MDL Panel Presented With Numerous Solutions for Handling Hundreds of Federal COVID-19 Coverage Actions

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This morning a hearing was held via Zoom before the Judicial Panel on Multidistrict Litigation (MDL) addressing whether the hundreds of COVID-19 coverage actions, pending in federal courts far and wide, should all be consolidated into one or more judicial districts and overseen by a single judge in each district. For the most part, but not entirely, policyholders are seeking MDL consolidation. Insurers across the board oppose it.

The interest in this question has been sweeping. Indeed, several federal declaratory judgment actions have recently been stayed by judges as they await a decision on whether their case will be shipped out. A slew of motions, for and against consolidation, have been filed. Just three months after the first motion for MDL consolidation was brought, the 95-page docket in the case has more than 750 entries listed.

The hearing lasted for 90 minutes and about 15 lawyers argued, each given three uninterrupted minutes before the panel could pose questions.

The takeaway: various theories abound on how to deal with this sprawling coverage litigation. And none of them is ideal. As one counsel put it, is the litigation the nightmare or is consolidation the nightmare?

Policyholder counsel proposed various solutions. These generally included a single MDL with consolidation of all cases in a single district with a single judge or separate insurer-based MDLs, given that a handful of insurers are involved in a high percentage of cases. One counsel argued for state-based MDLs, with separate proceedings in each of the states where significant numbers of cases have been filed.

A number of transferee jurisdictions were proposed, including the Eastern District of Pennsylvania, the Western District of Washington, the Northern District of Illinois, and the Eastern District of Illinois. Just about all of the proposals were met with tough questions from the panel.

Perhaps nothing demonstrates the lack of consistency on the proposed solution more than this: According to one counsel, one-fourth of the policyholder response briefs — including the policyholder advocacy group United Policyholders — oppose the creation of any kind of MDL. In our experience, it is unusual to see this kind of fracture among policyholders in a dispute with insurers.

The consolidation arguments centered around the following:

- Are there actually common questions of fact in these cases, which is at the heart of the legal basis for creation of an MDL? Or do the commonalities between the cases mostly involve legal issues, which is not a proper statutory basis to create an MDL?
- Just how similar are the policy provisions between the numerous insurers' policies? (It was stated that there are 96 insurer defendants across the federal coverage cases.) This was the most discussed issue. Those favoring consolidation argued that the policies are all the same or materially the same. As Mark Lanier put it, these cases are really just about five words: "direct physical loss or damage." Those against consolidation see this much differently — noting some wide discrepancies in standard policy

language, and that's before you get to the endorsements.

- How significant is the danger of inconsistent decisions, given that insurance law and the coverage issues are state specific?
- How much discovery is actually needed? Some favoring consolidation recognized that the answer to this question may be, perhaps, not much. So they argued that discovery is at least needed for those with bad faith claims.

It is difficult to predict what the panel will do. Our sense is that the most likely outcome will be the denial of a single MDL with consolidation of all cases in a single district and before a single judge. The panel signaled that a single, nationwide proceeding, would be too complex —legally and administratively. But even a series of smaller MDLs, based on cases sharing common traits, also seemed to cause the panel concern. This too is complex. And they wondered what would come of the many cases that do not fit the criteria to be placed into the smaller MDL.

Is was brought up by a counsel arguing for numerous insurers that, in eighteen cases, a Motion to Dismiss has been fully briefed. This favors having the cases stay where they are and being decided by the currently assigned judge.

There was agreement on one thing: time is of the essence to get these cases decided. That there are so many cases poised to possibly provide answers to the common coverage questions — which may then influence other courts — may be a persuasive reason for the panel to deny the creation of any type of MDL.

Whatever the panel's solution for dealing with hundreds of complex coverage actions may be, it seems that it will not be the one with the most positive attributes, but rather the fewest negatives.

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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.