INSURANCE POLICYHOLDER ALERT

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Maximizing D&O Insurance for Coronavirus Shareholder Claims

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Now is the time for policyholders to review their D&O policies. The global adverse economic impacts of the coronavirus pandemic and resulting stock market instability likely will lead to an uptick in securities class action lawsuits and shareholder derivative lawsuits. Over the past several years, filings of "event-driven" securities lawsuits—securities claims arising out of adverse news and events—have been on the rise. It is not difficult to envision a stock-drop shareholder securities class action alleging, for example, that a company was obligated to disclose the risk that a pandemic could have on its business operations and failed to do so. Nor is it difficult to envision a shareholder derivative lawsuit alleging that a company's directors and officers breached their fiduciary duty by mismanaging the company's response to the coronavirus pandemic or having failed to prepare adequately. Public and private companies buy D&O insurance to protect against these very sorts of claims.

If for no other reason than the sheer magnitude of potential losses the insurance industry is facing due to the coronavirus, D&O policyholders should expect their insurers to contest coverage for many claims arising out of the coronavirus pandemic. There are some steps that policyholders can take now to avoid such coverage disputes.

1. Negotiate Favorable Terms at Policy Renewal

It is no secret that some D&O insurers are contemplating adding coronavirus exclusions to their policies. Indeed, at least one insurer has already announced that it will endorse one line of renewal property policies with a coronavirus exclusion. At renewal, policyholders should pay careful attention to whether their renewal D&O policies purport to exclude claims involving coronavirus, communicable disease, or viruses. If the insurer does insist on such an exclusion, policyholders should attempt to negotiate the narrowest possible scope of the exclusion. Similarly, policyholders should also pay attention to whether the renewal policy's exclusions for pollution, property damage, and bodily injury sweep too broadly and potentially could be read to eliminate coverage for claims alleging covered wrongful acts such as misrepresentations or breach of fiduciary duty simply because they had some connection to the coronavirus pandemic. Renewal is also a good time to ensure that the policy's contract exclusion is properly drafted, as some courts have found that broadly written private company D&O contract exclusions eliminated coverage for pre-contracting wrongful acts.

2. Consider Giving Notice of Circumstances

As "claims made" policies, D&O policies only cover claims made during a specified period of time – during the policy period or, in some instances, during an extended reporting period, also known as a "tail." However, many policies specify that if the policyholder notifies its insurer during the policy period of circumstances that may give rise to a claim and such a claim is, in fact, made after the policy expires, the claim will be treated as having been filed when the notice of potential claim was given. Policyholders should consult with their attorneys and brokers to evaluate whether they are aware of circumstances that could give rise to a potential D&O claim for two reasons: (1) if their current D&O policy has favorable coverage for coronavirus claims, providing notice will allow the policyholder to take advantage of that coverage rather than rely on a renewal policy that may provide narrower coverage; and (2) the policyholder may be

required to disclose such circumstances pursuant to the conditions of the policy and in connection with the renewal process. This is not to suggest that the existence of the coronavirus pandemic, without more, would necessarily constitute reportable circumstances that could lead to a claim, but now is a good time for policyholders to review the notice of potential claim provisions in their policies.

3. Give Prompt Notice of Claims

Depending on the circumstances and jurisdiction, a policyholder's failure to comply with a policy's notice condition can be a complete bar to coverage. This risk is amplified with D&O policies, as many D&O policies require claims to be both made and reported during the policy period. A late notice coverage defense can be avoided with proper planning. In-house attorneys, paralegals, and risk managers should be aware of their D&O policy's notice requirements and its requirements regarding defending claims. In addition, they should be aware of how their D&O policy defines "claim," which rarely, if ever, is limited solely to lawsuits.

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