

Eric Hermanson Comments on COVID-19 MDL Proceedings

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On August 12, 2020, the Judicial Panel on Multi-District Litigation issued an important order declining to create a single, consolidated MDL proceeding consisting of all federal litigation against insurers facing COVID-19 business interruption claims. However, the Panel suggested it might be open to smaller MDL proceedings, consisting of business interruption claims filed against certain primary insurers.

Eric Hermanson, in White and William's Insurance Coverage and Bad Faith group, spoke to *A.M. Best* about the impact of the Panel's ruling.

"The Panel got it right," Hermanson said, "in rejecting a single large consolidated proceeding. A proceeding this massive, with hundreds of insurers and thousands of different policyholders and forms, would have been almost impossible to organize and administer.

"But it will be interesting to see what the parties say now, and what positions they take, as to four separate consolidated proceedings for the four separate insurer groups.

"Because that issue was never fully briefed," Hermanson said, "the Panel may have misunderstood, and possibly overstated, the extent of the similarities between policies, issues, and claims, even when there is only one primary insurer involved.

Hermanson went on: "Even in cases involving a single primary insurer, there are likely to be a number of different policy forms at issue, with different policy language, retentions, deductibles, and obligations. Those terms are often negotiated case-by-case to fit the specific needs of specific businesses.

"For larger claims, there may also be different excess carriers, sitting over the primary coverage. Those excess policies may not follow form to primary, and may have their own distinct language, which a court may need to consider in ruling on claims for relief.

"And even if you can find cases where a single primary carrier has used similar policy language with multiple insureds," Hermanson said, "that policy language may be subject to different state laws. Meaning, the language may be interpreted differently in different jurisdictions where claims are pending.

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"Finally, most fundamentally, no two claims are ever completely alike. Even where there is only one insurer, using similar policy language across multiple policies, each claim involves different losses, different causes of loss, different evidence of loss, different witnesses, and different damages. Insurance carriers handle claims one at a time, and a single consolidated proceeding – even against a single insurance carrier – will be difficult and problematic."

Read the full article from A.M. Best *BestWeek*. (subscription required)