



COVID-19 LEGAL ALERT

PENNSYLVANIA CASE MAY IMPACT INSURANCE COVERAGE

-by Bains Fleming bfleming@nwkt.com

In *Friends of DeVito, et al v. Tom Wolf, Governor, et al*, the petitioners brought an emergency petition for relief against the Pennsylvania Governor's order shutting down "non-life sustaining" businesses amid the COVID-19 pandemic. While not involving a question of insurance coverage and with no insurance company involved in the litigation, the effect of this Pennsylvania case may be far reaching.

By way of background, the petitioners each challenged the Pennsylvania Governor's authority to issue the Executive Order which prohibited all businesses deemed non-life-sustaining from continued operation of their physical locations during the pandemic and argued that each of their operations could be run while employing appropriate prevention and mitigation practices. They also challenged the State's process of businesses seeking waivers under the Order as unconstitutional.

The State of Pennsylvania argued that the Governor has broad authority to issue such orders in efforts to combat public health emergencies and the Order was the only effective way to reduce the spread of the disease.

In ruling in favor of the State, the Court first recognized that the Governor's broad powers under the State's Emergency Code to protect the public from "damage, injury and loss of life and property resulting from disasters" which includes the ability to order the shutdown of certain business and other operations. Significantly, the Court next ruled that COVID-19 qualified as a "natural disaster" that would justify the actions taken by the Governor.

Under the Pennsylvania Emergency Code a "natural disaster" is define as:

Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.

What will likely form the bedrock of future challenges to insurance coverage denial, the Pennsylvania Court found that COVID-19 was no different from the other listed natural disasters in that they all involve “substantial damage to property, hardship, suffering or possible loss of life.” The key phrase here is “damage to property.” The Court found that because the virus is spread from person-to-person contact, has an incubation period of up to fourteen days and can live on surfaces for up to four days, any location, including an individual business, is within a disaster area and is thus damaged.

Additionally, the Pennsylvania Court rejected the argument that the actual presence of the disease at a specific location was required before it could be shutdown, thus holding that all properties were damaged because of the manner in which the disease spreads. In enforcing the Governor’s authority, the Court held that the “COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions.” Accordingly, the Pennsylvania Executive Order, like other State’s orders, is a declaration that business property has been damaged and is unsafe due to the coronavirus.

This ruling could potentially negate one of the insurance industry’s standard bases for denial of coverage of business interruption claims—i.e. that COVID-19 did not result in “direct physical loss to insured property.”

This Pennsylvania case may now head to the U.S. Supreme Court as the petitioners have appealed. The U.S. Supreme Court has given the State of Pennsylvania until May 4th to reply to the petitioners’ accusation that the State was trampling on Constitutional rights as it ordered certain nonessential businesses to close their doors as a result of the coronavirus pandemic.

For more information on Norman, Wood, Kendrick & Turner’s COVID-19 practice, please contact: William McKenzie, Kile Turner, or Bains Fleming