COVID-19 Coverage Litigation Update

Will Your Claim be Batched with Others for Resolution?

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So far, traditional first-party property insurers have taken hardline "no coverage" positions for COVID-19 business interruption claims. As a result, policyholders nationwide (and even around the world) have been left to contemplate whether to press their coverage claims through litigation, or stay on the sidelines and watch as others develop the issues. Those policyholders already in coverage litigation or considering filing suit should be aware of the debate between policyholders and their insurers regarding how to manage the coverage suits that have been filed in many different courts in many different states around the country. To be sure, there are currently nearly 700 lawsuits pending in federal and state courts nationwide (most of which thus far involve small businesses) seeking rulings regarding whether business interruption losses associated with COVID19 are covered by traditional first-party property policies. Of those 700 cases, almost 200 of them are identified as putative class actions.

Recently, some of the policyholder-side lawyers representing restaurants, bars, theaters and other retail establishments across the country in already filed suits have sought to consolidate all federal court cases into one lawsuit and, thus, create a multi-district lawsuit commonly known as an "MDL." Essentially, when federal court litigants request an MDL, a panel of federal judges is convened to hear and decide whether to grant the MDL request. Here, more than 30 insurers and several dozen policyholders have challenged the MDL effort by arguing that the cases are not similar enough to be batched together for purposes of full or even partial resolution, and that consolidation will in fact slow the path to resolution for many policyholders.

Since April, when claimants in both Pennsylvania and Illinois lawsuits first presented the MDL request, much has been written about the rationale for supporting or opposing this MDL approach. The debate took an important step toward resolution on July 30th when an MDL panel heard oral argument via a Zoom call with attorneys on all sides of the issue.

The insurer-side lawyers arguing against consolidation, referred to consolidation as a "nightmare" and instead posited that "it would make most sense for the judges currently overseeing the proposed class actions to evaluate each individual motion for class certification on the merits."

Policyholder-side lawyers pushing for consolidation argued that many insurers have

asserted the same argument against coverage; namely that COVID-19 did not cause requisite "direct physical loss or damage" to the insured property. Those "five simple words," the policyholder lawyers argued, constitute a "common thread" running through all the cases thus warranting consolidation. Other policyholder attorneys have argued against an MDL, observing that (a) historically no insurance coverage cases have been batched into an MDL, (b) coverage litigation often centers on the nuances of the insurance laws of the particular state where litigation is filed, (c) forcing policyholders to litigate in the context of an MDL can result in insureds losing "control" of their individual case if their lawyers are not designated as "lead counsel" in the MDL, and (d) the process can result in many inefficiencies. Some of those lawyers again used the "nightmare" characterization of the proposed consolidation effort here. The issues presented by all sides at the hearing are now "under submission," and it is expected that the panel will render an opinion soon.

The upshot of the MDL debate: if you or your client is considering how best to address insurer denials of COVID-19 business interruption claims, and litigation is on the list of options, a key component of that evaluation should include "where" to file suit—in which state, and in federal or state court. The consolidation options for the MDL panel are multiple and should be considered as part of an ultimate resolution strategy.

Once the court rules, we will update this discussion with specifics about the ruling and provide thoughts about its impact on going-forward decisions involving COVID-19-related coverage claims.

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