essential retail businesses must close to the public as long as this Order remains in effect.”

59. The YMCAs were not considered “essential” under any of the Executive Orders signed by the Governor pertaining to the COVID-19 pandemic.

60. Numerous Executive Orders that have been signed by Governor Murphy have recognized that the coronavirus contaminates surfaces within a building and that those surfaces must be cleaned and disinfected, both before any businesses may reopen and repeatedly during a work day after a business reopens.

61. For example, Executive Order No. 122, issued on April 8, 2020 (Requirements for Operation of Essential Retail Businesses) provides that essential retail businesses “must adopt policies that include, at minimum, the following requirements:

1.h. Require frequent sanitization of high-touch areas like restrooms, credit card machines, keypads, counters and shopping carts.”

62. Executive Order No. 122 further provides:

3. Manufacturing businesses, warehousing businesses, and businesses engaged in essential construction projects must adopt policies that include, at minimum, the following requirements:

k. Require frequent sanitization of high-touch areas like restrooms, breakrooms, equipment, and machinery.

63. Executive Order No. 122 further provides:

5. [O]wners of buildings used for commercial, industrial or other enterprises, ..., shall adopt policies that, at minimum, implement the following cleaning protocols in areas where operations are conducted:

a. Clean and disinfect high-touch areas routinely in accordance with CDC guidelines, particularly in spaces that are accessible to staff, customers, tenants, or other individuals, and ensure cleaning procedures following a known or potential exposure in a facility are in compliance with CDC recommendations.

64. Executive Order No. 125, issued on April 11, 2020 (Mitigation Requirements on NJ Transit and restaurants) provides:

WHEREAS, in response to the current emergency, NJ TRANSIT has instituted enhanced cleaning regimens in stations including additional disinfecting of frequent customer touchpoints like ticket vending machines, handrails, and door handles.

65. Executive Order No. 125 further provides:

NJ Transit has “instituted enhanced cleaning efforts for vehicles across all its modes of transportation, including disinfecting vehicles every 24 hours, hard surface cleaning and disinfecting including handholds, arm rests, seating areas and restrooms.”

66. Executive Order No. 125 further provides:

5. All restaurants, cafeterias, dining establishments, and food courts, with or without a liquor license, all bars, and all other holders of a liquor license with retail consumption privileges that are continuing to offer food delivery and/or takeout services pursuant to Executive Order No. 107 (2020) (“food business”), must adopt policies that include, at minimum, the following requirements:

g. Require frequent sanitization of high-touch areas like credit card machines, keypads, and counters to which the public and workers have access.

67. In addition to the Governor, the New Jersey Department of Health (“DOH”) has issued an Executive Directive governing the limited re-opening of child care centers and summer

youth camps.

68. The DOH Executive Directive No. 20-021, which was issued on May 29, 2020, recognizes that the coronavirus contaminates objects and surfaces and that cleaning and disinfecting of such objects and surfaces is a condition both for re-opening and for continued operation.

69. DOH Executive Directive No. 20-021 provides, in part:

Sharing of supplies, food, toys and other high touch items must be strictly limited. Centers shall ensure an adequate supply of school, art and other supplies to preclude the need for sharing of items. Children's belongings shall be kept separate in individual storage bins or cubbies and sent home each day for washing. If items must be shared, they shall be used by one group at a time and cleaned and disinfected between uses.

DOH Executive Directive 20-021, sub-part 1.c.iv. (Emphasis added.)

70. DOH Executive Directive 20-021 further provides, at sub-part 1.f.:

Enhanced Cleaning and Sanitation Procedures

i. Centers shall increase the frequency of cleaning toys, equipment, and surfaces. *Centers shall clean, sanitize, and disinfect frequently touched surfaces (e.g, playground equipment, door handles, sink handles) multiple times per day and shared objects between use.* Cleaning shall be in accordance with the CDC's Guidance for Cleaning & Disinfecting Public Spaces, Workplaces, Businesses, Schools and Homes. Disinfecting methods shall utilize Environmental Protection Agency approved disinfectants for use against COVID-19. (Emphasis added.)

71. DOH Executive Directive 20-021 further provides, at sub-part 3.d, which applies to youth summer camps:

iii. To ensure proper cleaning and sanitation practices, camps should:

1. Close shared spaces such as dining halls, if possible; otherwise stagger use and clean and disinfect between use;
2. Perform enhanced cleaning of common surfaces such as playgrounds with shared playground equipment and rooms.
3. Maintain appropriate cleaning of any shared objects;

4. Ensure that an adequate supply of cleaning supplies is maintained; and
5. Follow procedures for deep cleaning set forth in CDC guidelines for reopening a camp closed due to the identification of positive case(s) as recommended by CDS.

72. In short, Executive Orders and Executive Directives issued by the State of New Jersey recognize that the coronavirus causes physical damage to inanimate objects and surfaces within buildings by contaminating those surfaces in a manner that transmits COVID-19.

73. A virus causes “physical loss of or damage to” property even though it is invisible to the naked eye. Coronavirus contamination of property is just as dangerous as, if not more dangerous than, the impact on property from fire or fumes or vapors, and all such damaged property is rendered lost and incapable of producing revenues.

74. The Insurers have failed or refused to provide coverage for the YMCAs’ business income losses occasioned by the Executive Order Shutdown for various reasons, none of which comport or comply with the law of New Jersey.

75. The Insurers claim that coverage for these losses is unavailable because there is no evidence that any of the Insured Properties have suffered “physical damage” in the form of any physical harm or alteration of the Insured Properties.

76. On the contrary, the Executive Orders and Directives issued by the State of New Jersey, as set forth above, recognize that the coronavirus contaminates objects and surfaces within buildings and that this contamination, in part, is the reason the shutdown has been ordered. Cleaning and disinfecting those objects and surfaces are prerequisites to re-opening and to staying open.

77. In addition, the Insurers’ claims are contrary to the coverage grant of the Policies, which provide that the Insurers will pay “for physical *loss of or* damage to” the Insured Property.

78. The use of the disjunctive means that the “loss of” Insured Property must, therefore, mean something different from “damage to” Insured Property.

79. When the State government orders an insured to close down its property, making it unavailable for any of the purposes for which the property is intended, this constitutes the “physical loss of” such property.

80. Moreover, as discussed above, the New Jersey Appellate Division has found that the undefined phrase “physical damage” when used in an insurance policy is ambiguous. Under well-settled New Jersey law, an ambiguous word or phrase in an insurance policy must be construed against the insurer and in favor of coverage.

81. In addition, as discussed above, it is the law of New Jersey that the phrase “physical loss of or damage to” insured property can mean “loss of use, loss of access, and loss of functionality” of such property. All of these phrases apply to the loss of the Insured Property as a result of the Executive Order shutdown.

82. Finally, the Communicable Disease coverage endorsement requires only the “suspicion” of “communicable disease” to trigger coverage. The ordinary dictionary definition of “suspicion” is the “feeling or thought that something is possible, likely, or true.”

83. As discussed above, Executive Order No. 103 recognizes that there is an “actual” or a “potential” threat that exists from the “possible exposure” to the communicable disease known as COVID-19 that is caused by contamination and/or infection from the coronavirus.

84. Accordingly, the Communicable Disease endorsements to the Policies provide coverage for the losses at issue up to the sub-limits of liability set forth in the Policies.

85. It is anticipated that Plaintiffs’ business interruption losses will continue for an extended period after the Orders are lifted and the existing and continuing damage is rectified. It

is likely that it will take a significant amount of time to restore Plaintiffs' businesses to the condition that would have existed had no loss occurred.

The Virus Exclusion

86. The Policies all contain a standard-form Virus Exclusion that provides, in relevant part: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

87. None of the Virus Exclusions contain an Anti-Concurrent Causation ("ACC") clause.

88. An ACC clause provides that an exclusion will apply when an excluded peril contributes "directly or indirectly" to cause a loss, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

89. Under settled New Jersey law, an exclusion without an ACC clause will not apply if there is more than one cause of a loss in a chain of causation, and either the first or the last cause is from a covered event, even if one of the causes in the chain is excluded.

90. Stated differently, as Justice LaVecchia observed in her concurring opinion in *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010): "[A]n insurance policy must unambiguously state that an exclusion will operate notwithstanding any concurrent or sequential causation issues even when the policy exclusion is otherwise clear and specific." *Id.* at 458.

91. This is referred to as the "Efficient Proximate Cause" doctrine. It is also sometimes called "Appleman's Rule," after the eponymous insurance treatise *Appleman on Insurance*.

92. The leading case on the issue, *Franklin Packaging Co. v. California Union Ins. Co.*, 171 N.J.Super. 188, 408 A.2d 448 (App. Div. 1979), described the operation of the doctrine thus:

An incidental peril outside the policy, contributing to the risk insured against, will not defeat recovery. ... In other words, it has been held that recovery may be allowed

where the insured risk was the last step in the chain of causation set in motion by an uninsured peril, or where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.

93. There is more than one cause of the recent closures of the Insured Properties. The first cause, the spread of COVID-19, set in motion the ultimate – or Efficient Proximate – cause of the closures: the issuance of Executive Orders 104 and 107 by the Governor requiring closure of non-essential New Jersey business operations.

94. While the first cause, the virus, is excluded by the Virus Exclusion, the last cause – the one that is, indeed, the most direct cause of the closures – was the Executive Orders.

95. That last cause is not the subject of any exclusion in the Policies. Under Appleman’s Rule, and in the absence of an express and unambiguous ACC clause, if the first cause in a chain of causes of a loss (the virus) is excluded but the last cause in the chain (the Executive Order to close) is covered, then the policy provides coverage and the exclusion will not apply.

96. Accordingly, the Virus Exclusions in the Policies do not apply to the losses at issue in this action.

97. In 2006, ISO presented the Virus Exclusion that appears in the Policies to the various state insurance regulators, including upon information and belief to DOBI, for approval, as it was required to do before insurers could include it in their policies.

98. In a July 26, 2006 circular, ISO represented to regulators that the Virus Exclusion was intended to preclude coverage due to direct contamination from a virus or from bacteria: “[W]e are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.”

99. To the extent that it may be determined that the YMCAs were not directly contaminated with the coronavirus, or it is determined that they were only indirectly or potentially

contaminated with the coronavirus, then the Executive Orders were issued prophylactically to prevent people from gathering in groups and spreading the virus.

100. In that event, the cause of the current interruptions in business was not consistent with the stated intent of the virus exclusion.

101. To the extent that the Insurers attempt to argue that the reach of the exclusion should now be expanded to include indirect losses resulting from governmental attempts to contain the spread of the virus, the New Jersey doctrine of “regulatory estoppel” will preclude such an argument.

102. Under the regulatory estoppel doctrine, the insurance industry may not apply an exclusion in a way that is inconsistent with the representations ISO made to state insurance regulators at the time it presented the exclusion for approval.

COUNT I

(For Declaratory Judgment)

103. The YMCAs repeat the allegations of the preceding paragraphs as if fully set forth here.

104. As a result of the foregoing, there is an actual controversy between the YMCAs, on the one hand, and the Insurers, on the other, about whether the Communicable Disease and/or the Business Interruption losses suffered by the YMCAs are covered by the Policies.

105. As a result of the foregoing, the Insurers have breached their coverage obligations to the YMCAs.

WHEREFORE, the YMCAs demand entry of judgment as follows:

- a. For a declaration that the Insurers must provide Communicable Disease coverage to the YMCAs whose Policies contain such coverage.
- b. For a declaration that the Policies provide Business Interruption coverage for the losses

- at issue in this action.
- c. For a declaration that the Insurers must immediately provide full coverage for the losses at issue in this action.
 - d. For such other relief as the Court may deem just and proper.

COUNT II

(For Breach of Contract)

106. The YMCAs repeat the allegations set forth in the preceding paragraphs as if fully set forth here.

107. As a result of the foregoing, the Insurers have breached their duties to provide Communicable Disease and/or Business Interruption coverage to the YMCAs.

WHEREFORE, the YMCAs demand entry of judgment as follows:

- a. Awarding compensatory damages to the YMCAs as a result of the breach of contract by the Insurers in an amount to be determined at trial.
- b. Awarding consequential damages to the YMCAs as a result of the breach of contract by the Insurers in an amount to be determined at trial.
- c. Awarding Communicable Disease coverage, as applicable, to the YMCAs in the full amount of their losses up to the limits of liability in the Policies for such coverage.
- d. Awarding the full losses incurred by the YMCAs in Business Interruption coverage up to the respective limits of liability in the Policies for such coverage.
- e. For such other relief as the Court may deem just and proper.

Dated: Scotch Plains, NJ
August 13, 2020

Bramnick, Rodriguez, Grabas, Arnold & Mangan
Attorneys for Plaintiffs

By: /s/ Carl A. Salisbury
Carl A. Salisbury (013991992)

JURY DEMAND

Plaintiffs demand a jury on all issues so triable.

DESIGNATION OF TRIAL COUNSEL

Plaintiffs hereby designate Carl A. Salisbury as trial counsel.

RULE 4:5-1 CERTIFICATION

It is hereby certified that this matter is not the subject of any other action pending in any court, is not the subject of any pending arbitration proceeding, and none is contemplated. I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/S/ Carl A. Salisbury _____
Carl A. Salisbury (013991992)