

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

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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 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

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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 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.
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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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