SUPREME COURT OF PENNSYLVANIA

No. 52 WM 2020

JOSEPH TAMBELLINI, INC., D/B/A
JOSEPH TAMBELLINI RESTAURANT
Petitioner

v.

ERIE INSURANCE EXCHANGE
Respondent

On Emergency Application for Extraordinary Relief Pursuant to Rule 3309, 42. Pa.C.S. § 726 and King's Bench Powers

BRIEF OF AMICI CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, INSURANCE AGENTS AND BROKERS OF PENNSYLVANIA, INSURANCE FEDERATION OF PENNSYLVANIA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PENNSYLVANIA ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND PENNSYLVANIA DEFENSE INSTITUTE IN OPPOSITION TO THE EMERGENCY APPLICATION

Robert L. Byer
Damon N. Vocke*
Robert M. Palumbos
Jonathan I. Aronchick
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae

* Admitted to practice in New York and Connecticut.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES OF COURT

OTHER AUTHORITIES

STATEMENT OF INTEREST

The American Property Casualty Insurance Association ("APCIA") is a not-for-profit corporation domiciled in the District of Columbia with an executive office in the District of Columbia, a principal place of business in Chicago, Illinois, and offices in other states. APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

APCIA's member companies write nearly 60% of the entire U.S. property-casualty insurance market, including 67% of the countrywide commercial property insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and regularly submits amicus curiae briefs in significant cases before federal and state courts.

Insurance Agents and Brokers of Pennsylvania ("IA&B") is a trade association representing nearly 1,000 independent insurance agencies and brokers in Pennsylvania. Among the many services it provides, IA&B counsels insurance agents on compliance with the various laws and regulations as they pertain to the business, and advocates the member interest before the government and legal system.

The Insurance Federation of Pennsylvania (the "Federation") is the Commonwealth's leading trade organization for commercial insurers of all types. The Federation consists of nearly 200 member companies and it speaks on behalf of the industry in matters of legislative and regulatory significance. It also advocates on behalf of its members and their insureds in important judicial proceedings.

The National Association of Mutual Insurance Companies ("NAMIC") is a national trade association consisting of more than 1,400 companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies write $268 billion in annual premiums, including writing 29 percent of the business insurance market. Through its advocacy programs, NAMIC promotes public policy solutions that benefit NAMIC member companies and the policyholders they serve.

The Pennsylvania Association of Mutual Insurance Companies ("PAMIC") is a trade association formed in 1907 that represents the Pennsylvania mutual insurance industry and the property and casualty insurance market in general. Its mission offers advocacy, education, and networking programs. Through its advocacy programs, PAMIC promotes public policy solutions that benefit member companies and the policyholders they serve. Additionally, PAMIC fosters greater understanding and recognition of the unique alignment of interests between insurer management and policyholders. PAMIC represents 119 property and casualty insurers licensed to do business

in Pennsylvania with a national premium totaling $28.6 billion and $4.3 billion in Pennsylvania. Beyond insurance companies, PAMIC represents over 130 market members who are crucial in upholding the value and operations of its members. Its associate members include law, accounting, reinsurance, property restoration, claims adjusting, financial, and technology firms.

The Pennsylvania Defense Institute ("PDI") was organized in 1969 as a non-profit association of defense counsel and insurance company executives. PDI is a forum for developing public policy initiatives; for exchange of ideas; for the pursuit of its goals, including the prompt, fair and just disposition of claims, preservation of the administration of justice, the enhancement of the legal profession's services to the public, the elimination of court congestion and delays in civil litigation; and promotion of other public related activities. To achieve these ends, PDI represents its members in a wide variety of matters, including legislation and litigation.

The pending Application for Extraordinary Relief requests that this Court exercise its jurisdiction in an unprecedented manner that could ultimately lead to a declaratory judgment against Erie Insurance Exchange ('Erie"), to require that it provide coverage for business interruption claims denied pursuant to the terms of its policy. Amici have a significant interest in advocating positions consistent with the interests of their members, which could be affected by this Court's ruling. This Court liberally allows associations to participate as amicus curiae. *Robinson Twp. V. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013). This invitation extends when members of an association have not

yet experienced injury but face "immediate or threatened injury." *Id.* A ruling of this Court regarding the obligations of Erie under its business interruption and property insurance policy will potentially affect the obligations and liability of Amici's members.

Amici state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no other person contributed money that was intended to fund preparing or submitting this brief other than Amici and their counsel. *See* Pa.R.A.P. 531(b).[1]

ARGUMENT

I. This Court should deny the Application for Extraordinary Relief.

Plaintiff Joseph Tambellini, Inc. ("Tambellini") asks the Court to assume plenary jurisdiction of a single coverage case currently pending at the earliest stage of litigation. Tambellini has filed a complaint in the Court of Common Pleas of Allegheny County, but, according to the trial court docket as of the morning of this filing, has not yet served process. *See* Docket, *Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurant v. Erie Insurance Exchange*, No. GD-20-005137 (C.P. Allegheny May 7, 2020). That this litigation is in its infancy is itself sufficient grounds on which to deny the Application.

[1] Erie is a member of APCIA and the Federation, and contributes in support of their general operations. Erie has not, however, contributed money to APCIA for the purpose of funding the preparation or submission of this brief.

While the Application's formal request is for this Court to assume jurisdiction over a single case, its true purpose appears to be to persuade this Court to decide legal issues of substantial import to potentially thousands of other insurance claims that may arise in the future from the COVID-19 pandemic, with no factual record, no underlying rulings on dispositive motions, no findings of fact or conclusions of law by a trial court, and no appellate review by Pennsylvania's intermediate appellate courts. Specifically, Tambellini requests that this Court expedite its case to decide whether the Erie insurance policy covers losses relating to government-ordered limitations imposed on its business intended to stop the spread of the novel coronavirus, with the apparent goal of having the Court's decision in this case set a precedent for other COVID-19 related coverage cases under Pennsylvania law.

This Court's proper role, however, is as a court of last resort. It is not "organized to support orderly fact-finding." *Friends of DeVito v. Wolf*, No. 68 MM 2020, __ A.3d __, 2020 WL 1847100, at *25 (Pa. Apr. 13, 2020) (Saylor, C.J., concurring and dissenting). The Court thus invokes its plenary jurisdiction "sparingly and only in circumstances where the record clearly demonstrates the petitioners' rights." *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010). Similarly, the Court exercises its King's Bench power "with extreme caution." *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (quoting *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886)). The Application asks the Court to ignore these well-founded principles. This Court should reject that request and deny the Application.

A. Business interruption lawsuits will present numerous individualized issues relating to variations in insurance policies and unique factual circumstances.

A fundamental problem with Tambellini's request is that it incorrectly assumes that a decision in this case would resolve coverage issues in a multitude of other cases Tambellini anticipates will be filed in the future. Tambellini alleges that "[h]undreds, if not thousands, of lawsuits are expected to be filed in the Commonwealth by business owners against insurers to recover for the losses, damages and expenses caused by the COVID-19 pandemic and the related governmental Orders." (App. ¶ 55.) Tambellini does not identify any other cases that have been filed to date in Pennsylvania state courts.

Even assuming that a flood of litigation is to come, this Court could not stem the tide through a decision in this case. Future cases will involve a variety of policies, each with a variety of coverages, and different provisions within those coverages, and each intersecting with a unique set of facts and circumstances. A decision on Tambellini's claims under one policy could not reasonably be extrapolated across "hundreds" or "thousands" of cases that have yet to be filed.

One need only look at Tambellini's policy, which is an exhibit to Tambellini's complaint, to appreciate the variety of individualized questions that arise from this coverage case. Tambellini's 136-page policy is company specific, with more than 50 endorsements, procured by one of hundreds of insurance agencies doing business in Pennsylvania.

This Court simply cannot resolve business interruption coverage issues on an industry-wide basis by taking jurisdiction over this case. As set forth below, there will be major differences among lawsuits over business interruption policy coverage arising from the current national crisis.

Different types of insurance policies and coverages: Business interruption coverage may be offered in different types of policies, including business owner policies, commercial property policies, package policies that include multiple coverages, and other specialized and customized policies. Such specialized policies may include coverage for event cancellation, and contingent business interruption. Policies are commonly customized for individual business policyholders.

Fundamentally, insurance policies are contracts. Each insurance policy is its own contract that must be interpreted based on its specific language, and pursuant to longstanding, well-settled canons of contract construction. A policy must be considered in its entirety when deciding whether coverage applies. Business interruption coverage will typically apply *only if* there is direct physical loss or damage to insured property caused by a covered cause of loss. *See* 11A *Couch on Insurance* § 167:12 (3d. ed. update 2019) ("[M]any business interruption policies and similar coverages will apply only where a covered peril creates damage or loss of property that is insured under the property protection provisions, resulting in an interruption of business."). A claim based on "civil authority" coverage will have to contend with post-9/11 legal authority rejecting such coverage based on safety fears, absent direct physical

damage to nearby premises. *See United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F.3d 128, 134 (2d Cir. 2006).

Thus, determining coverage for each purported business interruption claim requires a detailed analysis of the meaning of relevant policy provisions and their application to the facts. Common covered causes of loss include fire, storm, theft, or a tree falling through a roof.

Each policy at issue in a coverage case will thus present distinct issues for litigation. For instance, there may also be choice-of-law issues depending on the jurisdictional profiles of the litigants and the choice-of-law provisions in the contracts.

Different types of coverage grants: There is no one "blueprint" policy and no "one size fits all" approach to addressing the anticipated variety of lawsuits for business interruption coverage. Tambellini alleges that there are three separate and distinct coverages in his policy that purportedly confer coverage of his losses: Income Protection Coverage; Extra Expense Coverage; and Civil Authority Coverage. Each coverage grant has its own wording and must be applied together with other parts of the specific policy at issue. Civil Authority coverage, for example, typically provides coverage for when a governmental order prohibits access to the insured premises, and the order is due to direct physical loss or damage to property within a specified distance of the insured premises, caused by a covered cause of loss. That variety presents several highly individualized issues, such as: (1) whether the state or local order

actually prohibits access to the insured premises,[2] which depends on the precise language of the order and the specific operations of the insured business (e.g., restaurants are not required to close); (2) whether the order was due to direct physical loss or damage or due to another reason (such as to encourage social distancing); (3) if the mere presence of a virus could ever constitute direct physical loss or damage under applicable law, and, if so, whether any such "damage" could be established within the requisite distance of the insured premises.

There are different business interruption coverage provisions in different policies. Given the thousands of insured businesses in Pennsylvania and their scores of insurers, there may be hundreds of different provisions that could potentially be implicated in future coverage disputes in Pennsylvania. Where policy terms are explicit and unambiguous, they will control the determination of coverage. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100 (Pa. 1999).

Different types of exclusions: A variety of exclusions may also be implicated in different policies, and in different coverages within the policies. For example, some policies exclude loss caused by virus, bacteria, pollution, ordinance or law, acts or decisions, and/or contamination. Some insurers'

---

[2] Many courts have held that this policy language requires a complete prohibition of access. *See, e.g.*, *S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004); *730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 67 F. App'x 248 (5th Cir. 2003); *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 763 N.Y.S.2d 243, 244 (N.Y. App. Div. 2003).

policies have some of these exclusions, but not others, and thus which exclusion they will rely on in litigation will vary. Some exclusions apply to certain coverage grants, but not others, and some insureds make claims under some coverages but not others.

Additional coverage issues potentially implicated: Various other coverage issues are potentially implicated depending on the specific policy involved. As noted above, business interruption policies generally require some physical damage to the insured's property in order to invoke coverage. 11A *Couch on Insurance* § 167:15 (3d ed. update 2019). The Pennsylvania Insurance Commissioner, Jessica Altman, recently explained this concept in a public statement quoted in an insurance publication:

> As a general matter, business interruption insurance will only pay when there has been a physical loss (such as a fire) to the premises of the building[.] The product generally was not designed or priced to cover communicable diseases, such as COVID-19, and generally policies that we have seen in mediating complaints contain clear exclusions.

Elizabeth Blosfield, *More States Introduce COVID-19 Business-Interruption Bills*, Claims Journal (Apr. 16, 2020), https://www.claimsjournal.com/news/national/2020/04/16/296600.htm.

While it is unlikely under the case law that courts will conclude that there was any direct physical loss or damage caused by the novel coronavirus (or the COVID-19 illness or disease that it causes), if a court were to accept the possibility that a virus might cause physical damage, any attempt to prove the

existence of such damage would need to be undertaken on a case-by-case, highly-individualized basis. For example, one insured may be able to establish that there was actual virus DNA on a surface in their property (which is not, alone, evidence of physical damage), while another may not be able to make such a claim. Depending on the terms of their insurance policies, their claims, and the legal issues supporting and opposing coverage may be radically different. As described above, some policies include "Civil Authority" provisions that provide limited coverage, in certain circumstances, for business income losses caused by a prohibition of access to the insured premises. Typically, a Civil Authority provision requires a showing that the order was issued due to physical damage to property within a certain distance of the insured premises. In the COVID-19 context, many insured businesses (e.g., restaurants) have been required to limit their operations but have not been required to close. Therefore, even if a court were to conclude that the physical damage requirement for this coverage could be satisfied (notwithstanding that the case law counsels strongly against such a result), that would not be sufficient to establish that coverage applies. Even in the absence of an exclusion, the court would still be required to consider whether, based on the specific facts and governmental orders applicable to each individual business, there was a prohibition of access to the insured premises.

Furthermore, some policies may only provide coverage where there is a total cessation of business, which would require differentiation between policyholders who have been completely shut down and those able to continue

business on a limited basis. "Depending on the language of a policy, a business 'interruption' or 'suspension' triggering coverage typically involves a total cessation of business, not merely a slowdown or reduction of operations." 11A *Couch on Insurance* § 167:11 (3d ed. update 2019).

Determination of amount of loss, if required: If coverage were to be found under a specific policy and set of facts, such as the rare policy that (unlike Erie's policy in this case) specifically provides coverage for event cancellation without a relevant exclusion, there will still be fact-intensive questions of the amount due under the specific language of the policy at issue.

* * * * * *

If a significant number of lawsuits for business interruption coverage are ultimately filed in Pennsylvania, the courts of the Commonwealth will need to work through a multitude of claim-specific, individualized issues. If ultimately called upon, this Court could then decide on appeal appropriately framed questions of law that may arise from cases, with a fully developed record. Taking jurisdiction now over this one case will not meaningfully advance the cause of resolving future cases. Instead, it would require this Court to function as a trial court. Therefore, the Court should deny the Application.

B. The Court should not decide important legal issues without a factual record, review by the lower courts, and the participation of affected parties.

If a decision in this case would have the impact on other coverage cases that Tambellini seems to assume, that would present a different problem that counsels even more strongly against granting the Application. By taking

jurisdiction over this case, the Court would agree to decide legal issues of substantial importance before there is any ruling on dispositive motions by the lower court (or a trial, if necessary), before intermediate appellate review, and without the participation of many other parties likely to be impacted by such an order. This Court has never adopted such an extraordinary course, with good reason.

Assuming, as Tambellini asserts, that there will be a multitude of cases filed in every county in the Commonwealth, it is impossible at this early stage to predict the identity of all insurance carriers or to know all policy provisions that might be involved. If a decision in this case were dispositive of similar coverage issues in each future case, every insurance company that writes property insurance for businesses in the Commonwealth would need to be served with the Application and have an opportunity to be heard regarding the specific nature and extent of any contemplated King's Bench proceeding before the Court could assume jurisdiction. *See* Pa.R.A.P. 3309(a) (requiring that a petition to assume extraordinary jurisdiction or for exercise of King's Bench powers "shall show service upon all persons who may be affected thereby, or their representatives"); *see also Vale Chem. Co. v. Harford Accident & Indem. Co.*, 516 A.2d 684, 688 (Pa. 1986) (holding that "[e]ssential to the adversary system of justice, and one of the basic requirements of due process, is the requirement that all interested parties have an opportunity to be heard" and that "all parties whose interest will necessarily be affected must be present on the record"). That has not occurred.

Furthermore, other insurance carriers might well argue that the insureds are attempting to have a court make a novel interpretation of business interruption insurance policies that has the effect of requiring carriers to insure risks that they did not agree to assume. Based on current law, insurers could not possibly have anticipated that business interruption coverage tied to direct physical loss or damage could apply to losses caused by a viral pandemic that did not cause physical harm to the insureds' property. Any attempt to apply, industry-wide, a novel "interpretation" redefining the meaning of direct physical loss or damage in this manner would work a substantial change in the law and would subject insurance carriers to massive liability.

The potential impact of a legal ruling that purports to apply industry-wide cannot be overstated. Small business losses from the COVID-19 pandemic in the United States have been estimated at between $255 billion and $431 billion per month. *See* Press Release, American Property Casualty Insurance Association, APCIA Releases Update to Business Interruption Analysis (Apr. 28, 2020), http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60522. By contrast, the total surplus capacity of property insurers in the United States is roughly $800 billion. *Id.*

Furthermore, an analysis conducted by APCIA estimates closure losses just for the businesses with fewer than 500 employees in Pennsylvania with some business interruption coverage included in their commercial property coverage could range from $3.4 billion to $13.8 billion per month. These numbers dwarf the premiums for all relevant commercial property risks in the

key insurance lines for Pennsylvania, which are estimated at $164 million a month.

Thus, a retroactive imposition of a new, extra-contractual risk on insurance carriers could well result in insurer insolvencies, creating an anticompetitive market and adversely affecting the availability and affordability of insurance in the Commonwealth. A summary ruling by this Court on all business interruption coverage could be calamitous for many insurance companies and destabilize the Pennsylvania property insurance marketplace.

The impact of such an outcome would reach all property and casualty insurers providing primary coverage, as well as excess insurance carriers and reinsurers. Insolvency by any insurers would affect insurance guaranty associations, in addition to clogging the Commonwealth Court and this Court with complex insurance rehabilitation and liquidation proceedings. While Pennsylvania has had major insolvencies in the past, such as Reliance and Legion, this solvency crisis would be an order of magnitude larger in light of how widespread the economic damage is from the pandemic and the shut-down orders. More significantly, if the Pennsylvania property-casualty insurance industry is subjected to uncontemplated and potentially catastrophic losses, the effect would be devastating on the Commonwealth's entire economy.

In a statement last month on the current crisis, the National Association of Insurance Commissioners ("NAIC") confirmed the stakes on solvency from such litigation:

> Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period. While the U.S. insurance sector remains strong, ***if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims,*** and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.

NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm.

Rating agencies agree with the NAIC on the dire threat to solvency. AM Best estimates that "a closure of two months would result in a projected after-tax capital and surplus loss of 37-50%," and concludes that "many insurers could experience rating downgrades of multiple notches." Press Release, AM Best, Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital (May 5, 2020), http://news.ambest.com/presscontent.aspx?refnum=29325&altsrc=9. Likewise, S&P Global Ratings reports that "forcing carriers to provide business interruption coverage for communicable diseases such as COVID-19 could profoundly influence the creditworthiness of P/C insurers." S&P Global

Ratings, Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/ Casualty Ratings (Apr 27, 2020), https://www.spglobal.com/ratings/en/research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312.

There are also pending efforts in Congress and the General Assembly to provide government relief to businesses struggling due to the COVID-19 pandemic, demonstrating that legislators recognize that insurance coverage is not available under commercial property insurance policies. If enacted, such government relief may eliminate the need for policyholders to litigate in an attempt to obtain insurance coverage that is not provided under the plain language of their policies. For example, a bill is pending in Pennsylvania that would establish a "COVID-19 Disaster Emergency Business Interruption Grant Program" to allow businesses to apply for government aid under defined circumstances. House Bill No. 2386, Printer's No. 3529 (2020). Pandemic-related business interruption solutions may also emerge at the federal level. *See* Zachary Lerner, *Pandemic Risk Insurance Act and the Future of Business Interruption Insurance*, PropertyCasualty360 (Apr. 21, 2020), https://www.propertycasualty360.com/2020/04/21/pandemic-risk-insurance-act-and-the-future-of-business-interruption-insurance/; Press Release, American Property Casualty Insurance Association, APCIA Releases Update to Business Interruption Analysis (Apr. 28, 2020), http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60522 (advocating for a "COVID-19 Business and Employee Continuity and Recovery Fund").

In stark contrast to proposed governmental relief programs, bills have been proposed in some state legislatures—for example, New Jersey, New York, Ohio, Massachusetts, Louisiana—to require retroactive coverage of COVID-19 business interruption claims, again recognizing that existing policies as written and in place prior to the pandemic do not provide coverage. Similar bills have been introduced in Pennsylvania that purport to provide retroactive coverage or interpret certain policy terms in the business interruption context. *See* House Bill No. 2372, Printer's No. 3512 (2020); Senate Bill No. 1127, Printer's No. 1668 (2020). Insurance regulators nationwide, including in Pennsylvania, have raised the alarm that such proposals would be unconstitutional and threaten insurer solvency.

The National Association of Insurance Commissioners has expressed opposition to such bills, stating, "[A]s Congress considers further legislative proposals to address the devastating impacts of the COVID-19 pandemic, we would caution against and oppose proposals that would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover." NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm . Pennsylvania's Insurance Commissioner, Jessica Altman, made a similar point in a public statement, noting,

> The industry argues that proposals to retroactively apply coverage to policies that excluded benefits in such policies, though beneficial to the policyholder,

> are unconstitutional and threaten the viability of the broader industry[.] We understand those concerns and recognize the need for a national solution to this growing challenge confronting businesses across the nation.

Elizabeth Blosfield, *More States Introduce COVID-19 Business-Interruption Bills*, Claims Journal (Apr. 16, 2020), https://www.claimsjournal.com/news/national/2020/04/16/296600.htm.

* * * * * *

The Application presents this Court with a no-win situation. If the Court were to grant the Application, it would take plenary jurisdiction to decide factual and legal issues in a single case in its infancy, and potentially issue a legal ruling that would not apply to the vast majority of insurance claims and policies implicated by COVID-19 related business interruption insurance. Granting the Application would do nothing to stem the tide of litigation that Tambellini (or its counsel) believe is coming. Alternatively, in Tambellini's view of the world, the Court would prematurely assume responsibility for deciding important legal issues without either a factual record or review by the lower courts, and without the participation of numerous other affected parties. Under either approach, this case does not present one of the rare circumstances in which this Court should take plenary jurisdiction. *See Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d at 620; *In re Bruno*, 101 A.3d at 670 (Pa. 2014); *Friends of DeVito*, 2020 WL 1847100, at *25 (Saylor, C.J., concurring and dissenting) (urging the Court to "refrain from exercising discretion to grant King's Bench jurisdiction," despite agreeing that "the

circumstances are extraordinary and matters of great public importance are involved," because "several material aspects of the petitioners' claims may involve issues of disputed fact").

II. Tambellini's request that the Court coordinate hypothetical litigation relating to coverage for the pandemic is premature.

Tambellini alleges that "[h]undreds, if not thousands, of lawsuits are expected to be filed in the Commonwealth by business owners against insurers to recover for the losses, damages and expenses caused by the COVID-19 pandemic and the related governmental Orders." (App. ¶ 55.) But the Application fails to identify any other cases that have actually been filed in Pennsylvania state courts.

There is no reason for the Court to exercise its plenary jurisdiction to begin coordinating litigation that does not currently exist in the Pennsylvania state courts. If the wave of coverage litigation that Tambellini's counsel anticipates actually arises in the Commonwealth's courts, the parties in those cases and the trial courts can coordinate those proceedings, if they deem it appropriate, using the tools provided by the Rules of Civil Procedure. *See, e.g.,* Pa.R.C.P. 213.1. There is no precedent, and no logical reason, for this Court to exercise its extraordinary plenary powers to begin managing litigation that does not exist.

CONCLUSION

Because there is no basis for Tambellini to invoke this Court's plenary authority, and because this case does not present an appropriate circumstance in which to do so, the Court should deny the Application.

Respectfully submitted,

/s/ Robert L. Byer
Robert L. Byer
Damon N. Vocke[3]
Robert M. Palumbos
Jonathan I. Aronchick
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae

May 7, 2020

[3] Admitted to practice in New York and Connecticut.