

# CONSTRUCTION DEFECT JOURNAL

"News and Information for Construction and Claims Professionals"

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## CONSTRUCTION DEFECT NEWS



One common question is whether there is potential coverage under builders risk insurance policies.

pertaining to insurance coverage, the answers depend on the specific policy language and underlying facts required to trigger coverage. Builders risk policies are even more fact specific due to the lack of uniformity of base policy forms and endorsements between insurance carriers.

The first step in any analysis is to gather facts and carefully document any impending and potential damages or delays. The facts are crucial because the coverage analysis may vary depending on the specific reason the project was shut down. For example, the analysis would be different if the project was shut down as a result of an express government order, such as those in Northern California and Washington, versus the project shutting down as a result of workers testing positive for COVID-19. Properly analyzing builders risk coverage involves a granular account of the facts and damages, and can require a great deal of hair splitting with respect to specific policy language.

Regardless of the strength of the insured's facts and damages, or the breadth of its policy language, the policyholder still likely faces an uphill battle in finding coverage for COVID-19 related claims. The unfortunate reality of most builders risk policies is that they are property policies that require some evidence of physical loss or damage to trigger coverage. Whether or not COVID-19 claims constitute property damage will be the subject of great debate and litigation over the coming months and years. The outcome will likely depend on how the insured's jurisdiction ultimately rules on the litany of COVID-19 cases that have already been filed – specifically, how broadly each court interprets the meaning of "physical loss or damage."

Although these key issues have yet to be clearly defined by the courts, some policies are better than others and there are specific variables that could affect the likelihood of coverage. For example, some of the more policyholder-friendly insurance programs may contain coverage extensions for delay in completion, business interruption, loss of rental income, or civil authority that may not be tied to the property damage requirement, and which would tend to support coverage for COVID-19 claims.

Even if the insured crosses the initial threshold and can demonstrate a covered claim, the following common endorsements and exclusions may require additional analysis depending on the facts.

- **Virus or Pandemic Exclusions:** Virus or pandemic exclusions are not as common on builders risk policies as they may be on other forms of coverage. However, they do exist and, if present, result in a significant barrier to coverage. As with the policy itself, every endorsement is different and should be analyzed in terms of the express language contained in the endorsement and the facts.
- **Abandonment or Cessation of Work:** Most builders risk policies include provisions that preclude coverage in the event of the abandonment of the project or a lengthy cessation of work. As a result, the insured should take steps to articulate to the carrier that the project has not been

## Are COVID-19 Claims Covered by Builders Risk Insurance Policies?

Monday, May 4, 2020 — Jason M. Adams, Gibbs Giden Locher Turner Senet & Wittbrodt LLP and Cheryl L. Kozdrey, Saxe Doernberger & Vita, P.C.

If you are an attorney, insurance broker, or other professional representing developers and contractors, then your clients have likely reached out with concerns about losses related to COVID-19. One common question is whether there is potential coverage under builders risk insurance policies.

The short answer is: It depends. As with most questions

### Construction News

#### What Will the Future Hold for the Construction Industry?

MAY 4, 2020 — GARRET MURAI - CALIFORNIA CONSTRUCTION LAW BLOG

As we enter into the last week of April, many are wondering if the shelter in place orders issued by Bay Area counties (Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma) and the City of Berkeley, many of which went into effect six weeks ago on March 16, 2020, will be extended past their stated end date of next Monday, May 3, 2020.

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[GARRET MURAI, NOMOS LLP](#)  
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Construction Insurance News

#### California Insurance Commissioner Issues Notice Requiring Insurance Carriers to Investigate Business Interruption Insurance Claims

MAY 4, 2020 — GREG DILLION - NEWMAYER DILLION

On April 14, 2020, California Insurance Commissioner Ricardo Lara issued a "Notice" to "All admitted and non-admitted insurance companies, all licensed insurance Adjusters and producers, and other licensees and interested parties" concerning the "requirement to accept, forward, acknowledge, and fairly investigate all business interruption insurance claims caused by the COVID-19 pandemic." The Commissioner found it necessary to issue the Notice "to ensure that all agents, brokers, insurance companies, and other licensees accept, forward,

### Homebuilder News

#### Covid-19 Update: California Legislators Urge Bay Area Counties To Relax Restrictions On Housing Construction

MAY 4, 2020 — NEWMAYER DILLION

On April 16, 2020, sixteen California legislators urged Bay Area counties to relax the restrictions on housing construction under various shelter in place orders. Citing the desperate need to address the growing housing shortfall in California, the legislators recognized the intentions of the orders to limit the spread of COVID-19 and protect workers, but suggested alternative measures to allow both goals to be met.

Newmeyer Dillion continues to follow COVID-19 and its impact on your business and our communities. Feel free to reach out to us at

[NDCOVID19RESPONSE@NDLF.COM](mailto:NDCOVID19RESPONSE@NDLF.COM) or visit us at [WWW.NEWMAYERDILLION.COM/COVID-19-MULTIDISCIPLINARY-TASK-FORCE](http://WWW.NEWMAYERDILLION.COM/COVID-19-MULTIDISCIPLINARY-TASK-FORCE)

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abandoned, and that there exists an intent to return as soon as possible. The insured should also maintain a record of ongoing project oversight and protection efforts taken during the period when construction operations are suspended.

- **Security and Safety Requirements:** Many builders risk policies contain provisions requiring the insured to maintain protective safeguards and security protocols throughout the pendency of the project. Safety fencing, lighting and security guards are common examples. The policy should be analyzed to ensure that the policyholder can meet any such requirements during a COVID-19 related shutdown. For example, can the insured continue to staff a security guard? If not, arrangements will likely need to be made with the carrier depending on the language of the policy.
- **Insurable Limits:** Builders risk policies are typically underwritten based upon the total completed value of the structure, including materials and labor. The insured will need to analyze the policy to consider whether increased material or labor costs as a result of COVID-19 will alter the terms of coverage, trigger any escalation clauses, or result in an increase in premium due. If increased cost projections become apparent, the insured should report these changes to the carrier immediately.
- **Extensions of Coverage:** The insurance industry was facing a hard market even before the COVID-19 pandemic, which resulted in higher premiums and limited coverage options. The COVID-19 pandemic has only exacerbated these issues and it may be difficult to obtain coverage extensions on projects that have been shut down. The insured should work with its risk management team (risk manager, insurance broker and lawyer) to engage the carriers to negotiate any necessary coverage extensions resulting from COVID-19 related project delays.

To summarize, builders risk coverage for COVID-19 claims is far from certain, but not impossible. Insureds should provide notice of a claim to all potentially applicable carriers in order to preserve their rights. The insured should also report increased construction cost and articulate its intent to return to the project to preserve their escalation clause and avoid arguments that they have abandoned the project. The insured should continue to document its claims and damages, and be ready to substantiate its claims and push back on any coverage denial. Throughout the entirety of this process, the insured should work with its risk management team to get out in front of any extensions it may need to complete the project. In a climate where insurance carriers are receiving an insurmountable number of claims, the insured should be prepared to fight for coverage and not simply throw up its hands in the face of a denial. Given the intense social, legislative and executive pressure to cover COVID-19 claims, there may be a tendency for the courts to find coverage in gray areas, particularly if the insured was fortunate enough to have purchased one of the broader coverage forms referenced above.

#### About the Authors

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acknowledge, and fairly investigate all business interruption insurance claims submitted by businesses."

Under the Notice, insurance brokers are now required to transmit any oral or written notice of claim immediately to the insurer. Upon receipt of a notice of claim, subject to certain exceptions, every insurer is required to acknowledge orally or in writing the notice of claim immediately, but in no event more than 15 calendar days after receipt of the notice of claim. If the acknowledgment is oral, the insurer must keep a written record of the receipt date of the claim notice in the claim file.

[READ THE FULL STORY...](#)

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## ENR Future Tech Conference Moved to October

MAY 4, 2020 — BEVERLEY BEVENFLOREZ — CDJ STAFF

ENR's Future Tech construction conference has been rescheduled from next month to later this Fall. The three-day conference is suited for business and IT leaders in architecture, engineering and construction who wish to explore emerging technologies that can enhance construction productivity, profits and safety. The conference includes interactive sessions as well as networking opportunities.

October 14th-16th, 2020  
Hilton San Francisco Union Square  
333 O'Farrell Street,  
San Francisco, CA 94102

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*This Bulletin acts as a resource and "links" to provide you with needed information and to simplify your search for critical information during this unusual and challenging time.*

recent case, statute or a single development, but rather acts as a resource and "links" to provide you with needed information and to simplify your search for critical information during this unusual and challenging time.

#### CIVIL LITIGATION: CLOSURES AND RESTRICTIONS

The State and Federal Court systems in California have drastically reduced their operations. The Governor issued Executive Order N-38-20, this suspends certain limitations on the Chief Justice's authority, making it possible for orders to be issued adapting the Court's operations to address the COVID-19 health crisis. As of this time, the most recent statewide order from the Chief Justice is the March 30, 2020 Order which allows Courts to utilize remote technology when possible. The March 30, 2020 Order also clarifies a prior Order suspending all trials for 60 days. As many of you are aware, civil trials in California must commence within five years of the initiation of the action, this is commonly referred to as the "five year rule". While the five year time period was initially extended by the Chief Justice for 60 days, the Judicial Council subsequently adopted a series of Emergency Rules, including one which extends this to six months for all civil actions filed on or before April 6, 2020. The Judicial Council also adopted rules tolling the statutes of limitation for civil causes of action are tolled from April 6, 2020 to 90 days after the state of emergency has ended.

In addition to the statewide orders and rules, counties have enacted their own rules. Los Angeles Superior Court, for instance, has closed some locations while others remain open on a limited basis. On March 17, 2020 an Order was issued limiting the Court to "essential functions" through April 16, 2020. However, on April 15, 2020, a further Order extended the closure through May 12, 2020. While truly urgent Ex Partes may go forward, all regularly set hearings will be continued until after June 22, 2020. Trials will begin after June 22, 2020 with non-priority trials anticipated to start in later August or September. Notably, any deadlines imposed by current trial or hearing dates still stand until the specific dates are continued.

As with other aspects of the COVID-19 health crisis, the impact upon Civil Litigation continues to evolve, for the most up to date information we include the following links to the California Courts. The first page includes links to all the State and County Orders, the second page is for the Judicial Council Rules.

Links:

## COVID-19 Information and Resources

Monday, May 4, 2020 — Richard H. Glucksman, Esq. & Brian D. Kahn, Esq. — Chapman Glucksman Dean & Roeb Bulletin

### INTRODUCTION

The current COVID-19 health crisis has greatly impacted nearly every aspect of our business and personal lives. The constant flow of rapidly evolving, and often contradictory information creates its own challenges for those who are responsible for ensuring compliance with relevant regulations and best practices while still moving forward with their business and family activities.

This bulletin differs from most Chapman, Glucksman, Dean & Roeb bulletins in that it does not highlight a