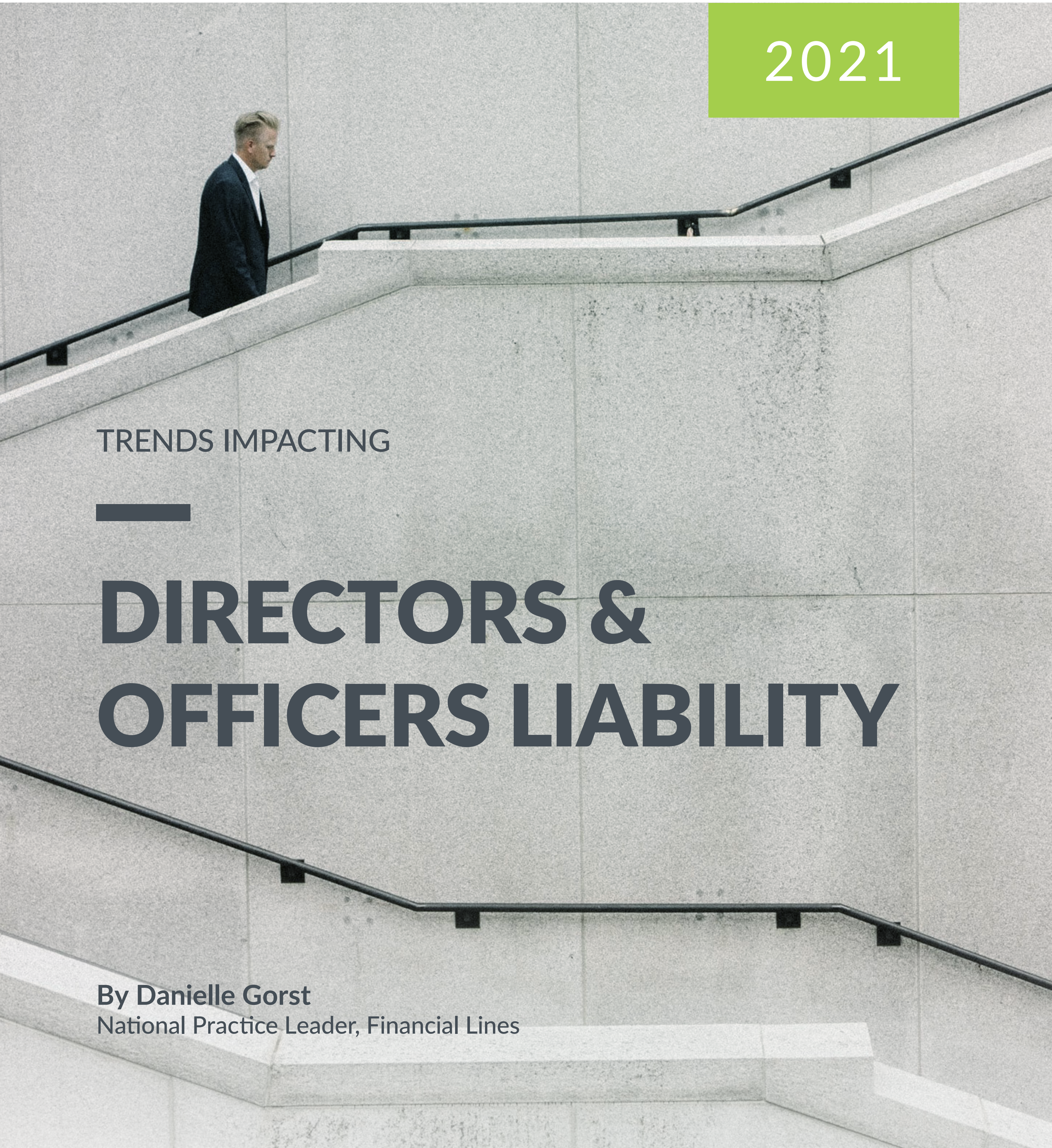
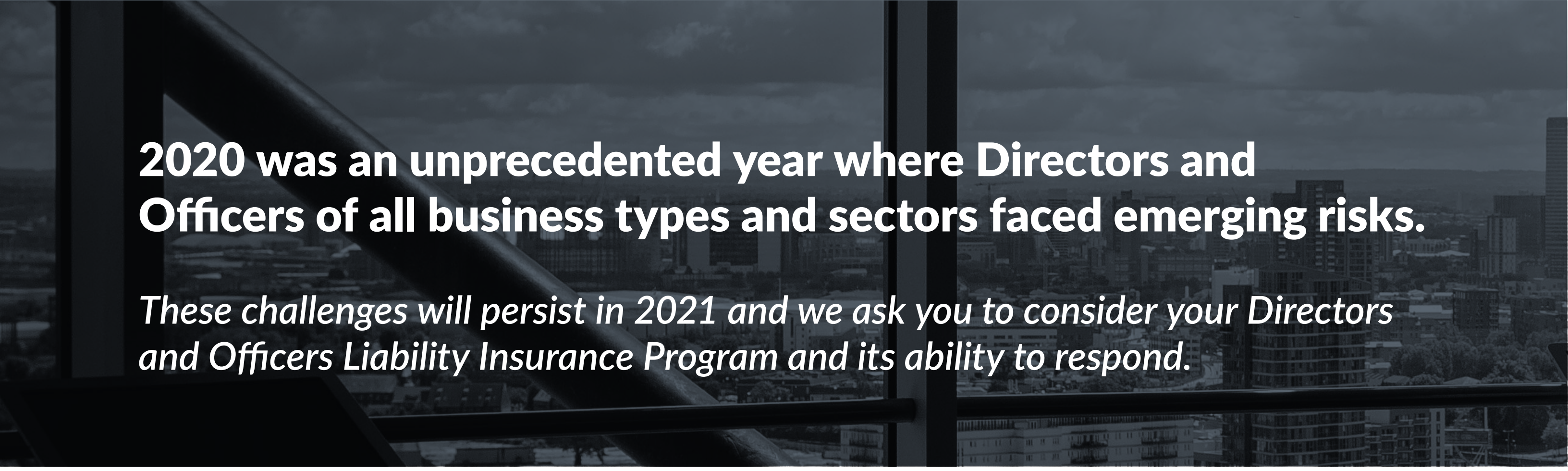


2021

TRENDS IMPACTING

DIRECTORS & OFFICERS LIABILITY

By Danielle Gorst
National Practice Leader, Financial Lines



2020 was an unprecedented year where Directors and Officers of all business types and sectors faced emerging risks.

These challenges will persist in 2021 and we ask you to consider your Directors and Officers Liability Insurance Program and its ability to respond.

1. SECURITIES CLASS ACTIONS

Shareholder Class Actions continue to carry high severity for publicly traded companies in Canada and/or the United States. Since personal liability can attach to securities laws, it is important to understand the current legal landscape and its impact on the rising cost of Directors and Officers Liability insurance. The number of Shareholder Class Action filings in 2020 rose to 15, matching the all-time high in 2011. While the overall frequency may not seem alarming, the cost to defend and settle these types of claims is rising and can cripple a company's balance sheet if not appropriately covered under a D&O Program. In contrast to Canadian statistics, the US finished 2020 with a slight decrease in filings, following a record three-year high where filings reached in excess of 400 annually.

The US statistics highlight traditional securities class actions alleging the D&Os breached their fiduciary duty to shareholders, and also reveal a growing number of Derivative Actions that are "event driven", meaning the shareholder suit is brought on behalf of the company against it's D&Os for their failure to respond to certain events such as a significant Cyber Breach, #metoo event, or COVID-19.

2. CORPORATE GOVERNANCE BEST PRACTICES

Difficult decisions and a complex set of pressures in 2020 have plagued every board, and good Corporate Governance practices have been a strong indicator of a company's overall leadership and approach to managing risk. Many companies both public and private are no longer implementing basic or "boilerplate" Corporate Governance. They are taking the opportunity to go above and beyond to ensure they are considering all stakeholders at any given time, and including public disclosure on Diversity, Cyber Risks, Climate Change, and a "Say on Pay" advisory vote. Companies with strong corporate governance including an Environmental, Social and Governance foundation may also find this a good defense against Activist Shareholders or Short seller attacks, whereby these attacks look to uncover inefficiencies and weaknesses in senior management.

Reports suggest 2021 could be primed for a high level of Shareholder Activism in Canada as companies' weaknesses begin to show through the pandemic. Companies will benefit from robust Corporate Governance and a solid communication plan in the event these instances arise.

3. EMPLOYMENT PRACTICES LIABILITY (EPL) AND WORKPLACE SAFETY

COVID-19 has brought many challenges to both employees and employers managing a workforce. As a result of COVID-19, the frequency of employment related lawsuits against corporations is on the rise. Allegations often include inadequate severance or discrimination against employees with COVID-19 safety concerns. Furthermore, workplace health and safety and the duty of an employer to take proper steps to reduce health and safety risks for their workforce is of utmost importance.

Under Bill C-45, the "Westray Bill", named after a 1992 coal mine explosion in Nova Scotia, Corporations and their Officers can be prosecuted for workplace incidents that result in injury or death. Although we have seen few cases in the past in Canada, COVID-19 has brought to light the possible exposures that Directors and Officers face in implementing proper protocols and procedures to keep employees safe in the workplace. Boards should consider the above risk and exposures, and the potential response available under their D&O, General Liability or separate EPL Policy.

4. TRANSACTIONAL RISK (BANKRUPTCY, CCAA, IPOS, M&A)

While the fall-out of COVID-19 continues to persist, we see the rise in various types of transactions in Canada. Transactions of any kind can create a heightened level of risk for Corporations and their Directors and Officers. Bankruptcy, in particular, has been a concern through the pandemic and may result in employee claims for unpaid wages, claims by the Government for failure to remit taxes, or environmental obligations in insolvency. Similarly, a private company conducting an initial public offering, or the merger or acquisition of entities can result in personal liability to Directors and Officers.

The presence of a D&O policy and review of reporting requirements and appropriate coverage (including Run-off or Discovery Period Coverage) should be undertaken for any transaction to ensure the personal protection of departing board members and C-suite, as well as any forward moving company exposure.

5. DIRECTORS AND OFFICERS LIABILITY INSURANCE MARKET UPDATE

The global D&O insurance market continues to tighten as we see a handful of Insurers exit Directors and Officers Liability insurance in 2020 and 2021. Remaining insurers are quoting steep rate increases, reduced capacity, and possible changes to deductibles and/or restrictions to coverage. In some instances, boards are having to make difficult decisions on the overall limits purchased, due to either cost increases or the availability of insurance for the corporation.

These hard market conditions are expected to continue in 2021 as insurers manage escalating loss ratios and unprofitable results in the D&O line of coverage. D&O insurance buyers should expect average rate increases on programs of approximately 25%-30% for 2021, with some sectors or financially challenged risks absorbing much higher increases and capacity challenges.

6. PREPARING FOR YOUR DIRECTORS AND OFFICERS LIABILITY INSURANCE RENEWAL

D&O Liability Insurers are taking a very cautious and disciplined approach to underwriting, choosing to be selective in their risk appetite, or firmly negotiating on price and coverage where the risk is deemed heightened, or the financial profile has deteriorated. D&O insurance buyers should expect more time to assess accounts with additional information required on employee layoffs, return to work procedures and COVID-19 protocols for employees and the public. Thorough financial details including pro-forma budgets and projections, details on banking and debt covenants, expense reductions, and government support programs accessed may also be requested to complete the underwriting process. Preparation, review and potential calls with underwriters may also be required.

The message is clear for 2021: attention to timelines and strategy will be critical to ensuring the appropriate program and coverage is obtained for the organization.

About Danielle Gorst

National Practice Leader,
Financial Lines

Danielle brings almost twenty years of financial lines insurance experience with over thirteen years in Executive Protection with a leading global insurer, in addition to six years with a global insurance broker, where she most recently led the Western Canada team of financial lines advisors.

Danielle works directly as part of Account teams along with providing consultative advice on service, strategy, and claims advocacy, in addition to thought leadership, white papers and participate in strategic client meetings such as claims and Board presentations.

Danielle has a Bachelor of Commerce Degree completed with a concentration in Insurance and Risk Management from the University of Calgary.

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