COVID-19 Business Interruption Litigation May Be Consolidated for a Select Few
The Joint Panel on Multidistrict Litigation declines petitions for an industry-wide MDL, but will consider four insurer-specific MDLs.

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TAKEAWAYS

😊 In declining the petitions for an industry-wide MDL, the panel concluded that the commonality among the cases was “superficial.”

😊 Because no petition for insurer-specific MDLs was before it, the panel declined to rule on the propriety of that alternative.

😊 The panel’s decision indicates that it will consider the formation of insurer-specific MDLs at its next hearing on September 24, 2020.

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With hundreds of cases now pending nationwide involving insurance coverage claims for business interruptions stemming from the COVID-19 pandemic, a federal panel has been considering the prospect of consolidating the litigation into one multidistrict litigation (MDL) to promote their efficient resolution. On August 12, 2020, the panel issued a decision ruling out a single nationwide MDL, but leaving open the possibility of smaller, insurer-specific MDLs.

In its ruling, the Joint Panel on Multidistrict Litigation (JPML) declined to consolidate lawsuits filed nationwide to recover COVID-19-related business interruption losses under first-party property insurance policies on the grounds that an “industry-wide MDL” would not advance the efficient resolution of the litigation. But in the same order, the panel directed four insurers to demonstrate why insurer-specific panels
should not be formed, indicating that at least partial consolidation of the litigation is still possible. Under the panel’s order, The Hartford, Cincinnati Insurance Company, various underwriters at Lloyd’s of London, and Society Insurance Company must file responses to the panel’s show cause order by August 26, 2020.

The panel’s order addresses two petitions for consolidation filed last April in In re: COVID-19 Business Interruption Protection Insurance Litigation, MDL No. 2942. One petition sought consolidation of COVID-19 business interruption litigation in the Eastern District of Pennsylvania and the other in the Northern District of Illinois. The movants, primarily restaurants, sought to transfer cases filed against more than 100 insurance companies. They argued that common factual question presented by the cases justified consolidation under 28 U.S.C. §1407. Those common factual questions included whether COVID-19 or orders closing businesses cause “physical loss or damage” to covered property, thereby triggering coverage, and whether virus exclusions preclude coverage.

More than 70 responses to the petitions were filed. In opposition to consolidation, both insurers and many policyholders argued that the cases involved many policy forms that differed in significant respects and discrete questions of fact that could not be resolved on a global basis. Triggers of coverage, government orders and the impacts of COVID-19 varied from case-to-case, they pointed out, and the sheer number of defendant-insurers involved in the litigation would make any consolidated proceeding unmanageable.

Oral argument on the petitions was presented to the panel, which consisted of U.S. District Judges Ellen Segal Huvelle, Catherine D. Perry, R. David Proctor, Matthew Kennelly and Nathaniel M. Gorton, on July 30, 2020. In the course of the 90-minute hearing, in addition to addressing the petitions for creation of a single panel for all pending litigation, counsel advanced a number of alternative approaches to consolidation. Some suggested that cases filed in each district court or in each state could be consolidated, and others indicated consolidation of cases against individual insurers could be an option, when a significant number of cases had been filed.

The panel issued its decision on August 12, 2020, and declined the petitions for consolidation. The panel concluded that the commonality among the cases was “superficial”:

There is no common defendant in these actions—indeed, there are no true multidefendant cases, as the actions involve either a single insurer or insurer-group (i.e., related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.
The panel noted that “seemingly minor differences in policy language could have significant impact on the scope of coverage.” The consolidation of a large number of complex cases, the panel explained, would not promote their efficient resolution, which was a particularly significant consideration given that a number of plaintiffs indicated they were on the brink of bankruptcy.

After declining to form an industry-wide MDL, however, the panel then indicated that it found that “the arguments for insurer-specific MDLs are more persuasive.” Such panels could involve “a single insurer or group of related insurers” and would be more likely to present common questions of fact and “achieve the convenience and efficiency benefits envisioned by Section 1407”:

The actions are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions. Thus, there is a significant possibility that the actions will share common discovery and pretrial motion practice. Moreover, centralization of these actions could eliminate inconsistent pretrial rulings with respect to the overlapping nationwide class claims that most of the insurers face.

Because there was no petition for such an MDL before the panel and the option of proceeding in that manner had been raised only in briefs and at oral argument, the panel declined to rule on the propriety of insurer-specific MDLs based on the record before it. Instead, the panel “direct[ed] the Clerk of the Panel to issue orders with respect to actions naming four insurers or groups of related insurers—Certain Underwriters at Lloyd’s, London; Cincinnati Insurance Company; the Hartford insurers; and Society Insurance—directing the parties to show cause why those actions should not be centralized. See Panel Rule 8.1.” Rule 8.1(a) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation provides that “[w]hen transfer of multidistrict litigation is being considered on the initiative of the Panel pursuant to 28 U.S.C. § 1407(c)(i), the Clerk of the Panel may enter an order directing the parties to show cause why a certain civil action or actions should not be transferred for coordinated or consolidated pretrial proceedings.”

Finally, the panel addressed the propriety of insurer-specific MDLs for insurers other than those subject to the show cause order and determined that for them “centralization does not appear appropriate.” The panel noted that other methods of “cooperation and coordination” were available to litigants in cases involving those insurers, including “relat[ing] actions against a common insurer in a given district before one judge.”

The panel’s decision indicates that it will consider the formation of insurer-specific MDLs at its next hearing on September 24, 2020. Responses to the show cause order are due on August 26, 2020, and replies on September 2, 2020.

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