



D&O for publicly traded life sciences companies 2020 – COVID-19 Update

Balance sheet protection 

Expense mitigation 

Decision support through analytics 

Our unique perspective

 **Is your current broker providing you with in-depth trends and insights on the life sciences industry and insurance marketplace? How about information on emerging risks in the industry?**

 **Are they assisting you with evaluation and analysis of your risks in order to minimize your total cost of risk to enable you to achieve the goals of your life sciences organization?**

 **Are they providing direction and consultation regarding risk mitigation improvement opportunities to enhance your life sciences organization's performance? Do they offer a full range of solutions to address your people, risk and capital issues?**

 **Does your broking team include product specialists who are Life Science experts? D&O, Cyber, Product Liability, Workers' Comp, Cargo, Property and Risk Control?**

Even before the outbreak of COVID-19, life science companies faced a higher likelihood of being sued than almost any other industry class. A review of federal securities class actions (“SCA’s”) shows that 97 new class action securities cases in 2019 were filed against life science companies which is equal to approximately 24% of all new filings for the year, this represents a 13% increase from 2018. Almost half of these claims involved either IPO, mergers, sales or other transactions.¹ We note the growth in law suits against larger companies with 60% of life science companies sued in 2018 having a market capitalization of more than \$500 million. Lawsuits against life science companies are still most commonly brought in the Ninth, Second and Third Circuits (primarily encompassing New Jersey, California and New York).¹

In 2020, one of the first companies to be sued for COVID-19-related allegations was a life sciences company. With health and safety on the forefront of public discourse, we anticipate heightened shareholder scrutiny of life sciences disclosures to continue. Looking back at 2019 filings, companies with market capitalization of less than \$250 million were still the most likely to be targeted. Among larger companies, new filings were spread quite evenly among all sizes including those greater than \$10 billion. In addition to IPO/M&A litigation, the causes of SCA’s last year cover all stages of a life sciences company:

- Over 15% of claims were based on alleged misrepresentations regarding regulatory hurdles to or timing of FDA Approval

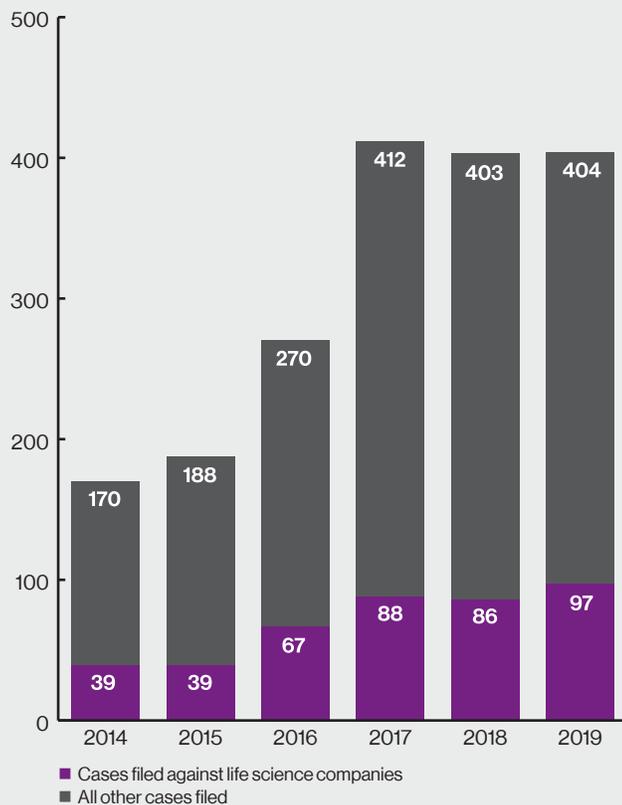
¹ Dechert Survey: Developments in U.S. securities fraud class actions against life science companies 2019 edition.

- 17% of claims included allegations of misrepresentations about product efficacy or safety of either approved products or of candidates for FDA approval
- An increasing volume of claims allege purported unlawful conduct such as illegal kickback schemes and anti-competitive conduct
- Companies involved in cannabis (especially those in Canada) were increasingly likely to be sued
 - 22 new actions were filed against issuers outside of the USA.

Life Science Companies of all sizes were being sued:

- 49% of companies sued had a market cap of less than \$500 million
- 39% of companies sued had a market cap of more than \$1 billion
- 19% of companies sued had a market cap of more than \$5 billion

Figure 1. **Number of class action securities fraud cases led from 2014–2019 (Total cases led compared to cases led against life science companies)**



Source: Dechert Survey: Developments in Securities Fraud Class Actions Against U.S. Life Sciences Companies |

We guard the present with one eye on the future.

Underwriting challenges

Pre-COVID-19, the D&O market for all public companies had been increasingly challenging. Life science companies had been facing the worst of market conditions with companies experiencing increased premiums, increased retentions, and a loss of capacity.

Many carriers, especially in London, had withdrawn from the market or reduced capacity for life science companies. Post-COVID-19, the market has become even more challenging. Underwriting inquiries may now be tailored to company-specific concerns and may also drill down on COVID-19-related risk disclosures, the impact on financial results, operations, industry-wide concerns, liquidity/solvency, and cybersecurity.

Directors & Officers Market Conditions for Publicly Traded Life Sciences Companies

- **Capacity:** Significant pull back of capacity, especially in the 2nd half of 2019. Many insurers are reducing their limit to \$5 million or less on risks. Replacing lost capacity is challenging.
- **Premiums:** The rate of increases grew significantly in second half of 2019. Double digit increases are common-even for “preferred” risks often 50% or higher.
- **Retentions:** Many companies saw their retentions increase significantly in 2019.
- **Coverage:** While key coverage terms remain available, some of the enhancements from the previous soft market such as low price, long term extended reporting periods are being pulled back by insurers.
- **IPO's:** For many insurers, minimum retentions of \$5 million or more, low capacity and high pricing.

Figure 2. How did we get to this hard market?



Pharma-Specific Drivers

- **Volume:** Approximately 25% of new Securities Claims in the USA over the past two years have been against Life Sciences/Pharma companies
- **Regulated Industry:** FDA/EMA etc.-Regulatory exposure with high complexity and unpredictability. (Note: Other regulated businesses also have heightened risk profiles, not just Pharma. Example: Financial Institutions)
- **Disclosures and labeling:** Unique to Pharma, allegations relating to product efficacy and safety, especially with respect to negative side effects. These kinds of claims represented about 20% of the 2018 securities suits.
- **Misconduct:** About 30% of the Pharma Securities Class Actions arose out of allegations of misconduct: for example, anticompetitive conduct, kickback schemes and inadequate internal controls, and other forms of financial malfeasance.
- **M&A:** Merger-related lawsuits have been a significant factor in the number of securities suits filed against Pharmaceutical companies.
- **Pricing:** Presidential election-year rhetoric, debate over the Affordable Care Act and the perceived overcharging and price fixing, U.S. vs ex-U.S. pricing all erode public trust in Pharma and have resulted in investigations and litigation – including securities class actions.

Challenges present opportunities – re-thinking the status quo in a changing environment

- Start and finish early! Hold your broker and insurers to time commitments, and not make decisions under duress.
- Do not assume that how you purchased D&O in the soft market will lead to success in the hard market, especially in today's post-COVID, economically challenging environment. Rely on a broker with the analytic resources to help you identify the best retention, limit, and structure.
- Consider creative approaches to risk transfer, including alternative program structures, that may mitigate cost increases or even give rise to savings.
- Meet with your insurers. Understand their specific concerns about your company and address them. Differentiate your company.
- The hardened D&O market had not yet experienced the wholesale narrowing of coverage breadth, but in limited instances, and on a case-by-case basis, more restrictive wording is beginning to surface. Aggressively push back on restrictions where feasible and continue to seek policy enhancements to maximize potential for claim recovery where needed.
- Companies faced with significant financial challenges should understand the importance of specialized consultation as part of the underwriting, renewal, and transactional processes. Willis Towers Watson's Strategic Solutions Group, formed within our FINEX and M&A practices, delivers expertise on the risk, insurance, claim and M&A challenges facing companies before, during or after a bankruptcy or restructuring.

D&O Practice

Will your policy respond to a claim?

Willis Towers Watson relies on life science industry D&O experts to ensure that your policy provides the coverage and limits that you require. Our analytical approach to help you set the right limits combined with our line-by-line review of your policy wordings ensure you the highest level of comfort that you can rely on your policy in the event of a claim. Operating within our overall financial and executive risks (FINEX) line of business.

- D&O Quantified -- a market leading model of a Life Science company's exposure to D&O claims frequency and loss severity
- Peer benchmarking against life science D&O clients
- Life science industry D&O center of excellence (COE)

- Claims & Legal Group, Thought & Product Leadership -- senior FINEX professionals, all former practicing coverage attorneys, who maximize claim recovery, negotiate coverage enhancements and manuscript policy language with leading D&O carriers
- Coordination with other leading risk and insurance areas, such as cyber, employment practices liability (EPL), fiduciary/ERISA exposures and fidelity (social engineering exposures)
- Brand new FINEX Rate Report, detailing quarterly changes in pricing for all FINEX lines of coverage
- Free, no-obligation and confidential review of your D&O (and other FINEX) coverage, focusing on the key exposures of today's world, including your policy's responsiveness to a foreseeable COVID-19-related claim.

<p>700+ Global FINEX colleagues</p> 	<p>FINEX North America colleagues, approaching 200</p> 	<p>Willis Towers Watson has the largest wholly-owned Global Network in the insurance industry.</p> <p>We have 45,000 employees serving 140+ countries and territories</p> 	<p>Experts in: </p> <ul style="list-style-type: none"> ▪ Pharmaceutical and Biotech ▪ Therapeutic Research & Development ▪ Generic/Specialty Drug Manufacturers ▪ Medical Device Companies ▪ Contract Research Organizations ▪ Contract Manufacturers ▪ Medical Laboratories ▪ Nutraceutical and OTC Companies
<p>FINEX representation in 50+ countries worldwide</p> 	<p>We have over 600 Life Science clients</p> <p>Globally largest multinational companies to early stage start-ups</p> 	<p>200+ Life Sciences practitioners in 100+ countries</p> 	
<p>A Globally Integrated Practice with industry specialist in all aspects of the client service</p> <ul style="list-style-type: none"> ▪ Property & Casualty ▪ Clinical Trials ▪ Management Liability ▪ Cyber ▪ M&A Due Diligence ▪ International Practice ▪ Claims Advocacy ▪ Risk & Loss Control ▪ Analytical Tools 	<p>Foreign Clinical trial resources in 100+ countries</p>  <p>1,000s of trials, International teams</p>	<p>Online database of Life Sciences expertise throughout our global network. Specific Information requirements for each country. By country:</p> <ul style="list-style-type: none"> ▪ Non-admitted status ▪ In-Country regulations ▪ Insurance limits ▪ Medical professional liability ▪ Certificate protocols ▪ Specific Information requirements 	

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Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. COVID-19 is a rapidly evolving situation and changes are occurring frequently. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the author or your Willis Towers Watson contact for more information.

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