

**D&O INSURANCE ALERT**

# COVID-19



## **D&O INSURANCE AND THE CORONAVIRUS (COVID-19): KEY ISSUES & TALKING POINTS**

As we grapple with the human and personal effects of COVID-19, the pandemic is forcing companies and their directors and officers to closely examine risks related to the virus and potential insurance that may be applicable to sustained losses. CAC Specialty's Financial Lines Practice answers your frequently asked D&O insurance questions below.



## WHAT KIND OF D&O CLAIMS ARE WE LIKELY TO SEE EMANATING FROM THE COVID-19 OUTBREAK?

As was the case with the relatively few claims that arose from past pandemics, we anticipate the early COVID-19 related claims will target the most heavily impacted industries including healthcare, retail and hospitality, gaming and casinos, airlines and travel, as well as those companies accused of committing outright fraud for allegedly misleading investors and the public with respect to potential cures for, or product efficacy in connection with mitigation of, the virus. As the pandemic progresses, and plaintiffs dig more deeply into other company disclosures, we may see additional claims relating to financial disclosure issues including goodwill impairment and/or bankruptcies.

### **HAVE THERE BEEN ANY D&O CLAIMS TO DATE ARISING OUT OF COVID-19?**

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Yes. Although this pandemic within the United States is in its early days, plaintiffs have already filed two securities class action claims concerning COVID-19-related disclosures and business practices: one against Inovio Pharmaceuticals, Inc. and the other naming Norwegian Cruise Lines.

In *Patrick McDermid, et al. v. Inovio Pharmaceuticals, Inc., et al.* filed on March 12, 2020 in the Eastern District of Pennsylvania, plaintiffs allege that the company and its CEO violated the federal securities laws by making false and misleading statements regarding a COVID-19 vaccine that it planned to bring to market. The second claim, *Eric Douglas, et al. v. Norwegian Cruise Lines, et al.*, filed on the same day in the Southern District of Florida, alleges that the company, and its CEO and its CFO employed sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises.

### **HOW WILL COVID-19 IMPACT OUR D&O RENEWAL?**

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Prior to this pandemic, the D&O marketplace was substantially hardening as a result of record high securities class action filings and multi-million dollar settlements. Throw in a worldwide pandemic, and insureds will be looking at very difficult renewal discussions. If your company is an energy company or otherwise depends heavily on the price of oil, you are facing even stronger headwinds.

## AS YOU APPROACH YOUR D&O RENEWAL, KEEP IN MIND THE FOLLOWING:

01

Start thinking about your renewal right now. Speak with your broker early and often as market conditions are changing daily.

02

Prepare senior management for continued pricing pressure and insurers pushing for higher self-insured retentions.

03

Ensure your coverage is placed with financially stable insurers with senior and experienced underwriting and claims teams known for problem-solving capabilities.

04

Insurers are going to be asking questions regarding your company's COVID-19 experience and response. What is working? What is not? Be prepared to answer detailed questions regarding supply chain disruption, crisis management, business continuity, occupational health and safety and the virus' overall impact on your workforce and balance sheet.

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Depending on your company's situation, it may be necessary to extend your current policy period rather than renewing at this time. On the other hand, extending for convenience may be ill-advised as neither the micro nor macro environment is likely to improve in the near term.



### ARE THERE NEW TERMS AND CONDITIONS WE NEED TO SPECIFICALLY NEGOTIATE IN LIGHT OF COVID-19?

Generally speaking, securities claims arising out of COVID-19 related matters should trigger most public company D&O policies without the need for new terms and conditions specific to the current pandemic. The policies are designed to cover securities claims, regardless of the underlying cause and generally provide broad protection to individual directors and officers.



## WHAT D&O INSURANCE POLICY TERMS, CONDITIONS OR EXCLUSIONS MAY BE IMPLICATED IN A D&O CLAIM ARISING OUT OF COVID-19?

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Your D&O insurance response to a claim will depend upon the precise terms and conditions in your policy as well as the specific factual allegations and underlying circumstances of the given claim. Nevertheless, the following issues are likely to be in the forefront:

- **The bodily injury/property damage exclusion.** Most D&O policies include some form of a BI/PD exclusion intended to exclude coverage for claims generally covered elsewhere (in a commercial general liability policy for example). The bodily injury/property damage exclusion should have “for” lead-in wording (as opposed to broad “based upon, arising out of, or related to” lead-in wording) with an affirmative exception for shareholder claims.
- **Pollution exclusion.** Some D&O policies today may still include a pollution exclusion. If the definition of Pollutants or Pollution within the D&O policy could in any way be interpreted to include a virus, it is important to ensure that the exclusion be narrowly tailored as with the BI/PD exclusion (with “for” wording and an affirmative exception for shareholder claims).
- **Claim trigger and reporting.** Review the definition of claim and the reporting requirements within your D&O policy. D&O insurance is typically written on an annual basis, and only covers claims made and reported during the policy period. The definition of claim is often broader than one would think. Once a claim is made, the insured is obligated to report that claim to the insurer during the policy period. In all of the virus chaos, do not lose sight of this obligation. You may be able to negotiate a late notice prejudice clause into your policy that would require that the insurer prove actual and material prejudice from any late notice.
- **Policy rescission and application severability.** The current pandemic will invariably lead to additional questions and heightened scrutiny in the underwriting process. In some states, insurers can void coverage when a policy is issued on the basis of innocent but otherwise material misrepresentations in the application process. Make sure you understand how your policy works in this regard. Where possible, tighten the severability of the application and non-rescission wording of the policy to ensure that only intentional misrepresentations that materially affected the insurer’s acceptance of the risk have an implication on coverage.
- **Bankruptcy provisions.** Unfortunately, the impact of the pandemic and oil crisis will likely lead to an increase in bankruptcy filings over the next few years. Take the time now to carefully review and negotiate bankruptcy-related protections long before you need them:
  - Make sure you have strong “Side-A only” protection designed to protect individual director and officers when the company cannot legally or financially fund an indemnity or advancement obligation.
  - Review bankruptcy waiver and priority of payments provisions to ensure that your D&O coverage will respond as intended in the event of bankruptcy. Under what conditions does your policy allow the company to withhold entity coverage so as to preserve protection for individuals?
  - Review all exclusions (and the entity or insured versus insured exclusions in particular) to ensure coverage for claims brought by bankruptcy trustees or other parties standing in the shoes of a company turned bankrupt debtor.
  - Review the change in control wording, and make sure that it is not triggered by bankruptcy.

## HOW DOES THE POLICY RESPONSE DIFFER FOR PRIVATE COMPANIES?

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The above analysis generally applies to private company risks with one important exception. The entity coverage in a private company D&O form is not restricted to securities claims coverage. A typical private company D&O form triggers if a claim is made against the company for any act, error or omission. What this means is that even if a claim would not be covered (e.g. it is excluded by one of the many exclusions within the policy), notice must be given to the insurer to preserve coverage for any subsequent claims arising out of the same facts or circumstances.

## SHOULDN'T WE NOTIFY OUR D&O INSURER OF ALL POTENTIAL CLAIMS THAT COULD ARISE OUT OF COVID-19 & ITS IMPACT ON OUR COMPANY?

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D&O policies generally permit insureds to notice circumstances that could give rise to a claim. Notice of circumstances or potential claims is not typically mandatory, however, and there are inherent dangers associated with “laundry listing” matters at the end of a policy period.

Most D&O policies today now have strict requirements regarding the specificity required to properly perfect a noticing of circumstances. In many provisions, the insured must provide “full” or “complete” particulars of the circumstance including the identification of a specific wrongful act, the names of claimants and insureds involved, scope of damages that may result, and details of how the insured first learned of the matter. If the notice is insufficient, the insurer may not accept the notice as effective under the policy. This can create a gap in coverage as future policies will typically exclude all matters previously noticed under prior policy years.

If your company is facing a reduction in coverage (whether in scope of terms and conditions or decreased limits or increased retentions), you will want to get out in front of this issue. Our advice is to speak with your broker and coverage counsel regarding any worrisome circumstance and weigh the pros and cons of noticing such matter. If notice is recommended, work with coverage counsel to perfect the notice well in advance of policy renewal.

## WHAT ELSE SHOULD WE KEEP IN MIND?

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In a once in a lifetime event, you are likely to see things you haven't seen before, or at least haven't seen in a long while. So-called “failure to maintain insurance exclusions,” for example, which preclude coverage for claims against directors and officers for their negligent failure to obtain and maintain adequate insurance, could resurface as distressed companies and plaintiffs struggle with inadequate recoveries of uninsured or underinsured losses. Unforeseen application of other provisions unique to specific industries like regulatory or bankruptcy and insolvency exclusions may also come into play. Even state insurance renewal or non-renewal notification statutes may be implicated in a given claim scenario.

In short, expect the unexpected. If you have not conducted a policy audit in a while, there is no time like the present. Coverage attorneys with blue chip law firms can provide a comprehensive audit and analysis relatively inexpensively depending on the scope of the engagement and whether formal written or board presentations are required. At a minimum, review your policy terms and conditions with a seasoned broker with these questions in mind. You may even find some helpful coverage you hadn't thought of previously. Some D&O policies, for example, include expense coverage for crisis management and public relations costs associated with crisis events like the present one.

**We wish everyone health and safety as we navigate this unique time in history. The CAC Specialty Financial Lines Practice is available to assist you with any further D&O insurance questions you may have.**

**Expanding what's possible for solving  
risk challenges – from the simple  
to the previously unsolvable.**

## **ABOUT CAC SPECIALTY**

CAC Specialty is a risk solutions company of seasoned and proactive senior industry leaders, operating as a nimble and collaborative partner who puts you and your business first. With a knowledge-driven approach informed by data and decades of honed instinct, CAC Specialty brings an innovative vision to insurance broking and structured solutions to solve your risk challenges – from the simple to the previously unsolvable.

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