



INSIGHTS



D&O NOTEBOOK | AS OF JUNE 30, 2020

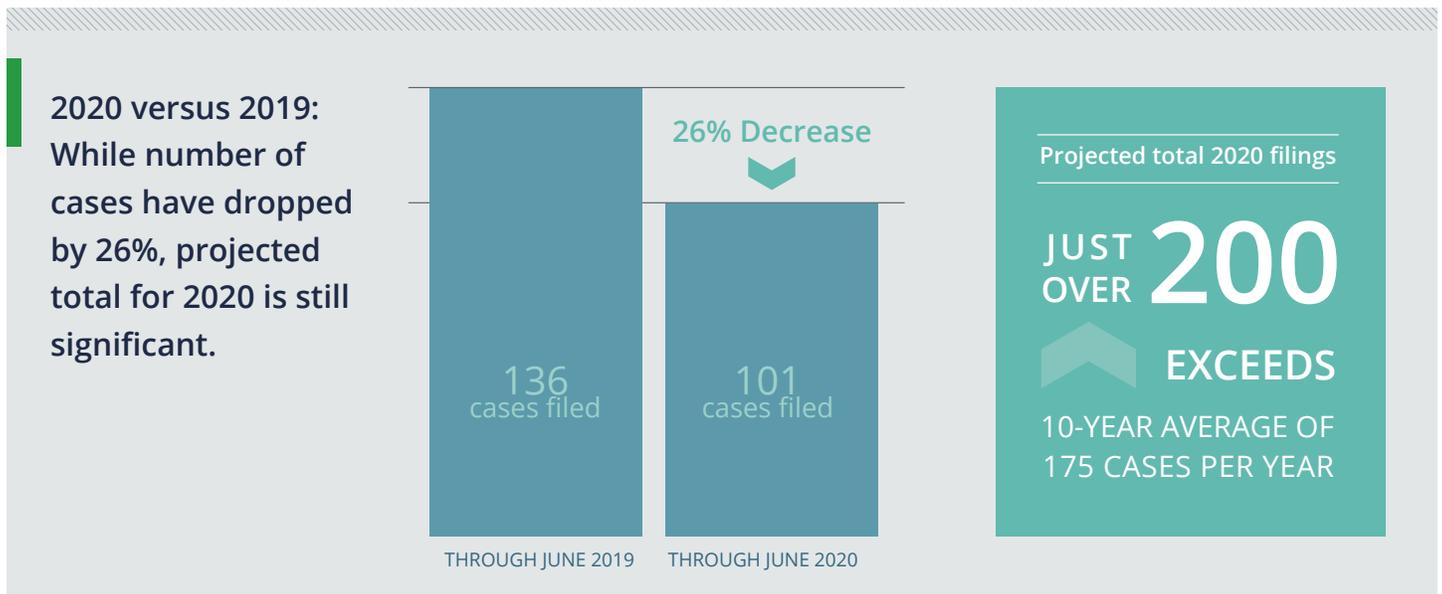
2020 Mid-Year DataBox Report

Drop in Securities Class Action Filings Amidst a Hardening Insurance Market

Executive Summary

The D&O Insurance market continues to be a challenged one, with rates and self-insured retentions continuing to increase on average. Filing rates are down, but carriers continue to suffer losses from recent large settlements. Carriers are also worried about cases in the pipeline that they believe will also result in large settlements.

A total of 101 cases were filed in the first half of 2020—a 26% drop in cases as compared to 2019 for the same period. With an average of 16.8 cases filed per month, the projected total filings for 2020 may be just over 200 cases. This number of filings would still exceed the 10-year average of 175 cases per year.



Read on for details about the types of filings, who is getting sued, and the state of the D&O market.

What is Driving the Drop in Activity?

Section 11 Claims

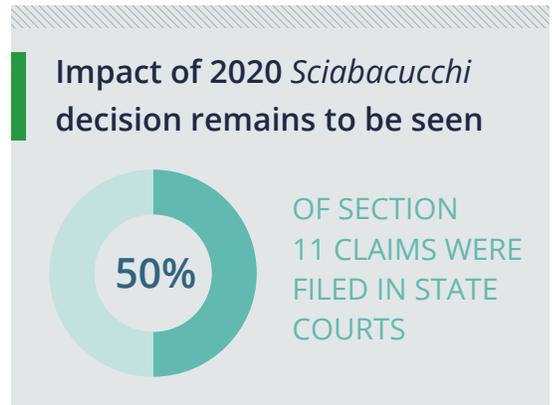
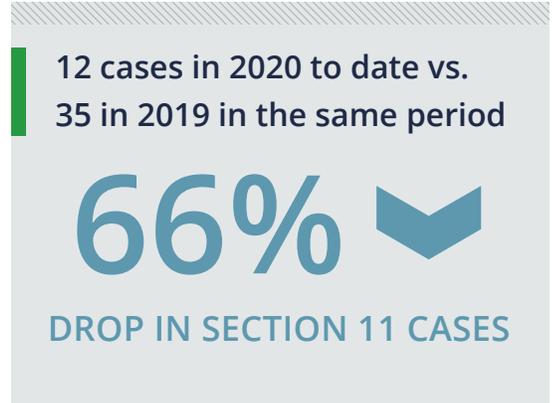
In 2019, Section 11 claims fueled the filing activity, which led to a 10-year high of 268 cases filed. This was largely due to the impact of the *Cyan* Supreme Court decision in March 2018, which led to a 79% increase in Section 11 claims from 2018 to 2019. In 2020 to date, there has been a 66% drop in Section 11 cases as compared to the same period in 2019 (12 cases vs. 35 cases). The rate of filings per month for Section 11 claims has dropped down to 2 cases per month in 2020 through June as compared to 6.25 cases per month in 2019.

We have yet to see the impact that the March 2020 *Sciabacucchi* decision issued by the Delaware Supreme Court might have on the number of cases being filed in state courts. This ruling held that federal choice of forum provisions in charter documents are *facially valid*. Companies that adopt this provision should be able to avoid having to litigate Section 11 claims in state courts.

Notwithstanding the ruling, the proportion of cases being filed in state court vs. federal court has not yet changed significantly. (50% of Section 11 claims were filed in state courts in 2020 to date vs. 51% in 2019).

The COVID-19 Pandemic

While filing activity got off to a slow start in January 2020, filings peaked in March 2020 at 26 cases and has declined by 38% in June 2020 to 16 cases filed. As the world economy slowed down, so did filings. This is in contrast to the steady number of filings that we saw in the first half of 2019, where over 20 cases were filed consistently each month from January to June. The chart below illustrates the dramatic differences in activity between 2019 and 2020 for the same period.



Dramatic drop in filings from March-May as global economy slows due to COVID-19
38% decline in cases compared to 2019 (Jan-Jun)



An event of such enormous import will obviously have impacted companies and their stock prices. A total of 14 companies from various industry sectors are being sued based on allegations related to the COVID-19 pandemic:

Entity Sued In Relation to COVID-19*	Industry Sector	Allegations
Carnival Corporation	Transportation	Mishandling of response to initial outbreak
Chembio Diagnostics, Inc.	Biotechnology	Accuracy and performance issues of antibody test
Co-Diagnostics, Inc.	Technology	Misleading statements about accuracy of diagnostic test
Colony Capital, Inc.	Financial	Unsustainable level of debt held in hotel and healthcare related properties
Elanco Animal Health, Inc.	Biotechnology	Inventory issues blamed on pandemic
Forescout Technologies, Inc.	Technology	Misleading statements about pandemic's impact on revenue growth
iAnthus Capital Holdings, Inc.	Financial	Failure to make a debt payment blamed on pandemic
Inovio Pharmaceuticals, Inc.	Biotechnology	Misleading claim that a vaccine had been developed in three hours
Norwegian Cruise Line Holdings Ltd.	Transportation	Mishandling of response to initial outbreak
Phoenix Tree Holdings Ltd	Financial	IPO exposure - China-based operator of apartments.
SCWorx Corp	Biotechnology	Inability to sell millions of rapid testings kits
Sorrento Therapeutics, Inc.	Biotechnology	Claim of COVID-19 treatment demonstrating 100% inhibition of infection
Wells Fargo & Company	Financial	Mishandling of Payment Protection Program applications
Zoom Video Communications, Inc.	Technology	IPO exposure - data privacy and security measures

Not surprisingly, suits against biotechnology companies led the pack for a total of five cases, followed by suits against four financial companies, three technology companies and two transportation companies.

* Excluding lawsuit against United State Oil Fund L.P. - an exchanged-traded fund

Who's Getting Sued? Activity by Industry, Size, and Location

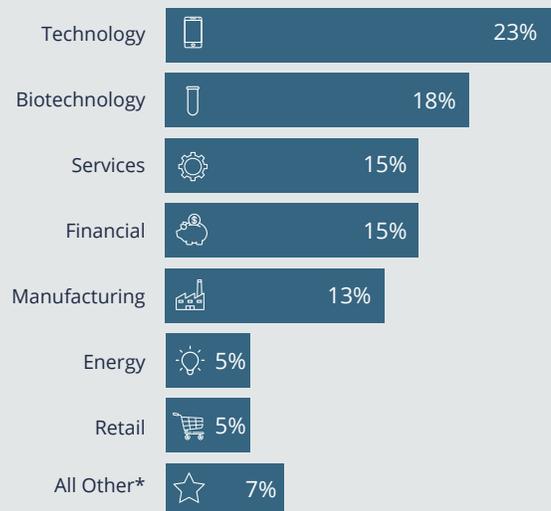
Gap Closes Between Tech and Biotech

Currently the gap between filings against technology companies and biotechnology companies is a mere 5% (23% and 18%, respectively). For 2019 cases filed, the percentage gap between these two industries was much wider at 19% (35% and 16%, for technology and biotechnology, respectively).

A couple of factors have pushed up the filings against biotechnology companies:

1. Cases involving cannabis companies
2. COVID-19 event-related cases

Cases Filed By Industry in First Half of 2020



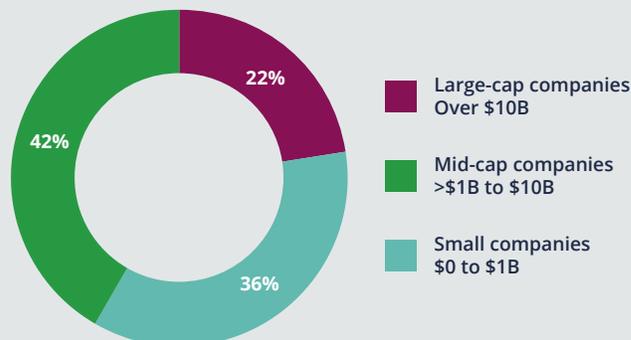
*All Other - Construction, Mining, and Transportation

Companies of All Sizes Getting Hit

This year, 78% of the filings have been against small-cap and mid-cap companies, which is slightly less than the 81% of companies of similar size sued through June 2019. By the end of 2019, the percentage had dropped from 81% to 68%, whereas filings against large-cap companies bumped up in the second half of 2019 from 19% to 32%.

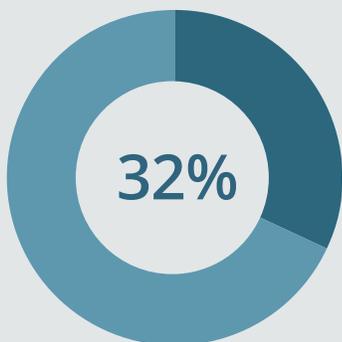
In 2020, filings against large-cap companies are remaining steady at approximately 3.9 cases per month and is exceeding the 10-year average of 18%. Through June 2020, 13% of the companies sued were S&P 500 companies.

78% of Filings Are Against Small- and Mid-Cap Companies



Foreign Filings Are Up Compared to 2019

There continues to be a steady stream of cases filed against foreign companies that are headquartered in the following countries:



FOREIGN COMPANIES COMPRISE 32% OF ALL CASES FILED

9 COUNTRIES

- AUSTRALIA
- BRAZIL
- CANADA
- CHINA (16 CASES)
- IRELAND
- ISRAEL
- NORWAY
- SOUTH AFRICA
- UNITED ARAB EMIRATES

Notably, some very large market cap companies located across the globe were sued

BAIDU, INC.
CHINA - \$60B

MYLAN N.V.
UK - \$21B

SASOL LIMITED
S. AFRICA - \$21B

WESTPAC BANKING
AUSTRALIA - \$71B

XP INC.
BRAZIL - \$19B

While Filing Activity Cools Down, Settlement Activity Heats Up

There were 36 settlements totaling \$1.4B in cash in the first half of 2020. Of these, 99% of the settlement dollars went towards 15 settlements that were for \$20M and over. A settlement of particular note was for a securities class action that included #MeToo-related allegations involving a company-wide culture of sexual harassment that was reached by Signet Jewelers for \$240M, of which approximately \$205M was to be funded by D&O insurance. Six of the cases that settled for \$20M and over had been in litigation for over five to eight years—far exceeding the average time to settle of 3.1 years.



36 SETTLEMENTS
SO FAR IN 2020
TOTALING
\$1.4B

Top 10 Settlements

Entity	Suit Year	Industry	Amount
First Solar, Inc.	2012	Technology	\$350M
Signet Jewelers Limited	2016	Retail	\$240M
Snap, Inc. (Federal & State)	2017	Technology	\$187.5M
Equifax, Inc.	2017	Services	\$149M
MetLife, Inc.	2012	Financial	\$84M
SeaWorld Entertainment, Inc.	2014	Services	\$65M
Community Health Systems, Inc.	2011	Services	\$53M
Zimmer Biomet Holdings, Inc.	2016	Biotech	\$50M
HD Supply Holdings, Inc.	2017	Services	\$50M
Silver Wheaton Corp.	2015	Mining	\$41.5M

Will 2020 Settlement Amounts Surpass 10-Year Average?

With a 10-year average of \$2.2B in settlements per year (excluding settlements \$1B and over), total settlement dollars in the first half of 2020 have surpassed the halfway mark of this 10-year average at 64%. Will total settlement dollars exceed the 10-year average in 2020 as it has for the past two years in 2018 for \$2.4B and in 2019 for \$2.6B? The current average settlement is \$42M with a median settlement of \$12.3M – amounts that will undoubtedly come down as more settlements in smaller cases are reached in the second half of 2020. However, if large settlements continue to come in at a steady pace, there is a high probability that the average and median could be comparable to the 10-year highs reached in 2019 at \$37M and \$14M, respectively.

Call and Response: The D&O Market Remains Hard

In the last several years, records have been broken for filing activity and settlement dollars paid by carriers. The unfortunate consequence is a hardening of the D&O insurance market: premiums and self-insured retentions (like a deductible) have increased dramatically as insurers have cut back on the capacity they are willing to offer companies. The excerpt to the right on the impact of a hardening market from a Harvard Law School Forum of Corporate Governance blog post by Carl E. Metzger and Brian H. Mukherjee of Goodwin Procter LLP illustrates this reality even further:¹

Our data indicates that filings have increased over the last five years from 2015 to 2019 by 47% with open cases increasing by 63% in that same time period. **As of mid-year 2020, there is a backlog of approximately 600 cases that have yet to reach a conclusion**—a significant concern for the D&O insurers who have responded accordingly to ameliorate the impact of current, ongoing defense costs and a considerable amount of forthcoming settlement dollars to be paid out.

“WHAT IS THE IMPACT OF THE HARDENING MARKET?”

Not surprisingly, insureds are seeing markedly increased premiums, in some cases double (or even higher) than previous premiums, even for those insureds whose risk profile has not changed. Those premium increases are also being transmitted in large part to the excess layers of insurance, with some insurers closest to the first layer of coverage (referred to as the primary layer) seeking almost as much in premium as the primary layer is receiving. Insurers in some cases are also increasing policy deductibles (the point at which an insurer’s payment obligation is triggered). For example, a \$2.5 million deductible for securities claims might be increased to \$5 million or even higher. For companies going through the IPO process, deductibles may set at \$10 million or higher. In some cases, insurers have lowered the amount of limits being offered, for example reducing a \$10 million primary layer down to \$5 million.

Finally, the current hardening market may mean that certain insurers simply decide not to renew their policies, or underwrite new ones, leading to a more limited pool of insurers for an insured to access. On a positive note, it does not appear that insurers are narrowing the scope of coverage offered under their policies, although some insurers may be less willing to grant coverage improvements than in prior years.”¹

¹ “Challenging Times: The Hardening D&O Insurance Market” dated 1/29/20 by Carle E. Metzger and Brian H. Mukherjee, Goodwin Procter LLP

Cases filed and growth in open cases



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