

Addressing Liabilities from the Coronavirus Pandemic

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At the time of this writing, the Coronavirus (COVID-19) pandemic is wrecking 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 architects, engineers and other design professionals, the Coronavirus pandemic presents significant risks beyond those to their health. 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 operations of design firms. It is likely that governments will pass programs, laws and regulations to help design firms survive these economic threats.

Here are three specific ways the Coronavirus pandemic is directly impacting design and construction operations and creating potential liabilities and losses for all parties involved.

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 design and construction field become ill or are quarantined for testing positive for the virus, resulting in personnel shortages and work slowdowns on both the design and construction sides of the equation.

State and local government mandates can also lead to project delays. To date, states like California and Illinois have imposed "shelter in place" orders that prohibit individuals from leaving their homes, with a few exceptions for delivering "essential" services. Employees may be unable to create plans and drawings at the design office or go to the jobsite to perform construction administration services. Work-at-home options can be helpful for keeping design work progressing, but this is not always sufficient to keep projects on schedule.

Unfortunately, when projects get delayed, clients often look to place the blame on the lead designer and/or contractor. After all, it is usually these parties who set schedules and specify materials per the contracts. 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 damages," such as the loss of potential profits caused by project delays.

So what contractual protection can a design firm have from being held liable for project delays caused by circumstances such as the Coronavirus pandemic? The key phrase is force majeure.

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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 design professional 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 or province.) Still, it never hurts to include a force majeure clause in your contracts with your clients, subconsultants 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. Contractors are forced to extend the amount of time to complete construction, resulting in added hours and likely overtime. 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 lead designer 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. Another contractual defense is to include a clause addressing opinions of probable cost.

"Opinions of probable cost" is preferable wording to "cost estimate," which may imply a more definitive estimation. 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 design firms is a loss of future income and the probable need for layoffs of those employees idled by the suspension.

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Chances are, the principle of force majeure will protect the client for having liability for stopping all work on the project. But what about the work completed to date on the project? Is there anything a design firm can do to ensure payment for services already delivered?

A suspension-of-services contract clause may provide leverage for a design consultant 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 consultant will be immediately 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 consultant has the right to terminate the client/consultant 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, at the least 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. Or, if the client paid a retainer to the consultant, the consultant may apply the retainer to pay for the services rendered to date. 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.

It's Time for Contract and Insurance Reviews

In light of the above, and other liabilities, you and your attorney need to review all active contracts with your clients and subconsultants 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 services or terminate the contract completely? Look for contract language that addresses your rights and responsibilities related to unforeseen conditions, including your right to increase your schedule and compensation for an expanded scope of services.

Look for any "express notice" provisions that may require you to report delays, additional costs, or other unexpected conditions to specific parties (client, contractor, subconsultants, 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.

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You, your attorney and your risk manager should also review your insurance policies, looking for coverages for the Coronavirus-caused losses. Once you gain a handle on your insurance profile, you can call in your insurance agency to address your specific questions and concerns. Realize that insurance agencies and brokerages like ours are receiving many emails, text messages and phone calls from clients regarding coverages for losses due to the pandemic. We may also have been forced to work from home. Please be patient as we field inquiries and gather the latest information.

Keep in mind that the coverage of losses related to epidemics and pandemics is a rapidly evolving area of commercial and liability insurance due to the current pandemic. Broad ranges of protections for these potential liabilities are likely lacking on many types of coverages and can change significantly by carrier and according to specific policy language.

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, your general liability policy would likely not kick in unless the injured party could prove negligence on your part.
- Property losses. The cost of cleaning services to remove the virus from your premises may be covered, but likely property loss coverage for pandemics will be minimal absent physical property damage. (Some property policies specifically exclude virus and bacterial contamination. Other policies may have non-physical-damage coverage extensions that provide coverage.)
- 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. If business income losses are the direct result of the virus being present at your location, business interruption (BI) insurance may apply according to policy conditions. If the cause of loss was more indirect (e.g., a stand-in-place order by state authorities, which causes losses due to project delays), you may need to look for other coverages, such as civil authority. (One exception is if your BI policy has an ingress/egress extension where coverage may apply if you are unable to enter or exit your property even absent property damage.) However, Insurers argue that most policies require actual property damage in order to activate coverage. Note that the Insurance Services Office (ISO) is reportedly working on new BI forms that may broaden coverage.

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Policy language is key to determining whether any Coronavirus-induced losses will be covered. We are not in a position to determine which coverages are in place without a policy review and are making no warranties that coverage is available. 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.

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. 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. Ask to see your client's relevant insurance policies. 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, scope of services and budget to reflect the new reality.

Make contractors, subcontractors and subconsultants part of these conversations as well. 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. Put the health and safety of your employees and the general public as your top priority and everything can work out from there.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.