



Preventing coronavirus claims: strategies for architects and engineers

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This article will consider potential future claims against design professionals that are expected to arise from the COVID-19 pandemic and offer recommendations for how design professionals can prepare now to limit or mitigate their risk.



In the wake of COVID-19, we anticipate claim activity against architect and engineering design firms and professionals (subsequently referred to as “DPs”) alleging:

1. Delay in performance of professional services arising from stay at home orders;
2. Inspection errors arising from their virtual vs. on-site performance;
3. Economic downturn causing owners/investors to allege faulty design and displace blame for backing out of projects/deals due to financial loss; and
4. Health-related claims from those who contracted COVID-19 alleging faulty premises design and deficient ventilation. In this article, we provide further insight into these anticipated areas of exposure and strategies to help prevent coronavirus design professional claims.

Delay claims

Delay claims related to COVID-19 are widely anticipated. If the design professional (DP) can work from home with internet access, the DP’s exposure to such claims should be limited. Still, it is likely that DPs may experience delays due to stay-at-home orders that bar access to the firm’s offices or to the work site where materials needed to provide services are located. For the same reason, a DP’s ability to issue approvals for construction phase completion and payment requests may be restricted and delayed. Similarly, the firm’s services may include coordination and review of services and documents provided by consultants. Stay-at-home restrictions or limitations on job site access at any one time may limit such consultants’ ability to complete their work in a timely manner, which, in turn, causes delays for the DPs.

There are reports of fewer workers showing up than expected and work being performed more slowly due to social distancing among the workers, either on their own volition or based on direction from their employers. Accordingly, even when construction has not been stopped, it is anticipated that worker shortages and social distancing on the job site will cause delays. Such delays may cause projects to fail to meet established benchmarks for continued funding due to COVID-19, which has not yet been established as a contractual excuse.

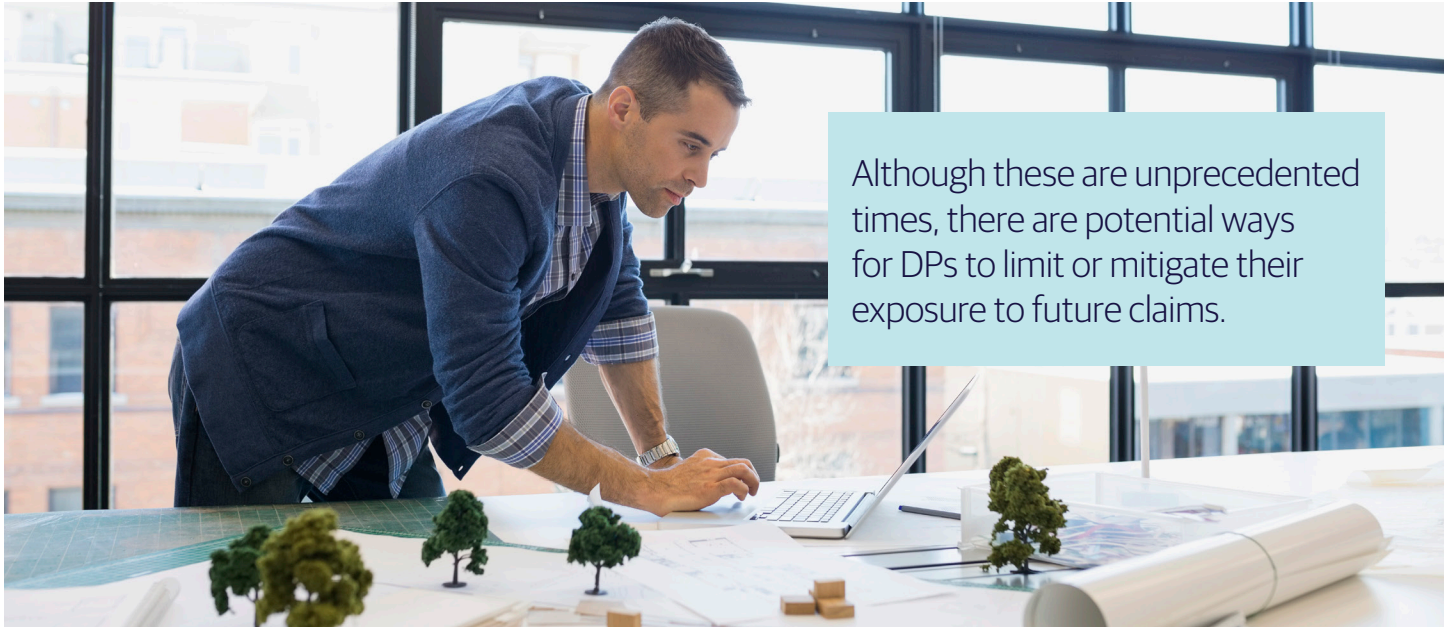
Some permit offices are temporarily closed or have suspended the issuance of permits and acceptance of applications. Similarly, some jurisdictions are suspending building department and health and safety inspections. Such suspensions can result in project delays even if portions of the construction itself are being allowed to continue. It is also anticipated that the virus will slow construction progress through supply chain delays and potentially delayed payments. Some banks will not issue checks larger than \$10,000 without face-to-face interaction, causing delays on larger projects.

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All such delays could potentially result in claims against DPs. Whether meritorious or not, it may be alleged that the DP contributed to causing the delay. Similarly, owners and contractors exiting a project because of delays related to COVID-19 may falsely blame DPs and assert baseless claims against them for purportedly defective design work.

Damages could be alleged by any number of entities claiming to be impacted by delays, such as a general contractor (GC) alleging additional costs for renting cranes and paying employees, or owners claiming additional interest payments on their loans or liability to purchasers of condominiums whose units were not made available on time. Delays resulting in project terminations could lead to damage claims against DPs by developers or GCs displacing the blame on purportedly flawed designs. Delay-related claims arising from stay-at-home edicts could also involve physical damage to material or equipment sitting out in the elements for prolonged periods, depending on how long government mandates or precautionary measures impede construction progress.

Force majeure or “Act of God” clauses may provide the DP with a defense against delay claims arising from the current public health crisis. But the extent to which courts construe force majeure clauses to include the COVID-19 pandemic may turn on their specific wording.



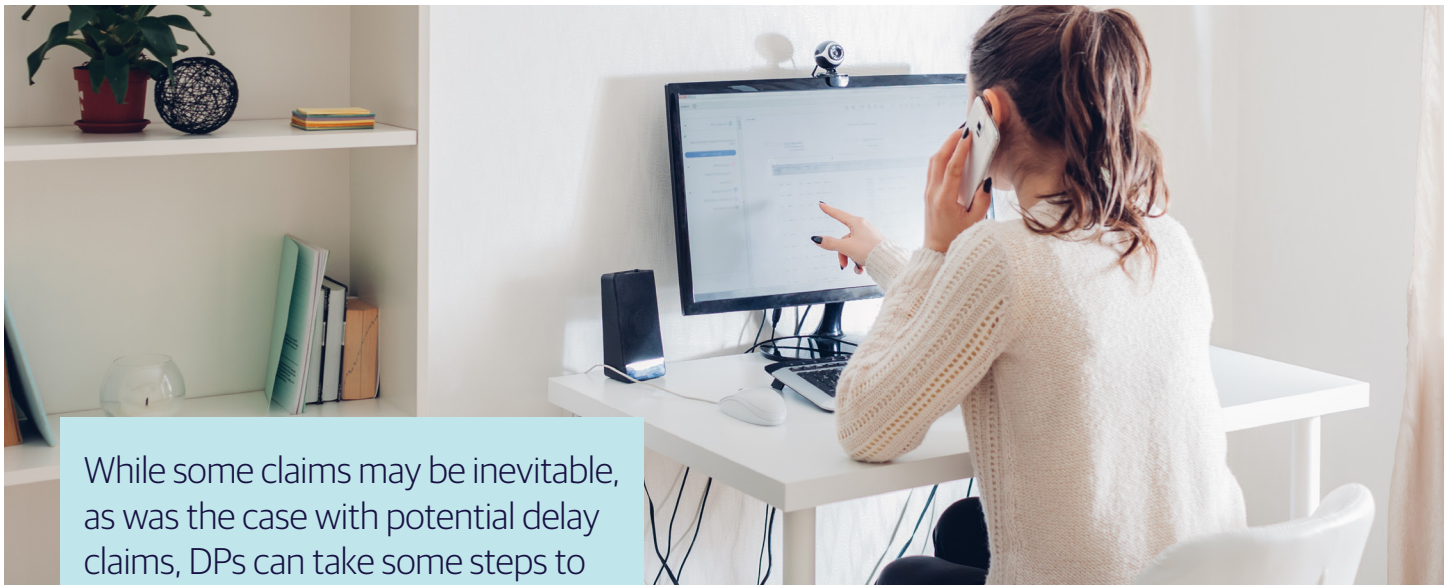
Although these are unprecedented times, there are potential ways for DPs to limit or mitigate their exposure to future claims.

1. Review existing contracts to ensure the terms accurately describe the scope of work including services that are excluded. One way to avoid or control litigation is to have a clear contract, preferably reviewed by a trusted attorney. DPs may be asked to take on additional obligations after the party originally responsible for certain work is prevented from doing so due to changed circumstances related to the coronavirus crisis. Whenever there is a change in the services provided or scope of work for a project, the DP should consider whether it falls within the existing contract and, if not, renegotiate the terms of the contract with the owner and/or contractor to ensure that those changes are accounted for prior to beginning the additional work.
2. Review new and existing contracts to make sure that the indemnity, force majeure, and insurance provisions are clear, beneficial, and comply with the law of your jurisdiction. Many projects will be revised to respond as the coronavirus crisis further develops, and DPs can use these changed circumstances as opportunities to revisit and renegotiate more favorable contract terms.
3. Clearly communicate any concerns regarding possible delays to the project's owner and contractor. The need for clear and constant communication with the owner and the contractor is even more pronounced during the coronavirus pandemic. The DP should advise clients of anticipated delays caused by the pandemic and seek their consultation, advice, and agreement regarding revisions to the design and project schedule. Firms also should ask clients about impacts that they expect to face (e.g., delays in approving deliverables and processing invoices). All such communications with clients should, when possible, be made with the client's lead decision-maker. They should also all be memorialized in writing to the clients and saved in the project file for easy reference in the event a dispute later arises.
4. Document the impact that the coronavirus has had on change orders and cost overruns. DPs should clearly and consistently document whether change orders resulted from conditions created or exacerbated by the pandemic, such as material shortages and labor force reductions. This practice should assist the DP in defending against any claims that the change orders were a result of its own making or negligence.
5. Avoid commenting on delay claims presented by other entities. If a DP's contract appears to require it to comment on a delay claim, the DP should consider documenting its inability to make a professional judgment due to the unprecedented conditions created by the coronavirus pandemic. Should an owner continue to insist that the DP render an opinion pursuant to the contract, the DP should consider consulting legal counsel before issuing an opinion.

Claims resulting from working remotely

Claims resulting from working at home are also widely expected. Site observations and review of construction progress payment applications for projects may be limited or delayed due to travel restrictions, recommendations regarding social distancing, and/or requirements by local authorities. Some design firms may try to replace site visits with video conference meetings and virtual tours, resulting in a failure to identify or call out errors and omissions that otherwise would have been observed in person. Or the person at the firm who normally would have conducted a site visit might be unavailable due to COVID-related issues, resulting in a substitute inspector with less project knowledge performing allegedly substandard construction observation and supervision. Under such circumstances, the owner or contractor could assert claims against the design firm, alleging that its failure to make the requisite amount of site visits with qualified personnel led to mistakes and damages.

In addition, architecture and engineering are tech-heavy disciplines, and software which worked adroitly in the office may falter in transition to the home office, especially when the DP is sharing a server or router with others. An increased likelihood of drawing errors could result. Moreover, architecture and engineering are, at least in the 21st century, group endeavors. Replacement of in-person meetings with telecommunications may increase the likelihood of miscommunications, especially in larger, more complex projects which require the input of multiple professionals sitting next to each other over a drawing.



While some claims may be inevitable, as was the case with potential delay claims, DPs can take some steps to limit or mitigate their exposure to claims caused by working remotely.

1. Avoid relying entirely on remote methods to perform site visits.

DPs who have construction management, administration, and observation obligations may find themselves increasingly tempted to rely on drone, video conferencing, or other remote means instead of site visits. To the extent permitted by local authorities, DPs should use government-recommended personal protective equipment (PPE) and conduct site inspections consistent with best practices, even if it requires their physical presence on-site.

2. **Document social distancing restrictions or policies preventing access to the site.** Wherever practicable, the DP should try to secure the project owner's and, if appropriate, the construction manager's cooperation in obtaining access to the site in a safe manner consistent with governmental social distancing directives. If it is not possible to adhere to social distancing while on site, the DP should communicate the conditions preventing them from doing so to the owner and the construction manager. As with all such communication and documentation, the record of this communication should be maintained in the project file for future reference in the event a claim arises.
3. **Enhance remote work capabilities.** DPs should consider moving to a cloud-based system, like those offered by Microsoft Azure and Workspot. They should also ensure that their employees are familiar and comfortable with its virtual private network, or VPN.

Claims resulting from a severe economic downturn

A third area of widely expected claims arising from the public health crisis is the unprecedented downturn of the U.S. economy. Owners may back out of deals due to the reduced value of their financial portfolios but displace blame on purportedly faulty project designs. Given the precarious condition of the financial and real estate markets, there is an increased risk of bankruptcies and project terminations that could also lead to baseless claims against DPs. Financial pressures could delay payments to DPs, who could lose patience and demand payment, resulting in (often bogus) defective design claims (or counterclaims if the DP has commenced litigation).

The economic downturn may also increase claims related to value engineering. For instance, there is a risk for engineers who design capital reserve studies and other cost assessments for condominium communities and other group developments. These engineers may find themselves in litigation years later if, in response to the financial crisis, construction managers implement value engineering measures resulting in repair and replacement costs much higher than those reflected in the prospectus.

With respect to unpaid fees, our advice would be to practice patience, if possible. It should be expected that delays, disruptions, and financial pressures associated with the public health crisis will result in some clients falling behind on paying fees. DPs should exercise great forbearance under these anticipated circumstances. Otherwise, they may encounter claims or counterclaims, and jurors may not be sympathetic to DPs who they perceive to be indifferent to the hardships caused by the coronavirus crisis.

In addition, consider whether you qualify for protections under federal and state Prompt Pay Acts. Not everyone can afford the luxury of waiting to get paid, especially if a project is placed on hiatus or terminated altogether. DPs facing such a dilemma may be able to make use of the many federal and state laws to protect contractors, architects, and engineers from nonpaying customers. For example, contractors doing business with federal government agencies are entitled to prompt payment under the federal Prompt Payment Act, which imposes late payment interest penalties on federal agencies which unreasonably delay in paying contractors. Various states have enacted their own versions of prompt pay statutes, sometimes mandating that DP claims and invoices are paid in a timely manner.

With respect to value engineering, the DP must always consider the potential adverse consequences, advise the client of them in writing, and document the file. The communication to the client should be specific with respect to the risks associated with the proposed value engineering. If the client nevertheless elects to proceed with the proposed value engineering measures, the DP should send the client correspondence confirming that this decision was made by the client alone, not by the DP or jointly with the DP.



Health-related claims

There is a possibility of claims from people who contract COVID-19 and blame a purportedly faulty design that created crowded conditions, deficient ventilation, or inadequate humidity levels. Attorneys for such claimants may try to find code violations or lack of adherence to other published standards to support their allegations.

As discussed above, DPs should be mindful of state and local social distancing regulations and be prepared to document their compliance with them. DPs should be particularly mindful of areas in buildings that may be likely to host pedestrian traffic and be vigilant about adhering to code regulations and prescribed standards relating to dimensions, ventilation, and humidity levels. The DP may also want to consider recommending an air treatment system. Future claims against DPs may occur but a significant defense will be that DPs obviously have no control over human behavior.