

[A Primer On The Push To Combine COVID-19 Coverage Cases](#)

Law360

Law360 June 9, 2020, 7:00 PM EDT) — Insurers and policyholders have weighed in on two petitions to centralize disputes over businesses’ coronavirus-related losses in multidistrict litigation, with supporters touting the efficiency of consolidation and opponents arguing that differences in companies’ policies and claims make an MDL inappropriate.

From early May through last Friday, the Judicial Panel on Multidistrict Litigation received 63 responses to the dueling petitions filed by two groups of policyholder plaintiffs, one seeking to centralize the cases in Illinois and the other asking for them to be centralized in Pennsylvania. The JPML is expected to issue a decision on the petitions after it meets in Boston at the end of July.

Of the responses submitted to the JPML, 20 of them — all filed by policyholders — support some form of coordination. The other 43, filed by a mix of insurers, policyholders and advocates for both, oppose MDL treatment.

Here, Law360 provides a primer on the debate surrounding the MDL petitions.

The Petitioners’ Positions

The MDL push dates back to late April, when two groups of businesses affected by COVID-19 shutdown orders filed petitions with the JPML asserting that the business interruption coverage battles in federal court across the country are well-suited for consolidated or coordinated pretrial proceedings. At the time, fewer than 20 cases were pending in federal district courts nationwide; as of Friday, that number had expanded to at least 140 in more than 30 district courts.

In the first petition, filed April 20, a pair of Philadelphia-based restaurants argued that the availability of

business interruption coverage in light of the novel coronavirus would be a key question requiring a uniform answer as the country deals with the economic fallout of the pandemic.

“This issue — whether business interruption insurance policies will cover losses incurred by businesses forced to shutter their business as a result of the governmental orders — is one of national importance and great significance to the ultimate survival of many businesses,” the petitioners said. “Addressing this issue in a uniform manner as opposed to potentially disparate treatment by different courts throughout the country helps to serve one of the main purposes” of multidistrict litigation.

The petition asked that cases be centralized before U.S. District Judge Timothy J. Savage of the Eastern District of Pennsylvania, in Philadelphia, who is already presiding over 17 business interruption coverage cases in his district.

“When you look at the mid-Atlantic region, from New York down to D.C., Philadelphia seems to be a natural location,” Richard Golomb of Golomb & Honik PC, one of the firms representing the restaurants, told Law360. “Judge Savage is an experienced MDL judge, and very efficient and no-nonsense. He can move a case like this along the way it needs to be moved.”

A day later, a group of policyholders in a slew of proposed class actions pending in multiple states filed a second petition to the JPML.

That petition emphasized the importance of coordinating expert witnesses in the cases, as policyholders will need to present “epidemiological modeling of the spread of the virus in order to ascertain its likely presence and impact.”

“If these myriad cases were not coordinated for discovery, thousands of plaintiffs would potentially be seeking to retain the same limited pool of epidemiological modelers,” the petition said. “Not only would that competition create a costly logistical nightmare for litigants, but that same pool of experts is also needed to help lawmakers fashion the best policies for dealing with the pandemic.”

The second group of petitioners suggested the cases be centralized before U.S. District Judge Matthew F. Kennelly of the Northern District of Illinois, in Chicago, who is overseeing an MDL regarding cardiovascular issues allegedly caused by a testosterone replacement therapy drug.

Adam Levitt of DiCello Levitt Gutzler LLC, which is among the firms representing the second group of petitioners, told Law360 that centralization before Judge Kennelly would best serve the principles of the MDL system's enabling statute.

"The insurance industry has obviously elected to take an industry-wide position to oppose JPML centralization, and to keep things as fragmented as possible because each insurer thinks that keeping things fragmented is more strategically advantageous. At the end of the day, all of the industry responses tried to argue how fragmented this all is," Levitt said. "The insurance industry traffics in creating confusion. We don't think it is an appropriate argument here, nor do we think it is valid."

Supporters' Stances

The petitioners' calls for an MDL attracted 20 supporting briefs from individual companies or groups of policyholders. While the supporters all argued that centralization can help streamline the resolution of the many COVID-19 business interruption cases, they offered diverse views on where the proceedings should be placed and how they should be structured.

Among the 20 briefs, seven backed the choice of the Northern District of Illinois and five favored the Eastern District of Pennsylvania.

In the Illinois camp, for instance, one group of 41 policyholders with cases pending in seven states, dubbed the Truehaven plaintiffs, highlighted the central geographic location of the Prairie State and Judge Kennelly's MDL bona fides. The other supporters of the Illinois proposal — plaintiffs in another eight business interruption cases — voiced similar views.

Meanwhile, the proponents of centralization in Pennsylvania — comprised of plaintiffs in 38 cases across 11 states — emphasized that Judge Savage is already handling a lot of business interruption cases and that the Eastern District of Pennsylvania has about half as many active cases on its docket as the Northern District of Illinois, 8,704 versus 15,874.

Five other groups of policyholder plaintiffs expressed support for the creation of an MDL based in a single federal court but proposed the respective courts in which they are currently litigating cases. Two groups pitched the Southern District of Florida, and one apiece requested the Western District of Missouri, the Western District of Washington and the Northern District of California.

The remaining three supporting briefs asked the JPML to consider forming not one but multiple MDLs, with cases lumped together either by state, region or insurer defendant.

For example, San Francisco-based children’s clothing boutique Mudpie Inc., which is pursuing a proposed class action against a Travelers unit in California federal court, proposed the creation of “a small number of MDLs corresponding with states in which numerous actions, filed by different counsel, are pending before different federal judges in different districts.” The retailer said that as of Friday, six states would qualify: California, Illinois, Florida, New Jersey, New York and Texas.

“There are still efficiencies to be gained from an approach to centralization that focuses on litigation hot spots, and the panel should follow that approach to steer such controversies on a prudent course,” Mudpie wrote.

Cincinnati-based Belgian restaurant chain Taste of Belgium LLC, which is pursuing a proposed class action against The Cincinnati Insurance Co. in Ohio federal court, suggested it would make sense to create multiple MDLs grouped by insurer, as different insurers’ policies may contain substantially different terms.

“All actions brought against a given insurer are based on the same or substantially similar questions of law and fact,” Taste of Belgium wrote. “Moreover, transfer will promote the convenience of the parties and efficiency in the pretrial proceedings by eliminating duplicative discovery and the potential for inconsistent rulings, including determinations on class certification.”

Opponents’ Views

The two MDL petitions also drew strong opposition, with 43 briefs urging the JPML to reject the efforts to combine the nation’s business interruption cases.

The insurance industry formed a unified front against centralization. Insurers lodged 29 opposition filings, and the industry’s two leading trade groups, the American Property and Casualty Insurance Association and the National Association of Mutual Insurance Companies, also weighed in against an MDL. But a dozen individual policyholders and groups of policyholder plaintiffs also opposed consolidated or coordinated proceedings, as did the nonprofit advocacy group United Policyholders.

The opposition briefs generally argued that an MDL would be an inappropriate vehicle for resolving insurance cases, given the differences in insurers' policy language, policyholders' losses during the pandemic and states' laws on the requirements for business interruption insurance.

In a brief joined by 10 other insurance groups, Chubb Ltd. units Westchester Surplus Lines Insurance Co. and Indemnity Insurance Co. of North America contended that combined proceedings would create a logistical nightmare. They pointed out that, while more than 100 insurers are facing suits around the country, only 5% of them have been named as defendants in more than five actions, and most have been named in only one or two cases.

"Every insurer would need and have a right) to be heard on every issue — including discovery and other pretrial rulings — affecting it," Westchester and IINA wrote. "The transferee court could not effectively implement a bellwether process, given the lack of overlapping parties among the cases. Resolution of one case would not resolve any other. The resulting proceeding would be unmanageable and delay would be inevitable."

A Chubb spokesman did not immediately respond to a request for comment.

APCIA and NAMIC similarly argued that an MDL could produce delays.

"In view of the extraordinary circumstances created by the COVID-19 pandemic, the parties, courts, and public would be better served by permitting resolution of these cases in their home courts on their individual merits," the trade groups argued.

James Martin of Zelle LLP, who represents APCIA and NAMIC, told Law360 in a statement, "The brief speaks for itself in setting forth why our clients firmly believe that a nationwide federal MDL is not appropriate for these types of matters."

United Policyholders' brief encapsulated the concerns expressed by the policyholder plaintiffs that filed opposition briefs, asserting that there is no "cookie-cutter" scenario for a business interruption claim over losses tied to the COVID-19 pandemic and saying that forcing smaller companies to litigate in courts far removed from their home states would impose undue financial burdens.

"From the beginning, we have been saying you cannot lump all these together, because the policy



language is all over the map, different businesses have unique challenges and losses, and insurance is regulated on the state — not federal — level,” United Policyholders executive director Amy Bach told Law360. “We knew it would be a balancing act between judicial efficiency and fairness, having each case resolved on its merits.”

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