Key Takeaways

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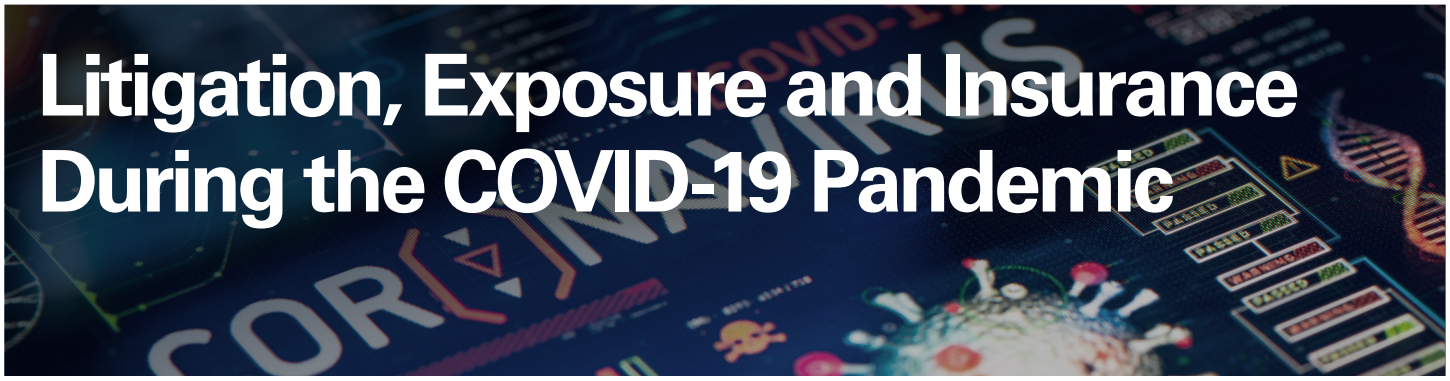
Litigation, Exposure and Insurance During the COVID-19 Pandemic



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On May 18, 2020, Skadden and Marsh cohosted a webinar addressing litigation, exposure and insurance during the COVID-19 pandemic. The panelists were **Marcie Lape**, Skadden litigation partner; **Amy Van Gelder**, Skadden litigation partner; and **Machua Millett**, Marsh Chief Innovation Officer, Financial and Professional Liability.

The webinar focused on emerging trends in litigation related to the COVID-19 pandemic, considerations for the prevention and defense of such claims, and a review of potentially applicable insurance coverage. The discussion focused on five categories of litigation: (i) exposure-based litigation, including negligence, personal injury and wrongful death; (ii) breach of contract and broken deal litigation; (iii) consumer class actions; (iv) securities and derivative litigation; and (v) litigation arising out of the CARES Act.

Below are high-level takeaways on each emerging category of litigation.

Exposure-Based Litigation

As companies reopen across the country, they face heightened risk of negligence, personal injury or wrongful death claims, premised on allegations that a plaintiff was exposed to COVID-19 due to the defendant's action or inaction. In the first instance, companies should take proactive steps to reduce the risk of such claims, including by adhering to federal, state, and local guidance and industry best practices; developing written policies and procedures; educating employees on all necessary guidance and policies; and informing employees of confirmed cases of COVID-19.

Relevant considerations for companies facing exposure-based litigation include:

- For litigation brought by an employee or employee's estate, determine whether a state workers' compensation exclusive remedy statute applies.
- Examine whether legislative efforts at the state or federal level to provide liability protections for COVID-19 exposure apply.
- Consider other legal defenses, including assumption of the risk or contributory negligence, and consider additionally whether the plaintiff may be unable to prove causation.
- Examine liability coverage available under insurance policies, including: workers' compensation/employer liability, commercial general liability, employment practices liability, professional liability (E&O), and directors and officers liability (D&O) policies.

Key Takeaways
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Breach of Contract and Broken Deal Litigation

The pandemic has resulted in increased litigation between parties to commercial contracts and merger and acquisition agreements, who dispute whether COVID-19 validly excuses performance or allows for contract termination. Force majeure provisions and the common law defenses of impossibility, impracticability and frustration of purpose may apply in such cases. Courts generally interpret force majeure clauses narrowly and will find a qualifying event to have occurred only if the type of event — *e.g.*, "pandemics" — is enumerated within the provision, and that event actually causes nonperformance.

Additionally, buyers attempting to terminate acquisition agreements may allege breach of an interim operating agreement or that the target company suffered a material adverse effect (MAE) between signing and closing. Relying on an MAE clause as a basis to terminate a transaction is extremely difficult and dependent on the specific contract language.

Relevant considerations for contract parties impacted by COVID-19 include:

- Carefully review the applicable contract to determine whether it allows for modifications that could prevent breach, provide defenses to performance or require notice of nonperformance.
- Consider renegotiating contract terms to avoid litigation.
- Document all attempts to perform and otherwise avoid negative consequences.
- Take reasonable steps to mitigate damages.
- Examine liability coverage available under insurance policies, including: professional liability (E&O), private equity general partnership liability, and private or public company directors and officers liability (D&O) policies. Also check if policies provide coverage for crisis or reputation management.

Consumer Class Actions and Related Litigation

Consumer class actions arising out of the pandemic are already starting to mount and a steady increase in such litigation is expected across industries and jurisdictions. Early trends indicate that putative plaintiff classes may seek recovery against defendant companies under state consumer protection, unfair business practices and privacy statutes, as well as the common law, for the following actions: (a) failing to suspend the collection of membership fees during business closures; (b) failing to refund payments for cancelled or postponed events or services; (c) falsely advertising the efficacy of products to combat COVID-19, or the effectiveness or extent of safety precautions and sanitization measures; (d) price gouging; and (e) exposing plaintiffs to invasions of privacy as consumers and businesses increasingly rely on virtual social networking and remote work technology.

Businesses accused of pandemic-related unfair trade practices also may expect litigation from competitors under state and federal laws.

Relevant considerations for companies facing consumer class action litigation include:

- Examine contract terms to determine whether they allow for delayed or different performance or contain class action waiver or mandatory arbitration provisions.
- Ensure reliable, documented support for every verifiable marketing statement made. Provide disclaimers where appropriate to avoid consumer confusion.
- Provide clear notice and obtain informed consent for the collection and use of any personal data.
- Carefully weigh policies and litigation positions against the potential for negative publicity and loss of customer goodwill.
- Consider class certification defenses, especially where a plaintiff is attempting to bring a nationwide class action for the alleged violation of state statutes.
- Examine liability coverage available under insurance policies, including: general liability, professional liability, private or public company directors and officers liability (D&O), cyber and technology liability, product liability, and class action settlement/litigation buyout policies.

Securities and Derivative Litigation

Market turmoil induced by COVID-19 has increased the risk of event-driven securities litigation against companies under Section 10(b) of the Exchange Act and Rule 10b-5. A rise in shareholder derivative litigation against company directors also may be anticipated because such suits often follow declines in corporate performance and many times are filed alongside related securities fraud actions. Because the pandemic is affecting nearly all industries in some way, no company is immune from this litigation risk.

Relevant considerations for companies and boards seeking to guard against or defend securities fraud and derivative suits include:

Key Takeaways
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- Confront warning signs that COVID-19 could adversely affect business operations or financial performance and take reasonable steps to mitigate risk, increase liquidity and conserve resources.
- Revisit disclosed risk factors and forward-looking statements. Disclose as much information as practicable, including company-specific operational and financial status as well as plans for addressing the effects of COVID-19.
- Maintain or augment board-level reporting and oversight and contemporaneously document board decision-making processes and rationales in detail.
- Consider available defenses to securities fraud litigation, including: contending that the plaintiff failed to plead loss causation or scienter; challenging the plaintiff's reliance on the presumption of market efficiency; or relying on the Private Securities Litigation Reform Act's "safe harbor" provision.
- Examine liability coverage available under insurance policies, including directors and officers liability (D&O) policies.

CARES Act Litigation

Applicants for financial relief under the CARES Act are required to provide particular certifications in order to be eligible. Any statements that are knowingly false could expose an applicant to liability under the False Claims Act. We expect to see increased regulatory focus on such false certification claims.

Relevant considerations for participants in CARES Act relief programs include:

- Carefully review the certification requirements under the program and ensure that the standards are met at the time you submit an application.
- If you are not confident that your company satisfies the requirements for participation, seek legal guidance and determine whether to take advantage of available safe harbors.
- Examine liability coverage available under insurance policies, including professional liability and public and private directors and officers liability (D&O) policies.