



Directors and Officers Liability in the wake of COVID-19

COVID-19 pandemic has unleashed an unprecedented global crisis that has impacted individuals and corporations alike. Even as the pandemic is underway, companies are reassessing their risk exposure and exploring risk management strategies including reviewing their liability risks under various types of insurance policies, including directors and officers (D&O) insurance policies.

Such is the nature of this pandemic that despite all well intended efforts it is likely that companies will falter. Even if the management has taken all reasonable measures to comply with lockdown and other statutory directives or maintain workplace hygiene or minimise business travels, there would be a possibility of default in the given circumstances.



Directors and Officers Insurance

Directors and Officers (D&O) Insurance policy is a Liability Insurance that protects the directors, employees and officers of a Company while faced with claims for actual or alleged Wrongful Acts such as breach of duty, breach of trust, misleading statement and or Employment Practice Violation.

Typically, allegations would include,

- a. Failure to disclose or adequately disclose risks that company faced or failure of the company to update prior disclosures as circumstances evolved;
- b. Inadequate steps to mitigate risks;
- c. Failure to observe recommended or required protocols;
- d. Failure to develop adequate contingency plans; or
- e. Failure to look into alternate avenues for business continuity and survival. In general, directors and officers may find that they are targets of claims that arose due to their decisions or actions or inactions taken in response to the coronavirus and/or market conditions created by the pandemic. Such actions, decisions or inactions were allegedly negligent or constituted a breach of their fiduciary duties to the corporation, such as the duty of care, which obligates the directors and officers to exhibit prudent judgment.

From claims from infected employees to new class action suits by shareholders, Directors may potentially witness significant action concerning their liability – something which was not even in the horizon a couple of months back.

Employee claims

The full blown scale of the pandemic is creating workforce and travel disruptions. Employees travelling on business or in office premises may contract the disease and may hold responsible the directors and officers on its employers.

They may file legal suit against the Directors or managers for negligence and not taking appropriate measures in the office or making employees travel in the wake of the pandemic outbreak. While most governments are trying to implement a lock down to avoid spread of the virus, a lock down also has its own set of issues and claims that arise therefrom.



Shareholders' claim / class action

Unprecedented drop in stock prices have led to a sudden need to increase sales and improve company health. One can expect this to lead into a sudden flood of shareholder suits in the wake of COVID-19.

For e.g., in the USA, on 12 March 2020, a securities class action lawsuit has been filed against a Cruise Line Company alleging that the company was employing misleading sales tactics (for example virus could not survive in various cruise conditions like warm weather) related to the outbreak to prevent cruise cancellations. This also led to significant price drop in the share value.

Similarly, a class action lawsuit was filed on behalf of the purchasers of securities of Inovio Pharmaceuticals, Inc. for claiming that they have developed a COVID-19 vaccine which drove up prices of their shares drastically. While this is illustrative, the fact remains that the directors and officers of companies all over the world, including India may be sued or held liable for making any false claims and misrepresentations.



Regulatory claims

Another direction from where D&O claims can be expected are regulatory investigations and proceedings. Given the country wide lockdown in India covering the most crucial two weeks upto the financial year end and a week even thereafter, many compliances, filing, returns etc get impacted and are likely to be delayed.

While we have seen that the Ministry of Corporate Affairs have provided some relaxations and a moratorium for the period

of April 1, 2020 to September 30, 2020, similar steps are yet to be announced by other regulators.

The gravity of relaxations from each regulator may differ, and while some may defer compliances altogether, some may only ease the process. Therefore the risk of non-compliance / delayed compliance would continue, and so would the risk of a resultant D&O claim.



What can organisations do?

From a liability perspective, the potential for claims against company's C-Suite after a crisis situation is always on the high. Companies should provide their investors and keep the markets sufficiently informed with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the pandemic to the fullest extent practicable. However, caution ought to be exercised when making any forward- looking statements as the current pandemic will likely bring about a plethora of shareholder actions. While one would expect some movement in stock prices due to this pandemic and its impact on business, it is also imperative during such times that the board and management take a close look into all public announcements, media interfaces as the tolerance for even the slightest of a wrong messages would be low in a post COVID era and the last thing an organisation needs is that the board decision aggravates any negative impact on the organisation.

A company ought to consult with their advisors regarding their planned response to COVID-19 and should review their policy terms and conditions to determine how the coverage

responds to any allegation made against the company. In particular, exclusions should be thoroughly looked at to see whether exclusions such as bodily injury exclusions narrowly worded or are they broadly worded, whether mere allegations or in-fact confirmations would suffice for an action under the D&O policy to be notified or adjudication of wrongful act is required.

Companies should also consider increased Side A-only limits which protects directors and officers from personal liability for claims asserted against them when the company is prohibited from or financially unable to indemnify them, such as if the company becomes insolvent. Given the uncertainties in the current economy, companies and their directors and officers should ensure sufficient limits to protect their personnel and to continue to attract talented management.

Overall, a fresh look ought to be given to the D&O policies with specific focus on claims arising out of COVID 19 and related restrictions, actions and omissions, possibility to wriggle out of the wide arm of exclusions and new policy that become relevant in these times.



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