

Court Opinion Finds COVID-19 Qualifies as a Natural Disaster

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Joann M. Lytle
Jennifer Black Strutt

A Pennsylvania Supreme Court Decision may help policyholders seeking claims coverage for COVID-19 losses.

The Pennsylvania Supreme Court recently issued an opinion that provides helpful language that policyholders and their counsel will likely cite in support of arguments for insurance covering business interruption losses related to the COVID-19 pandemic.

In *Friends of DeVito, et al. v. Tom Wolf, Governor, et al.*, Pennsylvania business owners brought an emergency petition for relief against the governor's executive order closing nonessential businesses to slow the spread of COVID-19. The petitioners generally argued the governor exceeded his statutory authority in issuing the executive order.

The Court found "the governor is vested with broad emergency management powers under the Emergency Code." Indeed, the governor is "responsible for meeting the dangers to this Commonwealth and people presented by disasters," and the governor may, by proclamation or executive order, declare a state of emergency.

Upon the declaration of a disaster emergency, the governor has "expansive emergency management powers," which include controlling the ingress and egress to and from a disaster area. The petitioners raised several challenges to the application of these powers in response to a viral illness such as COVID-19.

What constitutes a disaster?

First, the petitioners argued COVID-19 is not a "natural disaster" as defined by the Emergency Code. The Court disagreed, finding COVID-19 qualifies as a "natural disaster," which is defined 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."

Second, the petitioners argued that even if the COVID-19 pandemic constitutes a "disaster," the governor's authority to control ingress or egress to and from a disaster area did not apply because there had not been any disasters in the areas in which their businesses were located. The Court found "no merit" in that argument and found the petitioners' argument ignored "the nature of this virus and the manner in which it is transmitted[:]"

The virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area.

Therefore, the Court held the COVID-19 pandemic triggered the governor's authority under the emergency code and the governor had the authority to declare "the entirety of the Commonwealth a disaster area."

Finally, the petitioners argued the respondents exceeded their police powers by ordering the closure of businesses deemed to be non-life-sustaining. The Court disagreed, discussing (again) the risks of the virus. The Court noted the exponential increase in positive cases and deaths in Pennsylvania within a short amount of time.

The Court found that COVID-19 "does not spread because it is 'at' a particular location." Citing person-to-person spread, the 14-day incubation period, its ability to remain airborne and its survival rate on surfaces, the Court found that "the protection of the lives and health of millions of Pennsylvania residents is the *sine qua non* [essential condition] of a proper exercise of police power."

Court's decision affects policyholders

There are several reasons why this opinion, which has nothing to do with insurance, can be helpful to policyholders. Policyholders are submitting claims and seeking recovery for their business interruption losses from closures and social distancing requirements related to the coronavirus. Although property insurance policies often include 'business income' coverage, some insurers are denying these claims, arguing that the loss of business income was *not* caused by "direct physical loss of or damage to property," as the policies require.

The Pennsylvania Supreme Court's opinion assists policyholders in their pursuit of coverage (and in refuting the insurers' coverage defense) in several ways. First, in holding that COVID-19 constitutes a "natural disaster," the Court specifically found the virus is an "other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life," thereby leaving the door open to the argument that property damage may result from the virus.

Second, the Court found the governor had the authority to declare the entirety of the Commonwealth a disaster area, thereby giving the governor the authority to control ingress and egress throughout the state. Many insurance policies provide business income coverage when ingress/egress has been prohibited, such as this instance.

Finally, the Court rejected the notion that there must be a confirmed case of the virus "at" any particular location. Instead, the Court recognized the significant risk presented by this virus and that the risk is, essentially, everywhere. Therefore, to implement social distancing aimed at reducing this risk, policyholders have suffered a "direct physical loss" of their property.

Although *DeVito* does not directly address insurance coverage, the Pennsylvania Supreme Court's opinion may be helpful to policyholders in their arguments for business interruption insurance as applied to their losses related to the coronavirus.