Insurance

More Virus Insurance Suits Could Follow As Consolidation Fails

By Jacob Rund

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- JPML declines to consolidate hundreds of lawsuits
- Decision acknowledges difference in state insurance laws

A federal panel's refusal to centralize hundreds of businesses' lawsuits against their insurers over pandemic-related coverage reflects its deference to varying state insurance laws and desire for speedy resolutions.

The U.S. Judicial Panel on Multidistrict Litigation this week rejected some policyholders' efforts to transfer their business interruption lawsuits to a single venue, saying the facts and parties in those cases vary too greatly for one court to handle them efficiently.

The state-by-state variance in policy interpretations was underscored almost immediately when federal courts in Missouri and Texas issued conflicting decisions to, respectively, deny and grant insurance companies' motions to dismiss lawsuits brought by business plaintiffs. Policyholders claim their policy terms entitle them to payments to cover losses resulting from the coronavirus and subsequent state-ordered business closures.

The JPML's ruling—while far from foreshadowing the ultimate outcome of this litigation—will unleash a slew of decision on motions to dismiss in cases that were paused pending the panel's deliberation. And a mixed bag of rulings could embolden more policyholders to consider filing complaints if they start to see cracks in insurers' defense.

"Insurance coverage is determined by state law, so even the same policy language can be interpreted differently from state-to-state," Seth Lamden, a partner at Neal, Gerber & Eisenberg LLP said.

Some policyholders pushed hard for a nationwide multidistrict litigation (MDL), saying it would increase efficiency and prevent disparate rulings from cropping up throughout the U.S. Other policyholders joined with insurers in arguing that consolidation would prolong the dispute for years and the cases involve few common questions of facts.

State Law Deference

Insurance rates and terms are tightly regulated by states, a point the JPML panel harped on during oral arguments July 30. And the panel's ruling ultimately reflects that reality, Scott DeVries of Hunton Andrews Kurth LLP said.

"Insurance contracts are a matter of state law interpretation, so I would be surprised if there weren't different rulings in different jurisdictions," he said. "You could see how some policyholders might have held off on filing suits, or may have looked for ways to get out of a federal venue, to avoid being vacuumed into an MDL."

The seven-judge panel left the door open to the prospect of smaller MDLs with cases against only a single insurer or insurer group. But even that option is limited —naming only four insurers that could see their cases consolidated—and nods to the possibility of district courts taking matters into their own hands.

"There are alternatives to centralization available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination of the actions," the JPML said. "Parties also may seek to relate actions against a common insurer in a given district before one judge."

Such alternatives appear practicable, it added, for cases not involving the four, named insurers, "given the limited number of actions and districts involved as to each.

The panel directed the parties in lawsuits against the four insurers—The Cincinnati Insurance Co., The Hartford Financial Services Group Inc. affiliates, Society Insurance, and certain underwriters at Lloyd's of London—to explain why their cases shouldn't be centralized.

Insurer-specific MDLs might bring about "convenience and efficiency benefits" during discovery and other proceedings, the panel suggested. It also said that an insurer-specific case grouping would eliminate "inconsistent pretrial rulings" with respect to overlapping nationwide class claims that insurers are facing.

But this type of litigation, while being strongly considered, could raise issues similar to those brought up by the JPML's rejection of an industry-wide MDL, attorneys say. That's because of potential differences in provisions and modifications in the contracts held by numerous businesses in different industries.

"The language the judges used suggests that they're certainly taking this idea seriously," said DeVries. "Once the briefings on it come in, though, an awful lot of challenges will become apparent."

Waiting at the Gate

With the JPML decision now issued, decisions on motions to dismiss these business interruption cases are trickling in, and attorneys expect this to turn into a surge as the litigation progresses.

On Thursday, a Texas federal judge dismissed a case brought against State Farm Lloyds by a group of barbershops, finding that the virus didn't cause direct physical loss to their property and didn't trigger coverage under their policies.

A day earlier, the U.S. District Court for the Western District of Missouri went the other way, saying a collection of restaurants and hair salons plausibly alleged direct physical loss from the virus. The same judge also denied an insurer's motion to dismiss in a similar action.

The question of whether the coronavirus pandemic can trigger coverage for direct physical loss or damage sits at the heart of these business interruption lawsuits. And federal judges' conflicting actions underscore the differing interpretations of policy language under different state laws.

"You're going to see a litany of decisions coming out on the physical loss issue in the context of motions to dismiss," said Robin Cohen, principal at McKool Smith.

Since the odds of disparate decisions are good, those favoring policyholders could add to their momentum and encourage new entrants, insurance recovery attorneys say.

The Missouri decision and the JPML order are "probably going to result in new cases being filed," said Alexandra Roje, a partner at Lathrop GPM.

"I suspect that a lot of policyholders are going to be reconsidering whether to jump into the fray," she said.

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