

# D&O for publicly traded life science companies 2021



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; however, as we start to come out of the pandemic, rates, retentions and terms continue to see upward pressure, but capacity inflow is yielding a deceleration of rate increases. According to Willis Towers Watson's proprietary data, the rate of premium increases for public D&O appears to have peaked at the end of Q4 2020.

A review of federal securities class actions (SCAs) shows that 80 new class action securities cases in 2020 were filed against life science companies (down from 97 in 2019) which is equal to approximately 24% of all new filings for the year. While the total number of claims filed represents a 17.5% decrease from 2019, the 24% of total claims is consistent with 2019, and the total number of claims is 19.4% higher than five years ago. The 2019 trend of suits against larger life science companies continued with a consistent 60% of life science companies sued in 2020 having a market capitalization of more than \$500 million. However, 25 of the 80 suits were brought against companies with market caps of \$250 million or less. 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).<sup>1</sup>

An additional study on securities litigation filings points to “health technology and services,” inclusive of life science, biotechnology and pharmaceutical organizations, as the most sued industry in consecutive years from 2016 to 2018, and the second most sued industry in 2019 and 2020.<sup>2</sup> Another study identified “healthcare” as the industry most sued in securities class actions, by average number of annual filings over the near-20 year period from 2001 to 2019.<sup>3</sup>

Without a doubt, the COVID-19 pandemic had a material impact on 2020 filings against life science companies. One of the first companies to be sued for COVID-19-related allegations was a life sciences company. Of the 19 total pandemic-related securities class actions filed, nine were against life science companies.<sup>4</sup> One common factor of all of these suits – they related to products approved by the FDA under its Emergency Use Authorization procedure.<sup>5</sup> In addition to COVID-19-related litigation, the leading drivers of SCAs last year cover all stages of a life sciences company:

- Almost 34% of claims allege misrepresentations about product efficacy and safety.
- Over 21% of claims were based on alleged misrepresentations regarding regulatory hurdles to or timing of FDA approval.
- 22.5% of claims allege purported unlawful conduct, such as illegal kickback schemes and anti-competitive conduct.
- 19 new actions were filed against issuers outside of the U.S.

Life science companies of all sizes were being sued.

- 44% of companies sued had a market cap of less than \$500 million.
- 42% of companies sued had a market cap of more than \$1 billion.
- 23% of companies sued had a market cap of more than \$5 billion.

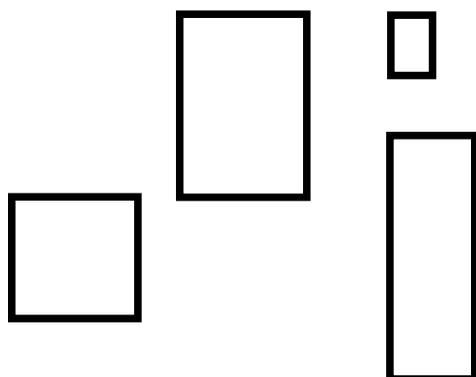
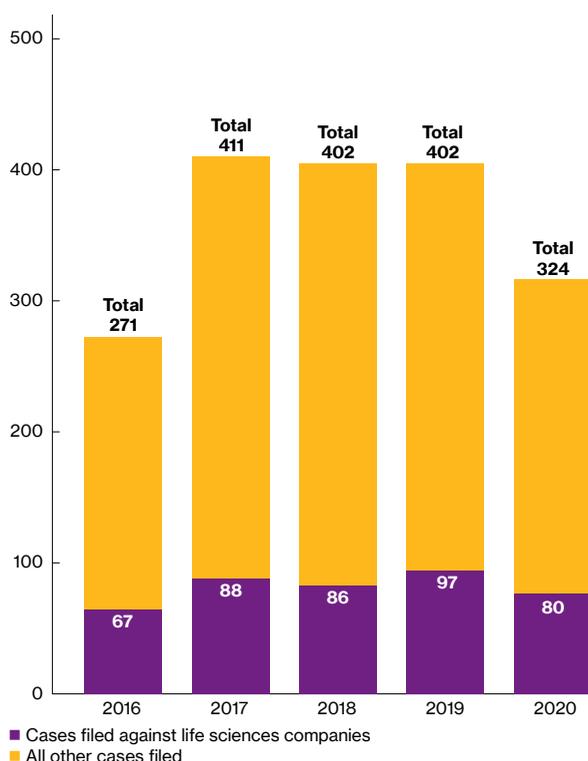


Figure 1. Number of class action securities fraud cases filed from 2016 - 2019 (total cases filed compared to cases filed against life science companies)



Source: Dechert Survey: Developments in Securities Fraud Class Actions Against U.S. Life Sciences Companies. 2020 Edition.

### 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. Some carriers, most prevalently in London, withdrew from the market or reduced their capacity for life science companies. Post COVID-19, the market remains challenging. The pandemic remains a cloud over the prospect of economic recovery. Vaccination of populations is promising, but mutated virus strains and social/political tensions around health and safety measures present issues over the timing and pace of business reopenings and the resurgence of employment and economic growth. D&O underwriter focus is on financial strength (especially, liquidity), claim history, and responses/resilience to COVID-19.

### Directors & officers market conditions for publicly traded life science companies

- The recent trend of reductions in overall capacity has begun to moderate in the face of new capacity in the public company space.
- Recalibration of excess pricing has begun to moderate.
- Buyers may continue to face pressure for higher attachment/retentions.
  - Terms are tightening

- Entity coverage: Targeted pullbacks especially for large (greater than \$1 billion annual revenues) privately held companies
- Exclusions: Cyber/privacy, insolvency and professional liability for private companies
- Derivative investigation sublimits: pullbacks or removals
- Some buyers may be particularly challenged.
  - Non-U.S. parent, U.S. D&O exposure (due to complexities of compliance across jurisdictions, internal controls and varying carrier appetites for U.S. and non-U.S. D&O risks)
  - Liquidity challenged and pre-restructuring/bankruptcy risks
- In a normal market, post-restructuring risks may be seen by some carriers as relatively clean risks, but in this environment, they are more often viewed as challenging risks, and willing capacity may be hard to find.

### 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 do 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. Modeling coverage breadth can provide you with tools to prioritize coverage requests, and to identify where wording enhancements may yield greater return.
- Companies faced with significant financial challenges should understand the importance of specialized consultation as part of the underwriting, renewal, and transactional processes. Willis Towers Watsons Strategic Solutions Group, formed in 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 claim 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 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

## Contact

### John Connolly

Life Sciences Industry Leader

+1 610 254 5686

[john.a.connolly@willistowerswatson.com](mailto:john.a.connolly@willistowerswatson.com)

### Chuck Shay

FINEX West Regional Leader – US

+1 415 955 0202

[charles.shay@willistowerswatson.com](mailto:charles.shay@willistowerswatson.com)

### Chris LoRe

FINEX East Regional Leader - US

+1 212 915 7806

[christopher.lore@willistowerswatson.com](mailto:christopher.lore@willistowerswatson.com)

### Lesley Warrin

FINEX Life Sciences Leader

+1 973 401 7470

[lesley.warrin@willistowerswatson.com](mailto:lesley.warrin@willistowerswatson.com)

### John Orr

D&O Coverage Leader, FINEX

+1 415 955 1096

[john.orr@willistowerswatson.com](mailto:john.orr@willistowerswatson.com)

### Scott McMahon

Mid-West Life Sciences Region

+1 312 288 7836

[scott.mcmahon@willistowerswatson.com](mailto:scott.mcmahon@willistowerswatson.com)

### Deb Prol

West Life Sciences Region

+1 858 678 2182

[debra.prol@willistowerswatson.com](mailto:debra.prol@willistowerswatson.com)

## Sources

<sup>1</sup> Dechert Survey: Developments in Securities Fraud Class Actions Against U.S. Life Sciences Companies. 2019 Edition.

<sup>2</sup> NERA 2020 Report

<sup>3</sup> Cornerstone's annual filings report

<sup>4</sup> Cornerstone/Stanford securities class action clearinghouse

<sup>5</sup> Sidley Austin LLP – Securities Litigation Against Life Sciences Companies 2020, published March 2021

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 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.

## About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 45,000 employees serving more than 140 countries and markets. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at [willistowerswatson.com](http://willistowerswatson.com).



[willistowerswatson.com/social-media](http://willistowerswatson.com/social-media)

Copyright © 2021 Willis Towers Watson. All rights reserved.  
WTW7826/04/2021

[willistowerswatson.com](http://willistowerswatson.com)

**Willis Towers Watson**