COVID-19 Coverage Litigation Update

Will Your Claim be Batched with Others for Resolution - Part 2

Last month we advised that a group of policyholders that have filed COVID-19 business interruption lawsuits against their insurers, asked the federal courts to consolidate all COVID-19 lawsuits that have been or will be filed in federal court.

They argued that the issues between these cases are so similar that they can and should be grouped together for resolution into one or a few multi-district lawsuits ("MDL"). Insurers fought hard against this MDL effort. So too, did many policyholders that did not want to give up control of their own lawsuits filed in the strategic jurisdictions that they preferred, with the counsel they chose making the arguments they believe best suit their particular COVID-19 insurance claim. Others agreed with the consolidation concept, but instead sought that cases be batched on a state-by-state, regional, or insurer-by-insurer basis.

During the pendency of the MDL proceeding, policyholders considering COVID-19 coverage litigation needed to make a judgment call about where and when to file suit. Many policyholders who pursue litigation against their insurer believe that it is strategic to file suit in the state courts where the policyholder operates its business. Frequently, however, policyholders and insurers are from different states and, therefore, are "diverse" for purposes of triggering federal court jurisdiction. Thus, policyholders that want to best protect their chances of litigating in the state where they operate often will file in their state's federal court and proceed from there.

Before the MDL proceeding resolved, filing in federal court in any state had its risks for policyholders (and even their insurers)—if the MDL court granted the consolidation requests, all federal court COVID-19 coverage cases were at risk of being transferred to that consolidated federal lawsuit(s). Thus, policyholders that decided to file suit in advance of an MDL ruling either filed in federal court and crossed their fingers that the MDL would be denied or, to avoid all risk of consolidation, policyholders considered filing suit in the state court where the insurer resides: defendants in litigation have no right of "removal" to federal court in their home state.

On August 12, the MDL court ruled. For most policyholders the ruling ended the "where to file suit" quandry: the court concluded that "the industry-wide centralization requested by movants

will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation." The court stated that the parties seeking consolidation identified three core common questions:

(1) do the various government closure orders trigger coverage under the policies;

(2) what constitutes "physical loss or damage" to the property; and

(3) do any exclusions (particularly those related to viruses) apply.

The court observed that these three questions "share only a superficial commonality," and the cases "involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states These differences will overwhelm any common factual questions." As a result, the court denied the request for an industry-wide consolidation of COVID-19 coverage suits. The court also denied alternative requests for "regional and state-based MDLs."

For many policyholders this ruling means that they no longer need to worry about the creation of an MDL that would undermine their COVID-19 coverage litigation strategic considerations.

For some, however, the conversation continues. In fact, the court expressed some interest in insurer-specific MDL's for policyholders with policies issued by Hartford, Cincinnati Insurance, Certain Underwriters at Lloyd's London and Society Insurance and ordered the parties to "show cause" why those actions should not be centralized. The court reasoned that centralization "may be warranted as to actions involving those insurers "to avoid duplicative discovery." The court is expected to hear oral argument on this issue as to these four insurers on September 24. We will provide a further update after the court rules on the consolidation question as to these insurers.

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