



CLM 2020 Focus: Cannabis, Environmental, Insurance Fraud,
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Lessons Learned from COVID-19 on the Insurance Industry and Property Claims

Background and Purpose

To no one's surprise, COVID-19 is the hottest topic of 2020; no industry, profession, or individual has been spared from the conversation. Executive orders shuttered businesses and changed the face (figuratively and literally) of industries everywhere. As we return to [new] normalcy following the quick shutdown and the pandemic itself, we've witnessed how vulnerable every industry, profession, and individual truly was. Businesses locked their doors in the face of the pandemic with no continuity plans for preserving goods. Contractors abandoned construction projects sites in unfinished states. The examples are endless. No matter the industry, where vulnerabilities were not properly planned for, or addressed prior to the shutdown, losses were inevitable. Who bears the burden associated with the losses? The business owner, contractor, insurance carrier, government, or purely an act of God? Who bears the ultimate responsibility? The discussion exploits lessons learned with foresight in anticipation of what's to come, whether COVID-20 or something else yet to be known.

I. The Ultimate Disruptor of 2020

The Virus, Pandemic, and Confusion

The novel coronavirus, officially named "SARS-CoV-2," that causes the Coronavirus Disease 2019, is referred to as COVID-19. According to the U.S. Centers for Disease Control and Prevention (CDC), a new coronavirus was identified in China in late 2019; the virus spread globally and reached the United States in 2020. The global spread of the virus caused the World Health Organization (WHO) to designate COVID-19 as a "pandemic" on March 11, 2020. Two days later (March 13, 2020), President Trump declared a national emergency due to the pandemic.

Due to unknowns surrounding the source of the virus, the effects, the symptoms, preventative measures, and more, the COVID-19 response has been marred with confusion. Reality has shown the pandemic to be mostly fluid – in that the situation is constantly changing. The CDC constantly is updating its website with new information and thus information is often outdated in hours, days, and minutes – which has compounded the pandemic response for individuals, business, and industries worldwide. One notable industry that has been affected

and will continue to see effects in the insurance industry; and by extension, effects have been felt downstream in the litigation and expert witness fields.

Direct and Indirect Effects on Insurance and Litigation

The insurance industry was largely impacted due to a multitude of different areas due to COVID-19; some of these areas include (in no order): business interruption, the classification of the virus, travel restrictions, and coverage. The litigation field has experienced its own challenges – both related to insurance and not. One of the most notable changes relates to the use of video conferencing – for depositions, mediations, settlement conferences, and more. Challenges to such have gone viral online including individuals “forgetting” what they are doing on livestreamed videos.

II. The Effects of COVID-19

Downstream Impacts

Several top stories, with downstream effects on the insurance industry, that have taken the spotlight since the United States government declared a national emergency have included the following:

Virus Reporting, Panic, Mayhem

With significant unknowns about the virus at the onset of the pandemic, everyone had questions. CDC guidelines were constantly being honed and developed. Individuals and business were faced with ethical questions regarding the use of masks, social distancing, and containment. Industries were directly impacted due to fear and unknowns; including but not limited to travel, hospitality, restaurants, and retail. A run on businesses resulted, most notably for food and household goods, caused shortages and increased demand for certain products.

Shutdown 1.0, Reopening, and Shutdown 2.0

Due to the spread of the pandemic, executive orders from varying levels of government (i.e. federal, state, local, etc.) caused immediate changes for businesses. Due to “shelter-in-place” and social distancing orders (and similar), businesses were categorized as “essential” or “nonessential,” which was met with varying degrees of response. The purpose of the categorization by government agencies was to slow the spread of COVID-19. Entities providing critical infrastructure, such as medical centers and food retailers, generally remained open, but businesses providing services or products that are recreational or less critical were ordered to close or operate remotely. Legal disputes arose due to the closures of certain categories of businesses, including but not limited to movie theaters, restaurants, and small businesses. In April, 2020, a lawsuit in California alleged that such policies violated 5th and 14th amendment rights, including the following excerpt (quote from plaintiff attorneys at Geragos & Geragos): *“These policies, as well-intentioned as they may be, have had an unlawful and disparate effect on some people and their businesses over other people and their businesses to the point where life, liberty and the pursuit of happiness has been ripped away from law-abiding citizens and businesses.”* The lawsuit sought a declaratory judgment that the state and local health orders violated the California and U.S. constitutions and an

injunction barring enforcement of the orders *“unless they are issued in accordance with all procedural and substantive due process requirements of the U.S. Constitution.”*

Moreover, due to the shutdowns and social restrictions, businesses were forced to lock their doors (many without continuity and/or restart plans), while some contractors were forced to abandon construction sites in unfinished states. The central theme with these businesses was related to business interruption coverage. On May 21, 2020 a total of 101 federal lawsuits had been filed seeking coverage from insurers for business interruption losses caused by COVID-19. This figure excluded lawsuits filed in state courts. An article published in Claims Journal highlighted these cases: *“The 101 cases...were tagged by the U.S. Judicial Panel on Multidistrict Litigation because they are related to a petition filed by groups of plaintiffs in Philadelphia and Chicago to assign to a single judge all COVID-19 business-interruption lawsuits filed in federal courts. The panel was created in 1968 to determine whether civil actions pending in different federal districts involve one or more common questions of fact and should be coordinated or consolidated for pretrial proceedings.”* The article continued, *“the central question binding all of the lawsuits is whether the novel coronavirus amounts to a physical loss of property that triggers insurance coverage for business income lost because of government ordered closures. The federal filings show that question is being asked by restaurants, taverns, dental practices, day care centers and hair salons across America.”*

Transitioning Business

Due to the pandemic, reporting to offices was no longer possible and/or not allowed due to government restrictions. Satellite offices and remote workplaces were established, while travel restrictions were implemented. Technology was leaned upon heavily to solve the face-to-face, boots-on-the-ground problem. However, technology created its own problem – with privacy challenges associated with claims and litigation, as well as ethical issues of “virtual inspections.” For instance, Zoom Video Communications (Zoom) became a top platform for completing such investigations, though it appeared Zoom was violating customer’s privacy through selling their information. A Sacramento, California user subsequently sued (*Case 5:20-cv-02155-SVK*) due to such violations throwing a wrench into technology helping solve COVID-caused problems. The lawsuit alleged that Zoom *“...exploded in the face of the current COVID-19 virus pandemic that is impacting the world and while a majority of Americans are currently under “stay home” or “shelter in place” directives.”* It continued that Zoom *“failed to properly safeguard the personal information of the increasing millions of users of its software application (“Zoom App”) and video conferencing platform.”*

Restarting “paused” Operations

Equipment that was shut down due to the COVID-19 pandemic will be required to restart. The effectiveness of the restart is tied to how the equipment was shut down; in turn relevant to breakdown coverage. This scenario is applicable across all industries including but not limited to automobile factories, consumer good factories, marine vessels, boilers, HVAC, and more. Liberty Mutual Insurance opined on the topic in an article published in June 2020 on their website. Included was reference to following *“manufacturer’s instructions on maintaining, testing, and restoring the equipment.”* The article continued with additional guidance and recommendations, to aide in reduction of risk for Liberty as well as the ultimate insured.

Ethical Questions

Constitutional rights have been discussed widely as a result of COVID-19, as well as other current events. One emerging topic relates temperature checks, questionnaires, and such to allow entrance inside businesses or homes. Businesses have responsibilities to protect their employees and adding such precautions can help slow the spread of the virus, though the implication has raised ethical questions. For instance, do you have the right to ask someone if they have the virus? If they have been exposed to the virus? Specifically, some companies (including those tied to the insurance industry) have implemented such questionnaires to protect their interests. Asking such questions is socially responsible while walking a line with privacy concerns.

III. Ultimate Responsibility with Effects of COVID-19

Government Intervention – and Insurance Coverage

Aside from the shelter-in-place and shutdown orders, in March, 2020, members of the U.S. Congress directed their attention at four major insurance trade organizations *“to make financial losses related to COVID 19 and other infectious disease-related losses part of their commercial business interruption coverage for policy holders.”* The members of Congress advised that the *“shelter-in-place”* orders that have been issued around the country *“will no doubt have an economic impact on America’s businesses, particularly its small businesses.”* Regardless of applicable coverage, the group argued the following:

- *“Business interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19 will help sustain America’s business through these turbulent times, keep their doors open, and retain employees on the payroll.”*
- *“During times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholder’s business interruption coverage. Additionally, we stand ready and willing to work with you on any other measures that might be necessary to see our country through this trying time.”*
- *“Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.”*

The insurance industry responded with regards to the *“ability of the insurance industry to compensate businesses for economic losses stemming from this global health emergency and about the nature and applicability of business interruption insurance. ... Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.”*

Business Interruption

Most Commercial General Liability (CGL) policies do not contain “virus” exclusions as might be found in a first-party property policy. A number of examples of exclusions that may be included in a CGL policy that could be raised by insurers as a basis for a denial of coverage include the following: communicable disease exclusion, fungi or bacteria exclusion, pollution exclusion, employer’s liability exclusion, and/or miscellaneous other exclusions. Typically, a CGL policy contains two main coverage parts: Coverage A for “bodily injury” and “property damage” liability; and Coverage B for “personal and advertising injury” liability. The likelihood of claims arising from exposure to COVID-19 are most likely to fall within Coverage A, as well as policy exclusions that may preclude coverage.

As noted previously, lawsuits alleging breach of contract due to business interruption have started. In June 2020, In-N-Out Burger sued its insurance company, Zurich American Insurance Company, claiming *“the insurer breached its contract by denying the chain’s claim for business interruption losses tied to the coronavirus pandemic.”* The lawsuit reportedly does not indicate a demand due to revenue lost during the pandemic; however, the suit does indicate that it’s “all risk” policy does not have an “exclusion for viruses or infectious diseases.” Refer to Case No. 8:20-cv-01000, in U.S. District Court for the Central District of California.

Contrarily to the In-N-Out suit, in alignment of the aforementioned insurance industry response, many insurers have claimed that various clauses in these policies (i.e. virus exclusions), negate the claim for coverage.

Extension and Grace Periods

The State of California Department of Insurance issued a notice in March 2020, stipulating that insurance companies shall give insureds a 60-day grace period to pay premiums in lieu of cancellation of policy. Specifically, *“In response to the disruption caused by the outbreak, Insurance Commissioner Ricardo Lara is requesting that all insurance companies provide their insureds with at least a 60-day grace period to pay insurance premiums so that insurance policies are not cancelled for nonpayment of premium during this challenging time due to circumstances beyond the control of the insured. This request is directed to all admitted and non-admitted insurance companies that provide any insurance coverage in California including, life, health, auto, property, casualty, and other types of insurance.”* In April 2020, an additional notice directed deadlines (such as statute of limitation) would require extensions. Specifically, *“All licensees are hereby notified that they should not attempt to enforce policy or statutory deadlines on policyholders until ninety (90) days after the end of the statewide “state of emergency” or other “state of emergency” that impacts a specific policyholder. This includes, but is not limited to, deadlines for the submission of a sworn proof of loss, other claim forms, examinations under oath, medical examinations, physical inspections of insured property, separating damaged property from undamaged property, temporary repairs to prevent further damage, and any other policy, statutory, or insurer imposed deadlines placed on the policyholder where failure to comply could result in the forfeiture, limitation, or waiver of any policyholder(s) rights to benefits under any policy of insurance.”* California was one of the first states to intervene in the insurance industry in this manner; the discussion continues to whether this was appropriate, ethical, or binding.

Force Majeure & Legal Strategies

Due to the COVID-19 pandemic, many businesses have been faced with circumstances that may excuse or delay their obligations to perform under existing contracts due to the

occurrence of a force majeure event. Force majeure is a contractual defense that allows a party to suspend or discontinue performance of its contractual obligations under specific circumstances. With shelter-in-place orders and such, businesses are claiming force majeure given they are unable to operate/perform contracted tasks due to conditions outside of their control.

IV. The “new” Normal the Post-COVID Era

Virtual Inspections and Beyond

Insurance companies, expert witness firms, litigation professionals, and others (included and beyond the insurance space) have been forced to conduct investigations differently than pre-COVID. Specifically, inspections for claims or lawsuits. Claims professionals must investigate claims of damage – like that being performed by experts. How can a fire scene be secured in such a scenario? How can a Professional Engineer establish “responsible charge” of an expert opinion through FaceTime or Skype?

AON provided insight from the insurance side: *“Virtual inspections are the logical manifestation – both during and after the pandemic – of the need for decentralization, with employees working remotely and productively by inspecting multiple losses virtually. Virtual inspections involve a remote desktop assessor connecting directly with a policyholder to inspect and assess their claim using live video streaming, meeting every insurer’s need to ensure the safety of customers and employees.”* From the claims perspective, this could potentially provide initial understanding of a loss; however, more detailed analysis and in-person investigation will often be required by claims, experts, and others – utilizing Personal Protective Equipment (PPE) and safeguards.

Virtual Depositions, Trials, Mediations, Etc.

Virtual litigation has taken off – including virtual depositions, trials, and mediations. In April 2020, the Chief Justice from the State of New York endorsed the “virtual” depositions. The Chief Judge stated, *“we are committed to keeping our courts open to hear essential and emergency matters throughout this difficult period.”* She continued with a forecast for the virtual depositions, that *“we have been discussing—with leaders of the tort, commercial, matrimonial and criminal bar—how we can incrementally expand court access for those cases . . . through virtual operations and remote appearance.”*

An article published in The Daily Guardian in June 2020, explored the idea of virtual proceedings, discussing the feasibility and legality. The article provided a formidable conclusion: *“...virtual court can be optional but not absolute. Indian judiciary is still not ready for virtual court; it has been imposed by the COVID19. Moreover, virtual court can be an option for urgent matter, like Bail & Stay but not recording of witnesses or entire proceedings. This may be the reason why the seven judges committee of Supreme Court issued SOP till 30 June only & taking the stock of situation will be decided further. One must remember that the revolution that is the virtual court system is because the outbreak of COVID19 [and] not preplanned execution; hence the courts are treating virtual court as an option not as absolute.”*

Return to Normalcy

Normalcy in joint inspections and in-person litigation might look very different – with the use of PPE, social distancing, and additional safeguards. There are unknowns as to what

“normal” will look like. The days of handshakes are already perceived to be a “blast from the past,” so only time will tell.

V. Conclusions & Takeaways

Preparation for the panel discusses the impact from COVID-19 that can be expected next year, the following year, and years to come.

The panel explores methods that claims professionals are using in their efforts to deal with the fallout from COVID-19 and reduce risk.

The panel explores trends that can be taken from Covid-19 that will be here to stay in claims management.