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Client Alert: Extending Liability Coverage By Providing Notice of Circumstances

BY CESIRA NEWCOMB • MAY 7, 2020

Litigation concerning COVID-19 has already begun. A number of lawsuits have been filed against cruise lines alleging that they were negligent by operating with infected passengers and crew members and failing to screen people. [Princess](#), [Carnival](#), and [Norwegian](#) cruise lines have all been hit by these lawsuits. Similarly, lawsuits have been filed by shareholders against corporations and their directors and officers concerning how they responded to the outbreak. Undoubtedly, additional claims of liability will be asserted against businesses and professionals in the coming months. Therefore, it is important to consider steps that can be taken now to potentially preserve coverage for those future claims.

Many liability policies, such as commercial general liability, directors and officers, and errors and omissions policies, are written on a claims-made basis, meaning that unless the claim was reported to the insurer during the policy period, the claim will not be covered. As one court has said: “The purpose of claims-made policies, unlike occurrence policies, is to provide exact notice periods that limit liability to a fixed period of time after which an insurer knows it is no longer liable under the policy, and for this reason such reporting requirements are strictly construed.”

Importantly, “notice of circumstances” provisions in these policies might extend coverage for claims made outside of policy period. These provisions provide that if during the policy period the insured becomes aware of circumstances that may reasonably be expected to give rise to a claim and if the insured gives written notice to the insurer of such circumstances, then any subsequent claim arising out of or related to those circumstances will be considered to have been timely reported. Typically, the notice provision will require detailed information about the circumstances, such as dates, persons and entities involved, and the conduct at issue. Because these provisions are strictly construed and because the burden of proving the existence of coverage rests with the insured, it is important that the notice of circumstances meets the requisite level of detail that is set forth in the policy.

Consider for instance, a hotel that is aware that it operated with infected guests and employees. The hotel might provide a notice of circumstance to its insurer under its commercial general liability policy, identifying that it operated with infected people on certain dates and that guests might assert claims in the future. Similarly, the hotel might want to provide a notice of circumstance to its insurer under its directors and officers liability policy because shareholders might file suits concerning how the directors and officers responded to the outbreak. If claims are made after the policy period expires, the notice of circumstances should render those claims as having been timely made.

It is anticipated that at renewal, insurers will seek to explicitly exclude COVID-19 claims. Thus, coverage might only arise if notice is made during the current policy period. Insureds should consider whether a notice of circumstances is appropriate based on information known and the policy language.

