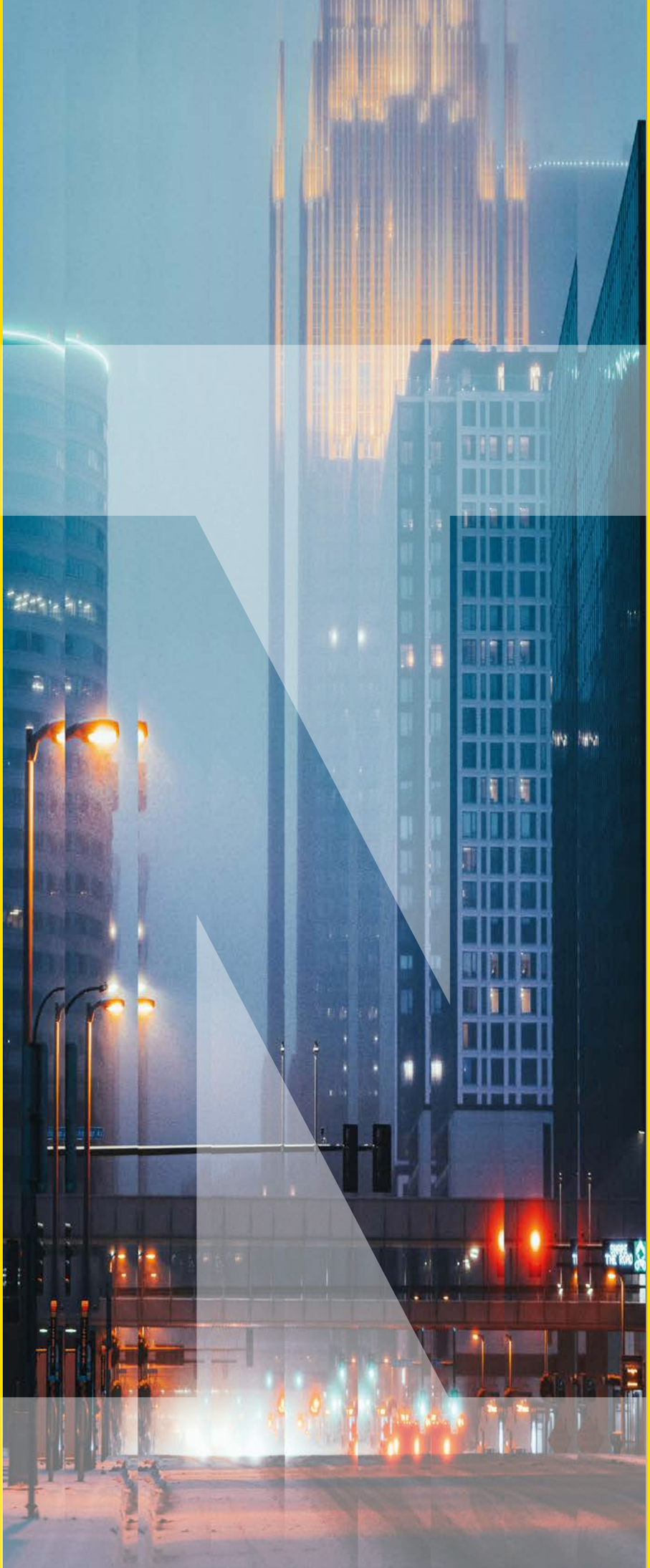

2024

INIGO DEFENSE COUNSEL SURVEY

INIGO

SURFACE THE SCIENCE OF RISK

2024

Foreword

We are pleased to publish our Defense Counsel Survey for the third year. The litigation arena continues to evolve as the pandemic recedes further in the rear-view mirror and companies operate in a higher-interest-rate environment. The reception to our second survey was even more positive than the first and we continue to find the insights invaluable.

This year, we decided to trim the number of questions we asked to 58 questions, as opposed to 62 last year. We are extremely grateful to those who we interviewed and who filled out the survey this year.

We identified more themes this year than in previous so have decided to group them into five sections. Some of the themes raised this year by our respondents echo those of last year, but new concerns have emerged. They are:

1. *Cybersecurity – will new disclosures trigger more class actions?*
2. *Securities class actions – are settlement demands increasing?*
3. *Artificial intelligence – the next ESG or EV DeSPAC?*
4. *Bankruptcies – what happens when there is no money left?*
5. *Derivatives and Delaware – how bad can it get?*

We also review whether the predictions we made last year came true and make further predictions for the next 12-months, based on this year's survey. Last, but not least, we once again rank the plaintiff's law firms that our respondents believe are the best in 2024.

We hope you enjoy reading this survey. Please do give us feedback, as we incorporate it into our future surveys.

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Did our 2023 predictions come true?

#01

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

Did it come true?

There have been some early signs of dismissal rates falling, as well as anecdotal evidence of new Federal Judges appointed by President Biden taking pro-plaintiff decisions. But it is still too early to see a clear trend, so we have marked our prediction a cautious Yes.

#02

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

Did it come true?

Once you strip out securities class actions filed against non-public companies, the filings rate is essentially flat. Despite the number not increasing, there have been more actions filed against mature companies in traditional sectors such as software, pharmaceuticals, and retail. But there have been fewer filings against crypto, cannabis and recent post-DeSPAC transaction companies. It appears that we overestimated the Plaintiff's Bar's appetite to bring more cases, and there is evidently still some caution about bringing more frivolous cases. That said, mature companies in traditional sectors have seen more lawsuits brought against them, which echoes a trend from before the pandemic and could help drive an increase in filing rates in the future.

#03

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

Did it come true?

High-profile cases in Delaware continue to go against companies and settlement values are rising quickly. Plaintiffs are aggressive in Delaware and hold a strong hand. We explore this further in this year's survey.

#04

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

Did it come true?

Bankruptcies have increased in 2023. There were 642 corporate bankruptcy filings in 2023, according to S&P, the highest since 2010 (if you exclude 2020, the first year of the pandemic). They are complicating securities litigation and dragging companies' A Side cover into play much more than in the past. But Corporate America has so far weathered high interest rates better than last year's survey respondents predicted it would. Also, companies filing for bankruptcy have mostly faced traditional securities class action litigation rather than fraudulent transfer cases, which we had predicted. So, again a cautious Yes.

#05

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

Did it come true?

The SEC's enforcement actions increased by 8% in 2023 and obtained nearly $5bn in penalties. It obtained admissions of guilt from 16 corporate defendants, as well as the high-profile conviction of Sam Bankman-Fried for the failure of FTX. The enforcement actions were heavily focused on cryptocurrency firms, but we think there is still room for the watchdog to act more aggressively against companies in other sectors.

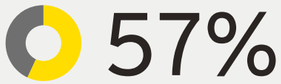
80%
ACCURACY

Overall, we are happy with last year's predictions. How will our 2024 predictions fare?

Q1

Will new cybersecurity disclosures trigger more class actions?

Much has been made of the SEC's new cybersecurity rules, which create new obligations for companies to disclose their current procedures and swiftly report any material data breaches to the market. We asked respondents whether they thought these new rules would result in more litigation, as plaintiffs' attorneys we had spoken to before the survey expressed differing levels of interest in bringing cybersecurity cases.



57%

Most defense counsels thought that companies were not well prepared to deal with the new disclosure requirements.

We then asked whether the new disclosures would lead to an increase in securities class actions, and more than seven out of ten say that they will. But of those, 80% feel that it wouldn't lead to a significant number of new actions being filed.

The reason is linked to the likelihood of a significant drop in the value of the stock of a company that discloses a cybersecurity breach. One respondent says:

"SCAs are filed largely on the heels of a substantial drop in stock price; generally speaking, cybersecurity events and disclosures do not appear to be driving substantial and sustained downward price movement."

Another echoed this, saying:

"We just don't think investors will see this as a big deal. Companies are the victim in a breach, after all."

But those defense attorneys who do predict more lawsuits highlight a possible path for plaintiffs to bring a claim.

"Where a material breach follows after a company has made significant new periodic disclosures about its cyber readiness, that will provide an opportunity for the plaintiffs' bar to look for misstatements in [those] filings."

Another states:

"My concern is where a material cybersecurity incident has been discovered [by] an organisation, but the news doesn't make it into an 8-K quickly enough. It might be a short class period but, with a stock drop, it would still be meaningful."

Respondents were divided on whether these cases would be more or less likely to succeed.

35%

expect them to be as likely to succeed as any other securities class action, while a further

35%

felt they would be less likely.
The remaining

30%

felt their likelihood of success would be greater.

Inigo Defense Counsel Survey 2024

Some respondents point to the $350m settlement made by Alphabet in February 2024, arising from a cyberbreach, as an example of what is likely to come. The new SEC disclosure rules are likely to strengthen plaintiff's lawyers' hands in future cases. One respondent says:

"The recent Alphabet decision is a sign of things to come. The new disclosure rules make it easier for the plaintiff to argue there has been a harm to investors if companies haven't followed the disclosure rules."

However, some defense attorneys expect cyberbreach cases will be brought as derivative actions, because (as we discuss later in the survey) the derivative legal environment has never been more attractive for plaintiffs in Delaware. So, where a cybersecurity event results in a material financial impact and there is evidence of a lack of preparedness or oversight, the plaintiffs' attorney may opt to file a derivative case instead of a standard securities class action. This may be against a company that has suffered a breach before, where the allegation would be that it did not do enough to prevent another from occurring.

One respondent argues:

"I see these [as] more of a derivative risk. Breaches would result in large financial impacts and plaintiffs' [attorneys] may look to the public filings to identify weaknesses in [the companies' cyber] preparedness. Absent a major stock drop, it could be the most attractive avenue."

30%

feel that non-financial factors, such as bad press or reputational harm associated with a late disclosure, would lead to a securities claim being filed.

Finally, we asked if the SEC would actively enforce the new disclosure rules. More than two thirds think the watchdog will file enforcement actions against companies whose disclosure falls short. These often result in private securities actions being filed, suggesting an increase in overall litigation in future.

WHAT ARE THE NEW RULES THAT WERE IMPLEMENTED IN DECEMBER 2023?

1. Companies must disclose a material cybersecurity incident to the market within four days of discovery, and describe its nature, scope and timing, as well as what the material impact is reasonably likely to be, including on the company's financial condition and results.
2. They are also required to describe what, if any, processes they have in place to identify, assess and manage material risks from cybersecurity threats, and describe whether those risks have or are reasonably likely to materially affect their business strategy, operations' results, or financial condition.

Conclusion

Cybersecurity has been a hot topic for years, but the SEC's new regulations have put the issue into sharper focus. The Defense Bar is watching closely, but for now, there's no consensus about what it will mean for litigation. Cyber-related class actions filed in the past three years have been few and far between: seven in 2021, four in 2022 and only two in 2023. So, we predict that the number of cyber-related cases will rise, albeit from a low base, but there is unlikely to be a deluge in new filings. But this, along with other factors, is likely to mean that the overall filings rate will rise over the next 12-months.

Inigo's prediction

No.1

The SEC's new cybersecurity disclosure rules will lead to at least 10 cybersecurity related securities claims over the next 12-months.

Inigo Defense Counsel Survey 2024

Q2

Securities class actions. Are settlement demands increasing?

Securities class action cases represent the bulk of settlements paid by US-listed companies, so a review of the current landscape is fundamental to this survey. We asked defense attorneys the same questions as last year but were surprised that this year there were some significant differences in their answers.

The first question we asked was whether defense attorneys expect filings to increase, decrease or stay the same over the next 12-months.

The number of new class actions filed in 2023 was slightly up on 2022, but is still some way below 2019. Although it is still early, the number of cases filed so far in 2024 suggest a further slight increase.

This year, fewer respondents than last year expect the number of filings to rise.

25%

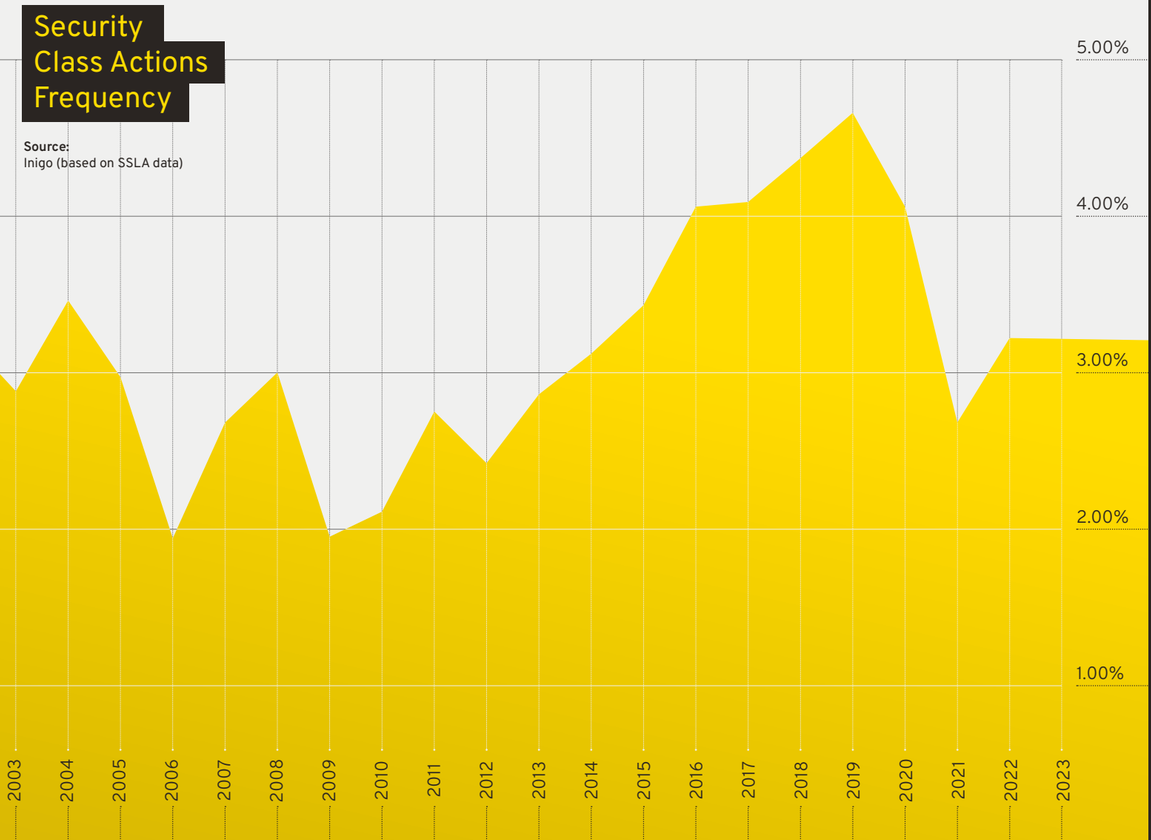
A quarter expect filings to increase slightly, while

18%

predict they will increase substantially.

57%

expect the number to remain the same as last year.



SCAS: THE STATISTICS

+23%

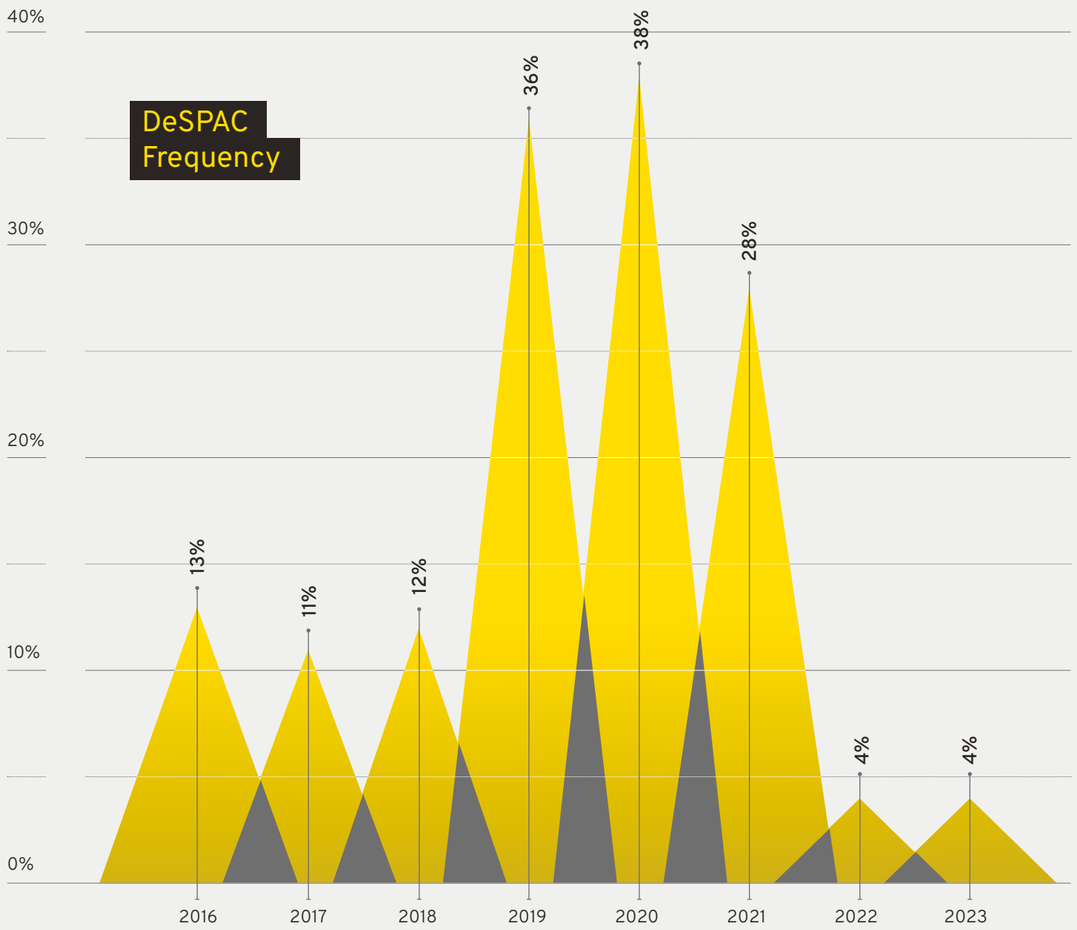
In 2023, there were 83 US securities class action settlements totalling approximately $3.9bn. In 2022, there were 105 settlements costing a total of $4bn. **This is a 23% increase in average settlement value.**

3.7 years

The median duration of a case, from when it is filed to the settlement hearing date was 3.7 years in 2023. **Therefore, claims filed from 2021 are susceptible to further claims inflation.**

$100m

In 2023, the top 10 settlements all surpassed $100m for **the first time ever.**



We asked in which industries or which types of listed companies they expected to see the most filings and the results echoed last year's. One says:

"DeSPACs are the gift that keeps on giving for plaintiffs' [attorneys], even if they are less fashionable than before."

DeSPACs have faced a slew of litigation. As the chart below shows, 38% of DeSPACs that closed in 2020 were subject to a securities class action. In 2021, that figure was 28%.

The cohort of transactions that closed in 2022 appears to be tracking better, although it is still early. The drop in class actions against these DeSPACS seems to be the result of fewer deals being done, and the size of those deals being smaller, which has reduced the pool of companies and the amount of funds that plaintiffs' attorneys can target in damages.

A major finding of this year's survey is that the size of defense settlements has jumped. This marks a departure from the past, where they broadly tracked within a range of percentages of the stock drop that prompted the class actions.

87%

of respondents say settlement demands are increasing, while the remaining 13% think they are unchanged.

54%

believe they are increasing substantially.

We have rarely seen this degree of consensus, so we reviewed the statistics. One year's results don't constitute a trend, but a 23% jump in average settlement value and a very large number of settlements in the pipeline, along with our respondents' comments, are cause for concern. There have already been some very significant settlements in 2024, which could mean the total value of this year's settlements could be even higher than in the recent past. This will clearly have the greatest impact on D&O programmes' excess layers and is likely to put further pressure on those layers' profitability, particularly for large-market-cap companies.

This year we revisited a topic that we dedicated a lot of space to in last year's survey, which is the make-up of the Federal Bench. Last year, respondents believed that the large number of judges appointed by the Biden Administration would have an impact on the dismissal rate.

We asked respondents this year if these newly appointed judges have had any impact on their work.

80%

say they have, and that the impact has been negative on their cases which have been heard by these new judges.

One states:

"There is already a feeling that Biden judges are different. We are expecting a long-term decrease in MTDs [Motions to Dismiss]."

Another says:

"The Biden judges are much more friendly to plaintiffs and sympathetic to their claims. We have also seen them being pretty lenient in the Class Cert stage too."

This was a common theme across the responses and in all the in-depth interviews we conducted for this year's survey. A small number did, however, point to a trend which they think is positive. One states:

"We are beginning to see district judges getting annoyed with plaintiffs' complaints, due to [their] excessive length and unwieldiness."

Inigo Defense Counsel Survey 2024

Another argues:

"I have seen some evidence of the federal bench getting fed up [with] plaintiffs throwing spaghetti at the wall and seeing what sticks. We have a case where the judge dismissed it for these exact reasons. It does feel [like] there's a [growing] lack of patience for the cookie-cutter complaint."

But it appears that the shift in the Federal Bench is now starting to have an impact on cases, as we predicted it would last year.

Another topic we investigated this year is whether a company's domicile makes a difference to the likelihood of a class action being filed against it and what the claim's outcome could be. This threw up some interesting results.

Opinion was split among our respondents about a company's domicile. Half say it does have an impact on the likelihood of a suit being filed against it, while the other half say it doesn't. But the question elicited some interesting answers. One defense attorney says:

"There are certain jurisdictions that are viewed by the Plaintiff's Bar as [being] unfavorable. They avoid them completely or try to [file the case] elsewhere and hope the case doesn't get transferred. If it does, they sometimes drop the case or don't seek to lead."

Another says:

"On marginal cases, plaintiffs' [attorneys] are influenced by the judges they are likely to draw and won't proceed in circuits they think will throw up ones less favorable [to them]."

However, another defense counsel argues that it's the industry in which the company operates that is the primary driver of whether a case will be filed, not where it is headquartered, and that there is a strong correlation between a particular industry and the likely court circuit where a case will be tried.

"The location of the suit is more a consequence of lots of these companies being based in the same place. Many tech companies are based in California, and they still tend to be sued more than other companies."

It is difficult to track whether a company's state of domicile is a factor in the number of class actions filed against it, but it is something the insurance industry should pay more attention to to understand whether there are any significant patterns.

The final question we asked in this section was how much respondents felt is the minimum cost to bring a typical securities class action to the Motion to Dismiss stage. The range was extensive, from $250,000 to a high of $1m, but the most common response was

$475,000

Minimum cost to bring a class action.

We also asked how much they thought the cost of defending a case to the Motion to Dismiss stage has increased over the past 12-months. The responses ranged from 5% to 40%, but the most common was 20%. The universal reason given was attorneys' rising salaries. One says:

"There is a talent war [raging] in our [industry] and costs are going up across the board. No matter how efficiently you litigate the case, you still need to pass that on to the client."

So, we expect to see continued pressure on defense costs, even in the early stages of litigation, which is likely to eat into the primary layers of a company's insurance programme, even where a case is ultimately dismissed.

Conclusion

Plaintiff's lawyers' settlement demands are increasing, while the cost of settling cases is rising. Biden-appointed judges are starting to have an impact on cases, but it is unclear now whether the likelihood and outcomes of cases differs significantly across the US.

Inigo's prediction

No.2

Regardless of whether the number of securities class actions being filed increases in 2024, the overall settlement value and amount spent on defense costs will increase by at least 10%.

Q3

Artificial intelligence. Is it the next ESG or EV DeSPAC?

Artificial intelligence has the potential to revolutionise how we work and live, and the race to develop AI is driving enormous investment and creating geopolitical tension, as both countries and companies look to capitalise on this new technology's massive potential. But it also poses a massive risk for companies and their shareholders, which is why we wanted to explore the issue in this year's survey.

We asked if AI would be a driver of securities litigation over the next 12-months, and nearly

73%

of respondents said YES.

Some defense counsels highlight the promises some companies are already making in their public disclosures. One says:

"Companies won't be able to resist jumping on the bandwagon as there is so much investor interest. A bit like EVs before, investors are getting excited about the sector without digging into the detail. I believe companies are looking to fake it until they make it."

We have already seen some class actions brought against companies for allegedly exaggerating the AI capability of their products, and these cases' outcomes will be watched closely. One respondent adds:

"It is inevitable that some of these filings will come through when [companies] claim some kind of benefit from AI."

We asked respondents what the likely causes of AI-related securities litigation might be. Most said that 'AI Washing', where companies exaggerate their products' or services' use of AI, would likely result in lawsuits.

38%

of respondents think that companies underestimate how AI could overtake their business, hitting their revenues.

As one respondent says:

"A lot of companies are burying their heads in the sand and convincing themselves that AI isn't going to eat their lunch. If they don't embrace the risks and disclose them early, they could be left behind and plaintiffs' [lawyers] will be looking to file cases [against them]."

GARY GENSLER
AI WASHING (MARCH 2024)

"I get why so many people are talking about artificial intelligence. AI is the most transformative technology of our time, fully on par with the internet.

It's already being used in finance, where it has the potential benefits of greater inclusion, efficiency, and user experience.

But let's face it, when new technologies come along, we've also seen time and again false claims to investors by those purporting to use those new technologies.

Think about it. Investment advisers or broker dealers might want to tap into the excitement about AI by telling you that they're using this new technology to help you get a better return. Public company execs, they might think that they will enhance their stock price by talking about their use of AI.

Well, here at the SEC, we want to make sure that these folks are telling the truth. In essence, they should say what they're doing, and do what they're saying. Investment advisers or broker dealers should not mislead the public by saying they are using an AI model when they're not, nor say that they're using an AI model in a particular way, but not do so.

Public companies should make sure they have a reasonable basis for the claims they make and yes, the particular risks they face about their AI use, and investors should be told that basis.

AI washing, whether it's by financial intermediaries such as investment advisers and broker dealers, or by companies raising money from the public, that AI washing may violate the securities laws.

So, everyone may be talking about AI, but when it comes to investment advisers, broker dealers, and public companies, they should make sure that what they say to investors is true."

Gary Gensler
Chairperson, U.S. Securities and Exchange Commission

We also asked if SEC Chair Gary Gensler's comments on AI Washing were likely to lead to more enforcement actions.

57%

of respondents believed AI Washing was likely to lead to more enforcement actions.

One respondent says:

"Enforcement activity has reliably followed in areas highlighted by Gensler."

Another states:

"One of our clients has already received an inquiry from the SEC. We're working through it with them now."

However, many respondents took the opposite view, which is that the SEC is unlikely to act against companies for their AI claims. The consensus opinion among these dissenters was that despite the SEC's stern words, it did not have the resources to follow through on its many warnings about corporate behaviour.

One respondent refers to the watchdog's actions on tackling environmental, social and governance issues [ESG]:

"The SEC talked a big game on ESG [but] we haven't really seen any enforcement action. I think [AI Washing] will go the same way."

Evidently, the Defense Bar is split on this issue. But the majority believes that the SEC will increase enforcement actions against companies that misrepresent their AI use, so we will follow the experts' opinion.

Conclusion

There was consensus among defense counsels that AI-related filings are likely to rise, either alleging that companies oversold their AI expertise or that they underestimated the risks it poses to their business. But there was less agreement about the likely level of enforcement activity by the SEC, although a slim majority believe it will act.

So, we believe AI will be a driver of litigation, and that AI-related private securities action and regulatory interventions will keep defense attorneys busy over the next 12-months.

Inigo's prediction

No.3

AI will be a material driver of new litigation and SEC enforcement action over the next 12-months.

Inigo Defense Counsel Survey 2024

Q4

Bankruptcies. What happens when there is no money left?

Despite robust national economic growth, US-listed companies remain under intense pressure. In 2023, corporate bankruptcies surged by 73% to 642, the highest since 2010, from 372 in 2022, according to S&P. Higher interest rates, tougher lender standards and the end of pandemic stimulus packages have been blamed for the rising number of insolvencies.

So, it is important for us to understand what is happening in bankruptcy-related litigation.

We ranked the industries with the most bankruptcy litigation in 2023, according to the cases our respondents were involved in. They are:

1. Retail
2. Electric vehicles
3. Real estate
4. Healthcare
5. Industrials

But what's new in the past two years is the number of companies that soon collapse after going bankrupt, rather than using Chapter 11 to restructure their debt and re-emerge to trade on.

As the cost of financing has increased, there have been multiple examples of companies that went public through a DeSPAC transaction eventually liquidating after filing for bankruptcy. This is because they have burned through their cash piles and been unable to find new investors willing to bankroll them.

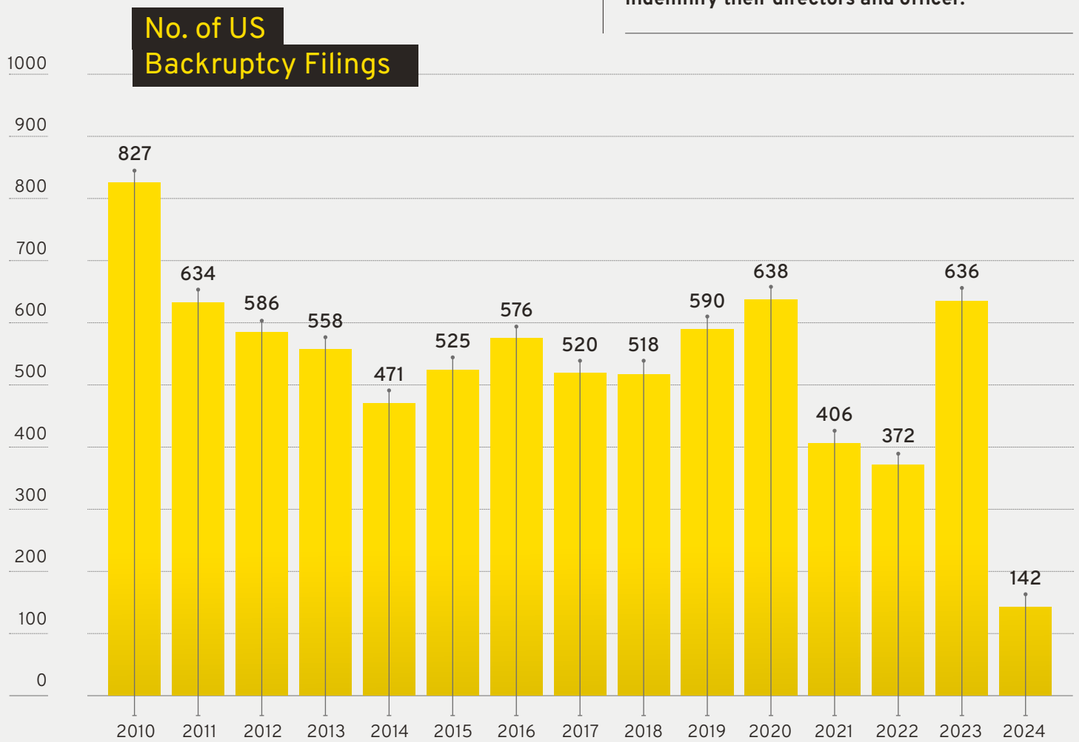
The complete failure of a company, which completely runs out of money, creates a complex challenge for defending its executives and board members against lawsuits using its D&O policy, as it often simply doesn't have the money set aside to pay its share of the defense costs required under the B and C Sides of the cover.

87%

of respondents told us they worked on a bankruptcy-related securities case in the past 12-months, while

58%

said that the companies did not indemnify their directors and officer.



The most common reason why was because the companies don't have the money to do so, not because they were prevented from doing so by the courts. One respondent explained simply, saying the reason was because "they're broke."

This tallies with the challenges facing companies looking for further funding. Companies that have gone public through a DeSPAC transaction have been particularly exposed to this. There have been many lawsuits brought against DeSPACs that were embryonic businesses in untested technologies. A respondent outlines a case they are involved in, that is representative of the broader problem:

"I have a DeSPAC case in the EV industry. The deal closed in 2022, they were sued three months later, the case has lost the Motion to Dismiss, they have filed for Chapter 7 [bankruptcy] and there is no money. The policy had a $15m deductible but it is now paying under the Side A. There is separate counsel for a lot of directors and officers and the SEC is involved."

42%

of respondents believe a company going bankrupt increases the amount for which a case is settled significantly.

28%

believes it decreases the amount.

When asked to explain why, a respondent says:

"The failure of the company often leads to a view by the judge that the allegations are more credible. However, recovery is typically limited by competing players seeking a portion of the insurance. The A Side tower is more likely to be available in a bankruptcy, so this cuts in both directions."

Another says:

"Defendants do not control the documents when there is a bankruptcy and that makes the case more dangerous."

With companies sometimes completely running out of funds, thereby rendering the deductible null and void, the A Side of a company's D&O cover plays a vital role in defending its executives and board members. But small towers without a large A Side layer at the top of the programme can be a problem, as the underlying layers can be eroded quickly.

The issues are highlighted by one respondent who recounted the facts in a recent case they worked on:

"The client totally ran out of insurance as they [had] only bought $10m. The programme was $5m ABC and $5m A Side. The A Side ended up coming into play. They burned through a lot of costs before they filed for Chapter 11 and there was nothing left. It made it really hard to settle."

Breach of fiduciary duty and fraudulent transfer claims against individual executives remain an issue. Directors and officers must remember their responsibilities if their company is on the verge of bankruptcy, as we highlighted last year. Though it is very hard to track the number of breach of fiduciary duty or fraudulent transfer claims.

55%

said they had seen more breach of fiduciary duty or fraudulent transfer claims filed in the past 12-months.

One respondent explains what plaintiffs' attorneys will often do:

"Most will see a stock drop and will file a speculative class action. [But] when a bankruptcy occurs, they may pivot to look in more detail at the board's conduct. We have seen the approach shift a few times in these cases."

Conclusion

The high number of bankruptcies illustrate the importance of A Side cover in defending subsequent claims. With bankruptcies still running at a high rate in 2024, this trend is set to continue, especially against companies that are running out of cash because they have been unable to refinance.

These cases' complexity and the fact that individuals are often implicated means that the A Side will play a significant role in defending and resolving bankruptcy-related claims over the coming 12-months.

Inigo's prediction

No.4

There will be at least 10 securities class action settlements in 2024 that involve a company in bankruptcy.

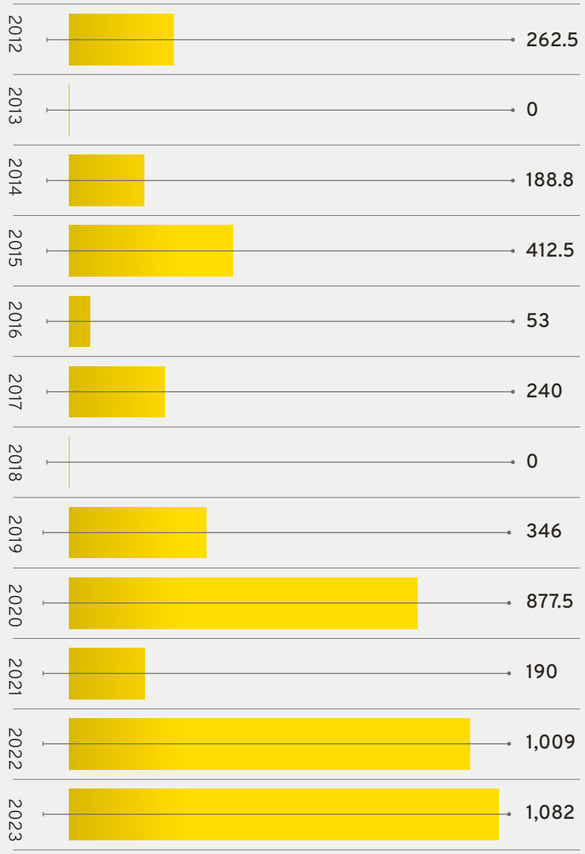
Q5

Derivatives and Delaware. How bad can it get?

In last year's survey, we discussed the deteriorating environment for defendants in derivative litigation. We didn't plan to revisit this topic this year, but respondents' feedback made us change our minds.

Derivative claims have risen over the past two decades. The likelihood that a US-incorporated company will face a derivative action in any given year has almost doubled since 2000 to around 2%. But the risk for larger companies is much higher. The probability that a company with a market cap of more than $25bn has a derivative suit brought against it is over 8%. Large companies not only face a higher risk of a standalone derivative lawsuit – which we define as not accompanied or preceded by a securities class action – but the cost of settling the suit is also much higher.

Aggregate derivative settlements over $1m



In 2023, there were just under $1.1bn in aggregate settlements over $1m – another record. This was less than we predicted, but there are several large settlements which are likely to come in 2024. There is a clear trend of spiralling derivative settlements.

We began by asking defense counsels who had been involved in a derivative case in Delaware in the past 12-months how they believed the litigation environment was changing.

83%

of respondents felt it had become harder to defend cases in Delaware in the past 12-months.

Most of the feedback centred on the continued impact of recent decisions that define the scope of the Caremark standard, or the business judgement rule. The second most common topic of discussion was how Section 220 Demands have become a launchpad for litigation.

Respondents once again focused on the fallout from recent landmark judgments. Many highlighted the McDonald's decision and how it has imposed fiduciary duties on company officers. One respondent says:

"We're still coming to terms with the impact of the responsibilities imposed on officers following McDonald's. We now need to view the broader actions of management and not just the board when applying Caremark."

But one respondent points out that:

"Recent rulings (e.g. McDonald's) and statutory amendments largely confirmed what everyone thought the law was before."

Respondents also believe that the courts are now more sympathetic to plaintiffs. One says:

"There are just too many pro-plaintiff judges in Chancery."

Another says:

"Delaware courts are just not as friendly to individual directors or officers. West Coast companies are having a particularly hard time."

It is difficult for us to put a finger on why there's been this perceived sentiment change among Delaware judges, but it is clearly starting to have an impact on case law and the outcome of cases.

RECAP: MCDONALD'S CORPORATION STOCKHOLDER DERIVATIVE LITIGATION

As it is such a topic of discussion among respondents in this year's survey, we felt it important to recap the McDonald's decision.

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 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 the McDonald's board acted improperly in addressing issues of sexual harassment facing the company, the plaintiffs' claims were dismissed.

WHAT ARE SECTION 220s?

Section 220 of the Delaware General Corporation Law allows stockholders to access corporate records for a "proper purpose" - most commonly to "investigate wrongdoing" such as a possible breach of fiduciary duty by the board or management.

Section 220 Demands

Section 220 Demands are forming the basis for a burgeoning number of derivative complaints, and, ultimately, settlements in Delaware, as plaintiffs' attorneys are using them to gather a lot of information about a company on which to file a derivative complaint.

All the defense counsels we surveyed who had litigated a derivative case had seen a Section 220 Demand develop into a filing. This indicates a change in strategy by plaintiffs' lawyers from that outlined in our 2022 survey, when we wrote that these demands were being filed alongside other securities claims, often by a firm that didn't file the main case and was looking to monetise an existing case. But now these are being used as the main fact-finding missions for significant standalone derivative cases in Delaware.

One respondent also highlighted how the scope of Section 220 Demands is widening.

"In a current case the court approved thousands of internal documents for review that we wouldn't have expected. This is basically now a proxy for discovery and is hugely inflating the cost of defending the case."

The greatly increased use of Section 220 Demands and their much-expanded scope is likely to have two impacts. It will increase the number of derivative cases being filed, as the information that plaintiffs' lawyers obtain which they can use to build a case is expanding rapidly. It will also make these cases much more expensive to defend, because these documents will need to be analysed by defense counsel before supplying them to the plaintiffs' lawyers.

As a result, corporations may decide to settle cases for large amounts, even if the case against them is weak, to avoid the cost of producing documents.

Conclusion

Delaware continues to become an increasingly attractive place for plaintiffs' lawyers to file cases, thanks to the perception of sympathetic judges, and the increasing use of disclosure demands to help them build a case against companies. Cases filed in the state will be more expensive to defend, regardless of their outcome.

Inigo's prediction

No.5

There will be a record number of derivative filings and settlements over $1m in 2024.

Inigo Defense Counsel Survey 2024

INIGO'S 2024 PREDICTIONS

#01

The SEC's new cybersecurity disclosure rules **will lead to at least 10 cybersecurity related securities claims over the next 12-months.**

#02

Regardless of whether the number of securities class actions being filed increases in 2024, **the overall settlement value and amount spent on defense costs will increase by at least 10%.**

#03

AI will be a material driver of litigation and SEC enforcement action over the next 12-months.

#04

There will be at least 10 securities class action settlements in 2024 that involve a company in bankruptcy.

#05

2024 will see a **record level of derivative filings and settlements over $1m.**

Which are the best US securities plaintiffs' law firms?

Once again, we asked respondents to name the opponents they most respect.

#01	#02	#03	#04	#05
ROBBINS GELLER RUDMAN & DOWD LLP	**BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP**	**LABATON SUCHAROV LLP**	**QUINN EMANUEL URQUHART & SULLIVAN LLP**	**SUSSMAN GODFREY LLP**

The top spot changed hands this year, with Robbins Geller Rudman & Dowd pipping Bernstein Litowitz Berger & Grossman by just one vote. One respondent summed up how close it was, saying: "Both have excellent lawyers and can afford to be aggressive, it's hard to choose between them." Another simply says of Bernstein, "talent".

Labaton retained its third place for the third year in a row. Quinn Emanuel Urquhart & Sullivan climbed a place to fourth and we had a new entry, with Sussman Godfrey climbing into the top five for the first time.

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