JPML Questions If One Size Fits All For Virus Cases

Law360

Law360 (July 30, 2020, 4:43 PM EDT) — A member of the Judicial Panel on Multidistrict Litigation questioned Thursday whether key business interruption policy language could be construed the same way under the laws of all 50 states as the panel mulled requests to centralize hundreds of federal cases over coverage for businesses' COVID-19 losses.

During a 90-minute hearing held via Zoom, the JPML heard arguments from 15 attorneys on dueling petitions filed in April by two groups of policyholder plaintiffs, one seeking to centralize federal business interruption cases in the Northern District of Illinois in Chicago and the other asking for them to be centralized in the Eastern District of Pennsylvania in Philadelphia.

Mark Lanier of The Lanier Law Firm PC, who represents the petitioners requesting centralization in Chicago, pointed out to the seven-member JPML that many insurers that have already filed motions to dismiss policyholders' suits have asserted the same arguments, including that COVID-19 did not cause "direct physical loss or damage" to the insured property, as required for business interruption coverage to apply. Those five words are a common thread running through these coverage disputes, he argued.

"So you are telling me the state laws of all 50 states interpret those five words in the context of every insurance policy the same way?" U.S. District Judge Catherine D. Perry asked Lanier.

Lanier replied that he would not say "quite that, totally," but that "by and large, every state has the same basic principle of contract interpretation, that you give plain and ordinary meaning to contractual terms."

"I don't think the courts are going to find this to be that different in terms of each state, and I think that is why insurance companies are seeking a national legislative solution," he said.

Arnold Levin of Levin Sedran & Berman LLP, who represents the petitioners seeking centralization in Philadelphia, argued there is no merit to insurers' contention that consolidation is inappropriate due to the high number of different defendants and policies involved in the coverage cases. He pointed to several past MDLs, such as one concerning orthopedic bone screw products liability litigation, that centralized cases involving multiple different defendants and products.

"So, Mr. Levin, what is the common issue of fact?" asked U.S. District Judge Matthew Kennelly, who is the Chicago petitioners' preferred pick to preside over a potential MDL.

"The common issues of fact are, one, whether or not there is property damage. Did the virus get into the property?" Levin replied. "Also, the exclusions are all the same."

Levin added that the insurance policies at issue "have all been formulated, for the most part," by the Insurance Services Office.

"We have sought discovery from the ISO to show they are the same," he said.

While the petitions requesting centralization in Philadelphia or Chicago have garnered the support of some policyholder plaintiffs, other policyholders have opposed them and pitched wildly varying proposals of their own.

The full range of policyholders' views was on display during Thursday's hearing. Some attorneys representing policyholders backed one of the two petitions, while others opposed any form of centralization. Several attorneys pushed for centralization in California, Florida or Washington. And still others advocated for the creation of multiple MDLs, either by consolidating cases filed against the same insurance company or lumping together cases lodged in the same state.

For instance, Patrick J. Stueve of Stueve Stueve Siegel Hanson LLP, who represents several policyholders in suits pending in Missouri federal court, suggested an "incremental approach" in which the JPML would create smaller MDLs to consolidate cases against "insurers who have been sued in many lawsuits, in multiple jurisdictions, by many plaintiffs firms." Currently, only a few of the nearly 100 insurers named in coverage cases around the country meet that criteria, including The Hartford, Cincinnati Insurance Co. and underwriters at Lloyd's of London, he said.

“Several smaller MDLs will ensure the most manageable and efficient resolution of these cases,” he said.

While policyholders’ views are varied, insurance carriers have uniformly opposed the formation of any kind of MDL.

Arguing on behalf of Westchester Surplus Lines Insurance Co. and more than 30 other insurers, Richard Goetz of O’Melveny & Myers LLP said the factual differences among the coverage disputes outweigh any commonalities. Goetz emphasized that all the organizations that filed amicus briefs with the JPML, including both insurance industry trade groups and the prominent policyholder advocacy group United Policyholders, oppose centralization.

“The fact issues are overwhelmingly centered on individual plaintiffs,” he said. “What is their business? Did they close? When and why would they have had any business if they had remained open? Did they claim that the virus was or was not there? Was there a stay-at-home order, and what did it say?”

Goetz further contended that creating smaller “insurer-specific” MDLs is “not the answer,” given that the policy language and factual circumstances can vary even across cases involving the same insurer.

U.S. District Judge Nathaniel M. Gorton asked Goetz what his “alternative suggestion” would be for dividing up the business interruption cases.

“Your honor, I think you could leave the cases where they are,” Goetz said, pointing out that insurers’ motions to dismiss have already been fully briefed in at least 18 cases.

Sarah D. Gordon of Steptoe & Johnson LLP, who represents Hartford and a number of its subsidiary insurers, later said she agreed with Goetz that the creation of multiple single-insurer MDLs would not resolve the issues that would abound with an industrywide MDL.

“The only efficiency that might be gained from a single-insurer MDL is a reduction in the variation of policy language, but even at the single-insurer level, there are still variations,” Gordon said.

The case is In re: COVID-19 Business Interruption Protection Insurance Litigation, case number 2942, before the Judicial Panel on Multidistrict Litigation.

–Editing by Gemma Horowitz.