D&O/EPL/Cyber Insurance Considerations in light of COVID-19

In the recent weeks our FINPRO team has identified a number of insurance related issues relevant to clients dealing with the outbreak of COVID-19 that we felt important to share with clients.

This alert is focused on Management Liability insurance, including Directors & Officers (D&O) and Employment Practices (EPL) and Cyber Liability insurance. We have highlighted some key issues in these policies to provide guidance on:

1. Recommendations for Boards
2. Type of D&O, EPL or Cyber claims that may arise and how policies may respond

Recommendations for Boards:

1. Communicate with your Employees – provide information about staying home if sick, proper handwashing, how to interact with customers and clients, etc. Recommend providing employees with guidance in line with CDC protocols:
   - Actively encourage ill employees to stay home, taking sick days as needed, or working-from-home when appropriate and where feasible.
   - Employees who appear sick with symptoms of acute respiratory illness should be separated and sent home or to seek medical attention as applicable.
   - Employers should continue to perform routine cleaning of surfaces; and maintain good indoor ventilation.
   - Employers should confirm that there are sufficient supplies of gloves, thermometers, disinfectants, and other items.

Companies should strongly encourage and in some cases insist that their employees work from home for the time being. Ideally, this is already addressed through your company’s crisis management plan which includes a work-from-home procedure.

Encourage CEOs and other management leaders to remain visible and accessible as a credible source of reliable information.

2. Identify risk factors – Does the company have supply chain disruption, and what’s being done to minimize its impact? Are sufficient cash reserves available? Given that many companies have banned all non-essential travel and international travel, what impact does curtailed travel and cancelled meetings have on the business? Boards may need to revisit forecasts that might seem overly optimistic. Consider the impact of a drop in business activity and whether it may cause companies to default on covenants or to conduct layoffs or furlough employees.

Even if your company doesn’t have a direct or immediate exposure, anticipate your customers may revise their spending habits and reevaluate business assumptions in light of the rapidly evolving landscape. For companies who bring customers on site, highlight your COVID-19 protocols.
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3. Update your investors and lenders - The SEC has offered some extensions of filings required under the Exchange Act and specifically encouraged public companies (and their auditors) to disclose the anticipated impact of the COVID-19 outbreak on the company to investors. Given the volatility in the stock market (as a result of the COVID-19 outbreak along with the plunge in oil prices), the possibility of a stock drop after an announcement relating to the effect of COVID-19 is more plausible. Such stock drops could attract securities litigation alleging disclosure deficiencies, breaches of fiduciary duty and corporate mismanagement, which may trigger coverage under D&O insurance. In fact, we have already begun to see the first of these types of lawsuits filed, alleging companies’ inadequate or misleading statements relating to their response to the outbreak and its impact on business operations.

For additional information on the SEC’s guidance on disclosure obligations and the above noted filing extensions, see link below to Goodwin Procter LLP’s summary, “SEC COVID-19 Disclosure and Considerations and Exemptive Relief: Some FAQ’s” at: https://www.goodwinlaw.com/publications/2020/03/03_11-faq-sec-covid-19

Due to the unpredictable nature of the coronavirus outbreak, certain companies that have normally disclosed expected 2020 earnings decided to discontinue the practice at this time. Other companies forecasted the impact of the coronavirus outbreak on first quarter earnings but excluded the potential impact from their full-year 2020 guidance. Some companies that had already issued 2020 guidance recinded that guidance as news about the outbreak worsened.

For private companies, we encourage you to update your lenders if you anticipate any liquidity or cash flow issues that may impact your ability to repay debt or meet your financial covenants. Lenders may be willing to grant an extension or work with you to refinance.

Potential for D&O/EPL/Cyber claims from COVID-19 and how policies are responding:

As noted above, we have begun to see the first of the anticipated D&O claims, coronavirus-related shareholder suits, filed against companies alleging misrepresentations made to investors regarding their readiness and response to the outbreak and its disruption on their business. We expect there will be more claims, particularly with companies’ first quarter 2020 results approaching relating to companies’ updated disclosures and response (or lack thereof) regarding the pandemic’s impact on business.

Specifically, the most recent filing last week is a shareholder class action vs. Inovio Pharmaceuticals, for misrepresentations regarding their development of a COVID-19 vaccine (see analysis here: https://www.dandodiary.com/2020/03/articles/securities-litigation/pharma-company-hit-with-securities-suit-over-covid-19-vaccine-claims/). Another shareholder suit was also filed earlier last week against Norwegian Cruise Lines, for allegedly making false and misleading statements about the virus, their sales tactics and response, purportedly leading to a 35+% drop in share price.

In addition to this type of shareholder litigation that is typically covered under D&O policies, there is also the possibility that government regulatory agencies may bring enforcement actions or at the least, investigations against companies and/or its Directors and Officers, alleging violations of law in connection with the adequacy of their response to the outbreak, such as consumer protection law violations, or other violations of safety and health, environmental, or employment laws, to name a few.
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Generally, you can expect your D&O insurance policy to respond to a COVID-19 related securities class action or breach of fiduciary duty suit as your policy would to any other shareholder litigation. However, we do recommend reviewing the Bodily Injury Exclusion typically found in most D&O policies, to ensure it is written with broader “for” wording (vs. the more restrictive “based upon, arising out of” language), to preserve coverage for the related securities or breach of fiduciary duty allegations made in connection with a COVID-19 related claim. It’s also worth reviewing your D&O policy’s Contract exclusion, if applicable, which is often included in private company D&O policies and may preclude coverage for third party coronavirus-related claims brought by customers, vendors, suppliers, etc.

From a private company perspective, we see the greatest impact is likely the potential for D&O bankruptcy related claims for companies that may sustain significant financial impact to their business, OR Employment Practices claims as a result of COVID-19 related termination or harassment. For example, EPL policies may cover claims by employees alleging discrimination against protected classes as a result of human resources policies implemented in response to the COVID-19 outbreak, or claims resulting from harassment (and tolerance of harassment by the company) of people in protected classes. Claims under the Americans with Disabilities Act (ADA) could also arise if employees are not careful about their questioning of employees relating to COVID-19, which may be covered under an EPL policy. Employers and Human Resource professionals may wish to consult Goodwin’s guidance on proactive steps to reduce workplace risks that might lead to potential liability: https://www.goodwinlaw.com/publications/2020/03/03_04-responding-to-the-coronavirus-outbreak.

We also may see indirect Cyber claims resulting from COVID-19 and its impact on businesses. Cyber insurance typically covers losses caused by damage, theft, disruption or corruption of electronic data, and information privacy liability violations. Given that the COVID-19 outbreak has resulted in one of the largest telecommuting situations in history, corporations’ cybersecurity needs will likely be stressed to an unprecedented level on a global scale. To the extent cyber criminals are able to exploit weaknesses from this surge in remote connections and launch phishing campaigns to exploit mass uncertainty and fear, Cyber claims will ensue. We’ve already begun to see an uptick in phishing messages from hackers posing as government and health agencies, purporting to offer information on the coronavirus.

Specifically, the risks to companies include a Security/Privacy breach through criminals targeting remote access portals, an Extortion Threat that leads to Business Interruption/Extra Expense in addition to payment of the demand, and Social Engineering Fraud, among others. These risks, and others, can typically be addressed by a Cyber Liability policy, if not already purchased. In addition to the benefits of transferring this significant risk exposure, many Cyber insurers offer their clients services to manage cyber risks, often for no additional cost or at a discounted rate. They also offer quick access to an incident response team to handle a Cyber event, including breach counsel and a team of service providers available to respond immediately, at pre-agreed and reasonable rates.
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Should you have any questions and would like to discuss further please reach out to:

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