Focus on the nature of the harm being alleged.

The first step in assessing insurance coverage is to identify the harm that is being alleged in the class action complaint. With respect to COVID-19, the most common types of alleged harm that could be pursued in the context of a class action may include the following:

- Bodily injury to customers or other third parties allegedly arising from an exposure to the virus through a company’s products or operations.


- Alleged wrongful termination or retaliation based on employees’ refusal or reluctance to work during the pandemic.

Identify potentially applicable insurance policies.

Once the nature of the alleged harm is determined, the next step is to identify the potentially applicable insurance coverage. The types of policies that might respond to COVID-19-related class actions, such as those mentioned above, include:

- Comprehensive general liability policies, which are meant to cover claims alleging bodily injury or property damage arising from the policyholder’s products or operations.
• Directors and officers liability (D&O) policies, which are meant to cover claims alleging loss of wealth arising from the mismanagement of a business.

• Employment practices liability insurance (EPLI) policies, which are meant to cover claims alleging such things as wrongful termination, retaliation, harassment, or discrimination, among others. Note that these types of policies typically exclude coverage for bodily injury claims on the premise that such claims should be covered under workers’ compensation insurance.

Ensure compliance with all policy conditions.

It is essential to work with coverage counsel to ensure that coverage is not jeopardized by failure to comply with the various policy conditions. Some of these require immediate attention:

• Provide timely notice of claims or of circumstances in the context of D&O claims.

• Comply with cooperation obligations.

• Properly ask for consent to incur various costs, such as defense counsel, experts, consultants, etc.

• Properly demand defense or coverage for defense costs.

• Comply with settlement approval obligations.

• Demand indemnification within specified time frames.

• Be aware of any dispute resolution conditions.
Ensure coordination between coverage counsel and underlying defense counsel.

It is important that underlying defense counsel and coverage counsel work together for many reasons, but the following are most important:

• Both defense counsel and coverage counsel need to be sensitized to each other’s mission to avoid conflicts in approaches or arguments that could prejudice the policyholder.

• Defense counsel will often be a principal source of the information that will need to be provided to the insurers in the context of the policyholder’s cooperation obligations.

• Defense counsel needs to be aware of various policy provisions directly relating to their work, such as the obligation that the insurer must consent to all settlements (which means the insurer need to be adequately informed of all potential settlements).

Protect Privilege.

There are many parties involved in defending against a class action and in properly securing insurance coverage for all costs and liabilities arising from the class action. It is important to understand which entities are within the scope of attorney-client privilege and which are not. For example, although many policyholders rely greatly on their insurance brokers, communications with brokers generally are not privileged. In addition, while a policyholder must comply with its cooperation obligations and often must allow its insurers to have access to defense counsel, insurers generally are not entitled to privileged information, except in limited circumstances such as when they have acknowledged coverage and are assisting in the defense of the class action.