



ARC Excess & Surplus, LLC

Executive Liability

COVID-19 Client Alert





Directors and Officers Risks

Public Companies

Securities Claims

In the midst of already historic record numbers of federal securities class actions, driven in part by “event-driven” litigation, it is no surprise that experts are predicting that we will see a good number of cases stemming directly from the COVID-19 pandemic. We have already seen two (2) such cases as follows:

1. Norwegian Cruise Line faced with a shareholder class action alleging it failed to disclose the allegedly false assurances its sales personnel were making to customers regarding COVID-19.
2. Inovio, a biotech company, sued by its investors alleging that its CEO made false statements about the development of a COVID-19 vaccine.

Derivative Claims

Historically, we saw derivative shareholder claims settling for corporate therapeutics and plaintiff's fees. In more recent times, we have witnessed some settlements including significant monetary consideration. As a result of the pandemic, we could see plaintiffs seek damages to the company for alleged failure to prepare for the crisis or failure to mitigate and manage the crisis.

Regulatory Risk

While the Securities and Exchange Commission (SEC) has relaxed certain regulatory requirements related to filing deadlines and annual shareholder meeting in certain circumstances, the SEC also reminded public companies regarding their disclosure duties to shareholders. <https://www.sec.gov/sec-coronavirus-covid-19-response>



Directors and Officers Risks (continued)

Private and Public Company Exposures

- **Shareholder claims** – While the largest exposure to public companies is shareholder claims (as described above), investor claims stemming from mismanagement relating to COVID-19 are also possible against private companies as well. Mismanagement claims could include allegations of failure to prepare an appropriate business continuity plan, failure to manage through the crisis, reliance on one supplier or customer who is not operational, etc.
- **Bankruptcy/Insolvency** – Given the enormous economic impact that COVID-19 has had, it is anticipated that some companies will be forced into bankruptcy or dissolve, leaving their boards exposed to claims from bankruptcy trustees, creditors and other bankruptcy constituents.
- **Commercial Disputes**- There will be disputes over whether force majeure provisions in contracts apply. A force majeure event refers to the occurrence of an event which is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract. While typically these would be considered entity contractual disputes and would not be covered by D&O insurance, the disputes could involve representations made by individual insureds, which could potentially trigger D&O coverage for the individuals.



Directors and Officers Risks (continued)

D&O Coverage Considerations and Expectations

- Underwriters are asking questions regarding COVID-19 impact and plans. It is possible we will see supplemental questionnaires, particularly for the hardest hit industries, such as hospitality, travel agents, event planners, etc. Some sample questions include:
 - What impact do you expect the virus to have on your business?
 - Does the company have a corporate Enterprise Risk Management process and if so, have they completed their analysis of exposure to the virus?
 - Has the company undertaken financial stress testing in response to this virus and the potential for long-term implications?
 - How many locations have you closed and what is the financial impact?
 - And the list goes on....
- We do not expect to see specific COVID-19/infectious disease exclusions (especially on admitted policies), BUT pollution and mold exclusions, which are typically very broadly worded, should be reviewed carefully.
- All traditional D&O policies contain bodily injury/property damages exclusions. To the extent possible, we want to see the lead in to the exclusion limited to a “for” preamble, as opposed to “alleging, arising out of, based upon or attributable to”. We also want to see express carve-backs to the exclusion for securities claims and non-indemnifiable loss. Note that most Side A /non-indemnifiable loss only DIC policies, do not contain a BIPD exclusion.
- Crisis Fund Extensions: Some D&O policies contain sublimits allowing access to public relations firms to mitigate exposure through assistance with messaging. The particulars of these coverages should be reviewed to see if they can be accessed.



Cyber/Crime

Exposures

- We have already seen the callousness of cyber criminals who are viewing COVID-19 as an opportunity to target attacks based on vulnerabilities created by the virus. This was evidenced by the hack at the United States Health and Human Services Department in the middle of this unprecedented crisis.
- We are seeing typical phishing/social engineering type activities, but they are utilizing links referencing CDC updates on COVID-19 or “important business continuity information in light of COVID-19”, knowing that people may be less thoughtful and will be more likely to click on the malicious link. Additionally, the increase in employees working remotely, causes other vulnerabilities: (1) employees working on personal computers may not be as secure as the corporation’s computers and software, making them more vulnerable to attack; (2) employees printing materials at home containing personally identifiable information and are they disposing of those documents as securely as they would if in the office; (3) employees are distracted and may not be focused on the tips they have learned in their cyber security training .

Resources

- If your client purchases Cyber Insurance, most carriers provide free resource tools to mitigate risk. This can be found either as an endorsement to the policy or in the cover sheet accompanying the policy.
- Attached is a warning of a known threat issued by the World Health Organization. Employers should remind employees regarding threats and best practices. <https://www.who.int/about/communications/cyber-security>
- Cybersecurity and Infrastructure Security Agency (CISA) issued a warning and best practices in light of COVID-19 cyber scams. <https://www.us-cert.gov/ncas/current-activity/2020/03/06/defending-against-covid-19-cyber-scams>



Employment Practices

Exposures

The speed of the spread of COVID-19 is forcing employers to have to make quick decisions about their work force under crisis conditions. Examples abound: (1) should an employer pull back an offer of employment?; (2) should an employer not allow an employee to return to work when he/she states they are healthy, but others on staff are concerned that the individual is sick; (3) are all employees allowed to work remotely or only some and what selection process is utilized; (4) ensuring that there is no retaliation for employees who choose to access benefits under FMLA; (5) selection process for layoffs, and the list goes on. Employers also have to maintain compliance with their obligations under the recent expansion of the Family Medical Leave Act (FMLA) via the Families First Coronavirus Response Act. All of these decisions and actions can create exposure to employers under Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, FMLA and other similar state, local and federal laws.

Resources

- If your client purchases EPLI, most carriers provide free resource tools to mitigate risk. This can be found either as an endorsement to the policy or in the cover sheet accompanying the policy.
- ARC makes available to all of its clients a free 30 minute consultation with an attorney at the national employment firm, Jackson Lewis, LLP. Call 1866-758-6874 and simply identify as an ARC client.
- Jackson Lewis also has a site dedicated to COVID-19, and it's impact on employers. Here's the link: <https://www.jacksonlewis.com/practice/coronaviruscovid-19>
- Disability Claims: The Equal Employment Opportunity Commission weighed in on the impact COVID-19 is having on employers in the attached press release. https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm



Fiduciary Liability

Exposures

- Given the dramatic impact that COVID-19 has had on businesses and the stock market, fiduciaries may face claims arising from plans that contain company stock, as well as claims for failure/inability to fund plans.
- Fiduciaries may also face claims alleging that fiduciaries failed their duties when selecting medical plans for their employees or as a result of COBRA obligations in the event of layoffs or furloughs.

Conclusion

As we are all dealing with COVID-19 and the struggles it imposes on our respective businesses, we want you to know that ARC Excess & Surplus, LLC is fully functional and stands ready to meet all of your Management & Professional Liability Insurance needs. Our entire staff is available and has remote access to continue to provide you with the exceptional service you have always enjoyed with ARC. Please let us know if we can help with any insured's specific questions about their particular risk or insurance policy.

We wish you and your family all of the best during this difficult time and look forward to being of continued service.



*For more information please
contact your ARC Broker*



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