

# FINPRO Coverage Considerations Regarding COVID-19

*As of March 17, 2020*



## D&O LIABILITY: THE RISK OF COVID-19 RELATED CLAIMS

*What are the possible D&O areas of concern?*

***Both traditional securities class actions (SCAs) and derivative claims***

- **Disclosure Risk:** Missing, inadequate, corrective or not appropriately updated.
- **Failure to Act / Respond Risk:** Claims based on allegations that the company management failed to respond sufficiently or appropriately to dramatically changed operating conditions.
- **Supply Chain Risk:** Failure to ensure that the company's supply chain allowed for alternative supply arrangements.
- **Bankruptcy Risk:** Certain industries and certain companies within those industries are particularly vulnerable.
- **Regulatory Risk:** Enforcement actions may come from regulators alleging violations of health and safety laws and regulations, consumer protection violations, environmental law violations, employment law violations, securities law violations or other violations of law allegedly committed in connection with a company's response or failure to respond appropriately to the coronavirus outbreak.

*Has there already been related litigation?    YES – both are traditional SCAs*

**1<sup>st</sup> Securities Class Action: (Plaintiff Firm – The Rosen Group)**

**Norwegian Cruise Lines** Filed on 3/12/20; Alleging misleading sales tactics related to the outbreak.

**2<sup>nd</sup> Securities Class Action: (Plaintiff Firm – Berger Montague)**

**Inovio Pharma** Filed on 3/12/20; Misleading Statements Related to a COVID-19 Vaccine.

*What has the Securities and Exchange Commission (SEC) done?*

- [On March 13, 2020](#), the SEC announced another ease of regulatory requirements by allowing companies to switch their annual meetings to virtual gatherings as long as they provide adequate notice.
- [On March 4, 2020 the SEC announced a new order](#) that provides what the agency calls “conditional regulatory relief for certain publicly traded company filing obligations” amid the coronavirus outbreak. The order provides publicly traded companies — subject to certain conditions — with an additional 45 days to file certain disclosure reports that were previously due between March 1 and April 20, 2020.

## D&O LIABILITY: THE RISK OF COVID-19 RELATED CLAIMS

### *What are the possible D&O coverage issues?*

- **Bodily Injury Exclusion:** At this time there is no exclusion for COVID-19 but both public company and private company D&O policies have some form of a bodily injury (BI) exclusion. The BI exclusion wording can vary, so it is important to review the following:
  - Is the preamble to the exclusion “for” as opposed to the more sweeping absolute preamble of “based upon, arising out of, attributable to...”
  - Are there any coverage carve-backs to the exclusion such that the exclusion does not apply to securities claims, non-indemnifiable claims or defense costs?
  - Confirm that there is no BI exclusion at all in your dedicated Side A DIC program.
- **Knowledge Exclusions and Warranties:** If new limits are being purchased, be careful of any required warranty statements as such statements could result in exclusions for known matters.

### *What are some possible D&O underwriting questions on COVID-19?*

- What impact do you expect the virus to have on your business?
- Does the company have a corporate Enterprise Risk Management process? If so, is it cross departmental?
  - Has the ERM team completed an analysis of the exposure of the virus? If so, what was the analysis?
  - Has a contingency plan been developed as a result and how is the company managing that as this situation evolves?
- Has the company undertaken financial stress testing in response to this virus and the potential for long-term implications?
- Have any company locations been closed? If so, what is the expected impact to the business and/or financials?
- What are the company imposed travel restrictions? Do you anticipate these having a meaningful impact on the business?
- How has the company prepared to accommodate employees working from home, particularly in regards to IT functions and controls?
- Does the company anticipate a reduction in headcount either temporarily or permanently as a result of the virus?
- If the company’s supply sources are expected to be impacted, what is the assessment of the current inventory levels available and your ability to meet demand?
- Will corporate guidance be impacted as a result of the virus?
- Is the company in the midst of an acquisition, financing or other transaction that may be delayed or terminated?
- Does the company believe they are in compliance with the recent SEC disclosure guidelines or will changes need to be made? Are any 3<sup>rd</sup> parties being utilized to make that assessment?
- Has the company requested an extension from the SEC to file audited financials?
- Has the company amended or does it intend to amend its insider trading policies?

## OTHER FINPRO COVERAGES

### *Employment Practices Liability Insurance (EPL)*

- Claims alleging discrimination or harassment may be covered under EPL.
- 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 employers are not careful about their questioning of employees relating to COVID-19, and such claims may be covered under an EPL policy.
- There is typically a bodily injury (BI) exclusion in an EPL policy but bodily injury claims by employees arising out of possible infection at work may fall under the company's workers' compensation policy. Review the BI exclusion in the EPL policy to ensure it has a "for" preamble " as opposed to the more sweeping absolute preamble of "based upon, arising out of, attributable to.... "
- Although claims under OSHA, the NLRA and many other workplace statutes are excluded under a typical EPL policy, a claim for retaliation (regardless of which statute the employee is proceeding under) would be covered.

### *Wage and Hour Insurance (W&H)*

- For many companies faced with drastically reduced business, employers must ensure they are in compliance with all of the wage and hour laws as they consider reduced hours, furloughs or reduction in pay.
- On the other end of the spectrum for those companies experiencing an extreme surge in business, employers must be equally vigilant in ensuring all employees are being compensated properly, especially with regard to overtime pay. Additionally it is critical that proper meal and rest breaks are being implemented.

### *Fiduciary Liability Insurance*

- Fiduciary claims may become more likely as a result of the market turbulence caused by COVID-19 if there is company stock in plans.
- Quickly changing work roles may lead to issues surrounding plan eligibility. Health plan coverage uncertainty may lead to allegations of poor plan design.

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## OTHER FINPRO COVERAGES

### *Cyber / Crime*

- COVID-19 has resulted in one of the largest work-from-home situations in history. Thus, cybersecurity will likely be stressed to a level never experienced before by corporations around the globe.
- To the extent cyber criminals are able to exploit weaknesses from this surge in remote connections, claims under cyber policies may arise.
- One of the leading reasons why there are malware, ransomware, wire fraud, and cybercrime events is because individuals click on links or open attachments that are malicious. This exposure is heightened when employees are operating outside their typical process flow (work from home, etc.).
- With everyone working remotely, there could be a higher propensity for Social Engineering Fraud type situations as people may be less likely to follow standard protocol given the remote access.



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