

COVID-19 Project Delays

Builders Risk and Pollution Insurance



Insurance | Risk Management | Consulting



Giving advice on any insurance claim that has yet to be processed or adjusted is pretty challenging, most brokers will provide a response to the standard question “is it covered?” with the same answer, “it depends.” The reality is there are too many variables in any specific claim scenario to render judgement without all the facts. With that said, we are hearing daily concerns and questions regarding insurance coverage with respect to project delays.

Below we have outlined key provisions in Builders Risk Policies, and action items to preserve your rights under those policies. Also included is an outline of the policy provisions that relate specifically to Builders Risk and Contractors/Construction Pollution Liability Insurance coverage for claims related to work stoppage or delay/suspension of performance as a result of COVID-19. Unfortunately, there is little coverage available, and specific exclusions are present in most policies. It is, however, beneficial to make yourself aware of how your insurance policy operates. To that degree, we provide analysis that we hope is helpful.

Key Provisions in Builders Risk Policies:

Minimum Premiums:

A typical Builders Risk policy will state that the premium is “fully earned” after coverage has been in force for one year. Given the unforeseen nature of COVID-19, it is recommended that you, or have the First Named Insured, request any minimum premium conditions be waived. COVID-19 and the subsequent market volatility may jeopardize the future of many projects, and a timely request to waive the application of the provision can save substantial premium dollars should the project fail to restart.

Cessation of Work:

Many Builders Risk policies contain provisions related to the “Cessation of Work”. Nearly all policies require notice to the insurer if work is stopped for 30, 60 or 90 consecutive days. Failure to properly notify the insurer can result in termination of coverage. Most policies contain language such as:

“The named insured will give immediate notice in writing to the Company in the event of a total cessation of work that exceeds 60 consecutive calendar days... in the event the Insured fails to notify the Company... coverage for the project where work has ceased shall be suspended until such time as written notice is given to the Company.”

It is critical to notify the insurers immediately if there is a delay that will exceed the time limit as outlined in the specific policy to avoid a lapse in coverage.

Guaranteed Coverage Extensions:

A well negotiated Builders Risk policy will contain some level of guaranteed coverage extension. The policy by itself will not automatically extend due to delays caused by COVID-19, but will at least provide some period of additional coverage (30, 60 or 90 days) at the “bound” rates. Any extensions beyond this guaranteed provision are subject to additional underwriting and re-pricing. Additionally, there is no guarantee that coverage will be extended by the insurer for any price. Despite that, it is highly recommended that you discuss a possible extension with your insurers sooner than later. Keep in mind: 1.) there will be thousands of these requests in the coming months, and its best to be one of the first before there are issues with capacity, 2.) if the insurer refuses, this will allow your broker time to provide reasonable alternatives, and 3.) the early bird gets the worm, negotiating extensions now will generate more favorable pricing, before the impact of COVID-19 affects insurance rates.

Recommended Actions:

Here are specific actions you can take to protect your rights under the potentially applicable insurance coverages.

1. If you currently have, or have the potential for, a job shut-down due to government enforcement or announcement of shelter-in-place or quarantine orders, or due to contamination at your project site – put your CPL and Builders Risk insurer “on notice”. It’s also important to refer to the action as a job delay, not a shut down. This will preserve your rights under the policy, and may also benefit your rights under your contracts.
 - a. File a notice of claim per the provisions outlined in your policy.
 - b. If filing via email, include “NOTICE ONLY” in the subject line.
 - c. If filing via phone, explain to the carrier that this is a “NOTICE ONLY”.
 - i. Set your email notice to include a delivery and read receipt.
 - ii. Request a written communication from the carrier confirming the notice has been processed and accepted.
 - d. Detail the specifics – Policy Number, Job details, anticipated duration of delay.
 - e. Advise that *“costs, damages, and other losses are undetermined at this time, however we are filing this Notice Only to preserve our rights under the insurance policy”*
2. If a project could be or will be delayed for more than 30 consecutive days – put your Builders Risk insurer on notice to avoid application of “Cessation of Work” coverage limitation.
 - a. Contact the underwriter who placed the coverage, in writing.
 - b. Detail the specifics – Policy Number, Job Details and anticipated duration of delay.
 - c. Send the email with a delivery and read receipt.
 - d. Request confirmation, in writing, that the “Cessation of Work” provision will not be applied.
3. Negotiate extensions to your Builders Risk coverage now.
 - a. Contact the underwriter who placed the coverage, in writing.
 - b. Detail the specifics – Policy Number, Job Details, and anticipated duration of delay.
 - c. Request an extension of coverage (we recommend a minimum of 6 months).
 - d. Request that minimum premiums be waived, given the uncertainty of the length of delays.
 - e. Request flexible payment terms as it may be possible to secure the extension with a small down payment now and full payment at a later date.



Builder Risk Coverage Analysis:

In general, Builders Risk coverage has two major components: 1.) Coverage for damage or destruction to a project and 2.) Coverage for costs due to delay, e.g. Loss of Earning, Extra Expenses, Expediting Expenses, etc. It is generally clear that item #1 does not apply to COVID-19; it is not a virus that will cause structural or physical destruction to a project. Focusing on delay, there are three sections of policy language we need to understand: Coverage Trigger, Exclusions and Additional Coverages.

Coverage Trigger:

In order to trigger coverage for delay in completion there must be two items present a: 1) direct physical loss or damage 2) by an insured peril. This wording is not defined within an insurance policy and is therefore open to interpretation. There have been multiple court rulings on the subject, and coverage counsel should be consulted before taking action. The cases, however, have largely held that there must be some physical alteration to the property. Alternatively, some courts have defined direct physical loss or damage to mean:

“...an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.”

Unfortunately, even if you can show a physical loss or damage by an insured peril, most policy forms contain a Pollution/Contaminant Exclusion, a Virus or Bacterial Exclusion, a Nuclear, Biological, Chemical or Radiological Materials Exclusion (NBCR), or a Communicable Disease exclusion. The exclusions, nullify the entire coverage trigger “direct physical loss or damage by an insured peril”. While these exclusions may be tested in the courts, it is unlikely that a court would find coverage with specific exclusions in a policy.

Additional Coverages:

There are many additional coverages in Builders Risk policies. The unfortunate reality is that most, if not all, of these additional coverages/perils are still limited by the Pollution or Virus exclusions as described.

Civil Authority/Ingress or Egress/Prevention of Access:

These coverages provide reimbursement for expenses and loss of earnings caused by a government mandated shut-down of, or an inability to access, a project site following a “direct physical loss or damage by an insured peril” to either the project site or any other location within a specified distance (e.g. 1 mile from the project site). This is exactly what has occurred, for example, in the San Francisco Bay Area, however, the Pollution/Virus/NBCR/Disease exclusions still apply to this coverage. Additionally, this coverage does not create an additional insured peril, it expands coverage for delay by 30-60 days. The attempt to secure coverage under this provision requires a “*direct physical loss or damage by an insured peril*”. As noted, there may be a direct physical loss, however, either the exclusions would likely apply. This specific coverage provision will be litigated in the coming months and case law may yield a different interpretation.

Pollutant or Contaminant Clean-Up:

There are two versions of this additional coverage grant. Most policies will provide some level of sub-limit to clean-up or decontaminate a site as a result of a pollution event (including contamination by virus). Some policies will limit this exclusion to only the costs to remove pollutants and contaminants from “*land and water*”. If a project site has been contaminated, there is a good chance the cost to decontaminate will be provided, to some degree, by the Builders Risk policy.

Ordinance or Law - Increase Cost of Construction:

Most Builders Risk policies contain additional coverage for the increased costs of construction due to the enforcement of any ordinance or law following a covered cause of loss. There very well may be increased costs to the project following the shut-downs related to COVID-19, however, this coverage is still subject to the exclusions referenced and therefore will likely not respond.

Contractors/Construction Pollution Liability Analysis:

The main purpose of Contractors/Construction Pollution Liability (CPL) is to provide coverage for pollution incidents for which the contractor or parties to the construction project are liable. For example – rupture of gas or sewer lines. However, some policies contain additional coverage grants, specifically coverage or “1st Party Business Interruption.” This coverage provides loss of earnings and coverage for extra expenses following a pollution incident – and may contain additional coverage provisions as it relates to the shut-down or delay of a project due to action taken by government authorities. After an extensive review of policies we found that coverage is likely restricted, similarly to the Builders Risk, either by similar exclusions or based on the definition of a “Pollutant.” For example:

“Pollutants do not include any virus”

We thoroughly expect these policies to be litigated in the coming months as well, and highly recommend a review of your specific coverage.

Ultimately, a positive coverage outcome due to delays caused by COVID-19 depends entirely on the specifics of the claim and policy provisions. However, in general, there are multiple exclusions that may apply and contractual remedies, as opposed to those provided by insurance, may be more effective. Pandemic risks are generally uninsurable as a matter of principle. The potential losses are so severe, simultaneous and wide-spread that a standard offering of coverage would, in all likelihood, cause insolvency in the insurance market.

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