Shuttered Businesses Seek National Consolidation of COVID-19 Business Interruption Claims

By: Sean P. Mahoney, Michael O. Kassak and Eric B. Hermanson
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On April 20, 2020, two Philadelphia restaurants filed a petition with the Judicial Panel on Multi-District Litigation (the Panel or JPMDL), seeking to transfer and consolidate all COVID-19 business interruption insurance cases in federal court to the U.S. District Court for the Eastern District of Pennsylvania in Philadelphia. That same day, seven Chicago-area businesses filed a similar petition asking the Panel to transfer sixteen pending cases from thirteen different districts to the U.S. District Court for the Northern District of Illinois before Judge Matthew F. Kennelly. If granted, either petition could have profound procedural and substantive impacts on the flood of business interruption cases likely to follow.

The JPMDL is a panel of seven current federal judges that administers the multi-district litigation process Congress has statutorily authorized as set forth in 28 U.S.C. § 1407. Through that process, all pending federal cases, and any later-filed federal cases raising the same (common) issues, may be transferred to a single judicial district and judge for consolidated pretrial proceedings upon a finding that consolidation will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Once transfer is ordered, the transferee judge becomes responsible for the pretrial management of all claims in the federal system. He or she coordinates discovery management, class certification motions, *Daubert* hearings, dispositive motions, and motions *in limine* – leading, often, to a series of bellwether trials, mediation, and settlement. The transferee judge may also need to coordinate with state court judges managing parallel, consolidated state-court proceedings. Any claims that do not resolve in the MDL proceedings are returned for trial to the federal judicial districts where they were originally filed.

The JPMDL serves a gatekeeper role in this process. It is charged with (1) determining whether pending actions in different federal district courts involve common questions of fact, warranting transfer and consolidation under the statute; (2) selecting the judge who will preside over such proceedings; and (3) choosing the federal district court where the MDL proceedings will take place. In carrying out this role, the Panel is driven by considerations of fairness, efficiency and sound case management.

It is becoming clear that the federal and state courts across the United States will soon be facing a large wave of insurance litigation, of which cases are likely to be filed as class actions, as insureds seek coverage from their insurers for business interruption, lost profits and other consequences of the COVID-19 pandemic. The recent MDL Petitions argue that this litigation, while widely dispersed, shares important common features that make these cases appropriate for coordinated, uniform adjudication. They point to similar contract language and claim-handling protocols applied to similar causes of loss, *i.e.,* the COVID-19 virus, and the perceived need for coordinated "expert epidemiology discovery." As a result, the Petitions assert, consolidation of federal court cases before a single judge in a single judicial district will eliminate duplicative discovery and proceedings and the risk of inconsistent results.

Insurers may not necessarily be moved by these arguments. They may highlight important differences in policy language, the disparate geographic locations of the plaintiffs and defendants, and plaintiffs' varying types of businesses to argue that these differences outweigh any commonalities that arise from the viral source of the plaintiffs' coverage claims. Among other things, they might note the following:

- ***Differences in policy language***. Not all insurers use the same coverage forms, and not all policies contain the same exclusions for viral and bacterial contamination. Material variations in the business interruption policy language might yield coverage in one instance but not in another.
- ***Differences in underwriting practices***. Whether and to what extent the insurers and the policyholders discussed the availability of coverage for losses arising out of viral contamination during the underwriting process may also influence the individual coverage determinations in each case. Each policy is the result of a process of negotiation, usually involving the insured, a broker, and an underwriter applying the underwriting standards and guidelines of his employer. These underwriting standards, in turn, can vary widely among insurers. In some cases, insureds and their brokers may have raised and discussed the potential availability of coverage for viral contamination, but there are likely to be many instances in which they did not. The differing circumstances by which policies were issued, and the different communications (or reasons for lack of communication) during negotiations in the underwriting process, may, under some circumstances, require different approaches to the adjudication of claims under these policies.
- ***Differences in claim handling practices***. The protocols for addressing COVID-19 claims vary from insurer to insurer, and claim to claim. Depending on the underlying facts, analysis, contract language, and claims examiners, individual claims examiners are likely to have focused, elicited and relied upon differing information in reaching a coverage determination in each individual case. Even if the underlying policy language may be similar, each coverage determination, ultimately, turns on its own specific facts, as each insured presents them.
- ***Differences in underlying facts.*** Each business is different. Each interruption of business is different. Therefore, each policyholder's business interruption loss is different. Each claim for coverage is different, depending on the circumstances of the insured's business, when the claim arose, where in the country it arose, and at which stage of the pandemic it arose. In some cases, claims will involve direct viral contamination to claimants' premises or property. In other cases, claims will involve the risk of such contamination from elsewhere (based on widely varying facts). In other cases, claims of business interruption will involve direct shutdown orders by civil authorities. In other cases, the asserted business interruption will arise simply from warnings, advisories, and social distancing norms.

In sum, opponents of consolidation will argue that each claim (and each coverage determination) involves and arises out of the application of different insurers' policies, issued by different underwriters, using different underwriting standards, which were ultimately applied and interpreted by an array of different adjusters to very different policyholders claiming very different losses on the basis of widely differing underlying facts. We accordingly expect any opposition to the MDL Petitions to be vigorous, supported by significant *amicus* participation, and the source of lively argument before the JPMDL on these points.

If consolidation is ordered, the Philadelphia petitioners have requested that the cases be transferred to Judge Timothy Savage, in the U.S. District Court for the Eastern District of Pennsylvania, who is currently managing the two COVID-19 business interruption cases in which these petitioners are involved. They argue that the Eastern District of Pennsylvania has significant experience managing other MDL proceedings: *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834 (J.P.M.L. 1998); *In re Tylenol (Acetaminophen) Mktg., Sales Practices and Prods. Liab. Litig.*, 936 F. Supp. 2d 1379 (J.P.M.L. 2013); and *In re: Nat'l Football League Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012). They also argue that Philadelphia is a convenient and accessible forum because it is located in the Northeast United States – a region particularly hard-hit by the pandemic.

The Chicago Petitioners, by contrast, have requested that all federal cases be transferred to Judge Michael Kennelly in the Northern District of Illinois, who has extensive experience in handling other large MDL proceedings. They also argue that the Northern District of Illinois has more cases than any other district and that many of the largest insurers in the country are located in the Northern District. Their remaining arguments relating to convenience and efficiency are similar to the arguments made by the Philadelphia Petitioners. Despite the competing arguments made by both sets of petitioners, the Panel is not required to accept either party's recommendation,

and it may select a different judicial district and choose a different judge if it wishes to do so.

These pending petitions – and the furious flurry of oppositions and related submissions to follow – will soon force decisions as to the commonalities and differences of COVID-19 claims around the country, whether all federal court business interruption insurance cases should be consolidated into a single MDL proceeding, and which court and individual judge should control these cases if consolidation is ordered.

If you have any questions or need more information, contact Sean P. Mahoney (mahoneys@whiteandwilliams.com; 215.864.6342), Michael O. Kassak (kassakm@whiteandwililams.com; 856.317.3653), or Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

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