

## COVID-19 BLOG

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# Directors and Officers Liability Insurance

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The so-called novel coronavirus, COVID-19, presents significant liability issues for companies insured under directors and officers liability policies. Whether it be securities class actions filed against public companies for failure to disclose information pertaining to adverse financials, shareholder derivative litigation for failure to install or adhere to internal controls or cyber liability heightened by employees working remotely during governmental lockdowns, the risks increase under the current economic circumstances. Last month, the SEC extended deadlines for certain financial disclosure filings. In doing so, Chairman Jay Clayton admonished “all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments.” Investors and class counsel undoubtedly will be following these disclosures closely as the markets fluctuate in these turbulent financial times.



Many publicly traded companies can be expected to report declining earnings and profitability in the coming months. COVID-19 supply chain shortages (including but not limited to those emanating from China), reduced employee functionality and company reputational injury all can give rise to D&O liability claims against insured entities and their management. Norwegian Cruise Line Holdings, Ltd. has already been sued in a securities class action related to COVID-19. The suit, commenced in the Southern District of Florida, alleges that the company and certain of its management made false and misleading statements regarding the company’s sales tactics in providing potential customers with unproven or false information about the virus in order to entice the public to book cruises. A shareholder class action also has been commenced against Inovio Pharmaceuticals in the Eastern District of Pennsylvania based upon allegedly false and misleading statements to the investing public regarding the company’s development of a vaccine. Securities class actions often are event driven and the scale of the coronavirus impact on the economy will undoubtedly prove no exception.

While more Side C / entity coverage claims can be expected, impending bankruptcies and cash flow shortages may lead to an increase in claims under Side A coverage as well. This insurance, which is triggered less often than traditional Side B coverage, typically applies where the insured entity is prohibited from indemnifying, or unable to indemnify, management personnel. However, the COVID-19 economy may bring this insurance more into play, as bankruptcies and cash flow shortages may leave companies unable to indemnify, or advance defense costs to, directors and officers. With no retention typically applying under Side A, an influx of non-indemnifiable claims may impose extra stress for insurers, especially given that Side A claims normally are required to be paid first under the policies’ priority of payments conditions.

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As to the coverage issues, D&O policies generally have broad insuring agreements, applicable to a “wrongful act,” which commonly is defined to include “any breach of duty.” Thus, the D&O coverage issues should come down to exclusions as a general matter. The most prominent of these are the bodily injury and property damage exclusions that are ubiquitous in D&O policies. Such exclusions should apply to any direct claims for illness, death or property damage (including loss of use) due to COVID-19, as these claims are the province of general liability insurance. Depending upon the breadth of the exclusions, coverage further may be unavailable for any claim “arising out of” bodily injury or property damage, such as a breach of fiduciary duty claim that has some relatedness to these types of loss. Many D&O policies also contain pollution exclusions. Depending upon how broadly a particular jurisdiction defines “pollutant,” COVID-19-related claims may fall within the scope of the pollution exclusion. Finally, breach of contract exclusions likely will come into play for claims alleging an insured’s failure to perform due to COVID-19 constraints, although such exclusions often provide for advancement or reimbursement of defense costs in such claims.

The insurance coverage attorneys at Traub Lieberman look forward to assisting their clients as they confront the many D&O issues that are developing in these disconcerting times.