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*

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

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF IN OPPOSITION TO THE EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF

John N. Ellison, Esq.
PA Bar No. 51098
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA, 19103
Phone: (215) 851-8100
Fax: (215) 851-1420
Email: jellison@reedsmith.com

Counsel for Amicus Curiae United Policyholders

Amy Bach, Esq.
California Bar No. 142029
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Phone: (415) 393-9990
Fax: (415) 677-4170

Counsel appearing under 204 Pa. Code. § 81.502(a)

On April 29, 2020, Petitioner filed an Emergency Application for Extraordinary Relief ("Application") requesting that this Court invoke its Extraordinary Jurisdiction and King's Bench powers to consolidate all insurance coverage lawsuits stemming from the ongoing COVID-19 crisis in a single county and to establish a consolidated system for resolving "any and all other legal insurance coverage issues which may arise in any COVID-19 lawsuits" in Pennsylvania. (Application ¶ 56(b)).

Pursuant to Pa. R.A.P. 531(b)(1)(iii), United Policyholders ("UP") respectfully submits this application for leave to file the attached *amicus curiae* brief for this Court's consideration in the above-captioned matter.[1]

As more fully explained in the attached brief, UP, an *amicus curiae* in this matter, is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and as an effective voice for a broad range of insurance policyholders in Pennsylvania and throughout the United States. Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and the overall

[1] UP recognizes that under Pa. R.A.P. 531(b)(4), *amicus curiae* briefs should be filed on the same date as that of the party the *amicus* seeks to support. However, given that Petitioner's Application is an emergency filing that Respondent answered within a week and UP just recently learned of this matter, UP still seeks leave to file its brief.

insurance claim process, it has a special interest in the orderly development of Pennsylvania's insurance law.

In the attached brief, UP provides multiple arguments as to why this Court should not exercise the powers Tambellini seeks to invoke here. By not invoking its extraordinary powers for the purpose of collective adjudication as sought by Tambellini, the Court will avoid impairing other policyholders' and future litigants' ability to address insurance coverage issues under materially different policies and fact patterns. Thus, UP is fulfilling the exact function that an *amicus curiae* should perform: to call the Court's attention to circumstances or law that may otherwise escape the Court's consideration. *See, e.g.*, 4 AM. JUR. 2D *Amicus Curiae* § 6 (2020).

WHEREFORE, UP respectfully requests that its motion for leave to file the attached *amicus curiae* brief be granted.

Respectfully Submitted,

/s/ John N. Ellison
John N. Ellison, Esq.
Attorney I.D. 51098
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Phone: (215) 851-8852
Fax: (215) 851-1420

Counsel for Amicus Curiae United Policyholders

Amy Bach, Esq.

Attorney I.D. 142029
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Phone: (415) 393-9990
Fax: (415) 677-4170

Counsel for Amicus Curiae United Policyholders Appearing Under 204 Pa. Code. § 81.502(a)

Dated: May 13, 2020

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*

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

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN OPPOSITION TO THE EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF

John N. Ellison, Esq.
PA Bar No. 51098
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA, 19103
Phone: (215) 851-8100
Fax: (215) 851-1420
Email: jellison@reedsmith.com

Counsel for Amicus Curiae United Policyholders

Amy Bach, Esq.
California Bar No. 142029
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Phone: (415) 393-9990
Fax: (415) 677-4170

Counsel appearing under 204 Pa. Code. § 81.502(a)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 whose mission is to serve as a trustworthy and useful information resource and as an effective voice for a broad range of insurance policyholders in Pennsylvania and throughout the United States. Because UP routinely assists and informs individual and commercial policyholders with regard to every type of insurance product and the overall insurance claim process, it has a special interest in the orderly development of Pennsylvania's insurance law.

UP assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support UP's work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: (1) *Roadmap to Recovery*™ (helping individuals and businesses understand their rights and options during the insurance claim and loss recovery process); (2) *Roadmap to Preparedness* (promoting financial and insurance literacy and disaster preparedness); and (3) *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

State insurance regulators, academics and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. Since 2009, UP's Executive Director Amy Bach has served as an official consumer representative to the National Association of Insurance Commissioners. UP routinely works with insurance regulators, including the Pennsylvania Department of Insurance and Commissioner Altman, on matters that impact policyholders.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States, including the Pennsylvania Supreme Court, particularly in cases involving insurance principles that are likely to impact large segments of the public. UP has appeared as *amicus curiae* in the following Pennsylvania Supreme Court cases: *Erie Ins. Exch. v. Moore* (20 WAP 2018); *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.* (24 MAP 2017); *Rancosky v. Wash. Nat'l Ins. Co.* (Case No. 28 WAP 2016); *Mut. Benefit Ins. Co. v. Politopoulos* (Case No. 60 MAP 2014); *Allstate Prop. & Cas. Ins. Co. v. Wolfe* (Case No. 39 MAP 2014); *Babcock & Wilcox Co. v. Am. Nuclear Insurers* (Case No. 2 WAP 2014); *ACE Am. Ins. Co. v. Underwriters at Lloyds and Co.s* (Case No. 45 EAP 2008); and *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.* (Case No. 88 MAP 2008). A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in our online *Amicus* Project library at www.uphelp.org.

Petitioner Joseph Tambellini, Inc.'s ("Tambellini") Application for Extraordinary Relief ("Application") requests that this Court invoke its Extraordinary Jurisdiction and King's Bench powers to consolidate in a single county all first-party property insurance lawsuits filed in Pennsylvania state courts as related to the ongoing COVID-19 crisis and business interruption/business income ("BI") coverage. (Application ¶ 56(a)). Tambellini's Application further requests that this Court establish a consolidated system for resolving "any and all other legal insurance coverage issues which may arise in any COVID-19 lawsuits" in Pennsylvania. (Application ¶ 56(b)). In response, UP urges this Court to reject this Application for the reasons more fully developed below. If the Court opts to hear this case, UP urges this Court to issue as narrow a ruling as possible in Tambellini's claim and limit its decision on any substantive insurance coverage issues raised by Respondent to Tambellini's specific facts of record. Issuing a ruling limited to Tambellini's facts will avoid impairing other policyholders' and future litigants' ability to address insurance coverage issues under different BI clauses employing materially different language and under fact patterns that materially differ from the limited record in this case. Thus, UP is fulfilling the exact function that an *amicus curiae* should perform: to call the Court's attention to circumstances or law that may otherwise escape the Court's consideration. *See, e.g.*, 4 AM. JUR. 2D *Amicus Curiae* § 6 (2020).

Pursuant to Pa. R.A.P. 531(b)(2), UP avers that no person or entity other than UP, its members, or its counsel (i) paid in whole or in part for the preparation of this *amicus curiae* brief, or (ii) authored in whole or in part this brief.

SUMMARY OF ARGUMENT

At its core, this case revolves around Tambellini's Common Pleas action against Erie Insurance Exchange ("Erie"), seeking declaratory, compensatory and injunctive relief for losses incurred as a result of Governor Tom Wolf's emergency orders regulating activities of businesses and persons in the Commonwealth. (Application ¶ 18, 19, 21). As Tambellini recognizes in its Application, the determination of whether the COVID-19 virus and the various government orders related to COVID-19 have caused losses so as to trigger coverage under first-party property insurance policies providing BI coverage is a critical question of law that significantly affects numerous policyholders. (Application ¶ 45).

But Tambellini fails to recognize that his is not the only insurance policy form involved in the various pending cases. The coverage that larger businesses purchase for lost gross earnings as a result of an interruption of business is generally referred to as "time element" or "business interruption" insurance. The coverage is written on a variety of forms, which vary substantially from insurer to insurer and insured to insured and cover a huge variety of risks. The coverage that small-to-medium sized businesses purchase is called "business income" insurance, which covers lost

net earnings during a business suspension. Business income insurance coverage is written on standard Insurance Services Office ("ISO") forms, which often are endorsed to add a plethora of coverage extensions and exclusions. While we use the acronym "BI" in this brief for convenience, the Court should be aware that the term encompasses thousands of different insurance policy iterations in Pennsylvania alone.

Because this issue is so significant, and the insurance policies are so varied in their language, scope, and covered risks, this Court should reject Tambellini's request that all insurance coverage lawsuits related to the COVID-19 crisis be consolidated in a single county so that any decisions made in Tambellini's individual case control other policyholders' claims, given the diversity and the lack of common policy language on issues that are material to the application of a BI policy to COVID-19-related claims.

For multiple reasons, BI insurance cases are not suitable for a homogenous, one-size-fits-all judicial resolution. First, Tambellini's proposed consolidation would limit the options and contractual as well as constitutional rights of other policyholders who may not necessarily find the county of consolidation accessible or preferable. Moreover, Tambellini is requesting "an expedited schedule for the submission of briefs on the legal insurance coverage issues." (Application ¶ 51(b)). There is a real possibility that any findings in Tambellini's expedited case would

amount to decisions precluding the rights of other parties on an inadequately developed record that would unfairly prejudice a large number of Pennsylvania policyholders. Further, it is unlikely that consolidating all COVID-19-related BI cases "in one County before a judge or group of judges" would result in an expedited and satisfying resolution. (Application ¶ 56(a)). Given the expected volume of pending and anticipated COVID-19-related BI claims, such consolidation would likely overwhelm the single county's trial court or specially-created panel when asked to extrapolate any findings in Tambellini's case for application to other claims. It is far more realistic that the litigation channels of multiple trial courts throughout the Commonwealth would be more efficient at handling "[h]undreds, if not thousands, of lawsuits." (Application ¶ 55).

Second, due to the lack of uniformity across each insurance policy's terms, conditions, endorsements, and exclusions, it is unlikely that findings in Tambellini's case would be broadly applicable to other claims made under materially different policies. For instance, Tambellini's case implicates business income, extra expense, and civil authority coverage under the terms, conditions and policy language peculiar to its Erie policy. (Application ¶ 39). Other restaurant policyholders may find it more advantageous to structure their primary claim around an endorsement specifically responsive to losses caused by infectious diseases, or around other types of coverage such as: Contingent Business Income, Contingent Extra Expense,

Contingent Civil Authority, Ingress/Egress, Extended Business Income, Supply Chain Coverage, Loss of Attraction and others. Larger businesses with non-ISO BI coverage would have completely different sets of varying coverage grants, coverage extensions, and factual and legal issues to resolve. Findings in Tambellini's case would have limited, imperfect and/or no application to the claims of policyholders purchasing their BI coverage from other insurance companies using different policy forms containing different policy language.

Third, the unique circumstances of each policyholder's business and claim further weaken any potential applicability of decisions in Tambellini's case, fundamentally tied to the wording in Tambellini's purchased policy, to other claims made by substantially different businesses with different policies operating at different levels of activity and experiencing differing degrees of COVID-19 exposure. Another reason why policyholders' claims will necessarily differ is because insurance companies have different claims-handling practices, which could lead to strong grounds for bad faith claims in some cases. Because Tambellini's Application does not include a bad faith claim, the court's findings in Tambellini's case could have limited or no applicability to other policyholders' bad faith claims.

Fourth, considering that many policyholders are likely to suffer BI losses for a prolonged period and the contractual nature of coverage disputes between private parties, Tambellini's case differs from those rare instances in which this Court has

exercised its Extraordinary Jurisdiction and King's Bench powers to provide immediate and sufficient relief, frequently as a remedy to government action. This Court has never invoked such powers in the context of having one contract's interpretation set precedent for numerous different contracts.

Thus, if the Court chooses to exercise the extraordinary powers as sought by Tambellini, a decision that UP respectfully submits is not warranted for the above reasons, UP urges this Court to issue as narrow a ruling as possible in Tambellini's case and to limit its decision to Tambellini's specific facts of record while taking care to avoid potentially harmful dicta. Decisions reached on an inadequately-developed record could foreclose other parties from proceeding in their materially-different and potentially-stronger claims. Thus, the Court should reject the proposed consolidation of all COVID-19-related BI claims for the purpose of applying to all Pennsylvania policyholders a blanket resolution derived solely from the facts and findings on insurance policy language only truly applicable to Tambellini and Erie.

ARGUMENT

I. This Court should deny Tambellini's proposed collective adjudication because it would limit the options, and contractual as well as constitutional rights, of other policyholders.

Were the Court actually to consolidate all COVID-19-related BI claims under a single county's jurisdiction for blanket adjudication on the basis of ad-hoc extrapolations of the dispositive rulings in Tambellini's case, the Court would be

disregarding interested policyholders' strategic preferences as well as their constitutional due process rights.

Tambellini's Application requests that this Court implement a style of collective adjudication similar to how multidistrict litigation ("MDL") is conducted. (Application ¶ 56(d)(n. 1)). It is also likely that the class action form of litigation influenced Tambellini's request for collective adjudication. Both MDL and class actions have existing, time-tested rules and procedures, none of which is appropriate for this situation for a number of reasons, including the lack of commonality. In contrast, Tambellini's Application requests that this Court create a new system to collectively adjudicate the meaning of different policies' language as applied to unique sets of facts in different industries. Tambellini's proposal that this new system use some amalgam of rules borrowed from the Rules of Procedure of the Judicial Panel on MDL does not inspire any confidence in other policyholders as to whether such an improvised, unproven system will adequately protect their interests and rights.

Indeed, under Pa. R.A.P. 3309 governing applications for extraordinary relief, Tambellini has already neglected the due process rights of other policyholders as Tambellini was required to provide notice of its Application to "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. However,

Tambellini did not provide notice via any reasonably calculated method, such as through newspaper or television as suggested by Pa. R.C.P. 1712 in situations not requiring individual notice. By not providing notice of its Application to other policyholders, Tambellini is depriving other policyholders of a meaningful opportunity to participate in a proceeding in which rulings are sought that could impact the individual rights of every policyholder doing business in the Commonwealth. This failure alone demonstrates how inappropriate and unfair a proceeding of the kind requested here from this Court would be to all of the BI policyholders in Pennsylvania, the vast majority of whom likely have no knowledge of this effort to litigate their rights under each of their unique insurance policies and circumstances.[2]

Additional uncertainties about the procedures that Tambellini's new system would have to develop also raise due process concerns. For instance, Tambellini's Application does not clarify whether its proposed system would be following 28 U.S.C. § 1407 governing MDLs by only consolidating all BI claims for purposes of pretrial proceedings while remanding actual potential trials to return to other policyholders' preferred counties for adjudication on the merits. Nonetheless, dispositive rulings in pretrial proceedings would still have a prejudicial impact on

[2] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal citations omitted).

other policyholders' claims because, for instance, some policyholders may have particular discovery requests. By way of further example, Pa. R.C.P. 1711 and 1712 provide notice requirements and opt-out procedures to protect potential members in class actions who wish to pursue their own claims individually. It is dangerously unclear whether Tambellini's proposed new system would offer similar protections for policyholders who want autonomy and control over their own litigation. To fully adjudicate all BI cases in a transferee court would completely divest other policyholders of their options and rights to conduct their own claims as they see fit.

By requesting that coverage decisions reached in its case be applied to other BI claims, Tambellini is essentially proposing that its selected attorneys determine the interests and rights of other policyholders. However, other policyholders may view or value certain coverage issues differently. For example, suppose that Tambellini did not challenge insurance companies on the issue of extra expense coverage because it preferred to prioritize other types of coverage, and the supervising court accordingly were to issue a ruling accepting the insurers' position. Other policyholders and their counsel, who would have had more incentive to vigorously litigate the issue of extra expense coverage, would be detrimentally bound by dispositive rulings relating to extra expense coverage in Tambellini's supposed bellwether case. Perhaps the court might allow those other policyholders to submit *amicus curiae* briefs, but they still would be presenting their positions on

an incomplete record, with no opportunity for discovery and little or no opportunity to argue their positions before the court. Thus, because Tambellini's vague and untested system of collective adjudication would limit the options and rights – both constitutional and contractual – of other policyholders, this Court should deny Tambellini's proposed consolidation.

This is not the first time in which Pennsylvania courts have handled numerous claims arising out of a single catastrophe. Past examples include the events of September 11, 2001, Superstorm Sandy, and floods of many of Pennsylvania's rivers. Based on these historical examples, we are unaware of any court adopting this proposed procedure by which the first policyholder to file a case litigates and binds all other policyholders. Nor, to our knowledge, has the federal Joint Panel on Multidistrict Litigation ever consolidated insurance coverage cases into a single MDL proceeding. The reason, we submit, is clear: individual insurance claims involving individual fact patterns under often-bespoke insurance policy wordings should be resolved individually.

II. This Court should reject Tambellini's proposed collective adjudication given bespoke contractual language across insurance policies.

Collective adjudication of all COVID-19-related BI cases in the Commonwealth would discount the uniqueness of each policy's contractual language to the detriment of policyholders and insurance companies. To properly

analyze the terms and conditions of any insurance policy, the Court cannot consider the wording in a vacuum. Rather, a court should consider the myriad of factors unique and peculiar to each BI claim including: (1) the specific form of insurance coverage purchased; (2) the exact terms, conditions and exclusions, as well as all the endorsements modifying these terms; (3) admissions of the claims handlers and underwriters involved in a specific policy and claim; (4) the trade usage and history behind the specific policy language at issue, including the representations made by insurance industry representatives during the process of obtaining regulatory approval to use the particular policy form; and (5) relevant Pennsylvania or related authority that may be persuasive to the issues raised regarding whether coverage attaches or not under the particular policy. As stated by this Court, in the context of policy interpretation, "[t]he court must give effect to every word that can be given effect."[3]

As evidenced by industry-specific endorsements, property insurance policies providing BI coverage differ greatly from policy to policy, and many such policies are designed with specific industries in mind. Under the terms of the Erie policy, Tambellini is primarily seeking recovery for its BI losses through three (3) types of coverage – income protection, extra expense, and civil authority. (Application ¶ 39). Other policyholders may have bargained for and paid a special premium for

[3] *Newman v. Mass. Bonding & Ins. Co.*, 361 Pa. 587, 591 (1949).

industry-specific coverage or a policy wording that is not similar in material respects to that found in the Erie policy. Because Tambellini's chosen counsel would have no incentive to litigate issues on other types of coverage which they view as not relevant to Tambellini's policy, collective adjudication spearheaded by counsel with diverging interests and limited experience could lead to harmful precedent or dicta on coverage issues that other policyholders would have prioritized. At best, findings with regard to coverage in Tambellini's case would have limited or no applicability to those other policyholders' claims for coverage. At worst, all other businesses in Pennsylvania could be disadvantaged by Tambellini's litigation choices.

For example, some insurance companies have taken the position that exclusions specifically referencing viruses or even more vaguely-worded exclusions on pollutants and contaminants bar coverage in COVID-19-related BI claims. Tambellini's Application claims that its policy "does not exclude the losses caused by the Coronavirus Pandemic." (Application ¶ 32). A cursory glance at the Schedule of Static Forms in Tambellini's policy indicates that it at least includes a form titled "Fungi or Bacteria Exclusion." (Application, Exhibit B, Page 4 of 128). Regardless of whether this exclusion in Tambellini's policy lists other perils, this Court's precedents require a narrow construction of that exclusion. By limiting any potential ruling in Tambellini's case to its specific facts of record, this Court would

protect the ability of other policyholders and future litigants to address pivotal coverage issues under materially-different policy language.

III. This Court should reject the broad applicability of Tambellini's proposed collective adjudication due to the unique circumstances and nature of policyholders' businesses and claims.

While many events can cause a business to lose income, BI insurance covers only losses of income caused by damage to or destruction of property through which the policyholder conducts business. That does not, however, mean there is no BI coverage for losses arising from COVID-19. Courts have held that the presence of agents dangerous to health that physically affect property so as to render it uninhabitable or unfit for its intended use can constitute physical loss or damage. *See, e.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (considering an infestation of a home with E. coli bacteria, the court held that there was "a genuine issue of fact whether the functionality of the [policyholder's] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable," and thus reversed the lower court's ruling in favor of the insurance company); *Brand Mgmt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (finding the policyholder, a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria at the facility, could make a Business Income claim for the period in which its premises was sanitized). Thus, under circumstances where property cannot be

used for its intended purpose due to COVID-19 and under particular policies, the presence of a virus constitutes physical loss or damage sufficient to trigger BI coverage.

Because COVID-19-related BI claims necessarily require the application of particular policy language to specific policyholders' circumstances, any potential for Tambellini's proposed consolidation to have broad applicability further diminishes. COVID-19-related BI claims will differ considerably based on differing degrees of: (1) interruption to a business' operations; and (2) evidence that a policyholder can produce of insured property actually experiencing direct exposure to COVID-19. Tambellini's restaurant is among the businesses that are still open, offering some form of takeout or curb-side pick-up or delivery.[4] Other policyholders however have completely ceased operations. Some BI forms allow for coverage for business slowdowns; others require complete shutdowns. Because the effect upon a business from the presence or suspected presence of the COVID-19 virus may impact a court's views as to the loss or damage wreaked by the virus, policyholders who have ceased operations would be prejudiced by a ruling in a case where the policyholder was able, in part, to stay in operation.

[4] Website of Joseph Tambellini Restaurant Pittsburgh PA, *available at* http://www.josephtambellini.com/.

In addition, the different nature of policyholders' businesses implicates differing levels of exposure to the COVID-19 virus, which necessarily means that policyholders will be able to produce different types and amounts of evidence on the issue of insured property having come into contact with COVID-19. For example, some policyholders may be able to produce evidence of personnel, staff, or customers who were on insured premises within temporal proximity of being tested for and confirmed as infected with COVID-19. Other policyholders may turn to the statistical models to evidence how pervasively COVID-19 was transmitting within relevant measures of proximity to their insured property. Should Tambellini employ the use of any statistical models, those findings would not be broadly applicable to other BI claims outside the vicinity of Tambellini's Pittsburgh location.

Further, the formulas for determining the amount of a BI loss differ from policy to policy. The formula for "time element" policies is based on lost gross earnings or gross profits. The formula for the ISO forms comprises different measures for contingent BI, civil authority, protection of property, and rental loss, and other insuring agreements, and lost net profits. Each business would also have a different loss period, based in part on the policy language and the circumstances of each business. The different loss periods would take into account the limits of liability and sublimits of liability in each insurance policy. Whether the loss period would vary from an objective standard using a "reasonable business" measure to a

subjective standard using the business's actual experience will also depend on the policy language and the circumstances of the claim. Then, for each insured, accountants would have to calculate the specific losses incurred by the insured. Such calculation depends on a forecast of lost gross earnings, lost gross profits, lost net profits, or whatever measure is specified, during the loss period, based on a variety of factors that are specific to each business, such as market conditions, forecasts, demand, etc. The amount of BI losses here cannot be determined on a class-wide basis, let alone a statewide basis as Tambellini proposes.

Moreover, Tambellini's Application does not include a bad faith claim. Other policyholders, however, may have strong reasons to pursue bad faith claims if their insurance companies issued generic denial letters without providing a reasonable explanation for the denials or issued denials so promptly that it becomes clear the insurers failed to diligently investigate those policyholders' claims. Findings in Tambellini's case with regard to coverage would have limited or no applicability to other policyholders' bad faith claims. Considering how bad faith claims are highly fact-intensive in focusing on specific parties' conduct and communications as well as detailed timelines, it is unlikely that any other proposed bellwether case would have broad applicability either.

IV. This Court should deny Tambellini's request for collective adjudication of all COVID-19-related BI cases due to the lack of supporting precedent on intervention in contractual disputes between private parties.

Tambellini's Application requests that this Court exercise its distinct 42 Pa. C.S. § 726 plenary jurisdiction and its King's Bench powers under 42 Pa. C.S. § 502. In multiple past cases, this Court has found that exercise of its King's Bench authority was appropriate where petitioners were challenging a government action by a government entity and thereby implicating this Court's supervisory role or issues of constitutional authority. *See, e.g.*, *In re Assignment of Avellino*, 547 Pa. 385 (1997) (finding that this Court's invocation of its King's Bench power was appropriate to resolve a dispute between judicial officers of a lower tribunal over which this Court occupied a supervisory role); *In re Bruno*, 627 Pa. 505 (2014) (finding that this Court had exclusive King's Bench jurisdiction to resolve a dispute involving the suspension of a magistrate judge and other jurists, which implicated this Court's disciplinary role); *Commonwealth v. Williams*, 634 Pa. 290 (2015) (finding that this Court's exercise of its King's Bench powers was appropriate to review whether the Pennsylvania Governor had constitutional authority to grant an inmate reprieve from the death penalty).

In Tambellini's case, however, there are no comparable judicial supervisory issues or similar challenges of constitutional authority. Even though COVID-19 and the related increase of BI claims are both matters of widespread importance

generating substantial public concern, those factors alone do not justify the exercise of this Court's King's Bench authority as being more appropriate here than the long-settled practice of how insurance coverage issues are properly refined and determined on an individual basis by lower courts under Pennsylvania law. The contractual dispute between private parties – namely, one specific policyholder and one specific insurance company disputing one specific contract – should first properly establish a reviewable or appealable record in the lower courts; thereafter, such dispute would remain properly reviewable or appealable to this Court through the time-proven, experienced channels of litigation. Evolving common law's power to guide parties to settlement should also not be discounted, either in this case or others. There is no doubt that a decision on Tambellini's claim under Tambellini's coverage might cause an insurance company and policyholder wrestling with a similar claim under a similar policy to settle their differences; nevertheless, those parties should not be deprived of their right to show why and how their case is different and should lead to a different result. Those rights and those results are at the core of the common law.

Regarding this Court's distinct § 726 plenary jurisdiction, Tambellini's case also differs from precedential cases "involving an issue of immediate public importance" where this Court's invocation of such broad powers could more fully resolve such exigent issues. *See, e.g.*, *Bd. of Revision of Taxes v. City of*

Philadelphia, 607 Pa. 104 (2010) (finding that exercise of § 726 plenary jurisdiction was appropriate where the challenged ordinance was of immediate public concern, the issue could be resolved on the pleadings, and the record clearly supported petitioners' right to immediate relief); *In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa. 296 (2011) (finding that exercise of § 726 plenary jurisdiction was appropriate where this Court's appointment of a special prosecutor to investigate alleged violations of grand jury secrecy led to useful identification of procedural errors to avoid future violations). In contrast, the instant case does not raise issues of such exigent importance that this Court's exercise of its § 726 plenary jurisdiction would fully and appropriately resolve the coverage issues. Indeed, Tambellini's request to bypass lower courts will result in an inadequately developed record in its case (with no record at all in other cases), and would neither appropriately resolve the coverage issues in Tambellini's individual case nor the numerous other BI claims for which Tambellini proposes collective, one-size-fits-all adjudication and issue preclusion.

CONCLUSION

For all of the above reasons, *amicus* United Policyholders respectfully requests that this Court deny Tambellini's request for consolidation of all COVID-19-related BI cases. Alternatively, United Policyholders respectfully requests that if the Court exercises the extraordinary powers that are sought to be invoked here, it

issue as narrow a ruling as possible in this case while specifying that any decision is limited to the specific facts of record in this case. By carefully calibrating its decision in this case to avoid harmful dicta or precedent, this Court will crucially protect other policyholders' and future litigants' ability to address insurance coverage issues under materially different policies and fact patterns.

Respectfully Submitted,

/s/ John N. Ellison
John N. Ellison, Esq.
Attorney I.D. 51098
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Phone: (215) 851-8852
Fax: (215) 851-1420

Counsel for Amicus Curiae United Policyholders

Amy Bach, Esq.
Attorney I.D. 142029
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Phone: (415) 393-9990
Fax: (415) 677-4170

Counsel for Amicus Curiae United Policyholders Appearing Under 204 Pa. Code. § 81.502(a)

Dated: May 13, 2020

CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 2135 AND Pa. R.A.P. 127

I hereby certify that the foregoing Brief is in compliance with the word count limits and type-volume limitation provided by Pa. R.A.P. 2135. This Brief contains 6,140 words of Times New Roman 14-point font, including text, footnotes and section headings as calculated by the word processing system used to prepare this Brief.

Pursuant to Pa. R.A.P. 127, 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.

Dated: May 13, 2020

John N. Ellison, Esq.
PA Bar No. 51098
REED SMITH, LLP
Three Logan Square
1717 Arch Street Suite 3100
Philadelphia, PA 19103
Phone: (215) 851-8100
Fax: (215) 851-1420

Counsel for Amicus Curiae United Policyholders

CERTIFICATE OF SERVICE

I, John N. Ellison, certify that a true and correct copy of the attached *Brief of Amicus Curiae* was served in compliance with Pa. R.A.P. 121 as follows:

Two Copies by US First Class Mail

John P. Goodrich, Esq. — *Counsel for Petitioner*
Jack Goodrich and Associates, P.C.
429 Fourth Avenue, Suite 900
Pittsburgh, PA 15219

James C. Haggerty, Esq. — *Counsel for Petitioner*
Haggerty, Goldberg, Schleifer & Kupersmith, P.C
1835 Market Street, Suite 2700
Philadelphia, PA 19103

Scott B. Cooper, Esq. — *Counsel for Petitioner*
Abbie Csovelak Trone, Esq.
Schmidt Kramer, P.C.
209 State Street
Harrisburg, PA 17101

Jonathan Shub, Esq. — *Counsel for Petitioner*
Kohn, Swift & Graf, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103

Two Copies by US First Class Mail

Frederick P. Santarelli, Esq. — *Counsel for Respondent*
John M. Elliott, Esq.
Elliott Greenleaf, P.C.
925 Harvest Drive, Suite 300
Blue Bell, PA 19422

Matthew G. Boyd, Esq. — *Counsel for Respondent*
Patrick R. Casey, Esq.
Elliott Greenleaf, P.C.

201 Penn Avenue, Suite 202
Scranton, PA 18503

Richard W. DiBella, Esq. — *Counsel for Respondent*
Tara L. Maczuzak, Esq.
DiBella Geer McAllister Best, P.C.
20 Stanwix Street, 11th Floor
Pittsburgh, PA 15222

Robert T. Horst, Esq. — *Counsel for Respondent*
Timoney Knox, LLP
400 Maryland Drive
Fort Washington, PA 19034

Adam J. Kaiser, Esq. — *Counsel for Respondent*
Alston & Bird LLP
90 Park Avenue
New York, NY 10016

Elizabeth Helmer, Esq. — *Counsel for Respondent*
Tiffany L. Powers
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street, Suite 4900
Atlanta, GA 30309

Two Copies by US First Class Mail

Robert L. Byer, Esq. — *Counsel for Amici Curiae*
Duane Morris LLP
600 Grant Street, Suite 5010
Pittsburgh, PA 15219

Jonathan I. Aronchick, Esq. — *Counsel for Amici Curiae*
Robert M. Palumbos, Esq.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103

Clifford B. Levine, Esq.
Mark A. May, Esq.
Alice B. Mitinger, Esq.
David F. Russey, Esq.
Dentons Cohen & Grigsby P.C.
625 Liberty Avenue
Pittsburgh, PA 15222

Counsel for Amicus Curiae