



Coverage Implications for COVID-19 Project Shutdowns

By Jeremiah M. Welch

Boston's recent decision to temporarily shut down city construction projects has many in the industry asking what impact, if any, a COVID-19 related shutdown would have on project insurance. For this article, the focus is not on the question of whether there is coverage for damages or liabilities because of COVID-19; there are many other articles which address that issue. Here, we are dealing with whether a temporary shutdown, regardless of cause, has any impact on project insurance coverage. In effect, we ask the question of whether coverage for the project continues, despite the shutdown. As explained below, the answer for most policies is "yes."

The most significant problem is probably the one created by the hard insurance market that preceded COVID-19's emergence. If the shutdown pushes the project completion date past the expiration of current policy periods, it may be difficult to obtain extensions. This is not because of COVID-19, but because of generally constricting appetites for construction risk. Insureds should discuss this potential with their insurance brokers. Insureds and their brokers are well advised to start these conversations early, before underwriters are flooded with such inquiries and requests.

CGL Insurance

With respect to the policies themselves, it is important to recognize COVID-19 related shutdowns are temporary shutdowns, which is not the same thing as abandonment. When it comes to insurance, wording is everything. ISO Exclusion J(2) removes coverage for property damage to "premises you sell, give away or abandon". Exclusion J(2) includes an important exception for premises which are "your work" and were never occupied, rented, or held for rental. Since "your work" is work performed either by you or on your behalf, the exception would possibly "save" most construction stakeholders even if the project was deemed abandoned. (Since the project is not finished, the insureds needn't worry about whether the premises were ever rented.) Other than the mention of abandonment in Exclusion J(2), there is no other place in the ISO CGL form that would make a shutdown relevant.

Many projects are insured by CGL policies issued by excess and surplus lines markets. Most of these have an ISO CGL form at their core, but they often have market-specific endorsements. These should be reviewed to determine if there are any consequences associated with a shutdown. Although rare, this author has seen manuscript exclusions that terminate coverage if a project is abandoned for more than a specified period of time. Those endorsements have not defined what it means to be abandoned.

For general liability insurance, it is also worth noting the coverage provided during a shutdown would continue to come from the policy's general aggregate, not the product-completed operations aggregate. Because the project has not been completed or put to its intended use, the products-completed operations hazard would not apply.

Insureds also ask whether they have an obligation to notify the insurer of a shutdown. The answer, for a basic ISO CGL policy, is "no". Notice is required for cancellations, suits, and occurrences, not shutdowns.

Builder's Risk Insurance

Builder's risk policies present more of a challenge because they do not share the level of relative consistency found in general liability insurance. Policies commonly have exclusions for "delay," "loss of use," "consequential loss," and similar terms. Sometimes these exclusions can be overcome by arguing that delay resulting from a covered peril (i.e. property damage, if COVID-19 qualifies as such) is covered. Exclusions for laws or ordinances may or may not be implicated. It is important to recognize, however, these exclusions would apply only to claims for damages caused by the shutdown – they do not mean there is no coverage for a shutdown project. For example, a shutdown project damaged by a hurricane is still covered for the hurricane damage. Many policies do have a provision that terminates coverage upon abandonment, but many of these define abandonment as when the insured has no intent to complete the project. Still, it seems the consistent item to watch for with builder's risk policies is the concept of abandonment.

Of course, any virus-related exclusion should be looked at carefully, but again, the thought is that these exclusions would apply, if any, to claims made for damages because of COVID-19; an unrelated peril should still be covered despite the COVID-19 shutdown.

Takeaways

General liability and builder's risk insurance should be carefully reviewed to determine whether there is any consequence associated with a COVID-19 shutdown or abandonment. Following a clear understanding of how the policy works, the goal would then be to avoid mischaracterizing the nature of a shutdown to inadvertently trigger a negative coverage consequence. To the extent possible, project stakeholders should endeavor to have any COVID-19 related shutdown characterized as a temporary shutdown/stop work etc., in order to best avoid any negative coverage consequence associated with abandonment. Wherever possible, the intent to return/resume should be expressed. Above all, insureds must assess the impact of any shutdown on the need for extensions and engage in early discussions with brokers and underwriters.

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