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COVID-19: Should notices be given under management liability policies?

The COVID-19 pandemic continues to impact people and business around the world. Companies are becoming increasingly concerned about financial losses they may sustain. That naturally leads to questions about whether those losses will be covered by their E&O, D&O, Employment practices liability (EPL), cyber and other management liability insurance policies.

Management liability policies typically require companies to provide notice of a claim during the policy period in which it is made and before the policy expires. Those policies also give insureds the option to report circumstances that may give rise to a claim in the future. If the insurer accepts the notice of circumstances, any future claim will be deemed to have been made during the policy period in which the insured submitted the notice of circumstances.

Because companies don't know what claims and losses they might face from the impacts of the coronavirus, many are tempted to provide a general notice of circumstances under all their management liability, E&O and cyber policies. While each company's situation is unique, absent other circumstances that might support such a notice (e.g., bankruptcy, major reorganization, change of control situations, problematic insurance renewals), Lockton generally recommends against giving such a notice.

There is a significant risk that insurers will reject such notices. Policies typically require notices of circumstances to contain specific information. That information includes:

- The probable claimant and defendants.
- The wrongful acts that would be alleged.
- The date the company learned of those acts.

A non-specific COVID-19-related notice is unlikely to contain all of that information. Insurers will probably reject it for that reason.

Because a notice of circumstances is optional, its rejection by insurers might not seem to be a problem. A company whose notice is rejected can simply wait for an actual claim to be made and then provide notice to the appropriate insurers, right? Well, maybe.

Management liability policies have exclusions for matters reported under earlier policies. Those "prior notice" exclusions often aren't limited to notices that are accepted by insurers. An exclusion without such a limitation could be applied to a rejected notice of circumstances. That would prevent any future coronavirus-related claim from being covered under future policies.

A coverage denial on the basis that a rejected notice of circumstances was given under an earlier policy would be a very harsh position for an insurer to take. However, insurers have done this. We have never seen an insurer that was on the risk when the rejected notice was given and when the subsequent claim

was made to take such a position, even though the policy might allow them to. Insurers that are new to a risk when the claim is made have used prior notice exclusions to avoid coverage.

Providing a non-specific notice of circumstances based on the COVID-19 pandemic carries risks. Because such a notice is likely to be rejected, Lockton recommends that companies thoroughly discuss such a notice with their Lockton Financial Services broker before any notice is given. We recommend that counsel assist in drafting circumstance notices. They may wish to set the foundation for certain future coverage positions.

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