

# Executive Risk Advisory – COVID-19

March 17, 2020



# Our ever-changing environment

For travelers crossing the San Francisco Bay Bridge early in the week of March 9, 2020, the jarring image of the Grand Princess cruise ship docked among container ships and cranes in the commercial Port of Oakland was a symbol of the unsettled feeling everyone is experiencing from the COVID-19 pandemic. By March 12, one of the first COVID-19-related securities class action lawsuits was filed against the Norwegian Cruise Lines and its chief executive and chief financial officers. The complaint alleges the company's disclosures regarding the novel coronavirus were misleading, the company's sales staff made false or misleading statements underplaying the risk of the coronavirus to consumers and, according to news articles, failed to disclose that practice to investors. On the same day, a securities class action lawsuit was filed against biotechnology company Inovio Pharmaceuticals and its CEO, J. Joseph Kim for making false and misleading statements on the company's progress on developing a vaccine, causing a temporary artificial inflation of the company's stock price.

## Risk containment and mitigation

All businesses, public and private, large and small, have been and will continue to be affected by the COVID-19 pandemic. How management approaches and handles its response to the pandemic is critical.

During your next D&O insurance renewal, underwriters will ask probing questions relating to the impact of the COVID-19 crisis on your business and your company's response. For example, underwriters may want to know:

- Whether the company has an enterprise risk management process.
- Whether the company has undertaken financial stress testing in response to the COVID-19 outbreak.
- Whether the company has assessed supply sources, inventory levels and ability to meet demand.
- What measures the company has taken to protect its work force and whether those measures will have a material impact on business.
- Whether any planned financing or corporate transaction might be delayed as a result of the COVID-19 crisis.
- Whether the company believes it is in compliance with the most recent SEC disclosure guidelines.

Discussions concerning questions such as these are expected. However, we will be cautious of requests for written answers and any requests for specific warranty/knowledge statements.

# Potential claim sources

The COVID-19 pandemic may spark claims under several different management liability policies.

## D&O policies

As we have already seen with Norwegian Cruise Line Holdings and Inovio Pharmaceuticals, securities litigation plaintiffs' attorneys are acting on this crisis and bringing lawsuits. We anticipate private companies will also be pulled into management liability claims related to the COVID-19 crisis.

Claims against directors and officers may be brought:

- By investors, alleging breaches of fiduciary duty.
- By business partners, creditors or customers, alleging fraud, misrepresentation or breach of contract for failure to perform, fulfill or deliver.
- By consumers, alleging fraud, misrepresentation or negligence.
- By governmental entities, alleging a failure to protect workers, mitigate an outbreak or to timely meet regulatory requirements.

Certain exclusions may apply, depending on the policy and the allegations in any particular claim. D&O policies commonly contain a bodily injury exclusion. However, in most cases the exclusion is for claims for bodily injury (not "arising out of or related to" bodily injury) and may be further limited so that it does not apply to securities claims, and thus would not be a bar to coverage for many of the claims we anticipate under the D&O coverage.

## Errors and omissions policies

COVID-19 could also give rise to claims under companies' errors and omissions policies. The disease and efforts made to limit its spread may impact a company's ability to provide the professional services it agreed to provide. Both timing of delivery and the quality of the service could be affected. Whether E&O coverage is available for any resulting claims will depend on a claimant's ability to allege a wrongful act, error or omission on the part of the company. Policy exclusions for bodily injury may also limit coverage.

## Employment practices liability policies

Employment practice liability claims may allege COVID-19-based wrongs, including:

- Perceived disparate treatment of employees with illness or perceived COVID-19 infection.
- Failure to accommodate ill or infected employees.
- Disclosure of private information or employment-related defamation relating to COVID-19 infection.
- Harassment of and retaliation against employees with real or perceived illness.
- Wrongful termination, retaliation or discrimination stemming from reductions in staff during business slow-downs.
- Inconsistent application of workplace policies.

## Fiduciary liability policies

Fiduciary liability claims are possible as well. Claims of an ERISA violation may result if companies' healthcare plan participants contend they were denied benefits under the plan for testing or treatment for COVID-19. Many participants in 401(k) plans are watching their retirement accounts diminish as the market reacts to the coronavirus crisis. Retirement plan participants may allege breaches of fiduciary duty if they believe plans were not adequately managed for the volatile market.

# Claim management: Increased sensitivity

Management liability policies may respond to the claims mentioned above, and there may be other insurance policies that should be considered for particular claims as well. How a policy will respond will always depend on the facts and circumstances of the claim, as well as the language of the particular policy. We encourage you to consult with your Lockton financial lines team if you receive notice of any demand or complaint that may implicate your management liability insurance program, or if you have any questions regarding your insurance program.

# We are here: Complete and fully functioning remote infrastructure

Lockton is here to help. We continue to monitor global developments and, especially, risk and insurance management implications. We remain constantly available to each of our clients. Call us about any concern and we will make sure that we respond or refer for appropriate response.



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