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Forum on Construction Law



The Construction Law Connection

The Forum's impact extends beyond construction lawyers as a valuable resource to the entire industry

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A Valuable Resource to the Construction Industry: The ABA Forum on Construction Law

By Arlan D. Lewis, Chair, ABA Forum on Construction Law, and Partner, Blueprint Construction Counsel

With approximately 6,000 members, the ABA Forum on Construction Law is the largest organization of construction lawyers in the world, with a primary focus of “building the best construction lawyers” through its programs, publications and people. However, the Forum’s impact extends far beyond construction lawyers as a valuable resource to the entire industry.

For example, in response to the global pandemic, the Forum developed a virtual COVID-19 Leadership Roundtable series of discussions to address impacts on the construction industry. The Roundtable was open to all construction industry participants, including executives, free of charge.

Since April 2020, the Roundtable attracted more than 5,000 registrants, many of whom were not lawyers.

Likewise, the Forum often partners with non-lawyer construction industry organizations such as the AIA, CMAA and AGC to develop programs and other content to benefit their memberships. Forum members frequently comment on proposed revisions to standard-form construction contract documents from the AIA, ConsensusDocs and others. The Forum also publishes books on topics ranging from construction insurance to construction accounting that are of practical use to non-lawyer construction industry participants.

Finally, the Forum is an incredible network of construction lawyers and industry consultants. There is significant value, particularly to in-house counsel, in the ability to quickly connect with a lawyer in a different state or country or a consultant with particular expertise. Instead of a blind “shot in the dark,” this outreach often stems from a personal relationship or trusted referral made through the Forum. I encourage you to take advantage of this valuable resource by ensuring that your construction counsel, whether in-house or external, is actively engaged in the ABA Forum on Construction Law. To learn more, visit www.americanbar.org. ♦

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Insurance May Cover Commercial Losses

By David Suchar, Partner, Maslon

It is a popular misconception that commercial losses caused by COVID-19 are not insured losses.

To the contrary, a variety of construction industry COVID-19 impacts are recoverable by way of insurance.

Business Interruption and Related Property Coverages

Most standard first-party all-risk property policies offer coverage for business interruption (BI), which pays businesses for losses and expenses in certain circumstances when their income stream ends for reasons beyond their control. Since the start of the COVID-19 pandemic, insurance industry advocates have argued that this type of insurance was not meant to cover losses caused by the virus and the standard Insurance Services Office (ISO) virus exclusion bars insurance coverage in any event.

While insurers have had success in court by raising the ISO virus exclusion, many construction industry property and builders risk policies do not contain this exclusion. Therefore, coverage should not be excluded under such policies.

Setting aside all the exclusions, policyholders seeking coverage under a property policy must in most cases demonstrate “physical loss or damage.” Despite insurers’ arguments to the contrary, many COVID-19 impacts and consequent government shutdown orders result from physical loss or damage and therefore are covered losses. This view is developing, but it is bolstered by prior case law across the country in which courts have held for decades that loss of use, caused by some physical impact, is a covered loss even where no part of the subject property is structurally demolished.

The Minnesota Court of Appeals reported a good example of this

thinking in the *Gold Medal Ins. Case*, decided 20 years ago, where the insured’s product was deemed unusable by governmental declaration, even though there was nothing physically wrong with the product. The court reasoned that the common-sense fact of its being commercially unusable was the practical and legal equivalent of “direct physical loss,” as stated in the policy. This same reasoning has been successfully argued in courts across the country by insureds seeking BI coverage arising from government-ordered closures of commercial properties because of the COVID-19 pandemic.

Inconsistent definitions between policies may mean broader coverage.

As more courts recognize the merit of this well-developed legal concept, policyholders may have increasing success on their insurance claims, including claims for BI, civil authority and builders risk COVID-19 losses. Further, some policy provisions do not even tie relevant coverage to “physical loss of or damage to property,” so arguments in favor of coverage are even stronger in these instances.

CGL Coverage

Commercial general liability (CGL) insurance policies typically cover property damage and bodily injury losses the insured is alleged to have caused to third parties, as well as costs incurred to defend the insured against those allegations in court. CGL policies are generally written on standard ISO forms.

To the extent businesses are sued based on claims that their actions or

inactions caused an increased risk of exposure to COVID-19, such claims should be covered by CGL policies. In other words, such allegations should fit within the standard definition of a covered loss under the policy and be covered, unless the policy contains an exclusion that would specifically prevent coverage for the virus.

Pollution Coverage

Pollution policies offer first-party coverage for cleanup costs, as well as third-party coverage for bodily injury or property damage claims asserted against the insured. The threshold question for insureds seeking insurance coverage for COVID-19 losses under pollution policies and policy extensions will be whether the presence of COVID-19 constitutes a “pollutant” under each policy’s language.

For pollution coverage, much depends on which insurer’s proprietary form is used. In contrast with CGL policies, for example, which typically use ISO forms (including pollution exclusion forms), pollution policies differ between insurers, and each insurer’s obligations will vary depending on the language in its policy. Nevertheless, it is certainly possible that COVID-19 may fit within a particular policy’s definition of “pollutant.”

Inconsistent definitions between policies may also mean broader coverage for insureds. For example, COVID-19 may not be excluded as a “pollutant” under a CGL or other policy and hence policyholders may be entitled to coverage there, but it may also be deemed a “pollutant” under a pollution policy, entitling policyholders to an additional avenue of insurance recovery.

For more guidance on state-specific treatment of these developing issues, please call 612-672-8321 or email david.suchar@maslon.com. ♦

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Reflections on a Forum Foundation: The Path to Being a Better Construction Lawyer

By Edward Gentilcore, Member, Governing Committee, and Chair, Marketing Committee, ABA Forum on Construction Law

While not a signature milestone,

I am currently several months into my 33rd year as a member of the ABA Forum on Construction Law, and I remain very grateful for the firm foundation that it has provided to me as a construction lawyer. My initial 1988 membership directory was published in a softbound format under the Forum's then-moniker, the Forum on the Construction Industry. It was approximately ¼ in. thick and in a 5-in. x 8-in. size. Today, it is far larger and available electronically. Nevertheless, at that time (and even now), for me, it was a concise listing of those who joined in my passion for construction law. They were from all over the country, they were from international locations, they were senior and junior (like myself) lawyers, both outside and in-house counsel, and they were there to further the practice of construction law.

Flourishing in the Forum

I still remember my first Forum meetings. They required travelling from Pittsburgh to New York as a young associate, which fortunately was supported by my law firm and the partners with whom I worked most closely.

I sat there in a huge ballroom with rows and rows of tables, and at each of them were hundreds of faces that I did not yet know. On the stage were lawyers, judges, experts and scholars in the field. I always returned from those meetings impressed by the knowledge conveyed and the depth of experience that those people not only possessed but

**Learning from
Forum resources,
which were always
respected and
trusted, made
me a better
construction lawyer.**

also were willing to share with me and others who were looking to learn more about what we really loved to do—be construction attorneys.

At first, I gained my own experience as a construction litigator, and later I grew into an attorney who also drafted



Forum members enjoy their time together in the Exhibitor Hall.

and negotiated construction contracts. Still, it was those Forum programs, publications and people who helped me fill in the areas where I did not yet have that direct experience. There were resources for contracts, dispute resolution, surety bonds, insurance, labor and employment, legislation, bidding and procurement, government contracting, payment disputes, default and termination, and project closeout. Learning about these topics from Forum resources, which were always respected and trusted, made me a better construction lawyer. I knew and greatly appreciated the benefit of my relationship with the Forum.

Then, there were the connections that were beginning to build with each program I attended, by virtue and with the assistance of those many people who reached out, introduced themselves, introduced me to others and urged me to get more involved. A great number of my fellow Forum members can share similar stories, mention the people who reached out and pulled them deeper within the almost familial fabric of the Forum, and exposed them to opportunities to be truly a part of this phenomenal collection of practitioners.

In a vibrant organization like the Forum, there is always plenty to do



The Welcome Reception gives Forum friends time to catch up.



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Forum colleagues gather at the Women's Networking Event.

and accomplish. There are articles to research and write, books to author and edit, presentations to develop and deliver, outreach initiatives to support, and meetings to coordinate and hold. There is also all the leadership required to coordinate these myriad contributions and efforts, and the Forum has been truly blessed to have been led by

a richly talented and diverse group of construction lawyers who went above and beyond to devote themselves and their considerably valuable time to make the Forum even better and stronger.

For the Greater Good

So this brings me to a question that has been presented to me by a number

of people more recently, perhaps borne from the reflective environment created by the worldwide COVID-19 pandemic and maybe just from natural and reoccurring introspection: Why do we do all this in and for the Forum? Why

The Forum has been truly blessed to have been led by such a richly talented and diverse group of construction lawyers.

do we spend countless hours crafting a detailed and deeply cited book or an article in the Forum's flagship publication, *The Construction Lawyer*? Why do we use so much time preparing and rehearsing for presentations, meetings

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and programs delivered with continuing excellence? Why do we have such a devotion of heart and soul to making the Forum accessible and relevant to a broad and diverse community of attorneys and consultants? And why do we bestow a substantial portion of a finite resource of time to the advancement of knowledge of others without expectation of reciprocation or remuneration?

I cannot answer these questions (and perhaps many more) for everyone involved in the Forum. Actually, now knowing many of the people in the Forum, I strongly believe that the answers to these questions would be as varied and diverse as the members. Still, from my own perspective, it really does come down to “paying it forward,” to borrow the phrase from the novel by Catherine Ryan Hyde. There is so much that I have taken and received from the Forum: knowledge, insights, friendships, connections, referrals and recommendations are but a handful of

what I can recount. Perhaps these are what inspired me to pursue my first supporting research, article, presentation, committee position, program presenter and leadership roles.

Out there in the audience, whether it be virtual or in person, is someone who, just like me, wanted and still wants to be a better construction lawyer.

However, I believe it is more about our commitment to being stewards and ambassadors to and for a group of people who have dedicated their

professional lives to supporting the legal needs of the construction industry, all within an organizational construct that continues to grow and evolve to remain relevant. I believe that it is also about remembering that out there in the audience, whether it be virtual or in person, is someone who, just like me, wanted and still wants to be a better construction lawyer. ♦



New members of the Forum are invited to get involved.

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Ten Truths About Construction Fraud

By Joshua B. Levy and Eric J. Meier, Partners, Husch Blackwell

1. There is a high cost of fraud.

Five percent of revenue is lost to internal fraud and abuse each year. The median for the construction industry is \$227,000, which is significantly higher than the median for all industries, which is \$130,000.

2. Recovering funds is the exception.

In 53% of the reported frauds, there was no recovery—money was often gambled away. For 15% of reported frauds where there was a full recovery, the source of recovery was usually an insurance policy.

3. Insurance applications provide a self-evaluation check.

Review carefully the management liability and cyber insurance applications. They not only speak to the different types of coverages available but also provide an outline of good thoughts to self-evaluate an internal program.

4. “Cybercrime” combines two distinct insurance product lines.

Cyber coverage traditionally covers risks with privacy and loss or theft of personally identifiable information, while crime coverage usually covers theft of money and certain property.

5. Fidelity bonds could be a useful insurance tool.

Fidelity bonds are insurance products that specifically target deceitful acts, not mistakes or oversights. They are commonly designed on a “claims made” basis.

6. There is no specific fraudster profile, but there are some perpetrator characteristics.

A study conducted by the Association of Certified Fraud Examiners’ (ACFE) in 2018 noted that characteristics of perpetrators were a direct correlation between: the level of authority and fraud loss; the length of employment for an organization; gender (many fraudsters were men); and age (the highest number of fraud acts are committed by those aged 36–45, but the highest dollar amount of loss from fraud acts were committed by those aged 56 or over).

7. There are anti-fraud controls for billing fraud.

Any scheme in which a person causes his or her employer to issue an irregular payment for goods or services (whether through an inflated or false pay application, change order abuse, billing for costs associated with another project, etc.) is considered billing fraud.

8. There are red flags for expense reimbursement credit card schemes.

Look for things such as purchases that do not appear to be business related, missing original documents supporting expenses, altered receipts, expenses in round dollar amounts, expenses just below the receipt submission threshold and costly meal expenses that lack information.

9. There are cost-effective methods to help prevent fraud.

Among the most effective methods to help prevent fraud is to involve numerous employees in the accounting process.

10. Hotlines are the top method of fraud detection.

The ACFE’s 2018 Global Study on Occupational Fraud and Abuse stated that tips from hotlines were the biggest means of fraud detection. More than 40% of all fraud is detected by a tip. Fraud losses are estimated to be 50% smaller for organizations with hotlines than those without. ♦



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Construction Claims in the Wake of COVID-19

By Gray Slocum, Senior Managing Consultant, Interface Consulting International

Like many sectors, the construction industry has been adversely impacted by COVID-19. Delays and reduced productivity have increased costs.

Despite construction being declared an essential industry, many projects were shut down in spring 2020, as contractors and owners tried to create and implement safety protocols to minimize the impact of the virus.

Once construction resumed, the new protocols required social distancing, smaller crews, increased craft segregation, additional PPE and increased sanitation requirements. These protocols have disrupted worker continuity and productivity, which increases labor

costs and delays project completion. Supply chains for materials and equipment have also been disrupted, creating additional uncertainties. As a result, the industry is faced with an increase in claims and disputes associated with the liability for COVID-19 impacts.

The liability for the increased construction costs associated with COVID-19 is often not clear for projects contracted before March 2020. The contract may or may not contain language allocating responsibility. For example, a force majeure clause addresses the parties' responsibilities in circumstances arising from events outside the parties' control and may

explicitly list some events, such as government directives, but may not include pandemics. Alternatively, with a cost reimbursable contract, a contractor experiencing productivity losses for complying with new protocols would likely be compensated for its labor under the contract's payment mechanism.

The COVID-19 pandemic continues to impact all areas of the construction industry, and as a result, there will very likely be an increase in the associated claims and disputes.

For additional information on this topic, call 713-626-2525, email gtslocum@interface-consulting.com or visit www.interface-consulting.com. ♦



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Force Majeure Protections During a Pandemic

A force majeure protects contractors for circumstances that are beyond their control. When a “force majeure” clause is added to a contract, there is no magic in these words. In truth, most construction contracts include a provision for delay caused by force majeure events, even if they do not specifically refer to it as a force majeure clause. Categories for work delays are listed in provision 8.3.1 of AIA contract document A201: 2017 General Conditions of the Contract for Construction, including a catch all for other “causes beyond the contractor’s control.”

A force majeure relates to major events, such as floods, hurricanes or some act that no one could counteract with appropriate planning (like the current pandemic). Those in the construction industry are paying even more attention to force majeure provisions because of government restrictions that are shutting down construction sites. Similarly, delays are happening because of social-distancing orders that decrease the number of trades at a jobsite. Contractors have gone to extreme measures since March 2020 to keep projects open and moving.

They have adjusted safety plans to include health measures, changed how many subcontractors can be on a jobsite at one time and created new work hours as allowed by ordinances.

Despite all of this, delays are still happening, and defining what qualifies as an excusable delay can be tricky. If a delay is encountered, a contractor should contact the owner and architect as soon as possible. Open communication is key to avoiding future arbitration or lawsuits. A contract also spells out notice requirements for requesting time extensions, and it is vital to satisfy those notice requirements.

The legal community expects specific references to delays caused by the pandemic to increase in the next few years. For now, however, the language of AIA documents already suffices to protect parties. For more information, visit aiacontracts.org/enr-covid. ♦

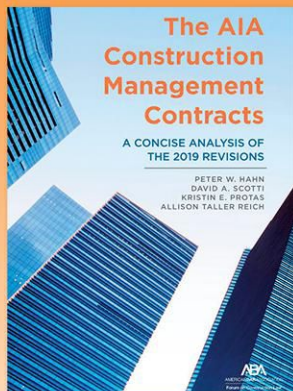


The legal community expects that force majeure will continue to play a major role in construction projects for the foreseeable future.

IMAGE: ADOBE STOCK © JOZEFMIDIC

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The AIA Construction Management Contracts: A Concise Analysis of the 2019 Revisions

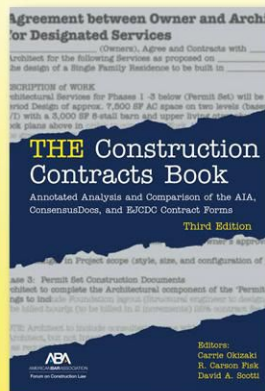


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Avenues to Affordable Auto Insurance

By **Steven D. Davis**, CPCU, ARM, Senior Vice President and Director of Construction Risk Services, McGriff, Seibles & Williams

The legal and insurance markets are bonded for engineers and contractors when it comes to company operations and management. For the past few years, auto insurance has been a particular area of concern for many. Insurance companies have seen their largest losses in their auto liability lines, leading to rising rates.

Insurers are looking at motor vehicle records and making their requirements for eligible drivers stricter. Substantial increases in rates are expected for another year, and companies with large losses should expect higher umbrella attachment points. This could potentially lead to a contractor needing to buy a “buffer” layer of coverage to get

to the attachment point with which the umbrella carrier is comfortable. This could be up to a \$1–2 million buffer layer, which can be an expensive and unexpected added cost for a contractor.

Providing details about your fleet safety is one avenue to better rates. Insurers are asking about driver policies, pulling motor vehicle records and looking for real-time monitoring systems on vehicles. Insurance underwriters understand that the investment implies a top-down support for driver safety.

As you navigate automobile insurance, be sure to take proactive measures. For additional information, please visit www.mcgriff.com. ♦

Substantial increases in rates are expected for another year, and companies with large losses should expect higher umbrella attachment points.



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Recovering From COVID-Related Impact Costs

By S.A. (Gator) Galbraith, PE, CCM, CFCC,
Dispute Resolution Service Leader, MBP

We are all ready for the COVID-19 pandemic to be over. With vaccinations underway, let us hope we soon return to our pre-pandemic lives.

Many construction industry firms received financial assistance for their business operations by obtaining U.S. government-backed loans through the Small Business Administration's (SBA's) Paycheck Protection Program (PPP). But how long will owners, contractors, attorneys and consultants deal with the fallout?

Will PPP loans affect a firm's ability to recover COVID-related impact costs through typical contract change clauses? Will a firm's request for loan forgiveness affect its ability to

recover COVID-related impact costs through contract change clauses?

Many owners are still grappling with how to respond to change requests for COVID-related project impacts, while SBA continues to refine its loan forgiveness guidance. In the interim, thorough documentation will be key to a firm's potential recovery of COVID-related project costs separate from costs recovered through PPP loan forgiveness.

The government and construction industry will deal with these questions for years. If your firm is facing related project issues, contact a member of the ABA Forum on Construction Law or email me at sgalbraith@mbpce.com. ♦

How Efficient Is Virtual Claims Resolution?

By Tom Finnegan, Senior Managing Director, FTI Consulting



By now, we have all experienced the "virtual world" of COVID-19 in construction litigation. I believe the lack of in-person

dialogue has had an impact on efficient claims resolution, namely in the analysis of project issues and expert testimony.

My experience in recent months on projects located primarily in the South and Gulf Coast suggests that many clients are welcoming the opportunity to get back to the pre-COVID world of meeting in person. Virtual meetings

I believe the lack of in-person dialogue has had an impact on efficient claims resolution.

struggle to compete with the efficiency of working as a team to analyze tough issues in a conference room with access to the key project documents, such as drawings, schedules, letters, etc.

A similar trend has emerged with expert testimony. While I have had successful experiences with testifying virtually, my sense is that many in our industry believe the "human factor" of an effective testifier is somewhat neutralized in the virtual environment. The nuances, such as eye contact, physical presence and body language, are lost. In the coming months, it will be interesting to see where our industry goes as we begin to see the light at the end of the long COVID tunnel. ♦

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