



# Personal liability of directors and officers in Switzerland – an overview of the legal situation and insurance solutions

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# Agenda

1. Introduction
2. Legal Liability
3. Directors' and Officers' Liability Insurance (D&O)
4. Conclusion



# Introduction



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# Importance of D&O Insurance for Biotech Companies

- Management decisions are are not immune from public scrutiny
- Directors and officers can be held personally liable for their management decisions
- Competition for external funds and the best managers and investors in the industry
- Reputable managers/investors require adequate D&O insurance to be in place prior to their engagement
- Biotech companies experience difficulties in finding reliable carriers offering state-of-the-art D&O insurance



# Legal Liability



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# Management responsibility

- Provisions to be found in Chapter Six, Responsibility, Art. 752 – 761 Swiss Code of Obligations (OR)
- Art. 754 I OR (Liability for administration, management and liquidation):

„The members of the board of directors and all persons engaged in the management or liquidation are liable not only to the company, but also to each shareholder and to company's obligees for the damage caused by an intentional or negligent violation of their duties:“



# Duties of the Board of Directors (BoD)

- The BoD manages the business of the Company insofar as it has not delegated it to the management (Art. 716 II OR)
- The BoD has the following non-transferable and inalienable duties (Art. 716 a OR):
  - Ultimate management and the giving of the necessary directives
  - Establishment of the organisation
  - Structuring of the accounting system and of the financial controls as well as the financial planning
  - Appointment and removal of management



## Duties of the Board of Directors (BoD) contnd.

- The BoD has the following non-transferable and inalienable duties (contnd.):
  - Ultimate supervision of the management in view of compliance with the law, the articles of incorporation, regulations, and directives
  - Preparation of the business reports and the general meeting
  - Notification of the judge in case of overindebttness



## Examples:

- Wrong or misleading financial information provided to potential investors by the BoD/Management
- Management approves large investments without authority
- Insufficient due-diligence process prior to the acquisition of a future subsidiary
- Failure to supervise
- Insufficient financial planning



# Business Judgement Rule

- BoD as well as managers shall carry out their duties with due care and must duly safeguard the interests of the company (Art. 717 I OR)
- Business Judgement Rule applies, but:
  - „Business decisions rarely involve black-and-white issues; instead they typically involve prudential judgements among a number of plausible alternatives. Given the vagaries of business, moreover, even carefully made choices among such alternatives may turn badly.“
- Problem: ex-post perspective



# Potential Claimants

- Members of the BoD or the management on behalf of the company (Art. 756 I OR)
- The shareholders:
  - On behalf of and for performance to the company (Art. 756 I OR)
  - On their own behalf and for performance to themselves
- Obligees
- Others: Liquidators, Tax Authorities, Social Security, Competitors



## Other provisions:

- Liability resulting from foundation (Art. 753 OR)
- Prospectus liability (Art. 752 OR)
- AHV contributions (Art. 52 AHVG)
- Tax law (joint liability for tax liabilities of the company)
- Liability in general (Art. 41 OR)



# Directors' and Officers' Liability Insurance





## Scope of coverage

Insurance shall pay on behalf of each insured person

- losses on account of any claim which the insured person becomes legally and personally obligated to pay and which
- is first made against the Insured Person during the policy period or during the extended reporting period
- for a wrongful act committed, attempted or allegedly committed or attempted by such insured person



# Basic Principles

- Claims made versus occurrence
- Third party beneficiary insurance contract
- Designed to protect the personal assets of directors and officers
- Indemnification comprises defence costs and damages and legal representation expenses
- Insured companies are the policyholder and all subsidiaries worldwide



# Insured Persons

- Natural Person who was, now is or shall become:
  - Member of the BoD, supervisory board, advisory board or executive management committee or executive management board
  - Director or Officer of an organisation in common law countries
  - Employee of an organisation acting in a capacity as outlined above
  - De-facto director of an organisation
  - Spouses, Estates and legal representatives



# Insured versus Insured

- Coverage for claims brought or maintained by or on behalf an insured person or an organisation
- US lvi-exclusion with carve backs:
  - shareholder derivative claim
  - claims for contribution or indemnity
  - retired insured persons
  - bankruptcy trustees/liquidators
  - defence costs



# Third Party Claims

- Coverage for claims brought or maintained by or on behalf of third parties:
  - Shareholders/Investors
  - Employees
  - Customers
  - Suppliers
  - Competitors
  - Patients
  - Government



## Retroactive coverage and Extended Reporting Period

- Full retroactive coverage
  - Option: full retroactive coverage for new subsidiaries
- Option: Extended Reported Period (ERP)
  - Coverage for claims first made after the termination of the policy period for wrongful acts committed prior to the effective date of termination or non-renewal
  - Extension of coverage for max. three years



# Exclusions

- Prior notice
- Pending or prior litigation
- Pollution
- Personal Injury and Property damage
- Fiduciary/Pension Trustee Liability
- Insider Trading
- Fraud/Intentional Breach of Law/Personal Profit
- Employment Practice Liability



# Conclusion



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# Conclusion

- A plethora of duties results in a considerable exposure of BoD/Management to be held personally liable for their management decisions
- Difficulties for biotech companies to find adequate D&O coverage
- Chubb is one of the most experienced providers of D&O insurance in the market
- Streamlined application procedure



# Thank you very much.

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