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LIFE SCIENCES: COMMON D&O CLAIMS

Key Liability Claims Faced by
Directors in the Life Sciences Sector

INTRODUCTION

In the competitive and fast-moving life sciences sector, mistakes can happen, allegations can be made, and actions taken. When claims occur—and they are on the rise*—directors and officers can find themselves personally liable due to the decisions they have made regarding the company. So, what are the most common D&O claims in the sector?

In the UK, the main sources of directors' and officers' (D&O) claims are those arising out of insolvencies and regulatory investigations. However, there is a growing trend of claims being made against D&Os/ companies, driven by shareholders.¹

As a director or officer of a company, being on the receiving end of legal action

doesn't just put your business at risk, but also your personal assets such as your home and other possessions. It could even affect your spouse if you have property in joint ownership.

So, what D&O exposures do life sciences companies and their key decision-makers need to know about? We outline some of

the common claims scenarios affecting companies of all sizes, from start-ups to established organisations.

Director versus company

Individual directors can face allegations from their own companies or shareholders, who may bring a claim against them if it

appears that management has breached their duties to the detriment of the organisation. Shareholders, in particular, may take measures to protect their investment if they are not happy with the company's direction due to decisions made at board level.

Corporate insolvencies

D&O claims resulting from insolvency typically rise in times of economic uncertainty. When companies fail, questions are asked about the actions and decisions of directors, and individuals can be targeted by administrators and creditors seeking to recoup losses. There will be retrospective scrutiny of company transactions, accounts and the actions of the company's directors, which is why it is important to remember that D&O insurance can cover directors and officers for a certain timeframe following their departure from a company, or its insolvency.

Regulatory investigations

Regulators no longer look to only hold companies accountable, but individual directors, too. Their investigations can often result in adverse findings and give rise to civil or criminal proceedings against senior executives. Government and regulatory authorities monitor compliance with numerous laws—from occupational

health and safety law, and environmental law, to laws on the ownership and management of the organisation. If regulators uncover wrongful conduct, they may pursue legal action against the company and the executives involved.

Contract disputes

Certain types of disputes commonly occur in the life sciences sector, such as disputes around licencing agreements, ownership of intellectual property, or access to research results. Claims may also arise from disputes with suppliers and customers, following allegations of nonperformance or nonpayment. Defending contract disputes can be a protracted and costly process, particularly in cases of infringement of patents or copyright, for example, as litigation often needs to be conducted in multiple jurisdictions involving counterclaims of infringement or invalidity.

Criminal actions

Directors and officers could find themselves faced with criminal allegations, and investigations into their conduct. Tougher bribery and corruption laws and enforcement, for example, has led to a notable increase in related D&O claims—which can take several years to resolve, while racking up large bills for defence costs. D&O policies may exclude deliberate

fraud, and claims for which other insurances apply (such as bodily injury), so it is important to check the policy wording. Whatever the nature of the claim, even if a director has done nothing wrong, refuting criminal accusations can result in significant legal bills.

Defamation cases

The interpretation of comments or statements made by directors may have the potential to lead to a claim for defamation, including libel or slander. For example, comments may have been written or spoken about a competitor, a supplier or a former employee. These types of claims are often bitterly pursued by the individuals or companies who feel aggrieved by comments and/or believe them to be damaging to their reputation. If the statement a director has made about a third party proves to be false, they could find themselves personally liable, rather than the company itself.

Harassment and discrimination

If employees are mistreated or discriminated against during any phase of their employment, they may bring their concerns to the organisation's management team. While claims for damages may have, in the past, been made against the organisation itself, it is now becoming more common





for companies to decide to claim damages from acting board members and executives. For example, in cases of breach of supervisory duties (i.e., failing to act on allegations), a board of directors can be held liable. If directors fail in their duty of care to employees, or where they preside over a toxic corporate culture that permits abuses, they may face prosecution or civil litigation.

Information privacy and data breaches

The COVID-19 pandemic accelerated the pace of digital transformation in the sector, with home working and remote clinical trials becoming more common. Data privacy is still a potential concern due to company data potentially being stored on personal devices, and personal data potentially being stored on company devices. Directors and officers are finding themselves at greater risk of data privacy claims if their risk controls are inadequate. Claims could include, for example, accusations of accessing the personal emails and messages of employees, or claims they have failed to provide sufficient cybersecurity training and IT systems to keep customers' or employees' data safe.

While these are some of the common directors' and officers' claims we see, it is certainly not an exhaustive list, and claims for alleged wrongful acts can span many scenarios.

D&O policies are intended to mesh with both the company's indemnification obligations to its officers and directors and the company's other liability insurance policies. As such, they are typically complex, and filled with terms, conditions, and exclusions that must be understood and weighed to evaluate possible shortfalls in coverage.

As specialists in the life sciences sector, we can help you navigate these complexities, and structure your D&O insurance according to the needs of your company and its directors.

These are brief product descriptions only. Please refer to the policy documentation paying particular attention to the terms and conditions, exclusions, warranties, subjectivities, excesses and any endorsements.

*<https://www.clydeco.com/en/insights/2021/12/the-soaring-costs-of-insuring-directors-and-office>
<https://www.rpc.co.uk/perspectives/insurance-and-reinsurance/current-developments-trends-in-shareholder-d-and-o-claims-in-europe/>

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Registered Office: Spectrum Building, 7th Floor, 55 Blythswood Street, Glasgow, G2 7AT.
Registered in Scotland. Company Number: SC108909. FP444-2022a Exp. XX.XX.2023.

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