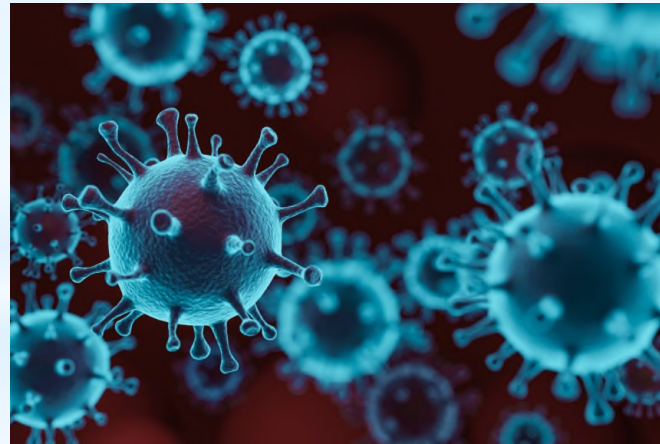


Directors and Officers Liability Insurance and COVID-19



Nisha P. Byers

Basics of D&O Insurance

General Scope of Coverage

D&O insurance policies generally provide coverage directly to a company's directors and officers for alleged "wrongful acts" made in connection with management decisions

Common Exclusions

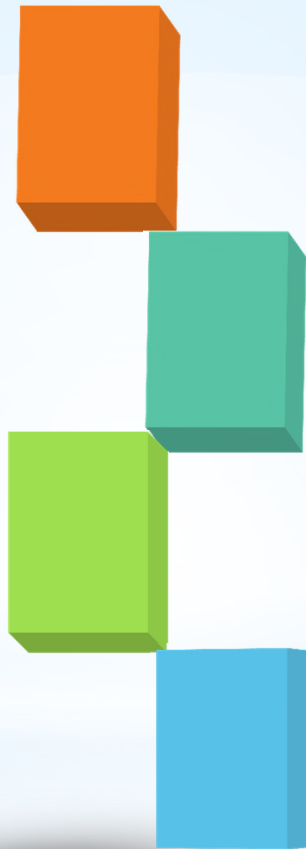
Exclusions to covered actions typically include dishonest, fraudulent, criminal, or malicious acts

Wrongful Acts Defined

Wrongful acts typically include errors, misstatements, misleading statements, acts, omissions, neglect, or breaches of duty.

Entity Coverage

D&O insurance policies may also provide coverage to companies for indemnification of directors and officers or for claims made directly against the entity



Regulatory Disclosures

- Federal (“SEC”) and state regulators impose various disclosure obligations on public companies in certain public filings
 - Protect Investors
 - Accurate and Adequate
- The SEC Corporate Finance Division has published disclosure guidance for companies related to COVID-19
 - <https://www.sec.gov/corpfin/coronavirus-covid-19> – March 2020
 - <https://www.sec.gov/corpfin/covid-19-disclosure-considerations> – June 2020

Government Investigations

- Allegations of noncompliant disclosure
- Antitrust claims
- False Claims Act claims related to Coronavirus Aid, Relief, and Economic Securities (CARES) Act or other programs related to COVID relief

Examples of SEC Actions

- *SEC v. Turbo Global et al.*- the company and its CEO were charged with allegedly false and misleading statements, stemming from press releases alleging the company had a large partnership deal with another entity to sell thermal scanning equipment to detect individuals with fevers.
- *SEC v. Praxsyn Corporation et al.*- the company and its CEO were charged with allegedly false claims that the company was able to acquire and supply large quantities of N-95 or similar grade protective masks for protection against COVID-19.

Examples of SEC Actions

- *SEC v. Applied Biosciences Corp* – issued a press release that it had begun offering and shipping finger-prick COVID-19 tests to the general public, for use in homes, schools, etc.

COVID-19 Disclosure Class Actions

- *Kirk Himmelberg, et al. v. Vaxart, Inc., et al.*-Vaxart, Inc. is a clinical-stage company purportedly engaged in the discovery and development of vaccines for a variety of diseases that would be administered orally, rather than by injection.
- The Complaint arises from Defendants' alleged fraudulent scheme to profit from artificially inflating the Company's stock price by announcing false and misleading information concerning Vaxart's oral COVID-19 vaccine candidate.
- The Complaint alleges that in ignorance of the adverse facts concerning Vaxart's business and financial condition which were concealed by Defendants, Plaintiff and the other members of the Class purchased or otherwise acquired Vaxart securities at artificially inflated prices and relied upon the price of the securities, the integrity of the market for the securities and/or upon statements disseminated by Defendants and were damaged.

COVID-19 Disclosure Class Actions

- *City of Riviera Beach General Employees Retirement System, et al. v. Royal Caribbean Cruises LTD, et al.* - a class action lawsuit filed complaining the Defendant cruise line failed to disclose material facts about the Company's decrease in bookings outside China, instead maintaining that it was only experiencing a slowdown in bookings from China. The Complaint further alleges that Defendants failed to disclose material facts about the Company's inadequate policies and procedures to prevent the spread of COVID-19 on its ships.

COVID-19 Disclosure Class Actions

- *Douglas v. Norwegian Cruise Lines et al.* – class action filed in March alleging the cruise company artificially inflated its stock prices during the first months of the year by making misrepresentations about both its business's financial operations and its health and safety precautions.

Management

- Duties broadly include those of loyalty and care, which are then used as a framework to assess other duties
- Possible breaches may include
 - Failure to monitor the pandemic situation and respond thereto
 - Failure to adequately put in place procedures and policies to protect employees or customers against the virus

Management

- Corporate directors may also have a duty to “exercise oversight” and to monitor the entity’s operations, financial viability, and compliance with applicable laws and guidelines. *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019).
- This includes the duty to have some sort of reliable information and reporting system in place which allows the Board to reasonably exercise oversight as required.

Management

- D&Os have a fiduciary responsibility to manage organizational risk
- This includes protecting investments, implementing adaptive procedures which allow the entity to combat major disasters and events, and conducting business transactions to maintain/enhance the entity's value

Operational Adjustments

- Workforce changes and adjustments to a company's operations to comply with COVID-19 safety guidelines may present new and unanticipated risks which lead to negative financial or operational outcomes
- Unanticipated risk may help D&Os avoid liability for certain business decisions
- D&Os may still be held liable if the risk could have been mitigated by a reasonable or prudent policy or procedure



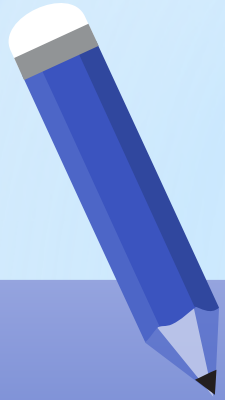
With a number of businesses moving significantly or entirely online, cyber hacking and data privacy breaches incidents are increasing in number.



Directors and officers could be exposed to liability if the company's cybersecurity policies and procedures are not adequate to protect consumers' private personal information, or if there is a breach of this information, do not provide adequate procedures for notification of management so they can handle the issues.

U.S. D&O Insurers Brace for Pandemic-Related Losses, FITCH WIRE
(Sept. 24, 2020)

Exclusion Considerations



- Bodily injury
- Material changes to structure or governance
- Insured v. Insured
- Inaccurate/untimely notice

Bodily injury

- Whether a claim related to the coronavirus could be covered depends on the specific language of the exclusion on the policy.
- A broad form exclusion is more expansive and precludes coverage for claims which are "based upon, arising out of, or attributable to" any bodily injury.
- A narrow form exclusion precludes coverage for claims which are "for" bodily injury which would allow for more broad coverage of COVID-19 related claims.

Significant Change

- A D&O policy may limit future coverage if there is a significant change to the entity
- This includes changes to the structure or operations of a business
- Mergers, divestitures, restructuring, or a significant change in management may be considered “triggering events” which implicate this exclusion and cut off coverage under the policy
- COVID-19 changes could be considered triggering events depending on the nature of the change and the specific policy language

Insured v. Insured

- *Westchester Fire Ins. Co. v. Schorsch*, 186 A.D.3d 132, 129 N.Y.S.3d 67 (2020) - A recent New York appeals court decision found that a D&O policy insurer was required to advance defense costs under a policy for a breach of duty claim which was brought by a company's post-confirmation litigation trust against the former D&Os who allegedly caused the company's bankruptcy.
- The Court found that the insured v. insured exclusion did not apply where a Chapter 11 reorganization plan created trust sues the former company D&O.

Notice of Claim

Policies typically Claims-Made Coverage

D&O policies, among other similar types of insurance, are triggered by a claim against the policyholder.

Notice of Circumstances

But a notice of circumstances may be submitted **during the policy period** to prevent potential future claims from being time barred from coverage.



Time Limits

Policies are for a set duration, after which claims which may have been covered are no longer eligible for such coverage.

Notice and COVID-19

Because the long-term effects of COVID-19 are still largely unknown, giving notice of circumstances may be useful for the future



Underwriting Trends

Underwriting Segment Performance Trends



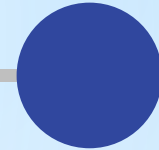
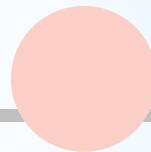
PRE-COVID-19

Widespread segment losses have led to a market tightening.



Negative underwriting performance for D&O policies.

U.S. D&O Insurers Brace for Pandemic-Related Losses, FITCH WIRE (Sept. 24, 2020)



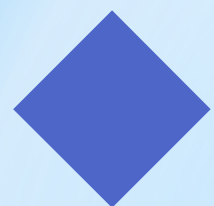
Limiting particular risks related to COVID-19 has become more popular among insurance companies.

Blanket COVID-19 exclusions have thus far been disfavored in the United States.

Insurance Marketplace Realities 2020 Spring Update-Directors and Officers Liability, WILLIS TOWERS WATSON (May 7, 2020)

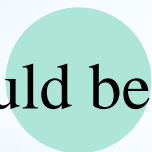


POST COVID-19



COVID- 19 Specific Questionnaires

- COVID-19 questionnaires may be required.
- Assist the insurance company in understanding the company's financial condition, business operations, and future outlook, taking into account specific COVID-19 related risk.
- It is possible carriers could be looking to the SEC Disclosure Guidance.



Premium Rates Continue to Increase in 2020

- Thus far in 2020, rates for D&O insurance policies have risen sharply, despite the more restrictive coverage(s) being offered by insurers.
- D&O insurance underwriters are less likely to offer broad, inclusive coverage, regardless of the applicant's previous policy terms.
- Additionally, applicants seeking D&O coverage policies for the first time may have a hard time finding an insurer.

U.S. D&O Insurers Brace for Pandemic-Related Losses, FITCH WIRE (Sept. 24, 2020)

Bankruptcy and Insolvency Considerations



- In the United States, numerous companies have been forced to declare bankruptcy due to COVID-19, and more are expected.
- D&O policy underwriters may want to include bankruptcy exclusions and creditors' claims exclusions.
- Will these exclusions be enforceable?

Bankruptcy and Insolvency Considerations

- In *Yessenow v. Executive Risk Indemnity*, the D&O policy bankruptcy exclusion provided:

In the event that a bankruptcy or equivalent proceeding is commenced by or against the Company, no coverage will be available under the Policy for any Claim brought by or on behalf of: (a) the bankruptcy estate or the Company in its capacity as a Debtor in Possession; or (b) any trustee, examiner, receiver, liquidator, rehabilitator, conservator, or similar official.

- The Court found that because a company's D&O policy is part of the debtor's estate, the exclusion was unenforceable based on Section 541(c)(1) of the Bankruptcy Code, which invalidates contract provisions that are **conditioned on** the insolvency or financial condition of the debtor or on the commencement of a bankruptcy case.

Bankruptcy and Insolvency Considerations

- But other Courts have found bankruptcy exclusions enforceable depending on the factual circumstances and the specific policy language.
- In *Lexington Insurance Co. v. American Healthcare Providers*, the D&O policy excluded from coverage:

Claims based upon, arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay of any Insured, any Insurer or any other person, including Claims brought by any insurer guarantee or insolvency fund or any receiver or liquidator of any insurer or any Commissioner or Superintendent of Insurance.

- The Court found that the exclusion was enforceable based on its unambiguous application to certain types of claims, and that it was not against public policy.