5 Tips For Purchasing Insurance During A Pandemic

By **Dennis Windscheffel** (June 9, 2020)

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According to a federal plan published by the U.S. Department of Health and Human Services, the coronavirus pandemic could last 18 months, and include multiple waves of illnesses.[1] An extended and reoccurring pandemic may create unique and unanticipated challenges for securing adequate insurance coverage for businesses. Given that many policies are written on an annual basis, insureds are likely to undergo the purchase or renewal process at least one during the pandemic.

An extended coronavirus pandemic certainly has the potential for creating numerous insurance pitfalls for the unwary. However, with careful planning, businesses can greatly mitigate against the risk of potential insurance coverage gaps brought on by the pandemic. This article provides suggested topics for insureds and businesses to discuss with their insurance broker when either purchasing or renewing their insurance coverage.

1. Evaluate whether the business may potentially undergo a significant change in either management or business structure.

Certain insurance policies may limit future coverage when there has been a significant change to either the structure or operations of a business. For example, many directors and officers policies limit future coverage when there has been a specified triggering event, which ordinarily includes a material change in management or business structure.

Mergers, divestitures, restructuring or significant changes in management may implicate and even cut off future insurance coverage. As a result, management could find themselves without coverage for actions and omissions occurring after a triggering event.

Ordinarily these types of provisions are rarely implicated for many businesses, and are often overlooked in favor of key terms such as amount of coverage, retentions and premiums. However, an extended coronavirus pandemic has the potential for materially changing the landscape for just about any business.

As a result, current and new policies should be carefully scrutinized for overly broad language that could inadvertently cost the business valuable insurance coverage should the company undergo either a significant change in composition of management or business structure. If necessary, insureds should consult with their broker to see if their carrier would be amenable to an endorsement to narrow overly broad language.

In addition, with respect to policies that are issued on a claims made basis, insureds should talk to their broker about potential tail options. Claims made policies, ordinarily requires that claims be made and reported within a particular policy period. Tail coverage provides an insured an extended period of time to report claims that are made against the insured after a policy has expired, for wrongful acts that took place during the policy period.

Given the unknown and potentially lasting effects of the coronavirus pandemic, tail coverage may be a valuable option for businesses that may be in the process of winding up operations or significantly curtailing business. Tail coverage can usually be purchased in increments between one and six years. Usually it is advantageous to negotiate and lock in

tail option pricing when a policy is purchased.

2. Discuss and consider your prior claims history.

Many courts have explained that it is against public policy to allow an insured to collect insurance proceeds for a known or expected loss. As a result, many types of insurance policies exclude coverage for previously noticed claims or occurrences, as well as supposedly new claims and occurrences that are substantially similar to past claims or occurrences.

For example, general liability insurance policies typically provide insurance coverage for personal or property damage upon the event of an occurrence — which is ordinarily construed to mean an accident. However, these policies often have related-acts clauses which ordinarily treat a series of related acts as being treated as a single occurrence and claim. As a result, a carrier may be able to successfully argue that the insured must look to a prior carrier for coverage if a new occurrence — under the relevant policy wording — has sufficient overlap with a prior occurrence.

Other types of policies may also be implicated by prior claims history. Many D&O policies have broad related-acts clauses, which treat similar or overlapping claims as a single claim. These types of clauses can be particularly thorny when similar claims span multiple policy periods. Ordinarily these related-acts clauses will also treat the later claim as being made at the same time as the earlier claim. Complications can further arise when policies are covered by different insurance carriers.

In addition, D&O policies will typically have a prior-claims type exclusion that may exclude coverage for new claims that are similar to or have sufficient overlap with previously reported claims under prior policies. Thus, even if an insured purchases a new D&O policy with substantial fresh limits, the insured may find coverage for any new claims significantly limited where such claims are similar to or overlap with previously noticed claims under prior policy periods.

Related-acts clauses however can cut both ways — and in some instances can benefit the insured. For example, if claims or occurrences are determined to be related, the claims or occurrences are typically subject to a single retention amount. In addition, it is a common practice for insurers to add endorsements that specifically disclaim coverage for negative events experienced by the insured.

Thus, to the extent that a current policy does not exclude coverage for virus or pandemic type events, such endorsements may be added in a new policy or renewal policy. However, if a new occurrence or claim is sufficiently similar to or overlaps with a prior claim, then it may be highly advantageous to the insured to have the new occurrence or claim relate back to an earlier policy period.

3. Discuss the impact of current government regulations and directives.

Insurance companies and their products are often subject to significant regulatory oversight by states and their respective departments of insurance. Over the last several months, state regulators across the country have imposed various requirements and restrictions on carriers and insurance products.

These myriad orders and directives have generally required insurance companies to expeditiously process and pay claims, and in some instances have ordered insurance

companies to temporarily suspend policy cancellations for certain events such as nonpayment. An extended pandemic will no doubt bring additional directives to carriers and protections for insureds.

4. Explore whether new coverages or additional coverages should be purchased.

While the current pandemic will no doubt result in many carriers adding pandemic type exclusions to many types of policies (to the extent they do not already exist), some carriers have indicated a willingness to specifically write and extend coverage for current pandemic type circumstances. For example, certain carriers have indicated that they are presently working on specialized products directed at COVID-19. Insureds should check with their broker and inquire about the latest and greatest insurance product offerings with respect to COVID-19.

In addition, insureds should consider potentially adding other forms of additional coverages. For example, in the D&O context, Side A coverage provides potential insurance coverage for directors and officers when the company is unable to indemnity the director or officer for various reasons, including financial insolvency.

Side A coverage is ordinarily included in most D&O policies, which may also include coverages for company reimbursement of indemnified directors and officers (typically referred to as "Side B"), coverage for claims against the company (typically referred to as "Side C"), and other potential coverages.

Since there is ordinarily only one pool of money for all the various coverages, directors and officers may find themselves competing against other parties for the same bucket of money when the company is in financial distress. A separate Side A excess policy can be highly advantageous to management when there is a potential risk of company insolvency. Side A excess policies usually have fewer coverage exclusions — particularly with respect to defense costs — as opposed to traditional D&O policies.

In addition, Side A excess policies are ordinarily not considered property of the estate in a bankruptcy, and may be the only firewall protecting a director's or officer's personal assets from creditors' claims. Side A excess policies can also contain difference in condition coverage, which may provide a director or officer with immediate coverage if for example, an underlying carrier refuses to provide coverage.

5. Consider whether foreign insurance markets may be a better fit for your business.

Many U.S. and global businesses have turned to foreign markets for insurance coverage. These foreign markets may offer broader coverage as compared to their U.S.-based counterparts. In addition, these foreign markets offer products that can be significantly cheaper than U.S.-based insurers.

These foreign markets, however, are not without tradeoffs. One of the potential tradeoffs for foreign sourced policies is unfavorable dispute resolution forums and choice of law provisions. For example, Bermuda forms, which may offer broader insurance coverage, typically require confidential binding arbitration in either Bermuda or London.

In contrast, insureds who purchase products from U.S.-based insurers are ordinarily free to initiate suit against their insurers in one of multiple jurisdictions. Talk to your broker about what makes the most sense for your business.

If you elect to renew your existing coverage with your current carrier, ask your broker if your current carrier is offering any concessions. An insured that renews a policy may save an insurance carrier from extensive underwriting that might otherwise be required for a new client or policy. As a consequence, many carriers will throw in a sweetener to retain the insured's business. These sweeteners vary and may include for example, lower retentions, a higher amount of coverage, additional coverages or a lower policy premium.

With careful planning, businesses can greatly mitigate against the risk of potential insurance coverage gaps brought on by the pandemic.

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[1] See March 13, 2020 U.S. Department of Health & Human Resources Report.