



Advice for Providing Notice for D&O Policies Renewing During the COVID-19 Pandemic

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As the COVID-19 pandemic affects companies' economic performance, we anticipate an uptick in Directors & Officers (D&O) Liability claims. Attempts by companies to downplay the effects of supply-chain disruptions or overall performance due to shutdowns are potential minefields for D&O claims. Two companies that either attempted to downplay the effects or capitalize on the effects of the pandemic have already been sued. On March 12, 2020, the first two known COVID-19 securities lawsuits were filed, and many more are anticipated. A shareholder class action lawsuit was filed against Norwegian Cruise Lines, its CEO, and CFO, alleging that the cruise line employed misleading sales tactics related to the coronavirus outbreak. That same day, shareholders of Inovio Pharmaceuticals filed a securities class action lawsuit against Inovio and its CEO based upon the CEO's false statements on Fox Business News that Inovio had developed a COVID-19 vaccine.

D&O Liability policies are claims-made policies (or, sometimes, claims-made and reported policies).¹ This means that coverage is triggered by a claim made against an insured during the policy that is in effect when the claim is made. Claims-made and reported policies require not only that the claim be made against an insured—but also that the claim be reported to the insurer during that same policy period. Either type of claims-made policy can provide for additional time after the expiration of the policy, say 30, 60, or 90 days, for the reporting of claims that were made against the insureds during the policy period. It is important to read and understand the reporting provisions of your claims-made policies.

D&O Liability policies also have a mechanism for reporting circumstances that may give rise to a claim. If an insured gives notice of circumstances that may give rise to a future claim, the insured

¹Claims-made coverage is typical in not only D&O Liability policies, but other types of policies, such as Employment Practices Liability, Fiduciary Liability, most Professional Liability, and certain Pollution Liability policies. Some policies will package together both claims-made coverages and occurrence-based coverages.

may be able to peg the current policy as the one that will respond, even if a claim arises out of those circumstances during a subsequent policy period. Some D&O policies also provide coverage for pre-claim defense costs the insured incurs, if those circumstances develop into a claim.

Why is tying a claim to a particular policy important? We anticipate that insurers will be adding virus/pandemic/infectious disease exclusions to policies upon renewal. If your current policy is renewing soon and has no such exclusion, consider giving notice of circumstances that may give rise to a claim. Your notice of circumstances should be as detailed as possible and should give some specifics as to why you believe you may have a future claim because of the COVID-19 virus. The degree of specificity needed in a notice of circumstances will be detailed in the policy. For example, one common private company D&O policy² states:

An Insured shall, as a condition precedent to exercising any right to coverage under this Coverage Part, [...] shall include in any notice under Subsections (A) or (B) above a description of the Claim or circumstances, the nature of the alleged Wrongful Act, the nature of the alleged or potential damage, the names of the actual or potential claimants, and the manner in which such Insured first became aware of the Claim, circumstances or alleged Wrongful Act.

Keep in mind, too, that the definition of "claim" in many D&O policies is very broad, so notice should be provided whenever it is possible that a "claim," has been made. For example, the definition of "claim" in many D&O policies includes a written demand for monetary damages or non-monetary (including injunctive) relief as well as a demand for any type of alternative dispute resolution (ADR). Some policies provide that a demand to toll or waive a statute of limitations is a "claim," while others provide that such demand is a "circumstance." In either circumstance, notice is appropriate.

In conclusion, it is important to understand the reporting provisions of your claims-made policies as well as the definition of "claim" and "circumstance" in those policies. SDV is always available to help you review your claims-made policies and to answer your coverage related questions.

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²Chubb ForeFront Portfolio 3.0, Directors & Officers and Entity Liability Coverage Part, Section VI. Reporting at (C).