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INCREASED SECURITIES LITIGATION CAUSED BY COVID-19 AND THE IMPORT OF DIRECTORS AND OFFICERS INSURANCE COVERAGE

The COVID-19 pandemic has caused a sharp downturn in the market. While the S&P 500 has rebounded somewhat in recent days, it remains down significantly from its high point in February of this year. That loss of shareholder value creates the perfect environment for increased shareholder class actions and derivative actions challenging the management decisions of company executives. Certainly some executives will make mistakes, but even the most well-intentioned, shrewd executives can find themselves under fire in this climate.

The best defense for shareholder class actions and derivative actions is, of course, proactive issue-avoidance. The failure to make appropriate disclosures, or adequately protect against cyber threats in a world where sensitive information is being handled in employees' homes, is sure to lead to litigation. Browne George Ross LLP's COVID-19 Rapid Response Working Group has already issued practical guidance in two client alerts on these issues—*Financial Forecasts and Securities Compliance in the Wake of COVID-19* and *Tips for Countering Cyber Threats in a "Socially Distanced" Corporate Environment*—and will continue to provide practical guidance for directors and officers dealing with issues created by COVID-19. Nonetheless, prudent directors and officers must prepare for the possibility of shareholder class actions and derivative actions, and further prepare to submit claims to their directors and officers (D&O) insurance carriers.

One need only review any publications concerning D&O insurance to appreciate that the industry is bracing for an influx of claims. Directors and officers would be well advised to take this time to review and understand their D&O coverage, and determine whether their current coverages are sufficient. Side A provides coverage to the directors and officers themselves, whereas Side B provides coverage for the entity when it properly indemnifies its directors or officers, and Side C provides coverage for the entity itself. Boards should consider, for example, whether it is appropriate to purchase additional Side A coverage for directors and officers, or whether additional Side C coverage is required to protect the entity itself in the event of securities litigation. These concerns are not theoretical—Norwegian Cruise Lines[1] and Inovio Pharmaceuticals, Inc.[2] – among others – have already been hit with securities litigation related to COVID-19.

Lastly, in the event of a shareholder class action or derivative action related to COVID-19, it is of paramount importance that directors and officers immediately seek legal counsel, not only as to the substantive claims, but as to coverage under their D&O policy. D&O coverage issues can be tricky, and are best addressed on the front end by counsel with experience in the area. With years of experience representing companies and boards in securities litigation, and navigating D&O coverage issues, Browne George Ross LLP is prepared to guide clients through these issues.

For further information and advice specific to your situation, contact any one of the Browne George Ross LLP attorneys listed above.

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[1] *Douglas v. Norwegian Cruise Lines*, Case No. 1:20-cv-21107 in the United States District Court for the Southern District of Florida.
[2] *McDermid v. Inovio Pharm., Inc.*, Case No. 2:20-cv-01402-GJP in the United States District Court for the Eastern District of Pennsylvania.