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JPML Hearing Shows Why Virus Insurance MDL Won't Work

By **Adam Fleischer** (July 30, 2020, 4:21 PM EDT)


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Policyholder counsel across the country have coordinated a strategy to file COVID-19 business interruption suits in such volume that the sheer number of suits manufactures momentum, gravitas and a façade that insurers must pay for the policyholders' business income lost due to the worldwide health and safety restrictions governments have promulgated.

With over 1,000 such suits now pending against over 100 insurers, there arises a glaring issue: First-party property policies generally insure business repercussions caused by direct physical loss of or damage to property within a specific insured location. By contrast, the COVID-19 business losses are caused by worldwide health concerns and interpersonal restrictions, unrelated to any precarious physical condition of insured property at any specific locations.

The policyholder effort to obscure proof of individual coverage prerequisites behind a morass of conglomerated claims came to a head Thursday before the Judicial Panel on Multidistrict Litigation when some policyholders asked for a single judge to oversee hundreds of federally filed COVID-19 business interruption claims, including over 200 putative class actions, impacting tens of thousands of different insureds, different policies and differing business circumstances.

In some sense, the very breadth of the vastly different arguments for consolidation actually demonstrated that the differences between the cases in fact far outweigh their similarities, as discussed below.

The COVID-19 Insurance Claims

The COVID-19 business interruption claims, at their heart, seek coverage under two main provisions. The first is typically a "business income" provision, which generally states that a policy only pays for lost business income if a business is forced to shut down due to the direct physical loss of or damage to property at the specified insured address.

Policyholders have argued that, because government orders have restricted full operation of their businesses, this constitutes a "direct physical loss." Insurers have responded by noting that the government COVID-19 orders exist irrespective of any property condition at any insured premises, and they are in fact not promulgated to address any direct physical condition or loss presented at the policyholder's insured premises.

The second argument for coverage is typically a "civil authority" provision. Civil authority provisions generally provide coverage when there is direct physical loss or damage to property in the immediate vicinity of the insured's premises, which then causes a threat of immediate precarious harm to the insured's location, which then causes a civil authority to order a prohibition of all access whatsoever to the insured premises.

Of course, in the context of COVID-19, the governmental restrictions, while differing from city to city and state to state, generally are not prompted by any property damage at any specific location. It is also true that the government orders generally do not prohibit all access to any insured premises, but in fact allow access to the insured premises, although under various restrictions, usually with respect to the number of customers allowed at one time. The press has referred to these civil orders as a "hodgepodge"(USA Today), a "mishmash" (CNN), and a "jumble of half measures" (New York Times).

The policyholders' effort to create a single massive multidistrict litigation to manage over 400 federal lawsuits (and counting) is really an effort to heighten focus on the tragic business consequences of COVID-19 such that concentrated pressures and postures may be created that could lead to findings of coverage within those arguments and issues set forth above.

Policyholders' Arguments for Consolidation

During JPML arguments, the policyholder theme was clear. A goal of an MDL is to allow for a quick economic resolution to unfavorable business conditions created by COVID-19, without necessarily steering the claims through the detailed requirements of individualized insurance disputes.

For example, policyholder counsel reminded the panel repeatedly that "time is of the essence," that the "world economy is in play here," that "America needs to speak with one voice on these issues," and that "the mom and pop stores we represent really need this." While there is no debating that the COVID-19 pandemic has devastated all sectors of the worldwide economy, these factors are not determinative of whether an MDL is to be created.

Under Title 28 of the U.S. Code, Section 1407, a consolidated MDL can be created where (1) the actions "involv[e] one or more common questions of fact"; (2) transfer "will be for the convenience of parties and witnesses"; and (3) transfer "will promote the just and efficient conduct of such actions." As the policyholders argued these factors before the JPML, the arguments often highlighted the lack of commonality among the claims, and demonstrated the disparate interests, law and geographical circumstances at play.

For example, different policyholder counsel spoke of the individualized circumstances of their respective clients, meriting consolidation in a court of geographic prominence and efficiency for their clients. By the end of the hearing, these arguments had requested consolidation in the Eastern District of Pennsylvania, the Northern District of Illinois, the Southern District of Florida, the Western District of Washington, and the Northern District of California.

The panel twice put the question to policyholder counsel as to what common questions of fact predominate across these claims and jurisdictions, with no common or direct answer forthcoming. Instead, the policyholders gravitated back to the common issue of law, as to whether or not a pandemic shutdown can constitute "direct physical loss or damage." Of course, even this point centers on a question of law rather than fact, and circumvents that the policy language to determine this legal question inevitably involves many more differing provisions than just the phrase "direct physical loss or damage."

The policyholders then presented an alternative means of consolidation. They argued for insurer-

specific MDLs that would be created against insurers that had a certain volume of federal cases pending against them. The feature of this argument was the suggested creation of an MDL against Hartford, and a separate MDL against Travelers and one against Cincinnati Insurance Company. The plaintiffs pointed out that over 35% of the COVID-19 business interruption cases filed in federal court were against these three companies.

It was also argued that an individual MDL should be established against State Farm in the Eastern District of Virginia, against Cincinnati in the Southern District of Ohio or in Kansas or in Missouri, and against Lloyd's in the Northern District of Illinois.

The policyholders suggested that, with respect to any insurers who don't yet have enough cases pending against them to warrant an individualized MDL, an MDL could be created at a later date if enough new cases are filed. In other words, if the JPML creates insurer-specific MDLs, it seemed that a new wave of suits were promised to then justify and populate such MDLs.

However, as pointed out by the insurers (and numerous policyholders who agreed), the creation of insurer-specific MDLs suffers from the same failings as would be presented by a national MDL, discussed below.

Arguments Against Consolidation

Insurers pointed out the differences in the claims sought to be consolidated, namely: (1) the policyholders have argued different theories as to whether or how the property at different locations caused loss or damage; (2) the wide range of differences in the government orders having allegedly caused such loss or damage; (3) the differences in types of policyholders, from restaurants to nightclubs to dental practices to marketing firms; (4) the differences in the insurance policy language issued to these diverse entities; and (5) differences in state law governing the nuanced and differing coverage circumstances.

More than 50 policyholders also actually opposed the creation of an MDL. Together, these policyholders and their insurers explained that there are actually no common questions of fact between the pending claims. There are important differences between what type of business is at issue, when it closed and why, if there was a stay-at-home order, and what it said. The insurers argued that, even in a single-insurer context, the policies issued by any one insurer still have differences, still implicate different state law, and suffer from all of the same challenges as would a single, massive MDL.

The insurers pointed out that 18 dispositive motions have been fully briefed and are awaiting determination in federal courts across the country. Countless additional motions have been filed and will be moving forward in federal courts, if only the JPML allows those individual cases to move forward. It was argued that, the creation of any MDLs would force inevitable constant maneuvering for a judge to differentiate at every stage of litigation countless differences in law, facts and policy provisions, which would all be avoided if courts were simply allowed to manage and resolve the individual cases pending in the courts in which they are pending.

The Landscape Moving Forward

While the JPML's questions indicated a sincere search for efficiency within the permitted confines of Title 28 of the U.S. Code, Section 1407, much of the panel's inquiry boiled down to a basic question it posed: "It seems that if we have one judge working on 17 different policy categories, with different state law, fact specific analyses with different policyholders ... how in the world is a judge going to get through all of this with any type of efficiencies?" The panel also noted, "COVID-19 is everywhere, but the same insurance policies with the same exclusions are not everywhere."

The panel's questions highlight three repercussions that are likely to befall any type of consolidation that is created. First, the parties in a consolidated action will be forced early and often to engage in an endless debate between the similarities and differences in claims, issues, facts and law.

As was addressed Thursday before the JPML, some insureds have pled that there was never a virus found in their premises, but they were forced to close because the government believed the virus was in the community. Other insureds have pled that, based on statistical analysis, the virus was likely to have been inside the insured premises. Others have pled variations of these theories. Some insureds brought suit before the insurer had even responded to a claim. Some suits include allegations of claims handling negligence, while others do not. Some policies have exclusions that others do not.

These distinctions between claims will permeate and dominate the handling of every issue in litigation from the earliest preliminary motion, to the length and proper scope of discovery, to everything in between. A policyholder, saddled with the burden of constantly comparing and contrasting its own claim with the others forced upon it, is not likely to feel that its interest in pursuing efficient and individualized resolution of its claim is being accomplished in any way, shape or form.

A second negative repercussion of consolidation derives from the reality that, for many of the "mom and pop" businesses mentioned in the JPML arguments, even if they were able to prove an entitlement to business interruption damages, the policies are likely to limit their recovery to lost income over a finite and capped period of months. This makes those mom and pop claims valued at significantly less than business interruption claims of much larger corporate entities. This means that, when mom and pop claims are pulled from their own court, and thrust into court with much larger lawsuits, the individualized claims for which time is of the essence, are likely to be pushed to the sidelines of any consolidated action, with their individual issues addressed one day in the very distant future.

Consolidation also brings an important third negative repercussion. With so many different policies and claims combined together before one judge — who is charged with efficiently managing the docket — there arises a heightened temptation for a court to retreat to one-size-fits-all coverage conclusions. As discussed above, such a coverage conclusion is particularly ill-suited to the COVID-19 business interruption claims which involve policies and policyholders of differing shapes and sizes.

A COVID-19 business interruption MDL is sure to create a cottage industry of newly filed suits packed together in a fashion that benefits neither insured nor insurer. There is an undeniable common interest between insured and insurer to have these claims resolved efficiently and expediently. Rather than pursuing such resolution through consolidation, the JPML would be well-served to encourage insureds and insurers to work collaborative to obtain court guidance and resolution on individual claims as they arise, in the appropriate court for each.

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