

The 2016 Carlton Fields Class Action Survey

Best Practices in Reducing Cost and
Managing Risk in Class Action Litigation

**CARLTON
FIELDS**





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Introduction

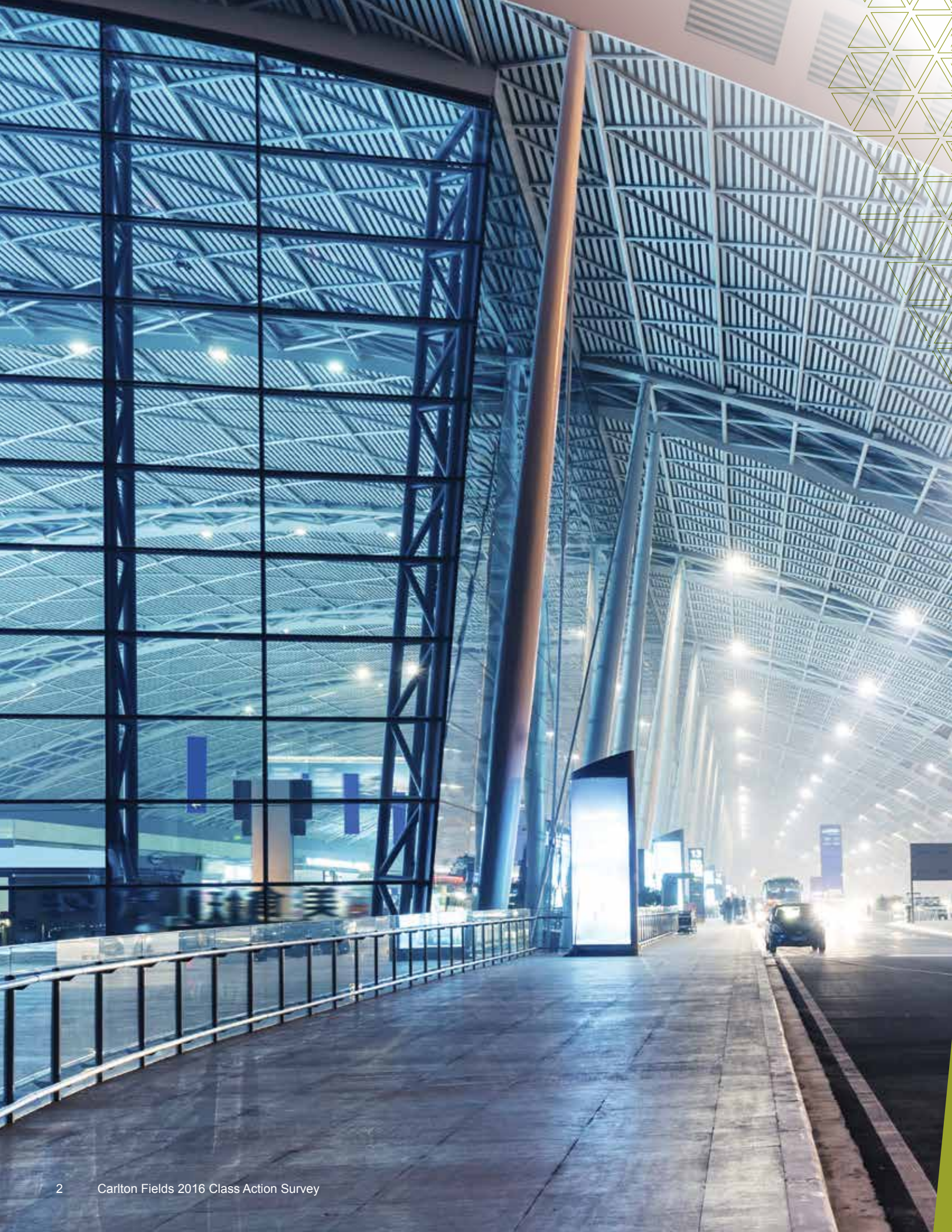
Following four years of decline, class action spending is up and is expected to continue to rise in 2016. In addition, more companies are facing class actions. Across industries and practice areas, class actions present legal departments with sizable risk. As the type and nature of these matters evolve, legal departments are devising better and more innovative ways to manage them.

The fifth annual Carlton Fields Class Action Survey continues to offer insight into the prevalence, cost, and type of class actions that companies face.

Our 2016 survey results from detailed interviews with general counsel or senior legal officers at 381 large companies operating in 25 industries. They shared thoughts and best practices on managing class actions and their associated risk. We trust that their valuable insights will, in turn, help your company and its legal department manage these lawsuits effectively and efficiently.

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Executive Summary

Spending on class actions is up after four years of decline. This marks an important turning point, and spending is projected to increase in 2016 as well.

Across industries, companies spent \$2.1 billion on class action lawsuits in 2015. The number of companies facing at least one major class action suit increased from 53.8 to 60.6 percent in 2015. Their class action dockets increased on average by one new case in 2015, bringing the average number of class actions managed to six. This total is expected to increase to seven in 2016.

Consumer fraud and labor and employment remain the most prevalent class action matters. They account for 48.7 percent of all class actions, down slightly from 2014. This year, financial services industry business practices emerged as an expected source of increased class action activity. In this connection, the proposed Consumer Financial Protection Bureau rule that will limit arbitration is expected to give rise to new class action suits. On the other hand, while data privacy class actions have been highly anticipated for several years, they remain a small percentage of matters overall.

The percentage of class actions identified by companies as routine is falling, as higher-risk matters become the norm. Complex matters now account for 62.5 percent of all class actions, up from 46.8 percent last year.

Even while increasingly facing higher-risk matters, corporate legal departments have reduced the number of in-house attorneys used to manage them. Not surprisingly, these in-house attorneys are spending more time on class actions, and their companies are relying more on outside counsel.

When evaluating the risks class actions present, exposure is still deemed the most important variable, and corporate counsel increasingly report that “coming in under estimated exposure” is a key determinant of success.

Faced with a greater number of class actions—and higher-risk matters—companies are taking a pragmatic approach. While the percentage of corporate counsel who favor a “defend at all costs” approach dropped from 13.6 to 9.7, the percentage committed to defending “at the right cost” rose from 28.8 to 33.9. In addition, 68.7 percent of companies settle their class action lawsuits, most at the precertification stage.

While the use of alternative fee arrangements to manage class actions declined somewhat, nearly half of companies still rely on them. Those who use them increasingly favor fixed fees and capped fees. Capped fees, in particular, are gaining in popularity.

Class Action Spending and Budgets

In 2015, Corporate Counsel Spent Over \$2 Billion on Legal Services for Class Actions

Class actions were one of the few areas of litigation where spending increased since our last survey. In 2015, companies spent a total of \$2.1 billion on legal services related to class actions. Of this sum, 75-80 percent went toward defending against certification.

\$19.4 Billion Market for Legal Services in Litigation

CLASS ACTIONS

\$2.1 Billion

10.8%

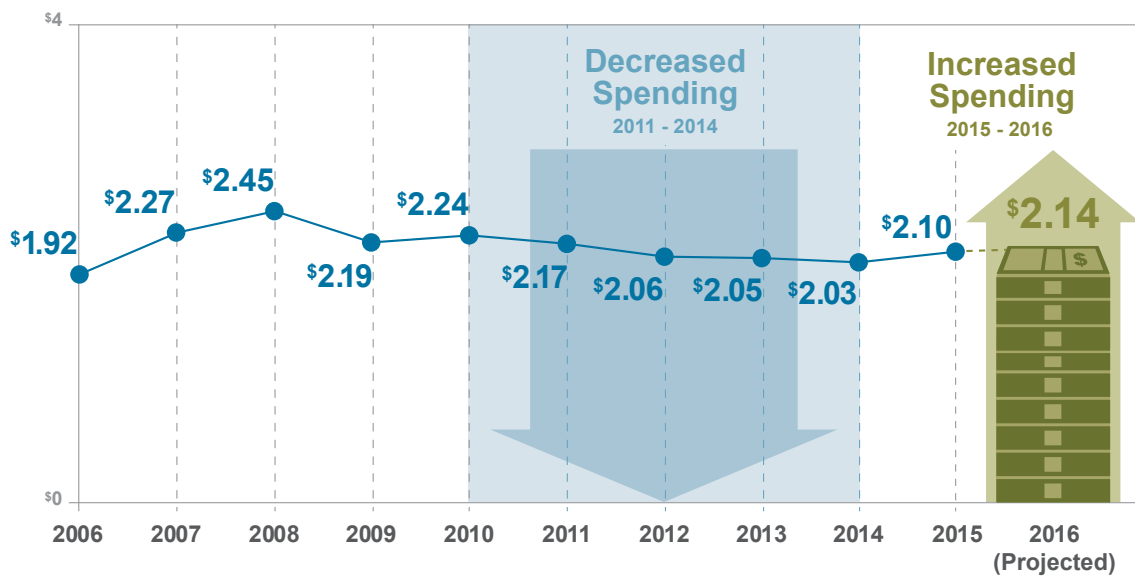


Four-Year Decline in Class Action Spending Ends

2015 marks a turning point in class action spending. After four years of decline, class action spending increased in 2015, from \$2.03 billion to \$2.1 billion. A further increase is expected in 2016.

U.S. Corporate Legal Spending on Class Actions

\$ Billions

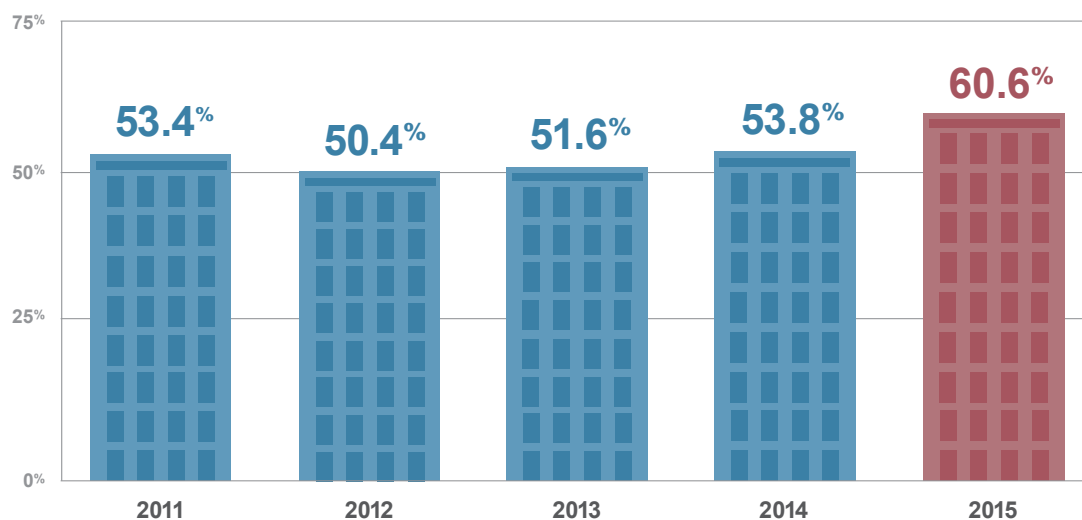


Type and Frequency of Class Actions

Class Actions Impact More Organizations Than Ever

Across industries, the number of surveyed companies facing at least one major class action rose from 53.8 to 60.6 percent, representing an increase of nearly 13 percent in 2015. The increased activity is due to a widening scope of high-stakes issues.

Companies with Class Action Matters
Percent



Bulk of Class Actions Continue to Raise Consumer Fraud and Labor Issues

Half of all class action matters and spending fall within the consumer fraud and labor and employment practice areas. Specifically, consumer fraud accounts for nearly 25 percent of matters and 25 percent of spending, while labor and employment accounts for just over 24 percent of matters and nearly 23 percent of spending. These practice areas are followed by product liability, antitrust, securities, insurance, data privacy, and intellectual property.

Class Action Matters and Annual Spending Breakdown by Type
Percent of Matters and Spending

PRACTICE	MATTERS	SPENDING
CONSUMER FRAUD	24.6%	25.0%
LABOR & EMPLOYMENT	24.1%	22.6%
PRODUCT LIABILITY	10.1%	10.5%
ANTITRUST	7.6%	7.9%
SECURITIES	7.3%	7.9%
INSURANCE (EXCLUDING CONSUMER FRAUD)	7.0%	6.9%
DATA PRIVACY	4.8%	3.4%
INTELLECTUAL PROPERTY	0.1%	0.1%
OTHER (INCLUDING REGULATORY AND FALSE ADVERTISING)	14.3%	15.7%

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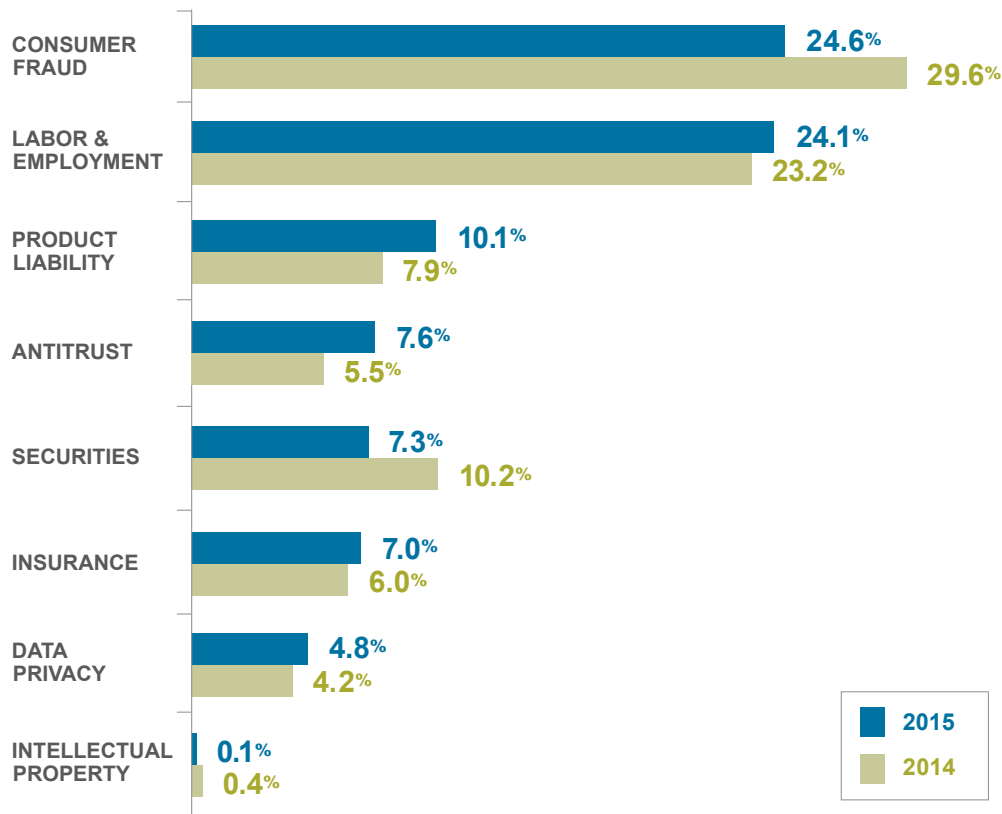
Types of Class Action Matters Rising and Declining

In 2015, companies saw a decline in the consumer fraud matters they managed. Nonetheless, these matters still made up a sizeable percentage of their class actions. Securities matters are the only other type of class action that saw a decline.

The types of matters that became more prevalent in 2015 include product liability matters, which rose as the scope of these matters broadened across industries, and antitrust. Labor and employment also showed a modest increase.

Class Action Matters Breakdown by Type

Percent of Matters



NOTE: Chart does not add up to 100 percent. Excludes other types of matters.

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The Big Question: What's Next?

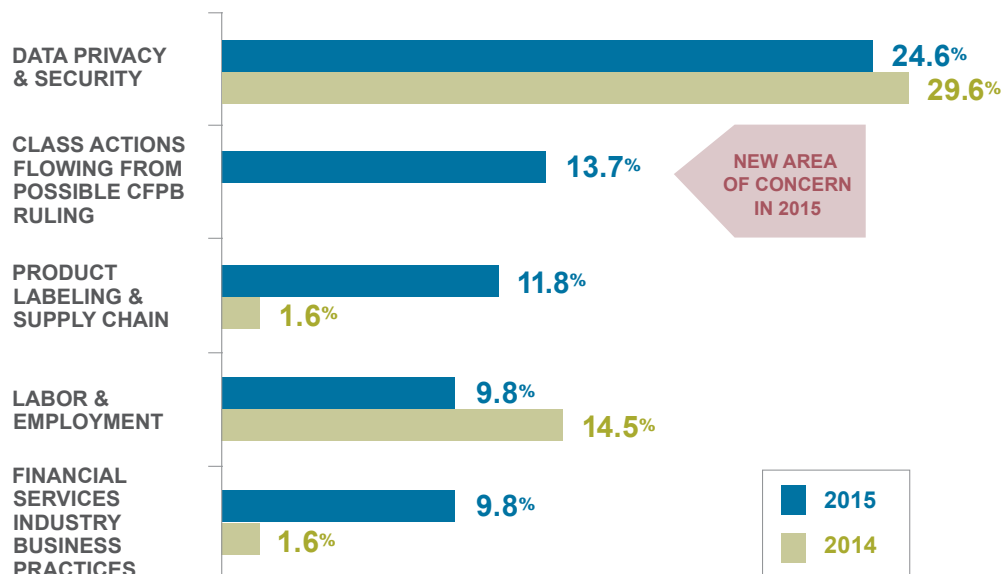
When corporate counsel were asked to predict the next wave of class actions, they most often named data privacy and security, although these matters have yet to gain significant traction.

They are also watching for an anticipated Consumer Financial Protection Bureau ruling that will ban class action waivers in certain arbitration clauses, which, in turn, will likely give rise to new class actions in the financial services industry.

In addition, they expect a dramatic rise in class actions stemming from heightened consumer awareness and regulatory oversight of product labeling and supply chain operations.

Predicted Next Wave of Class Action Suits

Percent of Companies



NOTE: Chart does not add up to 100%. Excludes responses under 9%.

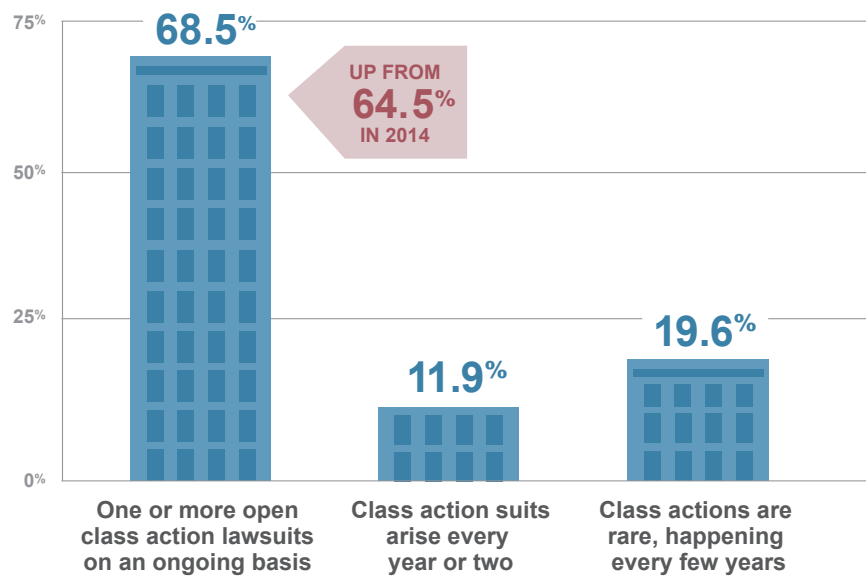
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Class Actions Becoming Part of Everyday Life for Organizations

Of the companies surveyed that reported handling class actions, the percentage indicating they had one or more open class actions on an ongoing basis rose compared to 2014, to 68.5 percent. This is consistent with the overall trend showing a rise in class action spending and an increase in the number of class actions handled on average.

Class Action Experience

Percent of Companies



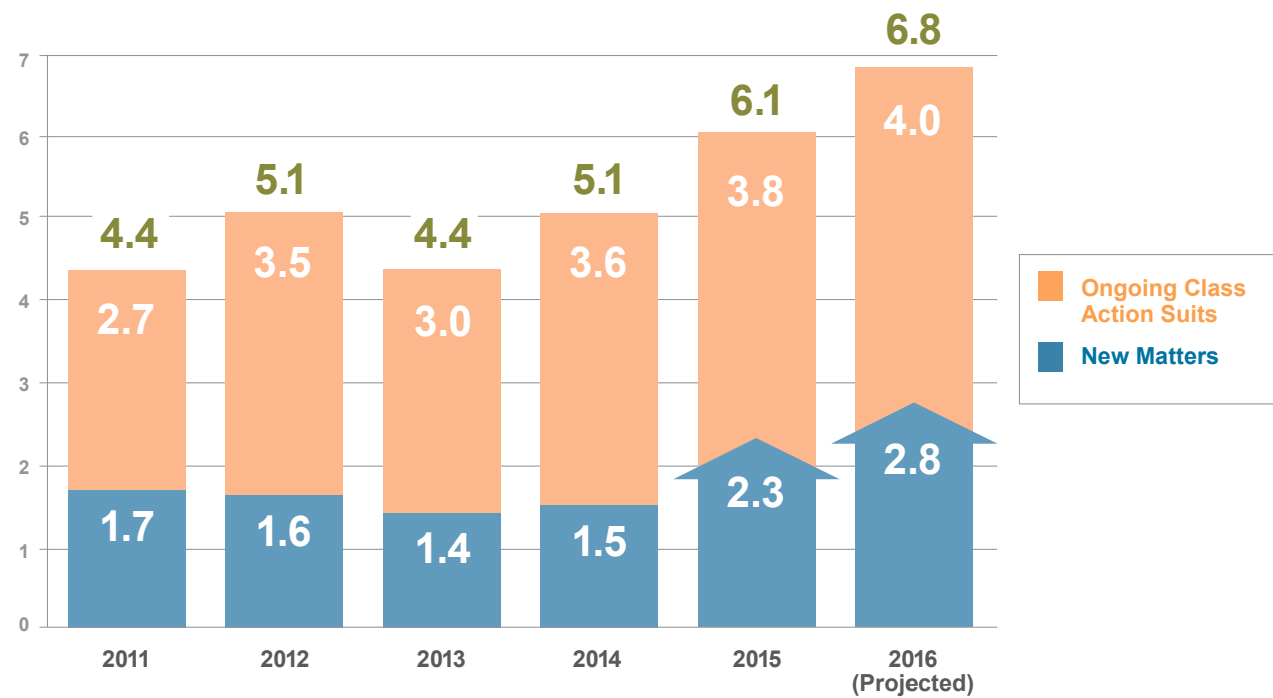
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Number of Class Action Matters Per Company Continues to Climb

In addition to confronting more class actions than ever, companies are also facing more per year. On average, they added about one new class action suit in 2015. They expect a further increase in 2016.

Current and Future Class Action Suits

Average Number of Matters per Company



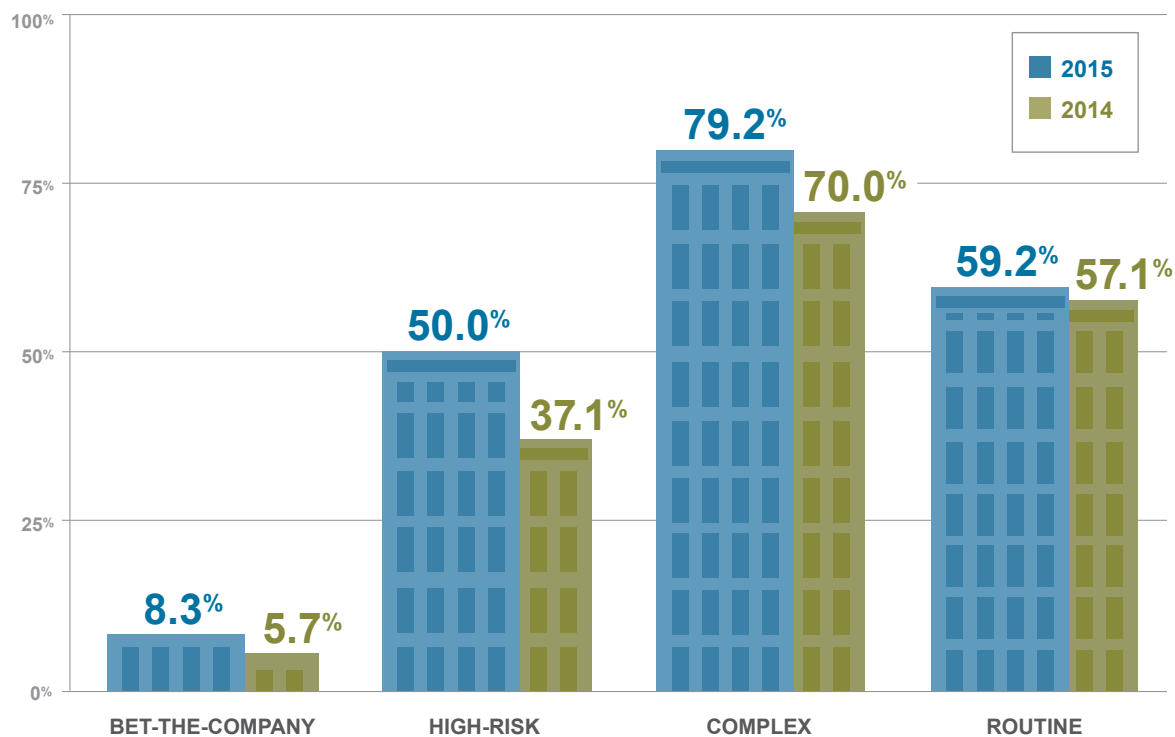
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The Number of Companies Facing Class Actions Climbs Across All Risk Categories

The number of companies that faced high-risk class action suits jumped by more than a third from 37.1 percent to 50 percent from 2014 to 2015. These cases are defined as those where exposure is deemed significant but not devastating.

Nearly 80 percent of companies with class actions handle complex cases, representing an increase of more than 9 percentage points from the previous year.

Percent of Companies Handling One or More Cases by Risk Level

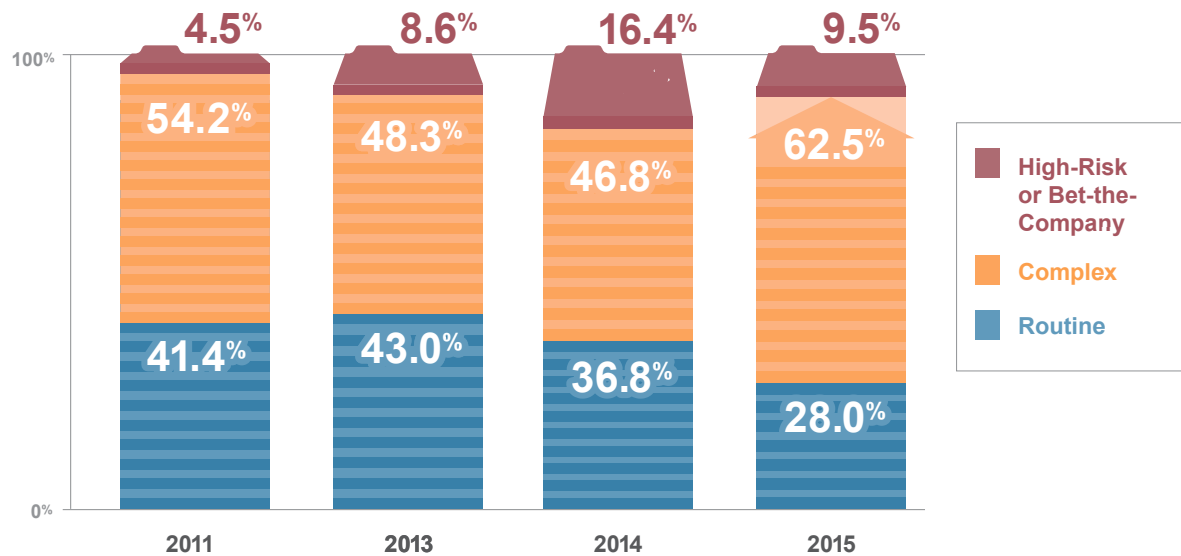


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Overall Mix of Class Actions Changing by Risk Category

Routine matters are becoming a smaller percentage of companies' class action portfolios. In fact, more than 70 percent of cases are considered complex, high-risk, or bet-the-company. In particular, the percentage of complex class actions rose sharply.

Class Action Matters by Risk Level
Percent of Matters



NOTE: Data not available for 2012.

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Exposure and Cost of Class Actions

Substantial Financial Exposure Across All Risk Levels

Class actions can represent a wide range of financial exposure. Even within risk categories (from routine to bet-the-company) exposure levels vary dramatically. For example, matters that companies consider high-risk can represent exposure that ranges from hundreds of thousands to billions of dollars.

Exposure by Risk Level

	Low	25th Percentile	75th Percentile	High
BET-THE-COMPANY	\$1.0 Billion	\$6.9 Billion	\$72.5 Billion	\$95.0 Billion
HIGH-RISK	\$0.5 Million	\$50.0 Million	\$225.0 Million	\$6.0 Billion
COMPLEX	\$0.1 Million	\$3.0 Million	\$30.0 Million	\$1.0 Billion
ROUTINE	\$0.03 Million	\$1.0 Million	\$17.5 Million	\$400.0 Million

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Outside Counsel Fees Jump Dramatically With Each Rise in Risk Level

Each increase in risk level dramatically impacts per-case spending on outside counsel.

Per Matter Outside Counsel Annual Spending by Risk Level

	Low	25th Percentile	75th Percentile	High
BET-THE-COMPANY	\$2.3 Million	\$5.0 Million	\$10.0 Million	\$26.0 Million
HIGH-RISK	\$1.0 Million	\$1.6 Million	\$4.4 Million	\$5.0 Million
COMPLEX	\$0.2 Million	\$1.0 Million	\$1.9 Million	\$2.5 Million
ROUTINE	\$0.16 Million	\$0.23 Million	\$0.72 Million	\$1.64 Million

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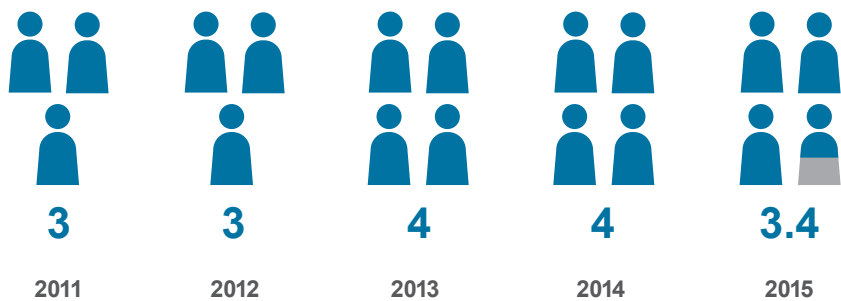
How Companies Manage Class Actions

Staffing of In-House Legal Teams Handling Class Actions Changes

In-house legal teams dedicated to handling class actions average seven attorney and non-attorney professionals, an overall increase from 2014. This is attributable to the average addition of two non-attorneys and the average loss of one attorney dedicated to class actions. This furthers organizations’ reliance on outside counsel. The drop in the number of attorneys used internally also increases the number of hours each spends managing class actions.

In-House Attorneys Dedicated to Class Actions

Average Number of Lawyers



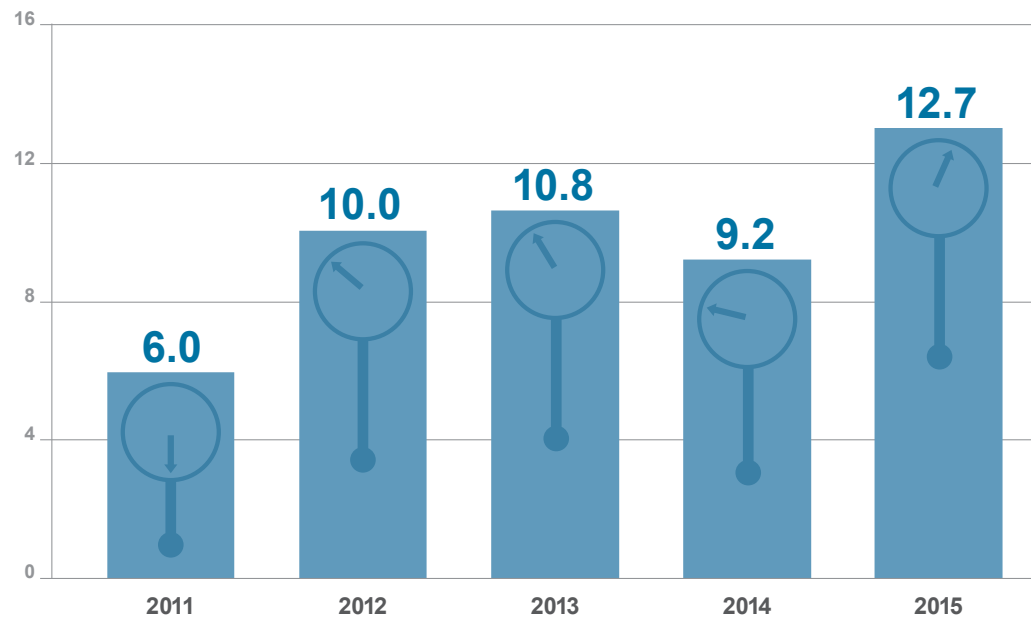
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In-House Attorney Time Spent Managing Class Actions Increases

After dropping in 2014, time spent managing class actions jumped in 2015. The increase in workloads correlates with the increased number and complexity of class action matters.

Aggregate Attorney Time Spent on Class Actions per Case

Hours per Week



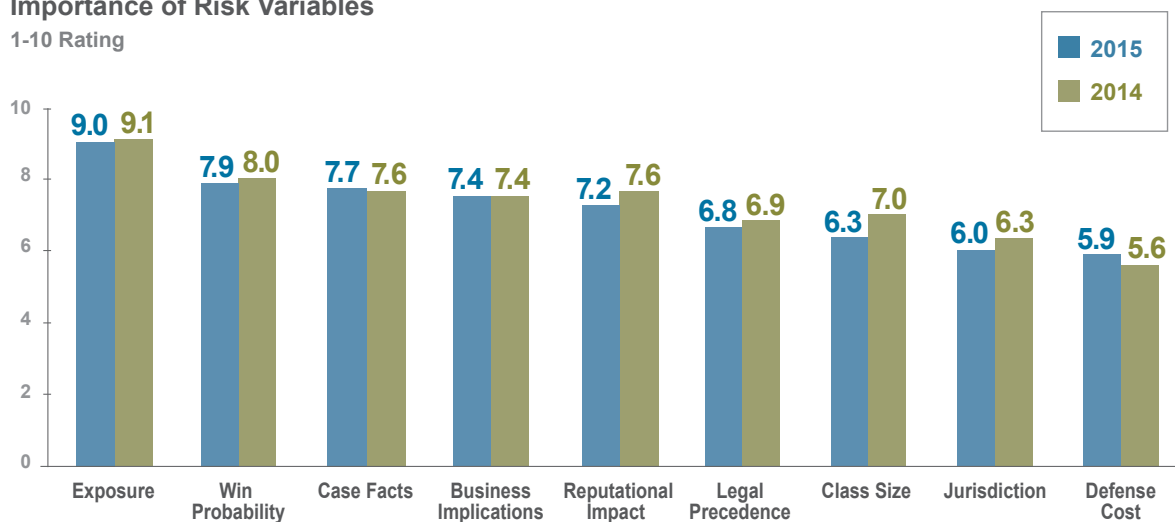
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How Companies Approach Class Action Risk

Understanding Class Action Risk: Potential Exposure Remains the Primary Concern for Corporate Counsel

On average, corporate counsel rank potential exposure as the most important variable when they assess class action risks. This is the third consecutive year that potential exposure and defense cost have been ranked, respectively, the most and least important variables by corporate counsel.

Importance of Risk Variables
1-10 Rating



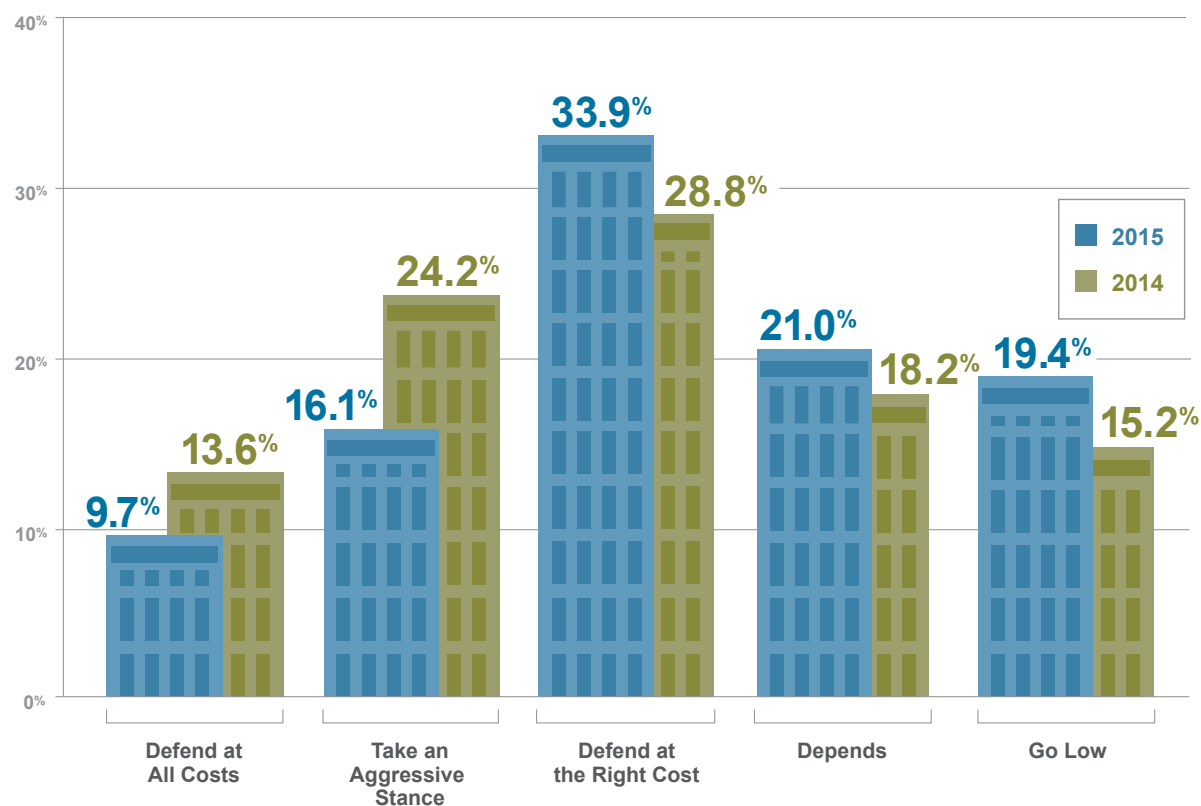
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As More Class Actions Loom, Greater Weight is Placed on Pragmatism

Corporate counsel have become increasingly interested in aligning cost with risk. The number of corporate counsel with a “defend at the right cost” philosophy continues to rise, now to more than one in three. Meanwhile, the “defend at all costs” approach continues to plummet. This shift in attitude reflects a more strategic approach to managing costs.

Class Action Philosophies

Percent of Companies



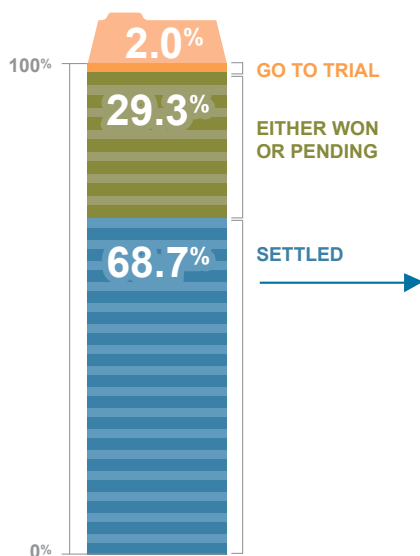
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Companies Settle More Than Half of Their Class Action Lawsuits

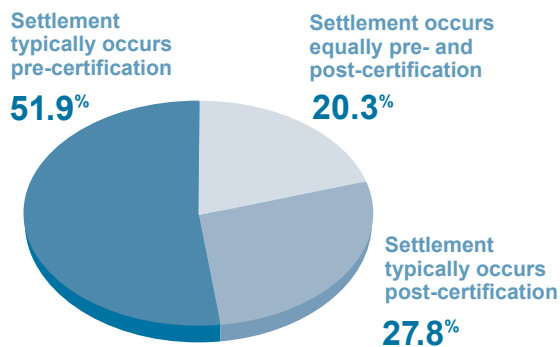
In appropriate cases, settlement offers key advantages including cost containment, shortening the time frame for suit, minimizing adverse business implications and reputational impact, and providing certainty regarding the final outcome. On average, companies settle nearly 69 percent of class actions, up from just over 57 percent in 2014. Most settlements occur prior to a litigated certification decision.

Class Actions Settled and Settlement Timing

Percent of Class Action Matters



Percent of Companies

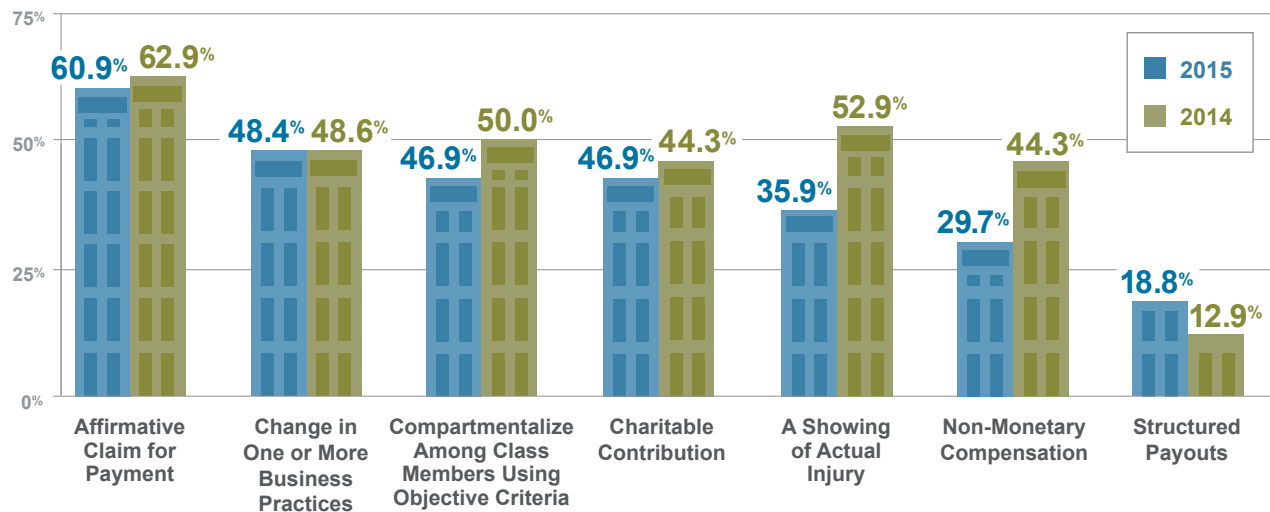


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Elements of Class Action Settlements

The types of conditions included in class action settlements vary. The most common condition requires class members to present an affirmative claim for payment, and many settlements also require a showing of actual injury. Depending on the specific nature of the case, settlement terms may also be impacted by regulatory restrictions.

Percent of Companies Involved in a Settlement with the Following Conditions

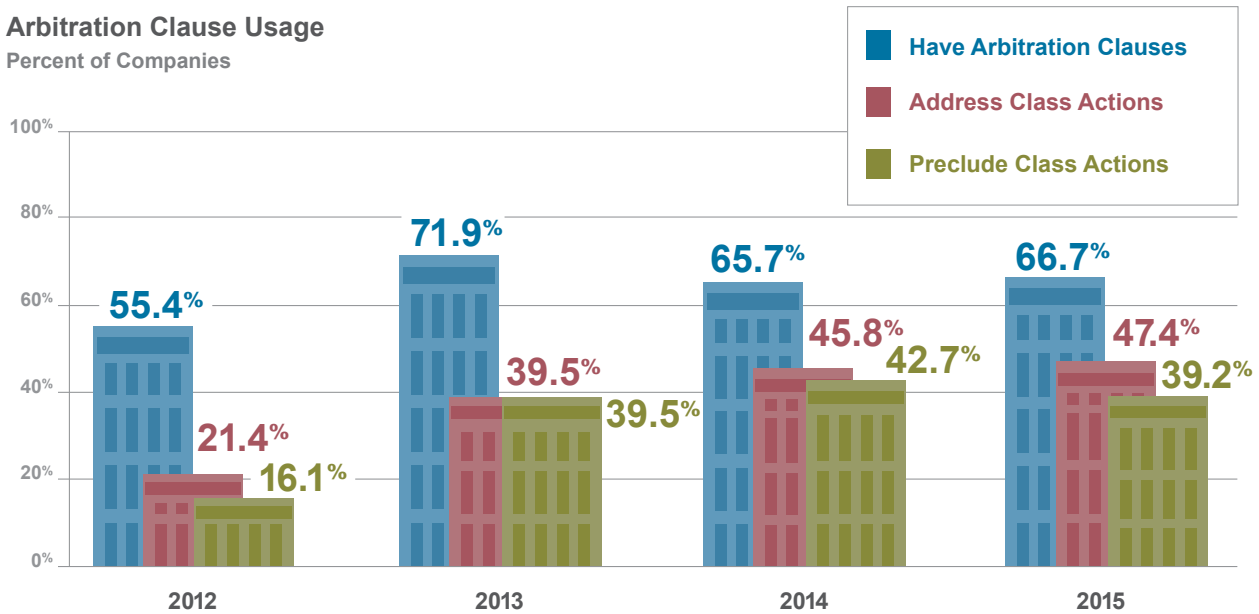


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Arbitration Clause Usage Remains Unchanged—For Now

In 2015, there was little change in how organizations used arbitration clauses to offset the risks and costs of high-stakes class actions. However, all eyes are on the Consumer Financial Protection Bureau's proposed rule prohibiting class action waivers in certain consumer arbitration agreements involving financial products.

Arbitration Clause Usage
Percent of Companies



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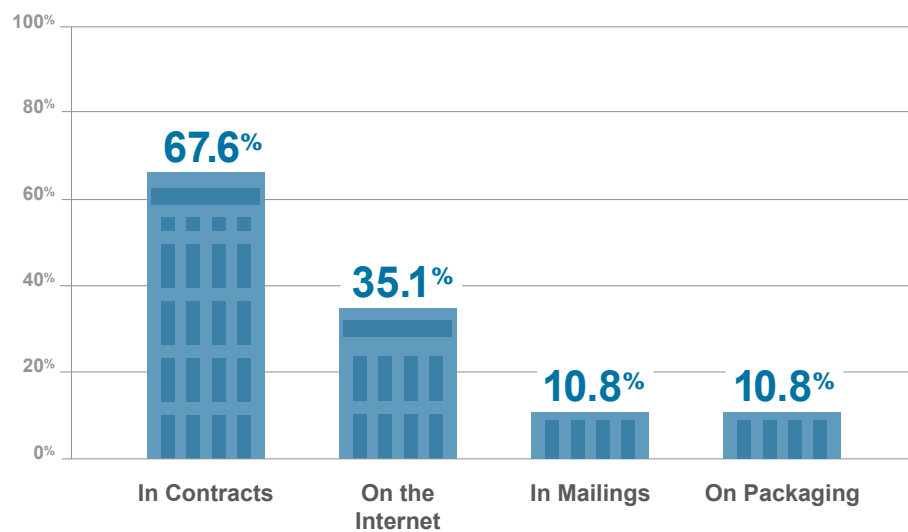
Arbitration Provisions are Commonly Found in Contracts, Gaining Traction Online

About two-thirds of companies with arbitration clauses incorporate these provisions into contracts.

Additional tools used to incorporate mandatory arbitration provisions are gaining traction. Posting them online is a popular secondary means of distribution. Direct client communications (e.g., mailings and packaging) are infrequently used to relay arbitration information. The use of mailings dropped by more than half from 2014.

Incorporation of Arbitration Provisions

Percent of Companies



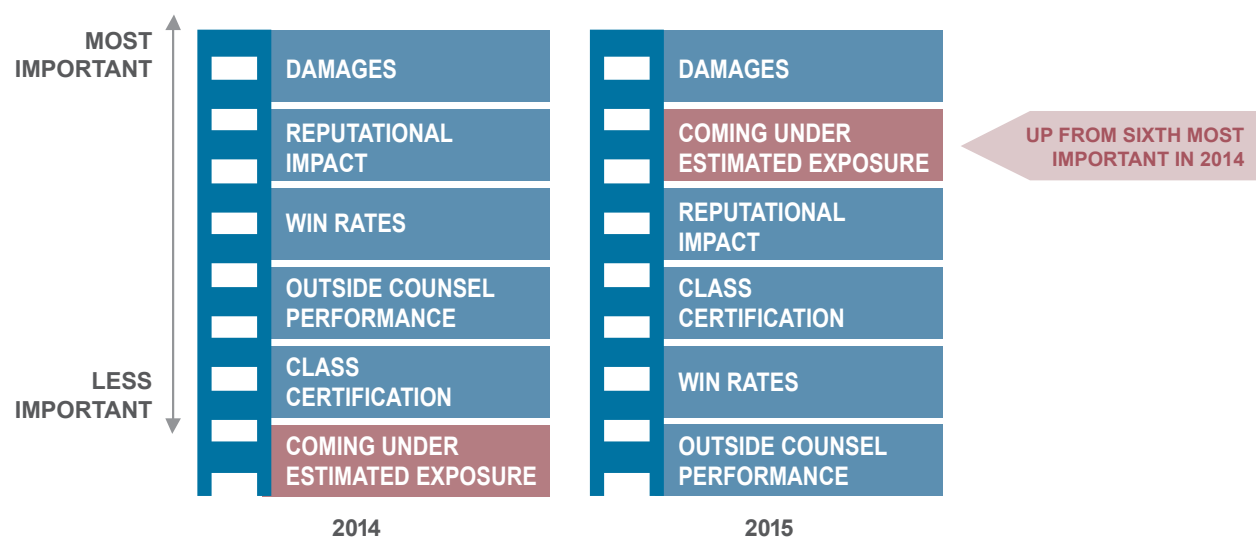
NOTE: Legal limitations, such as state insurance laws restricting the use of arbitration provisions, may apply to any of the avenues described above.

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As More Class Actions Arise, Costs—and Cost Containment—Become Top Measures of Success

Priorities and success factors realign as companies face more high-stakes class actions. While damages (whether in a settlement or at a trial) remains a top measure of success, a previously less important metric—coming in under estimated exposure—skyrocketed from sixth to second place. On the other hand, outside counsel performance, as a metric, became less important as companies expect their law firms will provide what is required to meet their goals.

Importance of Success Metrics



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Best Practices to Control Class Action Costs

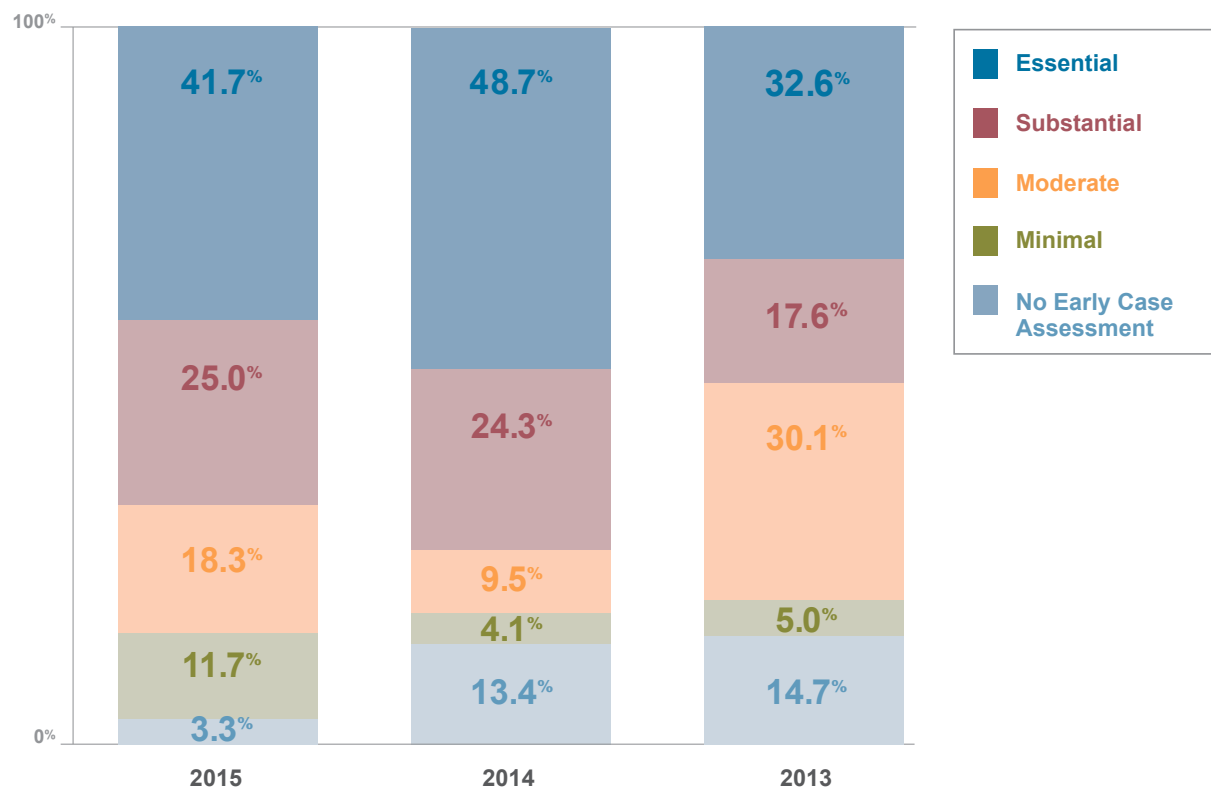
More Companies Conduct Early Case Assessments

Nearly all corporate counsel report performing some form of early case assessment on class actions. Nearly 67 percent describe outside counsel involvement in that process as essential or substantial.

Corporate counsel rely on outside counsel for key early case assessment activities including analyzing legal issues, advising on pertinent information relevant to the forum, reviewing key documents and financial data, interviewing important witnesses, and determining overall strategic direction.

Outside Counsel Involvement in Early Case Assessment

Percent of Companies

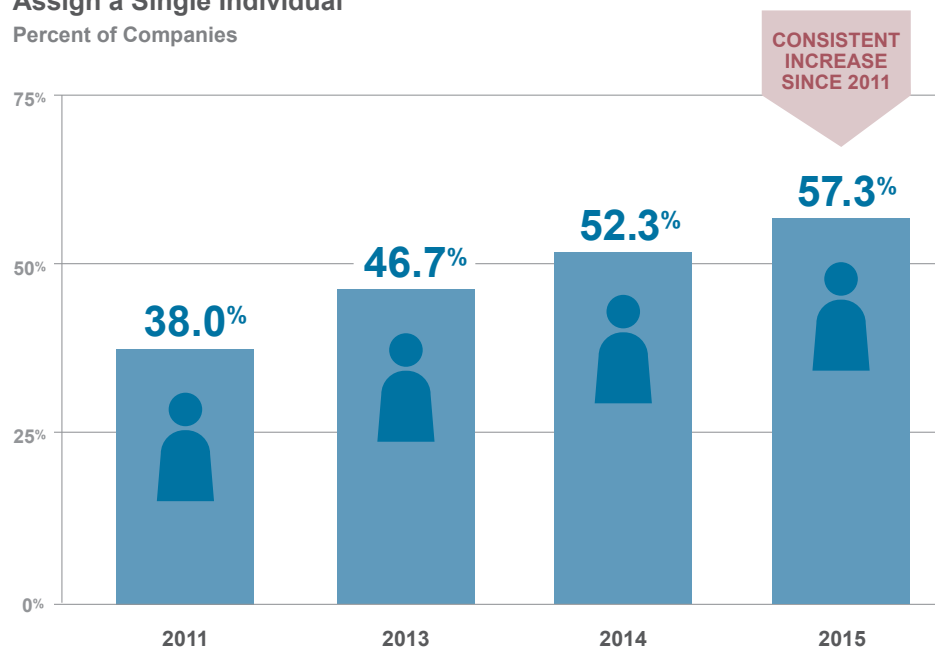


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As Class Actions Grow, So Does Practice of Making a Single Individual Accountable

A majority of organizations hold a single individual accountable for class action outcomes. This represents a consistent increase since 2011, when the figure was just 38 percent. Since 2014 alone, the percentage of companies that make a single individual accountable rose from 52.3 to 57.3 percent.

Assign a Single Individual Percent of Companies



NOTE: Data not available for 2012.

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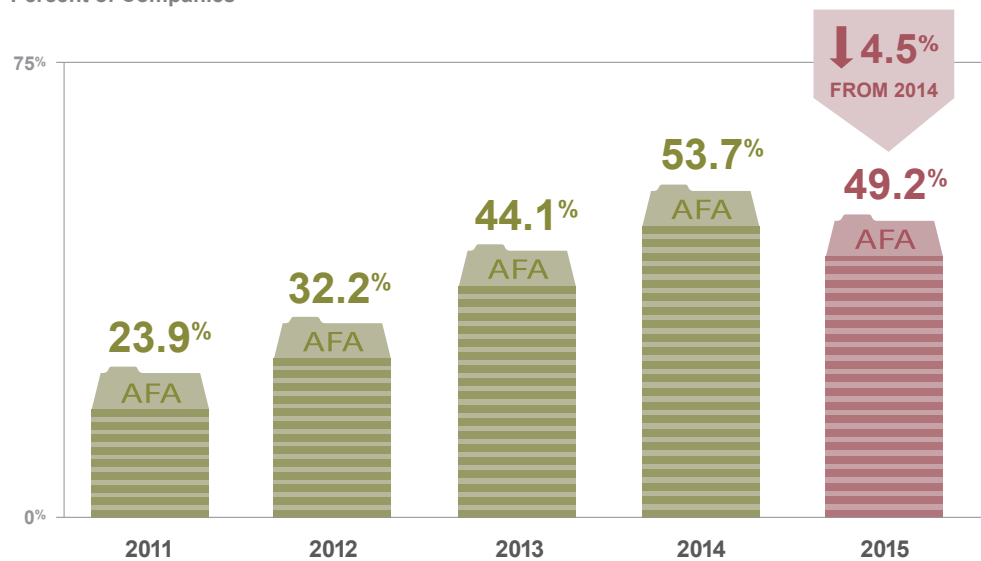
Use of Alternative Fee Arrangements Remains Popular But Dips Slightly

The high levels of risk and exposure inherent in class actions drive corporate counsel to find ways for law firms to share the risk through AFAs. Since 2011, AFA usage for an entire case or case segments more than doubled. More than 49 percent of corporate counsel now rely on AFAs for at least a portion of their class action work. This is down, however, from a high of almost 54 percent in 2014.

The nearly 50 percent of in-house legal teams that rely on AFAs find that these arrangements add predictability and can deliver cost savings by sharing risk between the law firm and client. Some companies, however, are unsure of the financial benefits of these arrangements.

Alternative Fee Arrangement Use in Class Actions

Percent of Companies



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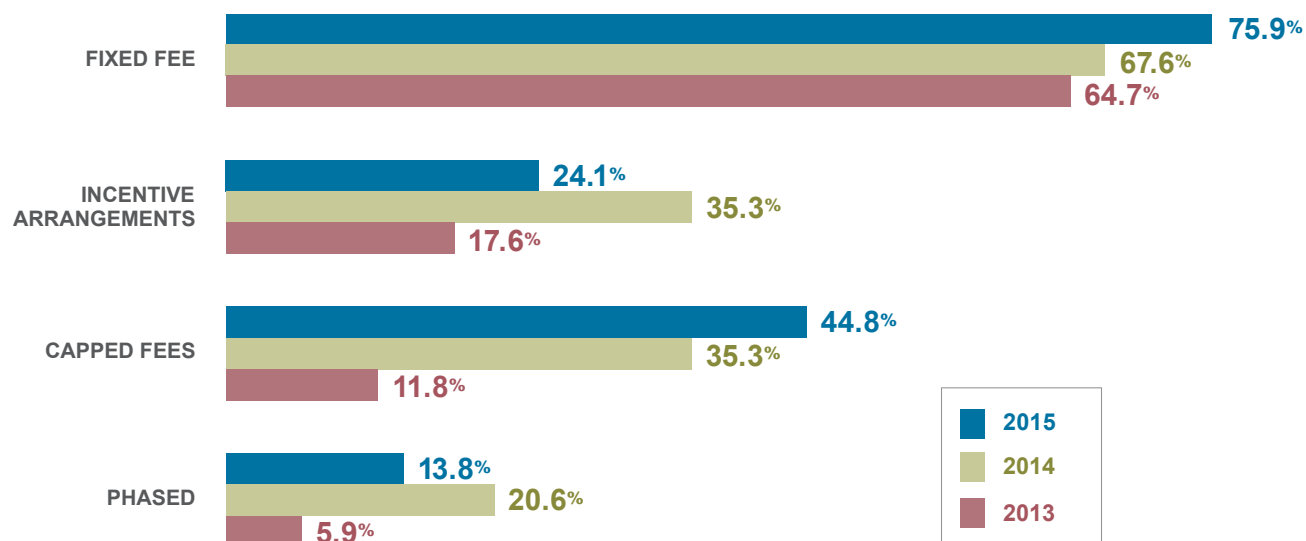
Fixed Fees and Capped Fees Lead the List of AFAs Used for Class Action Work

For companies that use AFAs, fixed fees are still the most commonly used, but capped fees are rapidly growing in popularity.

Capped fees are now the second-most commonly used AFA, and nearly 45 percent of in-house counsel reported using them, up from just over 35 percent one year ago. This percentage has risen dramatically since 2011, when it was approximately 12 percent.

Alternative Fee Arrangement Types in Class Actions

Percent of AFAs



NOTE: Chart does not add up to 100%. Excludes responses under 5%.

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The Impact of Recent Class Action Rulings

Landmark Supreme Court Rulings Still Carry Weight

As in prior years, the landmark decisions in *Wal-Mart v. Dukes* and *AT&T v. Concepcion* remain the top rulings that impact corporate counsel.

Though cited somewhat less than last year, *Wal-Mart v. Dukes* still leads the list because of its emphasis on the plaintiffs' burden to satisfy each element of Rule 23 and the courts' responsibility to engage in a rigorous analysis of those issues. The case places particular emphasis on the need to show that important common issues in a given case can be proven across the class.

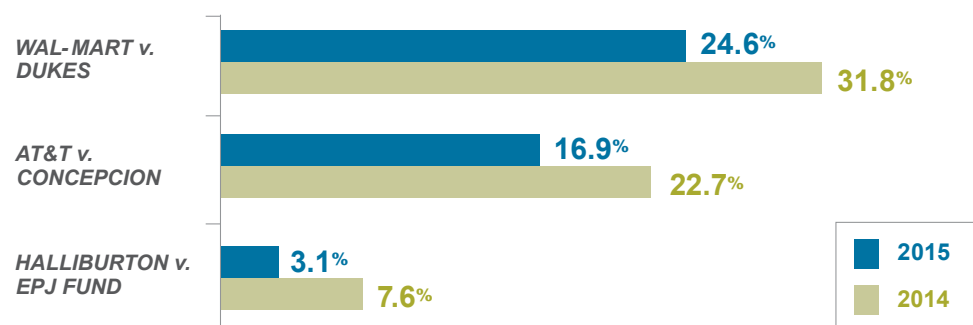
AT&T upheld arbitration clauses that waive plaintiffs' ability to proceed on a class basis.

In *Halliburton*, the Court held that defendants in securities fraud class actions may introduce evidence at the class certification stage to rebut the "fraud on the market" presumption of reliance.

A recent California district court decision on ascertainability, *Jones v. Conagra Foods*, was also seen as important by 3.1 percent of companies. If upheld on appeal, it would prevent class certification in consumer cases involving low-cost products where the class members cannot be identified.

Recent Impactful Class Action Rulings

Percent of Companies Touting Them



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In Their Own Words: Corporate Counsel Weigh In on Landmark Rulings

“We bolstered our mandatory arbitration agreements. The *Concepcion* ruling has helped us win on that issue.”

—Senior Vice President and Assistant General Counsel

Large Banking Institution

“Because of *Wal-Mart*, we have decentralized and implemented regional policies for company operations—it becomes harder for potential plaintiffs to achieve a large class.”

—Director of Employment Law

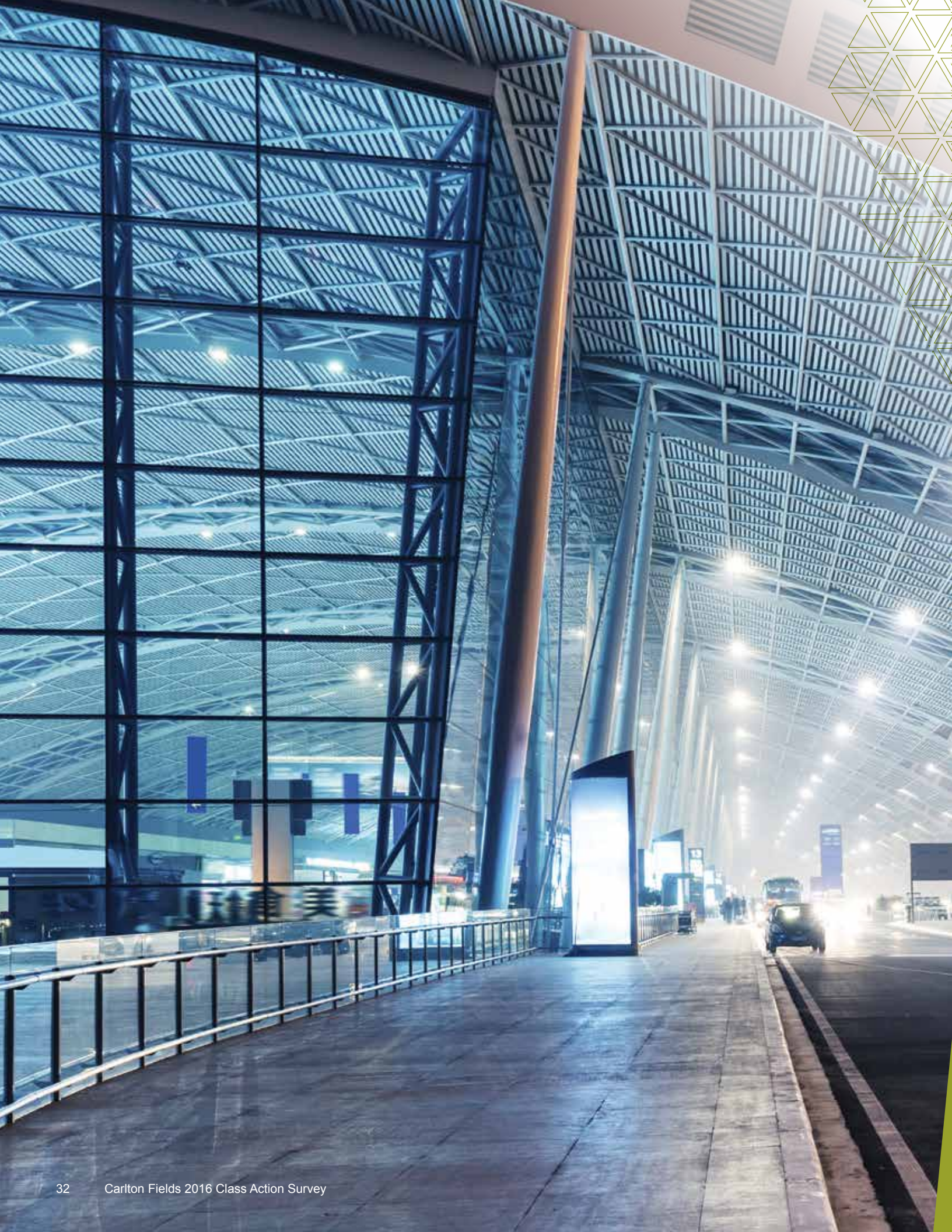
Fortune 500 Grocery Chain

“[In response to *Jones v. ConAgra*] [w]e involve experts early on, and do surveys to document what consumers think (e.g., if they really relied on information on our product labels).”

—Senior Corporate Counsel, Litigation

*Multi-Billion-Dollar
Consumer Goods Company*





Methodology and Approach

The 2016 Carlton Fields Class Action Survey results were compiled from 391 in-depth interviews with general counsel, chief legal officers, and direct reports to general counsel.* Consistent with the approach used in past years, to control for bias and assure objectivity, Carlton Fields retains an independent consulting firm to select the companies and conduct the interviews. To obtain additional data on bet-the-company class actions, that firm augmented its work with supplemental research. The consulting firm provides only aggregate data to Carlton Fields. All individual responses and company names are kept confidential and excluded from the survey results.

Survey participants' companies had an average annual revenue of \$18.2 billion and median annual revenue of \$4.7 billion. The surveyed companies operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, pharmaceuticals, professional services, and retail trade.

About Carlton Fields

Carlton Fields has litigated and counseled clients in hundreds of class actions for more than 30 years in federal and state courts across the nation, and in arbitrations. These cases present unique challenges due to their different rules, enhanced scope, and higher stakes. The firm understands the potential impacts, costs, and risks associated with class actions, and is a leader in developing legal approaches and strategies for handling class action litigation.

If you would like to learn about the survey and how these results may impact you, or to discuss the Carlton Fields class action practice, please contact Chris S. Coutroulis at ccoutroulis@carltonfields.com or 813.229.4301, or Julianna T. McCabe at jtmccabe@carltonfields.com or 305.347.6870.

To obtain additional copies of this report, visit <http://ClassActionSurvey.com/>

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* In addition, to present the survey results in context, pages four to six contain, with permission, information published by BTI Consulting Group.

Atlanta

One Atlantic Center

1201 W. Peachtree Street | Suite 3000
Atlanta, Georgia 30309-3455
404.815.3400 | fax 404.815.3415

Hartford

One State Street | Suite 1800
Hartford, Connecticut 06103-3102
860.392.5000 | fax 860.392.5058

Los Angeles

2000 Avenue of the Stars
Suite 530 North Tower
Los Angeles, California 90067-4707
310.843.6300 | fax 310.843.6301

Miami

Miami Tower

100 S.E. Second Street | Suite 4200
Miami, Florida 33131-2113
305.530.0050 | fax 305.530.0055

New York

Chrysler Building

405 Lexington Avenue | 36th Floor
New York, New York 10174-0002
212.785.2577 | fax 212.785.5203

Orlando

450 S. Orange Avenue | Suite 500
Orlando, Florida 32801-3370
407.849.0300 | fax 407.648.9099

Tallahassee

215 S. Monroe Street | Suite 500
Tallahassee, Florida 32301-1866
850.224.1585 | fax 850.222.0398

Tampa

Corporate Center Three at International Plaza

4221 W. Boy Scout Boulevard | Suite 1000
Tampa, Florida 33607-5780
813.223.7000 | fax 813.229.4133

Washington, DC

1025 Thomas Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5208
202.965.8100 | fax 202.965.8104

West Palm Beach

CityPlace Tower

525 Okeechobee Boulevard | Suite 1200
West Palm Beach, Florida 33401-6350
561.659.7070 | fax 561.659.7368

Carlton Fields practices law in California through
Carlton Fields Jorden Burt, LLP.