

COVID-19: MANAGING D&O RISKS DURING PANDEMIC

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India Inc. haven't had it easy recently. For an economy, already showing signs of slowing down, the coronavirus pandemic could further exacerbate recessionary pressures, impact consumer demand, and unemployment and liquidity constraints especially to firms with over-leveraged balance sheets.

Given this volatility and possibility of stock drops after announcements, relating to the real impact of the pandemic there could be increased litigation alleging disclosure deficiencies, breaches of fiduciary duty and corporate mismanagement that may trigger Directors and Officers Liability (D&O) insurance policy. For businesses in direct economic firing line of COVID-19 like retail, hospitality, leisure and travel, we are already seeing D&O insurers to increase underwriting scrutiny as well as impose restrictive coverage exclusions. Therefore, it is critical to engage with the insurers as early and openly as possible.



WHAT ARE THE KEY AREAS OF CONCERN FOR D&OS?

SECURITIES CLASS ACTIONS (SCAS): Shareholders will use stock drop as an excuse after an announcement relating to the effect of COVID-19 to bring in direct and derivative actions alleging breach of fiduciary duty.

DISCLOSURE RISK: Any material information, which is misleading, inadequate or undisclosed.

FAILURE TO ACT/RESPOND RISK: Claims based on allegations that the company management failed to respond sufficiently or appropriately to dramatically change operating conditions.

SUPPLY CHAIN RISK: Failure to ensure that the company's supply chain allowed for alternative supply arrangements.

BANKRUPTCY RISK: Certain industries such as retail, hospitality, leisure, SME's and travel are particularly vulnerable.

REGULATORY RISK: Enforcement actions may come from regulators alleging violations of health and safety laws, consumer protection violations, environmental law violations, employment law violations, securities law violations or other violations of law allegedly committed in connection with a company's response or failure to respond appropriately to the coronavirus outbreak.

CYBER RISKS: Dramatically changed operating conditions have encouraged the use of technology for the continuous operation of a business remotely. Due to this, organizations are prone to cyber security breaches. Confidential and sensitive information is vulnerable.

INSIDER TRADING: This is a real concern when select officials have the knowledge regarding key information not disclosed to public.

EPLI ISSUES: Claims by employees alleging discrimination or harassment as a result of HR policies implemented in response to the COVID-19 outbreak are a growing risk. Inevitably, the financial consequences of COVID-19 will result in some downsizing, redundancy or reduced compensation. This will lead to ELP litigation in some typical EPL policy.



WHAT ARE THE CLAIMS SO FAR?

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| SCWORX CORP. | Filed: 4/29/20 | SCA/Pending | Defendants allegedly made materially false and/or misleading statements regarding COVID-19 testing kits. |
| PHOENIX TREE HOLDINGS LIMITED | Filed: 4/24/20 | SCA/Pending | This suit is against a Chinese real estate firm whose American depository shares (ADSs) are listed on the NYSE, based on allegations that the company's January 2020 IPO offering documents failed to disclose the impact of the outbreak on the company's residential real estate operations in China. |
| INOVIO PHARMACEUTICALS | Derivative Filed: 4/20/20 SCA Filed: 3/12/20 | Derivative / Pending SCA/Pending | Derivative: The allegations in the complaint track very closely with the allegations in the previously filed securities class action lawsuit. SCA: Allegedly made misleading statements about the company's development of a purported vaccine for the novel coronavirus, artificially inflating the company's share price and resulting in significant investor losses. |
| ZOOM | Filed: 4/7/20 | SCA/Pending | The surge in usage following the coronavirus outbreak allegedly revealed allegedly undisclosed weaknesses in company's security, and alleged privacy and security weaknesses contrary to the company's alleged representations. (Zoom went public on 4/18/19). |
| NORWEGIAN CRUISE LINES | Filed: 3/12/20 | SCA/Pending | Allegedly made false and/or misleading statements and/or failed to disclose that: 1. Norwegian was providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members. 2. As a result, Defendants' statements regarding Norwegian's business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times. |



WHAT IS TRENDING IN INDIA?

- One of the reputed mutual fund abruptly announced closure of their debt schemes due to redemption pressures.
- PIL against one of the large pharma alleging negligence in taking precautionary measures as several Covid 19 cases were detected amongst its staff
- One of the largest industrial accident post relaxation of lockdown resulted in host of PILs, NGT demanding hefty sum to be deposited (INR 50 Crs) and surrendering of passports of directors apart from closure of factory premises.
- Online rent a room major suspends payment of monthly revenue to hotels; invokes force majeure.



DID YOU KNOW - POSSIBLE COVERAGE ISSUES?

- **COVID-19 / Pandemic Exclusion:** In a very small fraction of placements, we have seen some insurers trying to impose some type of exclusion for this. It is critical to push back on these.
- **Bodily Injury Exclusion:** Both public company and private company D&O policies have some form of a bodily injury (BI) exclusion. The BI exclusion wording can vary, so it is important to review the following:
 - Is the preamble to the exclusion “for” as opposed to the more sweeping absolute preamble of “based upon, arising out of, attributable to....”
 - Are there any coverage carve-backs to the exclusion such that the exclusion does not apply to securities claims, non-indemnifiable claims or defense costs?
 - Confirm that there is no BI exclusion at all in your dedicated Side A DIC program.
- **Pollution Exclusion:** Pollution exclusions preclude coverage due to release or dispersal of pollutants, including specified contaminants, some of which may have a bearing on COVID-19 claims. Examples may include “germs,” “viruses,” and “biological irritants.”
- **Knowledge Exclusions and Warranties:** If new limits are being purchased, be careful of any required warranty statements as such statements could result in exclusions for known matters.
- **Bankruptcy/Insolvency Exclusions:** Carriers may start to push for these so be very vigilant about pushing back.
- **Crisis Response Coverage:** Most D&O policies may offer sub-limited cover to respond to events such as negative earnings announcements, key executive resignations, employee layoffs, product recalls etc with the help of public relations experts.
- **Notice Requirements:** Companies should be familiar with notice provisions in the policy to determine when notice is required (an actual Claim) or optional (circumstances which may give rise to a claim). Its advisable to notify if you have a possible exposure before renewing the policy.



For more information about D&O and other solutions from Marsh, visit marsh.com, or contact your local Marsh representative.

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