

## ALERT

March 13, 2020

# INSURANCE CONSIDERATIONS IN LIGHT OF COVID-19

In the recent weeks our risk management team has identified a number of insurance-related issues relevant to clients dealing with the outbreak of the disease caused by the novel coronavirus, known as COVID-19, that we felt important to share with clients.

This alert is focused on business-related insurance (not individual or health insurance) and in particular, is primarily focused on management liability insurance (Directors and Officers (D&O), Employment Practices Liability (EPL), and Fiduciary liability policies), professional liability insurance (also known as Errors & Omissions (E&O) liability policies) and transaction liability insurance (such as Representations & Warranties Insurance (R&W Insurance)). We have highlighted key issues on these corporate policies to provide guidance on: (1) what types of loss may be covered under insurance that could potentially arise from the COVID-19 outbreak; (2) issues that could impact coverage for such claims; and (3) negotiating and underwriting policies during this pandemic.

## 1. WHAT TYPES OF LOSS MIGHT BE COVERED BY INSURANCE

Whether there is coverage for any particular matter depends on the specific claim or loss, and the individual wording of a particular policy. Accordingly, although we have highlighted a number of potential areas of coverage related to the COVID-19 pandemic below, the terms

and conditions of each policy should be reviewed carefully with specialists to determine whether there is coverage.

### **Property & General Liability Insurance**

Although a standard property policy only provides coverage for physical damage to property, some companies may have purchased add-on coverage that provides some amount of business-interruption coverage for certain losses in business related to, among other possibilities, outbreaks of disease. This coverage, if purchased, is typically provided for a sublimit that is lower than the full policy limit.

If lawsuits begin to emerge from individuals (whether customers claiming they were infected by the employees of a company, or by contaminated products), it is possible that a company's general liability policy and/or product liability policy could provide some coverage if claimants are actually able to establish causation and liability.

Companies that have trade disruption insurance may have coverage for potential loss of earnings and extra expenses resulting from disruptions to the supply chain or demand caused by the COVID-19 outbreak.

### **D&O Insurance**

The Securities Exchange Commission 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. [For additional information on the SEC's guidance, see our recent client update: SEC COVID-19 Disclosure and Considerations and Exemptive Relief: Some FAQs.] 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 than 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.

### **EPL Insurance**

Bodily injury claims by employees arising out of possible infection at work may fall under the company's workers' compensation policy. But there could potentially be discrimination and harassment claims covered under EPL insurance as well. 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. Employers and Human Resource professionals may wish to consult our earlier guidance [Responding to the COVID-19 Outbreak: Ten Questions and Answers for Employers] for suggestions on proactive steps to reduce workplace risks and avoid any missteps that might lead to such potential liability.

### **Fiduciary Liability Insurance**

Fiduciary claims can arise at any time relating to the handling, or mishandling, of fiduciary responsibilities for employee benefit plans. As with D&O claims, fiduciary liability claims become more likely as a result of the market turbulence caused by a number of recent factors (the largest of which is COVID-19). Fiduciary liability insurance provides coverage to companies for liability resulting from a variety of fiduciary liabilities to employees.

### **E&O Insurance**

E&O policies are intended to cover claims resulting from allegations relating to a company's professional services, whether it is a company installing fiber optic lines for increased work-at-home capabilities, a fund manager or investment professional for handling clients' financial portfolios, or medical practitioners' or medical institutions' care of patients. The range of possible liabilities resulting from COVID-19 that may be covered under an E&O policy depends largely on the type of professional service provided by the company. For claims relating to a company's services, or failure to provide services, E&O policies may be the most applicable insurance policy.

### **Cyber Insurance**

Cyber Insurance typically covers losses caused by damage, theft, disruption or corruption of electronic data. Given that the COVID-19 outbreak has resulted in one of the largest work-from-home situations in history, 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.

### **R&W Insurance**

If a buyer procures R&W Insurance in connection with a merger or acquisition, the R&W Insurance policy covers loss (in excess of the retention) resulting from breaches of the representations in the purchase agreement as of the date of signing (and as of the closing) of the transaction. Although issues that buyers discover during the course of diligence, such as disruption with a supplier in China, are likely excluded, there could be some coverage for some unknown breaches of representations that the buyer discovers post-acquisition. For

example, there could be breaches related to COVID-19 under broadly worded undisclosed liability representations, absence of changes representations, inventory representations, collectability of accounts receivable representations, among other representations highlighted in our firm's prior guidance on the impact of COVID-19 on M&A.

## **2. CLAIMS UNDER INSURANCE POLICIES IN THE WAKE OF THE COVID-19 OUTBREAK**

While the above section highlights the possible policies that could provide coverage, there are clearly limitations in many insurance policies that should be reviewed closely in the wake of claims relating to COVID-19. We have highlighted below some key exclusions to keep in mind, however, determining whether a claim or loss is within the scope of coverage under a policy is always the first and most critical factor in assessing coverage.

### **Knowledge Exclusions and Warranties**

Some insurance policies may make a distinction in coverage based on what was known about COVID-19 when the policy was purchased, generally reflecting insurers' desire not to insure against risks that the policyholder voluntarily assumed. For example, although we are not focusing on travel insurance, numerous travel insurers issued guidance on dealing with claims relating to COVID-19, specifically noting that plans purchased prior to January 21 - January 24, 2020 (depending on the insurer) would provide trip cancellation expenses for customers, but that those booked after that date would not be covered.

Even where a policy does not contain a "knowledge" exclusion, for new policies put in place since the COVID-19 outbreak, if an insured is required to sign a warranty statement, the wording of such statements could potentially result in an exclusion for issues known at the time the policy incepted.

### **Bodily Injury and Pandemic Exclusions**

Policies that are not intended to cover bodily injuries may have exclusions for claims arising from bodily injury. The scope and applicability of such exclusions will range widely, so for example while most D&O policies would still provide coverage for securities litigations where the underlying, tangential cause related to COVID-19, other bodily injury exclusions may be worded more broadly.

Likewise, some types of coverage may have specific exclusions relating to outbreaks or pandemics, or may provide coverage for such matters only subject to a sub-limit of liability (i.e., while an insured may get some coverage, it will be on a much more limited basis than

the full policy amount).

### **3. NEGOTIATING AND UNDERWRITING INSURANCE POLICIES DURING THE COVID-19 SITUATION**

As most savvy consumers of insurance know, insurance is a relationship business. To have a successful business, insurers need to make more in premiums than they pay on claims. Accordingly, insurers are typically not in the business of insuring a house that is on fire. However, insurers understand the need to maintain a good reputation of being in line with the market in underwriting, and the need to maintain good relationships with clients. For these reasons, underwriting and negotiating policies at this time is a very delicate balancing act for both insureds and insurers, and how much flexibility the insured can expect in policy negotiation varies depending on the type of insurance.

Some insurers, especially those writing policies with knowledge exclusions, are likely to seek to provide clarity during the underwriting process of their intentions to limit coverage for claims relating to COVID-19. However, brokers and legal advisors acting on behalf of clients procuring policies should, among other things, push back on such exclusions or limitations to the extent they are not market or simply not warranted. Insureds' advisors should also set clear expectations for clients as to what will and will not be covered.

In the R&W space, for example, for deals that are heavily impacted by COVID-19, insurers may add to the list of heightened diligence areas that the buyer's diligence providers have assessed the veracity of the representations in light of the COVID-19 outbreak. We have already seen insurers raising questions on underwriting calls regarding the impact of COVID-19 on businesses that have concentrations in the travel industry, and for businesses whose supply or demand chains are in heavily impacted areas. Likewise, we have seen insurers propose exclusions where they felt it was clear there would be a recognizable impact and breach.

We expect similar conversations to be happening on other lines of insurance that are being renewed in the coming months. With most existing claims-made policies that are renewing, however, insurers have less of a basis for seeking exclusions since those insurers may already either be on risk for an existing claim. Again, though, the market practice is likely to dictate the norm for policy renewals. Insureds would be advised to have good brokers and experienced counsel and advisors helping them to negotiate their policies.

*In conclusion, in many respects, the events unfolding with respect to COVID-19 are unique and unprecedented, and the impacts of those events are likely to be wide-ranging. Insurance may provide an available avenue for businesses to address the impacts of*

*COVID-19, although it will turn on the specific events at issue and the precise wording of the insurance policy. Companies should look closely at their insurance program as events with respect to the COVID-19 outbreak unfold, both in terms of the availability of that program to respond to issues facing the companies and ways to protect against future events under new programs, and would be wise to consult with their counsel and insurance brokers to ensure they are maximizing the protections afforded under their insurance program.*

Please visit Goodwin's **Coronavirus Knowledge Center**, where lawyers from across Goodwin are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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