

The Coronavirus Pandemic

Potential liabilities facing construction companies and how to address them

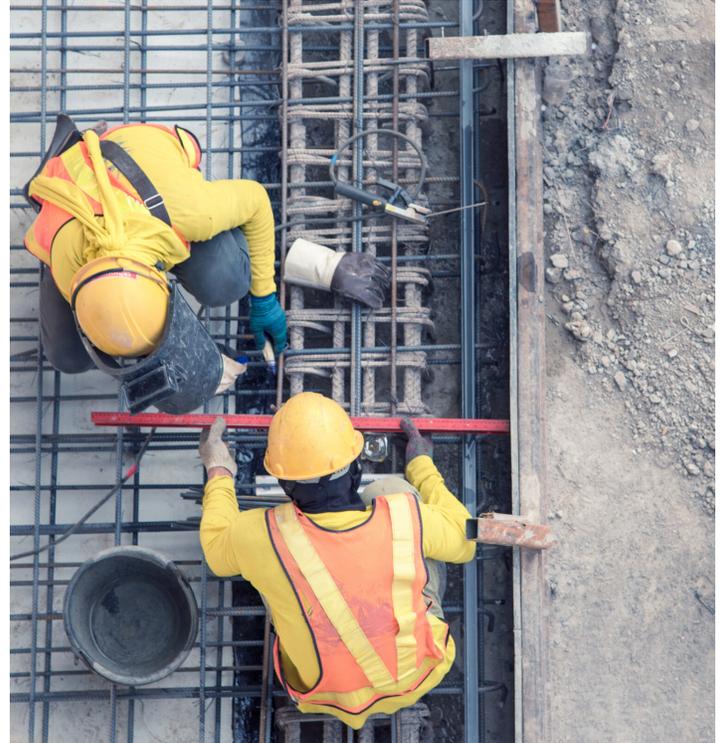
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The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with qualified legal and insurance professionals who can provide guidance that considers your own unique circumstances.

At the time of this writing, the Coronavirus (COVID-19) pandemic is wreaking havoc with the physical and financial wellbeing of people around the globe. This virus is causing untold losses for individuals and businesses, with no end in immediate site. Slowing rates of new infections in China, where the first outbreak is said to have occurred, are encouraging. But the bulk of economists agree that the worst is yet to come in many parts of the world, including the United States and the rest of North America. For those in the construction business the Coronavirus pandemic presents significant risks. While we certainly can't address all of the potential losses and liabilities regarding the Coronavirus pandemic, we can give a quick snapshot of where and how this disease is most impacting the construction industry.

Project Delays

The Coronavirus pandemic is already causing delays in projects and this trend will likely continue for the foreseeable future.



As the disease spreads, more and more employees in the construction field will become ill or will be quarantined for testing positive for the virus, resulting in personnel shortages and work slowdowns. State and local government mandates can also lead to project delays. To date, most states across the country have imposed “shelter in place” orders that prohibit individuals from leaving their homes, except for those services considered “essential.” Fortunately, at least in California, construction has been deemed an essential service. The Coronavirus pandemic can also lead to material shortages that delay projects. We've already seen shortages of many building materials and systems manufactured in China, by far the largest provider of these commodities.

Shortages of American-made goods are cropping up as well. Unfortunately, when projects get delayed, clients often look to others to share the blame and often that includes the contractor. After all the contractor is responsible for purchasing the materials to begin with so it is a logical next step to blame the contractor for the delay. Clients eager to complete their projects may file delay claims in an attempt to recoup direct losses. Making matters worse, clients may also seek consequential as well as liquidated damages. So what contractual protection does a construction firm have from being held liable for project delays caused by circumstances such as the Coronavirus pandemic? The key phrase is “Force Majeure”.

Force Majeure is a legal concept which states that individuals and entities are not liable for “acts of God” and other forces beyond their control. A typical force majeure contract clause between a client and a contractor states that neither party is liable to the other for delays or other failures to perform according to contract terms when the failure to perform is due to causes such as wars, riots, revolutions, terrorism, wildfires, floods, earthquakes, storms, epidemics, pandemics and other acts of God beyond the control of either party. The concept of force majeure may be upheld as common law by courts and other dispute resolution venues in various jurisdictions, even absent specific contract language (check the specific laws in your state). Still, it never hurts to include a force majeure clause in your contracts with your clients, subcontractors and other third parties.

Cost Overruns

Project interruptions caused by the Coronavirus pandemic can result in cost overruns as well.



The longer the project is delayed, the greater the chances of unanticipated expenses. When contractors are forced to extend the amount of time to complete construction, the result is often added hours and likely overhead overruns. The cost of materials may also increase as they become scarcer and more difficult to find. Sometimes, materials become unavailable altogether and more expensive substitutes may be required. And as the extra costs to the client mount, the greater the chance that the contractor will be blamed. As with project delays, the concept of force majeure may be the basis of a solid common law defense in the case of cost overruns that are the result of a pandemic or other act of God. If as part of a contractor's services you also provide cost estimates, these should be qualified and ideally referred to as an “Opinion of Probable Cost”. An “opinions” clause should acknowledge that you have no control over the eventual cost or availability of labor, materials, equipment and systems. It should state that your opinion is based on your professional judgment but that you make no warranty or guarantee of the eventual cost, which may vary significantly from your projections.

Suspension of Services

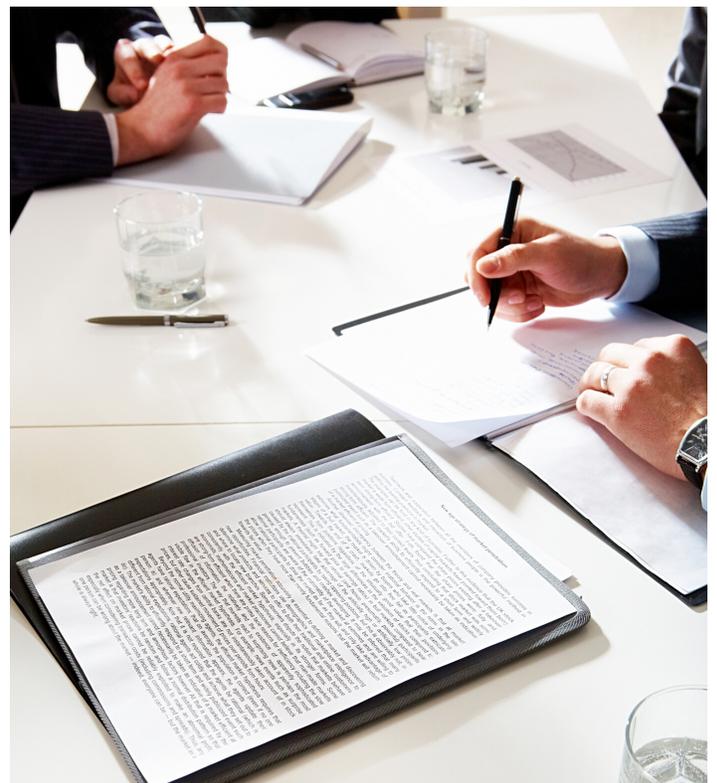
Eventually, a client dealing with the financial strains caused by the Coronavirus pandemic

may suspend an ongoing project. The result to a construction firm is a loss of future income and the probable need for layoffs of those employees idled by the suspension. Chances are, the principle of force majeure will protect the client from liability arising out of work stoppage. But what about the work completed to date on the project? Is there anything a contractor can do to ensure payment for work already performed? A suspension-of-services contract clause may provide leverage for a contractor looking to get paid for work completed. Such a clause may state, for example, that if a client suspends a project for more than 30 days, the contractor will be immediately be compensated for all services performed prior to the notice of suspension. Further, the clause may specify that if a project is suspended for more than 90 days, the contractor has the right to terminate the agreement and add compensation for the additional time and expenses related to restarting the project. If you have suspension of services contract language in your current contracts, you should have added leverage in negotiating a mutually acceptable solution. For instance, you may negotiate a payment plan that fits the clients limited resources. Pursuing litigation to force the client to pay may be unfruitful unless it can be shown that the client is financially able to make those payments.

In light of the above, and other liabilities, you and your attorney need to review all active contracts with your clients and subcontractors to gauge the extent of your liability for losses created by the Coronavirus pandemic. Do any of the contracts include force majeure clauses? Are epidemics and pandemics specifically included as causes of loss? Do your contracts include cost-estimate or opinion-of-probable-cost contract clauses? Are there suspension of services clauses? Under what conditions can you suspend your operations or terminate the contract completely?

It's Time for Contract and Insurance Reviews

Look for contract language that addresses your rights and responsibilities related to unforeseen conditions, including your right to expand your schedule and original cost estimates. Look for any "express notice" provisions that may require you to report delays, additional costs, or other unexpected conditions to specific parties (client, design professionals etc.) within a specific timeframe. Create a written record of your notification activities and seek written confirmation from your client and other parties that you complied with these notice provisions. Of course, current contracts that lack protection from Coronavirus caused losses cannot be amended without the written agreement of the client or other party to the contract. You and your attorney should certainly consider adding such protective clauses in your future contracts.



What about your insurance program?

Here are some of the policies you should review in the search for possible coverages:

- **General Liability-Bodily Injury.** Should someone allege they received bodily injury due to contracting the Coronavirus at your office or your project site, your general liability policy would likely not kick in unless the injured party could prove negligence on your part.
- **Property Losses.** Most property policies contain a specific microbe or virus exclusion. Absent the exclusion you may have coverage for the cost of the cleaning services to remove the virus from your premises. If you have a First Party Pollution Policy you may find coverage there as well. Regardless the exposure to property itself is fairly small.
- **Workers Compensation.** Should an employee become infected with the Coronavirus arising out of occupational employment or being put in “peculiar” high-risk conditions (e.g., attending a large company gathering during a pandemic), WC insurance coverage for pandemic-related losses may be available. Policy language will determine the extent of coverage.
- **Environmental or Pollution Losses.** An environmental or pollution policy may cover some of the cost of cleanup activities. Check the policy language for coverages and limits.
- **Business Interruption.** As mentioned above under Property, most Business Interruption policies will have a microbe or virus exclusion. Even if they don’t however in order to trigger coverage there would have to be direct damage to an insured property. If people can’t come to work or if a job site is shut down or a project is delayed because of a Government Mandate there is no direct damage to covered property and coverage would not apply. Regardless, it is your insurance company’s responsibility to adjust claims.

If you have a quantifiable loss, whether or not it might be covered, it should be turned in to your insurance company for evaluation. Ultimately it is their decision as to whether or not coverage would apply. Policy language is key to determining whether any Coronavirus-induced losses will be covered. As a rule, it's advisable to file a claim or pre-claim incident and let the insurance company make a determination of whether coverage is triggered and what is or is not covered.

Ask your clients to explain their state of affairs and what they would like to see happen during work stoppages and delays. Review contract language to determine rights and duties previously agreed to. Discuss interim steps to stabilize the situation or possibly move the project forward. Discuss possible addendums to your contract agreement. For instance, you may adjust your schedule and budget to reflect the new reality. Needless to say the health of your team and the public in general is the first priority. Clear minds, common goals and an esprit de corps among all parties to the project can go a long way toward surviving these troubled times. ■

For additional information on construction concerns arising out of COVID-19 see CNA Surety's White Paper [HERE](#)

As Always, “Communication” is the Key

Regardless of the specific contract language governing your active projects, it is always best to get ahead of potential project disputes brought about due to the Coronavirus pandemic. This is a situation where silence is certainly not golden. Talk with your clients. Address your current circumstances and ability to continue to provide services per your written agreements.