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## DATABOX™ 2022 YEAR-END REPORT

*Woodruff Sawyer's D&O DataBox™ Year-End 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.*

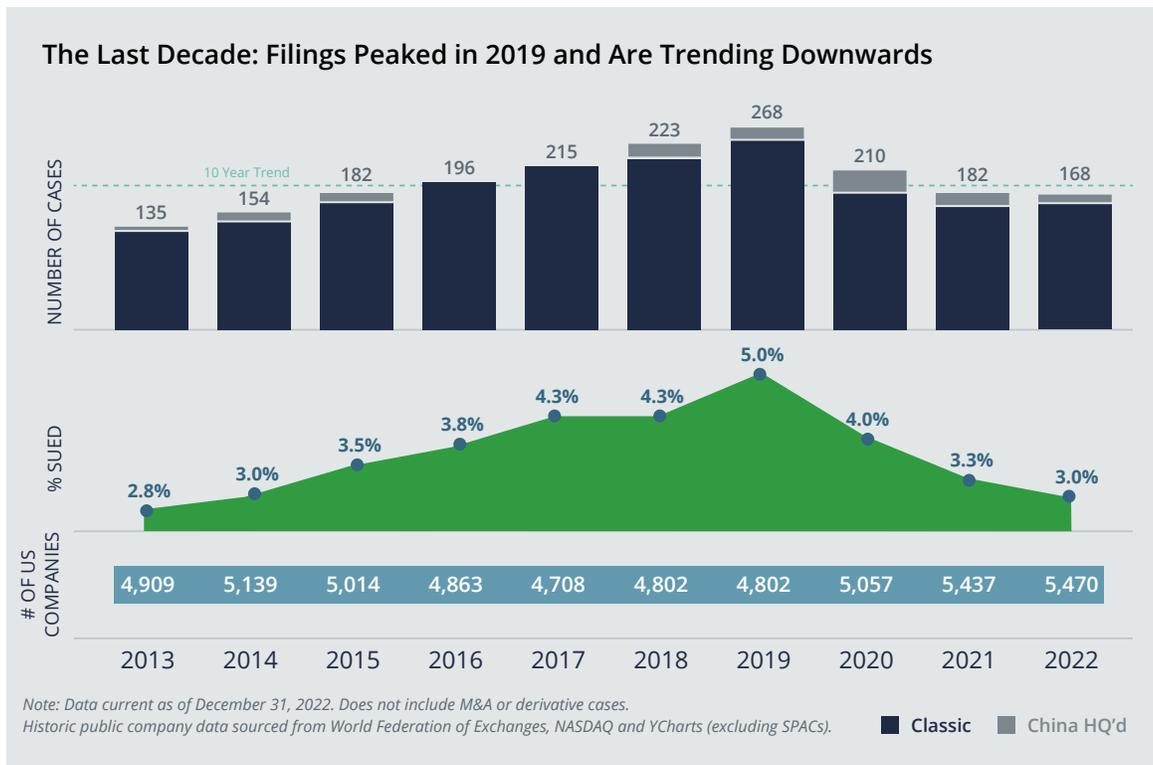
*This edition of the DataBox Year-End Report reviews 2022 results for securities class action filings and settlements and provides insights into 2023.*

# Securities Class Actions Lawsuits in 2022: The Downward Trend Continues

In 2022, 168 securities class action lawsuits (SCA) were filed, representing an 8% decrease from 2021 filings and a 37% decrease from the 268 cases filed in 2019.

After hitting a 10-year high in 2019, SCA filings began trending downwards—but it is not a given that this decrease will continue in any significant way in 2023.

It remains unclear what the impact of current turbulent economic conditions will be for SCA filings in 2023. On one hand, companies across the board will have muted valuations, making it harder for plaintiffs to show that a particular disclosure is the cause of a stock decline. On the other hand, economic turmoil in 2023 could cause companies to miss expectations, keeping filings on an overall steady rate.



In 2022, 49% of the SCA filings consisted of the following matters (as compared to 45% in 2021):

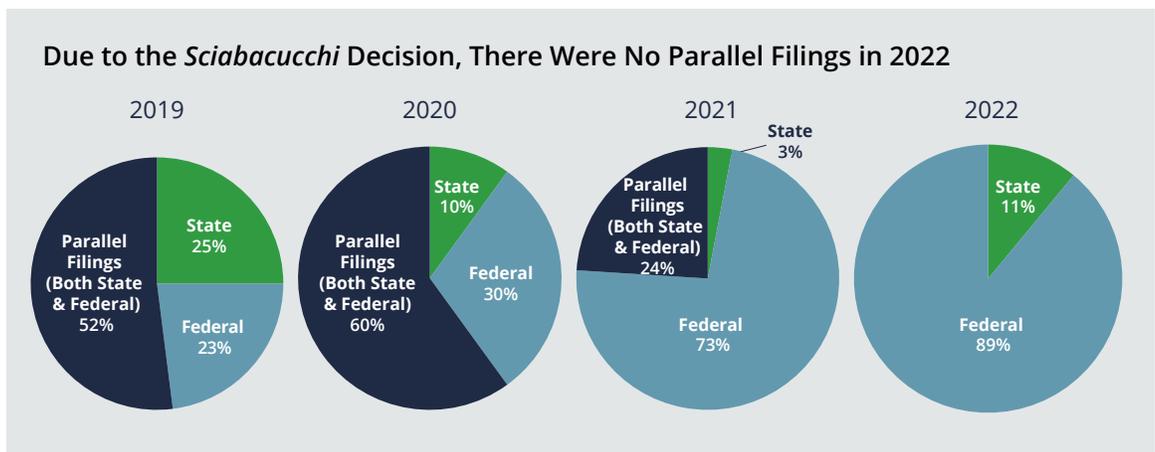
- 21% – Section 11 claims against IPO companies
- 16% – Suits against de-SPACs
- 13% – Suits involving COVID-19 matters

## IPO Companies: Filing Frequency is Up and Down

Filing frequency continued to go down in one area for IPO companies—by venue. Over the past two years, there has been a notable shift in filings against IPO companies that has led to a dramatic drop in the venues in which they were being sued. In 2019, 77% of the Section 11 filings against IPO companies were in state courts, with 52% of them consisting of suits being filed in both federal and state courts for similar allegations (i.e., parallel filings). In 2022, state court filings were down to 11%, and there were no parallel filings.

This decrease is due to companies including federal forum provisions in their charter documents prior to going public. Such provisions are possible as a result of the [Sciabacucchi decision issued by the Delaware Supreme Court in March 2020](#) that validated the insertion of such provisions in charter documents.

The charts below show the profound impact of the *Sciabacucchi* decision on which forum IPO companies are being sued.



The lack of parallel filings means that IPO companies are no longer fighting a two-front war, which, of course, means they are saving money on defense costs.

However, while the drop in the number of venues for filing has impacted the total number of annual filings, the frequency of filings against IPO issuers did not go down.



What should we expect in 2023? We are predicting the opposite—a drop in the frequency of filings. To understand this decrease, consider that a review of the past decade of Section 11 filings against IPO companies indicates that the majority of the suits are filed in the first year that a company goes public, as illustrated below:

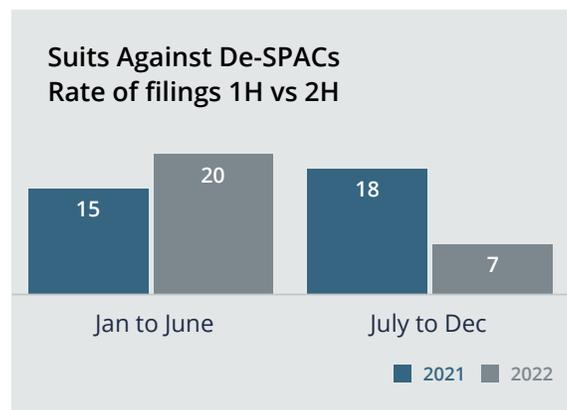


The average time to filing from IPO was 11.4 months. As shown above, the rate of filings drops after 12 months but does not go to zero, so we still expect to see a few more companies that went public in 2020 and 2021 to be sued in 2023. As of December 31, 2022, no companies that went public in 2022 had been sued. If the past is a prelude to the future, this means that the IPO class of 2022 will have a much lower frequency rate than most.

Consider too that, excluding SPAC IPOs, 2022 had the lowest rate of IPOs since 2009, with only 88 companies going public compared to a high of 400 in 2021. Moreover, the IPO market is not expected to be as robust as it has been in the past several years due to concerns about the economic outlook for 2023 that includes continued inflation and a looming recession. Caution in the market also means the IPOs that do take place will be the stronger ones. These factors will impact the rate of Section 11 filings against IPO companies for the foreseeable future. The inevitable result will be fewer IPO company Section 11 filings in 2023.

### De-SPACs: A Roller Coaster Ride for 2022

There were 27 suits filed against de-SPACs in 2022, as compared to 33 suits filed in 2021—an 18% drop. While the rate of filings in 2021 remained steady over the year, 2022 filings saw a large decrease (65%) from the first half of 2022 to the second half of 2022, as illustrated on the right.



This is not a surprising turn of events because the number of companies de-SPACing also fell in that period. Concerned about the huge number of SPACs and impending de-SPAC mergers at the end of 2021, the SEC released [proposed rules for SPACs](#) in April 2022. The proposed rules were designed to require enhanced disclosures and align de-SPAC transactions with traditional IPOs, creating the potential for greater liability for both the SPAC and the acquired company.

The SEC's involvement, coupled with the economic headwinds of 2022, had a dampening effect on the SPAC market, with far fewer SPAC IPOs (86 in 2022 versus 613 in 2021). There was also a record number of liquidations of 142 SPACs (as compared to just six in the previous three years).

SPAC merger activity continued despite these setbacks, albeit at a much lower rate than anticipated, with 102 completed de-SPAC mergers and another 151 impending business combinations at the end of 2022. The events of 2022 for SPACs may have had the effect of weeding out more problematic SPACs and strengthening the de-SPAC merger process. This year will be a bellwether year for testing the viability of de-SPACs as ongoing concerns and the robustness of their corporate governance.

As a result of the deceleration in SPAC and de-SPAC activity, we expect the rate of filings may decrease again in 2023 for de-SPAC lawsuits in which the complaint connects the allegations directly with it being a de-SPAC company. Indeed, we have seen more recently a trend of suits in which companies that went public via a de-SPAC process are being sued with no mention of them being a de-SPAC. In other words, they are being viewed as a traditional new public company with traditional new public company problems. Two companies have been sued in this manner: Sema4 Holdings Corp. and Tattooed Chef, Inc.—both have been public companies for less than five years. Considering the relatively few years that de-SPACs are reporting as a public company, the management of these companies will be crucial to limiting their exposure to SCA suits.

### [SPAC Litigation by the Numbers: Surprisingly Positive Trends in 2022 >>](#)

[Get SPAC litigation data for 2022 and learn the reasons for the decline in securities class actions.](#)

### [SPAC Notebook >>](#)

[Stay up to date on the latest developments in SPAC market trends, regulations, and litigation, and learn ways SPAC teams can mitigate risk.](#)

## COVID-19: Cases Remained Steady in 2022

In 2022, there were 21 suits in which COVID-19 was referenced. This bringing the total count to 61 suits filed since 2020—an average of 20.3 per year. These suits were related to the following matters:

- Issues with the development or production of COVID-19 treatments or tests.
- Business being directly impacted by an outbreak/surge of the virus.
- Vulnerabilities such as post-merger integration, staffing, sales, inventory, and/or product issues that were, in part, caused by or occurred during the pandemic.

There have also been four settlements in 2022 by biotechnology companies that involved issues with COVID-19 vaccines or tests. They are:

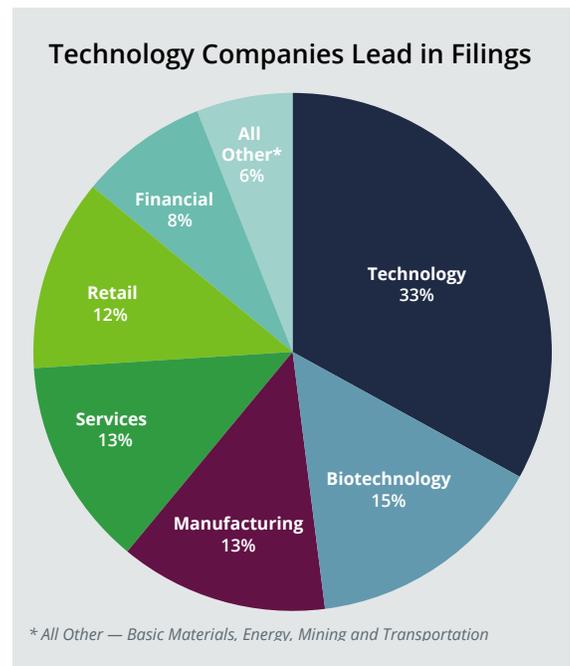
- SCWorx: \$2.7 million
- Chembio Diagnostics: \$8.1 million
- Vaxart: \$12 million
- Inovio Pharmaceuticals: \$30 million

These four companies were directly involved in developing COVID-19 vaccines or tests. Whether suits filed against companies in other industries result in settlements will depend upon how COVID-19 pandemic issues directly correlated with a stock price decline.

As we move further away from the height of the pandemic, COVID-19 litigation will likely relate to allegations in which the pandemic's after effects concerning supply chain disruptions impact production, sales, and revenues. Allegations in such suits could intertwine with global macroeconomic issues and geopolitical events. Suffice it to say there will be a shift in how these suits are categorized or viewed for trending purposes. These types of cases should likely no longer be labeled as COVID-19-type suits.

## Filings by Industry

The chart on the right shows a breakdown of suits filed in 2022 by industry. We saw the most movement in the biotechnology and trade/retail industries.



## A Five-Year Lookback from 2018 to 2022:

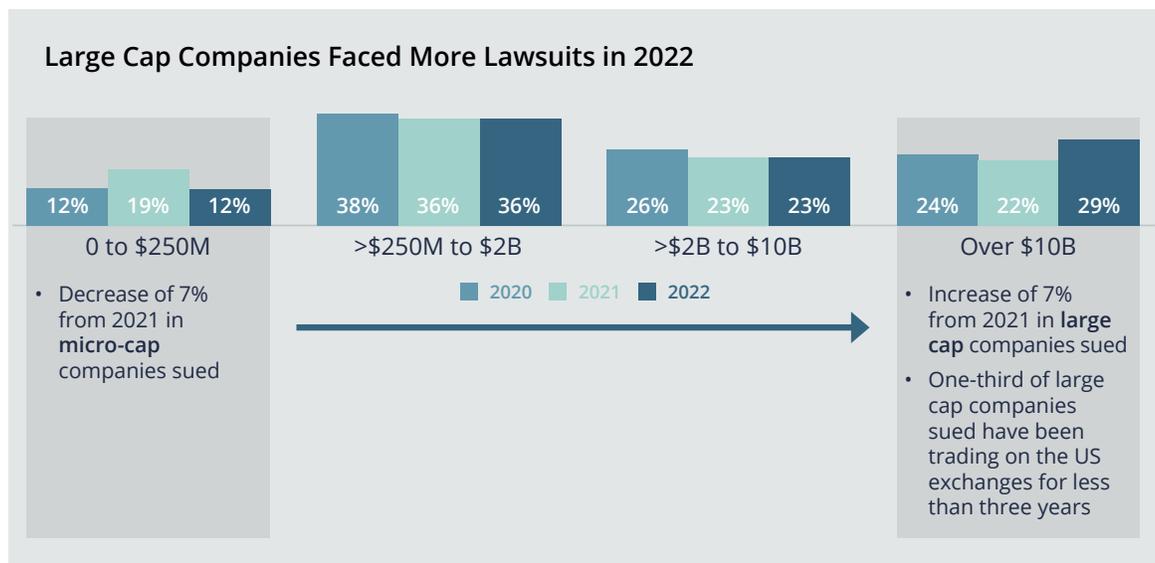
**Steady:** In 2022, technology remained steady at 33% as the usual leader in industry filings (five-year average is 31%).

**Decrease:** Biotechnology dropped significantly in 2022 to 15% from a five-year high in 2021 of 25% (five-year average is 19%).

**Increase:** Trade/Retail jumped back up to 12% after a drop down to 4% and 5% in 2020 and 2021, respectively (five-year average is 8%).

## Filings by Size

In 2022, there was a notable shift in filings against companies at the low and high end of valuation, as seen below in a review of filings over the last three years



While there was little to no change in suits filed against the small- to mid-cap companies, suits against micro-cap companies went down 7%, and suits against large-cap companies went up a corresponding 7% in 2022. And while it has been a typically held view that large-cap companies are well-established companies, the formerly robust IPO market has had an impact on filings against large-cap companies by making up one-third of the suits filed in the higher range.

Some of the large-cap, brand name companies that were sued in 2022 include:

- Abbot Laboratories
- Amazon.com
- Carvana
- PayPal
- Rivian
- Twitter
- Warner Bros Discovery
- Wells Fargo
- Unilever PLC

## Filings by Location

SCAs against companies headquartered outside of the US decreased in 2022, with 21% filed compared to 25% in 2021. The following is a comparison of 2021 versus 2022 and the location of the foreign companies sued in 2022.

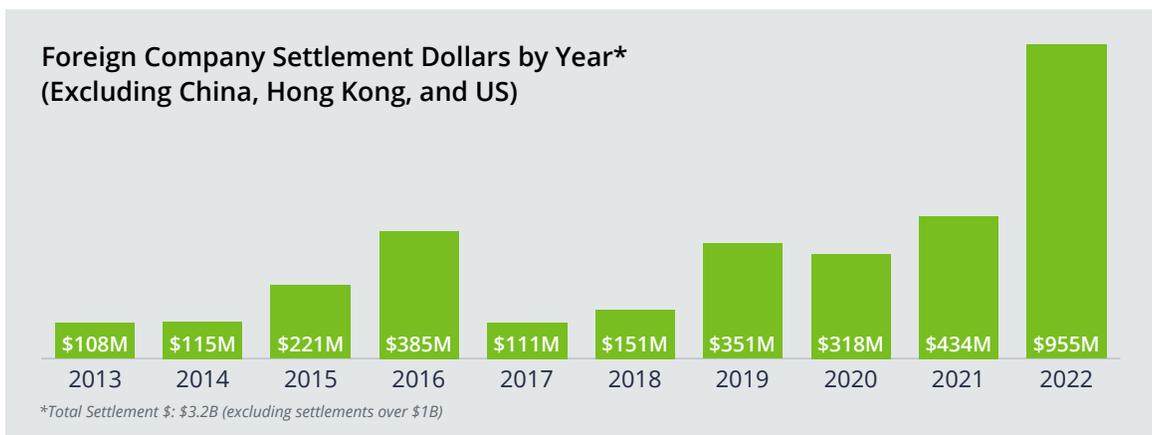


**13 Foreign Locations**

Australia	Israel
Bermuda	Singapore
Canada	South Korea
China	Sweden
Germany	Switzerland
India	United Kingdom
Ireland	

We have seen a decline in IPOs by Chinese companies over the past three years, which is likely due to increased scrutiny in recent years by both US and Chinese regulatory agencies of Chinese companies trading on the US exchanges. This decline in filings against Chinese companies was particularly notable in 2022. Despite a drop in filings, the rate of filings against foreign companies located elsewhere went up in 2022. Excluding Chinese companies, a steady rate of filings against foreign companies over the past decade has resulted in a 10-year average of 15% of SCAs filed annually.

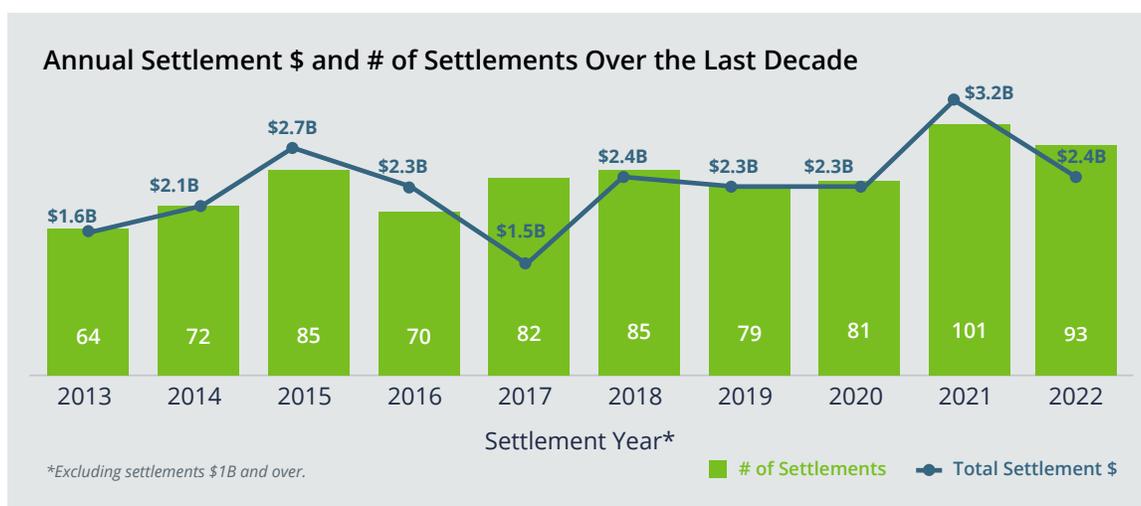
In addition, settlement activity has remained brisk. Below are settlement dollars by foreign companies (excluding China) that reached a 10-year high in 2022:



There are 74 open cases yet to be resolved against foreign companies. With a steady rate of annual filings and settlement dollars in the past decade of \$3.2 billion (including China at \$3.9 billion). This area poses significant risk for Directors and Officers (D&O) insurance carriers. The performance of foreign-based companies will continue to have an impact on D&O pricing.

## Settlements: Down in Total Dollars, but Up in Issuer Settlement Amounts

There were 92 settlements totaling \$2.4 billion in 2022, which is slightly above the 10-year average of \$2.3 billion. The following chart shows the total settlement dollars over the last decade.



### Distribution of Settlements

While 2022 saw a drop in settlement dollars compared to the 10-year high of \$3.2 billion, the distribution of settlement dollars indicates that the cost to settle each claim increased in 2022 compared to 2021.



**Distribution of Settlements 2021 vs. 2022**

Settlement Range	2021	2022
<\$20M	73%	66%
\$20M and over	27%	34%

A **7 percentage-point** increase in **2022** for settlements \$20M and over

Despite a 25% drop in settlement dollars from 2021 to 2022, the 2022 median exceeded the 2021 median—reflecting the higher percentage of settlements of \$20 million and greater. The 2022 median settlement amount also exceeded the average of the 10-year median, as illustrated on the right.

Average Settlement Amounts 2021 vs. 2022			
	10 Years* (2013–2022)	2021	2022
<b>Settlement \$</b>	\$23B	\$3.2B	\$2.4B
<b>Average</b>	\$29M	\$32M	\$26M
<b>Median</b>	\$9M	\$11M	\$13M
<b>75th %</b>	\$24M	\$27M	\$24M

\*Excluding settlements \$1B and over.

Here are the top 10 settlements of 2022:

Top 10 Settlements in 2022				
Entity	Suit Year	Industry	Cash Settlement Amount	Case Notes
<b>Teva Pharmaceutical Industries Ltd.</b>	2016	Biotechnology	\$420M	Price-fixing and collusion inter-related with a large acquisition
<b>Blackberry Limited</b>	2013	Technology	\$165M	Misrepresentation of revenue growth that led to write down of \$1 billion of unsold devices and layoff of 40% of workforce
<b>McKesson Corp.</b>	2018	Trade/Retail	\$141M	Price-fixing and collusion
<b>Walgreens Boots Alliance Inc.</b>	2015	Trade/Retail	\$105M	Misrepresentation of revenue growth pertaining to merger
<b>Newell Brands Inc. (State Court - NY)</b>	2018	Manufacturing	\$102.5M	Misrepresentation of revenue growth in offering documents when acquiring Jarden Corp. (Section 11 claim)
<b>Grupo Televisa S.A.B.</b>	2018	Technology	\$95M	Bribery scheme to obtain FIFA broadcasting rights
<b>Nielsen Holdings plc</b>	2018	Service	\$73M	Misrepresentation of revenue growth related to EU data privacy laws
<b>Mallinckrodt plc</b>	2017	Biotechnology	\$65.75M	Violation of antitrust laws
<b>Bank OZK</b>	2018	Financial	\$45M	Misrepresentation of ability to assess credit risks
<b>Chicago Bridge &amp; Iron Co.</b>	2017	Construction	\$44M	Post-acquisition accounting issues that led to a \$2 billion claim being filed

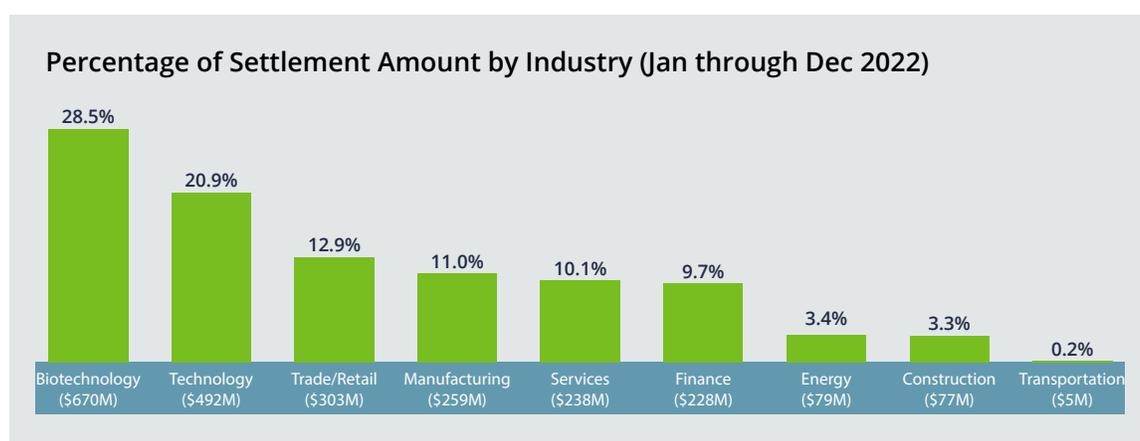
One item of note about the top 10 settlements concerns a mergers and acquisitions (M&A) transaction. The settlement by Newell Brands Inc. that was reached in New York state court for a Section 11 claim pertained to its acquisition of Jarden Corp. for \$15.3 billion in April 2016. The proceeds of the settlement went to former Jarden Corp. shareholders. While there has been a dramatic decline in Section 11 cases for IPO companies, the emergence of a large settlement in state court based on a Section 11 claim in an M&A transaction begs the question—will there be more of these to come? If a corporation does not have a federal forum provision in its charter documents, M&A activity for such companies can leave them exposed to state court litigation based on a Section 11 claim.

## Settlements by Industry

Nearly two-thirds of the settlement dollars were paid out by companies in the biotechnology, technology, and trade/retail industries (62%). The largest settlements paid out in these top three industry categories were:

Top 3 Industries for Settlement Amount — Largest Payout		
Industry	Company	Settlement Amount
Biotechnology	Teva Pharmaceuticals, Inc.	\$420M
Technology	Blackberry Limited	\$165M
Trade/Retail	McKesson Corporation	\$141M

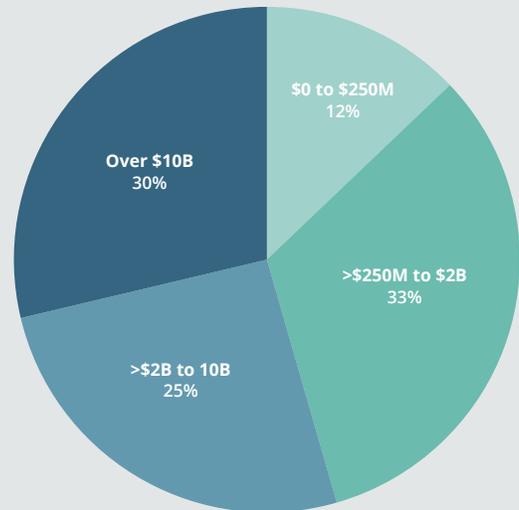
Below is the full breakdown of settlement dollars paid out by industry:



At the end of 2022, there were 463 open cases—a 4% net decrease from open cases in 2021. For the first time since 2016, the number of settlements exceeded dismissals/withdrawals. Coupled with the higher number of larger settlement amounts and the increase in large cap companies being sued in 2022, these movements are worth noting as 2023 unfolds. The chart, as illustrated on the right, is a breakdown of the open cases by market capitalization.

The distribution remains the same as 2021, where 55% of the open cases are against mid to large cap companies.

**Distribution of Open Cases by Market Cap as of 12/31/2022**



## Looking to 2023: Past Results Inform Future Concerns

The outcomes in 2022 were in many ways similar to those in 2021. There was more filing activity against IPO companies, de-SPACs, and companies with pandemic-related issues, and there was also another annual decrease in the overall number of filings. Nearly 100 cases settled in 2022 included high-dollar settlement amounts, pushing the 2022 median up past the 10-year average by 44% (\$10 million versus \$13 million). Moreover, 2022 saw the following developments:

- A significant decrease in filings against biotechnology companies—down 10% from 2021
- An increase in filings against large market cap companies—up 7% from 2021
- Total settlement dollars in 2022 by foreign companies reached a decade-long high of \$955 million.

### **What will 2023 bring?**

Concerns about a further deterioration of the economic outlook, accompanied by high inflation rates and expectations of a recession, will continue to depress IPO activity to some degree, and the natural consequence of fewer IPOs is fewer suits against IPO companies.

On the flip side, any public company that doesn't get ahead of managing the investment community's and shareholders' expectations in the current economic environment will be vulnerable to SCAs.

For further insights on D&O insurance pricing trends and what to expect in 2023, we invite you to take a look at our [D&O Looking Ahead Guide](#).

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