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Inigo 2023 Defense Counsel Survey

The inside story on US Directors & Officers litigation

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Foreword

Last year when we decided to survey the top US securities defense firms on the main trends in D&O litigation and publish the results, we did not expect to get such a positive reaction. Readers told us they found the results enlightening and the survey prompted a fierce debate, both among attorneys and in the wider D&O community.

We learned a huge amount from the study and it was a no-brainer to do it again. This time we went bigger, asking the top 50 securities defense law firms in the US 62 questions (compared to asking the top 25 firms 45 questions last year). We would like to thank those who completed the survey for being so generous with their time.

We identified four key themes from their responses. They have evolved from last year although some concerns remain. They are:

01 **US securities class actions and the Federal Bench – a perfect storm?**

02 **Derivative actions – a more attractive alternative for plaintiffs?**

03 **Bankruptcies – the new driver of securities litigation?**

04 **Has the SEC now taken the gloves off?**

We also consider whether the predictions we made in last year's survey based on us taking defense attorneys' temperature came true. Then we make a handful of new predictions for 2023 based on this year's results, because having gambled once before, why not double down this year? Finally, we reveal which plaintiff's law firms our respondents believe are the best for 2023.
We hope you enjoy the survey, and we welcome your comments.

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Key survey findings

01

The number of cases being dismissed is likely to fall materially due to changes in the judges on the Federal bench.

The rapid appointment of Federal Judges by the Biden administration is tipping the balance of the bench towards a more plaintiff-friendly attitude, our survey respondents argue, and they expect a tougher time in court as a result.

02

Derivative cases continue to pose companies, defense counsel and the insurance industry a serious challenge.

Respondents expect derivative cases to increase in both frequency and severity as case law continues to make this litigation route more attractive to plaintiff firms.

03

Bankruptcies will increase and directors and officers of distressed companies must be very careful in their actions in the lead-up to that to avoid creditor litigation.

Respondents believe that the challenging economic backdrop will lead to an increase in contested bankruptcies, and company directors and officers will increasingly be targeted to access their insurance policies.

04

There is strong evidence that the SEC is starting to be more aggressive in bringing enforcement actions.

There was a clear consensus among respondents that the SEC's promised new, more strident approach is starting to take hold. The new regime is now conducting more investigations and conducting them quicker and more aggressively.

Despite a false start last year, we continue to believe that filings are going to increase from the lows seen during the pandemic. Nine out of ten respondents predict filings will increase.

Defense counsel expect dismissal rates to fall as Biden administration-appointed judges are perceived as being more likely to let plaintiffs have their day in court.

The combination of a lower dismissal rate and higher filings rates could have a very material effect on the overall claims cost in the 2023 year of account. A 10% fall in the dismissal rate coupled with a 5% increase in the filings rate would drive the overall loss cost up by more than 20% relative to 2021.

DeSPAC cases will also continue to be a challenge. Our survey respondents believe that the cases are harder to defend and will likely have a lower dismissal rate than standard 10b5 cases, driven by bad optics and a sense that the judges look unfavourably on the circumstances of the transactions.

Several plaintiff's firms earn the defense bar's respect and there is a recognition among defense attorneys that the top tier firms do a very good job of advocating for their clients.

Defense attorneys also expect to see a material increase in the number of complex and contested bankruptcies. More than two thirds of respondents believed that bankruptcies would increase in 2023, but it is a moot point whether these bankruptcies would lead to more litigation.

Several respondents felt that creditors are being more aggressive in asserting their rights and directors and officers needed to be particularly careful in the decisions they make in the lead-up to a Chapter 11 filing to protect the interest of creditors.

Did our 2022 predictions come true?

When we started out on our first report last year, we decided we wanted to be bold, so we made several predictions for 2022 based on what we were told in the defense counsel survey. It's fair to say we did well, on balance, but some predictions turned out to be very wrong.

1

SCA filings will return to 2019 levels over the course of 2022 and 2023.

Did it come true? NO

Filings remained broadly flat overall in 2022 compared to 2021. But the rate at which new cases were filed accelerated as the year went on and the fourth quarter saw 10% more filings than the same period in 2021. Defense counsel still expect filings to increase in 2023, as this year's survey shows.

2

We will see over $1bn of derivative settlements in 2022 and more new claims filed than the historical average.

Did it come true? YES

Derivative data is always hard to verify, however there were 5 publicly announced large cash settlements in 2022. This follows a trend of rapidly increasing settlement frequency and severity in derivative cases, which we will discuss further in this year's survey.

3

ESG claims will not grow to form a significant new area of litigation over the next 36 months. Rather, it is likely that ESG claims will be included as part of broader allegations.

Did it come true? YES

Although ESG continues to be a hot topic of discussion, we have not seen a rise in specific filings in either securities class actions or derivative cases. ESG allegations have formed part of claims, but we believe these are cases that would have been filed regardless of these allegations. But the landscape continues to evolve.

4

Regulatory investigations are going to be more expensive to defend as the SEC becomes more aggressive and demands admissions of wrongdoing, which could set a benchmark beyond President Biden's term of office.

Did it come true? NO

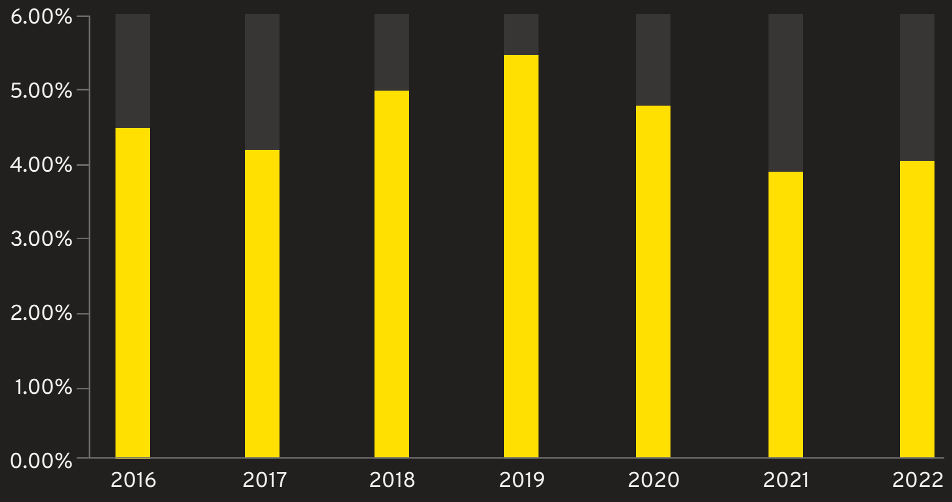
We have undoubtedly seen the SEC be more active, but that did not show in more settlements with admissions of wrongdoing. This may be because the SEC is still forming its strategy and there are cases in the pipeline, which because defense counsel have an obligation to client confidentiality, makes it a sensitive topic for them on which to answer questions. But this year's survey shows that the SEC is taking a more strident approach and have begun to be seen by defense attorneys in their cases. So, we could say that the prediction turned out to be true, but not within the year that we made it.

01

US federal securities class actions and the Federal Bench – a perfect storm?

Securities class actions (SCAs) continue to be the most frequent litigation that defense attorneys see. Last year, we predicted that case filings would rebound. But in the first three quarters of 2022 they ran behind 2021's pace, although the number increased in the fourth quarter. So far in 2023, the number of cases filed is roughly 10% higher than this stage in 2022, which suggests this upward trend is continuing.

SCA FREQUENCY



Nearly eight out of ten (78%) defense attorneys expected to see a "somewhat" or "significantly" higher filing rate this year, because the economic and stock market downturns were likely to create more opportunities for the plaintiff's bar to bring more cases against companies. One respondent says:

"As the equity markets tighten, there will be increasing pressure on companies to show revenue and earnings growth. This will result in companies being more aggressive in [their] financial reporting and will result in more financial restatements, missed earnings projections and asset writedowns."

Several industries came up repeatedly in our survey as being ones in which defense attorneys are expecting to or have already seen an increase in filings. One states:

"I would expect to see [the] retail and transportation sectors hit particularly hard. I would also be concerned about commercial real estate. Anything crypto related is also in play due to current dislocations in that sector. If the economic contagion spreads, no sector will be totally safe."

Commercial real estate (CRE) came up several times in responses, with another attorney writing:

"Commercial real estate is facing extreme distress, due to a double whammy from lower occupancy rates and higher interest rates. Most CRE deals in recent years have been structured based on large amounts of bank money financed at very low rates. Combining the overall softness in leasing with higher interest rates means that refinancing will be impossible for many projects with maturities coming due before 2027, That will make widespread defaults, foreclosures, bankruptcies, and loan losses nearly inevitable."

Technology and life sciences were other industries that were highlighted, because their access to funding has dwindled and companies are laying off large numbers of staff. Companies with weak balance sheets across all industry sectors were also regularly highlighted, but we will cover this in our section on bankruptcies.

One of the survey's key findings was a concern about decisions once they reach the Motion to Dismiss (MTD) ruling. Respondents highlighted the significant shift in the mix of the Federal Bench from Republican-appointed judges to Democrat appointees, which they expect to have an impact on rulings.

So far, 113 judges nominated by the Biden administration have been confirmed. Of these, 87 have been appointed to the district courts, or 10% of the total.

We asked respondents what impact these Biden administration-appointed judges might have on the outcome of cases. Over 80% said they saw a somewhat or substantially higher likelihood of a case being dismissed by a Republican-nominated judge compared to a Democrat-appointed judge. In a follow-up question, 80% of respondents also said they believed the dismissal rate would likely fall.

A common theme among responses was that the Biden administration-appointed judges' background could make them more friendly to plaintiffs. One respondent states:

"Many of Biden's District Court appointments have not had prior law firm experience. Many were public interest or plaintiff lawyers. They'll be much more reluctant to throw cases out."

But not everyone agreed. Another says:

"In my experience, most Federal Judges, and actually more often Democratic [-appointed] judges than Republican [-appointed] judges these days, follow precedent. Because precedent for dismissal is strong, I don't think the judge's political leanings have much impact. There are of course outliers at the edges."

Several respondents addressed the indirect outcomes on their cases because of what the Biden administration is doing elsewhere. They focused on the SEC's more active stance. One argues:

"The most important impact of the Biden administration will come from the vastly more aggressive stance from the SEC's enforcement division, as well as the extensive (and ongoing) rulemaking by the SEC."

We will address the SEC's new approach to investigations later in this report, but it is worth noting here that its stance is also likely to have an impact on the overall dismissal rate of private securities litigation.

Although there was no consensus, most respondents did expect the recent appointees to the Federal Bench to have a negative impact on the outcomes of their cases.

How are Federal Judges appointed?

We wanted to understand the impact that Biden Administration-appointed Federal Judges could have on securities class action (SCA) settlements.

Supreme Court justices and Federal Circuit and District Judges are governed by Article III of the US Constitution which oversees their appointment, tenure, and payment[1]. They are appointed to their positions by the President of the United States, which they hold until retirement.

Federal U.S. District Court Judges are typically assigned cases by random selection, according to their existing caseload and sometimes geographical considerations, although they may be given cases in which they have an expertise, such as securities cases. Courts also have a system to check if there is any conflict that would make it improper for a judge to preside over a particular case.

1. *www.uscourts.gov/judges-judgeships/about-federal-judges*

President Biden's Federal Judge nominees

Federal Judges largely vote according to their perceived values, academic research has found, while their ideological leanings, personal attitudes and values can influence the outcome of the cases over which they preside. As a judge's motion to dismiss opinion and ruling is critical on the potential settlement value of an SCA, so our survey respondents say they will closely follow the Biden administration's judicial appointments.

As of March 2023, President Biden's administration has announced 161 judicial nominees, of which the Senate has confirmed 117.

His appointees are the most diverse of any US president by race, gender, and professional background.

Before, many Federal Judges were previously either prosecutors or corporate law-firm partners, but 31 of President Biden's nominees were public defenders – a record – reflecting his pledge to nominate more lawyers from parts of the legal profession that are underrepresented in the federal judiciary.

Federal Judges

- 11 of Biden's 28 Circuit appointees are black women, compared to eight by all his predecessors.
- 75% of Biden Administration-appointed judges are women.
- Only five of his 96 circuit and district appointees are white men.
- The Biden Administration's nominations were submitted faster than under Obama and Trump, and were the fastest to be confirmed – the median time to confirm circuit nominees from their nomination was 123 days.
- Democratic appointees now occupy 48.7% of district judgeships versus 41.8% for Republican appointees; 9.4% are vacant.

Conclusion

The landscape for securities class actions is set to change in 2023. The tough macroeconomic environment is likely to lead to an increase in filings, particularly in sectors adversely affected by higher interest rates, our survey says.

Also, the appointment of a large number of Federal Judges by the Biden administration is likely to mean that fewer cases will be dismissed in future, which will drive up the cost of settlements.

Inigo's prediction No. 1

Dismissal rates will fall by at least 5% in 2023 relative to the average for the past 10 years.

Inigo's prediction No. 2

Securities class action filing rates will be higher in 2023 than in both 2022 and 2021.

02

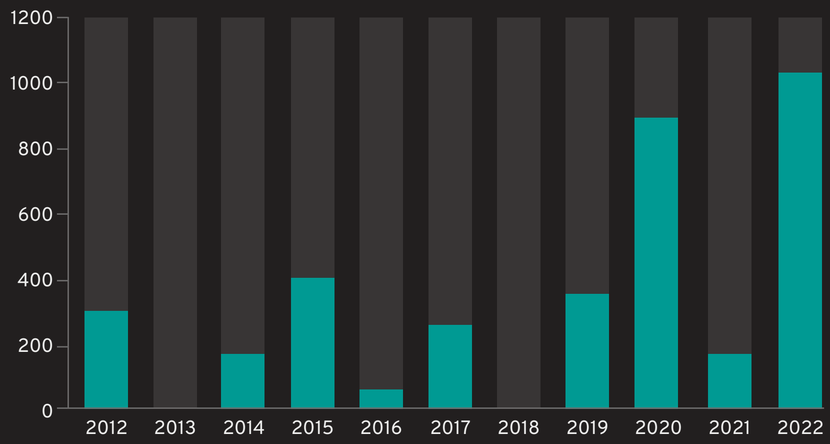
Derivative actions – a more attractive alternative for plaintiffs?

Derivative suits were a hot topic in 2022 and still are this year.

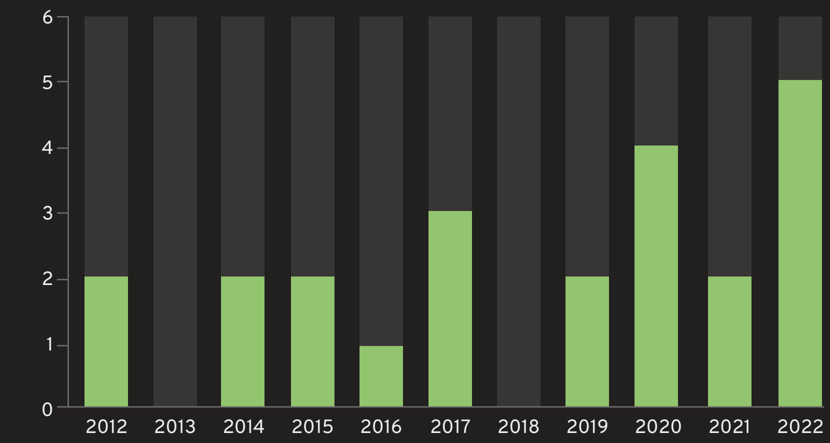
In our 2022 report we outlined some of the challenges defense counsel face following the erosion of the *Caremark* standard – which set a high bar for establishing directors' liability, making it difficult to successfully bring derivative cases involving conduct by employees that led to a loss for the company. We saw these issues play out in several very high-profile settlements last year.

Respondents continue to be very concerned about trends in derivative suits. There were a record number of settlements in derivative cases in 2022, and when we asked respondents about how many derivative filings they expected to see over the next 12 months, some suggested as many as 125, which would be an historic high. This concerning prediction reflects respondents' consensus view that derivative suits are becoming a more attractive way to obtain large cash settlements.

DERIVATIVE AMOUNTS



DERIVATIVE COUNTS
(CASH SETTLEMENTS OVER $1M)



re McDonald's Corporation Stockholder Derivative Litigation

On 1 March 2023, in *re McDonald's Corporation Stockholder Derivative Litigation*, Delaware's Court of Chancery granted a motion to dismiss derivative claims against McDonald's directors regarding allegations that they failed to tackle sexual harassment within the company.

In an earlier ruling, the court had denied a motion to dismiss brought by the corporation's Global Chief People Officer based on the same underlying facts. In doing so, the Court of Chancery affirmed that the *Caremark* standard also applied to officers. The court stated that board members have a duty to monitor all "central compliance risks", but because there were no allegations that McDonald's board acted improperly in addressing issues of sexual harassment facing the company, the plaintiffs' claims were dismissed.

The erosion of the *Caremark* standard features prominently in defense counsels' responses. One says:

> **"When a company suffers some corporate trauma and the board does not have procedures in place to monitor and report the risk that caused [it], it is fairly easy to plead a *Caremark* claim, especially when the risk involves an area that is heavily regulated."**

The recent ruling in *re McDonald's Corporation Stockholder Derivative Litigation* was discussed by respondents given the duty it imposes on officers as well as directors. One says:

> **"Even before the McDonald's opinion, experienced practitioners had long assumed officers owed *Caremark* duties. *Caremark* cases are extremely hard to win regardless of who they are against, and recent Delaware legislation that expanded exculpation to officers will make it even harder."**

We saw a shift from last year in respondents' answers to our question whether they felt a derivative action was more difficult to defend than a SCA. In 2022, only 20% felt it was harder to defend a standalone derivative case than a SCA. This year, that figure had jumped to 33%. It was those with most experience defending derivative cases who felt the most pessimistic. One says:

> **"The more of these cases I see, the more concerned I become. They are hard to get rid of in Delaware and the plaintiffs are pursuing them aggressively."**

Large derivative settlements continue to be triggered by a heavy fine or penalty, according to respondents, half of whom ranked this as the top factor. Next comes regulatory investigations, with 14% ranking it top and 36% ranking it second. The third major driver was a conflict of interest among the board or executives.

This year, we decided not to highlight ESG as a separate topic after having covered it in detail in last year's report, but we did ask about it within the broader theme of derivative litigation. Nearly two-thirds (63%) of respondents said ESG would not be an important factor in derivative actions (saying it would either be 'very unimportant', 'somewhat unimportant' or 'neither important or unimportant'). Just over a third (37%) of respondents felt that it would be 'somewhat important', but no one believed that it would be 'very important'.

Defense counsel still believe that ESG is not proving to be a very significant driver of litigation so far.

The consensus is that the litigation landscape for derivative cases, particularly in Delaware, continues to deteriorate. Our prediction in last year's report that there would be more than $1bn in derivative settlements in 2022 came true. This trend is set to continue, this year's survey results suggest. The Delaware court judgments in the Bluebell Creameries and Boeing cases will offer plaintiffs a framework to plead cases where they see evidence of failings, respondents argue.

Mission critical and "red flags" – how Delaware courts assess directors' and officers' duty of oversight

Two cases tried before Delaware Supreme Court and Court of Chancery since 2019 have given some new context to the tests they apply when ruling on *breach of fiduciary duty* derivative cases.

In *Marchand v. Barnhill*, otherwise known as the Blue Bell Creameries case, the Delaware Supreme Court reversed a lower court dismissal in a breach of fiduciary duty case, ruling that the board failed to adequately oversee food safety standards, leading some consumers to fall ill or die. The court held that food safety was "essential and mission critical" to the business and that therefore the board have heightened compliance requirements for these.

After this, the concept of "red flags" was explored in *re The Boeing Company Deriv. Litigation*, where the Court of Chancery ruled that the case could proceed under the *Caremark* standard as the Boeing directors had been "turning a blind eye to a red flag representing aircraft safety problems." The ruling also re-emphasised the directors' duty to focus on "mission critical aspects of the company's business".

We expect these tests will be routinely applied in future derivative cases in deciding whether cases should proceed or not.

Conclusion

Derivative actions continue to pose a significant challenge to US-incorporated companies. Delaware's courts have provided a framework to understand how to assess derivative cases and we expect these tests will be routinely applied in future.

Respondents' perception that the landscape has continued to deteriorate leads us to believe that the number of derivative cases filed will climb further, as will their severity.

Inigo's prediction No. 3

There will be at least five derivative settlements of more than $100m each in 2023.

03

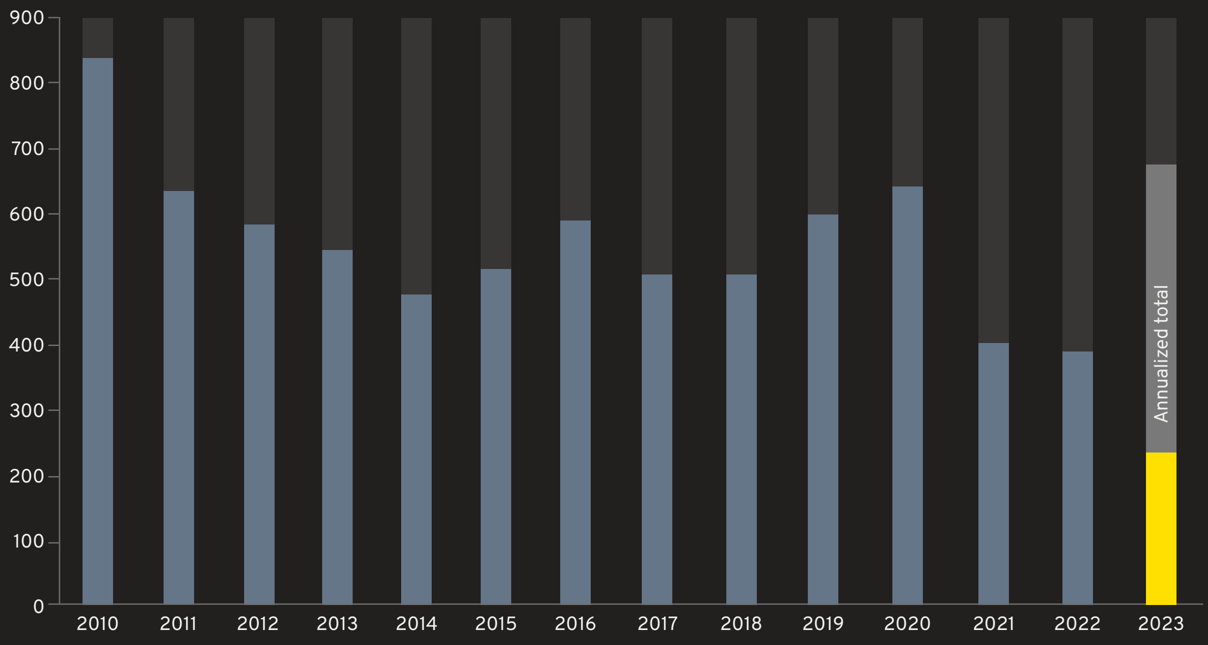
Bankruptcies – the new driver of securities litigation?

Understanding the potential impact of the current macroeconomic conditions on securities litigation was a key focus of this year's survey.

Interest rates are the highest they have been since before the 2008 financial crisis, access to new equity funding has dwindled and consumer confidence is weakening. So, this year we asked respondents several questions about bankruptcies. Silicon Valley Bank collapsed while we were writing this report, which made us pause and go back to some respondents for more information.

We wanted to understand whether bankruptcies were likely to be a cause for securities litigation in the future, similar to how cryptocurrency, cannabis and DeSPACs cases have recently resulted in a large percentage of the total filings.

US BANKRUPTCY FILINGS



More than two thirds (67%) of the defense counsel we surveyed said they have seen an increase in bankruptcy filings. But the responses we received offered a mixed picture of which sectors have seen the most bankruptcies.

Ranked in order they are:

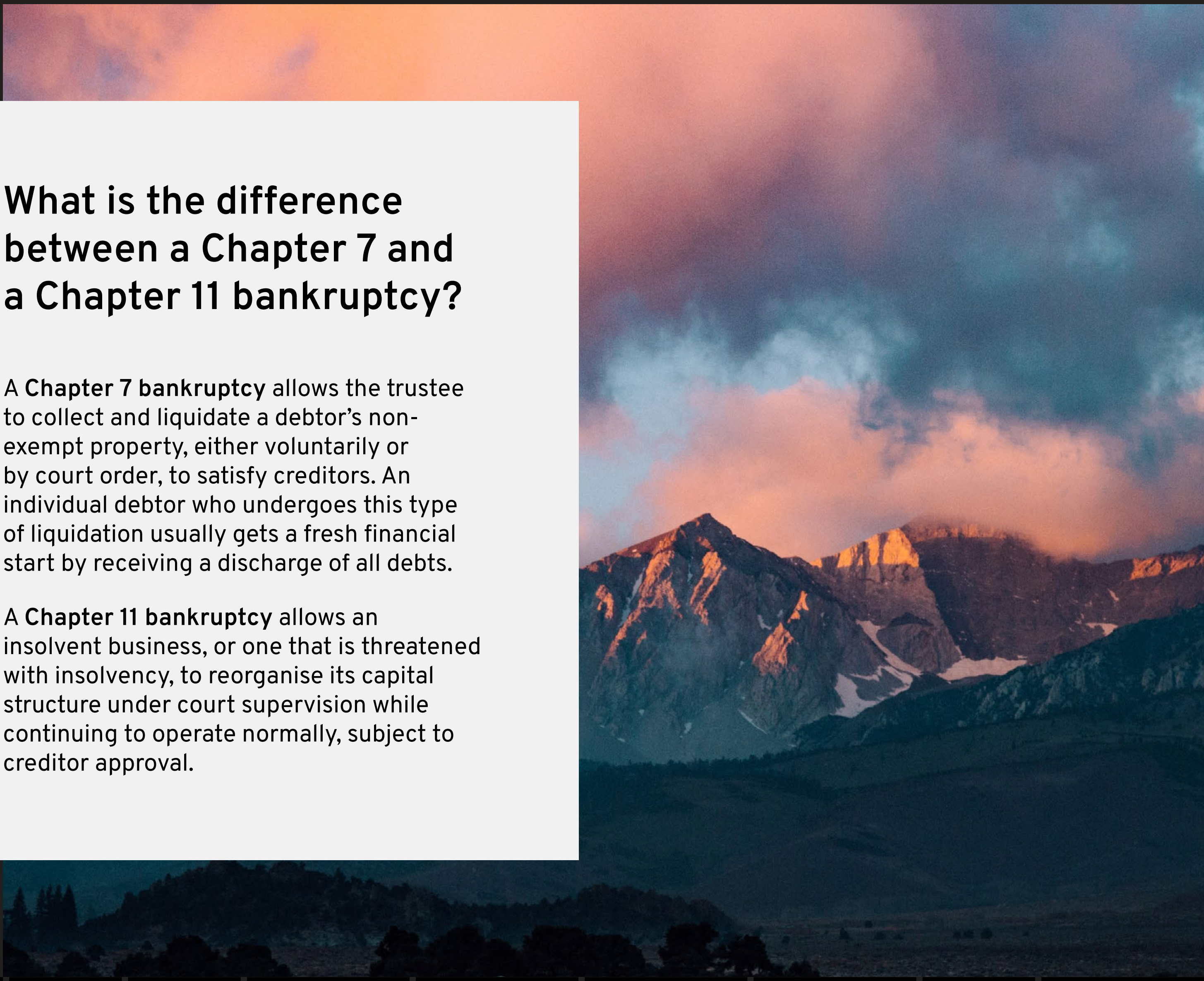
01 Retail

02 Real estate

03 Crypto

04 Technology

05 Life sciences



What is the difference between a Chapter 7 and a Chapter 11 bankruptcy?

A **Chapter 7 bankruptcy** allows the trustee to collect and liquidate a debtor's non-exempt property, either voluntarily or by court order, to satisfy creditors. An individual debtor who undergoes this type of liquidation usually gets a fresh financial start by receiving a discharge of all debts.

A **Chapter 11 bankruptcy** allows an insolvent business, or one that is threatened with insolvency, to reorganise its capital structure under court supervision while continuing to operate normally, subject to creditor approval.

We also wanted to know what are the main sources of securities litigation that respondents see following these bankruptcy filings. One says that in the current environment, it is more important than ever how a company sliding towards insolvency is run:

“Directors and officers of distressed assets that are on the brink of insolvency, need to be meticulously careful about how they direct and manage the company.”

The consensus was that the traditional forms of bankruptcy claims – breach of fiduciary duty and fraudulent transfer – remain the most problematic, rather than there being new types of claims. One respondent says:

“We’re seeing more allegations of fraudulent transfer and creditor committees being more aggressive in seeking to recover assets that they allege have been moved sometime prior to the [bankruptcy] filing.”

What is fraudulent transfer?

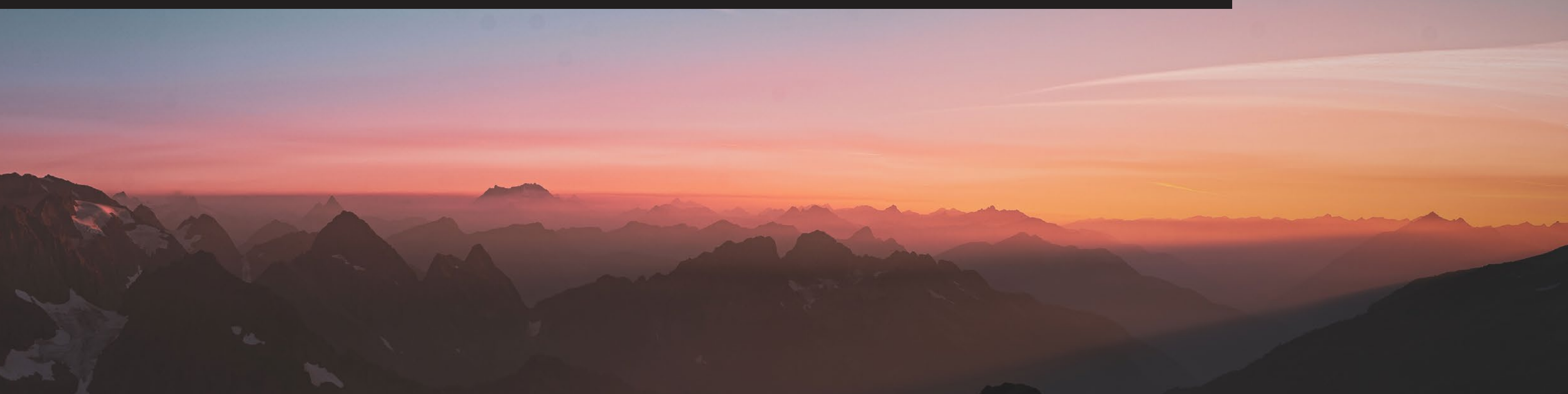
Under Chapter 11 of the US Bankruptcy Code a “fraudulent transfer” occurs when a debtor either:

01. transfers property with the intent to hinder, delay or defraud its creditors or

02. makes a transfer for less than reasonably equivalent value and at the time of such transfer:

- (i) was insolvent
- (ii) had unreasonably small capital
- (iii) intended to incur debts beyond its ability to repay them or
- (iv) made such tranfer for the benefit of an insider under an employment contract outside of the ordinary course of business.

Source: 11 U.S.C. § 548(a)(1)(A)-(B)



Many respondents also highlight the role a company's D&O policy plays, saying they are seeing breach of fiduciary duty claims being brought to access the policy. One says:

> **"Breach of fiduciary duty claims brought in bankruptcy are more dangerous than similar claims brought by shareholders against solvent companies because the plaintiff in a bankrupt entity (a trustee, plan agent or creditor's committee) does not have to demonstrate demand futility and has access to all company documents and emails before filing suit."**

Following Silicon Valley Bank's collapse, we asked several respondents a follow-up question if their view on the risk to the economy had changed following its failure and the impact it had had on other banks. One respondent says:

> **"It probably makes the situation even more precarious for those companies in desperate need of refinancing. We have had clients calling us for advice on disclosure when they are unsure if they are going to continue as a going concern. Access to capital is probably that little more constrained for weak companies following the collapses and banks look to be more disciplined."**

As bankruptcies rise, we expect to see more breach of fiduciary duty and fraudulent transfer claims being filed. The current issues in the US and European banking system could make matters worse.

The growing number of companies going bust, particularly ones that have larger asset bases – and debt loads – such as national retailers and real estate firms, means more lawsuits from their creditor committees and breach of fiduciary duty claims on behalf of their shareholders. A more active SEC will likely exacerbate this, as it investigates Chapter 11 filings more vigorously, drawing parallel private securities litigation.

Conclusion

Bankruptcies are a key concern for our respondents, and they expect an increase in the number of filings to have an impact on securities litigation. As more companies file for Chapter 11, creditors and plaintiffs will look for ways to access D&O policies to recover losses on behalf of shareholders and creditors.

Some industry sectors are particularly exposed to higher interest rates and the tougher macroeconomic climate. How directors and officers of distressed companies behave in the lead-up to any filing will have a strong bearing on any litigation, with respondents advising executives and board members to behave with extreme care. We expect to see Chapter 11 filings will trigger a large minority of the SCA and derivative filings in 2023.

Inigo's prediction No. 4

Bankruptcy filings will increase, leading to more breach of fiduciary and fraudulent transfer claims.

04

Has the SEC now taken the gloves off?

This year's survey saw much discussion about the Securities and Exchange Commission's (SEC) change in approach. Last year, we predicted the SEC was likely to become more active under Gary Gensler's leadership and it appears that defense counsels have started to see this.

Nearly eight out of ten (77%) respondents said regulatory investigations are now the greatest risk to companies and their directors and officers, a long way ahead of SCAs in second place and bankruptcies in third place This is flat relative to last year's survey but the key difference this year is that respondents are starting to see the SEC's new stance have an impact on the cases they are defending.

The main reason they cited is that it is now much easier for the SEC to bring formal investigations, thereby obtaining subpoena power, than under previous administrations. Now, individual offices or even individual investigators can issue a Formal Order of Investigation, whereas before the SEC had to overcome many more hurdles.

Interestingly, the impact isn't being felt uniformly. Some respondents reported seeing no real change, while others told us the SEC's approach had completely altered. One respondent offered an explanation as to why this might be:

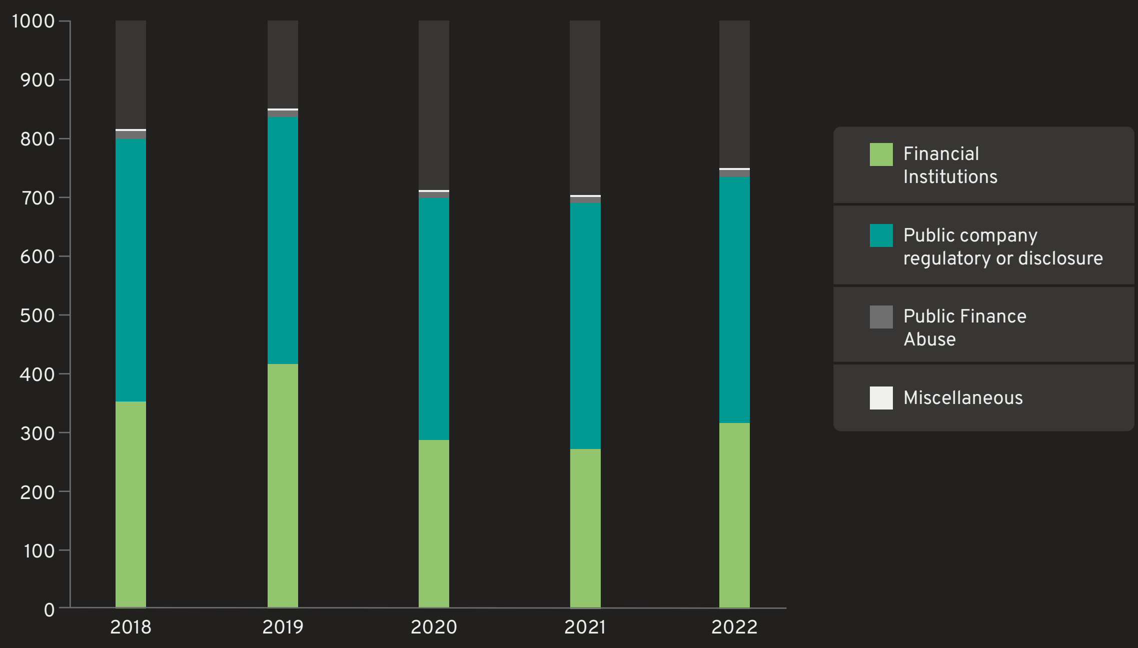
“The SEC [is] seemingly taking a very inconsistent approach, by office and even individual. It really depends [on] who decides to pick up an investigation as to the approach that might be taken. It makes it more difficult to plan a strategy as you don't know what to expect.”

But the outcome of a more activist SEC is that investigations are now being made formal much earlier in the process, with large numbers of subpoenas being issued earlier in investigations. This is making cases much more expensive to defend.

Another feature of the SEC's new regime is that it now investigating more individuals, according to our survey.

Respondents perceive that the SEC is casting a wide net early in its investigations, either requesting information from or even subpoenaing many individuals before narrowing the investigation's focus as it progresses.

SEC INVESTIGATIONS



We asked respondents what impact this was likely to have on their cases and there was strong consensus among them that it would mean investigations are now likelier to run all the way to trial, meaning much higher defense costs for the individuals and insurers where there is available policy limit. One respondent says:

“The SEC’s insistence on D&O bars will often essentially ensure that a matter cannot settle, especially if the officer is younger than 50. They seem to be aggressively pursuing individuals [using] a blunt instrument approach rather than [one] tailored to the specific individuals, which is unfortunate.”

Another respondent adds:

“An admission of guilt has a devastating impact on a client’s future. This makes settlements more difficult – the client would rather fight.”

Based on the survey results, Inigo expects to see these investigations run to trial more often. The SEC won in 12 of the 15 trials in 2022 – the most it had conducted in a single year within the past decade.

The SEC is also pursuing more admissions of guilt from those company officers it investigates under the recklessness and negligence offence of Section 17 of the 1934 Securities Exchange Act.

Section 17(a) claims employ different culpable states of mind under prongs 17(a)(1), 17(a)(2) and 17(a)(3). A negligence standard applies to Sections 17(a)(2) and 17(a)(3), whereas a scienter or fraud requirement akin to Section 10(b) applies to Section 17(a)(1). The statute itself does not expressly define the state of mind as an element of Sections 17(a)(2) and (a)(3), and the applicable negligence standard for Sections 17(a)(2) and 17(a)(3) is derived from case law interpreting the pertinent statutory language. (See, e.g., *Aaron v. SEC*, 446 U.S. 680, 696-97 (1980)).

The negligence standard in Section 17(a)(2) and 17(a)(3) claims is lower than that applicable to Section 10(b) and Section 17(a)(1) claims, offering the SEC a greater likelihood of success, our defense attorney respondents argue.

The SEC's new approach also has a knock-on effect where there is a parallel securities class action, as it makes it harder to settle the case when individuals are being pressed to make an admission of wrongdoing as part of a settlement with the SEC.

SEC enforcement actions – the facts

In its 2022 Enforcement Statistics, the SEC said that it had filed 760 total enforcement actions that year, a rise of 9% on the previous year. Of those, 462 were new standalone actions, 129 were against issuers delinquent in their required SEC filings, and 169 actions were follow-on administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders.

A further 91 of their investigations were related to Issuer Reporting / Auditing & Accounting. Its whistle-blower program received more than 12,300 tips, a record. The SEC also brought actions against gatekeepers (auditors, lawyers, and transfer agents) charging them with failing to live up to their heightened trust and responsibility.

The SEC reaffirmed its commitment to investigating companies for their public disclosures:

> **"Public company disclosure is the bedrock of our securities markets. The SEC places a high priority on pursuing issuers or their employees who make materially inaccurate disclosures, as well as auditors and their professionals who violate applicable laws and rules in connection with such disclosures. The Division's attorneys and accountants regularly investigate and recommend enforcement actions charging misconduct by issuers, auditors, and their employees."**

Conclusion

The respondents were almost unanimous in agreeing that the SEC's much publicised more aggressive approach is now starting to play out in their cases. The SEC is more likely to target and subpoena many more individual defendants as well as push for admissions of liability from them in investigations.

Not only does this have an impact on the cost of defending these cases, but there is also a knock-on effect on the likelihood of a parallel SCA being filed and its ultimate success.

Inigo's prediction No. 5

SEC investigations will be a major exposure for companies and insurers over the next 24 months, the remainder of President Biden's first election term.

Inigo's 2023 D&O Predictions

01

Dismissal rates will fall by at least 5% in 2023 relative to the average for the past 10 years.

02

Securities class action filing rates will be higher in 2023 than in both 2022 and 2021.

03

There will be at least five derivative settlements of more than $100m each in 2023.

04

Bankruptcy filings will increase, leading to more breach of fiduciary duty and fraudulent transfer claims.

05

SEC investigations will be a major exposure for companies and insurers over the next 24 months.

We will mark our predictions in the 2024 report.

Which are the best US securities plaintiffs' law firms?

We asked our survey respondents to name which plaintiff's firm they most respect.

According to our survey they are:

01
Bernstein Litowitz Berger & Grossman LLP

02
Robbins Geller Rudman & Dowd LLP

03
Labaton Sucharow LLP

04
Kessler Topaz Meltzer & Check LLP

05
Quinn Emanuel Urquhart & Sullivan LLP

Bernstein Litowitz Berger & Grossman LLP retains the top spot for the second year running, but its victory margin is narrower, at 42% of the vote compared to 50% in 2022. One respondent says it has "highly competent attorneys who bring the best cases." Robbins Geller Rudman & Dowd LLP again comes second, with 34% of the vote. One respondent describes it as "very effective. They are smart, savvy, and tenacious."

Labaton retained its position in third place, but two firms, Kessler Topaz Meltzer & Check LLP and Quinn Emanuel Urquhart & Sullivan LLP, join this year's rankings, at the expense of Pomerantz LLP and Grant & Eisenhofer. The scoring suggests that the top two firms still sit some way above their competition in defense counsel's opinion.

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