DEALING WITH THE CONSTRUCTION IMPACTS OF COVID-19

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During this time of global pandemic, contractors and their sureties are facing familiar challenges such as material shortages and labor inefficiency but at levels unprecedented in scope and duration, as well as unique challenges in the form of stay-at-home orders and government shutdowns of construction work deemed "non-essential" business. This article addresses some of the issues that the surety industry will need to consider in order to navigate the inevitable contractor failures and increased bond claims arising from the impacts of COVD-19 on the construction industry.

I. KEY CONTRACT TERMS ADDRESSING ENTITLEMENT TO SCHEDULE RELIEF AND DELAY AND OTHER DAMAGES

A. Introduction

Given the small profit margin of many construction contracts, a significant number of contractors may not be able to withstand the financial impact of COVID-19. Contractors are experiencing increased costs for a variety of reasons. For example, there is a need for more thorough and frequent cleaning of offices and job sites, a greater supply of hand-washing facilities, and additional staffing requirements to learn new safety guidelines and to perform temperature checks and other activities required or recommended to maintain a healthy work environment.[1] Contractors are experiencing diminished labor productivity caused by a number of factors, including increased employee absenteeism triggered by illness, quarantine, public transportation issues, or lack of available childcare; the general effects of telecommuting; and the necessity of reduced on-site staffing or additional shift work mandated by new federal or local social distancing requirements. Materials may be more expensive to timely procure as a result of global manufacturing shutdowns (goods made in China), closure of ports, and general material transportation delays within the United States. Even if a bonded principal is weathering the storm, a bonded project may still suffer because lower-tier subcontractors and suppliers are simultaneously facing the same issues.

While operating costs are increasing, revenue streams are declining. Government or owner-imposed shutdowns have suspended some private and public construction work, curtailing

[1] Under the Occupational Safety and Health Act ("OSHA"), there is a general duty to provide workplaces that are "free from recognized hazards." OSHA has released advisory guidance giving recommendations to employers on how they may provide safe and healthful working conditions during the pandemic. The Centers for Disease Control and Prevention, the World Health Organization, and the Equal Employment Opportunity Commission have also weighed in on best practices for avoiding or mitigating the spread of COVID-19. These guidelines, along with states and localities' executive orders, mean contractors (especially those working in multiple jurisdictions) and takeover sureties must be familiar with a patchwork of rapidly evolving rules regarding the pandemic. In addition, industry groups like the Associated General Contractors of America have also issued their own guidance and recommendations. Sureties should be closely monitoring developments to safely and lawfully maintain operations.

anticipated progress payments needed to fund overall operations. While other projects are continuing, some nervous or financially-distressed upstream owners/general contractors are slowing down payment processing or declaring bankruptcy, affecting the contractor's ability to adequately staff its own operations and pay lower-tier vendors. In addition to increased operating costs and payment delays, contractors may be subjected to delay damage claims from obligees when projects cannot be completed on schedule. The first place for principals and their sureties to look for some relief is in the underlying construction contract.

B. Contract Performance Obligations and Delay Clauses

Almost every construction contract has a "time is of the essence" provision and a completion deadline. Absent a justifiable excuse, the consequences for failure to meet the completion deadline may include a termination of the contract for default (usually accompanied by a demand on the performance bond surety to complete the work), payment of the obligee's costs to supplement the principal's labor force to mitigate delays, and/or the assessment of liquidated damages or actual delay damages for failure to timely complete the work. Significant project delays increase the surety's risk of receiving both a performance bond claim from the obligee and payment bond claims from lower-tier vendors seeking progress payments and delay/impact costs.

The vast majority of construction contracts also contain provisions allocating the responsibility for the impacts of various delays. Provisions addressing delays that are caused by forces outside of either party's control are typically referred to as "force majeure" clauses. Although their specific terms vary widely, there are two primary types of force majeure clauses: one type contains a non-exclusive list of examples of force majeure delays along with a "catch-all" provision containing language such as "or anything outside of either party's control" and the other type specifically spells out every calamity that will qualify as a force majeure delay. For those clauses containing a "catch-all" provision, a global pandemic is going to fall within the provisions of the clause. Clauses with ambiguous or narrower language may be subject to future litigation as to whether current circumstances meet the criteria.

After determining whether a global pandemic falls within a specific clause's coverage, a further assessment must be made to determine what relief triggering the clause may provide. In some cases, the contractor may be entitled to a time extension only, negating any effort by the obligee to legitimately declare a contract default or assess delay damages, but not providing any relief in the form of compensation for the contractor's additional costs attributable to the pandemic and extended performance duration. Other clauses may allow the contractor to seek additional compensation for costs that it can prove to be caused by the force majeure event.

One of the most widely-utilized sets of industry construction documents is the AIA series of contract forms. The current AIA contract language addressing delay is found in the A201 - 2017 General Conditions, which state:

> **§ 8.3 Delays and Extensions of Time**
> **§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by . . . unusual delay in deliveries, unavoidable casualties . . . or other

causes beyond the Contractor's control . . . or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

This language is sufficiently broad to entitle a contractor to relief for delays caused by the current COVID-19 crisis and the potential recovery of provable delay costs. Similarly, the ConsensusDocs 200 Section 6.3.1 contains a list of causes of excusable delay that includes both epidemics and transportation delays that are not reasonably foreseeable and references the contractor's right to an equitable adjustment in the contract price. Each contract must be read carefully though, as parties often modify the standard industry contract provisions, including the obligee eliminating the contractor's right to recover delay damages. In addition, many parties use their own contract forms rather than using the common industry forms and obligees routinely seek to avoid liability for a contractor's delay-related costs regardless of cause.

Most federal government contracts address the issue of delay by incorporating provisions of the Federal Acquisition Regulation ("FAR"). FAR 52.249 -10 addresses what constitutes a default under a fixed-price construction contract and FAR 52.349 -14 addresses excusable delays. Both epidemics and quarantine restrictions are grounds for excusable delay.

C. Suspension of Work and Termination for Convenience Clauses

Rather than deal with the cost of ongoing project delays caused by COVID-19 impacts, obligees may elect to suspend work on a bonded project until the severity of such impacts has passed. In other cases, obligees may have no choice but to suspend work due to local government shutdown orders, which are now starting to ease but could recur if the fears of a "second surge" are realized. Typical suspension for convenience language is found in the AIA A201:

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

- **.1** that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
- **.2** that an equitable adjustment is made or denied under another provision of the Contract.

ConsensusDocs Section 11.1.1 specifically references the contractor's right to an equitable adjustment in the contract price for cost and delay arising from an owner's suspension of the work. Under federal contracts, FAR 52.242-14, a suspension of work clause, provides that the contractor is entitled to compensation for increased costs if the project is suspended for an "unreasonable" amount of time, the delay is caused by the government and the contractor is not responsible for any concurrent cause of delay, and the contractor has provided proof of an injury. Manuscripted contracts take a variety of forms and may contain language that the contractor only receives a price adjustment if work is suspended for more than a stated duration of time. Suspension provisions may also allow one or both parties the option to terminate the contract if the suspension lasts beyond a stated duration.

In the private sector, where hospitality and retail sectors have been hit particularly hard by the impacts of COVID-19 and government-imposed shutdowns, contractors may see construction contracts for hotel construction or renovation, or construction related to restaurants or other retail spaces, terminated for the obligee's convenience. The termination language of the particular contract governs the contractor's rights to compensation for work not performed and anticipated profits. While a termination for convenience eliminates any threat of a performance bond claim due to performance delays, the risk of payment bond claims remains if the contractor cannot successfully negotiate termination claim settlements with its lower-tier vendors.

D. The Need to Protect and Preserve Both the Project Site and Notice and Claim Deadlines

As COVID-19 shutdowns, stay-at-home orders, slowdowns in the supply chain, or lack of labor begin to affect bonded projects, it is important to keep in mind that just because the project might be shut down does not mean that the deadlines applicable to certain aspects of the project have stopped running. Deadlines and other time periods will continue to run, limitations will continue to run (unless the government steps in), mechanic's lien rights and bond claim rights will continue to run. Accordingly, it is critical to determine and preserve applicable deadlines for notices of claims, lien rights, delays and impacts, requests for equitable adjustments, change orders, and insurance claims. The same is true for dispute resolution rights.

The contractor and its surety must be mindful of the fact that an integral part of preserving rights and claims involves properly documenting the impacts. Special attention must be paid to keeping track of COVID-19-related costs and impacts in a clearly identifiable way so that the claims, notices, and requests can be supported by sufficient evidence when the time comes. It does no good to preserve the claim through a notice if the claim cannot be proven with sufficient evidence and documentation.

Finally, if there is a project shutdown, the contractor must make an effort to determine the applicable contract requirements for protecting the site, protecting the work, materials, equipment, work of others, etc. as it is better to protect now, than pay later for damage, spoliation, or theft. The contract documents should also provide insight into who bears the risk of loss or damage if injury occurs despite the contractor taking the required steps to protect the work in place.

II. RELIEF FROM PERFORMANCE OBLIGATIONS ARISING OUTSIDE THE CONTRACT TERMS

A. The Common Law Defense of Impossibility of Performance

When dealing with an impatient obligee, whether in a takeover or when advising a principal having difficulties, a surety in the age of COVID-19 will need to be aware of the impossibility defense. Familiarity with the factors of this defense can be useful not only in defending a claim, but avoiding termination and assertion of a claim.

Whereas a force majeure defense is dependent on the particular language of the bonded contract and jurisdiction-specific case law addressing that clause, impossibility is a common law defense. This means that even if the principal did not comply with notice requirements or other conditions precedent, an impossibility defense may still be available. However, it should be kept in mind that if the contract specifically allocates risk for non-performance in the case of pandemic, the terms of the contract will control over common law concepts such as impossibility.[2]

In early American jurisprudence, the law of contracts essentially swallowed up the impossibility defense. The courts believed that if performance of a contract became impossible, this was a risk borne by the non-performing party.[3] As commercial activity flourished and construction increased, this framework became unworkable and a more realistic rule had to be applied. The courts came to recognize the unfairness of pinning the risk of performance solely on one party when a basic assumption implied in the contract fails through no fault of that party.[4] Over time, this doctrine has expanded beyond literal impossibility to include situations of commercial impracticability; i.e., where performance is technically possible, but only at unreasonable and excessive cost.

Most jurisdictions apply factors similar to the following in determining whether contractual performance is excused due to impossibility:

1. The unexpected occurrence of an intervening act;
2. The occurrence was of such a character that non-occurrence was a basic assumption of the parties when entering into the agreement; or
3. The occurrence made performance impracticable.[5]

1. "Unexpected Occurrence"

With COVID-19, most courts are going to agree that a pandemic on this scale was unexpected; however, that will change as time goes on. For contracts signed before February 2020, this part of the defense will likely be satisfied. But due to the widespread nature of the pandemic, future contracts should address disease specifically. Entering into a contract that does

[2] *See* U.S. v. Winstar Corp., 518 U.S. 839, 907-08 (1996) (citing RESTATEMENT (2D) CONTRACTS § 261).
[3] *See* Dermott v. Jones, 69 U.S. 1, 8 (1864).
[4] *See* Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 629-30 (1921).
[5] *See, e.g.*, Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1102 (4th Cir. 1987).

not allocate the risk of nonperformance in the case of disease or pandemic could well be at the risk of the party who cannot perform.

This is particularly relevant to takeover and tender agreements. Sureties should ensure that they are protected from risk if COVID-19 or some other pandemic prevents a contract from being completed. The agreement can address the availability of labor or materials, and the effect of government shutdowns and stay-at-home orders separately. Now that everyone is keenly aware of the threat posed by pandemics, the impossibility defense is going to be much tougher to establish for contracts entered into going forward.

2. "Non-Occurrence Was a Basic Assumption"

In some jurisdictions, the test for whether the non-occurrence of an intervening event was a basic assumption of the parties relates to foreseeability.[6] Other jurisdictions, such as the Fourth Circuit, have moved away from the foreseeability test because the human mind can conjure just about any possibility. The test in the Fourth Circuit, therefore, is whether the non-occurrence of the event was sufficiently unlikely or unreasonable at the time of contracting to constitute a reason for setting aside the contractual obligations.[7] This will depend on the scope and purpose of the contract, the timing, and the interests of the parties at stake.

When seeking to rely on an impossibility defense, a simple citation of the virus and attendant hardships is not going to be sufficient. The "event" has to be something more than simply the virus. There has to be an impact that specifically affects the project in some way. This impact should be documented with contemporaneous communications wherever possible.

3. Impracticability of Performance

In the majority of cases involving sureties, this factor will be the most heavily contested. Impracticability includes not just obvious circumstances such as a government shutdown, but also changed circumstances where the costs arising as a result of the virus would be excessive and unreasonable.[8] This does not mean that a simple increase in costs will relieve a party from its obligations. To support an impossibility defense, the costs and burden have to increase so much that they are not fairly to be regarded as within the risks the obligor assumed under the contract.[9]

An important point to keep in mind is that the party relying on an impossibility defense must exhaust all alternatives for performance.[10] For example, if the project is in a phase that 1) specifically relies on a particular type of skilled labor, 2) there are limited companies in the region that do this type of work, and 3) none of them are available because of the virus, the contractor or surety must document these facts and ask the companies to confirm their status or unavailability in writing. The information should be shared with the obligee so it can adjust its

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[6] *See, e.g.,* Heat Exchangers, Inc. v. Map Constr. Corp., 368 A.2d 1088, 1093 (Md. App. 1977).
[7] *See, e.g.,* Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1101-02 (4th Cir. 1987).
[8] Transatlantic Financing Corp. v. U.S., 363 F.2d 312, 315 (D.C. Cir. 1966).
[9] Comment a, RESTATEMENT (2D) CONTRACTS § 265.
[10] *See* Blue Cross Blue Shield of Tennessee v. BCS Ins. Co., 517 F. Supp. 2d 1050, 1056 (N.D. Ill. 2007).

expectations accordingly. Depending on the circumstances, it may be necessary to explore the possibility of using a subcontractor from a different part of the country.

Similarly, if a certain material specified in the contract is unavailable and it can only be obtained from a particular geographic or proprietary source, the efforts to agree on and obtain suitable replacements should be documented. If it costs 100 times the agreed amount to get material from an alternative source than what was assumed in the bid, this will likely excuse performance. On the other hand, if the difference is much smaller but still significant, performance may not be excused. Substitutions should be evaluated wherever possible.

4. Duration

In most construction matters, particularly those involving delay damages, an impossibility defense will likely be a temporary one. If a contract is only temporarily impossible, the performing party will be expected to resume performance once the event preventing performance ceases.[11] Accordingly, a surety working with a principal on a project that is currently on hiatus should be sure that the principal has the resources in place to resume work as smoothly as possible once the obligee gives the instruction to resume. This includes not only ordinary remobilization measures but ensuring any government-mandated social distancing guidelines and other health precautions, such as testing protocols, are implemented.

An excusal from performance can be permanent where it would be materially more burdensome to resume performance than it would have been had there been no frustration. The classic example would be if there was a dramatic increase in price of a necessary commodity that arose in conjunction with the pandemic. At this time, it cannot be predicted whether this will happen, or to which commodities, so the assumption should always be that the delay arising from COVID-19 is temporary and a contractor or takeover surety should expect to return to the job once the problem has eased.

B. Use of Frustration of Purpose Principals During COVID-19 Work Restrictions and Shutdowns

The surety's options for defending obligee delay claims and performance under a reservation of rights will be heavily dependent on factors such as the nature of any shutdowns or restrictions imposed on the project, the state or locality where the project is located, and in some places, the character of the project (for example, defense or medical-related jobs).

The goal when faced with a total shutdown should be apparent. If construction work is subject to a complete government shutdown, the project cannot proceed, workers and consultants cannot be on site and there should be a time extension coextensive with the amount of time that work is not allowed on the project. When the contract was formed, it was under the expectation that it would not become illegal to perform the work. Neither the principal nor the surety can be expected to break the law in order to perform the contract, and this applies even if a regulation or order is later found to be unconstitutional or unenforceable.

[11] *See* Com. Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 861 (N.D. Ill. 1990).

But what if work is allowed, but only under restrictions that affect the ability to timely perform? Requirements such as social distancing and caps on the number of employees active on a jobsite may slow down performance even if they do not completely prevent construction. The principle of frustration of purpose could prevent the imposition of delay damages by the obligee in light of the challenges these restrictions place on principals and takeover sureties. "Frustration of purpose," a concept very similar to the impossibility defense, applies where "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made[.]"[12]

The first consideration is always to check the bonded contract for provisions on work stoppages, government-ordered shutdowns, and instructions not to proceed. Equitable and common law doctrines can be useful in situations not contemplated by the contract, but they generally cannot be used if they contradict the contract's plain language.[13] If a claim has been asserted, or if restrictions are causing delays that may result in a claim, the most important step is to document the reasons for the delay. Ideally there should be detailed records of the manpower and time needed to perform certain tasks before restrictions came into place. If not, consultants may be required to approximate delay impacts using estimating tools and industry standards. If the claim ends up in litigation, expert testimony on the reasonableness of the delay in light of the restrictions in place will be very important in determining liability as well as damages.

In addition, the bond form may provide additional nuances affecting the viability of a common law defense. Consider the scenario where the principal closes its doors during the course of a government-ordered shutdown, and the obligee asserts a claim seeking immediate payment. To use a familiar example, the AIA A312-2010 performance bond gives the surety four options once the conditions precedent for assertion of a claim are met. Under § 5, once the surety has received notice that the obligee is considering a declaration of default, the principal has been terminated, the surety has been notified, and the obligee agrees to pay the balance of the contract price to the surety or a contractor selected to perform, the surety has four options, paraphrased below:

5.1: Arrange for the principal to complete the contract;
5.2: Take over and perform the contract itself;
5.3: Obtain bids and tender a completing contractor, paying the damages in excess of the balance incurred as a result of the default; or
5.4: Waive the right to take any of the above options and either pay the obligee the amount for which it is liable, or deny the claim.

Clearly, if a shutdown is in place, the surety cannot comply with §§ 5.1, 5.2 or 5.3 – at least not immediately. However, an obligee may argue that, while the first three options may be unavailable, the last is not. It may ask the surety to rely on the documents it provides and ask the surety to write a check for the full amount of the claim.

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[12] Chase Precast Corp. v. John J. Paonessa Co., 566 N.E.2d 603, 606 (Mass. 1991) (quoting RESTATEMENT (2D) CONTRACTS § 265).
[13] *See* Conneaut Lake Park, Inc. v. Park Restoration, LLC (In re Conneaut Lake Park, Inc.), 564 B.R. 495, 509-10 (Bankr. W.D. Pa. 2017).

There is some case law, albeit arising from other contexts, suggesting that where a contract gives multiple options for performance and some are unavailable, the performing party must choose from the options that are available.[14]

The key to responding to such an argument is in the plain language of the bond. The surety on an A312-2010 bond has the right to choose its method of performance. If it cannot exercise any of its options except one due to circumstances beyond its control, there is no choice. Therefore, the surety's obligation under the bond cannot be performed until the shutdown is over and the options for performance become reasonably practicable. When dealing with other bond forms, it is always advisable to check to see if the bond guarantees the surety the right to choose its method of performance.

C. Additional Guidance on Relief Available under Federal Government Construction Contracts

Recently, the Office of Management and Budget (OMB) issued Memorandum No. M-20-18 (the "Memorandum") to the heads of all federal executive departments and agencies entitled "Managing Federal Contract Performance Issues Associated with the Novel Coronavirus." In the Memorandum, OMB states that:

> agencies should be flexible in providing extensions to performance dates . . . if a contractor is unable to perform in a timely manner due to quarantining, social distancing, or other COVID19 related interruptions.[15]

OMB provided additional guidance in FAQs attached to the Memorandum. The FAQs provide that the government should be as flexible as possible in finding solutions when a contractor is unable to meet project schedules due to COVID-19 quarantine restrictions or exposure. The government agencies are encouraged to look for other solutions if completion with the existing contractor is not feasible including termination for convenience. OMB emphasized that such actions should be taken without negatively affecting a contractor's performance rating.

OMB further stated that requests for equitable adjustment associated with increased costs related to safety measures undertaken by contractors to protect employees from COVID-19—including costs for performance disruption—should be considered on a case-by-case basis, taking into account whether the contractor was attempting to comply with CDC guidance.[16]

Sureties may be able to use the OMB guidance to structure a reduction or elimination of scope of work, termination for convenience, or buy-out of a bonded contract as a means of resolving a performance bond claim. If a surety is in a takeover situation, it may be able to use

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[14] *See, e.g.,* Yankton Sioux Tribe of Indians v. U.S., 272 U.S. 351, 359 (1926) ("where one part of an alternative promise, originally possible, has subsequently become impossible of fulfillment, the other part of the alternative must nevertheless be performed.").
[15] Memorandum No. M-20-18 at p. 1.
[16] *Id.,* FAQ No. 3 at p. 4.

the OMB guidance to justify a request for equitable adjustment to recover increased costs for COVID-19 impacts, obtain schedule extensions, or mitigate liquidated damages.

III. LOOKING FOR FINANCIAL RELIEF FOR THE PRINCIPAL OUTSIDE OF THE CONSTRUCTION CONTRACT

As many contracts limit recovery to non-compensable time extensions or contain high burdens of proof to seek delay damage recoveries, contractors need to look to other sources of recovery for COVID-19 related financial impacts.

A. Insurance Coverage

Contractors typically have a variety of insurance policies that may apply to a bonded project and under certain circumstances the surety may be able to seek to assert a claim against such policies to recover costs incurred. One such coverage that might come into play through the surety's subrogation rights is "business interruption." In theory, this coverage is supposed to reimburse an insured for losses in business revenue caused by an interruption in business operations.[17] Obviously, with COVID-19 impacts such as shutdowns, quarantines, and decontamination, many bonded contractors may experience lost revenue from the interruption of their business. The problem with this type of insurance is that it is written on a property loss policy format and typically requires physical loss or damage to trigger coverage.[18]

In a recent Pennsylvania Supreme Court opinion, unrelated to insurance coverage, the court held that the COVID-19 pandemic qualifies as a "natural disaster" under the Pennsylvania Emergency Code because it involves "substantial damage to property, hardship, suffering or possible loss of life."[19] In addressing the nature of the virus and the manner in which it is transmitted, the court observed that "[t]he virus spreads primarily through person-to-person contact, has an incubation period of up to fourteen days, one in four carriers of the virus are asymptomatic, and the virus can live on surfaces for up to four days. Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area."[20]

The court in *DeVito* further rejected the argument that the virus had to be actually present at a specific location before a shutdown could occur, and held that all properties were damaged because of the manner in which the disease spreads.[21] This could have important implications in policy interpretation regarding physical damage. The court concluded that the "COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions."[22]A

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[17] *See, e.g.*, Lyon Metal Prod., LLC v. Protection Mut. Ins. Co., 321 Ill.App.3d 330, 342, 254 Ill.Dec. 455, 747 N.E.2d 495 (2001); Baxter Int'l, Inc. v. Am. Guarantee & Liab. Ins. Co., 369 Ill. App. 3d 700, 706, 861 N.E.2d 263, 269 (2006); Pacific Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co., 9 Cal.App.3d 270, 88 Cal.Rptr. 122, 124 (1970); Keetch v. Mut. of Enumclaw Ins. Co., 66 Wash. App. 208, 211–12, 831 P.2d 784, 786 (1992).
[18] Verrill Farms, LLC v. Farm Family Cas. Ins. Co., 86 Mass. App. Ct. 577, 581, 18 N.E.3d 1125, 1129 (2014).
[19] Friends of DeVito v. Wolf, No. 68 MM 2020, 2020 WL 1847100, at *12 (Pa., Apr. 13, 2020).
[20] *Id.* at *14.
[21] *Id*. at *13.
[22] *Id*. at *12.

surety should also carefully examine executive orders and disaster declarations issued in the relevant jurisdictions for statements and "findings" that the presence of the virus constitutes damage to property. Such findings could be used to support a claim.

Prior to the COVID 19 pandemic, there have been cases across the country holding that occurrences such as mold, fumes, and contamination can constitute physical damage or loss for purposes of business interruption coverage.[23] Further, several state governments such as New Jersey, Pennsylvania, Ohio, Massachusetts, New York, and Louisiana have introduced legislation to retroactively mandate coverage for business interruption caused by COVID-19.[24] In addition, over 30 lawsuits have been filed around the country challenging the denial of coverage for COVID-19 impacts under business interruption policies.[25] Thus, sureties will need to review the business interruption policy language and stay in touch with developments in the law regarding such coverages.

B. Coronavirus Aid, Relief and Economic Security Act (CARES Act)

If a surety is concerned about the financial health of one of its bonded principals or is already financing or working with the principal to complete bonded projects, the surety should be pushing the principal to apply for certain loans that are being offered by the federal government as a result of the COVID-19 pandemic. The CARES Act is now law and provides businesses with much-needed relief in the form of tax payment deferrals and loan programs. While the initial funding of the CARES Act program was depleted, Congress has authorized additional funding.

The CARES Act expands the Paycheck Protection Program (PPP) of the Small Business Act and applies to qualifying businesses that have fewer than 500 employees or that meet the SBA's size requirements under the industry-based standards.[26] CARES Act loans are available through lenders that administer SBA loans and are available for up to 250% of average monthly payroll costs, up to $10 million.[27] This amount is for the purpose of covering up to eight weeks of payroll and other business operation expenses.[28]

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[23] Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52, 55 (1968) (gasoline in soil); Sentinel Mgmt. Co. v. New Hampshire Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); Cooper v. Travelers Indem. Co. of Ill., No. C-01-2400-VRW, 2002 WL 32775680 at *3 (N.D. Cal. Nov. 4, 2002) (e-coli in water); Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 828 (3d Cir. 2005) (bacteria in water); Matzner v. Seaco Ins. Co., 1998 WL566658 (Mass. Super. 1998) (carbon monoxide); Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 115 A.3d 799 (2015); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of America, Civ No. 2:12-CV-04418 (WHW), 2014 WL 6675934 at *2, 3 & 8 (D.N.J. Nov. 25, 2014) (ammonia smell); Sullivan v. Standard Fire Ins. Co., 956 A.2d 643 (Del. 2008) (mold).

[24] *See* Ohio H.B. 589; Massachusetts S.D. 2888; New Jersey Assembly Bill 3844; Louisiana Senate Bill 477/House Bill 858; Pennsylvania House Bill 2372; New York Assembly Bill A10226.

[25] *See* S. Zimmerman, *Coronavirus Pandemic Prompts Wave of "Business Interruption" Lawsuits by Restaurants,* ABA Journal (5/26/20); E. Treleven, *Class-Action Lawsuit Joins Growing Number Over Business Interruption Insurance Denials Amid COVID-19 Pandemic*, Wisconsin State Journal (4/30/20); J. Oliver, *Contractual Distancing: Pandemic Insurance Litigation Spreads with Business Interruption Claim Denials,* The National Law Journal (4/19/20).

[26] *See* https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf.

[27] *Id*.

[28] *Id*. The government has recently increased the period during which the loan can be used.

Standardized loan terms have been developed with loans having a maximum term of ten years and interest rates are capped at 4%. The loans are limited to use for:

- payroll costs
- group healthcare benefits during periods of sick leave
- employee salaries and other compensations
- payments of mortgage interest
- rent payments
- interest on other debt, and
- utility payments[29]

No personal guarantee or collateral is required, and the recipient is not required to certify that it is otherwise unable to obtain credit.[30] Another feature of the loans is that they can be forgivable.[31] This loan essentially covers what a surety might otherwise have funded in a traditional financing situation.

C. The Disaster Loan Program

The federal government has also expanded the Economic Injury Disaster Loan Program (EIDL) under the Small Business Act. This expansion allows more businesses to obtain disaster loans in light of the COVID-19 pandemic. Such loans are available to small businesses in amounts up to $2 million for economic injury caused by the pandemic.[32] Originally, the loans were only available to small businesses in states that have made a disaster declaration. If a business qualifies, the SBA's goal is to reach a decision on applications within 2-3 weeks. Payback terms can extend up to 30 years and for private, for profit businesses, the interest rate is 3.75%.[33]

IV. TYPICAL SURETY LEGAL TOOLS TO PURSUE INDEMNITY MAY NOT WORK

As a result of the COVID-19 pandemic, many court systems have shut down or implemented emergency procedures or protocols that modify, limit, or postpone the normal operations of the courts. The extent of the emergency actions varies from jurisdiction to jurisdiction. The effect of the new emergency operations procedures may be to take away many of the bread-and-butter tools that sureties typically rely on. For example, it may be difficult or impossible to get a temporary restraining order for a books and records review or injunctive relief to enforce a collateral demand. In some instances, injunctive relief or declaratory relief may be necessary to protect other rights, stop certain actions, or preserve the status quo, but many courts have cancelled hearings and trials for all but limited emergency matters. Actions like default judgments, summary judgments, or even confessed judgments may all languish with courts closed or court staff reduced to skeleton crews.

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] https://disasterloanassistance.sba.gov/s/faq
[33] *Id.*

In certain circumstances, it may be possible to petition the court for an emergency electronic or other remote hearing. The status of local courts and government offices may also affect a surety's ability to secure various collateral. For example, it might not be possible to record a deed of trust or file a UCC-1 financing statement. Sureties may need to consider using the assignment clauses and power of attorney rights often found in indemnity agreements to seek self-help remedies and enforce indemnity rights.

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