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News

Coronavirus – a Bumpy Road Ahead for D&O Insurers

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Globally, insurers are waiting to see how COVID-19 related exposures will impact their respective D&O books. Hinshaw partners Kevin Burke and John DeLascio spoke with strategic alliance firm Reynolds Porter Chamberlain LLP (RPC) about possible D&O exposures in the United States.

DeLascio noted that while the pharmaceutical industry was already a challenging securities class action sector for D&O insurers prior to COVID-19, other sectors will also now be in the spotlight: "we expect there will be many other such class-action complaints filed by shareholders in the wake of COVID-19, with the targets being similarly-situated companies who have been strongly impacted by the COVID-19 epidemic – both positively and negatively, i. e., travel and leisure industries, as well as pharma and medical companies."

Burke addressed the lack of cyber coverage as a potential source of D&O claims against directors:

> "The failure to obtain cyber coverage may become the most critical failure of management by directors when it comes to procurement of insurance before COVID-19 hit. Under prevailing U.S. law, corporate boards have a duty to oversee compliance and monitor material corporate risks. This requires the establishment of appropriate reporting systems and procedures that enable the board to appropriately discharge its oversight responsibilities. In the wake of the COVID-19 pandemic, the materiality of corporate and privacy risks has significantly increased.
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> It is unlikely that many organizations had tested policies and procedures in place to minimize the cyber and privacy risks associated with this sudden and new normal, meaning that officers and directors were likely making important decisions rapidly and under tremendous pressure. In the event of a security event or privacy mishap, those decisions may be second guessed by plaintiffs' attorneys, with the benefit of hindsight, in shareholder litigation against the board."

DeLascio also addressed the issue of using specific COVID-19 exclusions as a means of protecting against future exposure:

> [In the United States] "courts fairly uniformly read "arising out of or relating to"-type language in insurance policies broadly, even if it appears in an exclusion. A COVID-specific absolute exclusion in the appropriate broad form would in our view exclude such claims. It also may do a better job of

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addressing unanticipated types of claims, and clarifying matters for courts which might be inclined to find ambiguities and therefore coverage."

Read the full article (PDF), which includes commentary from insurance law professionals at Miller Thomson, Colin Biggers and Paisley, RPC, Kennedy Van der Laar, HMN & Partners, and Nctm.