INSURTECH: THE WILD WEST OR A WELL-PAVED PATHWAY TO THE FUTURE?

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The property insurance underwriter of 2000 faced difficult hurdles. For example, a potential customer would submit an application for a commercial line of insurance for a 10,000 square foot commercial property. The underwriter had no information upon which to calculate the appropriate premiums and coverages with the exception of the 3-page application she received from the property owner. The underwriter, as she had done hundreds of times before, issued a policy for full coverage on the property. Three months later, a claim is submitted for full roof replacement. An adjuster adjusts the claim and finds that the roof is a total loss. If only the underwriter knew that the damage for which the insured is seeking coverage pre-existed the issuance of the existing policy by four years.

The property insurance underwriter of the future will have a different experience. Beyond just the application for insurance coverage submitted by the potential customer, the future underwriter will have a variety of information to dissect, including historical weather data, satellite imagery, and, perhaps most importantly, drone imagery showing the condition of the roof as it existed before the inception of the policy. This time, when a claim for full roof replacement is made, the carrier’s artificial intelligence claims handling software will recognize that the damage predated the coverage period.

While it may seem to the casual observer that this type of technological revolution in the insurance industry is unrealistic, many insurers have already positioned themselves to be at the forefront of the automation uprising. Just ask insurance giants Munich Re and Maiden Re, who just last year launched a new product that uses drones and artificial intelligence to analyze the characteristics and risk of a property and its roof to provide more accurate quotes that convert at a higher rate.¹

The insurance industry, while historically well-insulated from new, innovative competitors due to high levels of government regulation and massive entrance costs, has made significant moves to incorporate advancing technologies into its business practices. In addition, the industry has witnessed insurance startups with unique perspectives on insurance practices emerge. As insurance startups and incumbents vie against one another to win over the business of customers, leveraging new insurance-related technologies, now known as “insurtech,” is becoming more and more important in creating (or maintaining) success in this ever-changing market. However, as with all innovations, the adaptation of technology in the insurance sector is sure to bring new legal problems.

**What is Insurtech?**

Insurtech is a term meaning “the use of technology innovations designed to squeeze out savings and efficiency from the current insurance model.”² How different market players have begun to implement insurtech into their practices differs based on business goals. For example, large, financially stable carriers look for ways to hedge their risk groups more efficiently to increase their bottom line, while startups look to utilize insurtech to

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explore avenues that larger insurance firms have less incentive to exploit, such as ultra-customized policies, social insurance, and using new streams of data to adjust premiums of individual customers with real-time information.

**Current Uses of Insurtech**

The economics of running a successful insurance company can be simplified into a facially simple equation—the profits that a carrier makes are equal to its earned premiums less its incurred losses. Insurance carriers understand that the best way to leverage this equation is put to work the theory of large numbers. As the number of policyholders increases, the probability is higher than the actual loss per exposure will equal the expected loss per exposure unit. However, with more policies comes more information that carriers need to evaluate to maximize their gain. How carriers decide to interpret the potential information available to them can either make or break a carrier’s bottom line.

This is where savvy insurance carriers have decided to turn their attention to the promised land of insurtech. Insurtech can help carriers on both sides of the insurance process—underwriting and claims handling.

**Insurtech in the Underwriting Process**

Business success is commonly found where opportunity meets preparation. At least that is the way insurance startup Lemonade sees it.³ Lemonade is an insurance company built around artificial intelligence and behavioral economics boasting to collect “100 times more data than traditional carriers.”⁴ By employing artificial intelligence to interpret this wealth of information, Lemonade argues that it is able to increase underwriting precision improving premium pricing accuracy and lowering claims costs by reducing fraud.⁵ The more data that Lemonade accumulates, the more recursive risk patterns its AI is able to recognize, enabling more precise assessments.

Commercial lines insurance remains a sector where high degrees of expertise and specialization allow insurers and brokers to carve out very specific and profitable niches in the market, making the definition of the “best” risks necessarily relative. “The specificity of commercial lines business is precisely why these insurers are poised to become the beneficiaries of new tech driving efficiency gains up and down the value chain.”⁶ In an age overwhelmed by new tech, the ideal method for commercial lines insurers to recognize, compete for, and win the right to write the “best” risks possible include

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investing in solutions and partners which enable better communication, better products and significantly better distribution.\textsuperscript{7}

The most profitable policies to underwrite are the ones where carriers possess the most accurate information. While Lemonade is currently the “pop-icon” of mass insurance information analysis, other, more traditional carriers have also recognized the need for expanded avenues of data collection and interpretation. Insurance giant Swiss Re began encouraging adaptation of insurtech by launching the “InsurTech Accelerator.”\textsuperscript{8} Since 2017, the Accelerator has produced technologies that make better agricultural yield predictions by analyzing satellite images and other data sets, facilitate commerce transactions, linking insurance to the credit scoring and conceptualize ideas for new product solutions, and more.\textsuperscript{9}

Beyond the mere promotion of insurtech, some carriers have even begun to engage in strategic partnerships with insurtech firms to advance their interests. In 2018, global property-casualty insurer Chubb partnered with Bunker Technologies, a venture-backed company that embeds business insurance directly into the contracting process.\textsuperscript{10} Just this year, European insurer Allianz SE increased the size of its tech investment fund to $1.1 billion, making the fund one of the largest corporate-backed venture funds in Europe.

Many commercial carriers have taken notice of the potential benefits that insurtech can offer and have already taken a strong position to leverage these innovations. For example, Zurich Insurance Group now hosts the Zurich Innovation World Championship, a competition that promotes new technologies aimed at improving the processing of unstructured data sources using artificial intelligence.\textsuperscript{11} The 2019 winner of the competition, Chisel AI, developed an AI processing tool that allows commercial insurers and brokers to extract, identify, and classify unstructured data sources, such as insurance documents, 400 times faster and much more accurately than a human.\textsuperscript{12}

The process of connecting potential insureds with underwriters through the broker/agent relationship has also seen pressure from insurtech involvement, particularly in the small commercial lines sector. While some insurtech startups seek to displace the need for insurance agents, others seek to streamline the process from an efficiency perspective. For example, xagent is a program developed for single-entry market access solutions for property insurance agents.\textsuperscript{13} The program is similar to the ratings platforms commonly

\textsuperscript{7} Id.
\textsuperscript{8} Swiss Re launches its first-ever global InsurTech Accelerator in Bangalore, Swiss Re (Nov. 28, 2017), https://www.swissre.com/clients/newsletters/asia/InsurTech_Accelerator_in_Bangalore.html.
\textsuperscript{9} Id.
\textsuperscript{12} Id.
used for personal lines, but instead implemented for small commercial lines accounts.\textsuperscript{14} The software allows agents to generate quotes from multiple participating carriers instead of the current model of requiring carriers to input information across multiple carrier company ratings portals.\textsuperscript{15} To date, the program has received $2.1 million in seed funding.\textsuperscript{16}

To that end, there is a big market opportunity for technology to improve communication and collaboration between underwriters, brokers, and policyholders. Moreover, it is predicted that insurtech products can assist in automating the development of contract language and manage filings with insurance departments in an efficient manner, helping insurers focus on emerging market opportunities instead of creating more legal work. Additionally, the commercial lines market can benefit from insurtech by employing smarter and more targeted distribution methods that put the buying decision in front of the potential policyholder at exactly the moment insurance is needed for something—for example, allowing workers’ compensation to be purchased directly from a payroll app or property insurance to be purchased simultaneously with the sale of real property.\textsuperscript{17}

**Insurtech in the Claims Handling Process**

Beyond underwriting-related technological innovations, carriers have also begun implementing insurtech in the way they handle claims. Artificial intelligence and machine learning are being implemented by carriers to decrease claim handling time. For example, forward-leaning carriers have been able to drop the average cycle time of claims down to two to three days, where traditional-leaning carriers face average claim cycle times of 10 to 15 days.\textsuperscript{18} Insurers have also utilized insurtech to employ chatbots, which work through messaging apps customers will have already installed on their smartphones.\textsuperscript{19} These chatbots can be used to answer basic questions and resolve claims, as well as sell products, address leads, or make sure customers are properly covered by their insurance, ultimately improving the bottom line.\textsuperscript{20} Policyholders of Lemonade seeking to make an insurance claim do so by talking to a chatbot colloquially named “A.I. Jim,” which requires no paperwork and makes claim decisions in as little as three seconds.\textsuperscript{21}

**How Insurtech will Impact the Insurance Market**

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item Id.
\end{itemize}
The insurance market is one of the largest markets in the country. Carriers would thus be wise to contemplate implementing insurtech innovations to avoid being left in a more innovative company’s dust.

The Texas insurance market, for example, has already shown a strong interest in investing in insurtech startup companies. In 2016, Texas insurtech startups raised $25.23 million in venture funding. As these startup companies begin to gain more traction in commercial lines, competition is sure to follow, and competition breeds innovation. Accordingly, insurers should be sure to place themselves in a position to be open and willing to experiment with these new technologies.

Insurtech could have a vital role to play in disaster relief. For example, one industry professional has suggested that drones be used to better adjust losses in the claims process. Should insurers fly drones over storm areas once before a storm occurs and again after, drone footage could help to assist adjustment and to quickly and efficiently pay out valid claims. By knowing exactly how property appeared before a disaster, insureds and their carriers may narrow disputes relating to the value of the claim, resulting in streamlined claims processes, reduced investigation costs and in turn, lower premiums for consumers.

While insurtech continues to advance, it is unclear how governments will react from a legislative standpoint. For instance, when artificial intelligence is used to assess damage to a commercial property, how will insurers demonstrate that their approach was reasonable under that state’s fair settlement practice laws? At what point does the wealth of information available about insureds through insurtech become a violation of privacy? As technology becomes more and more involved in the insurance process, there will undoubtedly be much debate as to how these innovations affect legal standards regarding fair settlement practices.

Another legal issue that carriers are sure to face as insurtech becomes more mainstream is the effect that technology in the claims process affects an insured’s potential allegations of bad faith. The basic framework of an insurance bad faith claim is that the policy entitles the insured to certain benefits, and those benefits have been unreasonably withheld by the insurer. Such claims can be brought under the common law duty of good faith and fair dealing but are commonly brought under insurance bad faith statutes that prohibit specific conduct, such as denying a claim without explanation, or without first conducting a reasonable investigation.

When a claim is denied by a computer rather than a human, it can be difficult to analyze what led to the denial or alleged underpayment of a claim. Explaining to a jury why a

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24 Id.
computer algorithm correctly or incorrectly adjusted an insured’s claim could be a herculean task. It is not hard to picture a world that an insured would sue A.I. Jim for bad faith. Of course, carriers are aware of these issues, and have adopted technology slowly and with human oversight to attempt to negate these potential issues.

Although insurtech is viewed by some as a threat and to others as an inspiration, insurtech appears to be here to stay and at the very least will supply insurers a wealth of information previously thought impossible. Those carriers who leverage insurtech and its potential wisely, efficiently and legally could pioneer a new frontier of insurance.
Licensed in Texas, Arkansas, and the District of Colorado, Jennifer has over twenty-years’ experience in the insurance industry.

As a litigator, Jennifer’s practice is focused on first-party property insurance coverage disputes resulting from catastrophic losses such as hail, wind, ice, water damage, collapse, fire, and explosion.

As an insurance agent and risk manager, Jennifer specialized in large commercial property accounts, including property management companies, rural electrical cooperatives and publicly-traded corporations.

Jennifer’s unique and specialized knowledge of property insurance risks from the perspective of both a lawyer and insurance-industry insider allows her to effectively resolve complex disputes on a cost-effective basis for her clients.

Through talent combined with effort, Jennifer has become an expert and go-to lawyer for her clients in the field of property insurance law. To that end, in 2017 Jennifer received an L.L.M. in Insurance Law from the University of Connecticut School of Law and was awarded the CALI Award for Excellence in both Property Insurance and General Liability Insurance courses.
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Bennett is an attorney in Zelle’s Dallas office. His practice focuses on insurance and commercial business litigation, where he represents clients through every stage of litigation. Bennett is adept at understanding and articulating the specialized problems his clients encounter when faced with new and unique coverage issues, ranging from crypto-mining business interruption claims to large-scale catastrophe claims.

While in law school, Bennett received the Dean’s Achievement Award in Legal Research and Writing. Prior to law school, Bennett served as President of the University of Cincinnati Mock Trial Program.
Ethics in Technology & Property Claims

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What is Ethics?

**Ethics:** it is Moral principles that govern a person's behavior or the conducting of an activity.

“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently.”

Warren Buffett
Ethical Duties Affecting Tech Knowledge

In August 2012, the ABA amended the Model Rules to address technology issues, including…

- Competence: Rule 1.1
- Confidentiality: Rule 1.6
- Metadata: Rule 4.4
- Outsourcing/Cloud Computing: Rule 5.3
In 2012, the ABA approved a new resolution, incorporating proficiency in technology as a core requirement for “competent” representation.

**Model Rule 1.1:** “A lawyer shall provide competent representation to a client. Competent representation request the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

**Comment 8:** “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, ……”
What does this mean?

How proficient should an attorney stay in technology?

Answer: It depends.

If you are a corporate attorney, you should understand the ramifications of using outdated encryption software to protect intellectual property.

However, a personal injury attorney wouldn’t necessarily need to be proficient in encoding and encryption when dealing with a clients personal injury matter.
Practical Relevance

- Responding to discovery
- Storing client information in the cloud
- Compliance with data privacy regulations
- Protecting data and responding to a breach ("Cyber Security")
- Advising on document retention policies
- Sending & receiving documents with metadata
- Advising on social media for investigations, hiring, etc.
Who has adopted?

Texas has recently adopted the new comment to ABA Rule 1.1 regarding technological proficiency (Feb. 2019)
General Thoughts on Competence

- You should understand how technology affects your practice
- Standards evolve as practice changes—context matters and standards may vary
- You can still rely on consultants and IT experts (and probably should with appropriate diligence)
- Ethical duty of competence minimal standard; as a practical matter client business needs may require more
“An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law.”

California State Bar Formal Opinion Interim No. 11-0004 (Feb. 28, 2014) (related to ESI and discovery request)

See also, *Luddite Lawyers Are Ethical Violations Waiting to Happen*, Lawyerist, By Megan Zavieh, July 10, 2015

Model Rule 1.6: Confidentiality of Information/Client-Lawyer Relationship:

(a) *A lawyer shall not reveal* information relating to the representation of a client . . .

(c) . . . A lawyer shall make *reasonable efforts* to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
What does this mean?

What is considered a “reasonable effort?”

Answer: It depends.

- Does the nature of the information require a higher degree of security?
- Are you under a Court Order requiring disclosure, or non-disclosure and protection?
- Cost v. likelihood of disclosure?
Scenario #1

You are at an airport on your way to a deposition and need to access your client’s documents via email to prepare for your deposition.

1. Is it unethical to use the Free WIFI at the airport to access your email?

2. Is the use of Free WIFI at the airport, using “reasonable efforts” to prevent the inadvertent or unauthorized disclosure of information relating to the representation of a client?

3. What is you are not at an airport but are at a Starbucks?

4. What if you are at opposing counsel’s office and use the WIFI available for office guests to access your work email?
Scenario #2

Your paralegal is reviewing documents provided by your client for discovery purposes pertaining to training materials, underwriting protocols, and ESI. It is getting late and she decides to download the documents to an external hard drive and take it home to work on it. Later that night, she is working on the document review and download the documents from the external drive to her home computer. She goes to bed without turning the computer off. The next morning she takes the external hard drive with her on her way back to work but decides to stop at a Starbucks for coffee on the way. When she returns to her car, she realized she left her car unlocked and her computer bad with the external hard drive in it was stolen.
Scenario #2 Questions

1. Has the attorney in charge of the case breached his duty to protect the confidential information of the client in the scenario described?

2. How many instances of “breach” do you see in the scenario?

3. Has the attorney violated his ethical obligation to the client by exposing the clients’ information?
In 2011, a staff member of a Baltimore law firm took a portable hard drive out of the office and accidentally left it on a commuter train. She discovered her mistake quickly but it was too late when she returned to retrieve it. It was gone.

The drive contained unencrypted backup of all the firm’s data, including private health information of 161 patients of a doctor client. Its loss put the firm at risk of punishment under laws like HIPAA and exposed people to identity theft and other crimes by exposing their social security numbers. It also violated each attorney’s ethical obligations by exposing client data.

The hard drive was password protected by not encrypted.

Do you encrypt your files when you download them to an external hard drive?
What about Encryption?

Is a law firm required to encrypt communications and emails?

Answer: It Depends.

You have to look at the nature of the information and documentation you are protecting. The harm to the client if the information was stolen or inadvertently disclosed.

What is a good practice?: it is a good idea to warn clients ahead of time that emails are vulnerable to third-party interception and that the law firm does not encrypt emails.

What if the client wants encryption. Can a law firm charge an expense to the client for encryption services?
General Thoughts on Confidentiality

• Assess risks of handling information – systematically and matter specific

• “Reasonable efforts” is the ethical standard; your client may require more

• Analyze separately from data privacy obligations
What about Share Files?

Is using a share file program to send information and documentation through, consistent with using “reasonable efforts” to keep information protected?

Answer: YES but...

You must ensure that the service you use has good security protocols because you are relying on that services security measures to keep the data safe.

Benefits of File Sharing: File sharing also employs mobile apps that allow users to download encrypted files to their devices; even if they are on unsecured WIFI network, their files are protected.
What about Cloud Computing?

ABA Model Rule 5.3

“With respect to a nonlawyer employed or retained by or associated with a lawyer: * * *

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; * * *.”
Reasonableness Depends On…

• [Vendor’s] education, experience and reputation
• Nature of services
• How client information is protected
• Legal & ethical environments of jurisdictions
Cloud Computing

- Ethics rules allow it
- It is a form of outsourcing
- Exercise reasonable care to protect confidentiality of client information
- States largely agree that reasonable care required

WSBA Advisory Opinion 2215 (2012)
States May Require a Variety of Safeguards...

• Stay abreast of best practices
• Depending on sensitivity of date, get client consent
• Heed client instructions
• Understand provider’s security controls
• Periodically review security measures
• Have enforceable confidentiality agreement
• Get notice of breach
• Ensure access to client data
• Delete data & return to client when not needed
• Ensure back-up strategy

*E.g. New Hampshire State Bar Opinion 2012-13/4 (Cloud Computing)*
ABA Model Rule 4.4(b):

“A lawyer who receives a document or electronically stored information [ESI] relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”
Receiving Metadata

Obligations (ABA Formal Op. 06-442)

• Notify sender
• No need to send back (ABA Formal Op. 92-368 withdrawn)
• May be allowed to review, but know your state rules

Rules vary by state:

• Florida Ethics Op. 06-2 (2006), promptly notify the sender.
• Texas PEC Ops. 664, 665 (2016) no specific course of conduct for receipt of another party’s confidential information outside of discovery.
Photos & Drones
What about Drones?

Are use of drones to capture images of property damage ethical?

Answer: It Depends.
Scenario #3

You are approached by an insurer client regarding a claim that is still in claim handling. The client wants to investigate their insured’s claim for property damages caused by a fire caused by an undetermined source. The client has some ideas on ways to investigate and wants to know what would be allowed.
Scenario #3 Questions

1. Fly drone over property to get surveillance of insured and home. Once during the day? At night with night vision drone? Take thermal imaging? On weekend when insured is having a pool party?

2. Get electronic data from Google/Amazon for Alexa/google home? What about security cameras or motion detectors?

3. Get phone records for all residents of the home, including minor children and insured’s elderly parents that live there?

4. Have assistant add insured’s high school daughter as a friend on Facebook?

5. Get tax returns from business that insured is a partner of?

6. Contact other insured’s work and ask to interview the supervisor about insured’s behavior prior to filing claim?
Scenario #4

You are sitting in your office reviewing a file and you find the following.

1. **You are the Plaintiff Attorney**: The public adjuster that is on the case (that recommended you as an attorney) has an illegal contract.

2. **You are the Defense Attorney**: The third party adjuster that did the adjusting for your insurance client - violated the consumer protection statutes in your state:
   a. You represent the adjuster
   b. You do not represent the adjuster and they are not a party

In each situation, what are your duties to your client? What do you have to disclose?
Scenario #4 (cont.)

You are sitting in your office reviewing a file and you find the following.

1. **You are the Plaintiff Attorney**: You are contacted by the mortgage company, which is an additional insured under your clients’ policy, and they want to hire you.

2. **You are the Plaintiff Attorney**: You get an offer to settle your clients’ case but it is conditioned on you the lawyer never suing that carrier again.

In each situation, what are your duties to your client? What do you have to disclose?
Thank you!

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