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Prepare Now for the Coming Wave of COVID-19-Related D&O Insurance Claims

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DAY

COMMENTARY

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## Prepare Now for the Coming Wave of COVID-19-Related D&O Insurance Claims

### IN SHORT

**The Situation:** Corporate policyholders and their directors and officers may soon face lawsuits and claims arising from COVID-19 as the economy reopens and companies, their employees, and consumers get back to business.

**The Result:** Corporate policyholders should evaluate the risks posed by potential directors and officers ("D&O") claims, including securities litigation and regulatory investigations, tied to management's response to COVID-19 and how their D&O insurance program will respond.

**Looking Ahead:** D&O claim-related losses due to COVID-19, including related defense costs, could be significant this year and heading into 2021. Corporate policyholders should gear up for an insurance coverage fight under economic and market conditions that incentivize D&O insurers to deny coverage.

As companies face immediate and significant revenue and profit losses from COVID-19, commercial property and business interruption coverage understandably has been the primary focus (and battleground) for policyholders and insurers thus far. While such coverage remains an important consideration, policyholders should also look ahead and plan for a possible broader range of COVID-19-related risks, such as government investigations, securities lawsuits, claims in bankruptcy, claims against company executives and board members, and other forms of potential liability. Such risks may be covered under D&O insurance policies, which could soon become the next battleground in the fight for insurance coverage for COVID-19-related losses. Indeed, a number of federal securities class actions concerning COVID-19-related issues have already been filed against companies in consumer-based industries and insurance disputes are likely to follow.

### The Landscape of Potentially Covered COVID-19-Related D&O Claims

D&O policies typically cover a broad range of alleged "wrongful acts" in connection with the management of a company, including but not limited to, claims against individual directors and officers for their business judgment decisions. D&O insurance policies should be considered in connection with *any* claims, investigations and/or proceedings alleging management-level wrongful acts in connection with COVID-19, including but not limited to:

- Direct and derivative securities claims and class actions arising out of COVID-19 financial reporting obligations or public statements about a company's response to the pandemic, alleged board failure to manage the business impact from COVID-19, or other alleged management-related acts resulting in a diminution of share value or other economic losses;
- Antitrust lawsuits alleging price-gouging or price-fixing against publicly traded companies;
- Regulatory investigations in connection with SEC reporting and disclosure requirements, unfair trade practice claims, alleged misrepresentation and accounting issues, and claims under the False Claims Act and Foreign Corrupt Practices Act; and

- Claims by creditors, trustees, shareholders, and other stakeholders post-petition in bankruptcy.



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### Key COVID-19-Related D&O Insurance Considerations

While D&O insurance policies are intended to cover a broad range of alleged wrongful acts, insurers may attempt to avoid coverage for COVID-19-related losses by: (i) advancing unsupported or unduly restrictive interpretations of specific policy language to the factual circumstances at issue in order to deny claims; and (ii) attempting to eliminate coverage for COVID-19 and other virus-related claims during policy renewals. Policyholders should therefore review their policies carefully (paying close attention to the key exclusions, conditions and definitions) to fight back and engage coverage counsel early to assist with COVID-19-related claims and issues.

The availability of insurance coverage will depend heavily on the actual insurance policy language, the allegations and facts surrounding the claim, and the law of the relevant jurisdiction. Insurers may argue that various exclusions apply to avoid coverage. For example, D&O policies often include "bodily injury" exclusions. To the extent a securities claim has some connection to bodily injury, such as alleged misrepresentations regarding COVID-19 safety precautions and risks to customers, insurers may argue that any "bodily injury" exclusion precludes coverage because of the mere reference to COVID-19 health risks. Policyholders should respond that "bodily injury" exclusions do not apply because securities claims arise from financial losses to the shareholders, not alleged bodily injury.

D&O insurance policies also often include "insured-versus-insured" exclusions, which purport to preclude coverage for claims brought by, or on behalf of, or at the direction of any insured entity or person. D&O insurers may attempt to invoke such exclusions in connection with securities actions commenced by shareholders or claims by shareholders' representatives in bankruptcy. Policyholders should carefully review their policies for any applicable exceptions to such exclusions, such as carve-backs for derivative securities claims in which insureds do not "actively participate" or for bankruptcy proceedings, which often allow trustees, administrators and creditors' committees, among others, to bring potentially covered claims.

Other D&O insurance policy exclusions and coverage limiting provisions could also become at issue. Many policies include "pollution" exclusions, barring coverage for the alleged or actual release of "pollutants," which insurers may attempt to argue includes a "virus." Other exclusionary language which insurers may argue limits coverage for COVID-19 risks sometimes found in other lines of coverage, such as cyber, professional liability, and property policies, are also sometimes found in D&O policies. In sum, though your D&O claim might trigger your policy's insuring agreement, you may need to assess other coverage obstacles insurers may raise.

Finally, policyholders should be mindful of potential duties owed under all policy conditions, which can maximize coverage and avoid unnecessary coverage complications. For example, policyholders should be aware of, and seek to comply with, any reasonable insurer "consent" requirements before incurring otherwise covered losses (including defense costs). In addition, policyholders should adhere to the specific policy requirements to report claims to the D&O insurer, including any potential need to send a notice of circumstances letter to "lock in" the current policy period for COVID-19-related losses alleged in future claims. In short, corporate policyholders should consider working with experienced coverage counsel from the outset of any underlying claim to understand their D&O insurance policy's terms and conditions and help maximize insurance rights and potential recoveries under their D&O insurance policies.

## TWO KEY TAKEAWAYS



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1. Corporate policyholders should evaluate and consider how their D&O insurance policies may respond to potential COVID-19-related liability claims and exposures, particularly as business operations involving employees and customers begin to resume with "stay in place" executive orders relaxed or lifted in various jurisdictions.
2. Corporate policyholders should monitor the renewal process for their D&O insurance policies closely as insurers are expected to attempt to modify or restrict coverage for pandemic-type exposure going forward.



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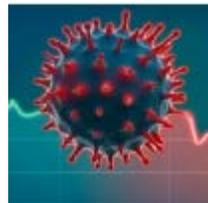
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