

Thinking Ahead About Your D&O Coverage

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With most policyholders focused on recoveries from business interruption insurance, you might not think this is the time to consider your company's D&O policy. It is. What you do now can make a difference later when it comes to securing coverage for liability claims against your company, and its officers and directors, arising from the coronavirus pandemic.

Why think about D&O insurance now?

First, plaintiffs' lawyers are always looking for an opportunity to generate event-driven litigation, particularly now when markets and companies are volatile. This can include claims that a company failed to implement proper risk management measures, or misrepresented the status of its business or the potential impact of the pandemic. These types of claims have already been filed. See *Douglas, et al. v. Norwegian Cruise Lines, et al.*, No. 1:20-cv-21107 (S.D. Fla.) (securities fraud class action alleging false statements about implementation of preventive measures and effect on future bookings); *McDermid, et al. v. Inovio Pharm., Inc., et al.*, No. 2:20-cv-01402 (E.D. Pa.) (securities fraud class action alleging false statements about development of COVID-19 vaccine).

Second, there has already been significant discussion within the insurance industry that certain carriers are considering adding new exclusions to new or renewed insurance policies for claims arising from COVID-19 or other infectious diseases. The extent and breadth of these potential exclusions is not yet known, but substantial efforts should be made during policy renewal and marketing negotiations to avoid entirely or, reduce the scope of these potential exclusions.

Third, D&O policies are claims-made policies. That means the policy in place when the claim (e.g. litigation, investigation or demand against an insured) is made will be the policy that responds to the claim, with an important exception: If a valid notice of circumstances likely to lead to a claim is given under an earlier policy, the claim will relate back to the earlier policy.

The option to give notice of circumstances is an important policyholder protection. As policies are renewed, your carrier could add new exclusions for future claims related to infectious disease, as discussed earlier. Giving a notice of circumstances before your current D&O policy expires could lock in coverage and avoid new exclusions. Careful consideration of policy language and attendant circumstances is necessary to determine when and whether to provide this notice during the current policy period. The right strategy should be informed by such factors as the available policy limits, whether other claims or circumstances have been noticed and accepted in the current policy period, whether a different insurance carrier will provide the renewal coverage, and the necessity and nature of an application and warranty statements required at renewal.

Fourth, small differences in policy language can be critical to coverage. Now is the time to review your company's D&O policy to identify and understand provisions that could be cited by insurers as a basis for denial of coverage in the COVID-19 context. For example, the specific wording contained in common policy exclusions for bodily injury, property damage or pollution can vary significantly between policies, and those distinctions can mean the difference between a claim being paid or fought by the insurer.

The bottom line is this: These are extraordinary times, and you should not make any assumptions about your coverage. Details matter. Expertise matters. Let us know if we can help.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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