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Market Conditions

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Management Liability for the Life Sciences Sector

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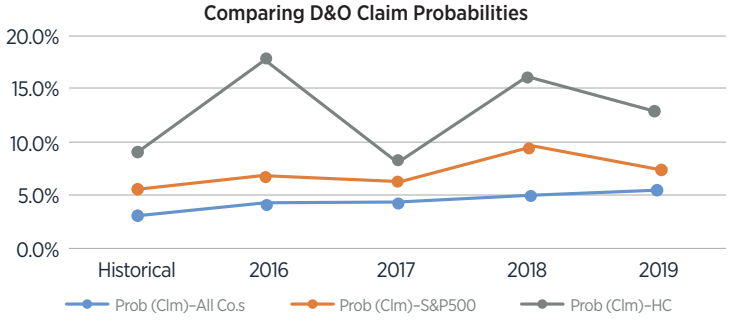
The world of life sciences is more dynamic than ever—new drugs, new therapies, new medical devices, and improvements and groundbreaking solutions are coming faster and faster. The COVID-19 crisis will add additional risk factors for Life Sciences companies around disclosures and financing. The downside is that not everything pans out, or perhaps takes longer than anticipated or meets unexpected competition from another innovative company. So in the world of D&O, disclosures are integral to the success of a life sciences company in terms of either preventing D&O or minimizing the costs of a securities class-action (SCA) lawsuit.

According to a recent 2020 report from Cornerstone Research on SCA filings, the probability of a claim against a publicly traded company is the highest on record at almost 9% per year based on 2019 year-end results. For the graph below, we used Cornerstone data to compare the probabilities of core claims (a subset of SCAs that represent traditional D&O claims such as alleged violations of rule 10b(5) of the 1934 Securities Act—meaning allegations of inadequate or inaccurate disclosure). The blue line shows the chances of a claim against a listed company rising to almost double historical rates, while the S&P 500-only group is even more likely to be sued for D&O disclosures. But the Cornerstone-defined healthcare (HC) group is dramatically higher, approaching 20% in some years and registering about 13% in 2019, which is still more than double other industries in general.



Source: Cornerstone Research 2020

This sets the tone for why life sciences companies that are publicly traded (especially if newly minted from a recent IPO) are considered one of the toughest classes of all by D&O underwriters.

According to the recent report on life sciences by law firm Dechert LLP, life sciences companies are the most popular sector for SCAs by far, up 148.7% from five years prior—so this is not a new issue.

Perhaps the most alarming statistic from the Dechert study is the activity in the Third Circuit, where 73% of all claims in that circuit were brought in the district of Delaware, meaning that approximately 30% of all SCAs in 2019 against life sciences companies were brought in this district. Leading this charge are just three plaintiff firms with fully 58 of the total of 97 SCAs filed against life sciences firms in 2019. These plaintiff attorney firms were Rigrodsky & Long, Pomerantz, and Rosen. Pomerantz and Rosen are well recognized as emerging firms, which have less history but have represented the majority of D&O claims filed recently. However, Rigrodsky & Long have ties to the historic Milberg LLP firm, since Seth Rigrodsky was with them from roughly 2001 to 2006 and founded the Milberg Delaware offices.

What can life sciences companies do to help themselves? And how does this impact their upcoming D&O renewals?

First, they can keep winning cases. Currently, as established by Dechert, Cornerstone and our own Gallagher review, life sciences companies win (outright case dismissed ruling for the defendants) more than half the time in their defense of SCAs compared to either a partial dismissal or a denied motion to dismiss. Indeed, many times the industry is a target and perhaps gets a high proportion of weak cases.

But many cases still result in the plaintiff's proceeding, and thus most often head toward settlement discussions. The good news here, according to Cornerstone Research and their analysis of 2019 SCA settlements, is that life sciences companies have a median settlement as a percentage of Cornerstone's simplified tiered damages equal to 3.7%. That's significantly below the overall average of 5.8%

As for renewals, many of the tough renewal actions have been occurring for over a year in this industry, including cuts in carrier capacity on a layer-by-layer basis and much higher deductibles in many cases. Life sciences renewal increases are expected to exceed the most recent average of 38% overall increase for the cost of the publicly traded D&O programs. By how much will be a factor of industry subsector (often comparing proven products to developing ones) and, on a related matter, financial strength. And, of course, claims history, the number of years trading and management experience have all proven to be critical as well.

With the Gallagher concentration in this industry group as well as leadership in IPOs, we have the data, the skillset and the experience to bring the best possible results to the challenging D&O renewals faced by life sciences clients.