COVID-19 – The Road Ahead

The impact of the COVID-19 pandemic on the A&E insurance market is not fully known, and it will continue to evolve. We offer the following observations on what the future may hold based on our general experience and what we have seen so far.

What impact will the pandemic have on market conditions in general?

- Many insureds (and brokers) will be under financial stress, with disruption to their businesses that will run through everything from their performance of professional services to their ability to secure new business. On the insurance side, we expect to see financially strapped insureds struggle with new placements and renewals.
- Our experience is that distress provokes claims. As projects become delayed or, in many cases, shelved temporarily or canceled altogether, and cash flow becomes an issue, claims will result.
- Current projects and projects that were set to begin soon will likely be affected by necessary retrofitting and redesign to accommodate the “new normal” with, for example, social distancing requirements and changes in building codes. This also could lead to increased demands on and exposure to architects.
- Some industries will be more stressed than others, *e.g.*, aviation, gaming, energy, hospitality and education. Construction in those sectors may slow to a halt or be very limited in scope. At the same time, there may be an increase in projects involving, say, health care, technology and communications.
- We expect a gradual move to implement more automation and prefabricated components to reduce human interaction.

What types of claims activity is expected?

- **Decrease in notifications**: We have seen a decrease in new claims notifications across most classes, not just A&E, which is likely due to several factors, including court closures, remote operations, a freeze on statutes of limitations and general uncertainty. As the courts reopen on a state-by-state basis and insureds, claimants and brokers return to more typical work routines, we expect the claims activity will increase.
- **Offensive claims**: We suspect we will begin to see affirmative claims by insureds, such as Mechanic’s Liens, which will provoke countersuits.
- **Contract issues**: These will come in many forms, including *force majeure*. Find additional information on contractual issues in our March 31 alert, **What to Do When COVID-19 Infects Your Contractual Duties**.
- **Delay**: As delays mount, we expect to see more attention to contract deadlines and liquidated damages. As well, design team members and contractors may be contractually responsible for increased costs or delays on existing projects. We believe that projects will be faced with significant material delays, which increase costs and slow project completion dates; employee health and safety issues due to new OSHA regulations concerning social distancing and personal protective equipment; stay-at-home orders/ travel bans; concerned owners/developers; anxious lending institutions resulting in a lack of or limited financing, notwithstanding record low interest rates; unprecedented legal issues; depleted workforce numbers; and general uncertainty about the future of the industry.

- **Failure or inability to perform**: We expect that some projects will be shelved – some during construction – and that some engineers, designers, contractors or tradesmen will not be able to perform. Insolvency impacts will likely be felt.
- **Settlement opportunities**: Many companies will be cash-strapped and may now be more willing to negotiate on a reasonable basis on existing claims.
- **Deductible challenges**: We may begin to see more complications from insureds being unable to pay their deductible obligations. Bankruptcy filings are expected to grow at an alarming rate. Many policies likely will not be renewed due to cash flow issues, which will result in insureds attempting to push claims to prior years and, in turn, increase coverage involvement.

What efforts are state and federal governments making to address the issues created by the pandemic, and how will they affect our business?

- **State governments**: As has been widely reported, various state legislatures have proposed laws that would override policy wording to provide business interruption coverage under property insurance policies without regard to policy language. In turn, some insurers have proposed endorsements to provide limited coverage for business interruption claims, presumably to avoid the harsher impacts of the legislation under consideration. While virtually all of this relates to first-party coverage and specifically to business interruption, it suggests the types of solutions state legislatures are considering to provide coverage for COVID-19-related losses.
- **Federal approaches**: At the federal level, a bill has been drafted to create a Pandemic Risk Insurance Act (PRIA), similar to the Terrorism Risk Insurance Act (TRIA) following the 9/11 terrorist attacks. PRIA would cap the total losses insurers would face as a result of a pandemic but would draw significant funding from insurers to provide a part of the package of aid for pandemic-related losses. The current situation is unlike TRIA, however, which had a relatively targeted number of claimants, many with similar claims. By contrast, the pandemic has created losses of various types for businesses and individuals all over the country (and indeed all over the world). Commercial insurers are not equipped to provide what is basically disaster aid, and the cost of handling so many claims would easily dwarf the available funds. The consensus appears to be building that while some sort of public/private risk sharing for pandemic risks is likely, PRIA, as currently drafted, is not a viable solution.

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