

# Excessive Litigation Over Excessive Plan Fees In 2023

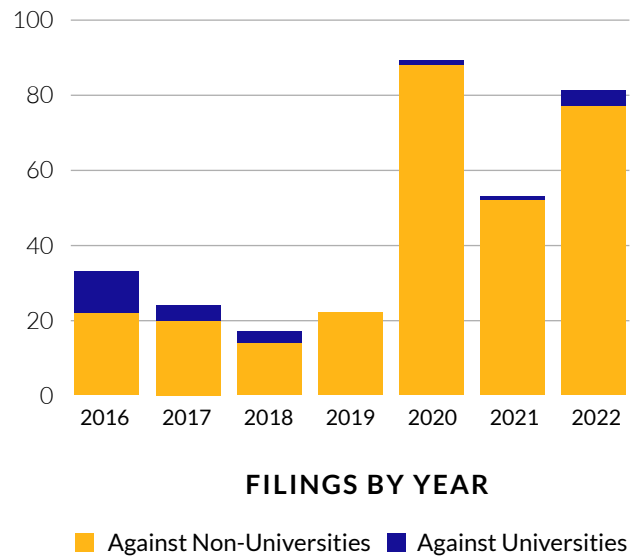
An inside look at the continuing barrage of excessive fee litigation targeting retirement plan fiduciaries in the US

As one of the leading carriers of fiduciary liability insurance protection, Chubb is dedicated to helping our clients understand and mitigate the risks they may face. The onslaught of claims over alleged excessive fees in retirement plans continues to be a potential exposure for all types of plan sponsors (e.g. publicly traded companies, privately owned companies, not-for-profit organizations) in all types of industries, while defined contribution plans of all sizes are being targeted.<sup>1</sup>

## The pace of filings industry-wide remains elevated with no end in sight.

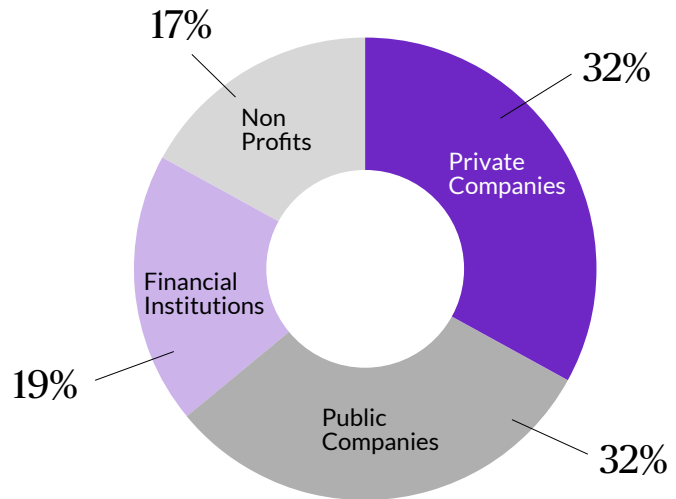
Although fiduciary excessive fee claims first appeared in 2006, they were historically infrequent, other than a brief period in 2016 when a series of claims were brought against universities.

Notwithstanding the wave of suits against universities, the filing activity over the last three years has significantly increased.



## All types of plan sponsors are at risk.

The increased filings do not exhibit a discernable trend in the types of plan sponsors or industries that plaintiffs might sue.

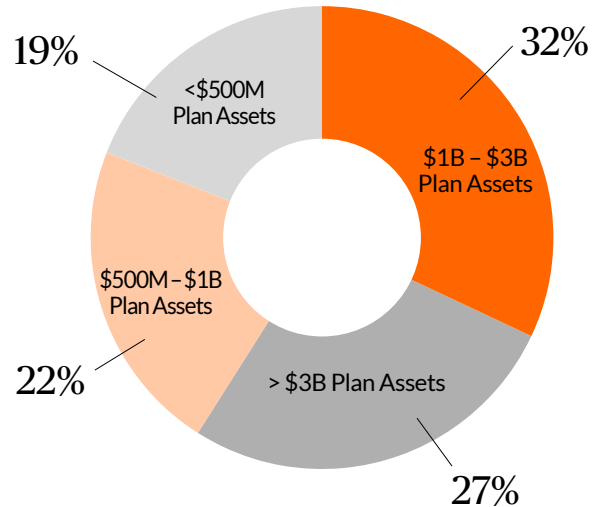


DISTRIBUTION OF SUITS FILED BY TYPE OF SPONSOR SUED\*

\*Suits filed 2016 - 2022

## It's not just large plans or plans with high fees getting sued.

Historically, the vast majority of plans whose fiduciaries were sued had well over \$1 billion in plan assets. In recent years, companies with smaller plans have increasingly been targeted, making litigation relatively equally distributed among plans of all sizes. Moreover, plans with robust plan practices and relatively low fees are being pursued.



**DISTRIBUTION OF SUITS BY SIZE OF PLAN SUED\***

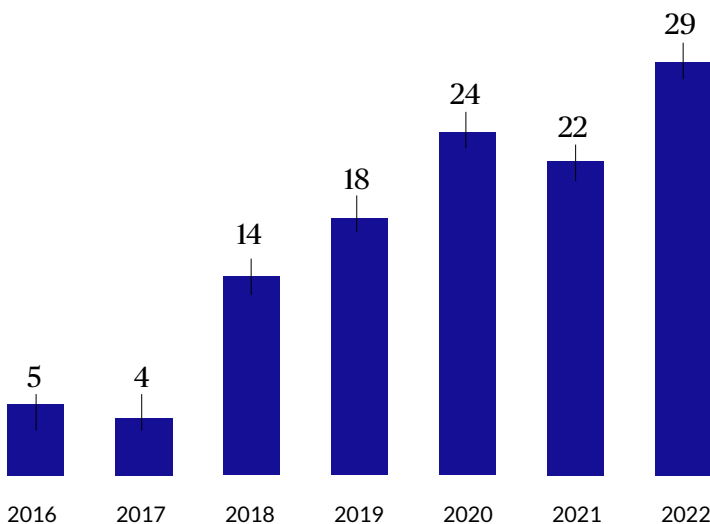
\*Suits filed 2020 - 2022

### Did you know?

- Numerous plans with less than \$100 million in plan assets were sued.
- A plan in which each participant paid less than \$20 for recordkeeping fees was sued.
- Plans using funds costing 4 and 5 basis points were sued.
- Plans with fees that were demonstrably lower than their peers were nevertheless sued when plaintiffs focused on second-guessing investment performance.

## Settlement activity continues to climb.

The significant increase in the number of filings has been accompanied by a substantial uptick in the total annual number of settlements, which has increased six-fold from 2016 to 2022.



**NUMBER OF SETTLEMENTS PER YEAR**

The average settlement value of cases resolved between 2016 to 2022 was approximately

**\$9.3 million**



The total amount paid in settlements from 2016 to present is over

**\$1 billion**

## Defense costs mount regardless of merits.

Defense costs are unpredictable and can run well into the millions, especially where a case survives a motion to dismiss. Unfortunately, less than 30% of these cases are dismissed.

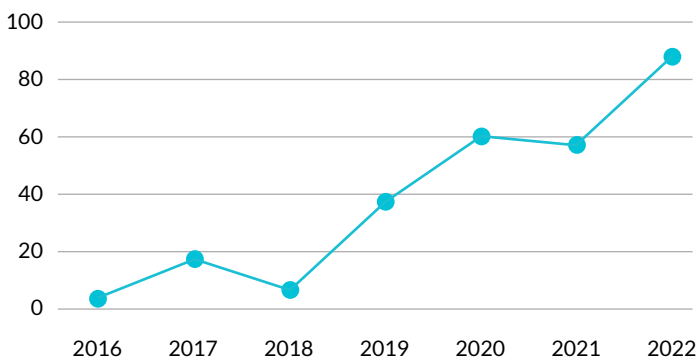
Defense costs may bear little relation to the merits or outcome of the case.

At least **20%**  
of the cases filed since 2016  
cost more to defend than to settle.\*

\*Based on available defense costs information

Amazingly, one case cost  
**almost \$5 million**  
despite the fact that the defendants  
won the motion to dismiss.

## A majority of claims filed since 2016 are still in active litigation, creating significant uncertainty.



**% OF CLAIMS FILED IN A GIVEN YEAR THAT ARE STILL IN ACTIVE LITIGATION**

Over this period of time, settlement values have varied greatly - from under \$500,000 to over \$30,000,000. As these claims age and remain active, they become more expensive to resolve. With over 65% of the claims filed between 2020-2022 still active, **what might this mean for their future exposure?**

### Case in point

Take a look at the average settlement values of the near 90 claims originally filed against employers in 2020:

- 3 of those claims settled in 2020 for an average of \$1.5M
- 13 of those claims settled in 2021 for an average of \$2.9M
- 12 of those claims settled in 2022 for an average of \$5.9M

## What can you do?

In addition to following prudent plan processes and utilizing qualified plan experts, companies that sponsor retirement plans should have adequate Fiduciary Liability Insurance in place with a trusted, experienced carrier like Chubb.

For more information on Chubb's Fiduciary insurance solutions, visit [www.chubb.com/ca-en/business-insurance/fiduciary-liability](http://www.chubb.com/ca-en/business-insurance/fiduciary-liability)

1. The data contained in this report reflects excessive fee claims brought against plan sponsors and their internal fiduciaries (i.e. the parties that are typically protected by Fiduciary Liability Insurance). It does not include excessive fee claims made solely against plan service providers, such as recordkeepers and investment managers. This data is based on Chubb's best efforts to monitor these matters industry-wide, but Chubb makes no representations or warranties as to the completeness of the data.