

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA**

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

Plaintiff,

v.

ERIE INSURANCE EXCHANGE

Defendant.

CERTIFICATE OF COMPLIANCE

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

s/Matthew B. Malamud
Matthew B. Malamud, Esquire

CIVIL DIVISION

No. GD-20-005137

**BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION TO
COORDINATE**

Code: 180

**Filed on Behalf of Defendant,
ERIE INSURANCE EXCHANGE**

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**JOSEPH TAMBELLINI, INC. D/B/A
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Plaintiff,

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CIVIL DIVISION

No. GD-20-005137

**DEFENDANT’S BRIEF IN OPPOSITION TO
PLAINTIFF’S MOTION TO COORDINATE**

Defendant, Erie Insurance Exchange (“Erie”) by and through its undersigned counsel, Timoney Knox, LLP, files Brief in Opposition to Plaintiff’s Motion to Coordinate.

PRELIMINARY STATEMENT

Erie opposes Plaintiff’s Motion to Coordinate for two principal reasons. First, as a procedural matter, Plaintiff has failed to give the required notice of this motion to all parties in all actions in which coordination is sought. Second, consideration of the relevant factors under Pa.R.C.P. 213.1 demonstrates that coordination in Allegheny County would not be a fair and efficient method of adjudicating the individualized coverage disputes that have arisen across the Commonwealth.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this litigation through the filing of a Complaint on April 17, 2020, which sought declaratory, compensatory, and injunctive relief against Erie stemming from Erie’s denial of Plaintiff’s insurance claim for business income losses arising out of the COVID-19

pandemic. Shortly after filing the Complaint, on April 29, 2020, Plaintiff filed an Emergency Application for Extraordinary Relief with the Pennsylvania Supreme Court seeking to have that Court exercise its authority under 42 Pa.C.S.A. § 726 and its King's Bench Powers to coordinate all pending COVID-19 litigation within the Commonwealth. *See* Emergency Application for Extraordinary Relief, pp. 11-12. The Pennsylvania Supreme Court denied Plaintiff's Emergency Application on May 14, 2020, refusing Plaintiff's request for coordination.

Following denial of its Emergency Application, Plaintiff filed an Amended Complaint on June 18, 2020, asserting claims for breach of contract and declaratory judgment stemming from Erie's denial of Plaintiff's insurance claim. Plaintiff's Amended Complaint is nearly identical to the class action complaint filed three weeks prior, on May 29, 2020, on behalf of Capriccio Parkway, LLC d/b/a Capriccio Café and Bar at Cret Park, and Capriccio, Inc. d/b/a Capriccio Café at Wills Eye Hospital ("Capriccio") and all others similarly situated, at Case Number 200600011 in the Philadelphia County Court of Common Pleas.

Plaintiff's Amended Complaint is also nearly identical to the Complaint filed by Plaintiff's counsel on behalf of HTR Restaurants, Inc. d/b/a Sieb's Pub ("HTR"), individually and on behalf of a class of similarly situated persons, at GD-20-006901, Allegheny County Court of Common Pleas. Moreover, Plaintiff's Amended Complaint is a near *verbatim* copy of the Amended Complaint filed on July 1, 2020 by Plaintiff's counsel on behalf of Perfect Pots, LLC ("Perfect Pots"), at CI-20-03612, Lancaster County Court of Common Pleas.

On June 24, 2020, Plaintiff took a second bite at the coordination apple and filed the instant Motion to Coordinate each of the above-referenced cases in Allegheny County. In this regard, Plaintiff also requests coordination of all actions "filed and to be filed against Erie in a

Pennsylvania state court.” *See* Motion to Coordinate, ¶¶ 33-34.¹ Beyond vague references to conservation of judicial resources and unsupported allegations concerning the convenience of the parties and witnesses, Plaintiff argues that coordination is appropriate because each case requires coverage determinations under various insurance policies issued by Erie based on circumstances arising out of the COVID-19 pandemic and related governmental orders.

Erie now files the instant Brief in Opposition to Plaintiff’s Motion to Coordinate.

II. ISSUE PRESENTED

- A. Whether Plaintiff’s Motion to Coordinate should be denied where Plaintiff failed to provide the required notice to all interested parties.

Suggested Answer: Yes.

- B. Whether Plaintiff’s Motion to Coordinate should be denied where each case requires an individualized determination regarding the application of the facts specific to each policyholder under the relevant insurance policy.

Suggested Answer: Yes.

III. ARGUMENT

A. STANDARD OF REVIEW

A trial court’s decision to grant or deny coordination under Pa.R.C.P. 213.1 is subject to review for an abuse of discretion. *See Richardson Brands, Inc. v. Pennsylvania Dutch Co.*, 592 A.2d 77 (Pa.Super. 1991). In exercising its discretion, the trial court should be guided by both the considerations enumerated in Pa.R.C.P. 213.1 and the explanatory comment thereto. *See Washington v. FedEx Ground Package System*, 995 A.2d 1271, 1277 (Pa.Super. 2010). The

¹ As of the date of this filing, there are thirteen (13) actions pending against Erie in Pennsylvania state courts. A list of all pending state court actions filed against Erie is attached hereto as Exhibit “A.”

ultimate determination that the court must make is whether coordination is a “fair and efficient method of adjudicating the controversy.” *Id.*

B. PLAINTIFF’S MOTION TO COORDINATE SHOULD BE DENIED BECAUSE PLAINTIFF HAS FAILED TO PROVIDE THE REQUIRED NOTICE TO ALL INTERESTED PARTIES.

Pursuant to Pa.R.C.P. 213.1(a), a party seeking coordination must provide notice of its motion to “all other parties.” This requires that notice be given to “*all parties in all actions which are to be coordinated.*” *Id.*, explanatory comment (emphasis added). Plaintiff has failed to comply with this notice requirement.

In its Motion, Plaintiff seeks coordination of the “Allegheny County Actions, Philadelphia County Action, Lancaster County Action, *and all other business interruption actions filed and to be filed against Erie in a Pennsylvania state court.*” Plaintiff’s Motion to Coordinate, ¶ 33. *See also* Plaintiff’s Memorandum of Law in Support of Motion to Coordinate, p. 11. Counsel of record in this matter represents all of the four (4) plaintiffs that joined in this motion. This is less than half of the thirteen (13) matters presently filed against Erie in Pennsylvania state courts. *See* Exhibit “A.” There is nothing in Plaintiff’s Motion indicating that any of the remaining plaintiffs have consented to coordination in Allegheny County, or even have knowledge of Plaintiff’s Motion.² In this regard, Plaintiff’s statements concerning a lack of “dissent” regarding coordination are only applicable to the matters in which Plaintiff’s counsel is involved. *See* Plaintiff’s Memorandum of Law in Support of Motion to Coordinate, p. 14.

As Plaintiff has failed to give notice of the Motion for Coordination to all parties in all actions for which coordination is sought, it would be an abuse of discretion for this Court to grant the relief sought in Plaintiff’s Motion. As such, Plaintiff’s Motion to Coordinate must be denied.

² It should also be noted that, while the attorneys that signed the Motion to Coordinate have consented to coordination, there is nothing in the Motion to suggest that the plaintiffs who will be affected by the coordination have consented.

C. PLAINTIFF’S MOTION TO COORDINATE SHOULD BE DENIED BECAUSE EACH CASE REQUIRES AN INDIVIDUALIZED DETERMINATION REGARDING THE APPLICATION OF THE FACTS SPECIFIC TO EACH POLICYHOLDER UNDER THE RELEVANT INSURANCE POLICY.

In evaluating Plaintiff’s Motion to Coordinate, this Court must consider, *inter alia*:

- (1) whether the common question of fact or law is predominating and significant to the litigation;
- (2) the convenience of the parties, witnesses and counsel;
- (3) whether coordination will result in unreasonable delay and expense to a party or otherwise prejudice a party in an action which would be subject to coordination;
- (4) the efficient utilization of judicial facilities and personnel and the just and efficient conduct of the actions;
- (5) the disadvantages of duplicative and inconsistent rulings, orders or judgments;
- (6) the likelihood of settlement of the actions without further litigation should coordination be denied.

Pa.R.C.P. 213.1(c). Here, consideration of these factors dictates *against* coordination.

Absent a common question of fact or law, coordination is inappropriate. *See Ahnert v. Rank Am.*, 632 A.2d 1336 (Pa.Super. 1993) (reversing coordination where the two matters to be coordinated lacked common questions of law or fact). Plaintiff’s efforts to manufacture the appearance of common issues through the filing of identical complaints in their respective actions entirely ignores the individualized nature of the coverage disputes at issue.

The mere fact that multiple courts across this Commonwealth have been asked to interpret and apply the same policy provisions is not a sufficient basis for coordination, and Plaintiff’s assertion to the contrary entirely fails to acknowledge the nature of insurance coverage disputes. Insurance coverage disputes, such as these, require that the factual basis for each individual claim be assessed for potential coverage under the terms, conditions, endorsements, and applicable exclusions of the specific policy at issue. *See Reeds v. Royal Ins. Co.*, 75 Pa. Super. 302, 304 (1921) (“... each case must be determined from its own peculiar facts”). *See also Miller v. Poole*,

45 A.3d 1143, 1147 (Pa.Super. 2012) (“whether contract language is ambiguous depends on the particular facts to which the policy language is to be applied”). For example, the Civil Authority Coverage offered in Plaintiff’s Policy requires that an order of civil authority prohibit access to the premises described in the Policy’s Declarations. *See* Amended Complaint, Exhibit “A,” Form PK-00-01 (Ed. 01/20), p. 4, as amended by Restaurants Enhancement Endorsement, PK-JK (Ed. 9/18), p. 3. As discussed in greater detail below, the impact of Governor Wolf’s Executive Orders varies from plaintiff to plaintiff, which necessarily requires individualized, case-by-case application of the policy provision.

Each of the thirteen (13) claims presently being litigated against Erie in Pennsylvania state courts arises from distinct factual scenarios. The plaintiffs’ businesses vary from restaurants and bars to landscaping, gardening and greenhouse products and services to hair salons to automobile sales and service to retail establishments to equipment sales, service and installation. Some plaintiffs were forced to close their entire business, while others were required to limit operations. Some plaintiffs were permitted to remain open, but elected not to do so. Other plaintiffs remained open, or remained open with reduced hours of operation. Still other plaintiffs were initially closed by Governor Wolf’s Executive Order, but permitted to re-open at a later stage in the pandemic. There is simply no “one size fits all” approach that can fairly and efficiently address these matters. To the contrary, each complaint requires individualized consideration of its unique facts under the relevant insurance policy. Given the wide range of factual circumstances each plaintiff faces, coordination makes little sense.

In addition to the varying impact of the COVID-19 restrictions from plaintiff to plaintiff, the actual restrictions with which the various plaintiffs have been required to comply are not consistent from one plaintiff to the next. In addition to the statewide orders issued by Governor

Wolf, individual counties have issued their own orders. For example, despite the recent relaxation of Governor Wolf's Executive Orders, on July 8, 2020, the Allegheny County Health Department issued a new order, which restricts restaurant/bar operation in Allegheny County, including imposition of drink limits and restrictions on attendance for events and gatherings in excess of 25 person (indoor) and 50 persons (outdoor). No such order is currently in place in Lancaster County or Lackawanna County.

In light of the unique and distinct factual underpinnings of the various suits against Erie, there is simply no predominating issue of fact or law sufficient to justify coordination. In this regard, the risk of inconsistent rulings is limited, as each specific case must be limited to its own facts.

Plaintiff also alleges that coordination will be convenient for the parties, witnesses, and counsel because the actions "all involve the exact same causes of action against the exact same defendant." Plaintiff's Motion to Coordinate, ¶ 30. Aside from offering no actual insight into the purported convenience of coordination, Plaintiff's position entirely ignores the reality of the circumstances it has put before this Court. Plaintiff's motion also fails to address the significant burden that coordination of all cases filed and to be filed against Erie would impose on any judge ultimately assigned to this matter.

Litigation is pending against Erie in Allegheny County, Philadelphia County, Lancaster County, Lackawanna County, and Westmoreland County. Plaintiff has offered no explanation as to how it would be more convenient for counsel involved in the Lackawanna County litigation to litigate a case across the Commonwealth. Similarly, litigating these matters in Allegheny County does nothing for the convenience of any witness located in eastern Pennsylvania.³ Travel for these

³ Eight (8) of the thirteen (13) pending cases were filed in eastern Pennsylvania.

witnesses will be both inconvenient and expensive. *See e.g. Bratic v. Rubendall*, 99 A.3d 1, 9 (Pa. 2014) (recognizing the “inherently empirical concept that distance and expedience are inversely proportional”). The same is true with respect to the other plaintiffs that Plaintiff is attempting to uproot from their chosen forum for litigation in a foreign jurisdiction. Moreover, travel restrictions and limitations imposed out of concern for the spread of COVID-19 further detract from any argument concerning the alleged convenience of coordination.

In the instant case, the relevant considerations make clear that coordination *is not* a “fair and efficient method of adjudicating the controversy.” Indeed, there is not only one controversy to be adjudicated here, but rather *thirteen (13) separate controversies*, each with their own facts, parties, and witnesses. Consequently, it would be an abuse of discretion to order coordination. As such, Plaintiff’s Motion must be denied.

IV. CONCLUSION

In light of the foregoing, Defendant, Erie Insurance Exchange, requests that this Court deny Plaintiff’s Motion to Coordinate.

Respectfully submitted,

TIMONEY KNOX, LLP

By: /s/ Matthew B. Malamud
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Date: July 17, 2020

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ERIE INSURANCE EXCHANGE

Defendant.

CIVIL DIVISION

No. GD-20-005137

EXHIBIT "A"

**LIST OF ALL PENDING ACTIONS AGAINST ERIE INSURANCE EXCHANGE IN
PENNSYLVANIA STATE COURT**

1. *HTR Restaurants, Inc. D/B/A Siebs Pub, individually and on behalf of a class of similarly situated persons v. Erie Insurance Exchange, Allegheny County Court of Common Pleas, No. GD-20-006901.*
2. *Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurant v. Erie Insurance Exchange, Allegheny County Court of Common Pleas, No. GD-20-005137.*
3. *Luke Wholey's Wild Alaskan Grill, LLC v. Erie Insurance Exchange, Allegheny County Court of Common Pleas, No. GD-20-005297.*
4. *Mageets, LLC doing business as Tapped Brick Oven & Pour House v. Erie Insurance Exchange, Westmoreland County Court of Common Pleas, No. 20CI010809.*
5. *Perfect Pots, LLC v. Erie Insurance Exchange, Lancaster County Court of Common Pleas, No. CI-20-03612.*
6. *Capriccio Parkway, LLC d/b/a Capriccio Café and Bar at Cret Park, and Capriccio, Inc. d/b/a Capriccio Café at Wills Eye Hospital, on behalf of themselves and all others similarly situated v. Erie Insurance Exchange, Philadelphia County Court of Common Pleas, No. 200600011.*
7. *Ian McCabe Studio, LLC and Ian McCabe Studio at Union Market LLC v. Erie Insurance Exchange, Philadelphia County Court of Common Pleas, No. 200600454.*
8. *Cheryl Simon d/b/a Cheryl's Studio II v. Erie Insurance Exchange, Lackawanna County Court of Common Pleas, No. 20-CV-2100*

9. *W & S Vehicles, LLC d/b/a P & W Foreign Car Service v. Erie Insurance Exchange*, Allegheny County Court of Common Pleas, No. GD-20-00654.
10. *Philadelphia Extract Company, Inc. v Erie Indemnity Company, Inc d/b/a Erie Insurance Exchange and Erie Insurance Property and Casualty Company, Inc.*, Philadelphia County Court of Common Pleas, No. 200600913.
11. *Natural Shoe Store, Inc. v. Erie Insurance Exchange and Erie Insurance Group*, Philadelphia County Court of Common Pleas, No. 200600959.
12. *Social Victory Media, LLC d/b/a Autobahn Title & Tag v. Erie Insurance Exchange*, Lackawanna County Court of Common Pleas, No. 20-CV-2221.
13. *Lori A. Hobbs d/b/a Live With It v. Erie Insurance Exchange*, Lackawanna County Court of Common Pleas, No. 20-CV-2308.

CERTIFICATE OF SERVICE

I, MATTHEW B. MALAMUD, ESQUIRE, hereby certify that a true and correct copy of the foregoing BRIEF IN OPPOSITION TO MOTION TO COORDINATE was served via email, this 17th day of July, 2020 upon the following:

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