Lawyer Insights

Massachusetts Considers an Act Concerning Business Interruption Insurance

The Joint Committee plans to issue a report on the bill but has not provided a timeline for its deliberations.

By Rachel Hudgins
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On Wednesday, Hunton Andrews Kurth LLP insurance partner Mike Levine testified before the Massachusetts Joint Committee on Financial Services in support of a bill that takes aim at insurers' argument that their policies do not cover losses caused by COVID-19 or government-issued closure orders. Passage of H.1079 would give business owners in Massachusetts a fair chance to show otherwise: that their all-risk insurance policies, for which they paid substantial annual premiums, do indeed cover business income losses and extra operating expenses incurred because of the pandemic.

According to insurers, the policies they wrote require that the property be "structurally altered" or suffer "distinct, demonstrable, physical alteration" before they will cover business income losses. But the policies do not say that. In fact, as Levine and other panelists explained, for the past 50 years courts have found that all-risks policies cover business income losses caused by dangerous or noxious airborne substances like asbestos, ammonia, carbon monoxide, smoke or foul odors. And yet, insurers have denied, and continue to uniformly deny COVID-19-related business income claims without regard for the facts, policy wording or applicable state law.

Most policyholders, meanwhile, are in no position to fight insurers' denials and, as Levine pointed out, small businesses are the most vulnerable. These businesses are struggling to stay afloat; they cannot afford to spend their dwindling resources to litigate against coordinated and well-funded insurers. What's more, while businesses' losses are substantial – even existential –they still may not justify legal representation on a contingent fee basis.

H.1079 seeks to level the playing field by putting the burden of proof on the party best-equipped to manage it: an insurance company, which, by definition, is in the business of predicting and managing risk. The proposed legislation includes rebuttable presumptions that, if passed, would merely shift to the insurers the burden that their policies already embrace: all risks of loss are covered unless specifically excluded.

Rebuttable presumptions aren't guarantees, Levine cautioned. Each side still must prove its case. But rebuttable presumptions moderate insurance companies' ability to simply deny claims and walk away without investigation; the presumption will force the insurer to show why a claim is limited or excluded.

And rebuttable presumptions aren't new. In his testimony, Levine ticked off presumptions dating back centuries to constitutional amendments: the presumption of innocence, of intoxication when drivers refuse sobriety tests, of joint custody after a divorce. In fact, insurers already shoulder presumptions in the

interpretation of certain insurance contracts. For instance, life insurers carry the burden of proving death by suicide, because courts apply – and the US Supreme Court upheld – a presumption of accidental death. *Dick v. New York Life Ins. Co*., 359 U.S. 437 (1959).

In his testimony, Levine stated facts to parry insurance industry lobbyists crying wolf: Rebuttable presumptions don't change facts. They don't re-write insurance policies, and they don't give either party a windfall. The rebuttable presumptions in H.1079 would merely give small businesses – ravaged by the pandemic and let down by their insurers – a chance to take hold of a lifeline they paid for and counted on.

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Rachel E. Hudgins *is an associate in the firm's insurance coverage group in the firm's Atlanta office. Rachel has litigated hundreds of insurance coverage and bad faith claims in state and federal courts across the country brought under a spectrum of insurance policies issued to individuals, public and private corporations, and government entities. She can be reached at +1 (404) 888-4110 or rhudgins@HuntonAK.com.*