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Policyholders Beware: The Risks of Multi-District and Class Action Treatment of COVID-19 Insurance Claims

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Insurance Recovery

In recent weeks, plaintiffs' law firms that do not specialize in insurance coverage have filed requests to consolidate coronavirus-related insurance lawsuits into a single, federal multi-district litigation (MDL) proceeding, or into state or federal court class actions. The premise of these efforts is that coronavirus-related property and business interruption insurance claims, the insurance policies that apply to them, and governing law are broadly the same across the nation, so policyholders will be better served, and efficiencies will be achieved, from consolidated or class action litigation. That premise warrants closer examination.

To be sure, "collective treatment"—in theory—can offer some litigation efficiencies and smaller enterprises may be unable to afford the alternative course of litigating on their own. But the reality is that many smaller businesses are more likely to benefit from legislative action, such as the state and federal legislative measures to supplement the federal CARES Act and Paycheck Protection Program, than from seeking relief in court.

Further, the prospect of litigating coronavirus-related business insurance claims through the blunt instrument of an MDL or class action proceeding, particularly if pursued by counsel who do not specialize in insurance coverage, could be highly prejudicial to larger businesses that have purchased more-robust-than-standard insurance policy terms and enhancements. In many insurance policies, such terms and enhancements could provide substantial coverage for COVID-19 losses.

Savvy policyholders and experienced counsel may also find consolidated and class action proceedings ill-suited to the resolution of insurance coverage disputes. That is because claim-specific differences are likely to predominate over common issues in three fundamental respects: (1) the specific facts of any particular insurance claim, and how that claim is best presented and substantiated, often vary greatly from claim to claim, place to place, and industry to industry; (2) the specific language of any given insurance policy is critical, and there can be enormous variation in policy language on the material issues implicated by COVID-19; and (3) insurance coverage is a matter of state law, which varies widely across jurisdictions on issues of importance for many policyholders.

For these reasons, sophisticated insureds should carefully review their own insurance policies, claims, and circumstances before signing on to any of the current efforts to aggregate coronavirus-related insurance cases into MDL or class action proceedings. Of course, it is by no means clear that such efforts will succeed; they are likely to face major procedural obstacles, including those discussed below. But if the cases are aggregated, overbroad and less nuanced rulings on insurance coverage issues may ensue, with potentially negative implications for policyholders with more favorable policy wordings or fact patterns. And even if consolidated proceedings should yield favorable rulings or settlements for some, the resulting recoveries for most businesses—after the plaintiffs' lawyers take their share—could fall into the nominal or nuisance-value range.

Current Efforts to Consolidate Coronavirus Insurance Coverage Cases

On April 20, a plaintiffs' class action law firm, representing two Philadelphia restaurants, petitioned the Judicial Panel on Multidistrict Litigation (JPML) to consolidate their clients' coronavirus-related insurance coverage suits against Admiral Insurance Company—and *all* "other similar lawsuits filed in other federal courts" against *any* insurers—before a single judge in the Eastern District of Pennsylvania.[1] The JPML is a panel of seven federal judges empowered by statute to transfer federal cases, from any judicial district, into a single federal district court for consolidated or coordinated pretrial proceedings, including discovery and summary judgment. The statute authorizes such collective treatment where the actions involve "common questions of fact," if the JPML finds that a single, consolidated proceeding will further "the convenience of parties and witnesses" and "promote the just and efficient conduct of such actions."[2] Similar requests have now been filed in the same action to consolidate and transfer the cases to a federal court in Illinois or Florida. As of the date of this alert, the JPML has not yet scheduled a hearing for these petitions, but it is likely to take up this issue on its July 30 calendar (unless the JPML agrees to take up the issue on an expedited basis at its May 28 hearing).[3] Putative class action suits also have been filed to date against specific insurers or groups of insurers in at least ten federal courts and one state court.[4]

The requests for collective treatment are virtually unlimited in their scope. The plaintiffs who filed the Philadelphia MDL request, for example, have asked for consolidation, into a single MDL proceeding, of every coronavirus-related insurance coverage lawsuit that has been filed in any federal district court anywhere in the nation—irrespective of the facts of the claim, the profile of the claimant, the identity of the relevant insurers, the specific coverages and insurance policy language at issue, the grounds for coverage being asserted, the posture and basis of the insurers' coverage positions, reservations of rights or denials, and the governing state law.

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[1] Brief in Support of Motion for Transfer and Coordination or Consolidation under 28 U.S.C. § 1407 at 1, *In re COVID-19 Bus. Interruption Ins. Coverage Litig.*, No. 2942 (J.P.M.L. Apr. 20, 2020), ECF No. 1-1 ("*In re COVID-19* Brief").
[2] 28 U.S.C. § 1407(a).
[3] The JPML did not schedule this petition for its May 28 calendar, but the Philadelphia plaintiffs have filed a motion to expedite its petition to be heard on May 28. *See* Plaintiffs' Motion for Expedited Consideration of the Motions to Transfer, *In re COVID-19 Bus. Interruption Ins. Coverage Litig.*, No. 2942 (J.P.M.L. May 1, 2020), ECF No. 22.
[4] *See, e.g.*, *Geneva Foreign & Sports Inc. v. Erie Ins. Co. of New York et al.*, No. 1:20-cv-00093 (W.D. Pa.); *HTR Rest. Inc. v. Erie Ins. Exch.*, No. GD-20-005138 (Pa. Ct. Com. Pl.).

Further, if the JPML establishes a federal MDL proceeding, most coronavirus-related business insurance cases filed in (or removed to) federal court *after* the establishment of the MDL likely will be transferred to the MDL court as so-called "tag-along" actions. The result would be a single federal proceeding in Philadelphia, or wherever the JPML directs, with tens of thousands of policyholders claiming against scores of insurers in widely divergent cases, connected only because they arise out of COVID-19.

According to the Philadelphia plaintiffs and their counsel, this consolidated treatment is appropriate because all coronavirus-related business insurance claims turn on a single issue: "whether business interruption insurance policies will cover losses incurred by businesses forced to shutter their business as a result of the [various] Governmental [Stay-at-Home] Orders" that have been issued "at the national level, the state level, the county level and the local level."[5] It is thus appropriate, these plaintiffs claim, to consolidate into a single proceeding before a single federal judge all business insurance cases that "span the entire economy" of the United States, "including not only businesses in the restaurant and hospitality sector, but also those in retail, manufacturing, real estate, professional services, and numerous aspects of the gig economy, just to name a few."[6]

The Challenges and Risks of MDL and Class Action Proceedings

An overbroad and ill-defined MDL proceeding could delay, rather than accelerate, the resolution of many business interruption claims and prejudice individual policyholders whose individual coverage cases depend on different insurance policy language, different governing state law, and different facts.

First, the availability of coverage for any particular insured depends on its specific policy language. Many small businesses in the United States purchase property insurance policies that are based entirely on, or incorporate parts of, an Insurance Services Office ("ISO") form. Some of these ISO forms include "business income" coverage, and it is these forms that are at issue in most of the putative class actions and JPML pleadings to date. But many insureds, particularly larger businesses, buy insurance written on a variety of insurer-specific forms, broker-generated forms, and customized (or "manuscript") forms, rather than ISO forms. As a result, the property and business interruption policies that most medium to very large businesses purchase are far from uniform and contain a variety of coverage grants, terms, extensions, and exclusions.

Second, insurance policy interpretation is a matter of state law.[7] State law varies substantially on insurance law issues. To take two common examples, New York and California differ dramatically in how they address whether a policyholder has given timely notice of its claim and, if not, how and whether that matters. These two states also differ substantially in whether and how to consider extrinsic evidence to interpret an insurance policy. The same may be said

[5] *In re COVID-19* Brief, at 2.
[6] *Id.* at 4.
[7] "Where a suit is consolidated and transferred under § 1407, courts typically apply the choice of law rules of each of the transferor courts." *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 17 (1st Cir. 2012). Many states apply either the law of the jurisdiction with the most "significant relationship" to the dispute, or the law of the jurisdiction where the contract was executed, *id.* at 18-20, none of which will be uniform across the nationwide universe of coronavirus coverage suits.

about scores of doctrines and interpretative issues under the laws of all 50 states. Addressing these differences would be a herculean task for a single judge. Any attempt at a one-size-fits-all workaround would result in unjust outcomes for many policyholders and possible distortions of various states' insurance laws.

Third, MDL judges necessarily phase pretrial proceedings because they lack the resources to preside over dozens or hundreds of separate cases. For example, an MDL judge may decide to address the ISO form language issues first, which means that medium-to-large policyholders could find their meritorious claims languishing in the MDL proceeding while the judge decides issues not relevant to them. Then, after what could be years of pretrial proceedings, any case that is ready for trial will be remanded to its original jurisdiction for final resolution by a judge unfamiliar with the record. Such an MDL could last far longer than an individual, well-pleaded case.

Fourth, particularly for larger policyholders, these cases will involve divergent factual scenarios, discovery, and other evidence. Insurance policy drafting, underwriting, and placement evidence relevant to interpreting the insurance policies will differ from policyholder to policyholder. Discovery directed to these issues (for instance, an insurer's communications with individual policyholders) cannot be meaningfully or efficiently conducted in an MDL process. Government shelter-in-place orders, which are relevant to many differing versions of "civil authority" coverage, also vary greatly, both in their terms and in their effects on particular policyholders. In that regard, the JPML's reasoning in denying a recent request to centralize proceedings for 2016 and 2017 hurricane recovery claimants is instructive:

> These [hurricane] actions possess only a superficial factual commonality . . . . Each case necessarily involves a different property, different insureds, different witnesses, different proofs of loss, and different damages. *The very nature of the cases ensures that unique issues concerning each plaintiff's loss, claim, investigation, and claim handling will predominate, and will overwhelm any efficiencies that centralization might achieve.*[8]

Fifth, for the most part, the damages that each policyholder is incurring must be separately calculated based on the policyholder's actual loss sustained during the loss period. This typically is done by an experienced forensic accountant, using the insured's projections for revenues during the period in which the insured is unable to operate. This loss calculation process cannot be performed on a collective basis.

Finally, MDL proceedings often settle globally. Resolution of an MDL involving, for example, 100,000 different insurance claims might not result in any meaningful settlement payment for each claimant. Plus, in a global settlement, policyholders with better insurance policy language, better facts, or better documented claims may receive no more than policyholders with far weaker claims.

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[8] *In re Fla., Puerto Rico, and U.S. Virgin Islands 2016 & 2017 Hurricane Seasons Flood Claims Litig.*, 325 F. Supp. 3d 1367, 1368-69 (J.P.M.L. 2018) (emphasis added).

Preferable Alternatives for Policyholders with Strong Claims

Before seizing on an MDL or class action as a means for obtaining insurance proceeds related to COVID-19 losses, policyholders should consider whether other options provide better prospects for a larger, more cost-effective, and quicker recovery.

1. The first step in any insurance recovery is a review of the facts of the specific claim, the relevant policy language, and the law that will govern relevant coverages.
2. Many strong claims may be resolved without litigation through effective claims advocacy by knowledgeable insurance coverage counsel, assisted in many instances by brokers, adjusters, accountants, or other experienced consultants.
3. Strong claims should be timely noticed and pursued aggressively by experienced insurance coverage counsel, particularly if insurers do not meet their obligations to pay promptly. Decisions to pursue coverage litigation must take into account the most favorable jurisdictions, procedures, and timing to maximize recovery for policyholders affected by COVID-19. If knowledgeable counsel is able to litigate the strongest claims first, those cases will set appropriate precedents that will establish insureds' rights to recover COVID-19 losses and benefit other policyholders.
4. As discussed above, an individual policyholder may be best served by an individual action where a court can best focus on the particular policy language and case-specific evidence. To the extent that some coordination is desirable, other available tools are likely to benefit policyholders more than MDL or class action treatment. For example, local courts may enter case management orders to establish uniform discovery practices and transfer materially similar cases to the same judge, as occurred in the aftermath of Superstorm Sandy.[9] Parties also may stipulate "that any discovery relevant to more than one action can be used in all those actions."[10] Thus, opportunities may arise for coordinated discovery of policy drafting history and marketing materials for a specific policy provision. Similarly, a large supplier might produce proof of physical loss or damage at its premises as a result of COVID-19, resulting in valuable documentation and other evidence that the supplier's distributors or end users then can use to help substantiate their own related claims for contingent business interruption losses. Judges also can conduct or attend joint conferences to facilitate the issuance of parallel orders in coronavirus cases.[11]

As the coronavirus coverage litigation landscape unfolds, efficiencies can be achieved without sacrificing each claimant's opportunity to be made whole for its losses.

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[9] *See* Case Management Order No. 1, *In re: Hurricane Sandy Cases*, No. 1:14-mc-00041 (E.D.N.Y. Feb. 21, 2014), ECF No. 243.

[10] *In re: Crest Sensitivity Treatment & Prot. Toothpaste Mktg. & Sales Practices Litig.*, 867 F. Supp. 2d 1348, 1348 (J.P.M.L. 2012).

[11] *See Manual for Complex Litigation, Fourth*, § 20.14 (2004).

If you have any questions regarding this matter or your insurance coverage rights for coronavirus-related or other losses, please contact any members of our Insurance Recovery Practice, including any of the following:

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