COVID-19: MASSACHUSETTS PROPOSED BILLS ADDRESSING COVERAGE FOR SMALL BUSINESSES – A DIFFERENT APPROACH

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COVID-19 has left its indelible mark on the nation's economy. As the pandemic continues, lawmakers in many jurisdictions are proposing legislation that would assist businesses in securing insurance coverage for COVID-19-related losses. In the face of insurers' reflexive denials of coverage for claims arising out of business interruption losses due to COVID-19, legislators across the country have proposed bills, largely aimed at small businesses, that would, if necessary, override policy language that may potentially be used by insurers to deny coverage for COVID-19-related losses.[1] These bills have been met with strong opposition by the insurance industry, which argues that, if enacted, the bills would violate the Contract Clause of the U.S. Constitution. Faced with this opposition, Massachusetts lawmakers recently have joined a small number of jurisdictions considering a different approach to such legislation.[2]

On February 18, 2021, Massachusetts Senator Diana DiZoglio and Representative Dylan Fernandes introduced companion bills S.D. 1845 and H.D. 3170.[3] S.D. 1845 and H.D. 3170 propose a series of rebuttable presumptions that would apply to businesses employing 50 or fewer employees that have suffered business interruption losses due to a declared public health emergency in connection with COVID-19; presumably, to align with policyholders' expectations and to avoid what would otherwise be lengthy litigation disputes.[4]

A rebuttable presumption "is an evidentiary tool that accepts a certain fact as proven in the absence of contradictory evidence."[5] While a party is typically required to prove every element of their claim, "[a] presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption."[6] If the other party does present evidence to rebut the presumption, then "the presumption shall have no further force or effect."[7] A rebuttable presumption shifts the burden of proving a fact onto the party that would normally have the better access to information.[8] Rebuttable presumptions are also used to avoid litigation over facts that are unlikely to be true[9] or for public policy reasons.[10]

Here, the Massachusetts bills address common terms in property insurance policies, such as "direct physical loss or damage[,]" and clarify that COVID-19 can constitute the predicate for recovery under a policy *unless* the insurer can show otherwise. Among other things, the bills propose the following rebuttable presumptions:

- A rebuttable presumption that COVID-19 "was present" and caused "(i) physical loss of or (ii) physical damage" to "Covered Property" resulting in business interruption losses.[11]

- A rebuttable presumption that the declaration of a public health emergency "means there is (i) physical loss of or (ii) damage" to Covered Property.[12]
- A rebuttable presumption that "COVID-19 was present on property other than" the Covered Property, which prohibited access to the Covered Property, thereby causing business losses.[13]
- A rebuttable presumption that, due to a civil authority order, "COVID-19 caused direct physical loss of or property damage to Covered Property" and "an action of civil authority was taken in response to dangerous physical conditions resulting from the damage[s]" to Covered Property.[14]
- A rebuttable presumption that "direct physical loss of or damage to Covered Property" includes "restriction on operations" and "limiting customer density" or "permitting only distant customer interaction."[15]

The legislation appears to have been drafted in reaction to a recent decision issued on December 21, 2020, by the Business Litigation Session of the Massachusetts Superior Court in the matter of *Verveine Corp. v. Strathmore Insurance Co.*[16] There, the court denied the policyholders' pursuit of coverage due to business interruption losses arising out of COVID-19. The court found that the policyholders did not allege "the COVID-19 virus was actually present in [their] restaurants, resulting in physical contamination of the premises."[17] Instead, they "allege[d] that the loss of income for which they seek coverage was the result of the Governor's Orders," which the court concluded could not constitute "direct physical loss."[18] The court also emphasized that the various provisions of the business interruption policy referring to a "'period of restoration' and the costs to 'repair or replace property,' [contemplate] that such property [be], in some way, lost or damaged."[19]

Had the legislation been in place, the policyholders in *Verveine* could potentially have benefited from a presumption that their restaurants did in fact suffer a "direct physical loss"—shifting the burden onto the insurers to prove the contrary.[20] From the policyholders' perspective, the rebuttable presumption would have allowed them to avoid proving that COVID-19 was in fact present in their business and that it affected them, a very complex task for which small businesses may lack the adequate resources. Instead, the legislation would place the burden of disproving the presumptions onto the party with the better access to information: the insurers.

S.D. 1845 and H.D. 3170 also include certain provisions that follow the approach seen in other early legislation working its way through legislatures across the country. For example, S.D. 1845 and H.D. 3170 propose precluding insurers from relying on certain exclusions to deny coverage due to COVID-19-related losses:[21]

> No exclusion for pollution shall be construed to include viruses, bacteria or microorganisms; no exclusion for mold shall be construed to include viruses, bacteria or other microorganisms; no exclusion for viruses shall be construed to include mold, bacteria or other microorganism, and shall be construed to have an exception for COVID-19; no exclusion for animal infestations shall be deemed to include any virus, mold, microorganism, or bacterium; notwithstanding this subsection, a policy that otherwise indemnifies debris removal or pollutant clean up shall be construed to include removal or clean up expenses incurred by the insured arising from the Public Health Emergency.

Insurers have not been shy in vocalizing opposition to this type of provision and have argued that such provisions would impair terms in insurance contracts in violation of the U.S. Constitution. Notably, the provisions in S.D.

1845 and H.D. 3170 are expressly severable. As such, to the extent that any one provision within the legislation is found invalid, it will not affect the validity of the remaining provisions of the legislation.[22]

Finally, both bills provide a safe harbor for policyholders that may have chosen to forego filing notices of loss or litigation because of their insurers' unwillingness to pay COVID-19 business interruption claims. Section 3(K) of both bills provides that no insurer may deny coverage based on an insured's non-compliance with a notice or reporting provision, including a contractually limited time period to file suit, unless the insurer proves it was "prejudiced directly from the insured's non-compliance." Thus, policyholders who did not provide a notice of loss to their insurers may now have a second opportunity to do so under the proposed legislation.

It is unknown at present whether or when the separate chambers of the legislature might take up the bills for a vote. Policyholders should keep abreast of developments and be prepared to take advantage of any such legislation—should it pass—as a tool to supplement their pursuit of coverage for COVID-19-related losses.

FOOTNOTES

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[1] *See* COVID-19: New Jersey Assembly Introduces Legislation to Provide Small Companies With Business Interruption Coverage for COVID-19 Losses, K&L Gates HUB (Mar. 20, 2020); COVID-19: Growing Number of U.S. States Propose Legislation Requiring Insurers to Pay for COVID-19-Related Losses Incurred by Small Companies, K&L Gates HUB (Apr. 6, 2020); COVID-19: Congress, Pennsylvania, Michigan, and South Carolina Join Other Jurisdictions Proposing Legislation Addressing Insurers' Obligations to Pay for Pandemic-Related Losses, K&L Gates HUB (May 6, 2020); *but see* John Sylvester, Pa. COVID Insurance Bill Differs From Other States' Proposals, LAW360 (Apr. 19, 2020).

[2] A.B. 743, 2021 Reg. Sess. (Ca. 2021); S.B. 1114, 2019 Reg. Sess. (Pa. 2020).

[3] S.D. 1845, 192nd Gen. Court (M.A. 2021); H.D. 3170, 192nd Gen. Court (M.A. 2021).

[4] S.D. 1845 §§ (3), (3)(C); H.D. 3170 §§ (3), (3)(C). Prior legislation addressing business interruption coverage was proposed in S.D. 2888, 191st Gen. Court (M.A. 2020). *See* COVID-19: Growing Number of U.S. States Propose Legislation Requiring Insurers to Pay for COVID-19-Related Losses Incurred by Small Companies, K&L Gates HUB (Apr. 6, 2020). The legislation failed to pass the committee vote on November 24, 2020 and was taken out of consideration on January 5, 2021 at the expiration of the legislative term.

[5] Williams v. Am. Honda Fin. Corp., 479 Mass. 656, 662 (2018).

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, Blake v. Hometown Am. Cmtys., Inc., 486 Mass. 268, 269 (2020) (analyzing a rebuttable presumption that "[a]ny rule or change in rent which does not apply uniformly to all manufactured home residents of a similar class shall create a rebuttable presumption that such rule or change in rent is unfair").

[9] *See, e.g.*, Jacobs v. Town Clerk of Arlington, 402 Mass. 824, 826 (1988) ("[U]pon a person's leaving his usual

home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life ceases, and [the presumption of death] arises."); Case of Tobin, 424 Mass. 250, 251 (1997) ("This statute provides that an employee over age sixty-five, who has been out of the labor market for at least two years and is eligible for social security benefits, or benefits from a public or private pension paid for in part or entirely by an employer, will not be entitled to total or partial incapacity benefits under G.L. c. 152, §§ 34 and 35, unless the employee can establish that, but for the injury, he or she would have remained active in the labor market.").

[10] *See, e.g.*, Ruffino v. State St. Bank & Tr. Co., 908 F. Supp. 1019, 1045 (D. Mass. 1995) (discussing rebuttable presumption under Title VII litigation).

[11] S.D. 1845 § (3)(A); H.D. 3170 § (3)(A).

[12] S.D. 1845§ (3)(B); H.D. 3170 § (3)(B).

[13] S.D. 1845 § (3)(C); H.D. 3170 § (3)(C).

[14] S.D. 1845 § (3)(D); H.D. 3170 § (3)(D).

[15] S.D. 1845 § (3)(E), (3)(F) ("An insured's partial operation following a Public Health Emergency and in compliance with any restrictions mandated under the Public Health Emergency, including limiting customer density and permitting only distant customer interaction, shall be deemed to be mitigation of loss and does not evidence that the insured's operations have resumed."); H.D. 3170 § (3)(E), (3)(F).

[16] Verveine Corp. v. Strathmore Ins. Co., Case No. 2084-CV-01378 (Mass. Super., Suffolk Cty. Dec. 21, 2020). One day after the legislation was filed, an opinion from the U.S. District Court for the District of Massachusetts held that the presence of COVID-19 could not constitute "direct physical loss of or damage to" property. *See* SAS Int'l, Ltd. v. Gen. Star Indem. Co., No. CV 20-11864-RGS, 2021 WL 664043, at *2 (D. Mass. Feb. 19, 2021) ("[T]he phrase 'direct physical loss of or damage to' does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm."). The proposed legislation could have a tangible impact on the outcome of these types of cases. It should also be noted that although *Verveine* and *SAS Int'l*. are the only two cases that have substantively addressed insurance coverage for COVID-19 under Massachusetts law, it is anticipated that policyholders will argue that the cases are not controlling and distinguishable from other cases due to the facts and policy language at issue.

[17] *Verveine*, Case No. 2084-CV-01378 at 7.

[18] *Id.*

[19] *Id.* at 8. Notably, the policyholders have filed a notice of appeal on January 13, 2021.

[20] It is not clear whether any of the policyholders in this case are small enough to qualify under the current legislation. While it is possible that at least one of the restaurants may have had 50 or fewer employees, the complaint as pled talks about the collective number of employees across the restaurant group. Plaintiffs faced with the same circumstances should consider the importance of pleading certain facts to avoid talking their way out of potentially valuable legislative tools.

[21] S.D. 1845 § 3(G); H.D. 3170 § 3(G).

[22] S.D. 1845 § 3(N); H.D. 3170 § 3(N).

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