



Anticipating Coronavirus D&O Insurance Claims

by William G. Passannante

The spread of spread of the novel coronavirus (SARS-CoV-2) that causes the disease COVID-19 is taking a growing human toll and causing massive disruption to businesses and communities. With losses come attempts to affix blame, and securities suits alleging that negligence and wrongdoing by company management and board members harmed shareholders will follow in the wake of mass closures, cancellations, disrupted supply chains and

reduced spending across most sectors of the economy. Such classic D&O claims ordinarily are covered by D&O liability insurance policies, usually with independent defense counsel paid for by the insurance company for the company and possibly for individual officer and directors.

DISCLOSURE RISKS

Securities suits often allege failure of the defendant company to meet disclosure requirements. An emergency filing extension granted by the Securities and Exchange Commission to businesses affected by COVID-19 provides some relief, but also creates obligations that could create new liabilities.

The SEC Order dated March 4, 2020 extended the filing deadline for a broad range of required reporting from March 1, 2020 to April 30, 2020. To obtain an extension, a company must explain “the impact of COVID-19 on its business”—if in fact there is a material impact. That order was modified and superseded by an SEC Order dated March 25, 2020, and extended the period of relief to July 1, 2020. In the SEC’s March 25, 2020 press release, the commission stated a number of questions regarding the effects of COVID-19 for companies to consider. The release questions the: 1) impact on financial condition and operations; 2) impact on capital and financial resources; 3) effect on assets on the balance sheet; 4) material impairment or changes in accounting judgment regard-

ing certain assets; 5) impact on demand for the issuer’s product or services, among others. The release states, that in sum, “each company will need to carefully assess COVID-19’s impact and related material disclosure obligations.”

The commission’s release also includes a fundamental reminder to avoid trading prior to the dissemination of material non-public information, referencing Fair Disclosure regulations (Regulation FD 17 CFR 243.100 *et seq.*). The release stated, “where a company has become aware of a risk related to COVID-19 that would be material to investors, the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company’s securities until such information is disclosed to the public.”

Accurately disclosing the impact of COVID-19 on its business is a significant undertaking, and one likely to be second-guessed by the plaintiff’s securities bar. In addition to disclosure risk, one might expect plaintiffs in securities actions also to allege a failure adequately to prepare for the crisis or to respond properly to COVID-19 once underway.

The current volatility in financial markets means that disclosures may have a significant impact on share price—a classic trigger for a shareholder “stock drop” suit. Since the Supreme Court increased D&O liability exposure generally with its opinion in *Cyan, Inc. v. Beaver County Employees Retirement Fund* (CT 2018), which



upheld the plaintiffs' right to bring certain securities class actions in state courts, companies may reasonably anticipate increased liability exposure as COVID-19 fallout accelerates.

POTENTIAL CLAIMS DISPUTES

The next few months will reveal the contours of the COVID-19 D&O insurance claims environment. Insurance companies faced with a flood of claims may advance certain arguments, including the assertion of an exclusion for "bodily injury" by claiming a management "wrongful act" is a bodily injury claim. Randy Maniloff of Margo Meta White and Williams LLP also anticipates disputes over whether allegedly causing people to contract the disease constitute an "accident" triggering coverage. He contrasts judgments addressing this question in *Liberty Mutual Insurance Co. v. Estate of Bobzien* (W.D. Ky. 2019), in which intentional exposure to second-hand smoke was judged not to be an accident with *Campanella v. Northern Properties Group*, D. Minn. Feb. 28, 2020), in which the court held that disease caused by exposure to chicken feces was in fact an accident. That the assertion of coverage-avoiding arguments precedes most claims could be a harbinger of claims squabbles to come.

Suits alleging COVID-19-related disclosure failures will also put defense counsel, risk managers and claims adjusters in uncharted territory. Unusual securities claims will lead to new types of insurance claims seeking defense and payment for settlements and judgments. New claims do not have a body of "custom and usage" in the industry to give meaning to key terms.

DIFFICULT DECISIONS

As defense counsel grapples with COVID-19 claims, risk managers need to be vigilant to ensure that defense strategies do not undermine insurance coverage. If the complaint includes a mixture of covered and potentially uncovered claims, should the matter be settled? What if the insurance company resists settlement within policy limits? Often, pressure to resolve claims quickly—perhaps driven by plaintiffs' or trial court deadlines—leaves little time for dispassionate consideration. Yet courts have held that the good faith duty reasonably and fairly to settle includes a duty to act promptly. Further, disagreements about agreeing to a settlement can lead to disputes regarding the duty to settle claims. "By refusing to settle within the policy limits, an insurer risks being charged with bad faith on the premise that it has 'advanced its own interests by compromising those of its insured.'" (*Pavia v. State Farm Mut. Auto. Ins. Co.* (NY 1993))

The spread of SARS-CoV-2 is creating uncharted territory in our personal, social and working lives. Businesses of all kinds, including insurance companies, will face intense financial pressure, so policyholders seeking coverage for COVID-19 claims will require vigilance and persistence to obtain the insurance they purchased. ■

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