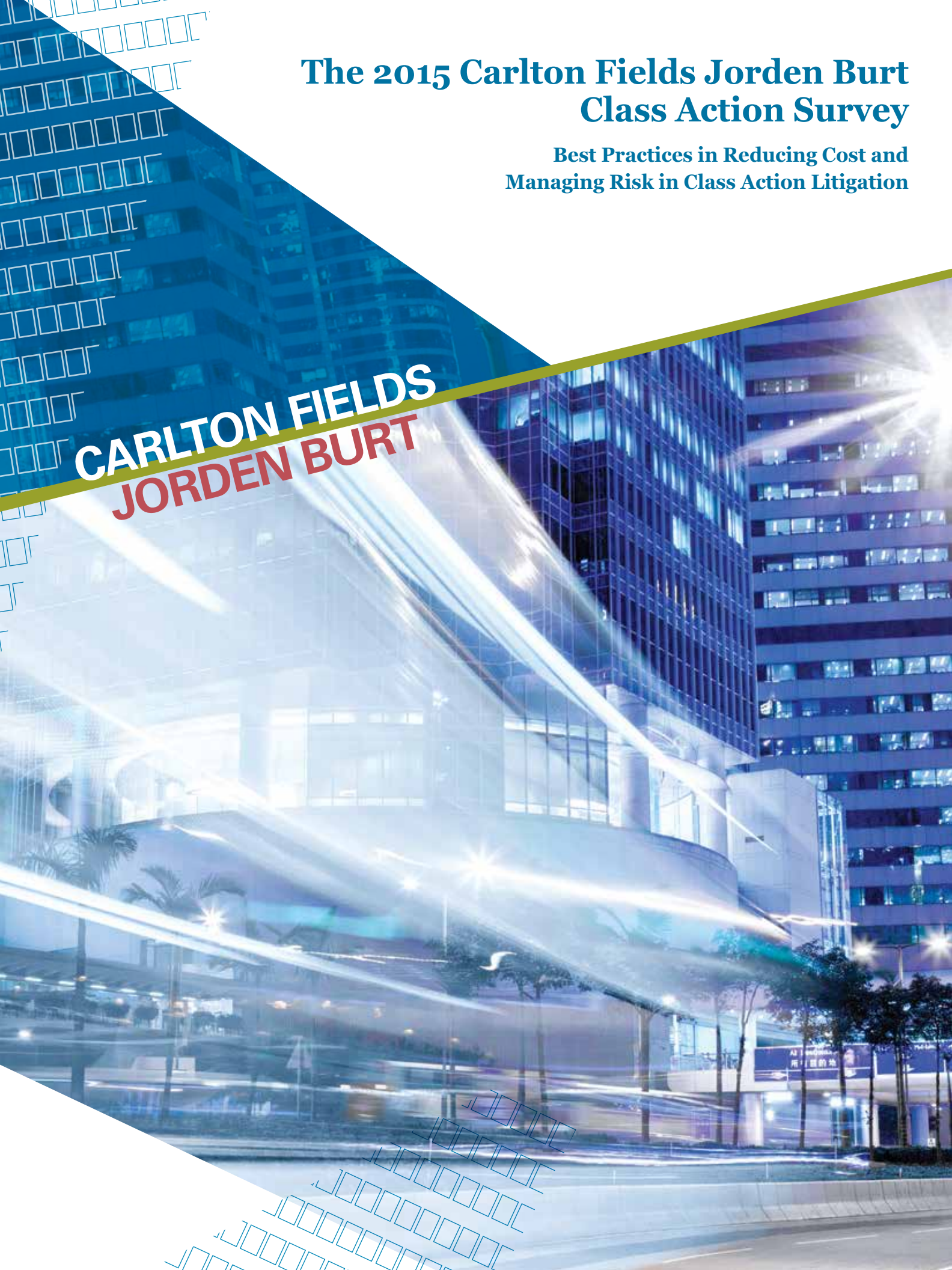


# The 2015 Carlton Fields Jordan Burt Class Action Survey

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

**CARLTON FIELDS**  
**JORDEN BURT**





## Table of Contents

Introduction.....	1
Executive Summary.....	3
Class Action Spending and Budgets .....	4
How Companies Manage Class Actions.....	11
How Companies Approach Class Action Risk.....	20
The Impact of Recent Class Action Rulings .....	25
Best Practices to Control Class Action Costs	
Early Case Assessment and the Use of Outside Counsel .....	29
In-House Accountability.....	31
Alternative Fee Arrangements.....	33
Methodology and Approach.....	37
About Carlton Fields Jordan Burt.....	37



## Introduction

Now in its fourth year, the annual Carlton Fields Jordan Burt Class Action Survey continues to offer insight into the prevalence, cost, and type of class actions that companies face, plus observations on the shifting strategies they use to manage them. As in past years, class actions—across industries and practice areas—present legal departments with sizable risk. But increased familiarity with these matters has yielded better and more innovative matter management and cost control tools to defend against them. This is true even as the type and nature of class actions have evolved.

Our 2015 survey results from detailed interviews with general counsel or senior legal officers at nearly 350 companies of all sizes and business types. They shared thoughts and best practices on class action exposure and management. We trust that their valuable insights will, in turn, help your company and its legal department effectively and efficiently manage these prevalent, costly lawsuits.

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## Executive Summary

Across industries, companies spent \$2 billion on class action lawsuits in 2014, slightly less than the \$2.1 billion they spent in 2013. This year, spending is expected to return to 2013 levels.

Companies' class action dockets increased on average by one new case in 2014, bringing the average number of class actions managed to five. This total is expected to remain constant in 2015, as the number of new matters is likely to be offset by those resolved.

As before, consumer fraud and labor and employment remain the most prevalent class action matters. They account for more than 50 percent of all class actions, down somewhat from 2013. As predicted in last year's report, data privacy emerged as a class action growth area. Insurance also made its first showing on the list.

Looking ahead, corporate counsel are bracing for an expected wave of data privacy class actions. Twenty-nine percent predict these matters will pose the greatest class action threat.

Across risk levels, class actions can result in substantial financial exposure. Corporate counsel reported that even routine class actions often place tens of millions of dollars at risk. With each increase in risk level (from routine to complex to high-risk to bet-the-company), the potential exposure jumps dramatically (well into the billions) as do fees paid to outside counsel. Just three years ago, only 4.5 percent of class actions qualified as high-risk or bet-the-company. That percentage has more than tripled, to 16.4 percent. As a result, corporate counsel have increased class action spending, as they confront the exposure these cases present.

Class actions typically resolve in one fashion or another—very few go to trial. Most resolutions occur prior to a decision on class certification, but in a relatively sizeable percentage, resolution comes later. If a lawsuit continues after the certification decision, settlement may be considered. If certification was denied, settlement is often quick and inexpensive. If it was granted, the degree to which settlement makes sense will depend on various factors, including damage and cost containment, minimized reputational damage, predictability regarding outcome, and less business disruption.

Recognizing that accountability is required to contain class action risks, companies are increasingly making a single individual accountable for the outcomes of their class action lawsuits. In 2014, more than half of surveyed companies took this step, up from 38 percent in 2011. This move toward accountability is associated with a decrease in per class action spending on outside counsel as well as overall.

Companies also report that early case assessment is critical to effective class action management, and nearly 49 percent deem outside counsel essential to that process, up from 32.6 percent the previous year. Legal departments increasingly involve outside counsel in these assessments at the earliest stages, particularly as a matter's risk level rises. Companies that do so experience savings of 25.5 percent per class action matter, up from 22.3 percent in 2013.

# Class Action Spending and Budgets

**In 2014, Corporate Counsel Spent \$2 Billion on Legal Services for Class Actions**

The world's largest companies spend \$20.2 billion annually on litigation in the United States. Of this sum, approximately \$2 billion goes toward class actions.

## \$20.2 Billion Market for Legal Services in Litigation

CLASS ACTIONS  
**\$2.0 Billion**  
10.1%

- Class actions comprise the fourth largest segment of the \$20 billion market for litigation services in the United States, following commercial litigation, employment litigation, and IP litigation

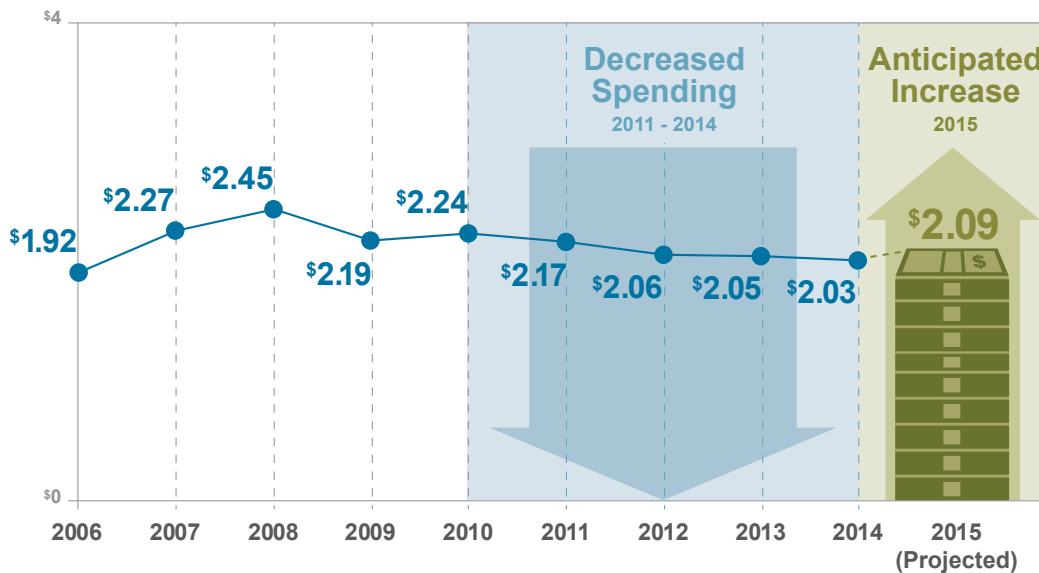


## Higher Risk and More Matters Funnel More Dollars into Class Actions in 2015

Between 2011 and 2014, class action spending declined slightly each year, from \$2.17 billion to \$2.03 billion. In 2015, however, class action spending is expected to rise to \$2.09 billion. This coincides with an increase in the complexity of these matters, higher risk levels, and a greater number of class action suits.

### U.S. Corporate Legal Spending on Class Actions

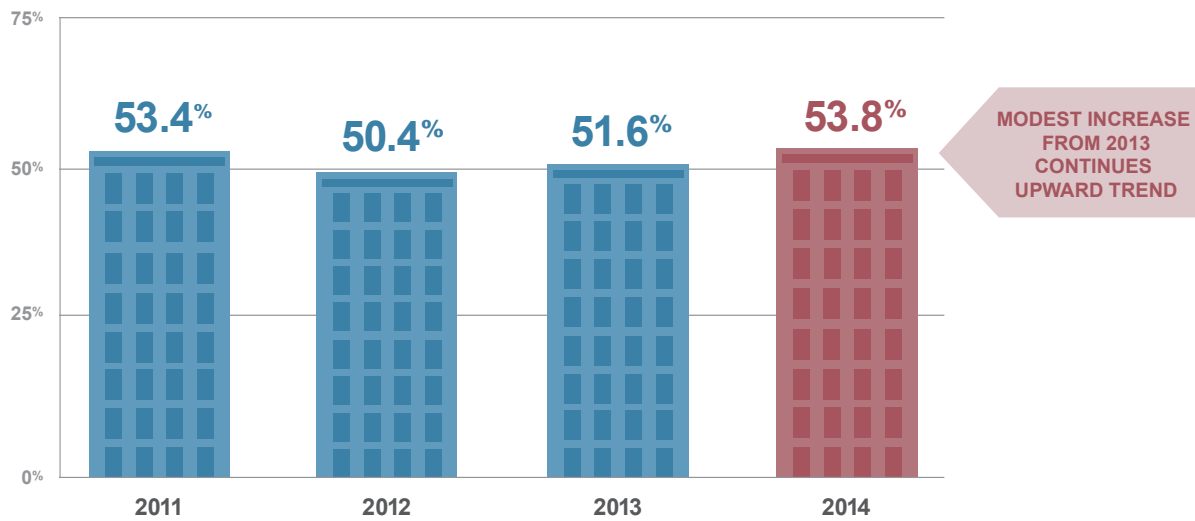
\$ Billions



## Percentage of Companies with Class Action Suits Grows

Fifty-four percent of major companies are currently engaged in class action litigation, up from 52 percent in 2013. While the increase is relatively modest, it continues an upward trend that began in 2012, when 50 percent of companies faced class actions.

**Companies with Class Action Matters**  
Percent





## Bulk of Class Actions Consist of Consumer Fraud and Labor Issues

Fifty-three percent of all class action matters, and 47 percent of class action spending, fall within the practice areas of consumer fraud and labor and employment. Consumer fraud accounts for 30 percent of class action matters and 24 percent of class action spending, while labor and employment accounts for 23 percent of class action matters, and 23 percent of class action spending. These practice areas are followed by securities, product liability, insurance, antitrust, data privacy, and intellectual property.

### Class Action Matters and Annual Spending Breakdown by Type

Percent of Matters and Spending

PRACTICE	MATTERS	SPENDING
CONSUMER FRAUD	29.6%	24.3%
LABOR & EMPLOYMENT	23.2%	22.8%
SECURITIES	10.2%	12.1%
PRODUCT LIABILITY	7.9%	5.2%
INSURANCE	6.0%	5.5%
ANTITRUST	5.5%	8.3%
DATA PRIVACY	4.2%	3.1%
INTELLECTUAL PROPERTY	0.4%	0.4%
OTHER	13.0%	18.3%

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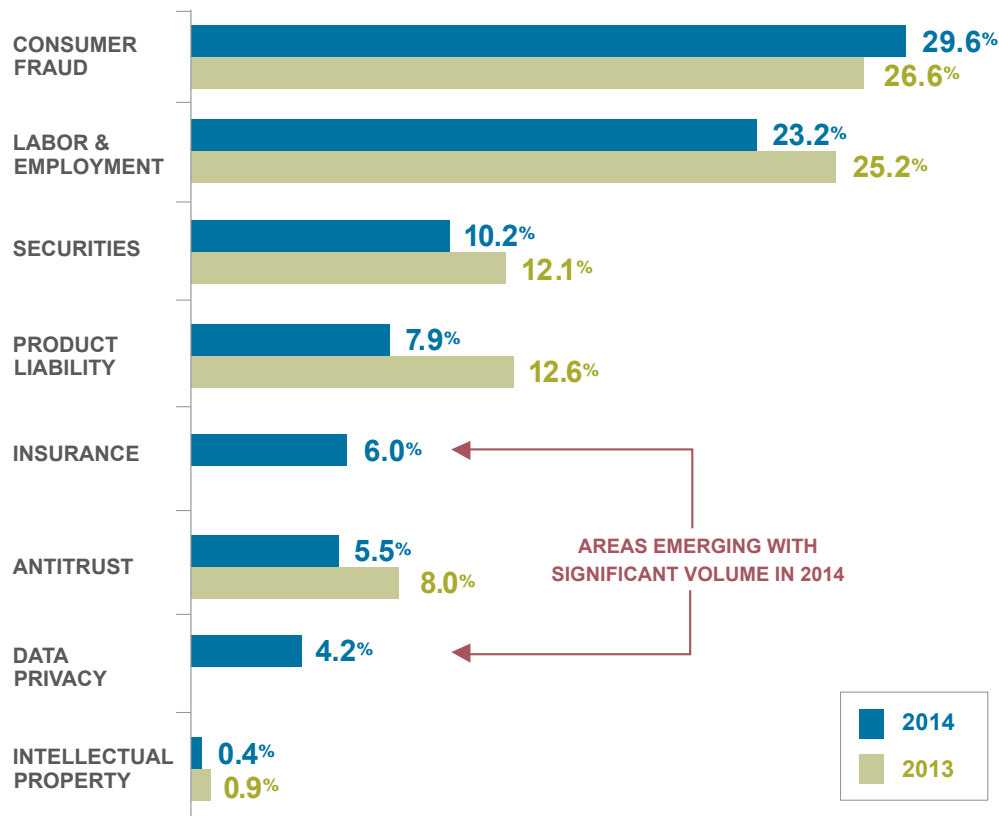
## Data Privacy and Insurance Class Actions Start to Pick Up Volume

Insurance and data privacy matters emerged as significant areas in 2014, making up 6 percent and 4.2 percent, respectively, of class actions handled. At the same time, the percentage of labor and employment, product liability, securities, and antitrust class actions dropped.

- Consumer fraud remains the largest component of class action portfolios
- As other class action sectors cool off, insurance and data privacy emerge

### Breakdown of Class Action Matters by Type

Percent of Matters



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

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## Corporate Counsel Expect Next Wave of Class Actions to be in Data Privacy

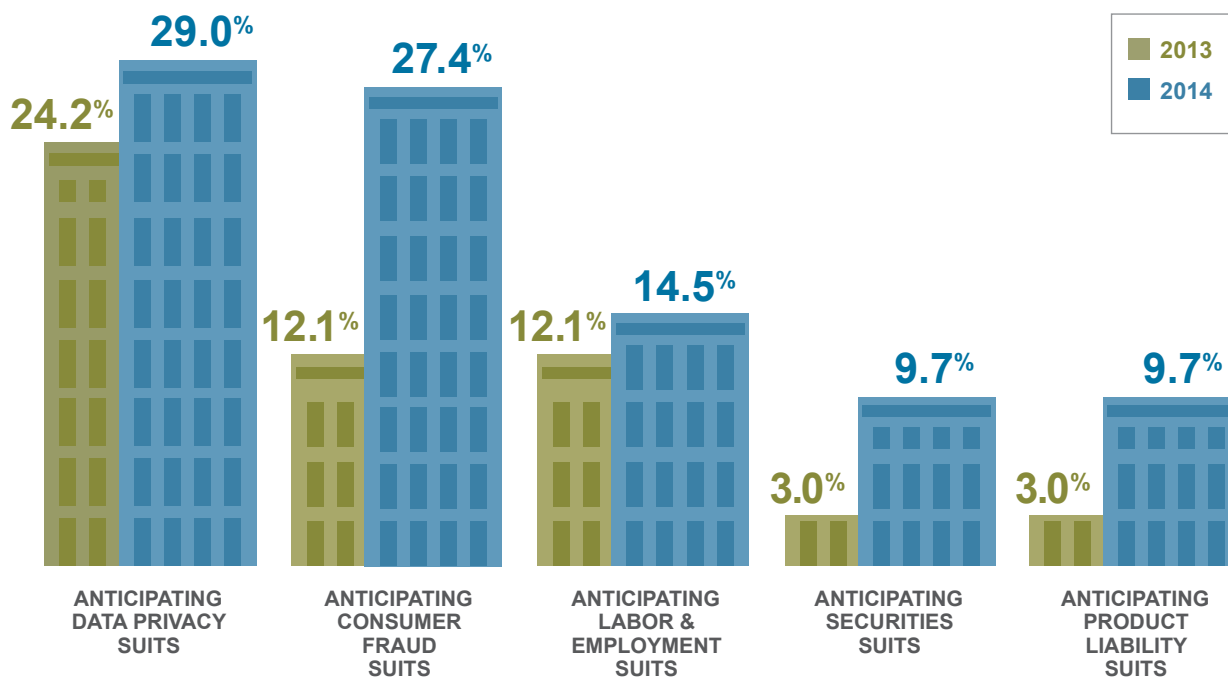
While data privacy matters currently represent a small portion of class actions, when corporate counsel were asked what area they saw as the next wave, they most often identified data privacy. And, while class certification has been a stumbling block for plaintiffs in this area, the following factors suggest data security matters are nonetheless poised for growth:

- increasing hacker activity;
- more frequent internal protocol and security lapses; and
- ongoing consumer and business sensitivity regarding data sharing and use.

Corporate counsel also expect a wave of consumer fraud class actions, even though these are already prevalent.

### 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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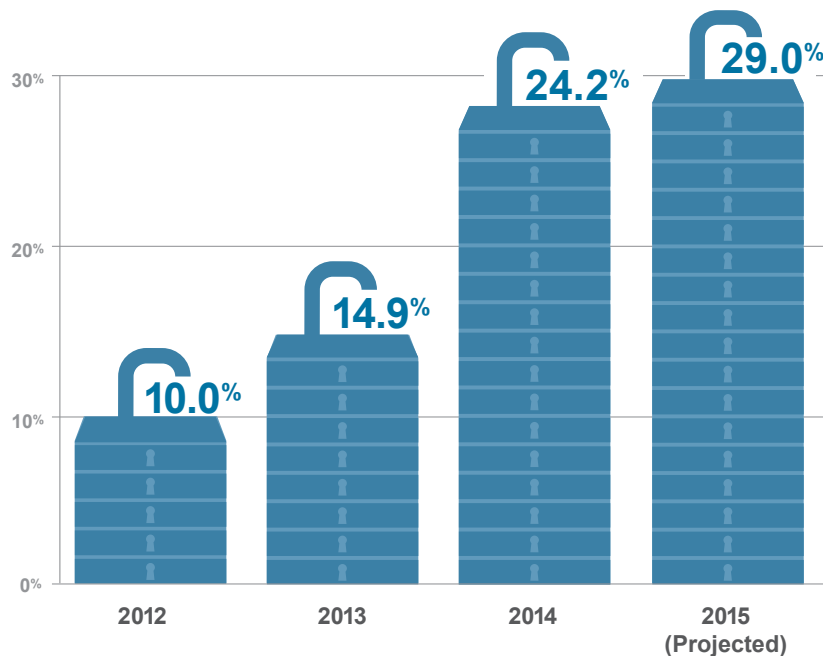
## Perception of Data Privacy Class Actions as Next Wave Continues to Rise

In the past few years, concern about data privacy lawsuits has grown steadily among corporate counsel. When asked in 2011, just 10 percent predicted that data privacy matters would make up the next wave of class action lawsuits. One year later, that percentage grew to 15 percent for 2013, then shot up the following year to 24 percent for 2014. Now, for 2015, it has risen still further—to 29 percent.

Corporate counsel are being proactive in an attempt to head off these matters. Best practices to mitigate risk include:

- engaging in in-depth scenario planning with outside counsel to anticipate and plan for various possibilities;
- performing ongoing risk assessments and audits to improve chances of avoiding a breach and to be better prepared to react if one occurs; and
- requiring certification of vendor systems to test external measures and commitments to security.

### Growing Prediction of Data Privacy



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# How Companies Manage Class Actions

## Class Actions Becoming More Frequent

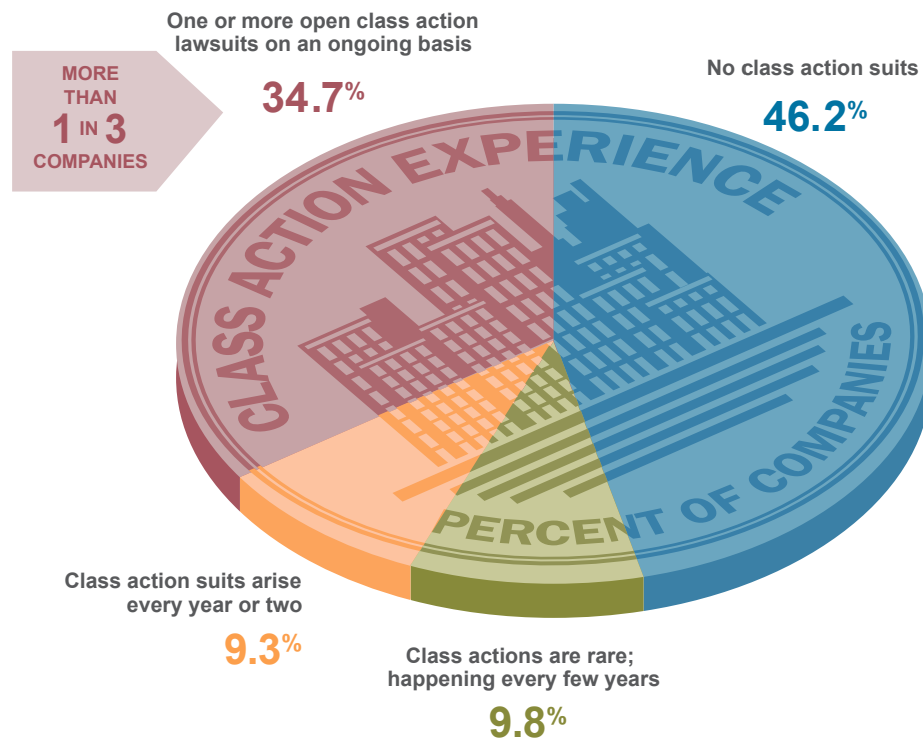
More than one in three companies, up significantly from one in four last year, report managing multiple class actions on a regular basis. Experienced companies work with their law firms to develop formal, established class action protocols, including early case assessment, sophisticated analysis of potential financial exposure, and proactive tracking of major decisions impacting class actions.

Among the 54 percent of companies currently managing class actions, 35 percent report handling one or more open lawsuits on an ongoing basis. Nine percent say class actions arise every year or two, and 10 percent say they are rare, occurring only every few years. Forty-six percent of companies report no current class action lawsuits.

- More than one in three companies report managing multiple class action lawsuits on a regular basis
  - A year ago, only 28 percent of corporate counsel dealt with class actions routinely—an increase of nearly 25 percent

### Class Action Experience

Percent of Companies



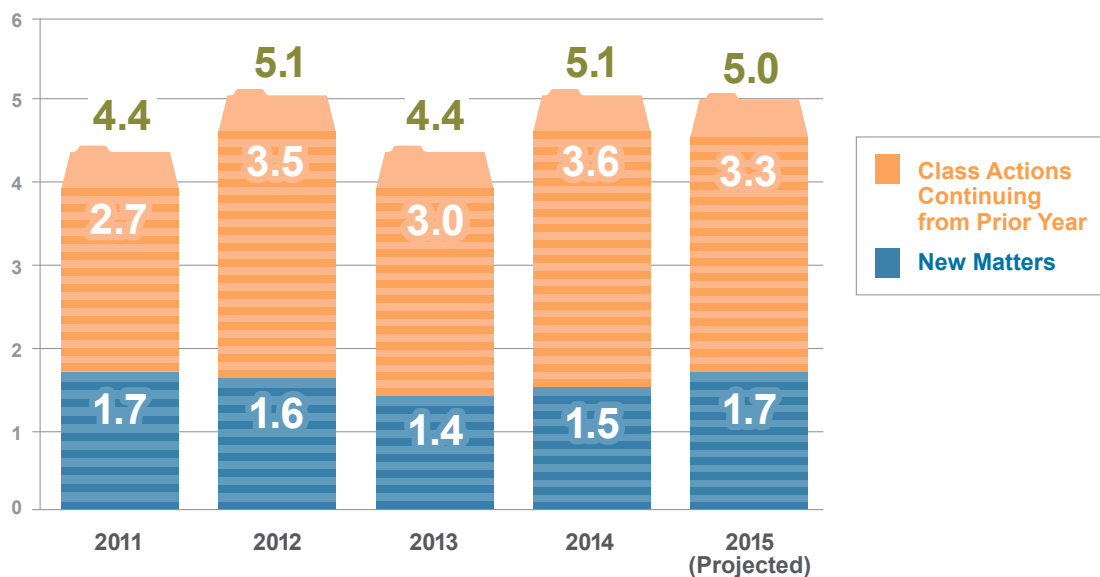
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## More New Matters Added to Class Action Dockets While A Number of Others Carry Over from One Year to the Next

On average, companies are managing five class actions, which is one more than they managed in 2013. This number is anticipated to remain constant in 2015, as new matters are expected to be offset by matters that resolve. New matters are expected to grow slightly, from 1.5 to 1.7, continuing a trend that began in 2013 when the number of new matters was 1.4. At the end of any given year, a company's ongoing class actions will typically include three to four that existed at the end of the prior year.

### Current and Future Class Action Suits

Average Number of Matters per Company



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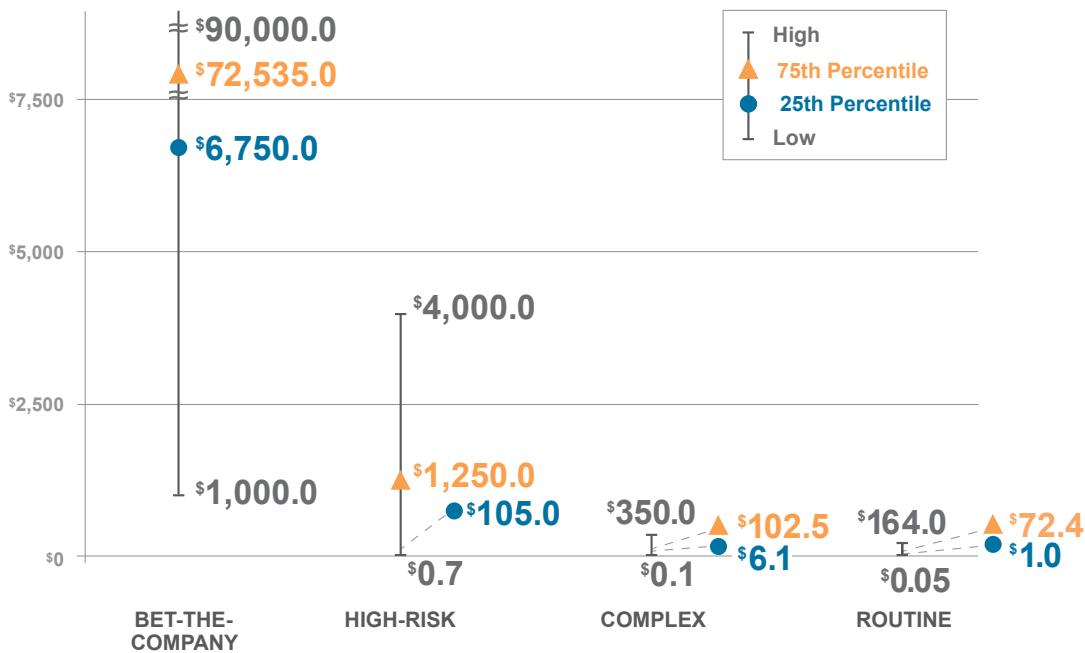
## Exposure Can Be Severe Even in Routine Class Actions

Across varying risk levels, class actions can result in substantial financial exposure. Corporate counsel reported that, even in routine class actions, there may be tens of millions at stake, and that this exposure can run into the billions on bet-the-company cases taking into account possible follow-on litigation and governmental actions.

- Financial exposure of class action cases ranges widely
  - At all levels, companies have substantial exposure

### Exposure by Risk Level

\$ Millions



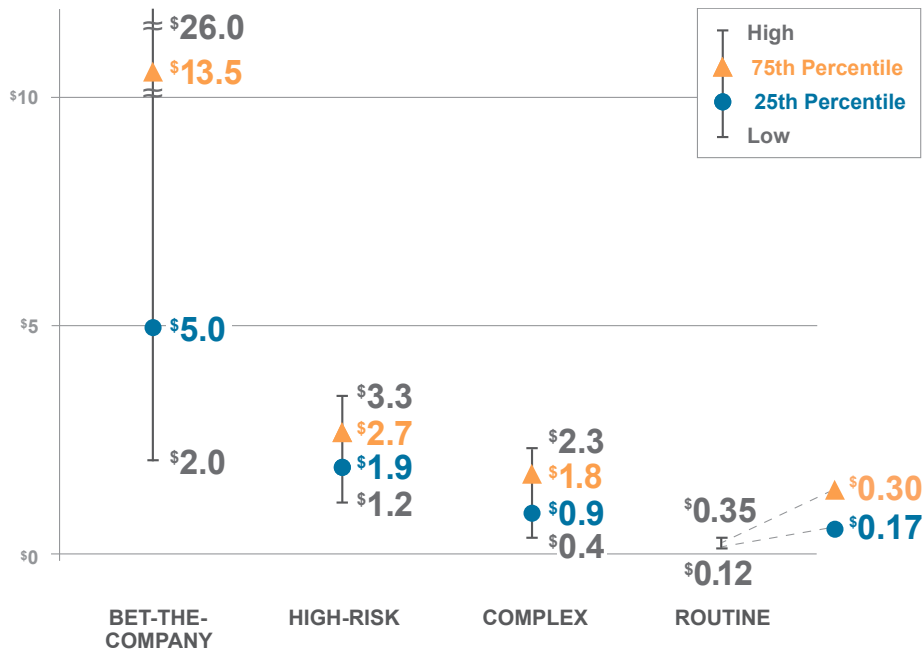
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## Outside Counsel Fees Per Year Per Case Increase with Each Rise in Risk Level

As risk levels increase from routine to bet-the-company, outside counsel fees jump dramatically. At the high end of their respective ranges, complex matters can be nearly seven times more expensive than routine class actions, and bet-the-company matters can be nearly eight times costlier than even high-risk matters. In 25 percent of bet-the-company class actions, companies spend more than \$13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds \$5 million per year per case.

### Outside Counsel Spending Per Year Per Case by Risk Level

\$ Millions



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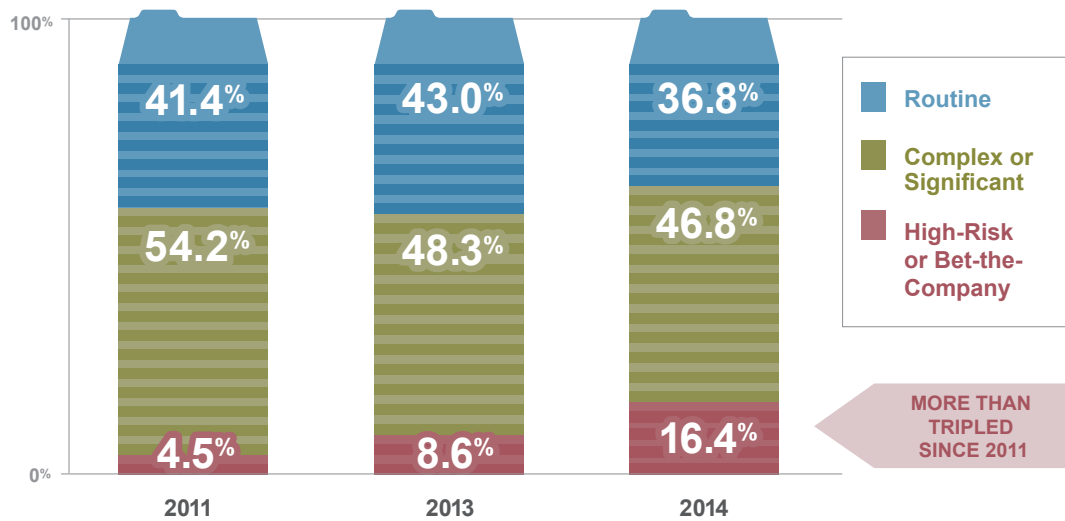


## More Class Actions Are High-Risk or Bet-the-Company Matters

These exposure and spending figures are particularly telling given the rise in high-risk and bet-the-company class actions. Just three years ago, only 4.5 percent of class actions qualified for inclusion in those categories, but that percentage more than tripled, to 16.4 percent in 2014.

### Class Action Matters by Risk Level

Percent of Matters



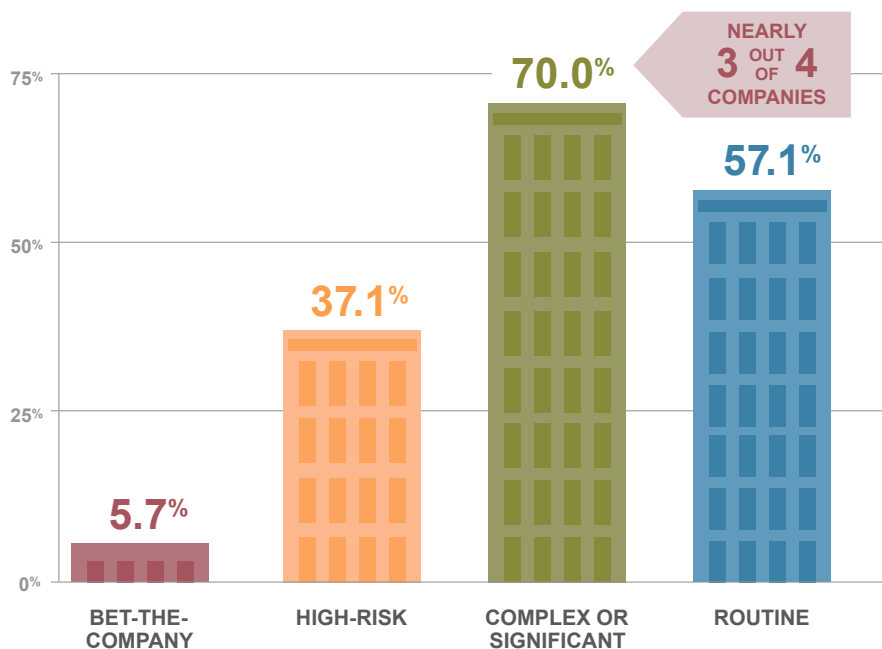
NOTE: Data not available for 2012.

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## Most Companies Face Enhanced Risk Cases, Even Though Few Face Bet-the-Company Stakes

About 70 percent of companies with class actions manage complex or significant cases. Although these cases do not rise to the level of high-risk or bet-the-company, they still present greater exposure and cost than more routine matters.

Percentage of Companies Facing Various Risk Levels



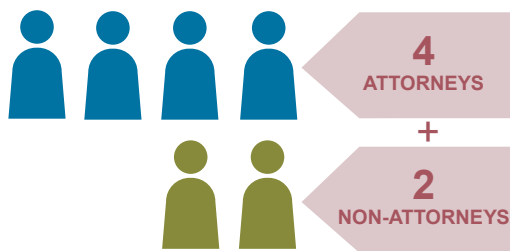
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## In-House Resources Dedicated to Managing Class Actions

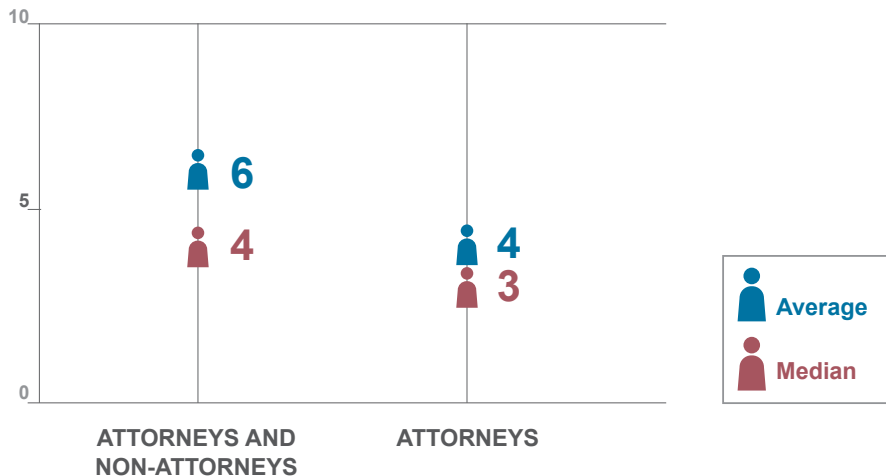
Companies dedicate—fully or partially—an average of six individuals in-house to manage class actions. This number includes four attorneys. While many companies fall within this range, a handful of organizations dedicate as many as 25 attorneys to class action management. Typically, these are companies that face numerous, ongoing lawsuits.

### Individuals and Attorneys Dedicated to Class Actions

Number of People



Number of People (Average & Median)



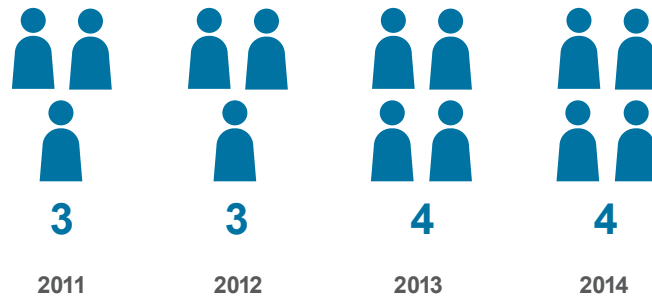
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## In-House Staffing for Class Actions Remains Unchanged

Class action staffing levels have not changed since 2013, when they rose compared to the previous two years. Flat staffing levels since 2013, even as the average number of cases has risen, indicate increased reliance on outside counsel.

### In-House Attorneys Dedicated to Class Actions

Number of People

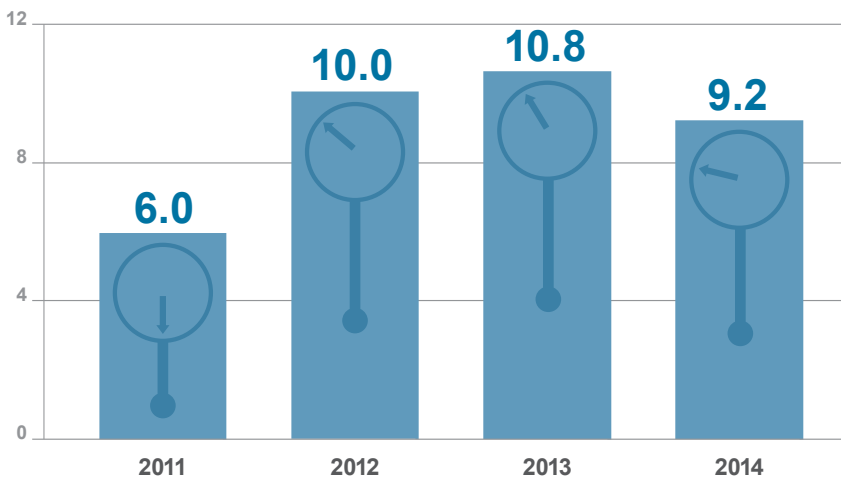


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## Time Spent Managing Class Actions Internally Dips Slightly

Consistent with this increased reliance on outside counsel, in-house attorney time spent managing class actions dipped from nearly 11 hours per case per week in 2013, to slightly more than nine hours in 2014. Despite that dip, in-house counsel still spent 53 percent more time managing such actions than they did in 2011.

**Aggregate Attorney Time Spent on Class Actions per Case**  
Hours per Week



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- After two years of steady increases, time spent managing class actions drops for internal attorneys

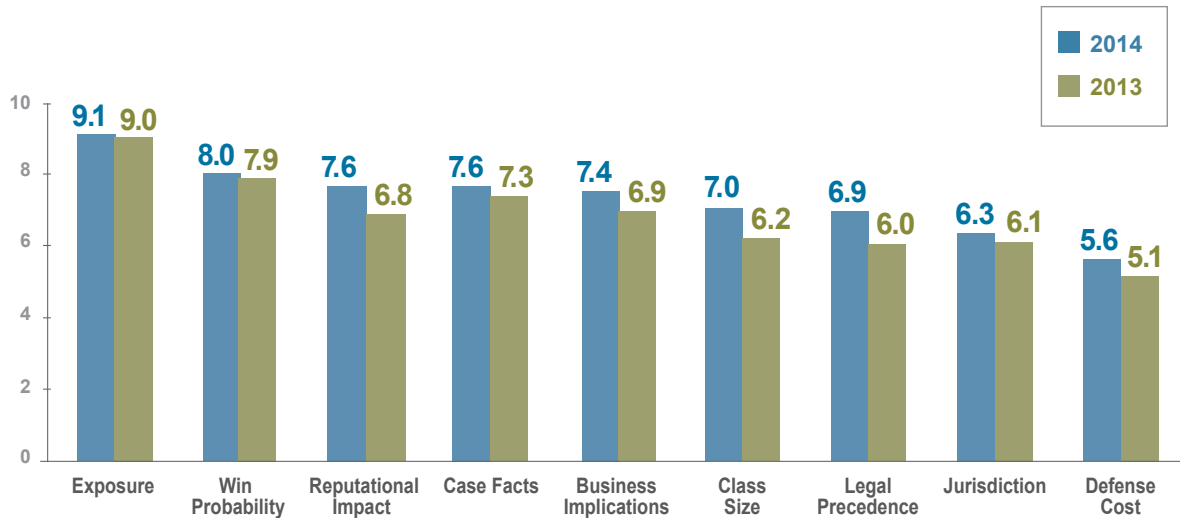
# How Companies Approach Class Action Risk

## Understanding Class Action Risk: With So Much at Stake, Defense Costs Remain a Secondary Concern for Corporate Counsel

Companies defending class actions face a variety of risks. When asked to assign importance to these risks on a scale of 1-to-10, corporate counsel gave by far the highest ranking, 9.1, to the extent of exposure. Win probability was next at 8.0. Among the nine risk factors considered, defense cost was the least important (5.6 on the 10-point scale), consistent with the high stakes involved in class actions. That is not to say that defense costs are considered unimportant—in fact their importance increased nearly 10 percent, up from a 5.1 score in 2013—but that relatively, they are at the lower end of the spectrum of risks faced.

Other risk variables that increased by more than 10 percent on the scale were legal precedent (by 15 percent), class size (by 13 percent), and reputational impact (by 12 percent).

**Importance of Risk Variables**  
1-10 Rating



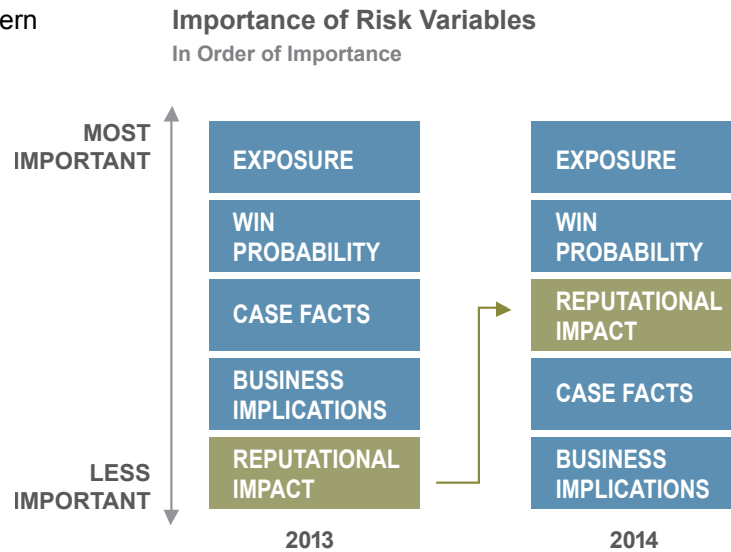
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## Corporate Counsel Put More Weight on Assessing Impact to Company Reputation

Consistent with its absolute increase on the 10-point scale, potential reputational impact also became more important relative to other risk variables, moving from fifth to third place between 2013 and 2014. This shift coincides with the trend toward higher risk class actions.

- Exposure remains paramount concern
- Reputational and business impact switch in relative importance while both increase in absolute terms



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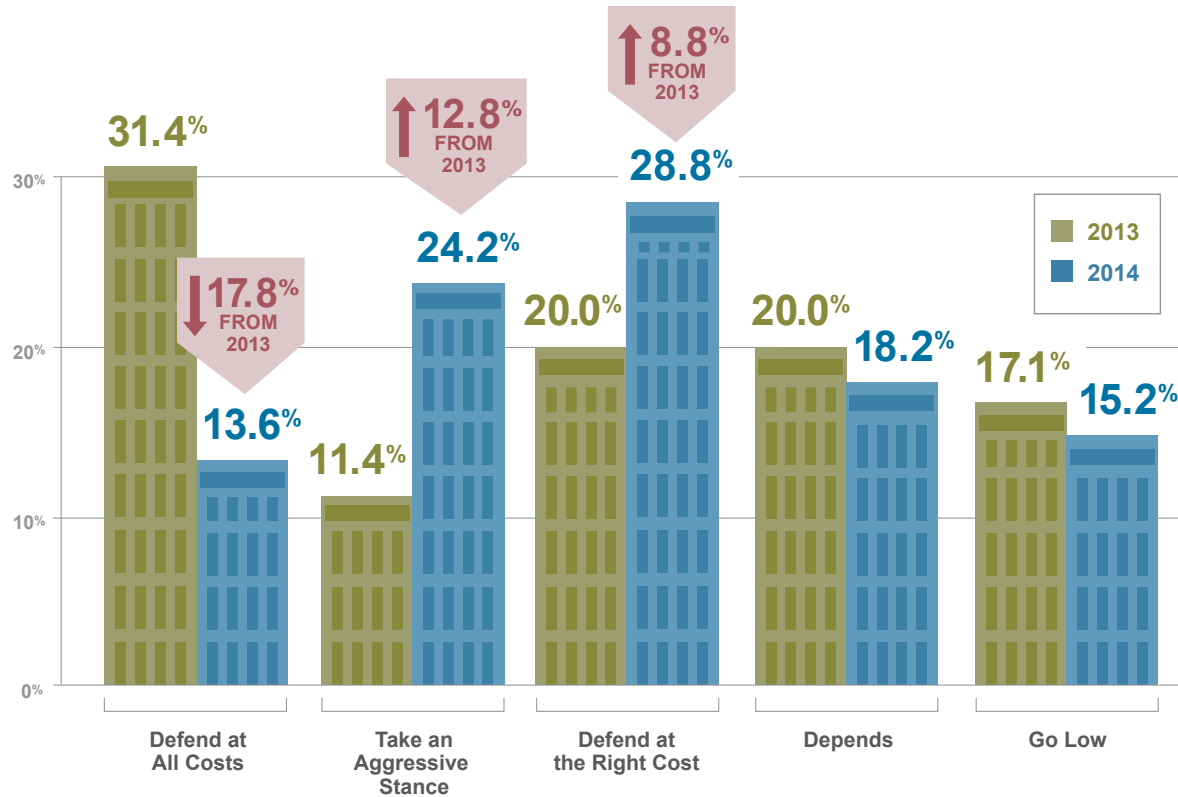
## Class Action Defense Philosophy Evolves

Class action defense philosophies have evolved among in-house counsel. While those who advocate a defend-at-all-costs approach declined by more than half (from 31 percent to 13 percent), much of the decline can be attributed to those who now support taking an aggressive stance (up from 11 to 24 percent) or defending at the right cost (up from 20 to 29 percent).

- A rise in matters and spending puts costs more clearly in focus
  - Corporate counsel interested in ensuring costs are in line with risk
  - Shift reflects a more strategic approach to managing cost and risk

### Class Action Philosophies

Percent of Companies



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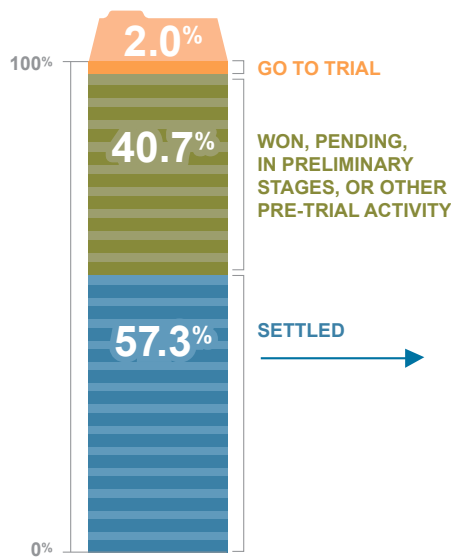


## More Than Half of Class Actions Settle

Class actions typically resolve in one fashion or another—very few go to trial. Most resolutions occur prior to a decision on class certification, but in a relatively sizeable percentage, resolution comes later. If a lawsuit continues after the certification decision, settlement may be considered. If certification was denied, settlement is often quick and inexpensive. If it was granted, the degree to which settlement makes sense will depend on various factors, including damage and cost containment, minimized reputational damage, predictability regarding outcome, and less business disruption.

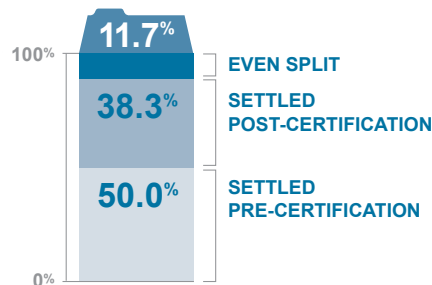
### Class Actions Settled and Settlement Timing

Percent of Matters at Different Stages



- On average, companies today settle 57.3 percent of class actions
  - Majority of settlements occur pre-certification

Percent of Companies Settling at Different Stages



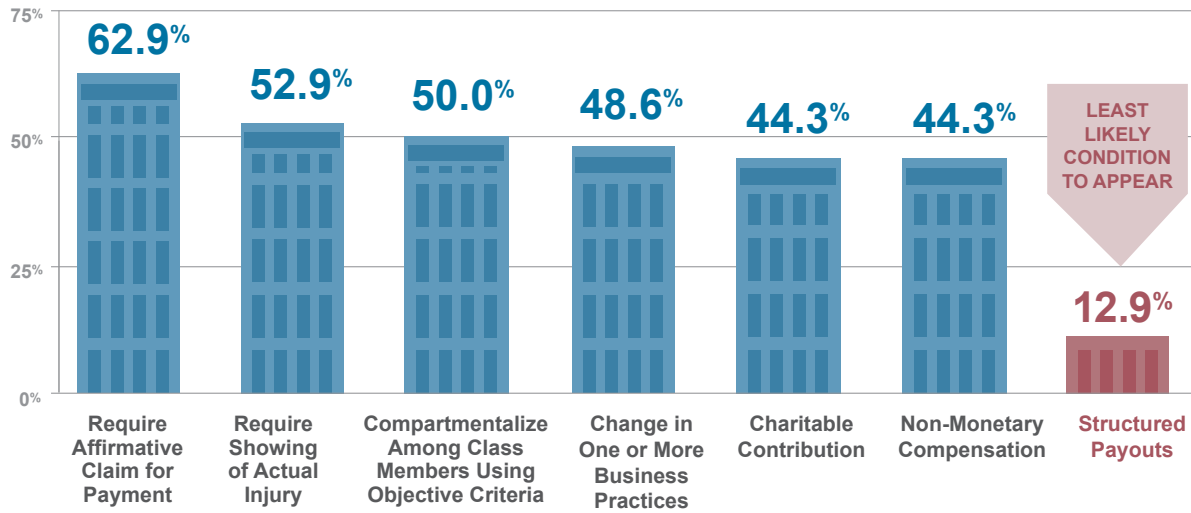
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## Class Action Settlement Conditions Vary Depending on the Specific Nature of the Case

The types of conditions included in class action settlements vary according to the specific nature of the case and may also be impacted by legal restrictions. Although there are no universally adopted conditions on settlements, the most common condition requires class members to present an affirmative claim for payment. Many settlements also require a showing of actual injury.

### Class Action Settlement Conditions

Percent of Companies Involved in Settlements with Each Condition



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# The Impact of Recent Class Action Rulings

## Class Action Defendants Continue to Benefit from Recent Class Action Rulings

Recent class action rulings continue to benefit class action defendants. The 2011 Supreme Court case, *Wal-Mart v. Dukes*, which was cited by nearly 32 percent of in-house counsel, still has the greatest influence on class action management. It increased the level of scrutiny given to each class action, requiring courts to engage in a rigorous analysis of whether the plaintiff has met its burden to produce evidence supporting certification. As a result, defense counsel focus on showing that important common issues in the case cannot be proven across the class and that certification is therefore inappropriate.

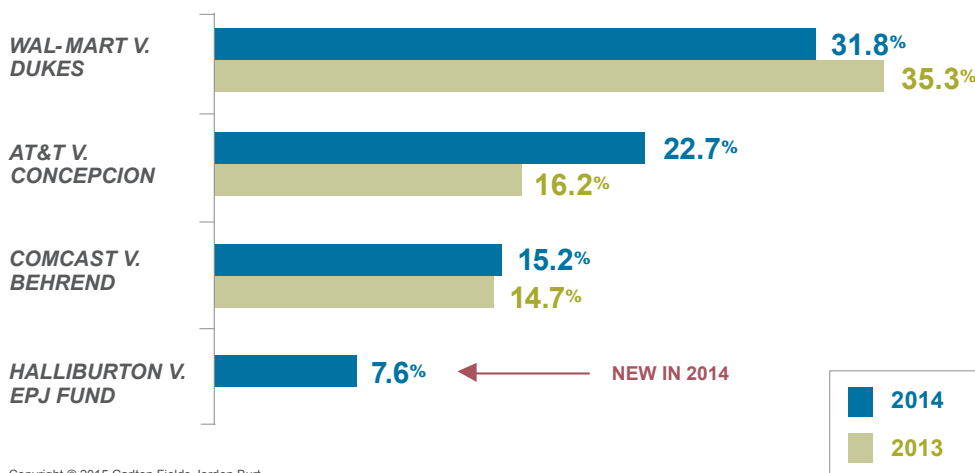
Other Supreme Court cases cited by counsel as having significant impact are *AT&T v. Concepcion*, *Comcast v. Behrend*, and *Halliburton v. EPJ Fund*. Regarding *Halliburton* one respondent stated:

**“We engage more experts and have increased the legal fees we spend at the class certification stage.”**

—Managing Director, Head of Litigation  
Leading International Investment Bank

### Recent Impactful Class Action Rulings

Percent of Companies



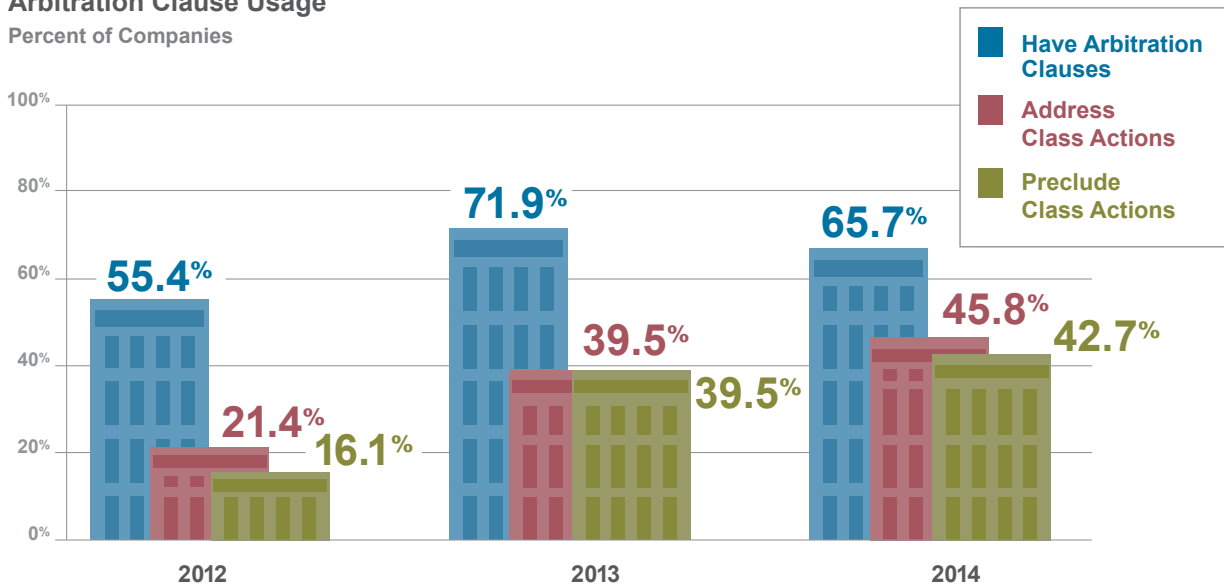
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## More Corporate Counsel Leverage Arbitration Clauses

In the wake of the Court's 2011 *AT&T* decision, the use of arbitration clauses to address class actions has continued to rise. Since 2011, the percentage of companies that address class actions in their arbitration clauses has more than doubled (from 21.4 to 45.8 percent), with most of those companies now using clauses that explicitly preclude class actions. These clauses are designed to offer companies an effective way to reduce risk and cost. Of course, in some regulated industries such as insurance, there are regulatory limitations on the use of these clauses.

### Arbitration Clause Usage

Percent of Companies



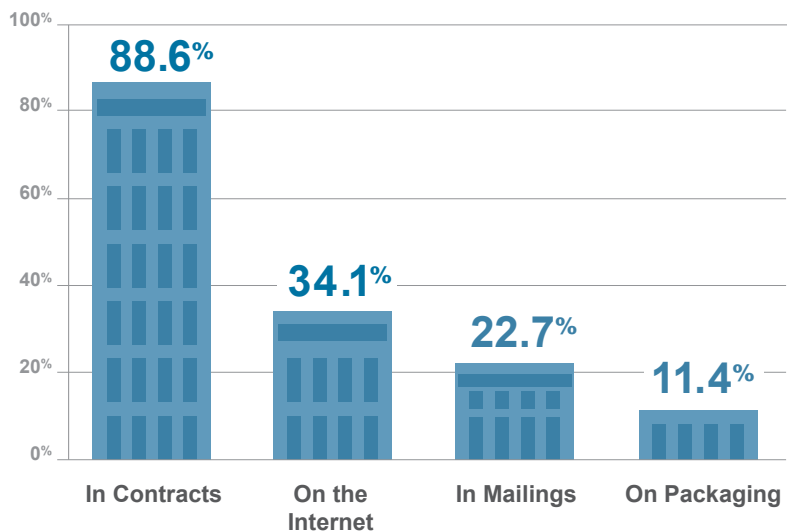
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## Arbitration Provisions Most Often Contained in Contracts; Gaining Traction on the Internet

The vast majority (88.6 percent) of companies that use arbitration clauses do so in their contracts. But others make them available elsewhere, either alternatively or additionally, with 34 percent posting their arbitration clauses online.

### Incorporation of Arbitration Provisions

Percent of Companies



NOTE: Legal limitations may apply to any of the avenues described above.

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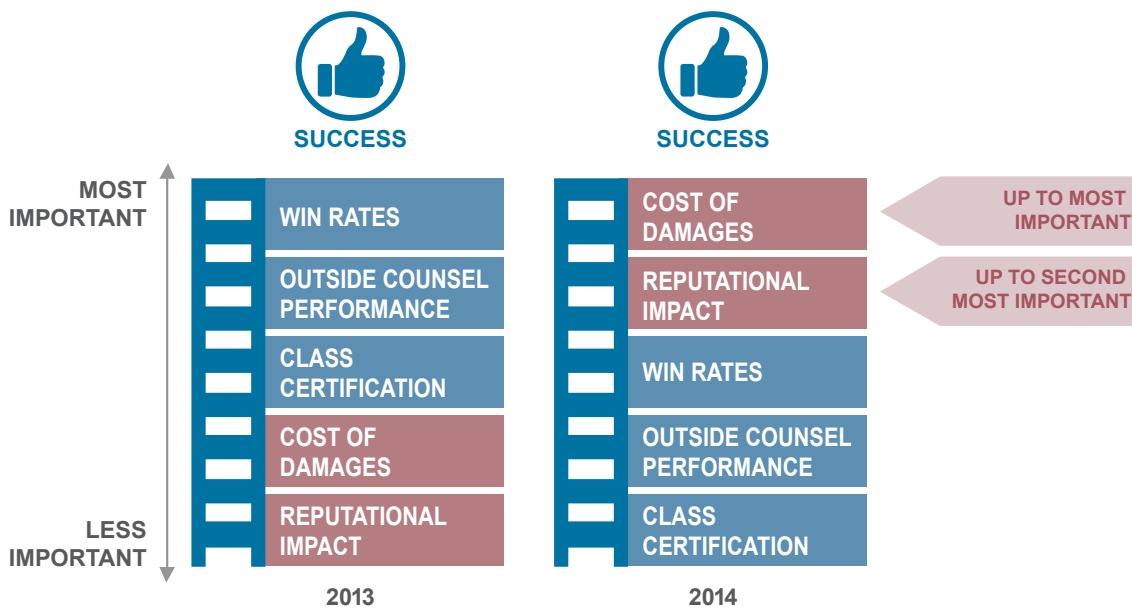
## Winning Isn't Everything ... Cost of Damages and Reputational Impact Top Measures of Success

Once the defense of a class action has concluded, corporate counsel are measuring success with different metrics than they used in the past. In 2013, win rates topped the list as the most important measure of success. It was followed by outside counsel performance, class certification, cost of damages, and, at the bottom of the list, reputational impact. However, in 2014, reputational impact shot up to become the second-most important measure of success, preceded only by cost of damages. Those metrics were followed by win rates, outside counsel performance, and whether class certification occurred.

- Importance of limiting reputational impact dovetails with its increased recognition as a significant risk factor

### Importance of Success Metrics

In Order of Importance



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# Best Practices to Control Costs

## Early Case Assessment and the Use of Outside Counsel

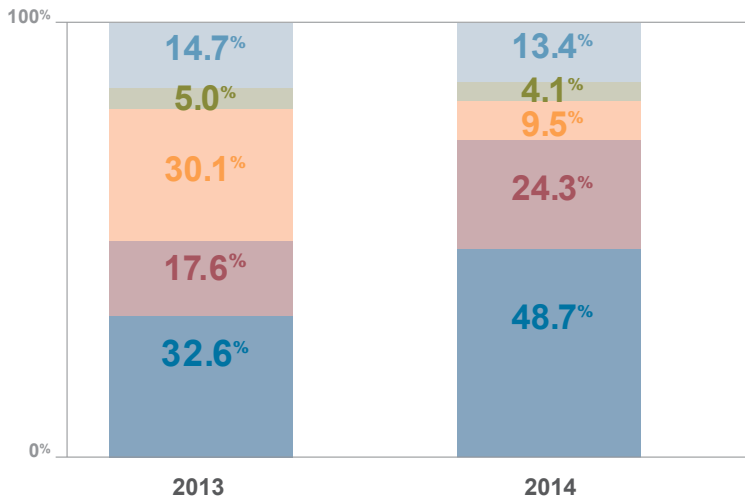
### Companies Increase Role of Outside Counsel in Early Case Assessment

More than 86 percent of companies conduct early case assessments, and more than half of them describe outside counsel as essential to the process. These companies involve outside counsel from case inception for help with such tasks as risk assessment, exposure evaluations, key issue isolation, interviews of key witnesses, and development of strategy and scenarios.

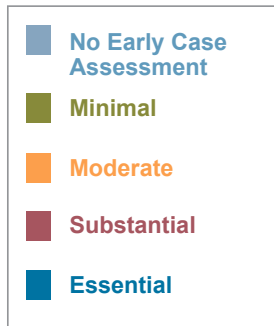
- An overwhelming percentage of companies now conduct early case assessment; only 13.4 percent do not
- For a majority of companies, the role of outside counsel is substantial, if not essential

#### Outside Counsel Involvement in Early Case Assessment

Percent of Companies



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“eDiscovery can be very dangerous. Plaintiffs’ attorneys can hang you on this. When a class action is filed, immediately get on top of preservation efforts related to regular discovery and eDiscovery.”

—Senior Vice President,  
Assistant General Counsel  
*Large National Retail Bank*

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“Hire outside counsel that sees the big picture and understands next steps.”

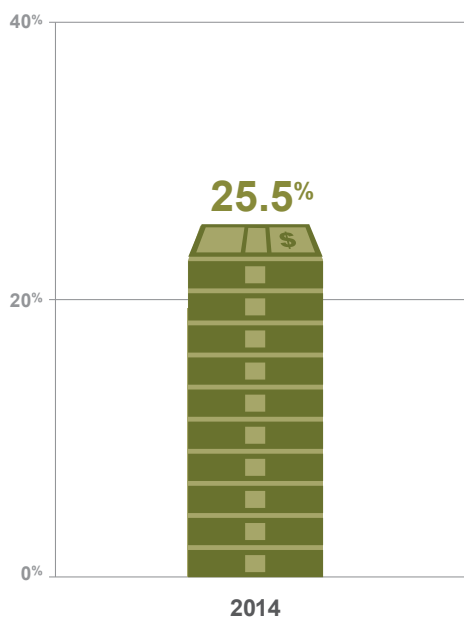
—Vice President,  
Assistant General Counsel  
*Globally Recognized Insurance Firm*

## Outside Counsel Savings Increase When Companies Engage Outside Counsel in Early Assessment

Engaging outside counsel in early case assessment is associated with substantial savings as to both outside counsel fees and total per matter legal cost. Companies that indicate outside counsel's role was essential or substantial in such assessments saw savings of 25.5 percent in 2014 compared to those that did not.

### Savings Generated Through Early Case Assessment Using Outside Counsel in an Essential or Substantial Manner

Percent Savings



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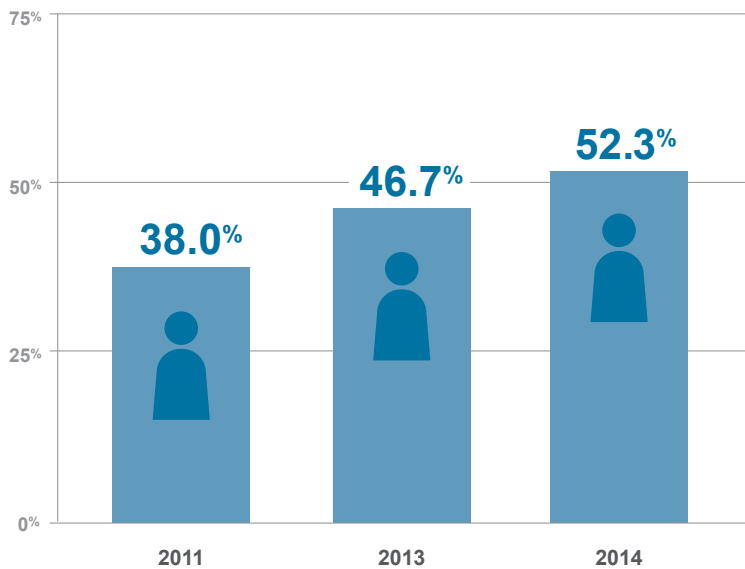
## In-House Accountability

### Companies Continue to See the Benefit of Having One Individual Responsible and Accountable for Results

Companies also recognize the benefit of having a single individual responsible and accountable for class action outcomes. In 2014, more than half of companies, or 52.3 percent, made a single individual responsible and accountable, up from just 38 percent in 2011.

#### Assign a Single Individual

Percent of Companies



NOTE: Data not available for 2012.

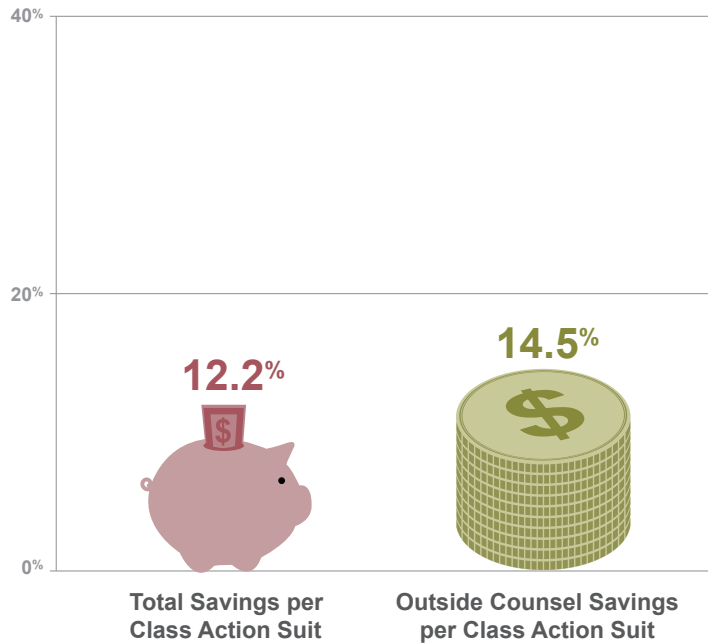
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## Substantial Savings When a Single Individual is Assigned

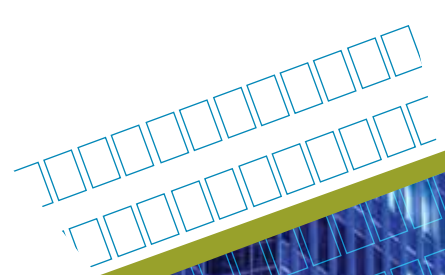
Having a single individual responsible and accountable is also associated with decreased spending per class action suit—overall and for outside counsel. Companies that employ this approach spend more than 12 percent less overall than companies that do not (corresponding with 15 percent less spending per suit on outside counsel). Although the range of reduced spending has varied, the data has shown savings when a single individual is responsible and accountable in three of the four years in which the Carlton Fields Jordan Burt Class Action Survey has been conducted.

### Class Action Savings

Percent Savings



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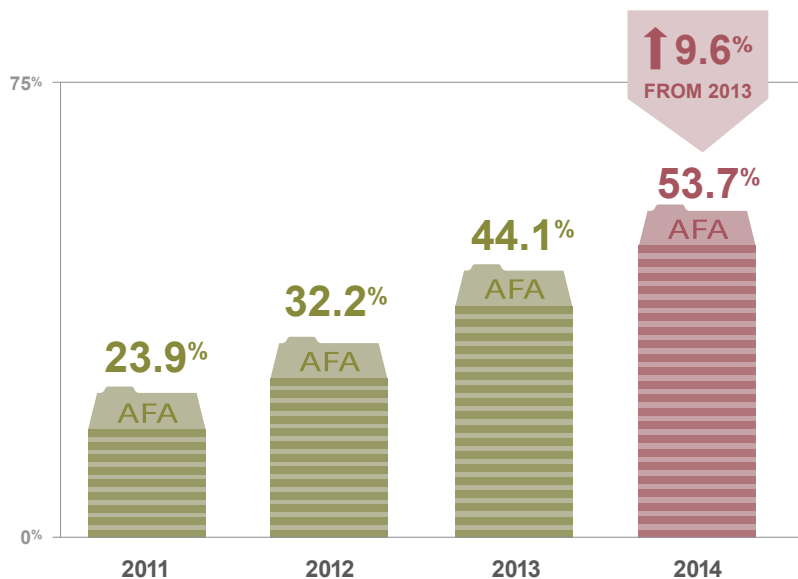
## Alternative Fee Arrangements

### AFA Usage More Than Doubles Between 2011 and 2015

Companies increasingly use alternative fee arrangements (AFAs) for some portion of their class action work. Since 2011, AFA use has more than doubled. Today, 54 percent of corporate counsel rely on AFAs for class actions, up from 44 percent last year and 24 percent just three years ago. AFAs help in-house legal teams articulate goals, add predictability to costs, deliver cost savings, and share risk with outside counsel while promoting overall efficiency.

#### Alternative Fee Arrangement Use in Class Actions

Percent of Companies



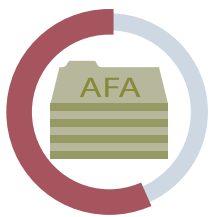
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## AFAs: Risk Level Impacts Adoption Rates

Despite the burgeoning popularity of AFAs in class actions, the riskier the class action, the less likely an AFA will be used. Even among companies that use AFAs in class actions, only 56 percent do so at the highest end of the risk spectrum—bet-the-company matters. While that percentage itself is significant, it shoots up to 68 percent for high-risk class actions, 82 percent for class actions that are considered complex, and 85 percent for those deemed routine.

### Alternative Fee Arrangement Use by Class Action Risk Level

Percent of Companies



**55.9%**  
OF COMPANIES USING  
AFAs EMPLOY THEM IN  
BET-THE-COMPANY  
CLASS ACTIONS



**67.6%**  
OF COMPANIES USING  
AFAs EMPLOY THEM IN  
HIGH-RISK  
CLASS ACTIONS



**82.4%**  
OF COMPANIES USING  
AFAs EMPLOY THEM IN  
COMPLEX  
CLASS ACTIONS



**85.3%**  
OF COMPANIES USING  
AFAs EMPLOY THEM IN  
ROUTINE  
CLASS ACTIONS

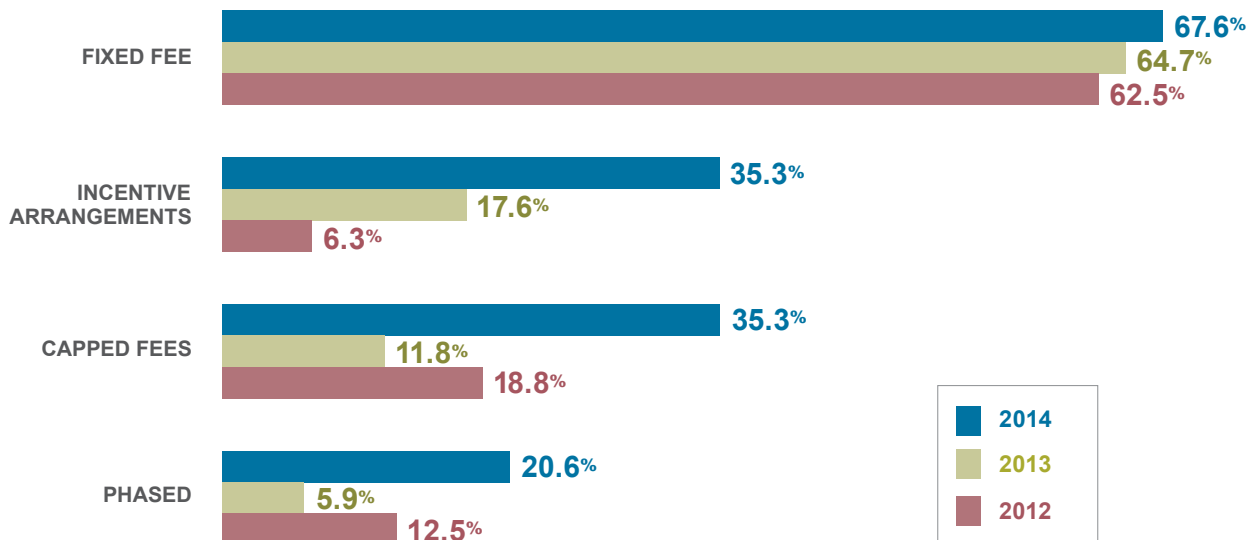
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## Types of AFAs Used in Class Actions

Fixed fees remain the dominant type of AFA used for class actions, although the use of incentive arrangements, capped fees, and phased fees have all at least doubled between 2013 and 2014. Many companies use AFAs for certain segments of the class action process (e.g., a fixed fee covering the time through initial motion practice; a fixed fee through a certification decision, including related discovery and briefing).

### 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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## Methodology and Approach

The 2015 Carlton Fields Jordan Burt Class Action survey results were compiled from 360 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 Jordan Burt 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 by conducting some supplemental research. The consulting firm provides only aggregate data to Carlton Fields Jordan Burt. All individual responses and company names are kept confidential and excluded from the survey results.

Survey participants' companies had average annual revenue of \$18.2 billion and median annual revenues of \$4.6 billion. The surveyed companies operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, professional services, and retail trade.

## About Carlton Fields Jordan Burt

Carlton Fields Jordan Burt 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 more about the survey and how these results may impact you, or to discuss the Carlton Fields Jordan Burt class action practice, please contact **Chris S. Coutroulis** at [ccoutroulis@CFJBLaw.com](mailto:ccoutroulis@CFJBLaw.com) or 813.229.4301.

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

Scan this QR code to view  
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\*In addition, to present the survey results in context, the first three slides show, with permission, generalized information from "BTI Litigation Outlook 2015: Changes, Trends and Opportunities for Law Firms."

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