

No Global MDL for COVID Business Interruption Claims, but Panel Will Consider Separate Consolidated Proceedings for Lloyds, Cincinnati, Hartford, Society

By: Eric B. Hermanson and Konrad R. Krebs

Insurance Coverage and Bad Faith Alert

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In a widely anticipated ruling, the Judicial Panel on Multidistrict Litigation has denied two motions to centralize pretrial proceedings in hundreds of federal cases seeking coverage for business interruption losses caused by the COVID-19 pandemic. However, the Panel has ordered expedited briefing on whether four separate consolidated proceedings should be set up for four insurers – Cincinnati, Society, Hartford, and Lloyds – who appear to be named in the largest number of claims.

In seeking a single, industry-wide MDL proceeding, some plaintiffs had argued that common questions predominated across the hundreds of pending federal suits: namely, [1] the question of what constituted 'physical loss or damage' to property, under the allegedly standardized terms of various insurers' policies; [2] the question whether various government closure orders should trigger coverage under those policies, and [3] the question whether any exclusions, particularly virus exclusions, applied.

The Panel was not persuaded by these arguments. It described the alleged commonalities as "superficial." Much more significant, in the Panel's view, was the fact that there was no common defendant in these actions, and little potential for common discovery. "These cases involve different insurance policies with different conditions, exclusion, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions."

In addition, the Panel expressed concern about the "significant managerial and efficiency concerns" of organizing a single, large, multi-defendant proceeding, with thousands of plaintiffs, more than one hundred insurers, and multiple different policy forms. It noted the delays that could be expected as a transferee court struggled to manage such a massive proceeding, and observed that "time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy ... an industry-wide MDL will not promote a quick resolution of these matters."

However, the Panel did signal it might be responsive to a request for four separate MDLs: one each for the four specific insurers and insurer groups – Lloyds, Cincinnati, Society, and Hartford – that were represented to be facing the largest number of federal claims. The Panel suggested that four separate single-defendant proceedings – one for each of these four specific entities – would be "more likely to involve insurance policies utilizing the same language, endorsements, and exclusions."

Thus, the Panel suggested, consolidation of cases against these four insurers, might serve the goals of convenience and efficiency envisioned by the federal statute.

The Panel ordered these four insurers and groups of insurers to file briefs on an expedited basis, by August 26, to show cause why the actions against them should not be centralized. The Panel will consider those briefs at its next hearing on September 24, 2020.

If you have any questions or need more information, contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226).

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