

IMPLICATIONS OF COVID-19 ON YOUR DIRECTORS & OFFICERS POLICY

As a result of the challenges presented by the COVID-19 pandemic, many companies have been tasked with adapting their businesses in order to stay operational. With the economy, society, and virtually all facets of life at a standstill, boards of directors should prepare for the anticipated increase in COVID-19-related wrongful death, business interruption, wrongful disclosures, and mismanagement lawsuits. How the insurance industry will respond is yet unknown, thus leading to a renewed focus on the scope of D&O policies and the protection they provide.

Aside from the speed of developments transpiring from this outbreak, one of the biggest challenges for public companies is contending with the evolving COVID-19-related disclosure responsibilities. Disclosure-related COVID-19 D&O claims have already been filed due to allegedly false and/or misleading statements (see *Douglas v. Norwegian Cruise Lines* and *McDermid v. InovioPharm, Inc.*). It is reasonable to presume that subsequent D&O claims could potentially involve allegations of mismanagement in the wake of this public health crisis, and it is not difficult to envision allegations for failing to respond sufficiently or appropriately to changing operating conditions.

Upon review of traditional D&O policies, epidemics or pandemics are not directly addressed. While there is not an outright exclusion applicable, there is also no affirmative coverage. As such, how the policy will respond will be guided as to the type of loss, and the actual allegations pled in the lawsuit. D&O policies will likely respond to the traditional allegations of mismanagement, negligence, and breach of fiduciary duties, notwithstanding that COVID-19 is the underlying cause. It should be noted that typically D&O policies contain an exclusion for bodily injury, which excludes claims for physical injury, sickness, or disease, including death. While this is standard language and it is present in virtually all D&O

policies, enhanced terms are available in the market that would provide exceptions or carve backs in coverage whereby this exclusion would not apply. The potentially available exclusions include, but are not limited to, the following:

1. Securities claims
2. An employment-related claim against a director or officer for mental anguish or emotional distress

These exceptions to the exclusion are intended to broaden the policy in favor of the insured.

Although fact-specific, it is expected that a company's D&O policy can respond to these COVID-19-related claims. We recommend reaching out to your insurance broker to review such terms that may affect coverage for COVID-19-related claims, specifically the bodily injury/property damage exclusion.

Please be advised that any and all information, comments, analysis, and/or recommendations set forth above relative to the possible impact of COVID-19 on potential insurance coverage or other policy implications are intended solely for informational purposes and should not be relied upon as legal or medical advice. As an insurance broker, we have no authority to make coverage decisions as that ability rests solely with the issuing carrier. Therefore, all claims should be submitted to the carrier for evaluation. The positions expressed herein are opinions only and are not to be construed as any form of guarantee or warranty. Finally, given the extremely dynamic and rapidly evolving COVID-19 situation, comments above do not take into account any applicable pending or future legislation introduced with the intent to override, alter or amend current policy language.