The Goldilocks Rule: Panel Rejects Proposed Insurer-Specific MDL Proceedings for Four Large Insurers, but Establishes MDL Proceeding for the Smallest

By: Eric B. Hermanson and Konrad R. Krebs
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It is an outcome few people expected. Back in August, the Judicial Panel on Multidistrict Litigation (Panel) refused plaintiffs' requests to set up a single industry-wide multi-district litigation, which would have consolidated — in a single massive proceeding — all federal lawsuits seeking COVID-related business interruption coverage from insurers. The Panel acknowledged common legal issues, and potential benefits of coordinated management, but it balanced those benefits against the numerous factual differences between policies, carriers, and insureds, and noted that "[t]hese differences will overwhelm any common factual questions."

Then, after lengthy argument, the Panel ordered further briefing as to whether separate, company-specific MDL proceedings might be appropriate against five specific insurance carriers: specifically, the five carriers against whom the largest numbers of federal claims were pending.

By choosing these five carriers and not others for further argument, the Panel seemed to be suggesting a formula: the larger the carrier, and the greater the number of claims against it, the greater the potential benefit from coordinated management, and the stronger the plaintiffs' case for pre-trial consolidation.

The Panel has now issued its ruling as to those five carriers. And that ruling is a puzzler. As to the largest four carriers (Lloyd's, Cincinnati, Hartford, and Travelers), the Panel rejected insurer-specific multidistrict proceedings.[1] In ruling against consolidation, the Panel rested its ruling on the volume and variety of claims against these carriers. It noted that the claims involved distinct theories of liability, under the law of multiple states, which could produce divergent outcomes even as to policies with similar or identical language. And the Panel noted that individualized discovery could be required for each insured, which, in light of the volume of cases, could significantly delay resolution.

But as to the smallest of the five carriers — Society Insurance (Society) — the court ordered a MDL be established.[2] The Panel rested its ruling on the fact that there were only 34 claims pending against Society, which, the Panel said, meant less difficulty in administration, and less burden from individualized discovery.

Moreover, the Panel said the claims against Society were pending in a much smaller number of jurisdictions, which meant fewer states' insurance laws would be involved. In short, a Society-only MDL, being smaller, would be more manageable, and would more efficiently promote efficient disposition of the cases.

Reading these decisions together, a lawyer might be forgiven for thinking the Panel has adopted a sort of "Goldilocks" Rule:

- Large insurers, defending multiple, geographically widespread lawsuits, can argue that consolidation is inappropriate because the large number of cases renders consolidation unmanageable.
- Small insurers, defending relatively few cases, can argue that consolidation does not promote efficiency.

- But midsize regional insurers, falling in some undefined "middle zone," will be at risk of consolidation if the Panel concludes they are defending enough lawsuits to warrant consideration, but not too many to be confusing.

The Panel did not say what it would do if — as seems likely — this week's ruling leads to an increase in the number of federal tag-along suits against Society, causing the volume of suits against that carrier to grow beyond the (undefined) upper limit of its "middle zone."

Nor did the Panel say what it would do if some of the small local insurers it heard from in July 2020 — insurers who were facing only a handful of cases at that time — experienced new and additional filings, so as to bring them above the "middle zone's" (undefined) lower end.

Clearly, the Panel's ruling will not end the issue. By declining to adopt clear parameters, the Panel seems to have ensured further motion practice and procedural confusion for months to come.

Insurers, particularly those who think they might fall in the Panel's undefined "middle zone," will need to await further guidance, perhaps on a case-by-case basis.

If you have any questions or need more information, contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226) or Konrad R. Krebs (krebsk@whiteandwilliams.com; 215.864.7018).

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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[1] *In re Cincinnati Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.*, 2020 U.S. Dist. LEXIS 183680 (J.P.M.D.L. Oct. 2, 2020); *In re Certain Underwriters at Lloyd's, London, Covid-19 Bus. Interruption Prot. Ins. Litig.*, 2020 U.S. Dist. LEXIS 183684 (J.P.M.D.L. Oct. 2, 2020); *In re Hartford Covid-19 Bus. Interruption Prot. Ins. Litig.*, 2020 U.S. Dist. LEXIS 183685 (J.P.M.D.L. Oct. 2, 2020); *In re Travelers Covid-19 Bus. Interruption Prot. Ins. Litig.*, 2020 U.S. Dist. LEXIS 183683 (J.P.M.D.L. Oct. 2, 2020).

[2] *In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.*, 2020 U.S. Dist. LEXIS 183678 (J.P.M.D.L. Oct. 2, 2020).