KING & SPALDING

CRISIS PRACTICE

Coronavirus

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D&O Coverage for COVID-19 Coronavirus-Related Lawsuits

The COVID-19 coronavirus ("coronavirus") pandemic has caused significant financial and economic turmoil around the globe. Governments have announced unprecedented travel restrictions, global supply chains have been disrupted, and some major retailers have closed their doors indefinitely. The turmoil has been especially apparent in the stock market, which entered bear market territory on March 11, 2020, and experienced the largest one-day percentage drop since 1987 on March 16 (-12.93%), not to mention major drops on March 12 (-9.99%), March 9 (-7.79%), and March 11 (-5.86%).[1]

Companies now face important and difficult decisions about how to respond to and plan for the effects of the outbreak of the novel coronavirus disease. Public companies, for instance, must determine whether, when, and how to update their disclosures to inform the market about the risk of impact of the coronavirus outbreak on their business. Both public and private companies face important decisions concerning operations and personnel, which may implicate management's fiduciary duties. In both public and private securities offerings, officers must consider how unforeseen circumstances, such as this coronavirus pandemic, should be reflected in underwriting, structuring, and arranging securities offerings (for a detailed discussion on this topic, see here). Securities lawsuits may accuse companies of failing to adequately inform investors of the risks from a global pandemic, supply chain disruptions, or other collateral effects, as our securities litigation team has explained in a separate piece available here. Indeed, just last Thursday, a putative class action securities lawsuit was filed against Norwegian Cruise Lines in the U.S. District Court for the Southern District of Florida, demonstrating that investors may, with the benefit of hindsight, second-guess decisions or public statements made by management before and during the crisis. *See Douglas v. Norwegian Cruise Lines, et al.*, Case No. 1:20-cv-21107-RNS, Mar. 12, 2019 Complaint, S.D. Fla. (alleging violations of Section 10(b) and 20(a) of the Exchange Act and Rule 10(b)(5)).

Unfortunately, as we know from prior economic shocks and periods of market volatility such as the 2007-08 financial crisis, securities and D&O

litigation against companies and their boards for the way they respond during these challenging economic times will continue for years after the crisis concludes. Some commentators have prematurely argued that corporate insurance policies will not respond to coronavirus-related liabilities. However, all companies should proactively review all of their policies, including D&O policies, as part of their crisis management response.

Most public company D&O policies should provide coverage for coronavirus-related "Securities Claims" that allege violations of state and federal securities laws. As for private companies, their D&O policies should respond to a broader range of claims alleging "Wrongful Acts" committed by the company. Further, D&O insurance should protect directors and officers of both public and private companies for potential liability arising from claims that management breached fiduciary duties in planning for and/or responding to the crisis. D&O policies also should provide companies with valuable balance sheet protection if companies are required to indemnify directors and officers for coronavirus-related litigation. To assess coverage for a D&O claim, it is important to review the specific language of your policy with your coverage counsel to determine the scope of coverage that may be available and to navigate the claim process. Most D&O policies do not contain "communicable disease" exclusions that are sometimes found in commercial general liability ("CGL") policies. Nevertheless, you should also review the "bodily injury exclusion" that is present in most D&O policies to assess whether it would have any impact to coverage for losses related to the coronavirus pandemic. Notably, the bodily injury exclusions in many D&O policies contain exceptions expressly stating that the exclusions do not apply to Securities Claims arising out of bodily injuries. Moreover, absent a claim that a plaintiff actually suffered a bodily injury as a result of the company's actions, these exclusions should not apply to claims relating to the management of the company or the company's public statements in securities filings.

Before the coronavirus crisis became a reality in the financial markets, the D&O insurance market was already tightening, both with respect to pricing and with respect to policy terms and conditions. In light of the current uncertain environment, this trend may continue for the foreseeable future. Moreover, as a result of the SARS epidemic of 2002-03 and the H1N1 pandemic of 2009-10, the insurance industry developed additional policy exclusions that are included in some non-D&O lines of coverage, such as pandemic exclusions, communicable disease exclusions, and other specific disease exclusions. For now, it remains to be seen whether insurers will seek to add these types of exclusions to their policies at upcoming policy renewals, or other types of exclusionary language to potentially limit exposure to the coronavirus pandemic. In the current environment, all companies should work carefully with their brokers and coverage counsel to ensure that their insurance policies provide the broadest possible protection against coronavirus-related litigation, including securities and D&O litigation.

[1] Stock market drops calculated based on Dow Jones Industrial Average.