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Fighting State COVID-Related Insurance Coverage Mandates

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Supreme Court Justice Louis Brandeis once described the fifty states as "laboratories of democracy" that could learn from each other's successes and failures in policies. Now, in response to the COVID-19 pandemic, various state legislatures have introduced legislation purporting to alter first-party property insurance policies to require retroactive coverage for business interruption losses related to COVID-19. So far, the legislatures in New Jersey, Massachusetts, Ohio, Louisiana, New York, Pennsylvania, and South Carolina have introduced bills.[1] These bills, for the most part, limit retroactive business interruption coverage to smaller employers (e.g., 100 or fewer full time employees) and allow insurers who are forced to pay COVID-19 business interruption losses to seek reimbursement through a state fund made up of assessments against all insurance companies (not all proposed legislation has this feature).

The key provision of these legislative proposals requires all insurers with in-force policies that offer coverage for business income and extra expense and civil authority orders to pay all losses arising from COVID-19 until the civil authority orders are lifted regardless of what the policy says. For example, the New Jersey Assembly bill (3844) provides:

> Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic.

Because the pending legislation presents potential dangers to both policyholders and insurers, both sides are examining their options. For policyholders, legislation mandating coverage not previously underwritten or paid for could increase the risk that their insurers might not be around to pay their claims in the future. This unintended consequence could be exacerbated because thousands, if not millions, of businesses could potentially fall under the scope of the proposed legislation. For insurers, it is no exaggeration to say that retroactive state-mandated coverage for the pandemic could threaten the industry. Besides claims payment issues and solvency concerns, the increase in commercial property insurance premiums by those companies that survive would be significant. This assumes that insurance companies are even willing to write business interruption coverage going forward.

Unilateral action by state governments to alter contracts between private parties always raises constitutional issues, and the proposed legislation here is no exception. The most likely option to address this legislation is a suit enjoining enforcement of the new laws, if and when they are enacted. This article focuses on what an injunctive suit would look like and some of the issues presented.

[1] New Jersey: Assembly Bill 3844, "An act concerning certain covered perils under BI insurance and supplementing Title 17 of the Revised Statutes."
Massachusetts: Senate Docket No. 2888, "An act concerning BI insurance."
Ohio: House Bill 589, "To require insures offering business interruption insurance to cover losses attributable to viruses and pandemics and to declare an emergency."
Louisiana: Senate Bill 477, "To enact R.S. 22:1272 and 1273, relative to property insurance; to require insurers to cover certain claims related to business interruption; to provide for required notice; and to provide for related matters."
New York: Assembly Bill A10226, "An act in relation to requiring certain perils be covered under BI insurance during the coronavirus disease 2019 (COVID-19) pandemic." Pennsylvania: House Bill 2372, "Business Interruption Insurance Act."
South Carolina: Senate Bill 1188, "A bill to amend Article 1, Chapter 75, Title 38 of the 1976 Code, relating to property insurance generally . . . to provide that every policy of insurance in force in this state insuring against loss or damage to property . . . shall be construed to include . . . coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus."

The Contracts Clause

State-mandated retroactive coverage under an insurance policy already in force between two private parties immediately implicates constitutional issues. Insurance policies are contracts, so a State that retroactively mandates insurance coverage by statute may violate the U.S. Constitution's Contracts Clause. The Contracts Clause curtails the States' ability to interfere with already-existing contracts, as that provision states in relevant part: "No State shall . . . [pass any] Law impairing the Obligation of Contracts[.]".

There is a two-step test for determining whether government interference with a private contract violates the Contracts Clause. First, there must be a "substantial impairment of a contractual relationship." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (quotations, citations omitted). Second, if there is an impairment, then the impairment must not serve a "significant and legitimate" public purpose. *Id.* at 1822.

Some courts have found statutes modifying existing insurance policies substantially impair contractual relationships and fail to serve significant and legitimate public purposes. In *Kirven v. Century States Health & Life Co.*, 760 S.E.2d 794 (S.C. 2014), in response to certified questions from a South Carolina federal court, the South Carolina Supreme Court held that a statute modifying existing policies substantially impaired the parties' contractual relationship and did not serve a significant and legitimate public interest. The statute retroactively modified certain existing supplemental health insurance policies by mandating a definition for "actual charges" covered under the policy when the policy did not define "actual charges." The court adopted the reasoning in a related case, *Montague v. Dixie National Life Insurance Co.*, No. 09-687, 2011 U.S. Dist. LEXIS 61539 (D.S.C. June 8, 2011), which also held that the same statute substantially impaired a contractual relationship and failed to serve a significant and legitimate public interest.

In *Montague*, the court found the statute substantially impaired a contractual relationship because it violated the policyholders' expectations when it modified the policies by redefining "actual charges" contrary to the industry-wide understanding of the term when the policy began. The court also found there was no legitimate public purpose for the statutory definition because it, *inter alia*, applied only to specific policies. Query the implication of *Montague* on the pending legislation that targets only specific commercial property policies that provide business interruption coverage.

Courts, however, have upheld statutes modifying existing insurance policies in certain circumstances. In *Liberty Mutual Insurance Co. v. Whitehouse*, 868 F. Supp. 425 (D.R.I. 1994), the court declined to find that a statute modifying workers' compensation policies to require payment of cost-of-living adjustments to all recipients who were totally disabled for 52 weeks substantially impaired a contractual relationship or did not serve a significant and legitimate public interest.

The court held the statute did not substantially impair the policies because, *inter alia*, the policies expressly provided that benefits were subject to statutory amendments and the statute was foreseeable because 22 other States had previously adopted similar legislation.

The court also found the statute served the legitimate public purpose of workers' compensation legislation because benefits:

> [L]ikely constitute all or most of the income of the workers in question and many of them have seen increases in the cost of living seriously erode the purchasing power of their benefits. The COLA amendment seeks to prevent further erosion of those benefits and, therefore, serves the legitimate and substantial public purposes underlying workers' compensation legislation.

Liberty is distinguishable from a suit enjoining enforcement of statutes that modify policies with business interruption coverage. The statute in *Liberty* required an increase of benefits already paid. It did not provide coverage for claims that were not covered and may have already been denied. Additionally, the policies expressly stated they were subject to statutory changes to workers' compensation laws. The commercial property policies likely affected by the pending legislation were not subject to such a change and some policies expressly exclude coverage for property loss due to a virus. Finally, while in *Liberty* the new benefits were foreseeable because many states had previously adopted the same changes, the pending legislation is new and only arose because of COVID-19, which did not exist six months ago.

Who Can Be Sued?

Who should be a defendant is an important question because filing a lawsuit against a government entity (or individuals working for that entity) immediately implicates sovereign immunity. Generally, under the Eleventh Amendment,[2] a strong but not exclusive source of sovereign immunity, States enjoy sovereign immunity from many types of suits. Private plaintiffs may not sue States unless (1) a State has disclaimed its sovereign immunity by waiver or consenting to a suit; (2) Congress has specifically abrogated immunity; or (3) there is some other exception to the State's immunity.

State legislators: These individuals are absolutely immune for liability from their legislative activities. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court evaluated whether a civil rights attorney could sue members of the California State Legislature's Senate Fact-Finding Committee on Un-American Activities, a state legislative committee in the shadow of the infamous House Committee on Un-American Activities, when the Committee encouraged his local prosecution after he distributed a petition criticizing the Committee. The Court dismissed the complaint, finding that"[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." Accordingly, "Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." See also Ford v. Tennessee Senate, No. 06-2031, 2007 U.S. Dist. LEXIS 99081, at n.12 (W.D. Tenn. Aug. 15, 2007) ("In any event, the [Tennessee] Senate would be immune from suit under legislative immunity, barring any prospective and/or attorney fees awards against it.").

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

State officials: Because state legislators enjoy absolute immunity, a plaintiff may opt to not challenge that immunity and instead name a different defendant, such as a governor or other official outside of the legislative branch. For over a century, the Supreme Court has recognized an exception to Eleventh Amendment sovereign immunity for injunctive suits against state officials for perceived violations of federal law. *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* exception requires the named defendant to have a connection with enforcement of the challenged law. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). Courts have recognized that certain state officials, like governors or attorney generals, have a connection to the enforcement of laws in their States. In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the plaintiffs filed suit to enjoin the governor and attorney general of Nebraska from enforcing a section of the State constitution that limited marriage to opposite-sex couples. The court found there was standing because the governor and attorney general, who had "broad powers to enforce the State's constitution and statutes," had "some connection with the enforcement of" the section the plaintiff sought to enjoin. *Id.* at 864.

In addition, at least one court has recognized that signing legislation is a "ministerial" act not entitled to sovereign immunity. In *Ford*, 2007 U.S. Dist. LEXIS 99081, at *31, although the court rejected a suit against a state legislature itself on Eleventh Amendment grounds, it permitted the suit to continue against a lieutenant governor for his role in signing a resolution as Speaker of the Senate. Specifically, the court stated:

> This court concludes therefore that the signing of legislation in Tennessee after the respective house has passed it is a ministerial duty. The signing of a bill by [the lieutenant governor] does not involve any discretion or exercise of judgment on his part, nor is it an "an integral part of the deliberative and communicative processes." Instead, this is a requirement that must be performed subsequent to the deliberations in the Senate and the voting on the proposed legislation. Further, the individual senators are not distracted or hindered in performing their legislative tasks, i.e. deliberations and exercising discretion in voting, by the commencement of suit against the Speaker of the Senate seeking to prohibit him from signing the legislation before it is presented to the Governor. While the [lieutenant governor] is a state senator who was able to exercise his discretion in voting for or against Resolution 7002, he was sued as a defendant in the present suit in his capacity as Speaker of the Senate, who signs and authenticates proposed legislation.

Id.

Is there Standing to Sue?

Standing addresses who may file a lawsuit and when it can be filed. Every lawsuit must sufficiently allege a cognizable, non-abstract injury.

Obviously, filing an injunctive action after legislation becomes law would be the way to go; and courts addressing an injunctive suit to enjoin enforcement have generally addressed statutes and not pending legislation. There is a material difference between enjoining enforcement of an assembly bill that has not even been referred to a committee and a bill that has been signed into law, and courts have recognized that difference.

For example, in *Connecticut v. United States DOI*, 344 F. Supp. 3d 279 (D.D.C. 2018), the court held that a party had standing to intervene in a challenge to federal administrative action. In finding standing to intervene, the court distinguished the suit from "conjectural or hypothetical injuries based on future legislative action; the necessary legislative action has already occurred." *Id.* at 300-01 (quotations omitted). The court compared the case before it to a case that evaluated the Export-Import Bank's pending "economic impact procedures." *See Delta Air Lines, Inc. v. Export-Import Bank of U.S.*, 85 F. Supp. 3d 250 (D.D.C. 2015). In *Delta Air Lines*, the court declined to find standing when, at the time of the suit, those procedures "had **not yet been operative or been applied** to a specific financial transaction." *Id.* at 263-67. (Emphasis added). In *Connecticut v. U.S. DOI*, legislation affecting the federal administrative action had passed the state's legislature so the necessary legislative action had already occurred.

To achieve standing, a plaintiff must also show that the injury posed by the legislation is "certainly impending." In *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), the Supreme Court found that Amnesty International did not have standing to challenge the constitutionality of section 1881a of the Foreign Intelligence Surveillance Act, which permitted warrantless surveillance of non-U.S. persons located abroad. Amnesty argued that the surveillance would inevitably capture their communications with clients who would likely be caught in the government's scope of surveillance. The Court rejected this argument, finding that Amnesty's claim harm was too speculative to be "certainly impending." Specifically, the Court stated:

> First, it is speculative whether the Government will imminently target communications to which respondents are parties . . . [a]ccordingly, it is no surprise that **respondents fail to offer any evidence that their communications have been monitored under §1881a, a failure that substantially undermines their standing theory**. Indeed, respondents do not even allege that the Government has sought the FISC's approval for surveillance of their communications. Accordingly, respondents' theory necessarily rests on their assertion that the Government will target other individuals--namely, their foreign contacts.
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> Yet respondents have no actual knowledge of the Government's §1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under §1881a . . . Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target.

Id. at 411-12. *Post-Clapper*, courts have found standing for parties to enjoin statues when although they could not show that the statute had been used against them, they could show a "reasonable and well-founded fear" that the statute would be enforced against them. Plaintiffs have accomplished this by showing that the statute, as written, was intended to "specifically target" them. In *PETA, Inc. v. Stein*, 737 Fed. Appx. 122 (4th Cir. 2018), the court found a group of animal protection organizations had standing to challenge a recently enacted law that created a private right of action against persons who "exceed[ed] the scope of authorized access" to the property of an owner or operator. The plaintiffs successfully argued that the statute would interfere with their ability to conduct undercover investigations of government facilities for purposes of gathering evidence of certain types of animal treatment and disseminating the information to the public.

The court identified three primary reasons why the plaintiffs' alleged injuries were not "too speculative" for standing: (1) the plaintiffs had previously engaged in undercover investigations; (2) the statute prohibited the plaintiffs' planned investigations and subjected them to civil liability; and (3) plaintiffs' fear of enforcement was "reasonable and well-founded" when they alleged that the statute was "specifically targeted at public-interest organizations" like themselves.

There is a strong argument that insurance companies would have a "reasonable and well-rounded fear" of a law that imposes upon them additional coverage at the risk of civil penalty. Like *PETA*, the proposed statutes "specifically target" insurers. Insurance companies should have no problem asserting standing to bring an injunctive action challenging the prospective laws.

Conclusion

The unintended consequences from the COVID-19 business interruption legislation, should that legislation become law, could very well cause a major disruption in the insurance industry. At the least, such legislation would interfere with the rights of private parties and raise constitutional concerns. While immunity and standing issues need to be considered, ultimately they should not preclude judicial challenges to the proposed legislation if enacted.

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