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It's a COVID-19 Pandemic; It's Everywhere – New Cal. Bill to Make Insurers Prove Otherwise

Article By:

Scott P. DeVries

Andrea DeField

On June 29, in a development that may fundamentally change the landscape for California businesses which have sustained COVID-19 related business interruption loss, two California legislators amended pending legislation to address several of the most hotly contested issues regarding insurance recovery for these devastating losses.

The bill, Assembly Bill 1552, focuses on All-Risk property insurance policies. As amended, it would create a "rebuttable presumption" that COVID-19 was present on and caused physical damage to property which was the direct cause of business interruption. A similar rebuttable presumption would apply to orders of civil authority coverage and to ingress/egress coverage. The bill would further prohibit COVID-19 from being construed as a pollutant or contaminant for purposes of any policy exclusion unless the exclusion specifically referred to viruses. The bill would apply to any All-Risk policy in effect on or after March 4, 2020 and is written to satisfy the standards for an "urgency" statute, taking effect immediately upon being signed into law.

While a technical legal concept, creation of a "rebuttable presumption" can have a dramatic effect on litigation. It instructs the trier of fact to assume something to be true while giving the other side the opportunity to refute the fact. This concept is particularly important here because one of insurers' first arguments is that even though COVID-19 is everywhere and has created an international pandemic killing hundreds of thousands of people, policyholders seeking coverage must prove, through scientific evidence, that the virus somehow affected the "physical integrity" of their particular property. This process can be expensive and time consuming for the policyholders who have already incurred considerable losses. While an insurer would still have the right to try to rebut the presumption of damage and establish there was none, it would bear the burden of proving it (and the concomitant expense).

The legislative creation of a "rebuttable presumption" is a significant departure from bills that have been introduced in other states and elicited an outcry from insurers. Legislators in New Jersey and other states (viz., Louisiana, Pennsylvania, Ohio, South Carolina and New York) introduced bills that would compel coverage with insurers protesting, among other things, this would be an improper impairment of contract. (To date, none have been passed.)

Here, however, the contract would still be enforced as written with the legislature simply creating a rebuttable presumption as it has done in countless other situations. Nor would this be the first time a rebuttable presumption was used in the COVID-19 context – on May 6 California Governor Newsom issued an executive order creating a rebuttable presumption in the workers compensation context, and over a dozen other states have done likewise. Further, numerous other state legislatures and courts have routinely established rebuttable presumptions and burden shifting with respect to other insurance coverage issues. See e.g. N.Y. Ins. Law §§ 3420(c)(2)(A) and (B) ("In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy…an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise."); Imhof v. Nationwide Mutual Ins. Co., 643 So. 3d 617 (Fla. 1994) ("An insurer's failure to respond within the sixty-day period [outlined in Fla. Stat. 624.155] will create a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond."); Friedland v. Travelers Indem. Co., 105 P.3d 639, 647 (Colo. 2005) (extending "notice-prejudice rule," which shifts burden to insurer to prove it was prejudiced by late notice, to liability insurance cases). The current iteration of the bill can be found here.

The bill was referred to the Senate Insurance Committee on July 2.

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