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Beyond the Pandemic: Anticipating the Next Industry Disruptors in Property and Construction

Background and Purpose

As 2021 arrived, it's safe to say we didn't want to talk about the pandemic from 2020; We are all so over it that we won't even name it! What we do need to talk about is how to plan for and anticipate the next industry "disruptor." None of us know when, or if, such a disruptor is coming – hopefully not any time soon. We saw in 2020 that no industry, profession, or individual was spared from the conversation or spared direct impacts. From executive orders, shuttered businesses, and what we now call the "new" normal, one common thread was visible – we were all vulnerable and had to pivot from the "old" normal just to stay afloat. As Americans, we are resilient, and as 2021 arrives, those lessons learned from 2020 are teed up for discussion. One of the most impacted industries was insurance, so we must have foresight rather than hindsight. Hot button topics that continue include business interruption, force majeure clauses, and defining an act of god. Although there were plenty of contentious moments and anxiety-filled days, there were also positives that came out of the pandemic. Consider teamwork and collaboration, taking advantage of technologies previously not explored to their fullest, and more.

Rather than playing defense, this panel explores playing offense with emerging trends related to the issues we are living and adapting through as the new normal, and how we can be ready for whatever it is that comes next.

I. Overview of the Ultimate Disruptor of 2020

The Virus, Pandemic, and Confusion

The novel coronavirus, officially named "SARS-CoV-2," that causes the Coronavirus Disease 2019, shall not be named beyond its official name. 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 a "pandemic" on March 11, 2020. Two days later (March 13, 2020), President Trump declared a national emergency due to the pandemic.

Direct and Indirect Effects on Insurance Industry

One notable industry that has been affected and will continue to see effects is the insurance industry; *and by extension*, effects have been felt downstream in the litigation and expert witness fields. The insurance industry was largely impacted due to a multitude of different areas due to the pandemic; 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.

Hindsight is 20:20

Due to unknowns surrounding the origin of the virus, the effects, the symptoms, preventative measures, and more, the response to the pandemic was marred with confusion. Through 2020 and into 2021, the response to the pandemic has had to remain fluid – in that the situation is constantly changing. Through 2020 and 2021, the CDC constantly has updated 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. As 2020 ended, hope was on the horizon with the rollouts of multiple vaccines; 2021 has seen additional promising results with additional (alternate) vaccines likely to hit the market.

Hope is defined as “a feeling of expectation and desire for a certain thing to happen.” Thus, we must pivot from hindsight or lessons learned approach, and consider an outlook on the future with foresight. Consider the roles of insurance professionals in risk management and/or underwriting for guidance. Risk managers “*forecast and evaluate risks with the identification of procedures to avoid or minimize their impact.*” Underwriters “*sign and accept liability under (an insurance policy), thus guaranteeing payment in case loss or damage occurs,*” and “*accept (a liability or risk) under an insurance policy.*” As insurance professionals, litigators, and experts, we must consider such definitions as we plan, prepare, and anticipate for the *next* disruptor.

II. Was ALL of 2020 that bad?

Downstream Impacts

Several downstream effects on the insurance industry evidenced the struggle; however, both good and bad things have been realized through the pandemic response and outfall, including the following:

Virus Reporting, Panic, Mayhem

With significant unknowns 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.

Vaccine Rollout

Perhaps we all needed to be optimistic. Perhaps we were lead to believe that the vaccine would be the saving grace. As the calendar turned to 2021, we all prepared for the vaccine to be more widely rolled out so we could get back to normal. Only to be met with more delay and confusion. Delayed distribution, production and “missing” vaccine. And then even if the vaccine were distributed, actual administration posed its own set of challenges – who was entitled to get the vaccine, how quickly, and where can those clinics be hosted. So as we moved into a new year, we were met with more of the same confusion and uncertainty which plagued us in 2020.

Shutdown and Reopening – Rinse, and Repeat

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 curtail the pandemic.

Entities providing critical infrastructure, such as medical centers and food retailers, generally remained open, but businesses providing services or products that are considered to be 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.”*

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 pandemic-caused problems. The lawsuit alleged that Zoom *“...exploded in the face of the current ... 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.”* Zoom, WebEx, and Teams have revealed complications;

however, they have also provided the industry to stay more involved than previously – mediations can be attended without traveling cross-country. Expert depositions and trial testimony can be done remotely. The industry adapted, and although struggles continue, technology has been embraced.

Ethical Questions

Constitutional rights have been discussed widely as a result of the pandemic 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. Claims and Insurance Update

What Worked? What Didn't Work?

The best way to answer questions regarding what worked and what didn't is through a lesson learned approach.

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 [the pandemic] 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.”* 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 [the pandemic]. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.”* Given the pandemic has not ended, there is much to be determined on this story.

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.

- 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 to include 90 days after the end of the state of emergency. 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 Clauses

Due to the pandemic, many businesses were 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.

Legal Strategies with 2020

In litigation, emerging technologies became a staple and required lawyers and consultants to quickly adapt, learn and master in 2020. The need for change is at the forefront of agendas.

Adjusting to video depositions, mediations and trials required the legal community to learn how to be effective advocates for their clients through a computer screen. In some ways, being in the same room as your client while both speaking through a computer screen proved to be an acceptable hybrid approach to video depositions and mediations. While certain things are better “in person” it is anticipated that at least through a large portion of 2021 this trend will continue.

IV. Current State of the Insurance Industry: the “new” Normal in 2021

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 – similar to 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? From the claims perspective, virtual inspections potentially provide an 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 inspections have not, and cannot, replace a hands-on evaluation. Working to integrate new technologies can only help.

Virtual Depositions, Trials, Mediations, Etc.

Virtual litigation took off – including virtual depositions, trials, and mediations. In April, 2020, the Chief Justice from the State of New York endorsed the “virtual” future. 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 future, 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.”* Virtual litigation has continued into 2021.

Adapting to virtual litigation going forward is a necessity in the claims community. Video conferences, a more sophisticated usage of drones, artificial intelligence and other emerging technologies are gaining traction and being ubiquitous in litigation and claims.

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. What’s Next?

Adapting from what we’ve learned

Claims handling and investigation is going through a period of change during the pandemic. Moving forward there's more uncertainty on the horizon. Being creative and flexible is an important skill to adapt to the present and prepare for the uncertain future.

What impact can we expect in 2022, 2023, and beyond?

2020 changes our collective understanding of just how pervasive and expansive an impact any one disruptor may have. Prior to 2020, localized issues tied to catastrophes or similar events were in large part expected and, therefore, planned around. Insurance, as with other industries, had business continuity and disaster recovery plans in place – but few had any play book to address a nationwide shut down.

Can we return to our FORMER normalcy?

Despite the confusion and uncertainty of 2020 (and into 2021), it forced many businesses, including the insurance industry, to transform in many positive ways that will change our notion of what is normal. Our former normalcy is gone. However, we have expanded our capabilities and learned that the industry can, in fact, pivot in the face of unforeseen and unanticipated circumstances, in large part by harnessing the technology that many have been hesitant to embrace.

How are we mitigating future risks?

What methods are claims professionals using in their efforts to deal with the fallout from the pandemic and reduce risk?

Be ready for a pivot.

“Anticipate the breaking ball. Be ready for the fastball.”

V. Conclusions & Takeaways

We must prepare for the future – whether a pandemic or something else. The panel explores trends that can be taken from the pandemic that shall not be named and determine what will be here to stay in the insurance industry.