MULTIDISTRICT LITIGATION AND AN EXAMINATION OF THE RECENT ATTEMPTS TO ESTABLISH A BUSINESS INTERRUPTION MDL

Justin K. Curtis*
Eman Z. Senteno*

In 1968, Congress enacted the multidistrict litigation statute to provide federal courts with a mechanism to consolidate cases sharing common questions of fact into a singular federal district for coordinated pretrial procedure. The theory was that this would provide centralized pretrial management of cases to promote the just and efficient conduct of such actions and for the convenience of the parties who might otherwise be forced to litigate in several federal districts simultaneously. The multidistrict litigation statute also relieves the burden on federal courts when a common occurrence threatens to expand into several hundred lawsuits spanning the country. Since the enactment of the multidistrict litigation statute, the Judicial Panel on Multidistrict Litigation ("Panel") has considered motions for transfer in several thousand groups of cases affecting more than 500,000 individual actions and claims.[1]

Transfer to a multidistrict litigation court is more frequent in certain classes of cases. Violations of securities laws, antitrust actions, and product liability cases frequently involve similar facts and meet the threshold requirements for transfer. While some case classes are frequently considered for transfer, others rarely meet the threshold requirements to establish multidistrict litigation. Insurance coverage litigation is an area of law that is rarely appropriate for multidistrict litigation. The Panel as a general rule declines to transfer declaratory judgment or insurance coverage actions to a multidistrict litigation court because these actions involve the interpretation of specific policy language that is rarely identical in different insurers' policies. Minute differences in policy language can vastly alter the interpretation of a specific policy provision.

While insurance coverage litigation rarely implicates multidistrict litigation, many coverage attorneys found themselves encountering the concept of multidistrict litigation for the first time in 2020. As is now common

* Mr. Curtis is a partner in the Hammond office of HeplerBroom LLC & chairs the Insurance Coverage Section of the Defense Trial Counsel of Indiana. Mrs. Senteno is an associate in the Hammond office of HeplerBroom LLC and a member of the Defense Trial Counsel of Indiana.

[1] MULTIDISTRICT LITIGATION MANUAL § 1:1 (2020).

knowledge, the COVID-19 virus spread throughout the United States (and world) in early 2020 and was quickly classified as a global pandemic. Governments around the globe attempted to combat the spread of the pandemic by issuing "shelter-in-place" orders restricting individual travel and ordering the closure of many businesses. Beginning in March 2020, many state and local governments across the United States issued similar shelter-in-place orders. Many business owners were forced to close or substantially limit their activities as a result of these orders and/or the presence of COVID-19 on their premises. Business owners sought to recover the resulting business losses. Many turned to their business owner or property insurance policies to recover their lost income.

The widespread denial of these business income claims sparked a flood of lawsuits in state and federal courts across the country, including six lawsuits in Indiana as of the drafting of this article. Hundreds of business interruption lawsuits were filed in federal courts and several attempts were made to transfer the business interruption lawsuits to a multidistrict litigation court. And so, many insurance coverage attorneys were forced to consider multidistrict litigation for the first time.

This article examines the purpose and establishment of multidistrict litigation (MDL) and its relationship to insurance coverage litigation. It goes on to examine the recent attempts to establish a business interruption MDL in the wake of the COVID-19 pandemic and the Judicial Panel for Multidistrict Litigation's treatment of the same.

I. MULTIDISTRICT LITIGATION

When civil actions involving one or more common questions of fact are pending in different federal district courts, such actions may be transferred to a single district for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407.[2] Congress created MDL to save time and money and to ensure similar outcomes in lawsuits that involve many people and contain similar allegations. When numerous lawsuits have been filed by plaintiffs who have suffered a similar harm caused by the same defective product or act of corporate negligence, the attorneys representing clients in these lawsuits may ask the Panel to create an MDL to consolidate the cases. The Panel "may permit litigation in a single, logical district even if that district would otherwise be unavailable due to venue or personal jurisdiction limitations."[3] The objective of transfer is to eliminate duplicative discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts.[4]

---

[2] 28 U.S.C. § 1407.

[3] MULTIDISTRICT LITIGATION MANUAL § 1:1 (2020).

[4] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131, at 219–20.

For comparison, transfer of multiple actions under 28 U.S.C. § 1407 for coordinated pretrial proceedings is significantly different from certification of an action or actions to proceed as a class under F.R.C.P. 23.[5] Class actions exist as a form of permissive joinder under the federal rules—actions are not certified as class actions unless some party seeks that treatment by commencing a class action suit.[6] Transfer to an MDL court is not permissive—if the Panel determines that an MDL should be established, all common cases pending in the federal district courts will be subject to the MDL's pretrial orders regardless of whether any party in that action sought transfer.[7] No party may opt out of MDL as it may in the class action setting. The refusal of a trial court to certify a class does not affect the Panel's decision to transfer a class of cases.[8]

A. THE HISTORICAL NEED FOR MULTIDISTRICT LITIGATION

The current MDL statute was judged necessary in order to relieve the federal judiciary of the burden created by the onslaught of civil lawsuits filed in the wake of the electrical equipment price fixing scandal. In 1960, numerous American electrical equipment manufacturers, including General Electric, Westinghouse, and their executives, were indicted for alleged conspiracies to "divide business and fix prices in twenty product lines of electrical equipment, implicat[ing] $6–7 billion in sales."[9] Several criminal lawsuits followed the indictments and the information compiled during the criminal investigations uncovered large-scale and systematic violations of the Sherman Act. The criminal cases were largely resolved through a series of guilty pleas resulting in nearly $2 million in fines, jail sentences, and consent decrees.[10]

Although the criminal cases concluded by fall 1962, the civil litigation had just begun. "[W]hen the indictments were returned in Philadelphia, the pleas of guilty in 1961 were followed by an avalanche of anti-trust litigation in 35 districts of the United States."[11] The number of federal cases filed following the antitrust convictions "was about four times as many cases as had been filed in all the district courts on an average over the preceding years."[12] Ultimately, 1912 different federal court actions consisting of

---

5 MULTIDISTRICT LITIGATION MANUAL § 5:11 (2020).

6 *Id*.

7 MULTIDISTRICT LITIGATION MANUAL § 3:8 (2020).

8 MULTIDISTRICT LITIGATION MANUAL § 5:11 (2020).

9 Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 855 (2017) (a complex overview of the historical formation of MDL and the enactment of the MDL statute).

10 *Id*.

11 *Proceedings of the Twenty-Eighth Annual Judicial Conference: Third Judicial Circuit of the United States*, 29 F.R.D. 375, 497 (1965).

12 *Id*.

25,632 individual claims were filed in 35 federal districts.[13] "The Judiciary had dealt with these cases on an ad hoc basis while they were pending, but became aware of the need for a more comprehensive means of dealing with massive litigation."[14]

The torrent of federal lawsuits following the antitrust convictions caused Chief Justice Earl Warren in early 1962 to form a subcommittee of the Committee of Pretrial Procedure "for the purpose of considering the problems arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits," such as "major air crashes" and "antitrust conspiracies."[15] The new committee was named the Coordinating Committee on Multiple Litigation ("Coordinating Committee"). The Coordinating Committee studied the currently available means of consolidating massive litigation under the federal rules and found the existing procedures inadequate for the current crisis.[16] The Coordinating Committee presented its conclusions at the Judicial Conference in March 1962.[17] Central to the Coordinating Committee's conclusion was that the judiciary should seek to coordinate the progress of the multiple similar litigation "in the hands of as few judges as possible, who should carefully supervise and regulate all discovery procedures."[18] The Judicial Conference supported the conclusions of the Coordinating Committee, which began the process of realizing its plans.

At its formation, the Coordinating Committee had no power to enter any orders or to require any judge to take any action—the Coordinating Committee depended entirely on the voluntary cooperation of the judges assigned to the antitrust civil cases.[19] Many of the district court judges did in fact follow the lead and guidance of the Coordinating Committee, adopting

---

13 *Proceedings of the Twenty-Eighth Annual Judicial Conference: Third Judicial Circuit of the United States,* 29 F.R.D. 375, 497 (1965); MULTIDISTRICT LITIGATION MANUAL § 2:1 (2020).

14 MULTIDISTRICT LITIGATION MANUAL § 2:2 (2020).

15 Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 855–56 (2017) (quoting Press Release, Admin. Office of the U.S. Courts 1–2 (Feb. 7, 2962)).

16 Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 855–56 (2017) (citing SUBCOMM. ON MULTIPLE LITIG., REPORT OF THE SUBCOMMITTEE OF THE COMMITTEE ON PRETRIAL PROCEDURE FOR CONSIDERING DISCOVERY PROBLEMS ARISING IN MULTIPLE LITIGATION WITH COMMON WITNESSES AND EXHIBITS 5 (1962)); MULTIDISTRICT LITIGATION MANUAL § 2:1 (2020).

17 Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 855–56 (2017) (citing SUBCOMM. ON MULTIPLE LITIG., REPORT OF THE SUBCOMMITTEE OF THE COMMITTEE ON PRETRIAL PROCEDURE FOR CONSIDERING DISCOVERY PROBLEMS ARISING IN MULTIPLE LITIGATION WITH COMMON WITNESSES AND EXHIBITS 5 (1962)); MULTIDISTRICT LITIGATION MANUAL § 2:1 (2020).

18 *Id*. (citing SUBCOMM. ON MULTIPLE LITIG., REPORT OF THE SUBCOMMITTEE OF THE COMMITTEE ON PRETRIAL PROCEDURE FOR CONSIDERING DISCOVERY PROBLEMS ARISING IN MULTIPLE LITIGATION WITH COMMON WITNESSES AND EXHIBITS 5 (1962)).

19 Phil C. Neal, *Multi-District Coordination–The Antecedents of § 1407*, 14 ANTITRUST BULL. 99, 101 (1969) ("The Committee was of course operating without statutory or other formal authority. The success of its effort depended entirely upon the willingness of all the judges responsible for the cases to follow the lead of the Committee.").

uniform pretrial orders that coordinated discovery and depositions at a national level.[20] The Coordinating Committee "also created a schedule of national depositions—first by plaintiffs, then by defendants—that were presided over by a judge who would make legal rulings, and which were held around the country so that common witnesses would be deposed only once."[21] Universally noted by defense counsel were the breakneck discovery deadlines established by the Coordinating Committee's pretrial orders.[22] It was collectively agreed that the pace of discovery and case management deadlines set by the respective courts based upon the Coordinating Committee's pretrial orders was an effort to force settlement of the antitrust litigation.[23] The antitrust cases settled in droves and were completely resolved by 1966.[24]

B. THE MULTIDISTRICT LITIGATION STATUTE

Following the success of the speedy resolution of the antitrust cases, the Coordinating Committee began considering more permanent and enforceable mechanisms for the coordination of pretrial procedure in multidistrict litigation.[25] The bill that would ultimately pass as the MDL statute was submitted to Congress in 1968.[26] In examining the bill, Congress clearly recognized the federal courts' need for centralized management of mass litigation and passed the bill providing the federal judiciary with significant discretion in determining when the establishment of an MDL was appropriate.[27] The MDL statute (excerpted below) evidences the congressional in-

---

20 CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 83 (1973).

21 Andrew Bradt, "*A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 855 (2017) (citing Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621 (1964).

22 John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint,* 32 ANTITRUST L.J. 133, 137 (1966) (arguing that the way discovery was handled "virtually eliminated" defendants' "ability . . . to point out and question specific characteristics of the cases").

23 William M. Sayre, *Developments in Multiple Treble Damage Act Litigation–Introduction*, in N.Y. STATE BAR ASS'N, 1966 ANTITRUST LAW SYMPOSIUM 46, 51–52 (1966).

24 Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971) ("[A]lthough a total of 1,912 cases had been filed, only nine trials were required.").

25 *See* Andrew Bradt, "*A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) (Notably, the defense bar was initially opposed to legislation permanently codifying procedures for multidistrict litigation based upon the negative experiences encountered in the antitrust cases.).

26 *See* 28 U.S.C. § 1407.

27 H.R. REP. NO. 1130, 90th CONG., 2D SESS. 2 to 3 (1968) ("The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management. To accomplish this objective the bill provides for the transfer of venue for the limited purpose of, conducting coordinated pretrial proceedings.").

tent that the federal judiciary take the lead in developing the parameters in establishing MDLs.

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.
>
> (c) Proceedings for the transfer of an action under this section may be initiated by—
>
> (i) the judicial panel on multidistrict litigation upon its own initiative, or
>
> (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A

> copy of such motion shall be filed in the district court in which the moving party's action is pending.[28]

Breaking down the statute, a party may request that the Panel transfer actions involving common questions of fact to a single federal district for coordinated and consolidated pretrial proceedings.[29] "The Panel exists primarily to determine whether cases pending in more than one district should be transferred to a single district court for coordinated or consolidated pretrial proceedings before a single judge and, if so, which judicial district and judge should handle the cases."[30] The Panel's function is fundamentally "one of case management, not adjudication."[31] "The practical nature of the Panel's task also reduces the importance of precedent. In many cases there is no precedent that dictates the Panel's decision; the Panel decides each matter of transfer on the unique facts of the cases before it."[32]

Per the statutory language, only three requirements are necessary to establish MDL:

1. the actions must share common issues of fact;

2. transfer must be for the convenience of parties and witnesses; and

3. transfer must advance the just and efficient conduct of the actions.[33]

While these statutory requirements to establish an MDL appear easily satisfied, precedent set by the Panel shows that they are the bare minimum necessary for the establishment of an MDL court.[34] If transfer is granted, all cases pending in the federal district courts consisting of the common issue of fact will be consolidated into the MDL.[35] The Panel has no authority over actions pending in state courts.[36] The Panel is authorized only to transfer cases for pretrial proceedings and must remand the cases to the original federal district court for trial.[37]

---

28 28 U.S.C. § 1407.

29 28 U.S.C. § 1407(a).

30 Multidistrict Litigation Manual § 1:1 (2020).

31 *Id*.

32 *Id*.

33 28 U.S.C. § 1407(a).

34 Multidistrict Litigation Manual § 5:3 (2020).

35 *Id*.

36 In re General Motors Corp. Piston Slap Prods. Liab. Litig., 314 F. Supp. 2d 1386, 1387 n.1 (J.P.M.L. 2004).

37 Multidistrict Litigation Manual § 3:2 (2020).

II. MULTIDISTRICT LITIGATION INVOLVING INSURANCE COVERAGE ISSUES

There are many types of civil actions that repeatedly come before the Panel for consideration of transfer. These include, but are not limited to, securities actions, antitrust actions, patent infringement and validity actions, product liability actions, and trademark and copyright actions. While these classes of cases are often appropriate for transfer, the Panel is often resistant to the transfer of insurance coverage litigation. The Panel has noted that the question of "[w]hether declaratory judgment insurance actions . . . should be transferred pursuant to 28 U.S.C. § 1407(a) poses a challenging issue."[38] "[A]s a general rule, [the Panel] declines to transfer such actions if they appear to present 'strictly legal questions . . . requiring little or no discovery.'"[39] Where "insurance coverage questions in . . . cases are likely to be decided by an application . . . [of] policy language under the applicable state law, and the insurance company that might benefit the most from the efficiencies of centralization opposes transfer of [the] cases," the cases usually are not transferred to an already existing MDL.[40]

While coverage actions generally are inappropriate for MDL, the recent onslaught of federal lawsuits arguing that business interruption coverage should be extended as a result of the pandemic or the government orders stemming therefrom raised the issue whether the establishment of an MDL was appropriate. As outlined above, the threshold requirements for transfer to an MDL court are that the actions share common issues of fact, that transfer would work for the convenience of the parties, and that transfer would advance the just and efficient conduct of the actions.[41] Several groups of plaintiffs argued that all the business interruption lawsuits involved a common issue of fact in assessing whether government orders that closed nonessential businesses and/or mandated that individuals stay home triggered coverage under the businessowners' insurance policies.[42] The plaintiffs further argued that the transfer to an MDL court would promote efficiency for the various insurance carriers who would otherwise be required to litigate in several federal districts simultaneously.[43]

A review of the motions for and against the transfer of the business interruption lawsuits to an MDL court for pretrial proceedings and of the Panel's ruling on the same is instructive in the insurance coverage context.

---

38 In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, 764 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011).

39 *Id.* (quoting In re: Helicopter Crash Near Weaverville, California on August 5, 2008, 626 F. Supp. 2d 1355, 1356 (J.P.M.L. 2009)).

40 MDL No. 2047, June 15, 2010, Transfer Order at 2.

41 28 U.S.C. § 1407(a).

42 *See* LH Dining L.L.C. and Newchops Restaurant Comcast LLC in support of their Motion to Transfer and Coordination or Consolidation, MDL No. 2942 (J.P.M.L. Aug. 12, 2020, ECF No. 543).

43 *See id.*

A. MOTIONS SEEKING TO ESTABLISH MULTIDISTRICT LITIGATION

At least two separate groups of plaintiffs requested that the Panel transfer the various federal cases to an MDL. The first motion to centralize was filed by plaintiffs in the Eastern District of Pennsylvania.[44] The Pennsylvania movants sought consolidation of eleven business interruption actions pending in the Eastern District of Pennsylvania.[45] The Pennsylvania movants claimed that the core factual issue shared by all plaintiffs was whether various government orders, which closed nonessential businesses and/or mandated that individuals stay home, triggered coverage under the business interruption insurance policies.[46] The Pennsylvania movants argued that although some actions may contain various causes of action such as breach of contract or bad faith insurance practices, they all ultimately share key core questions: Do the government orders regarding COVID-19 trigger coverage under the business interruption insurance policies and do any exclusions apply?[47]

While the Pennsylvania movants acknowledged that the various business interruption lawsuits involved different businesses subject to different government closure orders and slightly different policy language, consolidation and centralization of the cases was appropriate because the central issue of coverage was identical across all actions.[48] Further, the Pennsylvania movants argued that consolidations would eliminate the likelihood of duplicative discovery and duplicative proceedings that may result from inconsistent rulings and would husband judicial resources in the face of the magnitude of the business interruption filings.[49]

A second group of plaintiffs centered in Illinois sought to establish MDL by taking a slightly different approach.[50] The Illinois movants' position is essentially that the majority of the business interruption complaints assert the same things:

- the insured purchased an insurance policy from the defendant insurance company;

---

44 *See* LH Dining L.L.C. and Newchops Restaurant Comcast LLC Motion for Transfer and Coordination or Consolidation, MDL No. 2942 (J.P.M.L. Apr. 20, 2020, ECF No. 1).

45 *See* LH Dining L.L.C. and Newchops Restaurant Comcast LLC in Support of Motion for Transfer and Coordination or Consolidation, MDL No. 2942 (J.P.M.L. Apr. 20, 2020, ECF No. 1-1).

46 *See id.*

47 *See id.*

48 *See* LH Dining L.L.C. and Newchops Restaurant Comcast LLC in support of their Motion to Transfer and Coordination or Consolidation, MDL No. 2942 (J.P.M.L. Aug. 12, 2020, ECF No. 543).

49 *See id.*

50 *See* Christie Jo Berkseth-Rojas DDS *et al.* Subsequent Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, MDL No. 2942 (J.P.M.L. Apr. 21, 2020, ECF No. 4, 4)

- the property policy provides coverage for all risks of physical damage or loss to covered property; the insured suffered property damage and/or business interruption losses occasioned by COVID-19;
- the insurer owes coverage to the insured under one or more of the provisions typically found in the standard-form property insurance policies issued;[51]
- the insured breached its obligation to provide coverage; and
- the policy holder is entitled to payment or to a declaration of coverage.[52]

The Illinois movants directed the Panel to focus on two issues they believed were factually similar in all the business interruption lawsuits, namely: (1) whether COVID-19 causes "physical damage or loss to property"; and (2) whether COVID-19 was present on the insured property or on property sufficiently connected by proximity or in other ways to the insured property such that coverage is triggered.[53]

As to the first issue, the Illinois movants argued that the interpretation whether COVID-19 causes physical damage or loss to covered property merely requires an interpretation and application of the insurance policy language.[54] Notably, the Illinois movants focused their argument on the reliance of all parties on scientific experts in order to investigate the "physical damage or loss" caused by COVID-19, and very similar expert deposition testimony will be solicited and challenged in all the pending suits.[55] Further, the Illinois movants argued that each business interruption case would necessarily seek discovery into the drafting history of the standard terms as well as other evidence regarding the phrase *physical damage or loss*.[56] Consolidation of the cases would permit more efficient discovery as well as more consistent answers to the same basic questions.[57]

In assessing the second issue, the Illinois movants maintained that the presence of COVID-19 on the business premises is purely a question of fact

---

51 The relevant standard policy provisions usually cited include: the business interruption insuring provision, the civil authority provision, the extra expense provision, the sue and labor provision, the ingress and egress provision, and/or the preservation of property provision. *See* Christie Jo Berkseth-Rojas DDS *et al.* Brief in Support of Their Subsequent Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, MDL No. 2942 (J.P.M.L. Apr. 21, 2020, ECF No. 4-1).

52 *See id.*

53 *See id*.

54 *See id*.

55 *See id*.

56 *See id*.

57 *See id*.

and would require the same type of expert evidence in each case. The Illinois movants surmised that thousands of plaintiffs would attempt to retain the same experts, which would result in a costly and inefficient nightmare for litigants. Consolidating the business interruption cases would serve to reduce the burden on parties with regard to expert retention.

B. MOTIONS OPPOSING THE ESTABLISHMENT OF MULTIDISTRICT LITIGATION

In opposition to these attempts to persuade the Panel to transfer the business interruption lawsuits for MDL, thirty-two insurers or related groups ("Insurers") responded to the motions and uniformly opposed centralization.[58] The Insurers argued that the policies at issue contained different language, would be interpreted under different state laws, and would involve widely disparate government orders.[59] The Insurers maintained that the significant factual and legal differences between the various claims outweigh their all being concerned with coverage disputes related to COVID-19.[60] "The 'common factual question' identified by Plaintiffs—whether Plaintiffs' policies provide business interruption coverage for losses arising out of the COVID-19 virus pandemic or Executive Orders—is not common at all because the litigation sought to be centralized does not involve uniform industry-wide policies and procedures or standardized Executive Orders or sufficient identity and similarity of businesses or industries named as plaintiffs."[61] In addition, the Insurers maintained, there is no common core of defendants as there are fifty separate insurers sued in the actions proposed for transfer.[62] More telling is that the respective Plaintiff business owners were advancing different claims: some business owners argued coverage is warranted as a result of the government orders, some business owners argued coverage is warranted because of the physical presence of COVID-19 on the business premises, while other business owners argued both.[63]

The Insurers argued that consolidation was inappropriate because the policy considerations were not factually similar. Specifically, the Insurers argued that each policy warrants individual consideration because of differences in policy language or the way that policy provisions are interpreted

---

58 *See* Order Denying Transfer, MDL No. 2942 (J.P.M.L. Aug. 12, 2020, ECF No. 772).

59 *See* Cumberland Mutual Fire Insurance Company's Response in Opposition to the Motion to Consolidate, MDL No. 2942 (J.P.M.L. June 1, 2020, ECF No. 353).

60 *See* Liberty Mutual's Interested Party Response in Opposition to Motion for Transfer, MDL No. 2942 (J.P.M.L. June 4, 2020, ECF No. 382).

61 *See id.*

62 *See* Society Insurance Company's Opposition to Motion for Transfer, MDL No. 2942 (J.P.M.L. June 2, 2020, ECF. No. 371).

63 *See* Liberty Mutual's Interested Party Response in Opposition to Motion for Transfer, MDL No. 2942 (J.P.M.L. June 4, 2020, ECF No. 382).

under a specific state's law.[64] For instance, some policies contain a sue-and-labor provision and an ingress-and-egress provision, while others do not.[65] Even when the policy provisions at issue are titled the same, there are often differences in the terms of the policy.[66] For instance, civil authority and related extra expense provisions cited in various complaints in cases proposed for the MDL differ from those in other policies with respect to requirements of proximity to damaged property, at what point coverage begins after the first action of civil authority that prohibits access to the described premises, and for what period the coverage applies.[67] To further differentiate the claims, some policies contain virus exclusions that are introduced by an anticoncurrent causation clause that dispositively distinguish them from other insurance policies.[68] The policies at issue do not contain "standard or near-standard terms across all the property insurance policies at issue . . . irrespective of which insurer issued the particular policy."[69]

The various business interruption claims vary more in that the impact of government orders on the various businesses varies greatly. Some businesses were ordered to close while other businesses were considered essential and allowed to remain open through the pandemic.[70] Further, there was no uniform national government order affecting all similar businesses—states, counties, and municipalities all approached the pandemic differently resulting in different government orders. For instance, Governor Pritzker of Illinois issued a stay-at-home order on March 21, 2020, whereas the Governor Wolf of Pennsylvania did not issue a stay-at-home order until April 1, 2020.[71] The reopening of counties and the extensions and or modifications of the orders varied from state to state. Therefore, the liability assessments and damage calculations will depend not only upon each state's laws relating to contract interpretations, but also upon the language of the specific policies, the specific policy limits, whether any coverage is warranted, the specific business, and the specific reasons that each business had for shutting down.[72]

---

64 *See* Society Insurance Company's Opposition to Motion for Transfer, MDL No. 2942 (J.P.M.L. June 2, 2020, ECF No. 371).

65 *See id*.

66 *See id*.

67 *See id*.

68 *See* Cumberland Mutual Fire Insurance Company's Response in Opposition to the Motion to Consolidate, MDL No. 2942 (J.P.M.L. June 1, 2020, ECF No. 353).

69 *See id.*

70 *See* Society Insurance Company's Opposition to Motion for Transfer, MDL No. 2942 (J.P.M.L. June 2, 2020, ECF No. 371).

71 *See* Cumberland Mutual Fire Insurance Company's Response in Opposition to the Motion to Consolidate, MDL No. 2942 (J.P.M.L. June 1, 2020, ECF No. 353).

72 Cumberland Mutual Fire Insurance Company's Response in Opposition to the Motion to Consolidate, MDL No. 2942 Dkt. No. 353, *filed* June 1, 2020.

C. THE PANEL'S ASSESSMENT OF THE BUSINESS INTERRUPTION ARGUMENTS AND DENIAL OF TRANSFER

On August 12, 2020, the Judicial Panel on Multidistrict Litigation denied the two motions for centralization.[73] The Panel concluded that the industrywide centralization requested by the movants would not serve the convenience of the parties and witnesses or further the just and efficient conduct of litigation.[74] The Panel held that the MDL movants' request entailed very few common questions of fact, which were outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry.[75]

The Panel reasoned that although the three common core questions identified by both motions share only a "superficial commonality," there is no common defendant in these actions. "[T]here are no true multi-defendant cases, as the actions involve either a single insurer or insurer-group (*i.e.,* related insurers operating under the same umbrella or sharing ownership interests)."[76] Thus, the Panel concluded, there is little potential for common discovery across the litigation.[77] The cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states.[78] "These differences will overwhelm any common factual questions."[79]

The Panel disagreed with the proponents of centralization who argued that the insurers use standardized forms.[80] "While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage."[81]

The Panel also disagreed with the argument that an industrywide MDL in this case would promote a quick resolution of the matters.[82] A transferee court would have to establish a pretrial structure to manage the hundreds of plaintiffs and more than one hundred insurers.[83] The court would also have to identify common policies and oversee discovery that likely will dif-

---

73 *See* Order Denying Transfer, MDL No. 2942 (J.P.M.L. Aug. 12, 2020, ECF No. 772).

74 *See id*.

75 *See id*.

76 *See id*.

77 *See id*.

78 *See id*.

79 *See id*.

80 *See id*.

81 *See id*.

82 *See id*.

83 *See id*.

fer from insurer to insurer.[84] Managing such a litigation would take time and given that time is of the essence for the various businesses involved, implementing an MDL to address the concerns would not be efficient.[85]

D. THE PANEL'S CONSIDERATION OF ALTERNATIVE MDL ESTABLISHMENT

Instructive on how the Panel assesses requests for transfer to an MDL court, the Panel considered two alternative proposals for setting up the MDLs.[86] First, the Panel was asked to establish regional and state-based MDLs.[87] The movants argued that the issues regarding policy interpretation under different states' laws would be eliminated if MDLs were established on a state-by-state basis.[88] The Panel ultimately rejected the proposal. Although the MDLs would be smaller, they still would involve multiple defendants with different policies, coverages, exclusions, and endorsements.[89] "Any efficiencies with respect to common discovery and motion practice would be outweighed by the unique discovery and motion practice as to each insurer."[90]

Next, the Panel was asked to establish MDLs for each insurance company. The Panel was persuaded by this argument, which was not raised until briefing on the MDL was nearly complete.[91] An insurer-specific MDL would be limited to a single insurer or group of related insurers and would not entail the problems of an industrywide MDL involving more than a hundred insurers.[92] These actions are more likely to involve insurance policies using the same language, endorsements, and exclusions.[93] The actions would likely share common discovery and pretrial motions and could eliminate inconsistent pretrial rulings. The Panel concluded that an insurer-specific MDL could achieve the convenience and efficiency envisioned by section 1407. The Panel directed its clerk to issue orders naming four insurers or groups of related insurers that require the parties to show cause why those actions should not be centralized.[94]

---

84 *See id*.

85 *See id*.

86 *See id*.

87 *See id*.

88 *See id*.

89 *See id*.

90 *See id*.

91 *See id*.

92 *See id*.

93 *See id*.

94 *See id*.

III. CONCLUSION

Multidistrict litigation is a useful and convenient tool for streamlining massive litigation. The recent attempts to establish a business interruption MDL highlight the factors courts will consider in establishing an MDL and are instructive as to the Panel's treatment of attempts to establish MDLs addressing issues of insurance coverage.