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IN THE SUPREME COURT OF PENNSYLVANIA
NO. 52 WM 2020

JOSEPH TAMBELLINI, INC.,

D/B/A JOSEPH TAMBELLINI RESTAURANT

PETITIONER

v.

ERIE INSURANCE EXCHANGE

RESPONDENT

ERIE INSURANCE EXCHANGE'S ANSWER TO APPLICATION FOR EXTRAORDINARY RELIEF

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Erie Insurance Exchange ("Erie"), through undersigned counsel pursuant to Pa.R.A.P. 3309(b), respectfully files this Answer to Petitioner's Emergency Application for Extraordinary Relief Pursuant to Rule 3309, 42 Pa.C.S. §726 and King's Bench Powers ("Application"). For the reasons set forth below, Erie requests that this Court deny the Application in its entirety.

INTRODUCTION

This Court should deny the pending Application because, while the ongoing COVID-19 crisis itself is obviously of immediate importance to the nation as a public health matter, the instant contractual dispute and other unidentified insurance coverage contractual disputes between private parties are not matters of immediate public importance.

Petitioner Joseph Tambellini, Inc., D/B/A Joseph Tambellini Restaurant ("Tambellini") asks this Court to take two extraordinary and unprecedented actions. First, Tambellini asks this Court to forego all judicial norms and processes to exercise its extraordinary jurisdiction pursuant to 42 Pa.C.S. §726 or the Court's King's Bench power in a private contractual dispute between Tambellini and Erie involving a policy of insurance. This Court has *never* exercised plenary, original jurisdiction in a case such as this, and for good reason: the Commonwealth has established a court system to adjudicate such claims, and this Court serves as the highest appellate court, not a *de facto* trial court to hear cases in the first instance.

This system has served the Commonwealth well for literally hundreds of years. Historically, this Court has limited its King's Bench jurisdiction to cases involving governmental authority, and even then, only where time was of the essence because a delay could render the dispute moot by the time the issue made its way up to this Court. This case breaks the mold and finds no precedent in this Court's jurisprudence.

Indeed, with very few applicable exceptions, this Court addresses issues on appeal after records are developed, lower court opinions have issued, and the parties have briefed and argued the issues of law that are of sufficient importance to warrant this Court's time and attention. These insurance coverage disputes present no compelling reason to depart from those norms. Were the Court to do so here, it would fundamentally alter the judicial system to the detriment of this Court and all litigants before it.

Tambellini's request also fails to meet the substantive standard this Court historically has applied to requests for the exercise of its extraordinary jurisdiction. There is no question that the COVID-19 pandemic and related executive orders have had a significant impact on many businesses across the Commonwealth. However, Tambellini conflates the public importance of the public health aspects of the COVID-19 pandemic generally, with its private lawsuit against Erie. Individualized insurance coverage disputes, like the case at bar, do not as a matter

of fact or law involve matters of "immediate public importance," which this Court has previously reserved for issues involving disputes over the scope of governmental authority. And, Tambellini offers no limiting principle as to why every litigation relating to COVID-19 would not be subject to the same arguments it makes for the exercise of jurisdiction here. Nor does Tambellini address the fallout of any decision by this Court to exercise plenary jurisdiction: plaintiffs in every crisis to come will seek relief first in this Court, subverting the Court's role as the final appeals court and clogging its docket.

Additionally, Tambellini asks this Court to exercise plenary jurisdiction to issue dispositive "rulings on the legal insurance coverage issues" (App. ¶ 56(d)) that would bind not just Erie, but unidentified "other insurers throughout the State." *See id.* ¶ 50. Though not spelled out in detail, Tambellini apparently wants this Court to create and appoint some type of unspecified supervisory court to take the findings from this single policyholder dispute with a single insurance company and somehow apply those findings to the "[h]undreds, if not thousands, of lawsuits . . . expected [by Tambellini] to be filed in the Commonwealth by business owners against insurers." App. ¶¶ 55-56. In effect, though neither a class representative nor a plaintiff in a bellwether case, Tambellini unilaterally asks this Court to take the radical step of assuming plenary jurisdiction over *all* (currently unknown and not-yet-filed) "COVID-19 litigation in Pennsylvania" and "establish a system for

the expeditious resolution of any and all other legal insurance coverage issues which may arise in any COVID-19 lawsuits . . . ." *Id.* ¶ 56. But that system already exists: it is the Pennsylvania court system, which is no stranger to handling complex cases involving multiple claimants.

Setting aside, for the moment, the troubling constitutional due process concerns that arise when any court issues dispositive rulings for the express purpose of applying such rulings to classes of persons (insurers and policyholders) without affording such persons basic legal protections like notice and an opportunity to be heard—as well as the patent violation of court rules requiring Tambellini to provide notice to such persons—there is no "one size fits all" solution to the "legal insurance coverage issues." In a contract case, after all, the terms of the contract matter. Different insurers employ different policy forms, endorsements, and exclusions, and any findings are limited to the specific contractual language as applied to the specific facts of a particular case. The idea that any court can—with no record before it, in a vacuum, and at the beginning of the case—issue sprawling industry-wide rulings that will adjudicate potentially thousands of unknown disputes involving myriad contract forms, an exponential number of different types of businesses, and varying underlying facts is, respectfully, unthinkable. And, engaging in such an exercise without providing all interested participants with notice and an opportunity to be heard would

undeniably infringe on their constitutional rights. Never in the history of this Commonwealth has a court attempted such a "star chamber" procedure, and this Court should not countenance it now.

In seeking this novel relief, Tambellini asks this Court to ignore completely the role of trial courts in determining whether procedural devices, developed by courts over many decades, to address cases involving multiple claimants ought to be applied here, and if so, which ones. These procedures involve (where appropriate) levels of joinder, coordination, consolidation, and class devices. They have been invoked by plaintiffs in all manner of disputes, as plaintiffs have filed multiple putative class actions for varying COVID-19 insurance coverage disputes and many of them are seeking consolidation in federal court before the Judicial Panel on Multidistrict Litigation.[1]

While the parties in various cases undoubtedly will engage in the ordinary sparring over whether the requirements necessary to invoke various procedural devices have been met, that battle should take place in the trial court, on a

[1] Significantly, the same attorneys who ask this Court to discard normal procedural rules in favor of creating an entirely new "system" in the Pennsylvania judiciary filed a complaint against Erie in the same county court (and on the same day, and at the exact same time) on behalf of another insured, seeking certification of a putative class of policyholders. In that case, the insured pled that "the only practicable means available" to adjudicate coverage claims is through the class action device and that "[i]t is desirable for all concerned to concentrate the litigation in this particular form for adjudication" *HTR Rest. v. Erie Ins. Exch.*, No. GD-20-5138, ¶¶ 44, 58 (Allegheny Cty. Court of Common Pleas, Pa.) ("*HTR* Comp."). Indeed, as pleaded, the class action complaint filed by Tambellini's lawyers in that case would arguably include their client here, Tambellini, in their definition of the "class" on behalf of their client in that case.

complete record, and not here in the absence of any record. There is in short no basis, let alone an "immediate" and "extraordinary" one, for this Court—for the first time in its history—to divest all trial courts of original jurisdiction in favor of creating on-the-fly new procedures to address a contract dispute between private commercial entities. And, Tambellini offers no rationale for why this Court, for the first time in its history, ought to address one seemingly random insurance coverage case and have its ruling then applied by a newly-created specialized court to every policyholder and every other insurer, come what may.

Respectfully, this Court should not be swept away by the passions of the moment and abandon established processes and procedures in favor of some mass, *ad hoc* rush to judgment. The Application presents no compelling evidence that the normal litigation channels available to private litigants are failing or inadequate. Tambellini's request that this Court discard Pennsylvania's tried and proven Judicial system and Rules of Civil Procedure is baseless and makes no sense. For these and for the reasons set forth below, Erie respectfully urges this Court to deny the Application, and to instead to allow Tambellini's case—and the cases of other unidentified plaintiffs who may assert claims related to COVID-19 insurance coverage against other insurance companies—to proceed through the normal, truth-seeking, fairness-ensuring channels of Pennsylvania's judicial system, beginning in the trial court.

STATEMENT OF THE CASE

Joseph Tambellini owns and operates a restaurant in Pittsburgh, Pennsylvania. App. ¶¶ 2, 4. Since March 6, 2020, Governor Tom Wolf has issued a series of orders related to the COVID-19 crisis that have required certain non-essential businesses to shut their doors to the public. App., Ex. A at ¶¶ 18-22 (Tambellini Complaint). However, restaurants, like Tambellini's, have been permitted to continue operating in order to offer delivery and curbside takeout, and Tambellini's apparently has done so.[2] Tambellini nonetheless alleges that it has been forced to "close" its business and furlough employees, and that its business has been adversely affected by the COVID-19 crisis and related executive orders. App. ¶ 23.

Tambellini purchased an Ultrapack Plus Commercial General Liability Policy (No. Q982145987) from Erie, which includes property coverage. App. ¶ 29. On April 17, 2020, Tambellini filed a suit in the Court of Common Pleas of Allegheny County against Erie for losses, damages, and expenses caused by the

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[2] *See* Tambellini's website, available at http://josephtambellini.com/ (last accessed May 2, 2020) (indicating that it is open for delivery and takeout).

Governor Wolf's March 19, 2020 Executive Order provides that "[b]usinesses that offer carry-out, delivery, and drive-through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons." Executive Order dated March 19, 2020 at § 2, available at https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf (last accessed May 3, 2020).

COVID-19 pandemic and governmental orders entered in connection therewith. App., Ex. A. Tambellini seeks declaratory, compensatory and injunctive relief. App., Ex. A. Specifically, Tambellini seeks a declaration that its insurance policy with Erie, which by its terms insures against "direct physical loss" or damage to Covered Property (App., Ex. B (Policy at p. 1)), provides coverage for losses caused by the COVID-19 virus and referenced orders. Tambellini further seeks an order enjoining Erie from denying it coverage for business income, extra expenses, civil authority and other coverages for losses caused by the COVID-19 virus and referenced orders. App., Ex. A ¶ 53.

Twelve days after filing its complaint in the trial court, and before service of the complaint on Erie, on April 29, 2020, Tambellini filed its Application in this Court. The Application asks this Court to invoke its extraordinary jurisdiction under 42 Pa.C.S. §726 and its King's Bench power to take this case from the trial court and make a nearly immediate decision on the coverage issues presented therein without the benefit of any factual record whatsoever. Tambellini urges this Court to bypass the normal judicial process that has been established and employed for centuries for the adjudication of private claims involving insurance coverage. Specifically, Tambellini asks the Court to (1) assume control of the litigation; (2) establish an expedited schedule for the submission of briefs on the insurance

coverage issues; and (3) schedule oral argument for the presentation of the "legal insurance coverage issues" to the Court. App. ¶ 51.

Tambellini further asks this Court to assume plenary jurisdiction over *all* "COVID-19 litigation in Pennsylvania" in order to (1) coordinate the handling of those cases in one County before a judge or group of judges; (2) establish a system for the expeditious resolution of any and all other legal insurance coverage issues which may arise in any COVID-19 lawsuits; (3) exercise consistency and fairness in the implementation of the rulings of the Supreme Court on the COVID-19 legal insurance coverage issues; and (4) establish a system for the prompt and fair resolution of the COVID-19 claims in a manner consistent with the rulings on the legal insurance coverage issues by the Supreme Court. *Id.* at ¶ 56.

SUMMARY OF ARGUMENT

This case involves a private coverage dispute between a single plaintiff and a single insurer in which the plaintiff seeks money damages. It is not extraordinary and does not implicate issues of immediate "public" importance. Resolution of this case will turn on the language, coverages, and exclusions set forth in Tambellini's unique insurance policy, as well as on the case-specific facts and circumstances surrounding the alleged "closure" of Tambellini's business and business interruption losses. A decision in this case will not have broad applicability to other COVID-19 insurance coverage disputes.

Thousands of coverage disputes, like this one, are litigated through the trial courts each year. Pennsylvania trial courts have vast experience and are well-equipped to adjudicate insurance coverage issues and have been doing so for well over 200 years. Tambellini offers no reason to disrupt this tried and true process and jump directly to this Court.

Nor should this Court take the even more drastic step of assuming plenary jurisdiction over *all* business insurance litigation arising out of the COVID-19 pandemic before the tried and proven Pennsylvania Judicial system and Rules of Civil Procedure have been given a chance to address any issues that may arise. For a host of reasons, such a request is unprecedented, unworkable and unconstitutional. There are myriad procedural mechanisms that allow for the efficient resolution of multiple plaintiffs' claims, including statewide class actions, if the appropriate prerequisites are met,[3] or an interlocutory appeal of an important trial court decision under 42 Pa. C.S. §702(b). Tambellini has not provided any evidence or justification that these normal judicial channels should be disregarded or would not render justice in this context.

Exercise of the Court's jurisdiction at this time would be premature and significantly undermine the principles that reside at the heart of the judicial system.

[3] Erie does not suggest that this case could satisfy the requirements for class certification under Chapter 1700 of the Pennsylvania Rules of Civil Procedure, and Erie reserves all rights to contest any attempted class certification in this or other matters.

The Court certainly could not, consistent with due process, purport to exercise plenary jurisdiction over the "hundreds if not thousands" of other not-yet-filed cases involving unidentified parties and unknown circumstances that Tambellini speculates will be filed in Pennsylvania state trial courts. Thus, this Court should, in its discretion, decline to assume plenary jurisdiction over this case.

APPLICABLE STANDARD

Tambellini seeks an immediate decision from this Court on its claim for coverage under its Erie insurance policy pursuant to the Court's King's Bench power under Article V Section 2 of the Pennsylvania Constitution and the Court's extraordinary jurisdiction power as set forth in 42 Pa.C.S. §726. The King's Bench authority is codified in Section 502 of the Judicial Code ("General powers of Supreme Court"), which states as follows:

> The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722. The Supreme Court shall also have and exercise the following powers:
>
> > (1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.
> >
> > (2) The powers vested in it by statute, including the provisions of this title.

42 Pa.C.S. §502. The Section 502 King's Bench authority is:

> generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law. *In re Bruno*, 101 A.3d 670. While such authority is exercised with extreme caution, the availability of the power is essential to a well-functioning judicial system. *Id.* The exercise of King's Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature; rather, the Court may employ any type of process necessary for the circumstances. *In re Franciscus*, 471 Pa. 53, 369 A.2d 1190, 1193 (Pa. 1977) (citing *Petition of Squires & Constables Ass'n of Pa.*, 442 Pa. 502, 275 A.2d 657 (Pa. 1971)).

Commonwealth v. Williams, 129 A.3d 1199, 1205-06 (Pa. Super. Ct. 2015). (emphasis added).

Section 726 of the Judicial Code provides this Court with similar but distinct authority:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. §726.

Although the Court's Section 726 extraordinary jurisdiction and its Section 502 King's Bench jurisdiction are similar, they are not the same. Section 726 enables this Court to assume plenary jurisdiction over a matter pending before a lower court when that matter involves an issue of immediate public importance that requires intervention to ensure that right and justice prevail. Section 502 (King's Bench) "allows the Court to exercise 'power of general superintendency

over inferior tribunals even when no matter is pending before a lower court" when resolution of an issue of public importance will prevent harm that will otherwise be caused by the delays inherent in the judicial process. *See In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929, 933 n.3 (Pa. 2007) (internal citation omitted). Because an action between the same parties regarding the same issues is pending in the Court of Common Pleas, Tambellini's Application should be evaluated under the extraordinary jurisdiction power of Section 726. *Id.*

In determining whether to exercise its discretion to assume plenary jurisdiction, this Court "considers the immediacy and public importance of the issues raised." *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 619 (Pa. 2010) (citing 42 Pa.C.S. § 726); *see also Commonwealth v. Harris,* 32 A.3d 243, 251 (Pa. 2011) (declining to assume plenary jurisdiction because "the requisite degree of public importance is lacking in most orders overruling privileges").

Significantly, "[p]lenary jurisdiction is invoked sparingly and only in circumstances *where the record clearly demonstrates the petitioners' rights*." *Bd. of Revision of Taxes,* 4 A.3d. at 620 (citing *Commonwealth v. Morris,* 771 A.2d 721, 731 (Pa. 2001) (emphasis added) and *Phila. Newspapers, Inc. v. Jerome,* 387 A.2d 425, 430 n.11 (Pa. 1978)). *See also, Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001) (even "the presence of an issue of immediate public importance is not alone sufficient ... *[W]e will not invoke extraordinary*

jurisdiction unless the record clearly demonstrates [the] petitioner's rights.") (emphasis added). And "even a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief." *Bd. of Revision of Taxes*, 4 A.3d. at 620 (quoting *Phila. Newspapers, Inc. v. Jerome,* 387 A.2d 425, 430 n.11 (Pa. 1978)).

Here, there is no record, and certainly not one that supports Tambellini's Application. Indeed, Tambellini has not even advised this Court of all pending cases, and its Application, at bottom, rests on its guess as to future cases that may not be filed at all. Nor is there any "immediacy" for the relief Tambellini seeks. *Bd. of Revision of Taxes*, 4 A.3d. at 620. There is no reason why the trial courts cannot in the first instance address any procedural motions Tambellini may file. Trial courts do so all the time. And, if any plaintiff believes the trial court erred in its analysis, it may file an appropriate appeal to correct any perceived error.

Ultimately, this Court's goal is to "conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth." *In re Bruno*, 101 A.3d at 675. Divesting the trial courts of jurisdiction, extending this Court's jurisdiction beyond any precedent, resolving complex issues without a record, infringing on the due process rights of absent policyholders and insurers, and creating new civil procedures, will achieve the exact opposite result.

ARGUMENT

Tambellini asks this Court to set aside Pennsylvania's well-established, longstanding judicial process and instead exercise King's Bench authority to immediately resolve its dispute with its insurer over its commercial insurance policy. But the trial courts are armed with the tools to determine the best manner of resolving such litigation, and that has been the exclusive role of Pennsylvania's trial courts for centuries. There is no reason why this Court needs to wade into this dispute, and certainly not at this time.

In short, this case is a property insurance coverage dispute. That kind of purely private, fact-specific contractual matter is radically different from the issues of public importance historically addressed through the exercise of this Court's King's Bench power, which almost always involves the exercise of governmental authority. Indeed, Tambellini is asking this Court to exercise its extraordinary jurisdiction and King's Bench power to do two distinct things, neither of which has ever been done by this Court:

- *First*, Tambellini asks the Court to assume jurisdiction over its individual private contractual case against Erie and issue a coverage decision without the benefit of any record below, including any decision on any dispositive motion Erie may file in the trial court, or

(if necessary) discovery, development of a factual record, or findings of fact from a jury (App. ¶ 51);

- *Second*, Tambellini asks this Court to assume control of *all* of the "hundreds, if not thousands" of insurance coverage cases that Tambellini speculates will be filed in Pennsylvania state court in the wake of the COVID-19 pandemic and to "establish a system" for the expeditious resolution of "any and all other legal insurance coverage issues which may arise in any COVID-19 lawsuits" by all other plaintiffs against all other insurers, under the assumption that this Court's holdings in this single-plaintiff case could somehow be applied to other litigants, regardless of whether their insurance policies bear any resemblance to the one purchased by Tambellini or whether their cases warrant the same treatment as Tambellini's. (*Id.* at ¶¶ 55-56).

Both of these unprecedented requests for a sea change in the judicial process should be denied.

I. The Court Should Decline to Exercise Extraordinary Jurisdiction Over Tambellini's Case.

A. Tambellini's Private Coverage Dispute With Erie Does Not Raise Any Issues of Immediate Public Importance.

To warrant the exercise of plenary jurisdiction over this case, the issues involved must be of "immediate public importance." *See* 42 Pa.C.S. §726. Historically, this Court has exercised its extraordinary jurisdiction and King's Bench power only on rare occasions, to take jurisdiction of cases involving issues of governmental authority such as those involving election disputes, public employee strikes, disputes involving public officials, prison overcrowding, investigating grand juries, powers of the General Assembly and alleged judicial misconduct. *See, e.g., In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). There are monumental factual and legal differences between those governmental public interest and constitutional matters and this contractual dispute between two private parties.

This Court has invoked its authority in only limited categories of cases: cases implicating constitutional questions (*see, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018)); cases between a governmental body and a union (*see, e.g., Masloff v. Port Auth. of Allegheny Cty*, 613 A.2d 1186, 1188 (Pa. 1992)); cases concerning government funding (*Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 52 A.3d 1213, 1220 (Pa 2012)); cases involving statutory interpretation (*Kilmer v. Elexco Land Servs.*, 990 A.2d 1147, 1151 (Pa. 2010)); and cases dealing with the integrity or authority of a governmental entity or official (*Commonwealth v. Kline*, 555 A.2d 892, 894 (Pa. 1989)). S*ee also,*

Barbieri v. Shapp, 368 A.2d 721, 722 (Pa. 1977) (assuming plenary jurisdiction to determine whether a judge was entitled to extend his term under the Pennsylvania Constitution); *Wilson v. Blake*, 381 A.2d 450 (Pa. 1977) (assuming plenary jurisdiction to determine whether criminal defendants were permitted to make tape recordings of a preliminary hearing when the proceedings were officially recorded); *Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57 (Pa. 1971) (exercising King's Bench jurisdiction in a matter challenging gubernatorial appointments to judicial vacancies); *Summers v. Kramer*, 114 A. 525, 527-28 (Pa. 1921) (exercising King's Bench jurisdiction to resolve dispute between judicial officers over payment to contractor examining common pleas files and records); *In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929 (Pa. 2007) (reviewing under its plenary powers challenges to the District Attorney's authority to conduct a grand jury investigation, but declining to exercise King's Bench or extraordinary jurisdiction over the remainder of plaintiff's claims challenging the grand jury process, which the court found did not raise issues of immediate public importance and were properly reviewable in the ordinary course once final orders issued); *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006) (assuming plenary jurisdiction over constitutional challenge to legislation that tied salaries of state officials to those of federal officials); *Perzel v. Cortes*, 870 A.2d 759 (Pa.

2005) (assuming plenary jurisdiction to review rejection by Commonwealth's Secretary of election writ issued by House Speaker).[4]

All of these cases share a common, unifying thread: the key issues in dispute involved discrete matters of unique public importance (in nearly all instances issues of governmental authority or time-sensitive constitutional issues) that could be adjudicated expeditiously and fairly without development of an extensive factual record and without abridging the rights of individual litigants. This Court has not, by contrast, invoked these extraordinary powers to assume immediate jurisdiction to try contractual disputes between private parties, much less a private insurance coverage dispute between a single plaintiff and a single insurer. Nor is there ***any*** precedent for this Court taking control over all current and future (and as of yet undefined) insurance coverage litigation in the Commonwealth related to COVID-19, as is discussed in more detail below.

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[4] *See also Ieropoli v. AC&S Corp.*, 842, A.2d 919 (Pa. 2004) (Court assumed plenary jurisdiction over challenge to constitutionality of statute which extinguished appellants' causes of action that had accrued before statute was enacted); *Silver v. Downs*, 425 A.2d 359, 362 (Pa. 1981) (Court assumed plenary jurisdiction over interlocutory appeal from order disqualifying township solicitor from representing township officers); *Commonwealth v. Williams*, 129 A.3d 1199, 1201 (Pa. 2015) (invoking King's Bench authority to review whether the Governor's grant of an inmate's reprieve from the death penalty was within his authority); *Fagan v. Smith,* 41 A.3d 816 (Pa. 2012) (*per curiam*) (assuming King's Bench jurisdiction over electors' petition for mandamus and ordering the Speaker of the Pennsylvania House of Representatives to issue writs of election for special elections to fill vacancies in enumerated legislative districts); *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1264 n.6 (Pa. 2007) (invoking King's Bench jurisdiction as an alternative ground to review a challenge to actions taken by the Philadelphia City Council and the Philadelphia Board of Elections that had profound importance and generated substantial public attention).

Nor are the issues presented by Tambellini's individual money damages case ones that require "immediate" resolution. Tambellini has not alleged any facts or proffered any argument establishing that having its dispute adjudicated in the Allegheny County Court of Common Pleas would somehow be prejudicial to its claim or deny it justice. To the contrary, at the very same moment Tambellini filed its complaint, its own lawyers filed a different suit against Erie on behalf of another restaurant in which more customary relief is sought: class treatment. The trial courts will address these issues in due course and determine whether the demanding prerequisites for class certification can be met on these facts. Determining how these cases will proceed does not entail questions of constitutional concern or speak of governmental authority; nor are they immediate, as the plaintiffs who filed putative class actions are obviously aware that putative class practice requires rigorous scrutiny and takes time to resolve. In truth, this is just an ordinary case by an insured against its insurer for money damages.

While the ongoing COVID-19 crisis itself obviously is of immediate importance to the nation as a public health matter, that fact alone does not establish that Tambellini's contractual dispute with Erie is of such immediacy that the normal litigation processes and procedures that govern civil disputes in Pennsylvania should suddenly be disregarded entirely.

Apparently recognizing that there are adequate remedies at law for this private breach of contract case—namely money damages—Plaintiff chose not to move the trial court for immediate equitable relief, the typical procedural vehicle for expediting litigation of emergent issues. The undisputed availability of monetary damages makes clear that there is no immediacy requiring an unprecedented diversion from the usual civil litigation process for two private litigants. The Judicial Panel on Multi-District Litigation stated as much when it declined other plaintiffs' lawyers request to expedite its own process as to COVID-19 related insurance coverage litigation.[5]

Moreover, while Erie does not seek to diminish in any way the losses experienced by any business as a result of the COVID-19 pandemic, trial courts often address cases involving equally important losses, including (especially in the case of natural disasters) the loss of homes and irreplaceable personal possessions. Yet, in such instances, the judiciary does not panic and try to craft *ad hoc* rules to address the crisis. Instead, the courts use the tools that were created to address precisely these types of situations, where the requirements are met. Tambellini offers no rationale for why ordinary, tested judicial procedures—consolidation or

[5] *See In re: COVID-19 Bus. Interruption Ins. Coverage Litig.*, MDL No. 2942, Dkt. No. 51.

coordination, among others—should be, if appropriate here, jettisoned in favor of turning this Court into a trial court with brand new procedures.

Nor is Tambellini's individual case of sufficient "public importance" to warrant exercise of this Court's extraordinary jurisdiction. Resolution of this matter will turn on the specific coverage terms, endorsements, and exclusions found in Tambellini's contract of insurance, as well as the specific facts surrounding the alleged shutdown of its restaurant. It will not affect the resolution of disputes involving other insureds who have different policies—with different types of businesses, claims, coverage terms, and exclusions—with Erie or different insurers.

As this Court has explained, "[i]nsurance contracts, while highly regulated, are still contracts. They remain arrangements between private parties." *Sayles v. Allstate Ins. Co.*, 219 A.3d 1110, 1130 (Pa. 2019). Private contractual disputes are not of "public importance" under this Court's precedent. There is no factual or legal basis for turning the judicial system on its head and bypassing the trial court to fast track a decision in Tambellini's case, any more than there would be in any other coverage dispute where the stakes for an individual business could be just as high. *See Bd. of Revision of Taxes*, 4 A.3d. at 629 (denying request to exercise jurisdiction over a challenge to the validity of a Salary Ordinance, and explaining that "[t]he parties' dispute over the propriety of reducing BRT members' salaries,

while important, does not require accelerated review by this Court out of the ordinary course, nor are petitioners' arguments regarding the public importance of the issue they present particularly compelling . . .").

Tellingly, Tambellini does not cite a *single instance* in which this Court exercised its extraordinary jurisdiction or King's Bench power in an insurance coverage dispute or any other type of contractual dispute between private parties. Litigating against the backdrop of a pandemic simply does not turn a routine private coverage dispute into a matter of "immediate public importance." *See, e.g.*, *Civil Rights Defense Firm, P.C., et al. v. Wolf*, 63 M.M. No. 2020, 2020 Pa. Lexis 1585 *2 (Pa. March 22, 2020) (denying application for immediate relief pursuant to Court's King's Bench power in COVID-19 case); *Markey v. Wolf*, No. 75 M.M. 2020, 2020 Pa. Lexis 2130 *1 (Pa. April 20, 2020) (denying petitioner's Emergency *Ex Parte* Application for Extraordinary Relief Pursuant to the Court's King's Bench power in COVID-19 case).

Nonetheless, despite the lack of any urgency, constitutional or statutory issues, or an action involving the exercise of governmental authority; Tambellini seeks to improperly bootstrap its case to this Court's decision in *Friends of DeVito v. Tom Wolf, Governor* ("*Friends of DeVito*"), No. 68 M.M. 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020). But *Friends of Devito* shows why this Court should *not* exercise plenary jurisdiction here. There, the Court was confronted with an

issue *involving governmental authority* that the Petitioners contended violated the constitution, state statutes, and disrupted an ongoing political campaign. *Id.* at *2. What's more, "[b]oth Petitioners and Respondents agree[d] that the present action presents an issue …[that] requires immediate resolution." *Id.* at *8. And indeed, a decision a year or more after the case percolated up to this Court that the Governor lacked authority to close some businesses would by then be utterly moot, so it is easy to understand the Court's rationale in taking the case (in a year, for example, the election involving Mr. DeVito would have already taken place).

This case, in sharp contrast, does not involve any question of governmental authority, or the constitution, or state statutes, or an election; it is instead a straightforward coverage dispute between a policyholder and its carrier. Tellingly, Tambellini is the *only policyholder* in the entire state that is seeking to radically alter the normal judicial process, as other policyholders (some of whom are represented by Tambellini's own counsel) seek other procedures, both in Pennsylvania state courts and in the federal courts, to address these coverage claims. Indeed, other policyholders may rightfully conclude that, by even entertaining the Application, *their* constitutional rights would be violated, as Tambellini seeks to hijack all COVID-19 coverage litigation through this Application in which no other policyholder has been afforded notice or an

opportunity to be heard. In short, the standard for exercising plenary jurisdiction as articulated in *Friends of DeVito* for cannot be met in this case.

B. A Decision Regarding Coverage Under Tambellini's Policy With Erie Would Not Have Broad Applicability to Other Coverage Matters.

Although Tambellini seeks to characterize this case as one involving sweeping issues of broad applicability to businesses across the Commonwealth, it is not. The resolution of this case will turn on numerous unique and highly individualized factors, including, but not limited to the specific terms of Tambellini's one hundred-plus-page insurance policy, such as whether any peril insured against in fact occurred, whether a covered loss occurred under its base and supplemental coverages, whether any of the exclusions in the policy apply, and whether Tambellini can even provide proof of loss and in what amount.[6]

Even if this streamlined process was feasible (putting aside the massive procedural and due process deprivations it would impose on Erie and other insurers), this Court's determination of Tambellini's coverage claims would have

[6] The Pennsylvania Department of Insurance has put forth the following statement related to coverage: "[b]usiness interruption insurance does not usually cover communicable diseases, such as COVID-19. This insurance coverage replaces lost income if a business is closed for a reason related to property damage to the location, like a fire." *See* "FAQ: COVID-19 Business Interruption Insurance," Pennsylvania Department of Insurance website, available at https://www.insurance.pa.gov/coronavirus/Pages/COVID-Business-Insurance.aspx (last visited May 2, 2020). It further states that "the Governor's declaration doesn't change the terms of your business interruption insurance." *Id.* It goes on to explain that *"[b]ecause business interruption insurance can be different for each business*" (emphasis added), policyholders should speak with their particular agent or company for more information. *Id.*

at best limited applicability to any other litigants in the Commonwealth. Each insurer (including Erie) sells a multitude of policies that have different terms, conditions, and exclusions. A disposition in Tambellini's case would have no preclusive effect on other disputes involving different policyholders who purchased different policies, especially from different insurers. Under no circumstances could litigants beyond the scope of this individual matter between Tambellini and Erie utilize *res judicata* principles to take findings made here and apply them, expeditiously or otherwise, to resolve their individual cases.[7]

Moreover, Tambellini's request to have this Court consolidate an unknown number of cases involving an unknown number of insurers and policyholders flies in the face of normal practice. As the Pennsylvania Rules of Civil Procedure recognize, complete consolidation—*i.e.*, consolidation whereby the actions lose their separate identities, and judgment in one is conclusive as to the others—is

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[7] The doctrine of res judicata "incorporate[s] both claim preclusion, or traditional res judicata, and issue preclusion, or traditional collateral estoppel. *McNeil v. Owens-Corning Fiberglas Corp.*, 680 A.2d 1145, 1147 (Pa. 1996) (citing *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 676 A.2d 652 (Pa. 1996)). To successfully assert res judicata, a claimant must establish four elements: "(1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; (4) identity of the quality in the persons for or against whom the claim is made." *Schuback v. Silver*, 336 A.2d 328, 332 (Pa. 1975) (citing *Fisher Bldg. Permit Case*, 49 A.2d 626 (Pa. 1946)). Collateral estoppel requires proof of the following four prongs: "(1) An issue decided in a prior action is identical to one presented in a later action; (2) The prior action resulted in a final judgment on the merits; (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action." *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998).

appropriate only in actions involving the same parties, subject matter, issues and defenses. *Kincy v. Petro*, 2 A.3d 490, 495 (Pa. 2010); Pa. R.C.P. No. 213. "While it may be reasonable to order separate actions filed by different plaintiffs to be consolidated for trial, or, for example, discovery, it seems patently unfair to require different plaintiffs, by complete consolidation of their actions, to join forces as if they filed suit together." *Id.* Yet, Tambellini seeks some form of blunderbuss consolidation in which potentially "thousands" of yet-to-be filed cases would be automatically and mandatorily joined, in direct contravention of normal practice and procedure, at the urging of Tambellini alone.

The relief Tambellini seeks, moreover, goes well beyond impermissible mass consolidation, as improper as that would be. By seeking to have any decision on its policy apply to other policyholders, Tambellini, in effect, is seeking to have this Court issue a "class-wide" ruling in the absence of any class certification (and this case was not even filed as a class suit). Such relief would be improper at any stage. As this Court has made clear, "determining the appropriateness of class treatment is an inherently fact-laden inquiry" and must be "premised on properly determined facts, not assumed ones." *Basile v. H&R Block, Inc.*, 52 A.3d 1202, 1208 (Pa. 2012). For a host of reasons, these claims are not susceptible to class

treatment.[8] Yet—with no facts and armed with no more than speculative assumptions regarding the number of cases that may be filed—Tambellini wants this Court to treat all policyholders alike, as if this were a class action (it is not), all policyholders had the exact same policy (they do not), and a class was certified (also no).

Worse still, Tambellini then asks this Court to treat *all insurers* alike, despite myriad policy forms and their complete absence from the case. Yet, Tambellini does not explain—nor could it—how any decision concerning its policy with Erie could be imposed on another insurer, or even on Erie with respect to a policyholder with a different form of policy or whose claim arises from different circumstances. In any event, the kind of *ad hoc* approach to litigation trumpeted by Tambellini, in which adjudications are quickly made in a void without facts or any record, and are then applied universally as if there are both certified plaintiff and defendant classes when there are none, is utterly inconsistent with *Basile* and violates every norm of the legal profession and fundamental principles of fairness and due process.

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[8] Differences in policy provisions and differences in the facts and circumstances of each claim render coverage disputes like this one unsuitable for class treatment. *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-436, 2006 WL 1066645, at *1 (S.D. Miss., Feb. 23, 2006) (denying certification based on "the preponderance of individual questions of damage, coverage, policy provisions, mortgage obligations . . . involved in the case of each individual property owner who sustained damage as a result of Hurricane Katrina."); *Terrebonne v. Allstate Ins. Co.*, 251 F.R.D. 208, 211 (E.D. La. 2007) (denying certification to putative class of insureds because "plaintiffs' claims still require highly individualized inquiries into the cause of each plaintiff's loss and the amount of the damages sustained at each of the plaintiffs' properties."); *Schafer v. State Farm Fire & Cas. Co.*, No. 06-cv-8262, 2009 WL 2391238, at *1 (E.D. La., Aug. 3, 2009) (individual issues regarding insurance claims precluded certification of class of State Farm's insureds).

There is, in short, no appropriate "one size fits all" approach. Tambellini's counsel have implicitly acknowledged the highly individualized nature of these types of cases—and procedural mechanisms for grouping similar cases—by filing at least four other COVID-19 insurance coverage matters in two different courts against at least four separate insurers, including in federal court, on behalf of separate clients, two of which are putative class actions.[9] Counsel could have included Tambellini's case in one of their putative class actions if it had been appropriate. That they are litigating these matters separately speaks loudly and clearly to the fact that it is necessary or appropriate to do so.

II. Pennsylvania's Trial Courts Are the Appropriate Forums for Litigating Insurance Coverage Disputes.

A. There Are Established Processes and Procedures in Place for the Resolution of Insurance Coverage Disputes.

Pennsylvania's trial courts are, of course, well-suited to resolve private civil litigation matters involving contested issues of fact and law, including insurance coverage disputes. They handle such cases all the time and have done so for more

[9] Tambellini's counsel have filed the following cases that defense counsel are currently aware of: (1) *HTR Rest., Inc. v. Erie Ins. Exch.*, No. GD-20-5138 (Allegheny Cty. Court of Common Pleas, Pa.) (class action filed by Plaintiff's counsel based on COVID-19 coverage issues); (2) *Windber v. Travelers*, No. 3:20-cv-00080 (W.D. Pa.) (class action filed by Plaintiff's counsel based on COVID-19 coverage issues); (3) *Dianoia's Eatery v. Motorists*, No. GD-20-005273 (Allegheny Cty. Court of Common Pleas, Pa.) (non-class case filed by Plaintiff's counsel based on COVID-19 coverage issues); and (4) *Bowser v. Fed. Ins. Co./Chubb*, No. GD-20-005272 (Allegheny Cty. Court of Common Pleas, Pa.) (non-class case filed by Plaintiff's counsel based on COVID-19 coverage issues).

than 200 years. *See, e.g.*, *Hood v. Nesbit*, 1792 Pa. LEXIS 7 (Pa. Jan. 1792) (affirming trial court's verdict that an insured was not entitled to recover for loss of its ship where the ship's captain deviated from the course of the specific voyage insured, without necessity or reasonable cause). The adjudication of an insurance coverage dispute is not akin to resolution of a constitutional or statutory interpretation dispute that needs immediate attention. Insurance coverage disputes require each individualized claim to be assessed for potential coverage under the terms, conditions, endorsements, and applicable exclusions of that insured's contract. Even if any policy language is found to be ambiguous when applied to the facts and circumstances of the specific claim at issue (and Erie does not believe its policies are ambiguous, but plaintiffs may advance a different view in litigation), the insurer would be entitled, under Pennsylvania law, to develop and present extrinsic evidence to resolve the purported ambiguity. *See, e.g.*, *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468-69 (Pa. 2006). This Court should not take it upon itself to make these determinations in the first instance.

This Court should instead allow the instant case and any other COVID-19 related cases to be addressed through the established judicial channels, where the legal issues can be developed and crystalized in dispositive motions, discovery can take place (if necessary), and factual disputes (if any) can be resolved before they

are considered by appellate courts. *See, e.g., Commonwealth v. Spotz*, 870 A.2d 822, 836 (Pa. 2005); *Commonwealth v. Lord*, 719 A.2d 306, 308 (Pa. 1998) ("The absence of a trial court opinion poses' a substantial impediment to meaningful and effective appellate review."). This will allow the parties to generate an appellate record so that appeals courts may consider any legal issues on a full record, and not in a void as Tambellini seeks here.

Moreover, trial courts in Pennsylvania are more than capable of handling litigation involving many plaintiffs. *See, e.g., Cleland Simpson v. Co. v. Firemen's Ins. Co.*, 1957 Pa. Dist. & Cnty. Dec. LEXIS 202 (C.P. Pa. Jan. 11, 1957) (adjudicating insurance coverage dispute regarding alleged business interruption related to Hurricane Diane); *Gibson v. Commonwealth*, 415 A.2d 80 (Pa. 1980) (consolidation of multiple actions involving a calamitous flood); *In re Bridgeport Fire Litig.*, 5 A.3d 1250 (Pa. Super. Ct. 2010) (massive fire); *Johnson v. Rohm & Hass Co.*, 1986 Pa. Dist. & Cnty. Dec. LEXIS 93 (C.P. Pa. Jan. 6, 1986) (toxic contamination harming property); *Lipinski v. Beazer East, Inc.*, 76 Pa. D. & C. 4th 479 (2005) (chemical contamination); *Hoffman v. Sun Pipe Line Co.*, 575 A.2d 122 (Pa. Super. Ct. 1990) (pipeline spill); *Engle v. West Penn Power Co.*, 598 A.2d 290 (Pa. Super. Ct. 1991) (massive flood).

In many of these cases, the courts concluded that consolidation or class treatment was improper due to the presence of individualized issues, or for other

reasons. That is certainly Erie's position here. Regardless, our system calls for the trial court, after assessing the facts and circumstances, to assess whether any form of consolidation or other joinder is warranted.[10] The current public health crisis is not so unique that it requires this Court to divest inferior courts of jurisdiction, or to essentially rewrite the rules of civil procedure and develop an entirely new method of resolving claims between private litigants, particularly when there is no evidence that the current judicial system does not and will not work.

Significantly, Pennsylvania trial courts offer varying mechanisms to deal with voluminous litigation and capitalize from the efficiencies brought by coordination where the appropriate prerequisites are satisfied. Plaintiffs in other cases, for example, are pressing for class treatment.[11] Tambellini's own counsel seeks to invoke such procedure in other cases. While Erie does not believe that

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[10] Facts and circumstances matter. In one case, a court certified a class of people who inhaled chlorine gas. *Floyd v. Philadelphia (No. 2)*, 1978 Pa. Dist. & Cnty. Dec. LEXIS 182 (C.P. Pa. Aug. 18, 1978). In a case involving a horrific train crash, in contrast, the court ruled that 40 lawsuits pending in three counties would need to proceed individually in the counties in which the suits were filed. *Kertis v. Consol. Rail Corp.*, 1981 WL 207386 (C.P. Pa. July 13, 1981). Each decision reflects a full record in which the court could assess the law and facts; there are no such facts in the record before this Court.

[11] Pa.R.C.P. No. 1703 provides that, "Upon the filing of the [class action] complaint the action shall be assigned forthwith to a judge who shall be in charge of it *for all purposes*." (emphasis added). Despite this Rule, which expressly vests trial courts to determine "*all*" issues, Tambellini asks this Court to divest trial judges who have been assigned putative class action suits against Erie (and others) of the ability to make *any* decisions in the case. Tambellini wants to turn the rules of civil procedure upside-down.

class action treatment is feasible or desirable here, the parties should spar over that issue where they usually do—in the trial courts.[12]

B. Federal Courts Also Have Procedures Available to Manage High-Volume Litigation, And Many Plaintiffs Are Already Seeking Consolidation in Federal Court in Connection with COVID-19 Litigation.

Plaintiffs seeking to consolidate coverage disputes have a means to do so and already are invoking such procedures. A number of plaintiffs—including in Pennsylvania—are seeking to consolidate the federal cases in an MDL proceeding. *See In re: COVID-19 Bus. Interruption Ins. Coverage Litig.*, MDL No. 2942 (J.P.M.L).[13] Significantly, there are already federal putative class actions against Erie pending in two different federal district courts in two different states, including Pennsylvania, and a number of similar class actions have been filed against other insurers. *See, e.g., HTR* Comp. *See Geneva Foreign & Sports, Inc., et al. v. Erie Ins. Co. of N.Y, et al.*, No. 1:20-cv-00093 (W.D. Pa.); *Ian McCabe*

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[12] Similarly, Rule 213(a) provides that cases may be consolidated if they "involve a common question of law or fact or which arise from the same transaction or occurrence." Pa.R.C.P. 213(a). Additionally, Pennsylvania Rule of Civil Procedure 213.1 provides that "[i]n actions pending in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions." Pa. R. Civ. P. 213.1(a). Whether such procedures may be utilized here requires a complete record; here there is none.

[13] As of April 20, 2020, plaintiffs in two federal cases pending in Pennsylvania filed a motion for transfer and for coordination or consolidation pursuant to 28 U.S.C. § 1407. *See In re: COVID-19 Bus. Interruption Ins. Coverage Litig.*, MDL No. 2942 (J.P.M.L.); *LH Dining LLC v. Admiral Indem. Co.,* No. 2:20-cv-01869 (E.D. Pa.) (TJS); *Newchops Rest. Comcast LLC v. Admiral Ins. Co.,* No. 2:20-cv-01949 (E.D. Pa.).

Studio, LLC v. Erie Ins. Exch., No. 2:20-cv-01973 (E.D. Pa.).[14] Tambellini's own counsel, in fact, has filed federal putative class action suits where plaintiffs are seeking consolidation before the MDL panel. *See e.g., Windber v. Travelers*, No. 3:20-CV-00080 (W.D. Pa.) (class action filed by same Tambellini's counsel based on COVID-19 coverage issues). Plaintiffs seeking MDL treatment maintain (over likely objection) that the only sensible way to proceed is in a single consolidated federal court proceeding. *See, e.g.*, MDL No. 2942, Dkt. Entry 1-1 (4/20/20).[15] If the statutory requirements are satisfied, federal lawsuits that have been filed against Erie may be among the cases that are swept into an MDL proceeding, should the Panel establish one.[16]

Moreover, procedures exist to coordinate state and federal proceedings where standards are met. *See, e.g., Manual for Complex Litigation (Fourth)* § 20.3

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[14] There are numerous other federal cases pending in Pennsylvania as well. *Geneva Foreign & Sports, Inc., et al. v. Erie Ins. Co. of N.Y, et al.*, No. 1:20-cv-00093 (W.D. Pa.); *Ian McCabe Studio, LLC v. Erie Ins. Exch.*, No. 2:20-cv-01973 (E.D. Pa.); *Newchops Rest. Comcast, LLC v. Admiral Indem. Co.*, No. 2:20-cv-01949 (E.D. Pa.); *Laudenbbach Periodontics & Dental Implants, LTD v. Liberty Mut. Ins. Grp., et al.*, No. 2:20-cv-02029 (E.D. Pa.); *Shantzer, DDS v. Travelers Cas. Ins. Co. of Am., et al.*, No. 2:20-cv-02093 (E.D. Pa.); *LH Dining LLC v. Admiral Indem. Co.*, No. 2:20-cv-01869 (E.D. Pa.).

[15] So far, the Pennsylvania plaintiffs who have sought transfer and consolidation in the MDL Proceeding have been represented by Golomb & Honik, P.C., and Levin Sedran & Berman LLP.

[16] For many of the same reasons that this Court should not apply a ruling in this single plaintiff case to all insurers, Erie intends to oppose the creation of the proposed sprawling industry-wide COVID-19 coverage MDL proceeding, and expressly reserves the right to do so. The proposed industry-wide MDL does not satisfy the commonality, convenience, and efficiency requirements of 28 U.S. §1407. That the insurers may avail themselves of the opportunity to oppose the federal MDL proceeding underscores why an end-run should not be made around the various civil procedures established to ensure the fundamental fairness of such treatment.

(2004). Plaintiffs, defendants or the courts may consider such procedures. This will all be sorted out by the trial courts, which are charged to make these decisions as the courts on the front line, and which do so all the time.

Notably, within the past few days the JPML *denied* Plaintiffs' Motion for Expedited Consideration of the Motions to Transfer, finding that "[t]he Panel considers all motions in due course and is not persuaded to depart from its long-standing practice." *See In re: COVID-19 Bus. Interruption Ins. Coverage Litig.*, MDL No. 2942, Dkt. No. 51. The Panel has, despite hysteria emanating from the plaintiffs that the sky will fall unless all COVID-19 coverage matters are immediately expedited (the same picture Tambellini paints here), followed its normal procedures and will resolve the plaintiffs' motion to transfer and consolidate in the normal course. This Court, respectfully, should likewise refrain from abandoning long-standing rules and traditions and should instead uphold those rules and traditions that have survived since the courts of this Commonwealth were created.

III. Tambellini's Request That This Court Exercise Extraordinary Jurisdiction Over All COVID-19 Insurance Coverage Litigation is Fatally Flawed.

Notwithstanding the fact that this case involves a single plaintiff, a single defendant, a single policy and a single place of business, Tambellini makes an even more astounding request in its Application: that this Court assume control over *all*

COVID-19 insurance coverage litigation. According to Tambellini, "[m]any individual and class actions have been filed in the counties throughout the Commonwealth by businessowners against insurers for the losses, damages and expenses caused by the COVID-19 pandemic and related governmental Orders" and "[h]undreds, if not thousands" are expected to be filed. App. ¶¶ 54-55. Tambellini wants this Court to resolve all of them, but as explained below, that is not practical and doing so would raise troubling constitutional and case management issues.

A. Tambellini Offers No Support for Its Unsubstantiated Allegations of an Unmanageable Litigation Wave.

As an initial matter, the Application provides no factual record to support the ominous speculation 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." App. ¶ 55. The Application requests this Court to take jurisdiction over "these cases," but does not identify any of them, thus begging the questions: who are the plaintiffs and defendants in "these cases"? How many of "these cases" have been filed? Which county courts are handling "these cases," and have the clerks of those courts—and the parties in those case—been notified of this request? Do the plaintiffs in "these cases" want their cases to stay in their home county, where they

operate their businesses and where their lawyers' practice, and where they chose—and presumably prefer to—litigate their cases?

The existence and identity of "these cases"—let alone the number of them—are unknown and unidentified on this record, and there is no verification of anything in Tambellini's Application. Tambellini's Application presents this Court ***nothing*** to justify asking this Court to engage in an extraordinary blanket disregard for Pennsylvania's Rules of Civil Procedure—not even the Verification required by the Rules.

Significantly, Rule 123(c), governing Applications in the Pennsylvania Supreme Court, expressly requires a verification for facts averred in an Application: "*Speaking applications*.—An application or answer which sets forth facts which do not already appear of record ***shall be verified*** by some person having knowledge of the facts, except that the court, upon presentation of such an application or answer without a verified statement, may defer action pending the filing of a verified statement or it may in its discretion act upon it in the absence of a verified statement if the interests of justice so require." Pa.R.A.P. 123(c) (emphasis added). Tambellini's failure to comply with this Rule alone warrants denial of the Application.

B. Tambellini Has Failed to Give Other Litigants Notice of its Application As Required.

Just as there is no competent evidence that any other plaintiffs, or attorneys representing them, want the relief Tambellini is requesting, so too is there no evidence that those litigants are even aware of the pending Application. Any such litigants are entitled to notice and an opportunity to be heard on this issue, and Tambellini's failure to provide notice, by itself, mandates denying this request.

Rule 3309 of the Pennsylvania Rules of Appellate Procedure, which applies to Applications for Extraordinary Relief, requires that "[a]n application for relief under 42 Pa.C.S. § 726 (extraordinary jurisdiction), or under the powers reserved by the first sentence of Section 1 of the Schedule to the Judiciary Article, shall show service upon ***all persons who may be affected thereby, or their representatives, and upon the clerk of any court in which the subject matter of the application may be pending.***" Pa.R.A.P. 3309 (emphasis added). There is good reason for this rule. Basic notions of due process and fundamental fairness dictate that parties who may be affected by a request, such as this one, first be given notice and an opportunity to be heard on the issue. Although this Application purports to "affect" "all insurers in the Commonwealth," there is no evidence that Tambellini served any of these unnamed entities. In addition, the Application as framed would potentially affect every business in Pennsylvania that has property insurance including any form of coverage for loss of income. None of those business owners (other than Tambellini) have been given appropriate notice

and an opportunity to be heard before they cede their fate to Tambellini and its choice of attorneys, and to an unprecedented trial-and-appellate proceeding. The Application thus violates the Pennsylvania Rules of Appellate Procedure.

"Essential 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. Thus, all parties whose interest will necessarily be affected must be present on the record." *Vale Chem. Co. v. Hartford Accident and Indem. Co.*, 516 A2d 684, 688 (Pa. 1986) (failure to join an indispensable party to a declaratory judgment action deprives a court of subject matter jurisdiction). The Application asks this Court to declare the coverage obligations of all "insurers in the Commonwealth"[17] and then enforce those obligations as to "all businessowners in the Commonwealth." App. at ¶¶ 52, 53, 54. In other words, Tambellini wants this Court to take this one case and issue a broad edict about insurance coverage regardless of whether other policies issued by Erie or other insurers have different terms. Such relief, however, would in addition to violating court rules also violate

[17] The Application not only fails to name the insurers it seeks to subject to this Court's jurisdiction, it does not offer any meaningful definition that would allow the Court, or insurers doing business in the Commonwealth, to determine whether they are within the purview of the Application. Instead, the Application purports to cover "[a]ll insurers in the Commonwealth." It does not specify whether it applies to commercial insurers, property insurers, homeowners' insurers, vehicle insurers, or any other type of insurance carrier. And even if it did, insurers operating in the Commonwealth issue different policies to different insureds. Each policy is governed by its own terms, exceptions, endorsements, and exclusions. It is entirely unclear which of these insurers, and which of their policies, would be subject to the Application. Thus, not only does the Application fail to provide notice to unnamed insurers, it fails to even define the universe of insurers who would be entitled to notice.

the Due Process Clause of the United States Constitution because it denies these unnamed insurers and businesses notice and an opportunity to be heard. *See* U.S. Const. Amend. XIV.

"The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385 (1914)); *see also Shelley v. Kraemer*, 334 U.S. 1, 16 (1948) ("The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment."); *Com. Dept. of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1064 (Pa. 1996) (recognizing that the essential requisites of procedural due process are notice and meaningful opportunity to be heard). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

Although the Application purports to affect "[a]ll insurers within the Commonwealth," *see* App. at ¶ 53, Tambellini did not notify any insurer except Erie. To subject all insurers–and, for that matter, all claimants–in the Commonwealth to a summary adjudication of their rights without adequate notice

or opportunity to be heard blatantly violates basic rights of due process. The United States Supreme Court has consistently held that due process prohibits courts from adjudicating the rights of absent parties. *See Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 801 (1996) (rejecting argument that named taxpayers represented interests of unnamed taxpayers and concluding that unnamed taxpayers, who were absent and lacked notice and an opportunity to be heard, could not be bound by the named taxpayers' judgment).

Beyond that, Plaintiff here has no standing to seek adjudication of the rights of absent insurance carriers with whom they have no contractual or other relationship. *See Nye v. Erie Ins. Exch.*, 470 A.2d 98, 99 (Pa. 1983) (finding that standing is requisite under Pennsylvania law and that class action plaintiff lacked standing to assert claim against insurance companies that did not issue policy to plaintiff's decedent). Tambellini has not alleged any facts suggesting that it has any contractual relationship with the hundreds of other carriers who write commercial insurance in the Commonwealth of Pennsylvania, and thus no legal basis on which to seek adjudication of their substantive or procedural rights, much less to do so without notice. *See id.*

Moreover, it would be fundamentally unfair to order *policyholders* across the Commonwealth into some sort of consolidated proceeding without giving them a chance to object to such a radical, unprecedented procedure. Plaintiffs involved

in other litigations chose to hire their preferred litigation counsel and file suit in particular forums—most likely, the county courts that were most convenient to them—for a reason. They may not want to have their cases essentially swallowed whole by this Application and transferred to a different county or be forced into an unprecedented procedure that would deny them the opportunity at the outset to be heard.

IV. This Court Should Decline to Alter the Fundamental Structure of Pennsylvania's Judicial System.

A final, practical reason to deny Tambellini's Application to assume plenary jurisdiction over this case and all other COVID-19 insurance litigation is that it would fundamentally alter this Court's purpose and role within the Pennsylvania judicial system. Tambellini is asking this Court to create an entirely new procedural framework for resolving insurance coverage disputes that would require this Court's ongoing involvement.

If the Court opens the door to becoming a *de facto* trial court for insurance coverage disputes, it would invite every litigant in every major area of insurance coverage litigation (*e.g.*, fracking, environmental contamination, fires, floods, hurricanes) or other litigation involving large-scale events of potentially broad application, to bypass the trial and appellate courts in the Commonwealth to jump directly to this Court for what amounts to an expedited trial without the

opportunity for fact and expert discovery, not to mention the ability to demand a jury trial.

Rendering trial and appellate courts irrelevant in such a significant part of civil litigation would irrevocably alter the administration of justice in the Commonwealth. The risk of this happening flies in the face of the purpose of the King's Bench power and the Court's statutory extraordinary jurisdiction, which as discussed above, are to be exercised sparingly and only in the most exigent of circumstances, not contract disputes.

Beyond the scope of the instant dispute, to the extent Tambellini is asking this Court to create a procedure similar to a federal MDL proceeding, *see* App. at n. 1 (requesting that the Court's powers "be implemented in a fashion not unlike that utilized by the Federal Courts pursuant to 28 U.S.C. § 1407 and Rules of Procedure of the Judicial Panel on Multidistrict Litigation"), this Court should deny the request. As the Application acknowledges, MDLs are authorized by federal statute, and there are detailed rules and procedures that govern such actions. For example, at the outset, the panel is required "to give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made." 28 U.S.C. § 1407. If the statutory requirements are satisfied, and an MDL is created, there is

also a process by which parties are required to notify the court of related pending tag-along actions, and likewise, an opportunity for parties opposing transfer to the MDL to do so. *See* J.P.M.L. Rule 7.1. This is to afford the parties in those cases the due process requirements of notice and an opportunity to be heard. Pennsylvania courts lack this procedure and accompanying rules to ensure due process. This Court, therefore, would have to create that process from whole cloth and then establish a detailed framework for overseeing such proceedings on a going forward basis. That is not only impractical, but it would result in rewriting Pennsylvania's court rules, which is not the purpose of King's Bench jurisdiction.

This Court should not be recast as a court of first impression. That outcome is not what was envisioned in 1722 when the King's Bench power was first recognized in this Commonwealth.

CONCLUSION

Tambellini asks the Court to completely disregard the Pennsylvania Rules of Civil Procedure, the Judiciary Act of Pennsylvania, and basic notions of due process to create an unprecedented new process for litigation arising out of COVID-19 that would require this Court's ongoing involvement as a *de facto* "super trial court." There is no evidence whatsoever that these cases cannot be resolved through the Pennsylvania court system, starting in the trial court, just as coverage disputes have been adjudicated for centuries. What's more, Tambellini's

failure to follow basic court rules requiring verification of facts and notification to affected parties is fatal.

For these reasons, Erie respectfully requests that this Court decline to exercise jurisdiction over this matter pursuant to either its King's Bench power or its statutory extraordinary jurisdiction under 42 Pa.C.S. §726 and summarily dismiss the Application without further briefing or argument.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief contains 12,850 words in compliance with the with 14,000-word limit of Pa.R.A.P. 2135, as calculated by the word processing system used to prepare the brief.

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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