WOODRUFF SAWYER

D&O DATABOX

BETTER DATA FOR BETTER ANALYSIS

FLASH REPORT: 2021 YEAR-END SUMMARY

Woodruff Sawyer's Flash Report provides insights about securities class action activities, developments, and historical trends—sourced from DataBox™, our proprietary database and leading resource for securities class action data over the last 30+ years. DataBox powers our analysis of the D&O litigation environment and enables public companies—and those looking to IPO—to assess and mitigate their management liability risks with more precision and clarity.

While 2021 Securities Class Action Filings Were Down, Settlement Costs Went Up

In 2021, 182 securities class actions were filed against issuers of stock listed on US exchanges. This statistic means that the total number of annual filings in 2021 was down 13% compared to 2020. As highlighted in our Mid-Year Report, there were a few trending events that contributed to a different mix of filings than we had seen in the previous years and that we can now report for 2021.

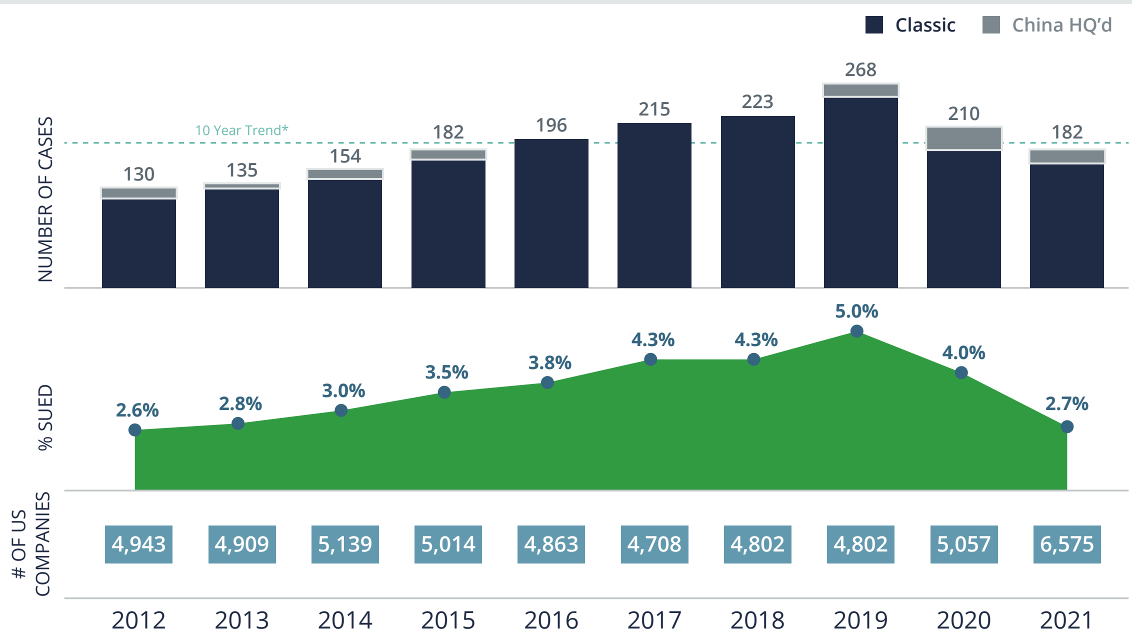
2021 Case Numbers:

13% **182** SCA filings — 13% fewer than 2020

$3.2B Total settlement dollars reached - highest in a decade*

** Excluding settlements in the last 10 years that were over $1 billion.*

The Last Decade: Filings Peaked in 2019 and are Currently Trending Downwards



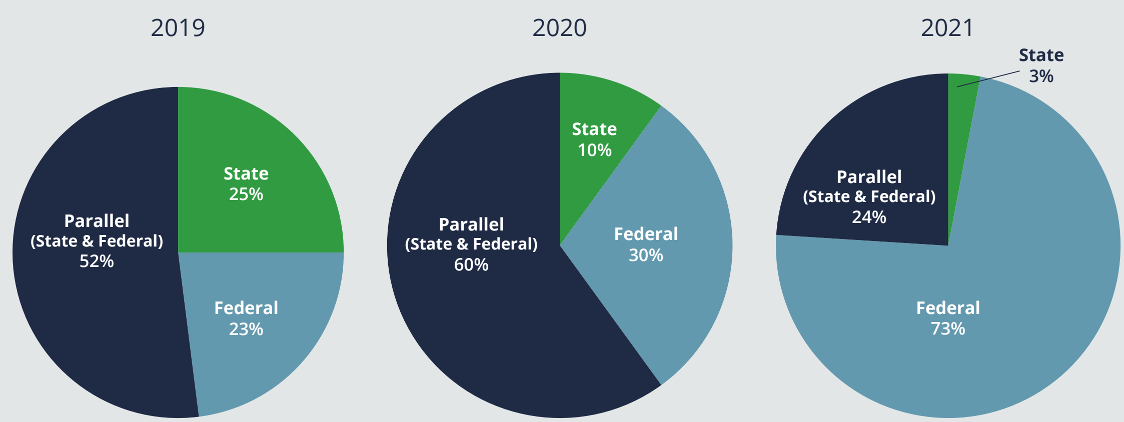
Note: Data current as of December 31, 2021. Historic public company data sourced from World Federation of Exchanges, NASDAQ and vCharts (excluding special purpose acquisition companies — SPACs)

A Welcome Relief for Defendants: A Drop in State Court Filings

The drop in filings can be attributed in part to the decrease of securities class action filings in state courts alleging a Section 11 claim. Parallel filings of Section 11 claims against companies in both federal and state courts had reached a peak in 2019 as a result of the US Supreme Court's decision in March 2018 that continued to allow Section 11 claims to be filed in state courts (the *Cyan* decision). In 2019, there were 40 cases as a result of parallel filings, an enormous number. But in 2021, there were only eight parallel filing cases—an 80% drop from 2019.

Why such a large and precipitous drop in the number of Section 11 cases filed in state court? Some companies had already started trying to avoid Section 11 suits in state court by implementing federal forum selection provisions in company charter documents mandating Section 11 claims be filed in federal court (**the Grundfest clause**). Every well-advised IPO company in the land adopted federal forum provisions following the decision handed down by the Delaware Supreme Court in March 2020 allowing such provisions (**the *Sciabacucchi* decision**).

Section 11 Claims Filed in State Courts from 2019–2021 Went Down Significantly

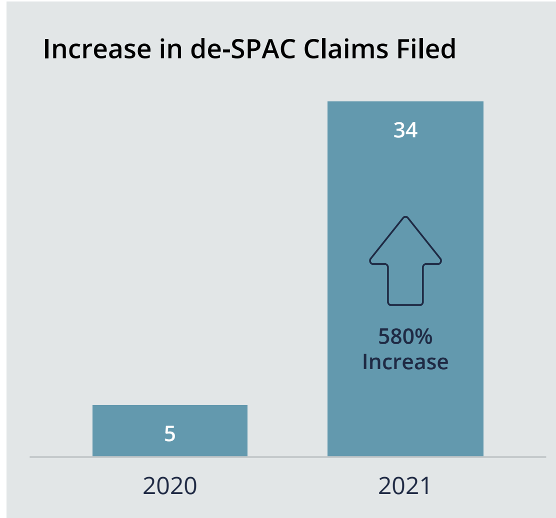


Note that the state court Section 11 suits filed in 2021 were all filed in New York state court against foreign companies that did not have federal forum provisions in their charter documents. Reading the landscape, many foreign companies are now also implementing federal forum selection provisions into their charter documents.

While there has been a decrease in state courts of Section 11 claims against IPO companies, there has not been a decrease in the rate of filings against IPO companies. Seventeen percent of the cases in 2021 involved Section 11 filings (31 of 182 cases) as compared to 14% of the cases in 2020 (29 of 210 cases). So while IPO companies can benefit from the difficulties of plaintiffs filing securities class action cases in state court—thereby cutting back on the expense of defending cases in two different venues—there has been no let-up in Section 11 federal court filings against newly public companies. With over 550 companies going public in the last three years, we do not expect the rate of filings against IPO companies to slow down at any significant rate this year.

An Area of Concern for Plaintiffs: De-SPACs

Much attention has been paid over the last several years to the plight of IPO companies defending state court filings. More recently, there has been an increased focus on private companies that have become public via a de-SPAC merger. (As a reminder, a "de-SPAC" is the process whereby a publicly traded blank check/ special purpose acquisition company merges with a private operating company, resulting in the private operating company becoming a public company trading on a US exchange.) In 2020, only five de-SPAC companies were sued, but, in 2021, there were 34 sued—a 580% increase.



This increase is not terribly surprising, given that the growth in SPAC IPOs has skyrocketed in the last two years. There were 920 SPAC IPOs in the last three years, with approximately one-third of these completing their de-SPAC mergers. Our prediction in our Mid-Year report that 17% of securities class actions in 2021 would be against de-SPACs was near the mark. In fact, these cases have comprised 19% of all filings in 2021 as compared to 2.4% in 2020.

Guide to D&O Insurance for De-SPAC Transactions >>

If you plan to go public through a de-SPAC transaction, prepare to navigate the complicated and expensive process of obtaining D&O insurance.

Becoming a public company via a de-SPAC process introduces a new complexity to running a company where public disclosures and perceived missteps are carefully scrutinized by shareholders who are eager to see a return on their investment. While a company that has become public via the traditional route has the benefit of prepping for its debut on a US Exchange over several years, many de-SPACs have had a short ramp up to moving from a private to public venue.

Notwithstanding the shorter on-ramp, however, expectations about corporate governance, internal controls and revenue growth are given the same weight as for any other newly public company. In other words, the explosive growth of SPACs presages growth in securities class suits against de-SPACing companies, as we are already seeing in the number of cases filed in 2021.

The Pandemic Effect

The D&O litigation landscape felt the impact of the COVID-19 pandemic in 2020 cases, and the pandemic's impact continued to be felt in 2021. There were an additional 18 cases filed in 2021 with allegations related to COVID-19 matters for a total of 40 cases filed in the past two years involving 39 companies (one company was sued in both federal and state courts).

Some of the more notable companies sued were:

- **Astrazeneca plc**: Clinical trial issues for its COVID-19 vaccine
- **Docusign, Inc.**: Drop in subscriber growth rates as the pandemic eased
- **Emergent Biosolutions, Inc.**: Production issues that led to contamination of vaccines
- **Peloton Interactive, Inc.**: Backlog of inventory that was not properly accounted for that came to light as product demand slowed down after pandemic restrictions eased
- **The Honest Co., Inc.**: Misrepresentation at IPO of potential revenue growth due to high inventory levels stocked up for pandemic purposes in which consumer demand had since diminished

Companies that were sued had one or more of the following characteristics:

Type of Characteristic	Sample of Companies Sued
Involved in the production, manufacturing, and/or distribution of COVID-19 vaccines or tests	Eastman Kodak Company Emergent Biosolutions, Inc.
Experienced an outbreak of the virus that directly impacted its business	Royal Caribbean Cruises Ltd. Tyson Foods, Inc.
Experienced a bump up in revenue growth as a result of the pandemic lockdown and then subsequently experienced a deterioration in growth	Docusign, Inc. Peloton Interactive, Inc.
Shown to have vulnerabilities that came to light as a result of the pandemic	K12 Inc. Zoom Video Communications, Inc.

As the pandemic subsides, will there be more COVID-19 related cases? As efforts continue to keep the pandemic under control in 2022 and the side effects, such as supply chain disruptions and shifts in consumer/customer demand continue, there are likely to be more companies impacted to the extent that a lawsuit will follow. We are also keeping an eye out for pandemic or vaccine mandate-related employment practices litigation.

COVID Return-to-Work >>

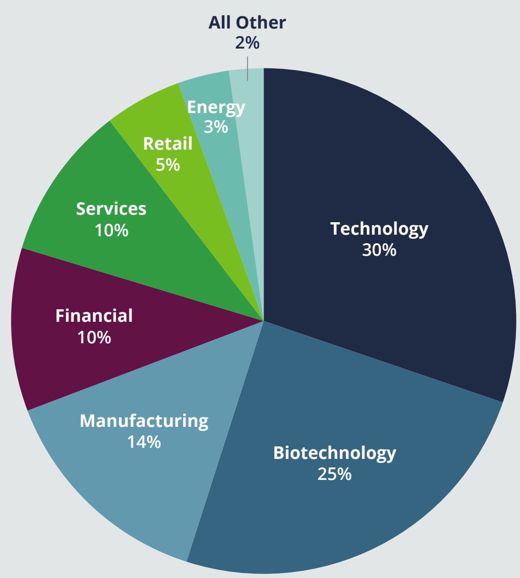
Get the latest news, risk management guidance, and a host of resources to help you in your COVID return-to-work adjustment.

Suits by Industry, Size, and Location

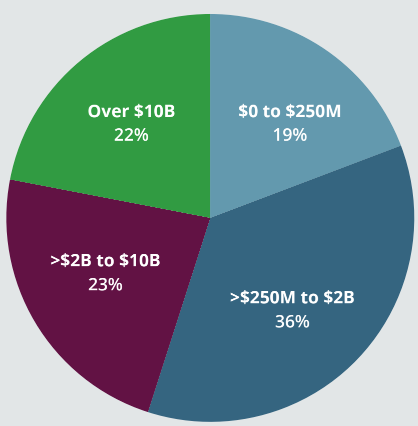
Historically, the technology and biotechnology industries have comprised the lion's share of filings each year, and 2021 was no different. Last year, these two industries comprised over half of cases filed—55%, which is up from 47% the year before. The increase can be attributed to biotechnology companies being sued for pandemic-related allegations (25% in 2021 as compared to 19% in 2020). Manufacturing moved up to third place as a result of the increase in filings against de-SPACs.

In 2021, there was a bump up in filings against micro-cap companies being sued ($0 to $250 million) from 12% in 2020 to 19% in 2021 while all other categories saw a minor decrease of two or three percent. This rise in filings at the lower end included a dozen filings that involved de-SPACs or companies trading on the OTC.

Technology and Biotech Industries are the Lion's Share of Filings



Filings by Market Cap



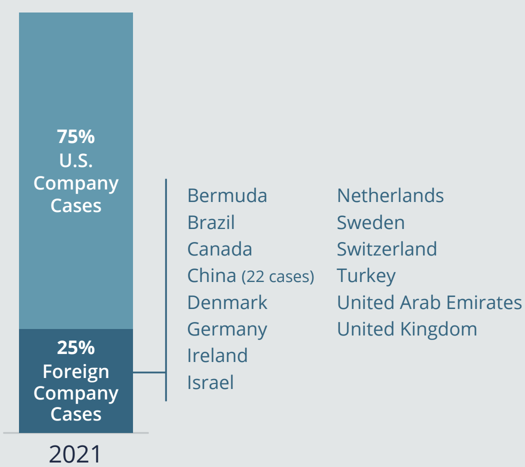
Some Brand Name Companies That Were Sued

Filings Against Foreign Companies

In the past decade from 2012 to 2021, 344 companies located outside of the US have been defendants in securities class actions. Thirty-four percent of these companies were located in China or Hong Kong. In 2021, 25% of the class actions filed involved foreign companies in 14 countries as seen below.

Excluding two settlements over $1 billion, approximately $2.2 billion has been paid out in settlements by foreign companies in the past decade. While Chinese companies have always led in the number of filings by foreign countries, 45% of the settlement dollars paid out in the last decade involved companies headquartered in Europe. With approximately 135 open cases and a steady stream of filings each year against foreign companies, insurers continue to maintain a cautious approach to underwriting the risk.

Cases Filed in 2021 (182 Cases)

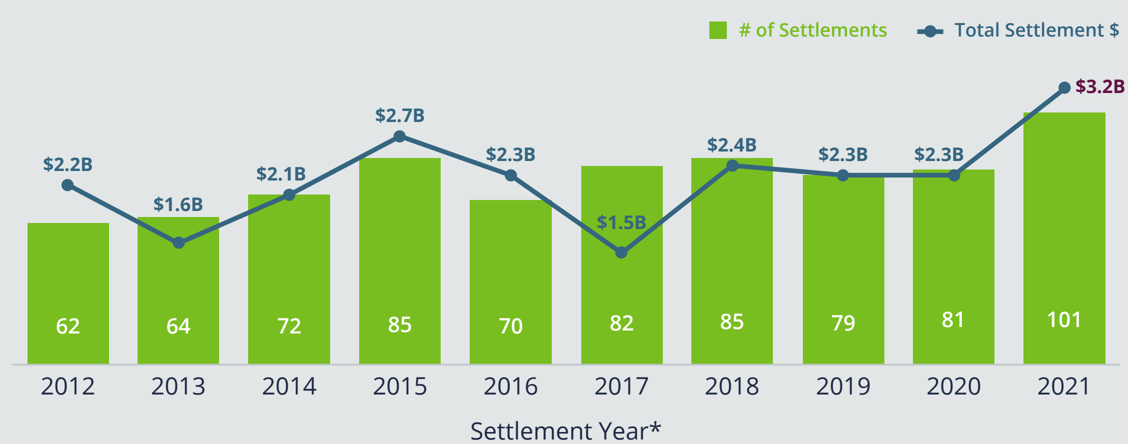


While Chinese companies have always led in the number of filings by foreign countries, 45% of the settlement dollars paid out in the last decade involved companies headquartered in Europe.

Annual Settlement Dollars Were at a Decade High

In 2021,101 settlements were reached, for an aggregate of $3.2 billion. The year 2021 is notable as the year for many high dollar settlements ($50 million and over), for the largest number of settlements reached, and for total dollars being paid in settlements in any one year in the last decade.

2021 Had Largest Number of Settlements and Dollars Paid Out in Past 10 Years



Excluding settlements $1B and over.

Additionally, 27% of the settlements in 2021 were settled for over $20 million. A settlement reached by Twitter for $809.5 million accounted for 25% of the settlement dollars. The following table shows the top 10 settlements of 2021.

Top 10 Settlements in 2021

Entity	Suit Year	Industry	Amount	Case Matter
Twitter, Inc.	2016	Technology	$809.5M	Performance metrics issues involving user activity
Luckin Coffee Inc.	2020	Trade/Retail	$187.5M	Accounting irregularities and fraud (Section 11 claim included with regard to its IPO)
Allergan plc	2016	Biotechnology	$130M	Antitrust investigation of price collusion of certain generic drugs
Granite Construction Inc.	2019	Construction	$129M	Cost overruns on joint venture projects
Novo Nordisk A/S	2017	Biotechnology	$100M	Antitrust investigation of price fixing between company and pharmacy benefit managers
Stamps.com, Inc.	2019	Services	$100M	Alleged abuses of the USPS reseller program
Mattel, Inc.	2019	Manufacturing	$98M	Accounting issues regarding its tax valuation allowance
Cognizant Technology Solutions Corp.	2016	Technology	$95M	FCPA violation and bribery scheme involving former officers
Tableau Software, Inc.	2017	Technology	$95M	Disclosure issues pertaining to its competition and its impact on revenue growth
Altria Group, Inc.	2019	Manufacturing	$90M	Reputational harm pertaining to its $12.8B investment in JUUL that led to a canceled merger with Philip Morris

The distribution of upper and lower settlement amounts for 2021 are as follows:

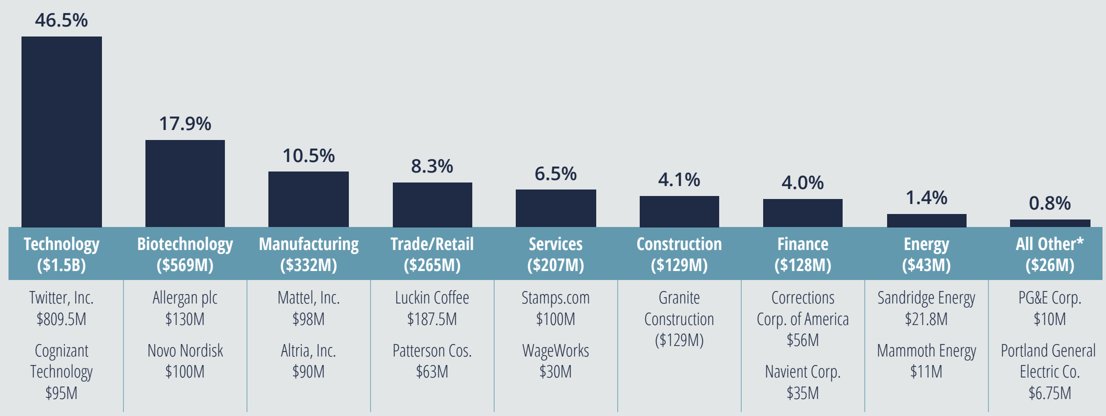
Distribution of Settlements by Settlement Amount

Settlements By Industry

Three-fourths of the settlement dollars were paid out by the technology, biotechnology and manufacturing industries ($2.4 billion). Trade/Retail moved down from third place in 2020 to fourth to be replaced by manufacturing in 2021. The breakdown by industry is as follows:

Settlements by Industry

Percentage Distribution of Settlement Dollars and Largest Settlements



All Other: Mining, Transportation and Utilities

The Bottom Line on Settlements

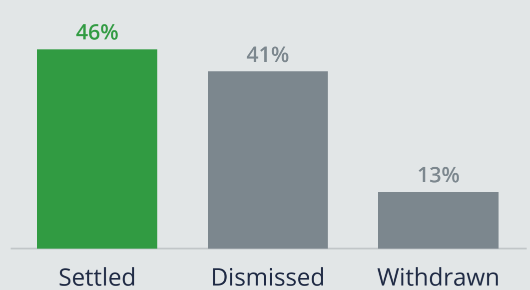
The end result of all this settlement activity in 2021 is that the average, median and 75th percentile amounts exceeded 2020 and the 10-year average.

This robust settlement activity is not surprising as there was an increase of hundreds of open cases that reached its peak in 2020 with over 550 cases that were yet to be resolved. In 2021, we saw a high of 101 cases coming to a resolution. But there were still around 480 cases being litigated as of the end of last year. Case resolutions in the last decade have broken down as follows (excluding trials that comprised less than 0.3% of resolved cases):

	10 Years* (2012–2021)	**2020**	**2021**
Total $	$23B	$2.3B	$3.2B
Average	$29M	$29M	$32M
Median	$8M	$10M	$11M
75th %	$21M	$23M	$27M

**Excluding settlements $1B and over.*

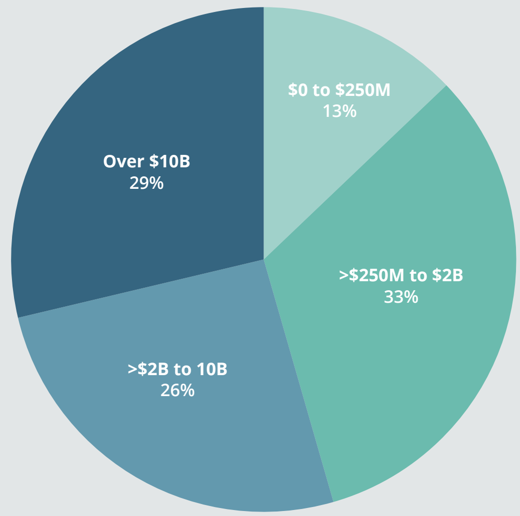
Case Resolutions (2021–2021)



As the numbers bear out with regard to case resolutions, when it comes to case dispositions over the last decade, courts did not show a strong preference for settlements (46%) versus dismissals (41%). It is clear from the volume of settlements in 2021, that despite the pandemic, the courts have been busy moving cases towards a final resolution. The market caps of the companies with pending litigation yet to be resolved are as set forth in the chart to the right.

Over half of the open cases involve mid-size to large size companies (55%).

Distribution of Open Cases by Market Cap as of 12/31/2021



What Does This Mean for D&O Rates?

While there are many factors to be considered for resolution of these cases, the rise in settlement dollars have to be taken into account as insurers review renewals and consider new business. However, the drop in filing activity over the last two years is a trend in the right direction for D&O insurance buyers and could be a precursor for 2022.

As we noted in our Mid-Year Report, there are positive signs that the market could soften for rates with the introduction of new capacity to the D&O market, thereby creating healthy competition among carriers and better rates in the D&O liability insurance market.

While there is somewhat of a mixed message in the decrease in filing activity and an increase in settlement dollars, the hard market for D&O coverage appears to finally be easing up. Having said that, the surge in filings against de-SPACs will mean at least that carriers will not be inclined to pull back on the rates for newly de-SPACed companies given that this class of risk has yet to be fully vetted in the courts.

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