

# Developments on the Intersection of D&O and EPL



**Moderator:**

**La’Vonda McLean, Managing Director, EPL/W&H Product Leader, Senior Client Advisor, Marsh USA | FINPRO**

**Panelists:**

**Dove A.E. Burns, Equity Partner, Obermayer**

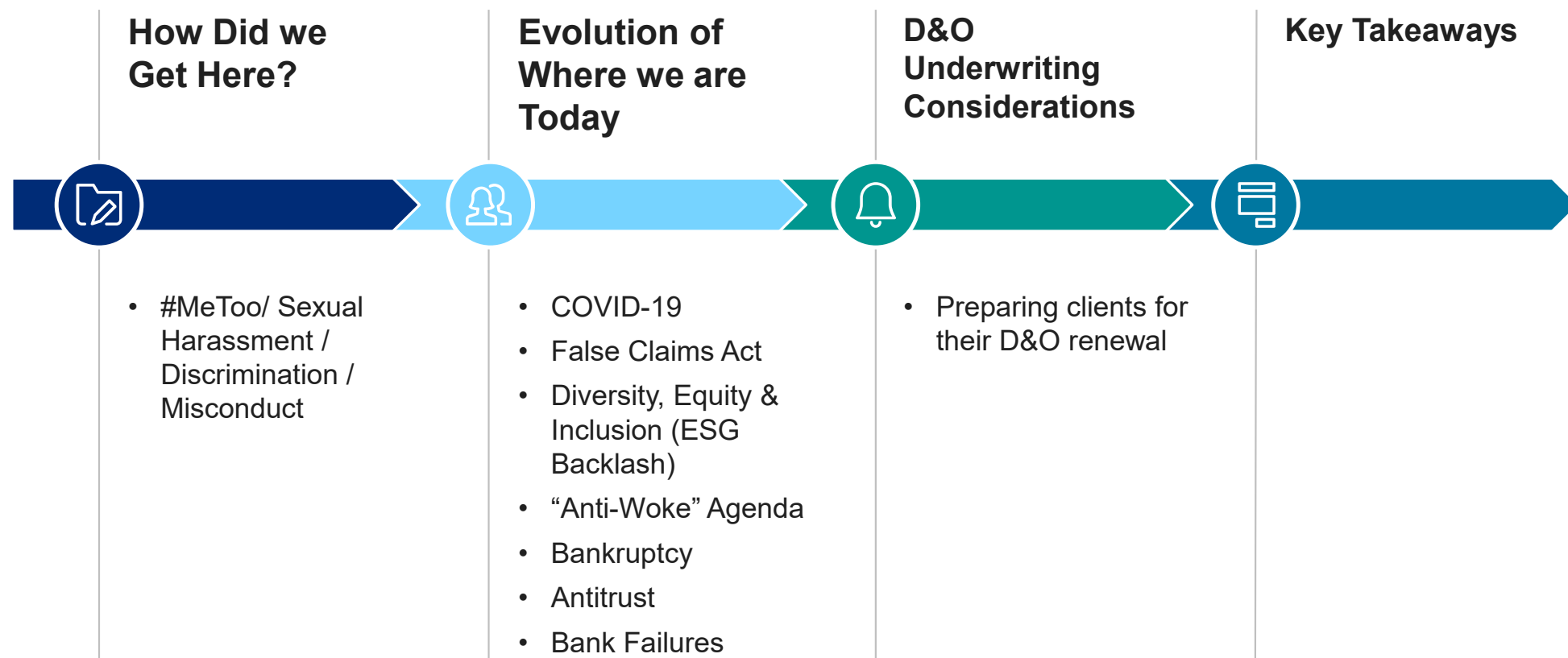
**Marisa DeMartini, Vice President, Management Liability Claims Manager, Ascot Group**

**\*The opinions and positions expressed in this presentation are the presenters' own.**

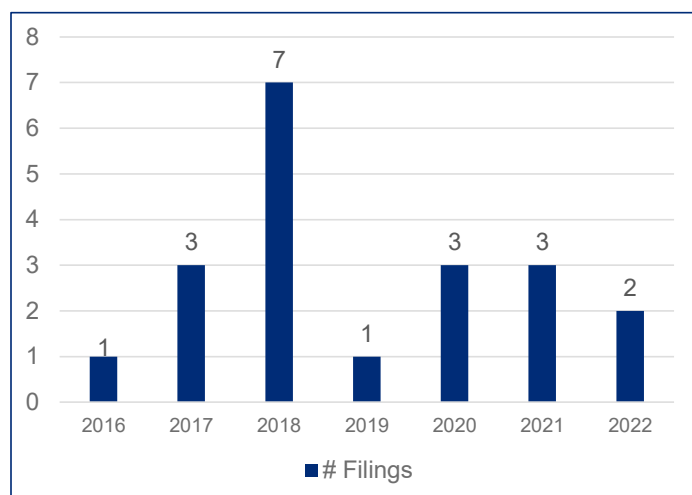


# The Intersection of D&O and EPL

## Topics

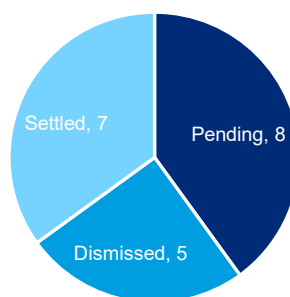


# Selected Sexual Harassment / Discrimination / Misconduct Securities Claims (as of 3/31/23)



20 Events Tracked

- 8 SCA only
- 10 Derivative Only
- 2 SCA and Derivative



■ Pending ■ Dismissed ■ Settled

**Average Settlement: \$119 million**

## SETTLEMENTS:

1. CBS Corp (SCA) - \$14.7 million (Derivative still pending)
2. Google (Alphabet) (Derivative) - \$310 million
3. Wynn Resorts (Derivative) - \$41 million
4. L Brands (Derivative) - \$90 million
5. 21<sup>st</sup> Century Fox (Derivative) - \$90 million
6. Pinterest (Derivative) - \$50 million

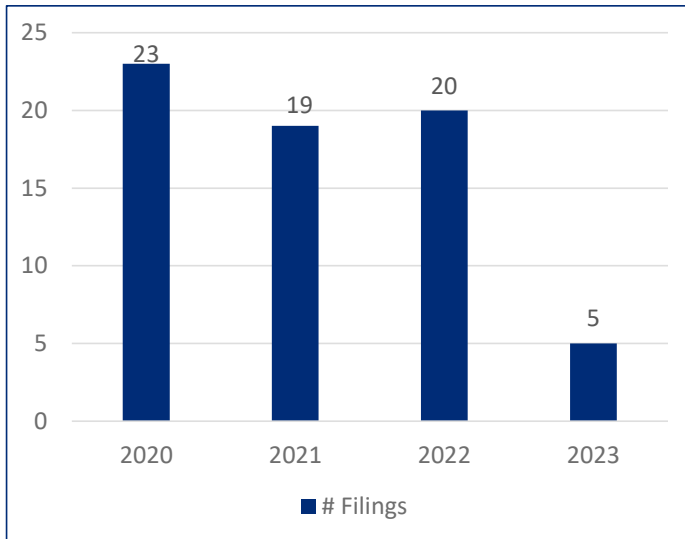
It's not just public companies:

- The Weinstein Company
- Michigan State University

Four Legal Theories for D&O Claims Arising from Claims of Sexual Misconduct:

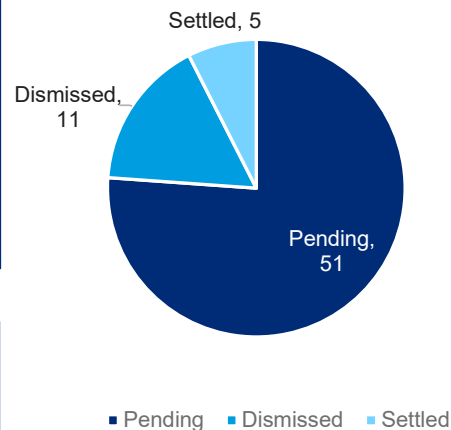
- Corporate officials breach duties of care and loyalty when they engage in sexual misconduct putting resources and reputation at risk
- Officials failed to monitor harassment making them liable under a Caremark theory
- Corporate officials turn blind eye or enable harassment to continue creating liability for breach of duty of care or loyalty
- Official and their organization violated securities laws by making misleading statements about workplace sexual misconduct

# Selected COVID-19 Securities Claims



67 Events Tracked

- 57 SCA only
- 2 Derivative Only
- 8 SCA and Derivative



**Average Settlement: \$13.7 million**

## SETTLEMENTS:

1. SCWorx - \$3.3 million
2. Vaxart - \$12 million
3. Inovio - \$44 million
4. Universal Health Services - \$925,000 – plaintiff fees only as non-cash settlement.
5. Chembio - \$8.1 million

## Categories of COVID-19 Claims:

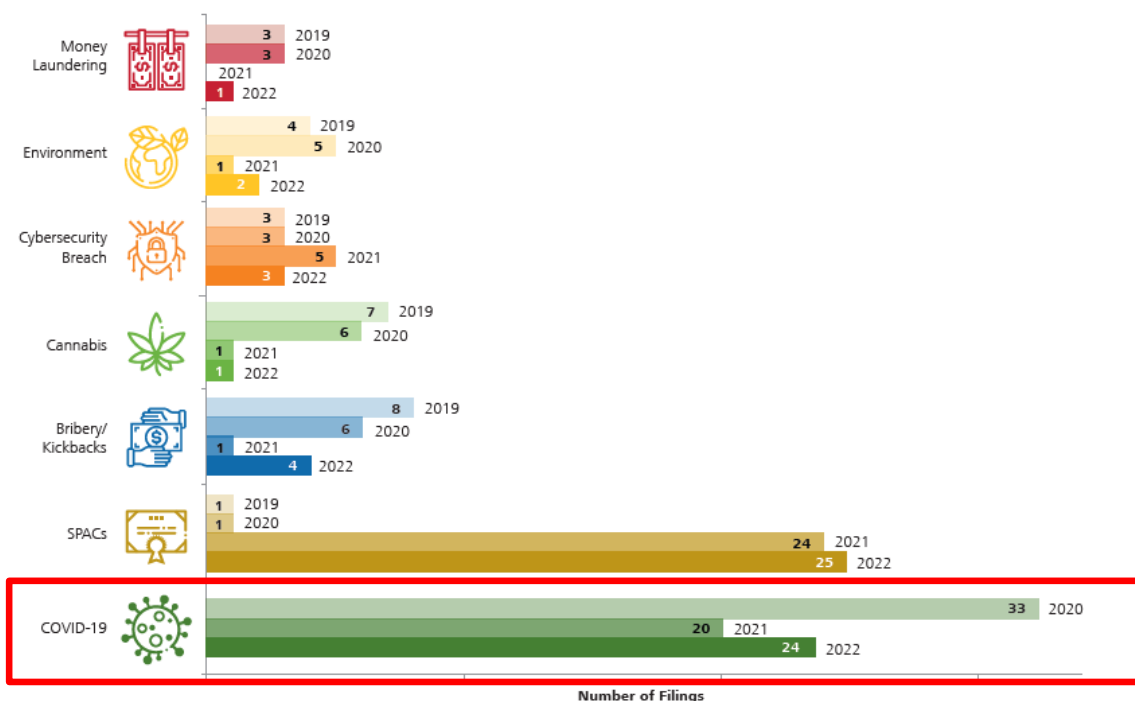
- Companies who had outbreaks in facilities (i.e. cruise-lines, prisons).
- Companies who could prosper as a result of the pandemic (i.e. drug, vaccine and testing manufacturers, on-line services, etc.).
- Companies whose operational or financial performance were disrupted by the pandemic (i.e. real estate development firms).
- Companies who profited at the outset but are now deteriorating as pandemic progressed (i.e. Peloton).

## COVID Claims with Intersecting D&O and EPL Legal Issues:

- Inadequate health and safety procedures to prevent spread
- Mismanagement claims for failure to comply with employment related rules/regs
- False Claims Act
- Vaccine Objections

# COVID-19 Securities Class Action Trends

Figure 7. Event-Driven and Other Special Cases by Filing Year  
January 2019–December 2022

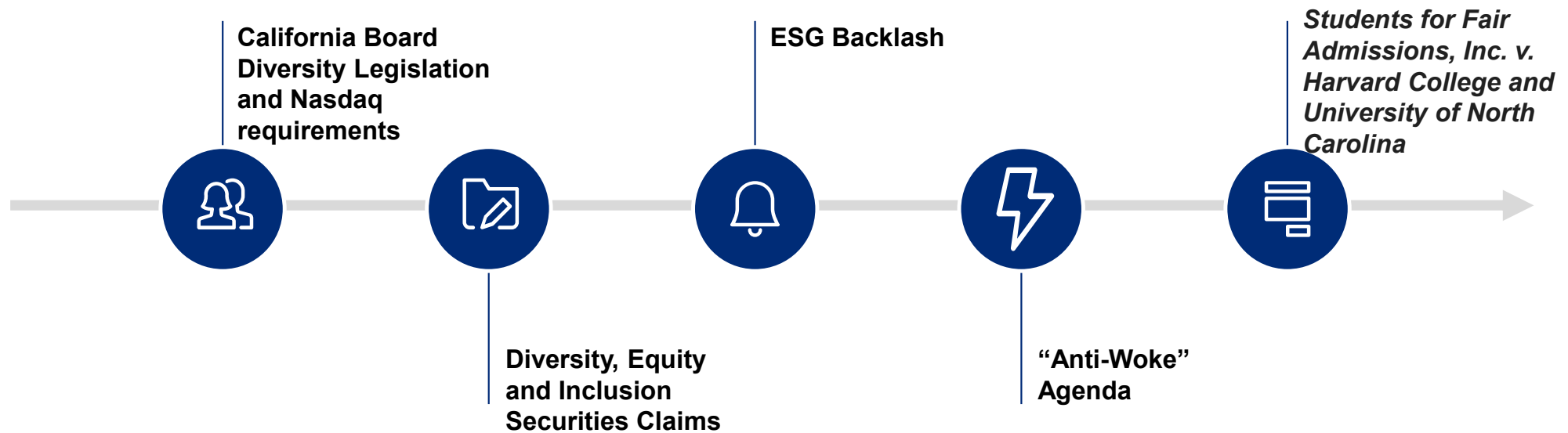


Source: NERA Full Year 2022 Report

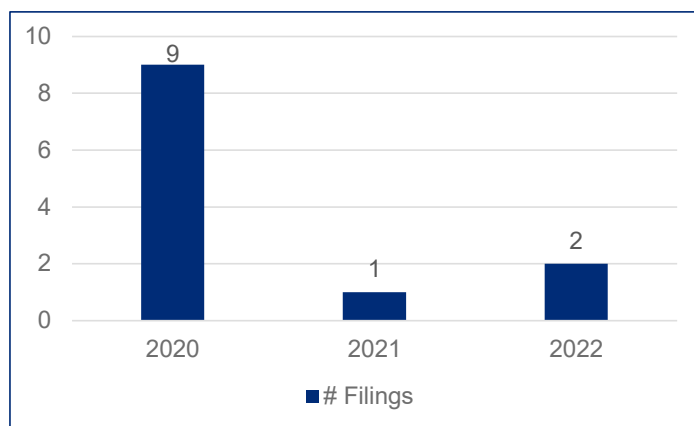
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# Diversity, Equity and Inclusion and ESG Backlash

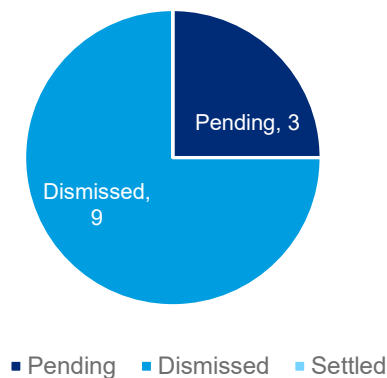


# Selected Diversity, Equity & Inclusion (DEI) Securities Claims (as of 3/31/23)



## 12 Events Tracked

- 1 SCA only
- 10 Derivative Only
- 1 SCA and Derivative



**Average Settlement: None settled**

## DISMISSALS:

- Danaher, Cisco, Facebook, Qualcomm, NortonLifeLock, OPKO Health, Oracle, The Gap, Monster Beverage

## OTHER PENDING CASES:

- Wells Fargo
- Starbucks
- Micron Technologies

## Legal Theories:

- Breach of fiduciary duty
- Unjust enrichment
- Corporate waste
- Misleading statements
- Failure to monitor DEI leading to liability under Caremark theory



## Additional Areas Leading to D&O Claims

- Antitrust
- Bankruptcy
- Bank Failures





# QUESTIONS