Dozens of attorneys primed to make or break the case for novel COVID-19 business interruption MDL

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(Reuters) – At least 40 attorneys have signed up to argue Thursday as the Judicial Panel on Multidistrict Litigation weighs petitions to create an MDL for nearly 270 lawsuits seeking Business Interruption (BI) insurance coverage for losses from coronavirus contamination or government orders restricting their operations.

If the petitioners succeed, it will be "the first-ever nationwide insurance coverage MDL in the 52 years since Congress authorized the MDL process," according to an amicus brief filed by Covington & Burling on behalf of United Policyholders, a nonprofit advocacy group for insureds that opposes consolidation.

The two petitions were filed a day apart last April, when about a dozen individual lawsuits and potential class actions were pending in the federal courts. The plaintiffs in those actions had been told that their BI coverage did not apply because there was no "property damage," and that even if COVID-19 had somehow damaged their property, the policy excluded damages caused by viruses or pollution.

In the first petition, restaurants represented by Levin Sedran & Berman and Golomb & Honik sought centralization before U.S. District Judge Timothy Savage in Philadelphia. In the second, businesses represented by DiCello Levitt Gutzler, the Lanier Law Firm, Burns Bowen Bair, and Daniels & Tredennick urged the JPML to send the cases to U.S. District Judge Matthew Kennelly in Chicago.

Both petitions said an MDL would avoid piecemeal litigation and resolve "core questions"; for example, does COVID-19 cause "physical damage" or "property loss" as used in BI policies? Do government-ordered shutdowns trigger BI coverage? What exclusions, if any, limit that coverage?

By the time responses were filed in early June, the cases – and the number of insurers involved – had grown to more than 100, spread across 36 insurance groups.

Two Chubb affiliates, represented by O'Melveny & Myers, argued that each insurance policy was a separate contract, to be interpreted based on its own terms, in light of each state's insurance laws, each

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individual shutdown order and other circumstances unique to each insured.

Steptoe & Johnson, representing Hartford Financial Services Group and its Hartford, Sentinel and Twin City Fire Insurance Co. subsidiaries, expressly joined in the Chubb affiliates' brief, as did many other insurers. At the time, the Hartford companies were facing 47 federal lawsuits; that number now tops 65.

The American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies filed a joint amicus brief opposing an MDL, saying the number of defendants and contracts involved would make it unwieldy and delay resolution.

United Policyholders agreed, as did about 10 groups of plaintiffs. Some of them, including businesses represented by Boies Schiller and King & Spalding, suggested consolidating cases against individual defendants or involving a particular state's laws.

Most of the plaintiffs who responded, however, supported the creation of a broad-based MDL.

In their reply brief, the Chicago petitioners stressed that insurance policies are designed to be uniform, following forms prepared by the Insurance Service Office (ISO). They offered an affidavit from Professor Tom Baker of Penn Law and Wharton, who is building a matrix of COVID-19 related insurance cases, and has found that many of the provisions "are nearly identical across insurers."

However, illustrating the potential differences between policies issued by the same company, The Hartford announced on July 15 that it expects to report a $213 million (pretax) reserve for COVID-19 incurred losses in its Property & Casualty division for the second quarter. It said the amount includes BI payments on policies that do not require direct physical loss or damage, legal expenses to defend against BI claims under policies that do, and exposures under various other lines.

The Hartford intends to release its second quarter results on Thursday afternoon, after the JPML meeting.

The case to be heard on July 30 is In re: COVID-19 Business Interruption Protection Insurance Litigation, U.S. Judicial Panel on Multidistrict Litigation No. MDL No. 2942.

For the Philadelphia petitioners: Arnold Levin of Levin Sedran & Berman; Richard Golomb of Golomb & Honik; and W. Daniel "Dee" Miles III of Beasley, Allen, Crow, Methvin, Portis & Miles

For the Chicago petitioners: Adam Levitt of DiCello Levitt Gutzler, Mark Lanier of the Lanier Law Firm, Timothy Burns of Burns Bowen Bair, and Douglas Daniels of Daniels & Tredennick

For Chubb: Richard Goetz of O'Melveny & Myers

For The Hartford: Sarah Gordon of Steptoe & Johnson

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