WOODRUFF SAWYER

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FLASH REPORT: 2020 YEAR-END SUMMARY

Insights about 2020 securities class action activities and developments and their relationship to historical trends—sourced from DataBox™, our proprietary repository of over 30 years of data. DataBox powers our analysis of relevant information that gives our clients an accurate view of the D&O litigation environment for the assessment and mitigation of their management liability risks.

2020 Securities Class Action Filings Exceed 10-Year Average

There were 210 securities class action cases filed in 2020[1]. While this was a decrease in filings from 2019 of 268 cases filed, 2020 was still an active year for filings: 210 cases is still 13% higher than the 10-year average of 186 cases. It is also on par with the robust filing activity since 2017, in which filed cases have been routinely exceeding 200 cases per year.

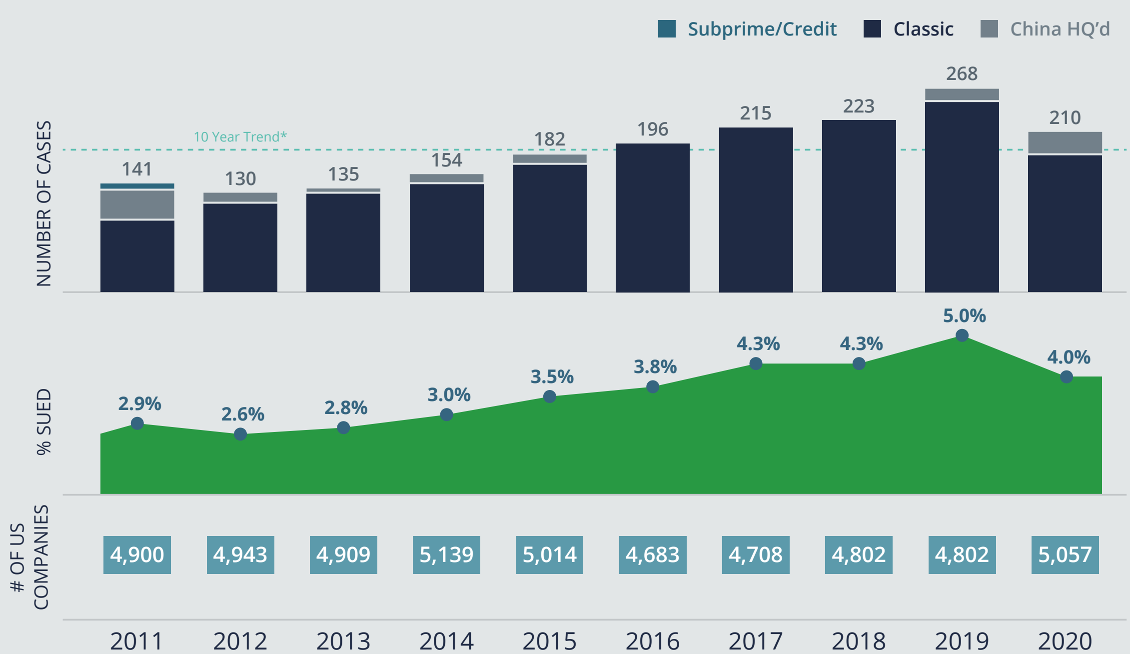
How the 2020 Case Numbers Compare:

22%
Fewer filings than 2019

13%
More filings than the 10-Year Average

The rollercoaster pace of filing in 2020 reflects the disruption caused by the COVID-19 pandemic. The pace was up in the spring (56 cases), down in the summer (49 cases), up in the fall (60 cases) and down again in the winter (45 cases)—an average of 17.5 cases were filed per month. This up-and-down activity appears to correlate with the spikes in coronavirus cases in June and November, which may have been affecting filing activity.

Securities Class Action Lawsuits: The Last 10 Years



Note: Data current as of December 31, 2020. Historic public company data sourced from World Federation of Exchanges, NASDAQ and vCharts.

1 For purposes of tracking issuer-related securities litigation, the D&O DataBox focuses exclusively on securities class action lawsuits against public companies by holders of common or preferred stock for which there was a decline in stock price.

An additional impact of the pandemic on filings was the number of cases related to COVID-19. Ten percent of the cases were filed against 20 companies that have been sued across various industries for the reasons set forth below. Additionally, at least three of these companies sued for securities class actions have also been sued derivatively.

Industry Sectors with COVID-Related Suits*	
• Healthcare: 8 cases	• Technology: 3 cases
• Financial: 6 cases	• Transportation: 3 cases

* Excluding two cases filed against exchange-traded funds in the energy sector.

Reasons for the Suits
• Impacted directly by a virus outbreak
• Impact of the virus on the world's economies directly affecting the company's immediate and/or projected financial health
• Experienced a business disruption that exposed vulnerabilities in their operations
• Direct involvement with virus-related matters such as: the development of tests or treatments for the virus, or the manufacturing of virus-related products, or the distribution of Payment Protection Program funds

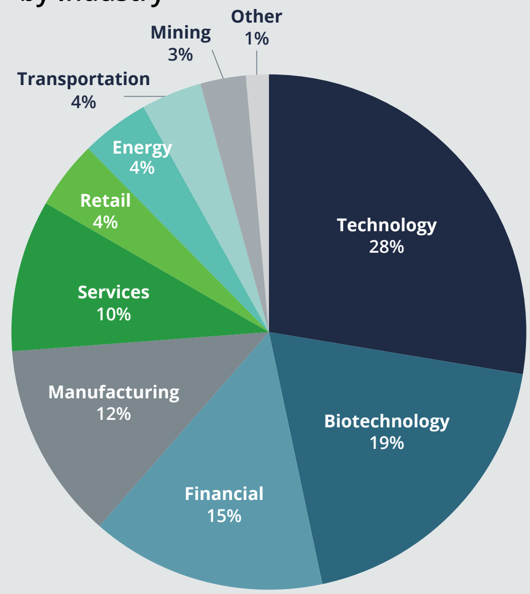
The Continuing Impact of COVID

COVID-related filing activity slowed down by November. However, as we enter 2021 and we continue to see the impact of the pandemic on global economies, there will inevitably be more cases to come. Consider, for example, the civil penalty of $125,000 imposed by the Securities and Exchange Commission on The Cheesecake Factory in December 2020. The SEC imposed this penalty for misleading investors in March and April 2020 about the financial effects of the pandemic on the company. Commentators see the SEC's pursuit of The Cheesecake Factory as a shift from investigations of bogus transactions to a review of potential negligence by companies in their pandemic-related disclosures. Such investigations could result in more securities class actions and/or derivative suits.

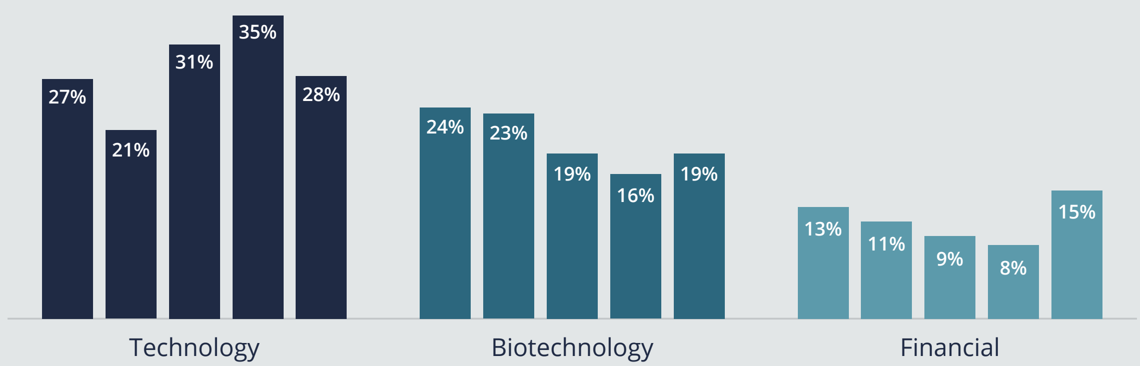
Tech and Biotech Lead in SCA Lawsuits

Notwithstanding the plaintiff's bar interest in pandemic-related cases, both the technology and biotechnology sectors continued to be the recipients of a majority of the filings, comprising 47% of all filings by industry sector. From 2017 to 2019 the financial sector had dropped out of the top three category, but moved back up to third place in 2020. Almost 30% of the cases filed against the financial sector involved Section 11 allegations related to an IPO or M&A. Additionally, well-established financial firms were sued such as Citigroup, Deutsche Bank, JPMorgan, and Wells Fargo. The following charts set forth the breakdown by industry in 2020 and a five-year review of the top three industries sued.

2020 Securities Class Action Filings by Industry



Top Three Industries in 2020 for Securities Class Action Filings
Five-Year Lookback (2016 to 2020)



Filings Against Foreign Companies—and China's Role

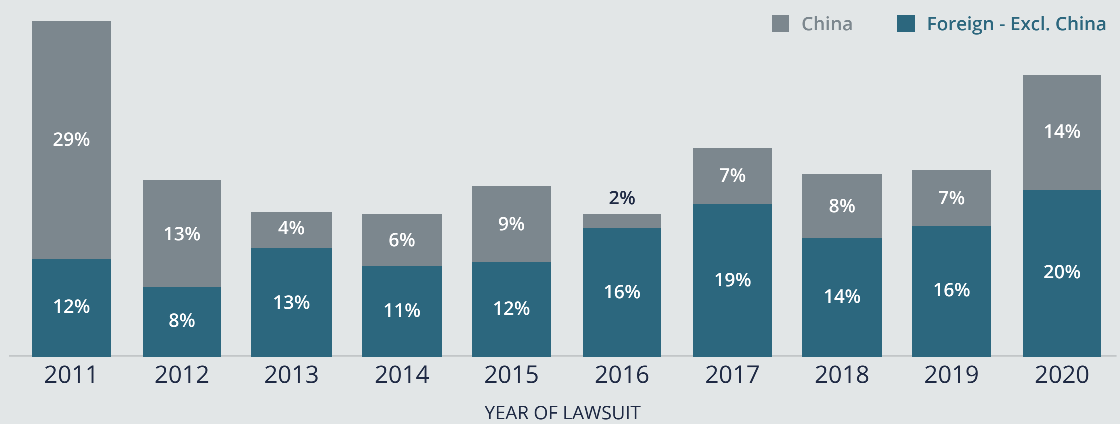
In 2020, over one-third of the cases filed (34%) involved companies headquartered in 19 countries outside of the US (72 cases). Here is a breakdown of this geographic distribution:

Geographic Distribution of Securities Class Action Filings Against Foreign Companies

Region	Countries
Asia-Pacific	Australia, China, India, Singapore
Europe	Cyprus, France, Germany, Ireland, Netherlands, Norway, Poland, Switzerland, United Kingdom
Middle East and Africa	Israel, South Africa, United Arab Emirates
The Americas	Bermuda, Brazil, Canada

At the beginning of the decade in 2011 and 2012, Chinese companies that went public on the US exchanges as the result of reverse mergers were in the limelight for driving up the numbers of filings against foreign companies. However, in the last eight years, non-Chinese foreign companies comprised the larger proportion of annual filings as compared to cases filed against Chinese companies:

Underwriters' Concern Is for More Than Just China



So while Chinese companies have shown up consistently in the past decade as a target of SCA lawsuits, cases filed against them comprised 9% of total filings in the past decade as compared to 15% of total filings against all other foreign companies based elsewhere—a significant reason for underwriters' concern about coverage for companies regardless of where they are based.

Brand Name and Mature Companies Were Not Spared

While there may be a tendency to focus on less experienced public companies and their vulnerabilities to being sued, the larger, more mature, and/or more high-profile companies received their share of suits in 2020.

S&P 500 Companies

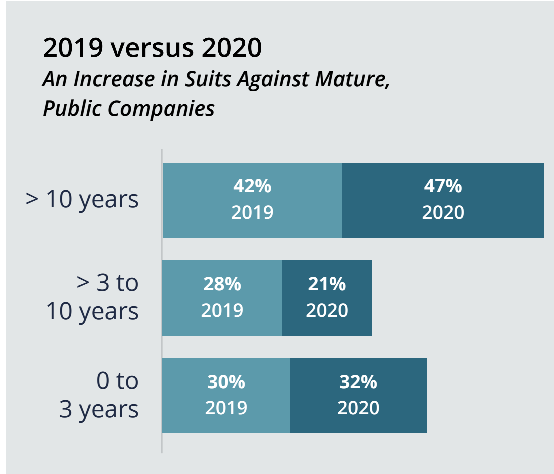
10%
of S&P companies were sued in 2020, a 10-year high

Brand Name Companies

In the past two years, there have been over two dozen high-profile and mature companies that have been sued. More than half of them were sued in 2020:

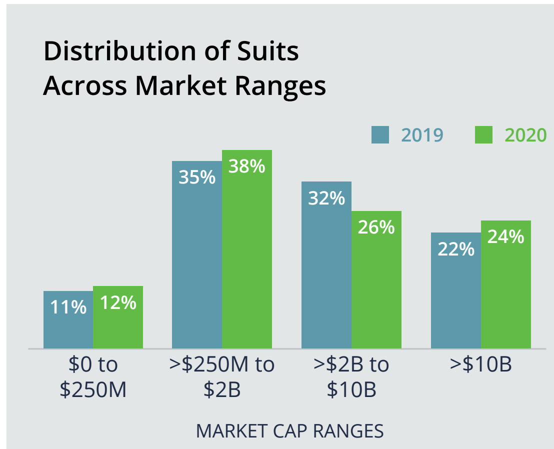
- Bayer AG
- BMW
- CapitalOne
- Carnival Cruises
- Citigroup
- Deutsche Bank
- Eastman-Kodak
- HP
- Intel
- JP Morgan
- Las Vegas Sands
- Mohawk Industries
- Norwegian Cruises
- Royal Caribbean
- Six Flags Entertainment
- Southwest Airlines
- Wells Fargo

The chart on the right reveals a shift upwards in the number of suits filed against companies with a longer public company shelf life. On a year-to-year basis, they carry the largest share of securities class action suits.



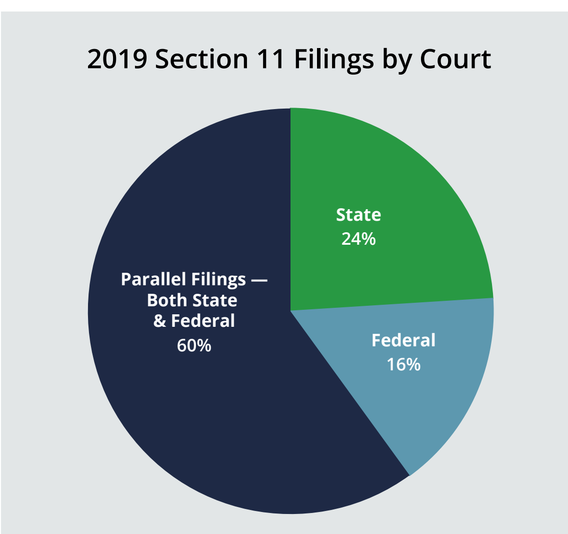
Redistribution of Cases Based on Company Size

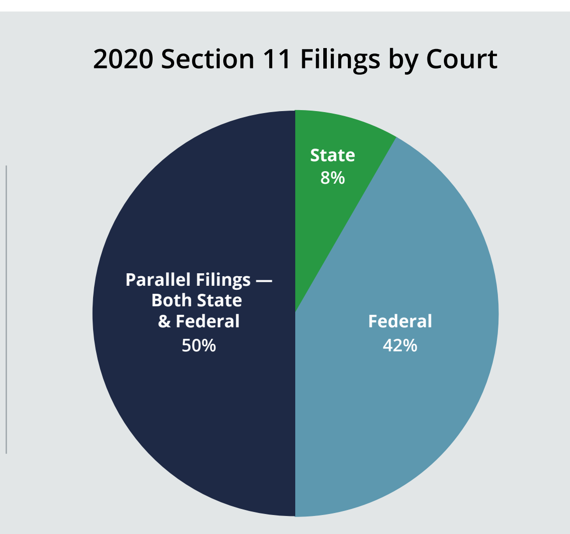
In 2020 there was a drop in suits filed against mid-cap companies with a market value of >$2B to $10B. The reason for the drop? Markedly fewer Section 11 cases. In 2019, 32% of the suits against companies in that market cap range were sued for a violation of Section 11 versus just 16% in 2020. (For more commentary on Section 11 cases, see the next section).



Filings Against New Public Companies (Section 11 Suits)

Filings in 2019 stood out for the large number of Section 11 suits filed in the **post-*Cyan* period**—the year after the US Supreme Court had sanctioned filings of Section 11 cases in state courts. In 2019 there were 75 cases filed as compared to 36 cases filed in 2020—a 52% drop in Section 11 filings. Note that the number of filings also went up in 2019 because of the phenomenon of companies being sued in both federal and state courts for the same Section 11 allegations (i.e., "parallel filings"). As the charts below show, this phenomenon of parallel filings dropped in 2020:





The two pie charts above also show the percentage of Section 11 cases that were filed only in state courts versus cases filed only in federal court. It is notable that in 2020 state-court only filings have also gone **down** by a significant percentage (from 24% in 2019 to 8% in 2020), while federal court-only filings have gone **up** (from 16% in 2019 to 42% in 2020). We attribute this movement to a decision in **March 2020 by the Delaware Supreme Court in *Sciabacucchi*** where they unanimously held that federal forum provisions are facially valid under Delaware law (aka the "Grundfest Solution"). This permits companies incorporated in Delaware may insert provisions in their charter documents that will allow them to select the federal court as the exclusive forum for Section 11 cases, thus eliminating state courts as a venue for plaintiffs.

A review of the Section 11 cases filed in 2020 found that 12 of the 27 companies sued have exclusive federal forum provisions in their charter documents or bylaws. Of these 12, 11 have been sued only in federal court and one company has been sued only in New York state court. While it is too early to tell how the Delaware decision is truly affecting the trend in filings in state courts, there appear to be signs that momentum is working in the defendants' favor: several California state court cases have recently been dismissed due to the companies' having exclusive federal forum provisions in their charter documents.

For more information on the Delaware decision and what impact it could have on future Section 11 filings, check out the following link in the D&O Notebook: **"Good News for 2021: Section 11 Litigation Should Start to Ease"**.

A Record Year for IPOs

Despite the pandemic, there were a total of 461 companies that went public in 2020. It should be noted that 248 of these companies are operating as specialty purpose acquisition companies, also known as "blank check companies," in which their only focus for an initial 12- to 24-month period will be searching for a company to acquire. Setting those aside, the 213 operating companies that went public in 2020 are traditional companies with prior operating history before going public. This is the highest annual number of IPOs in the last decade.

Section 11-only cases comprised 17% of the total cases filed in 2020. Here is the breakdown of IPO companies sued in 2020:

- 2 went public in 2017
- 6 went public in 2018
- 10 went public in 2019
- 5 went public in 2020

The year 2021 will certainly bring more Section 11 suits against companies that went public in 2020. While the statute of limitation for these registration statement cases is three years, the average time to lawsuit from IPO is 11 months.

Settlement Activity in 2020 Exceeds 10-Year Settlement Numbers

The settlement pace activity in 2020 was steady with a total of 79 settlements for an aggregate of $2.3B in settlement dollars. Total settlement dollars exceeded the 10-year annual average of $2.1B per year (excluding settlements over $1B). While the 2020 average and median did not exceed 2019 average and median settlement amounts, it did exceed the 75th percentile for 2019 and the 10-year measurements (as set forth below).

2020 Settlements Compared to 2019 and 10-Year Averages

Settlements*	10 Years (2011 to 2020)	2019*	2020
Total $	$2.1B	$2.6B	$2.3B
Average	$29M	$37M	$29M
Median	$8M	$14M	$10M
75th Percentile	$20M	$21M	$23M

**Excluding settlements $1B and over.*

Top 10 settlements in 2020 amounted to approximately $1.4B of the total settlement dollars (62%). The 10 settlements are listed below:

Top 10 Settlements in 2020

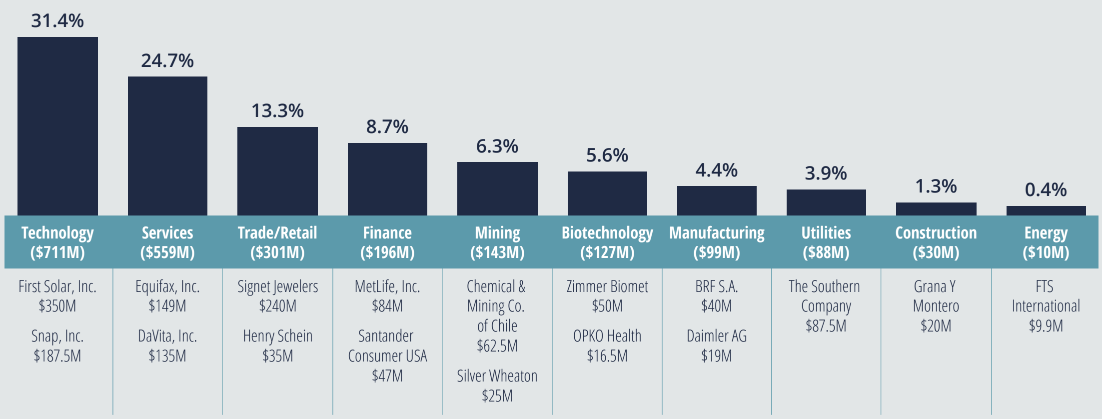
Entity	Suit Year	Industry	Amount	Case Matter
First Solar, Inc.	2012	Technology	$350M	Manufacturing flaws and warranty claims
Signet Jewelers Limited	2016	Retail	$240M	Sexual harassment and assault claims
Snap, Inc.	2017	Technology	$187.5M	User metrics and revenue growth
Equifax, Inc.	2017	Services	$149M	Cyberattack of consumer data
DaVita Inc.	2017	Services	$135M	Health insurance scheme
The Southern Company	2017	Utilities	$87.5M	Production delays and cost overruns
MetLife, Inc.	2012	Financial	$84M	Accounting issues
SeaWorld Entertainment, Inc.	2014	Services	$65M	Mistreatment of orca whales
Chemical & Mining Co. of Chile	2015	Mining	$62.5M	Bribery and tax evasion scheme
Community Health Systems, Inc.	2011	Services	$53M	Accounting fraud

The settlement by Signet Jewelers Limited is noteworthy for being the largest settlement related to the #MeToo movement that began in 2017. The plaintiffs in Signet Jewelers alleged disclosure issues related to the company's having fostered a pervasive culture of sexual harassment against its female employees.

Which Industries Settled for the Most Dollars?

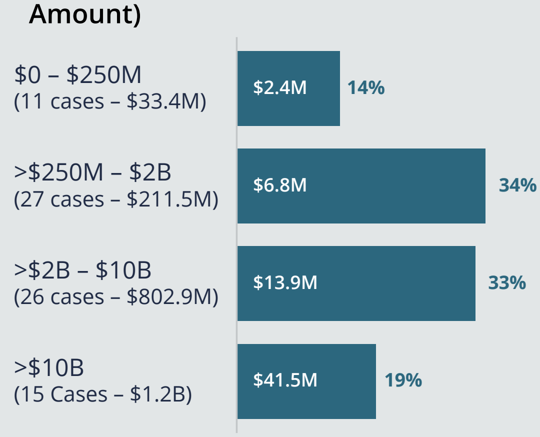
In 2020, the technology sector led in settlement dollars, moving up into the first place slot while the finance sector dropped down to fourth after leading in settlement dollars in 2018 and 2019. The following chart breaks down total settlement dollars per industry and the largest payouts per industry in 2020.

Percentage of Settlement Dollars by Industry (Total Settlement $ per Industry) and Largest Settlements per Industry



The settlements by market cap range in 2020 are set forth below. As expected, the majority of the settlements by number were made by small-to mid-cap companies for a combined settlement amount of $1B.

Distribution of Settlements by Market Cap (with Median Settlement Amount)



Settlement Activity and IPOs

2020 was also notable for being a busy year for state court settlements of Section 11 IPO cases. Seven of the top 10 IPO case settlements in 2020 involved state courts. The large number of cases filed in state courts in 2018 and 2019 are now reaching resolution. The following are the top 10 IPO cases that settled in 2020.

Top 10 Settlements — IPO/Section 11 Cases

Entity	Suit Year	Industry	Amount
Snap, Inc. (Federal & State – CA)	2017	Technology	$187.5M
Santander Consumer USA	2014	Financial	$47M
ADT, Inc. (State – FL)	2018	Services	$30M
Impinj, Inc. (Federal & State – NY)	2018	Technology	$20M
Camping World Holdings, Inc.	2018	Trade/Retail	$12.5M
BrightView Holdings (State – PA)	2019	Services	$11.5M
Sea Limited (State – NY)	2018	Technology	$10.8M
FTS International, Inc.	2019	Energy	$9.9M
Menlo Therapeutics (State – CA)	2018	Biotech	$9.5M
Endochoice Holdings (State – GA)	2016	Biotech	$8.5M

More settlements are coming in 2021 as there are approximately 100 active cases with Section 11 allegations filed against IPO companies working towards closure.

State of the Market and What to Expect in 2021

With approximately 600 securities class action cases yet to be resolved and limited capacity in the D&O insurance market, 2021 will be another challenging year for public companies seeking to obtain D&O insurance coverage. While 2020 was a year of upheaval for the world in general, securities class action activity continued to move apace, and there is no expectation that this pace will abruptly slow in 2021, especially since 2020 was a record year for IPOs filed. Adding another layer of risk and complexity to the world of D&O insurance are the 248 IPOs in 2020 for specialty purpose acquisition companies (SPACs) along with the 105 SPAC IPOs in 2018 and 2019. The plaintiffs' bar will be paying close attention to this sector—especially as these SPACs acquire private companies and, in doing so, create a whole new class of newly public companies subject to all the disclosure requirements of federal securities laws.

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