Maryland Defense Counsel
P.O. Box 575
Riderwood, MD 21139

Senate Finance Committee
March 8, 2022

Testimony of the Maryland Defense Counsel, Inc. ("MDC") in Opposition to

Senate Bill 10 – Workers' Compensation – COVID-19 Occupational Disease Presumption

Senate Bill 10 creates a rebuttable presumption that a COVID-19 diagnosis is an occupational disease arising out of and in the course of employment for certain classes of workers. SB 10 will allow an injured worker to establish a *prima facie* case for COVID-19 as an occupational disease by submitting (1) proof of a positive COVID-19 test, and (2) proof that the test was administered within 14 days after the employee worked for the employer in an assigned location other than the employee's home. The injured worker would not be required to submit any additional proof. Once this threshold evidence is submitted, the burden would then shift to the employer/insurer to submit "substantial evidence" showing that the injured worker did not contract COVID-19 while working. Notably, SB 10 applies to all diagnoses that occur between March 1, 2020 and July 31, 2023. This renders the statute retroactive as it explicitly applies to diagnoses that occurred *prior to* the effective date of the statute.

It is the MDC's position that the retroactive aspect of this presumption bill is unconstitutional. Retrospective statutes that abrogate vested property rights, including contractual rights, violate the Maryland Constitution; specifically, Articles 19[1] and 24[2] of the Maryland Declaration of Rights and Article III, § 40, of the Maryland Constitution.[3] *See Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 629-30, 805 A.2d 1061, 1076 (2002).

In *Dua v. Comcast Cable,* the Court of Appeals of Maryland ruled two different statutes passed by the General Assembly were unconstitutional. The first was a statute enacted in 2000 that increased the allowable recovery for late fees in consumer contracts that were "entered into, or in

[1] Article 19 of the Declaration states "[t]hat every man, for any injury done to him in his person **or property**, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land." Md. Const. Declaration of Rights, art. 19 (emphasis added).

[2] Article 24 of the Declaration states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty **or property**, but by the judgment of his peers, or by the Law of the land." Md. Const. Declaration of Rights, art. 24 (emphasis added).

[3] Article III of the Constitution states "[t]he General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Md. Const. art 3, § 40.

effect, on or after November 5, 1995." *Id*. at 610-11, 805 A.2d. at 1065. The second statute provided that contracts between a health maintenance organization ("HMO") and its customer were permitted to contain subrogation provisions allowing the HMO to be subrogated to a cause of action that a customer had against another person. *Id*. at 611, 805 A.2d. at 1065. The HMO statute was also enacted in 2000 and it applied to "all subrogation recoveries by an [HMO] recovered on or after January 1, 1976." *Id*.

In finding both of the statutes unconstitutional, the Court emphasized that "[n]o matter how "rational" under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else."[4] *Id.* at 623, 805 A.2d at 1076. It held that **there is normally a vested property right in a cause of action which has accrued prior to the legislative action**. *See id*. at 633, 805 A.2d at 1078.

Accordingly, the legislature is barred "from retroactively creating a cause of action, or reviving a barred cause of action, thereby violating the vested right of the defendant." *Id*. *See also Smith v. Westinghouse Electric*, 266 Md. 52, 57, 291 A.2d 452, 455 (1972). It is further precluded from "abrogating accrued causes of action." *Dua*, 370 Md. at 645, 805 A.2d at 1085 (citing *Gibson v. Commonwealth of Pennsylvania*, 490 Pa. 156, 160–162, 415 A.2d 80, 83–84 (1980), which held that a constitutional provision similar to Maryland's Article 19 providing that persons are entitled to justice "'by the law of the land,'" means "'that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in substance, by any subsequent law.'").

The Court further clarified that even a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights. *Id*. at 625, 805 A.2d at 1073. This principle applies to both common law and statutory causes of action. *Id*. at 632, 805 A.2d at 1077.

These principles were previously applied by the Court of Appeals with respect to retroactive modifications of the Workers' Compensation Act in *Cooper v. Wicomico County Department of Public Works.* In *Cooper* I and *Cooper* II the Court issued decisions analyzing the constitutionality of a retroactive increase in the amount of benefits payable to a claimant who was found to be entitled to permanent total disability ("PTD") benefits. *See Cooper* I, 278 Md. 596, 366 A.2d 55 (1976), and *Cooper* II, 284 Md. 576, 398 A.2d 1237 (1979). In the *Cooper* cases the subject statute increasing the compensation rate was enacted in 1973 and it retroactively applied to all injuries suffered after July 1, 1965 and prior to July 1, 1973. *See Cooper* I, 278 Md. at 598, 805 A.2d at 57. Given that Mr. Cooper was injured in 1969 and awarded PTD benefits in 1971, the statute increased the maximum compensation payable for his PTD award from $30,000 to $38,397 and it applied a supplemental allowance to his weekly benefit increasing it from $45.33 to $57.96.

The Court held that the statute unconstitutionally disturbed the vested rights of the employer and insurer because the operational effect of the statute required them to pay more than

[4] Maryland does not apply the "rational basis" test applied by the Federal Courts when analyzing whether a retroactive civil statute violates the U.S. Constitution. *See* i*d. at* 623, 805 A.2d at 1072.

they were required to pay under the law in effect at the time of the injury.[5] *See id.* The Court held as such because "the basis for a compensation award is contractual and the amount payable thereunder cannot be increased retrospectively." *Id*. at 598-99, 366 A.2d at 57. In doing so, the court noted that:

> An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that **the statute giving the commission power to make an award is read into and becomes a part of the contract**…. The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents.

Id. (quoting *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 271 (1992)) (emphasis added). As indicated above, the Court's holdings in *Dua*, *Cooper* I and *Cooper* II, make it clear that it is unconstitutional for the General Assembly to enact retroactive legislation that impairs or adversely impacts a defendant's vested rights in a cause of action that has already accrued in the workers' compensation context.

Currently, in Maryland if a workers' compensation claim is controverted by the employer/insurer, then the injured worker generally bears the burden of proof to establish that his or her condition is an occupational disease that arises out of and in the course of employment.[6] *See Hathcock v. Loftin*, 179 Md. 676, 678-79, 22 A.2d 479, 480 (1941). If enacted, SB 10 will shift the burden of proof in COVID-19 claims from the injured worker onto the employer and insurer in claims where the cause of action has already accrued (*i.e.*, the diagnosis has already occurred). Doing so adversely impacts the rights of employers and insurers by prejudicing their defenses and

---

[5] In *Cooper* I the court held that the retroactive increase in the amount of benefits awarded was unconstitutional, but the case was remanded to obtain evidence as to whether the reimbursement provision in the statute removed the adverse financial impact to the employer/insurer. In *Cooper* II the court reviewed the evidence obtained and concluded that the reimbursement provision in the statute did not render it constitutional because there was still a financial injury to the employer and insurer. *See Coope*r II, 284 Md. at 584, 398 A.2d at 1241.

[6] There are exceptions to this general rule due to some statutory presumptions set forth in the Act, but none of the presumptions currently set forth in the Act apply to a COVID-19 diagnosis. *See* Md. Code Ann., Lab. & Emp. §9-202(a) (2022) (presuming that a worker is a covered employee while he or she is in the service of an employer under an express or implied contract for hire); Md. Code Ann., Lab. & Emp. §9-503 (2022) (creating statutory presumptions that certain diseases (heart disease, hypertension, lung disease, Lyme disease, and specific cancers) constitute occupational diseases arising out of and in the course of employment for certain types of employees in public safety related positions); Md. Code Ann., Lab. & Emp. § 9-506(f)(1) (2022) (presuming that injuries are not the result of an employee's deliberate act and placing the burden upon the employer to prove an employee's intent to inflict injury); Md. Code Ann., Lab. & Emp. § 9-506(f)(2)-(3) & (g) (2022) (presuming that injuries were not caused solely or primarily by intoxication of the employee); Md. Code Ann., Lab. & Emp. § 9-702 (2022) (presuming that the claim "comes within the Act," that the injured worker provided sufficient notice of the injury to the employer, and that the employer was not prejudiced by a claim filed more than 60 days after the injury).

substantially reducing the amount of proof required in order for a claimant to successfully pursue a claim. This will make it remarkably easier for an employee to obtain workers' compensation benefits related to COVID-19, which would have an adverse financial impact on employers and insurers by requiring it to pay claims that would normally have been defensible under the existing burden of proof. Such a shift in the burden of proof is unconstitutional when applied to the employer and insurer's vested property rights in the accrued cause of action related to a COVID-19 diagnosis.[7]

For all these reasons, the MDC respectfully requests that the Committee provide an unfavorable report on SB 10.

Contact: Maryland Defense Counsel, Inc.
P.O. Box 575
Riderwood, MD 21139
www.mddefensecounsel.org

Michael L. Dailey, Esq.
Legislative Committee Chair
Cell: (443) 286-5660

Ashlee K. Smith, Esq.
Legislative Committee Member
Cell: (410) 463-5800

[7] *See e.g., San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999) (finding a statute that retroactively changed standards pertaining to water rights violated the state's constitutional due process clause because it impaired or altered vested property rights and noting that legislation "may not disturb vested substantive rights by retroactively changing the law that applies to completed events."); *DeWoody v. Superior Ct.*, 8 Cal. App. 3d 52, 56-57, 87 Cal. Rptr. 210, 212-13 (1970) (finding a change in the rules of evidence by creating a presumption of intoxication based on blood alcohol levels was unconstitutional when applied retroactively because it deprived the defendant of substantial protection and permitted the defendant's conviction upon "less proof, in amount or degree," than was required at the time of the offense).