The 2014 Carlton Fields Jorden Burt Class Action Survey

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

Table of Contents

Introduction

Class action lawsuits across practice areas continue to affect companies operating in a wide range of industries, and corporate legal departments are devising better and more innovative matter management and cost control tools to handle them effectively.

To provide the latest in class action best practices and trends, Carlton Fields Jorden Burt is pleased to share its third annual class action survey, which presents quantitative data and information on how corporate legal departments identify and manage class action risk and cost. The survey offers findings on topics as vital as risk mitigation tools, the continuing impact of recent case law, and internal and external cost control approaches, including increased use of alternative fees. Its findings result from a thorough survey process that involved detailed interviews with general counsel or senior legal officers of 326 companies of all sizes and business types on the subject of class action exposure and management. By documenting how companies perceive, monitor, and control their class action matters, we hope to identify evolving best practices across operations and industries, and provide useful benchmarking data.

We trust you will find the 2014 Carlton Fields Jorden Burt Class Action Survey a valuable source of information that helps your legal department effectively and efficiently manage these prevalent, costly lawsuits.

Executive Summary

Fifty-two percent of major companies are currently engaged in class action litigation. This percentage has remained fairly consistent since 2011. On average, companies managed four class actions in 2013, one less than they did in 2012. The number of new and ongoing class action matters is expected to stay virtually the same in 2014.

The nature and type of class actions continue to evolve. In 2013, 11 percent of class action spending went toward high-risk/bet-the-company matters, an increase of five percentage points since 2011. The growing number of these matters increases corporate counsel spending on class actions and makes winning – as opposed to defense costs – the primary measure of success.

Consumer fraud and labor and employment remain the most prevalent class action matters. Together, they account for more than half of all class actions, as they did in 2012. They are followed by product liability, securities, and antitrust matters, which have increased since 2012 and now collectively account for another third of class actions.

In 2014, corporate counsel expect an onslaught of new class actions related to data privacy and security. Twenty-four percent believe these areas will present the greatest class action threat. Additionally, corporate counsel are concerned about class action lawsuits in the areas of consumer fraud, labor and employment, health care, debt collection, and intellectual property.

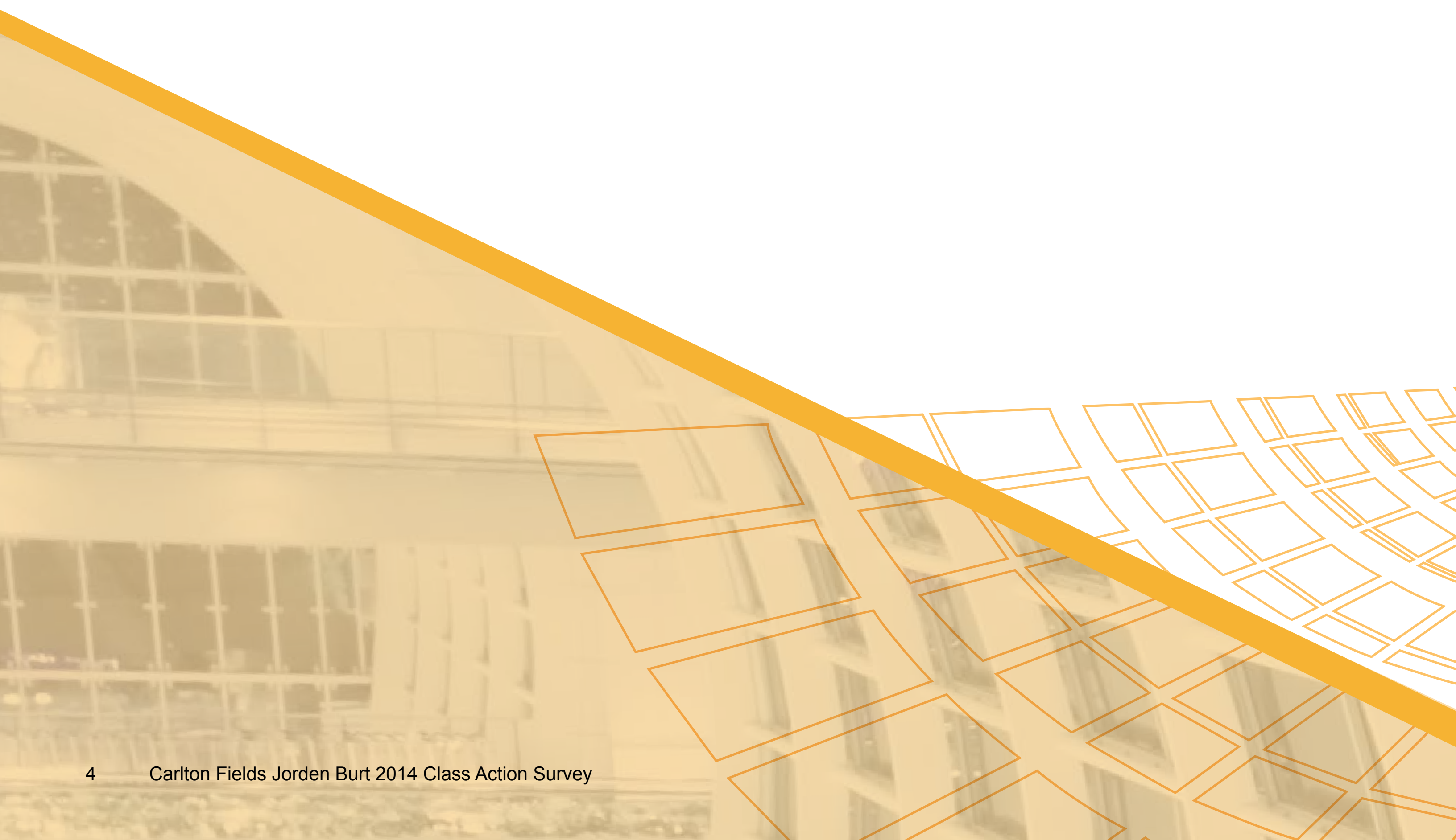
Companies added one attorney to their class action management teams in 2013, bringing the average number of legal department attorneys handling class actions to four, up from three in 2012. Additionally, each attorney that handles class actions is spending more time on them per week. In 2013, in-house class action attorneys spent 11 hours per week per case, up from six hours in 2011. This is consistent with the trend toward building internal legal resources.

While spending on outside law firms decreased from $2.9 million to $2.8 million from 2012 to 2013, the number of law firms used to handle class actions increased from three to four during this same period. This is consistent with the increasing complexity of class action cases, and contrasts with a decline in the total number of law firms used between 2012 and 2013.

The use of alternative fee arrangements in class actions continues to rise. More than 44 percent of companies now rely on them, up from nearly one-third in 2012. Projections indicate that almost 50 percent of companies will use AFAs in 2014. Fixed fees, chosen by nearly 65 percent of these companies, remain the most commonly used form of AFA.

A growing number of companies – 47 percent, up from 38 percent in 2011 – are making a single individual accountable for class action outcomes. As a result, these companies cut both overall and outside counsel spending, and reduce the amount of time spent on class action management. They spend 25 percent less on outside counsel, and save almost $800,000 annually. As in past years, companies that rigorously assess financial exposure also realize savings. They save nearly $400,000 per suit, which translates into $1.6 million per company annually.

The 2011 Supreme Court cases, *Wal-Mart v. Dukes* and *AT&T v. Concepcion,* continue to influence class action management. Additionally, corporate counsel reported that the 2013 Supreme Court case, *Comcast v. Behrend*, impacted their management of class actions.



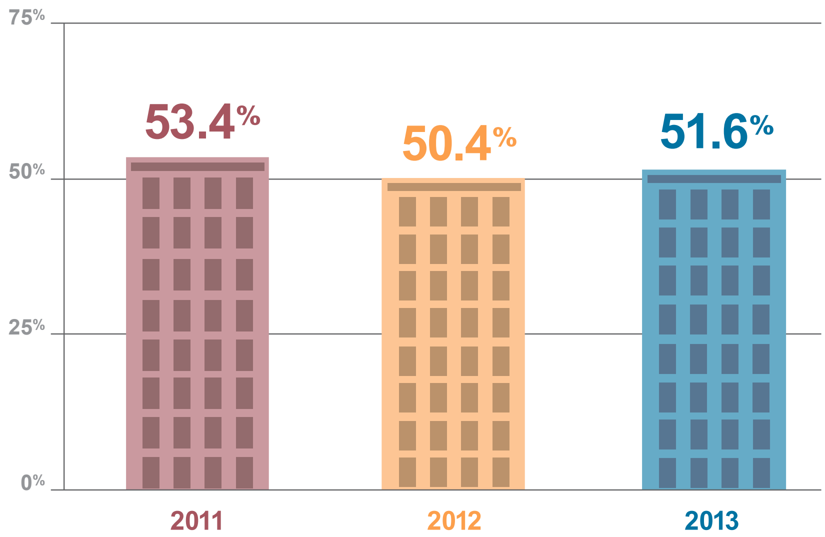
Class Action Spending and Trends

The Majority of Companies Are Actively Handling Class Action Suits

Nearly 52 percent of companies are currently engaged in class action litigation. This percentage has remained fairly consistent since 2011, when it reached 53 percent, before dipping to 50 percent in 2012. Of these companies, almost 80 percent report handling class actions routinely. The remaining 20 percent say they arise less frequently, every few years.

Companies with Class Action Matters

PERCENT OF COMPANIES



SOURCE: BTI's Premium Practices Forecast 2014: Survey of Corporate Legal Spending

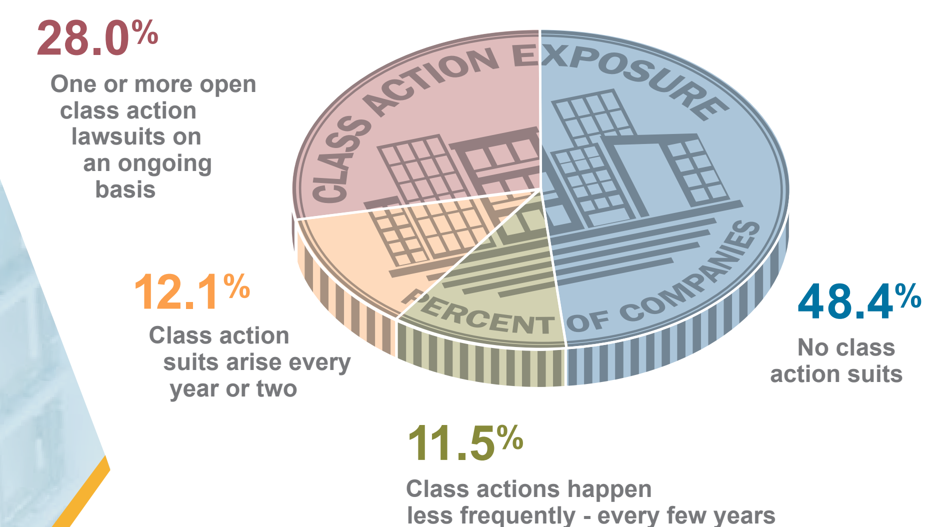
More Than 40% of Companies Handle Class Actions on an Ongoing Basis

Twenty-eight percent of companies report managing one or more class actions on a regular basis. To handle these suits, they have established more formal protocols, including predictive risk modeling, sophisticated analysis of potential financial exposure, and protective tracking of major decisions that impact class actions.

An additional 12 percent of companies report that class action lawsuits arise only every year or two. For still another 12 percent, class actions arise less frequently, only every few years. The remaining companies, 48 percent, report no class action lawsuits.

Level of Class Action Exposure

PERCENT OF COMPANIES

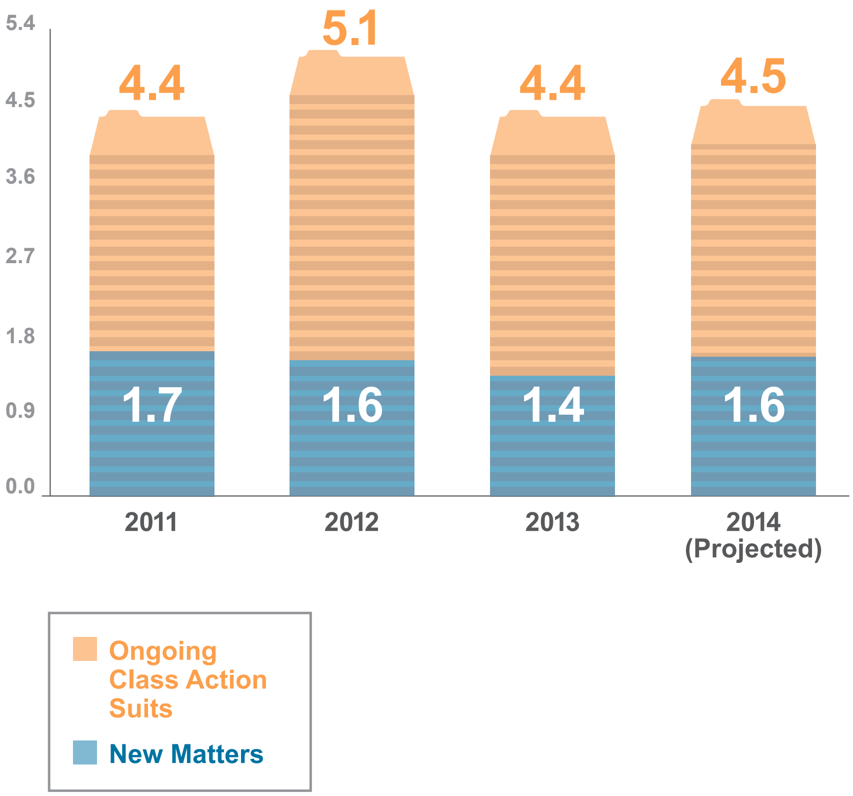


Class Action Case Loads Level Off

On average, companies are managing 4.4 class action suits, which is down from the 5.1 they managed in 2012. This number, which reflects new and ongoing matters, is expected to remain constant in 2014.

Current and Future Class Action Suits

AVERAGE NUMBER OF MATTERS PER COMPANY

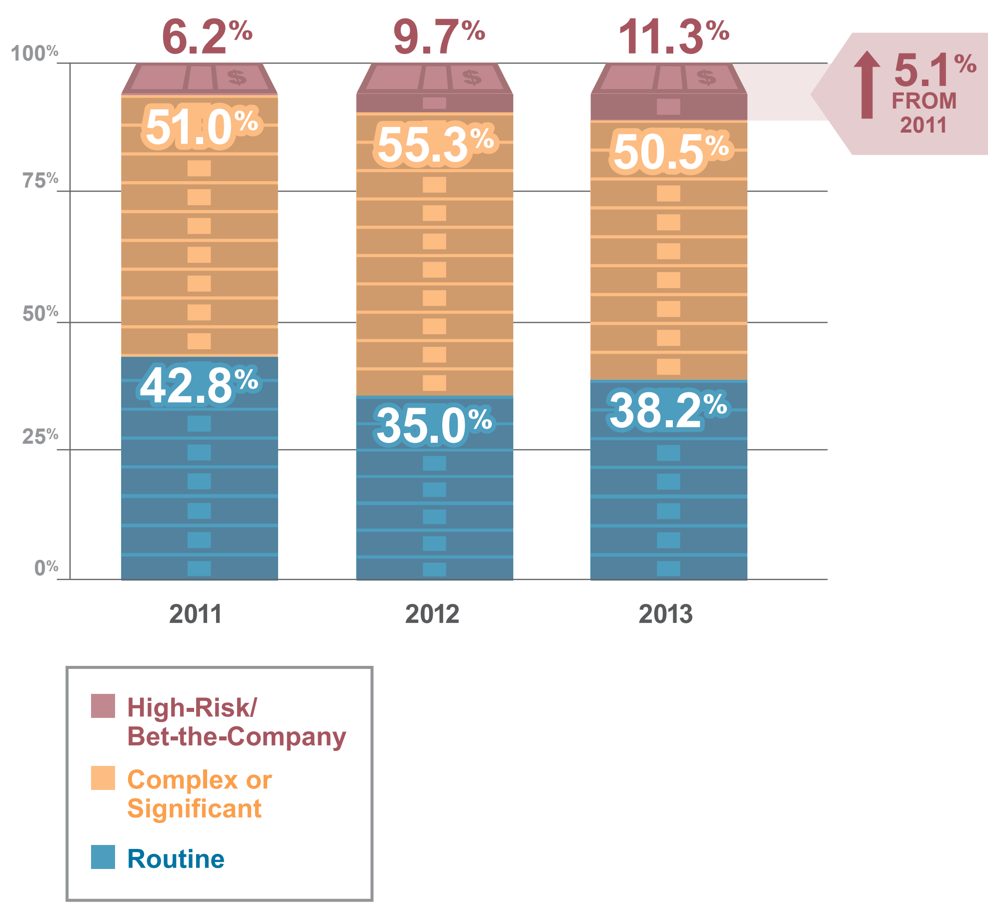


Bet-the-Company Matters Continue to Rise

In 2013, corporate counsel classified 11 percent of their class actions as "high-risk/bet-the-company," up from 10 percent in 2012, and 6 percent in 2011. The significant growth over the past two years of "high-risk/bet-the-company" cases increases corporate counsel spending and makes winning the primary measure of success, replacing the cost of defense.

Class Action Annual Spending by Risk Level

PERCENT OF CURRENT SPENDING



Consumer Fraud and Labor Dominate the Class Action Landscape

More than half of all class action matters and spending fall within the practice areas of consumer fraud, and labor and employment. Consumer fraud accounts for 27 percent of class action matters and 29 percent of class action spending. Labor and employment accounts for 25 percent of both class action matters and spending. These practice areas are followed by product liability (13 percent of matters and 12 percent of spending); securities (12 percent of matters and 10 percent of spending); and antitrust (8 percent of matters and spending). Other matter types including contracts, environmental, false advertising, financial, insurance, intellectual property, privacy, and regulatory comprise 16 percent of matters and 17 percent of spending.

Class Action Matters and Annual Spending Breakdown by Type

PERCENT OF MATTERS AND SPENDING

PRACTICE	MATTERS	SPENDING
CONSUMER FRAUD	26.6%	28.6%
LABOR & EMPLOYMENT	25.2%	25.0%
PRODUCT LIABILITY	12.6%	12.4%
SECURITIES	12.1%	9.8%
ANTITRUST	8.0%	7.7%
OTHER Contracts Environmental False Advertising Financial Insurance Intellectual Property Privacy Regulatory	15.5%	16.5%

MORE THAN 50% OF ALL CLASS ACTION MATTERS & SPENDING

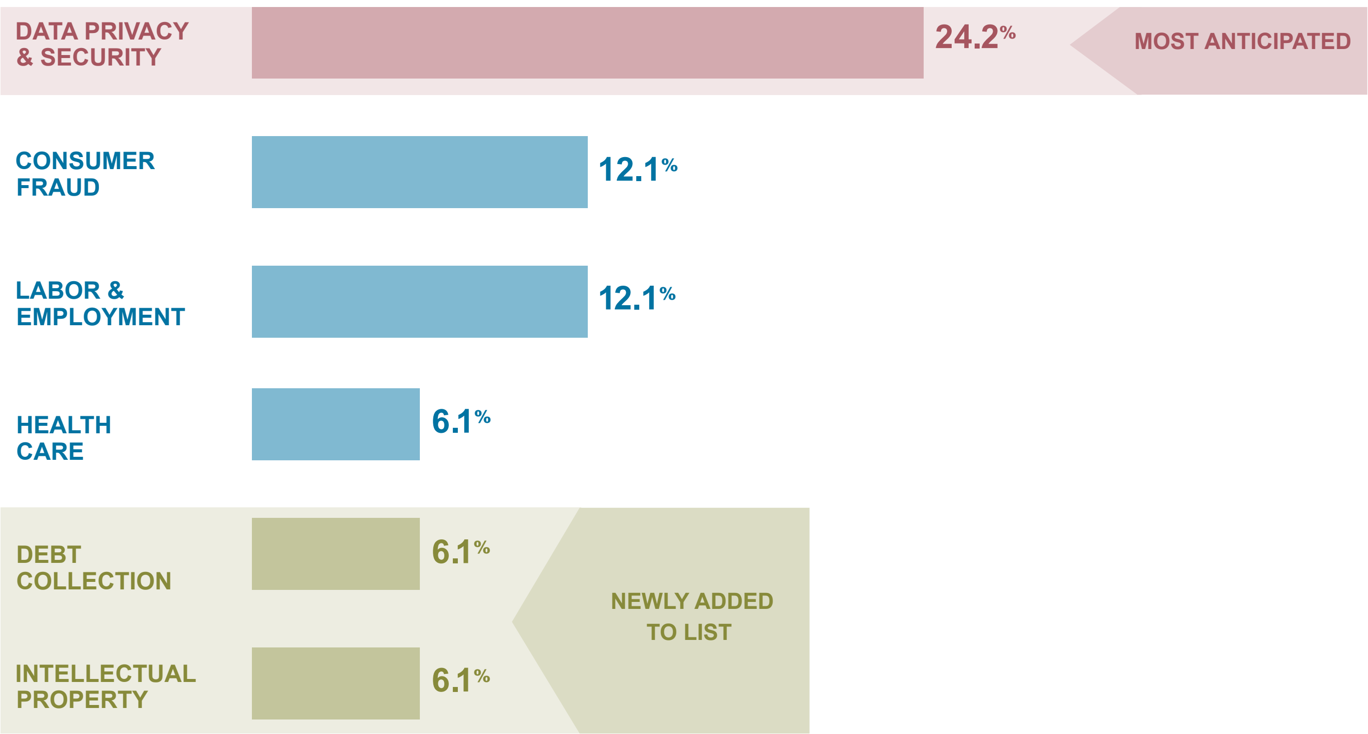
Corporate Counsel Expect More Data Privacy and Security Suits as Next Wave of Class Actions

In 2014, corporate counsel expect an onslaught of new class action litigation related to data privacy and security. Data security issues, which include prospective culpability for alleged faulty technology designs, are a major concern. Additional concerns include potential liability for wireless and other untested technologies, hackers and outside parties, and internal protocols and lapses.

Data privacy and security, which 24 percent of corporate counsel predict will form the next wave of class action lawsuits, is followed by consumer fraud and labor and employment (12 percent each); and health care, debt collection, and intellectual property (6 percent each).

Next Wave of Class Action Suits

PERCENT OF COMPANIES ANTICIPATING SUITS IN EACH AREA



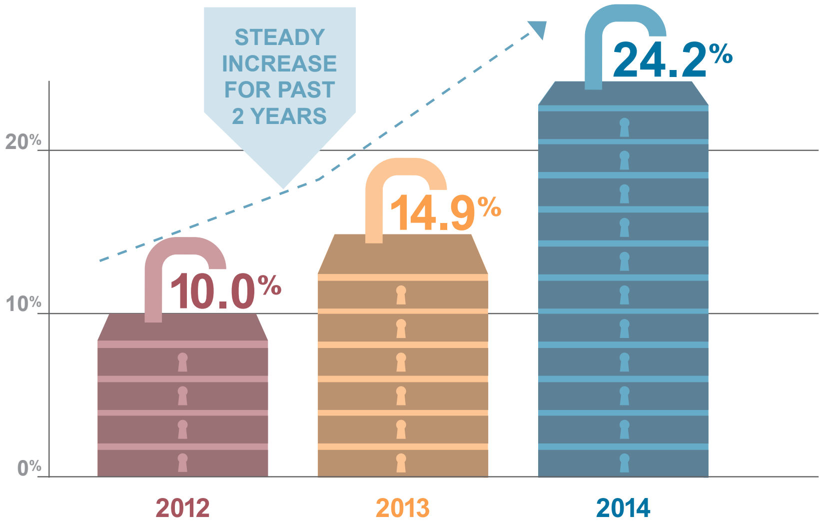
NOTE: Chart excludes responses under 6%.

Trend Watch: Companies Brace for the Impact of Data Privacy and Security

For the past two years, corporate counsel have increasingly predicted a significant rise in data privacy and security class actions. In 2012, just 10 percent predicted an increase in this area. That grew to 15 percent in 2013, and 24 percent this year.

Data Privacy and Security Class Action Suits

PERCENT OF CORPORATE COUNSEL PREDICTIONS



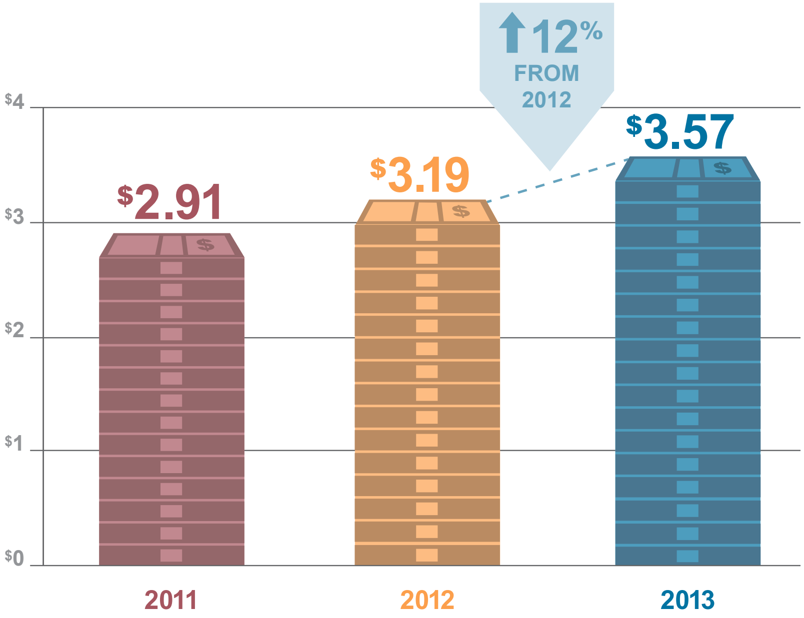
How Companies Manage Class Actions

Annual Class Action Spending Up 12% from 2012

For organizations that defend and manage class actions, annual spending increased 12 percent, or from $3.2 million to $3.6 million, from 2012 to 2013. Nearly 25 percent of these companies expect their class action spending to continue to rise in 2014.

Annual Class Action Spending

IN MILLIONS

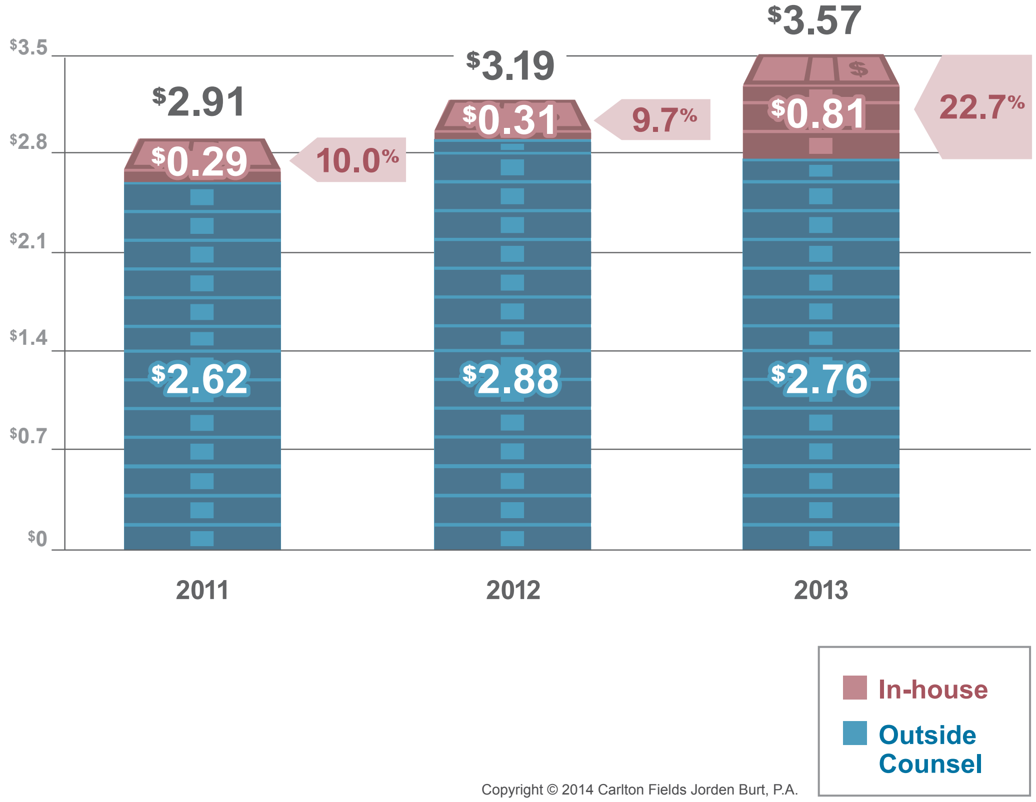


Class Action Spending Increases, Outside Counsel Spending Falls

As class action spending increased, spending on outside counsel fell. Of the $3.6 million spent on class actions in 2013, $2.8 went to outside counsel. This represents a major shift from 2012 when those numbers were, respectively, $3.2 million and $2.9 million. The shift reflects that corporate counsel have more than doubled their internal spending on class actions. They are adding more attorneys to handle these matters, and increasing the time spent on them as their significance grows. As a result, in 2013, 22.7% of class action spending was internal, dramatically up from 10.0% in 2011 and 9.7% in 2012.

Annual Class Action Spending

IN MILLIONS

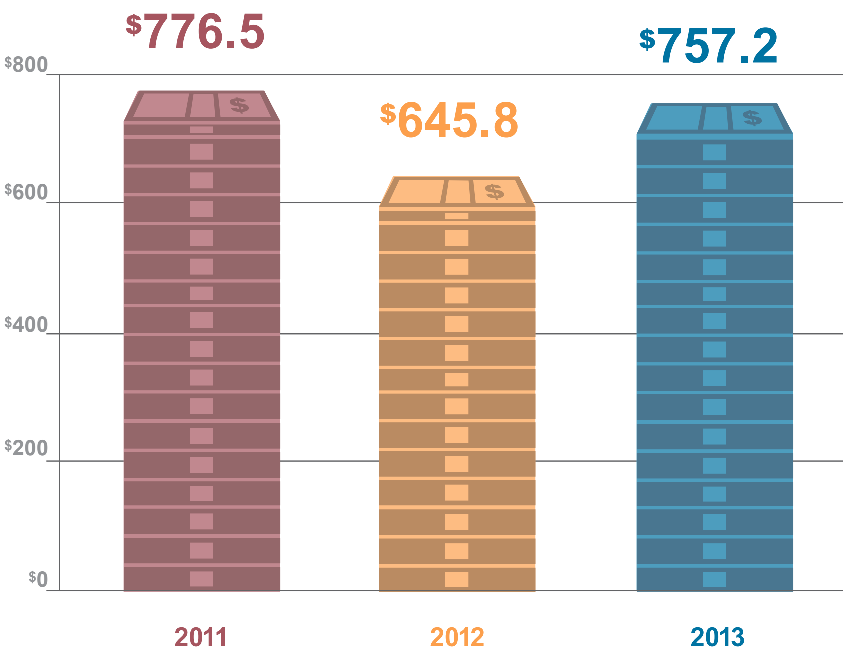


Companies Spend an Average of $757,200 Annually per Class Action

On average, a single class action lawsuit costs companies $757,200, up from $645,800 in 2012. Yet annual spending per class action varies considerably, even within a single organization. Cost differences are driven by the level of risk associated with a particular class action and how the company manages such actions.

Average Spending per Class Action Suit

IN THOUSANDS



Companies Using Fewer Law Firms Overall, But Add a Class Action Firm

From 2012 to 2013, companies reduced the number of law firms used overall, from 54 to 46. However, during that same time period, they increased the number of law firms used to defend class actions from 3.0 to 3.6. This increase is consistent with the increased overall risk in the cases being handled.

Law Firms Used Overall and for Class Actions

NUMBER OF FIRMS

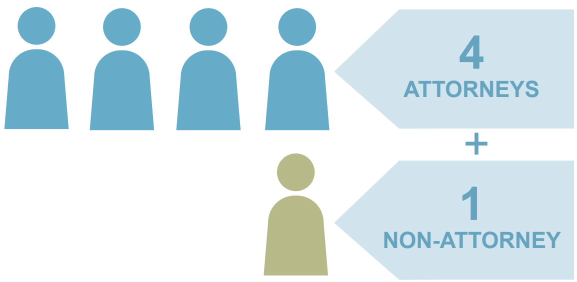
> "A passionate defense by outside counsel who care, and their ability to partner effectively with in-house counsel, make a tremendous difference with the overall cost of class action lawsuits."
>
> **– Associate General Counsel**
>
> *Fortune 100 Professional Services Firm*

Companies Use 4 Attorneys and 1 Non-Attorney to Manage Class Actions

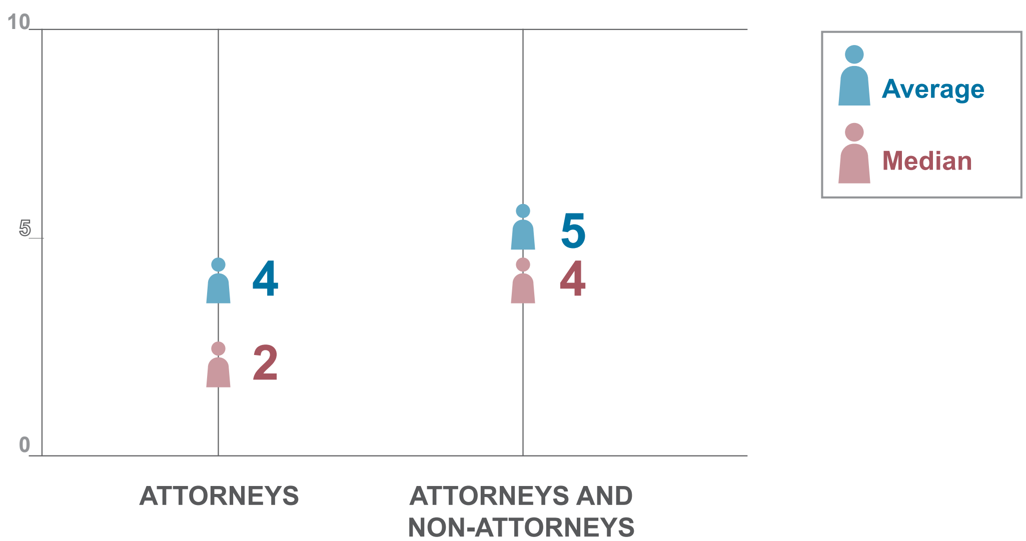
Companies use an average of four attorneys and one non-attorney to manage class actions. Companies that face a large number of ongoing suits, however, may utilize as many as 25 attorneys to handle them.

Individuals and Attorneys Dedicated to Class Actions

NUMBER OF PEOPLE



NUMBER OF PEOPLE (AVERAGE & MEDIAN)

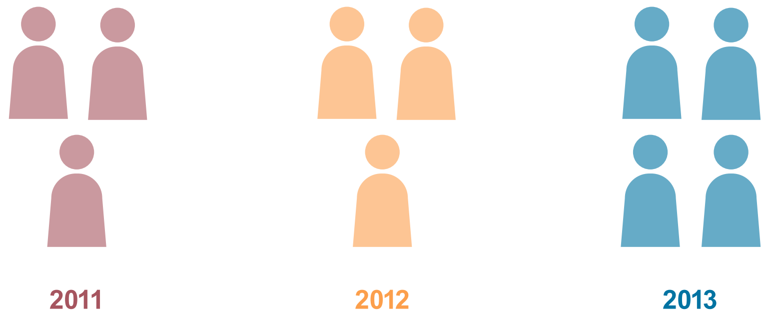


Companies Add to In-House Class Action Capability

In 2013, legal departments, on average, added one attorney to their class action management teams. This is consistent with the trend toward building internal legal resources. These additional attorneys account for a portion of the increase in internal spending on class actions, and are used to alleviate the costs of more routine matters. Outside counsel predominantly handle more complex and bet-the-company work.

Attorneys Dedicated to Class Actions

NUMBER OF PEOPLE

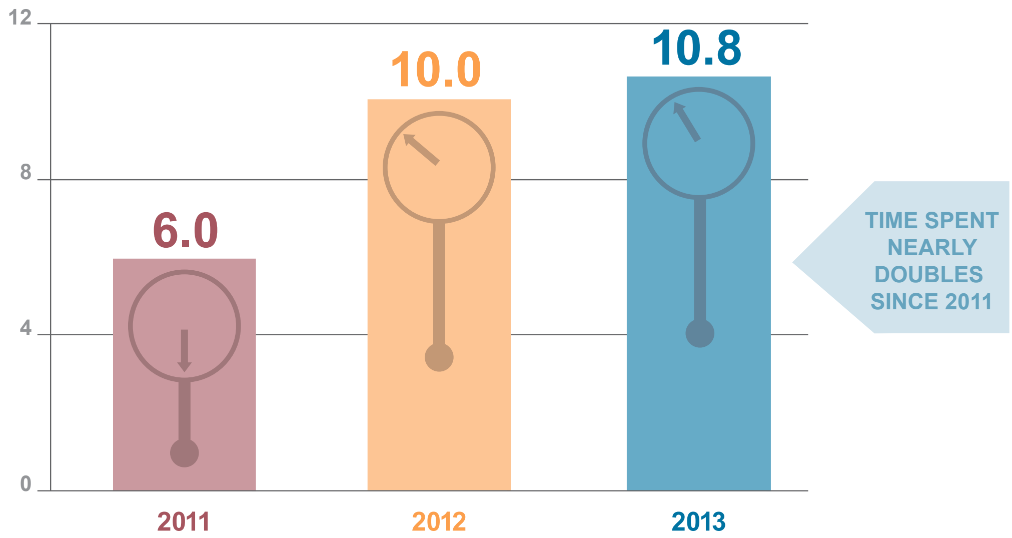


In-House Counsel Time Invested in Class Action Management Continues to Grow

Since 2011, in-house counsel time devoted to managing class actions has nearly doubled, from six to 11 hours per week per attorney per case. Combined with the concurrent addition of one attorney working on class actions, these increased hours signify a marked rise in the time spent managing class actions.

Average Individual Attorney Time Spent on Class Actions per Case

HOURS PER WEEK



How Companies Approach Class Actions and Measure Success

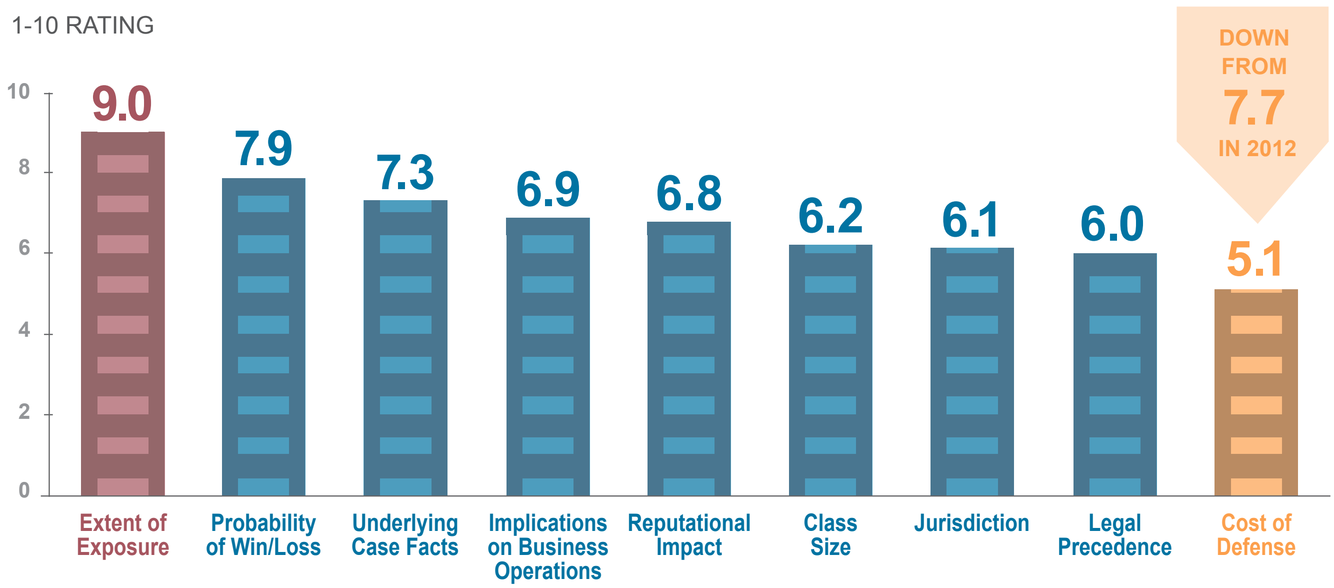
Exposure Remains Top Concern for Assessing Class Action Risk

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 the highest average ranking, 9.0, to extent of exposure. They viewed the probability of win/loss as the next most important concern, assigning it 7.9. This was followed by underlying case facts (7.3), implications for business operations (6.9), impact on reputation (6.8), class size (6.2), jurisdiction (6.1), and legal precedence (6.0).

Corporate counsel deemed the cost of defense the least important risk, assigning it a 5.1. This represents a significant drop since 2012, when corporate counsel deemed cost of defense the third most important variable in evaluating risk and gave it a 7.7 on the 10-point scale. This is consistent with the increase in high-risk, bet-the-company cases.

Importance of Risk Variables

1-10 RATING



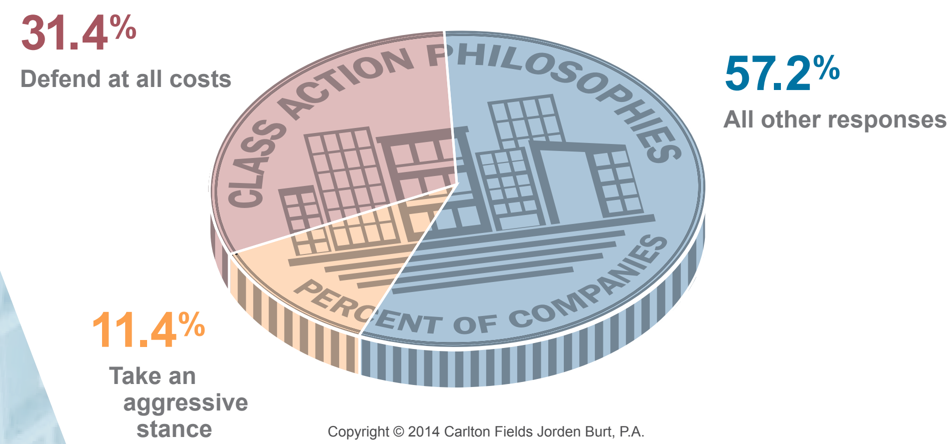
> "Do not cut costs on legal talent. The stakes are too high to be out-lawyered."
>
> – **Senior Counsel**
>
> *Global Consumer Goods Manufacturer*

Companies Fight Class Actions Harder

Among corporate counsel who manage class actions, 31 percent describe their philosophy as “Defend at all costs.” Another 11 percent say they “take an aggressive stance.” These approaches reflect the diminished importance of cost when defending high-risk matters that may impact the company’s reputation, core business models, and/or revenue producing processes.

Class Action Philosophies

PERCENT OF COMPANIES



> “Don’t give in. Take an aggressive stance if you have a valid defense.”
>
> – **Corporate Attorney**
>
> *Nationally Recognized Food Products Company*

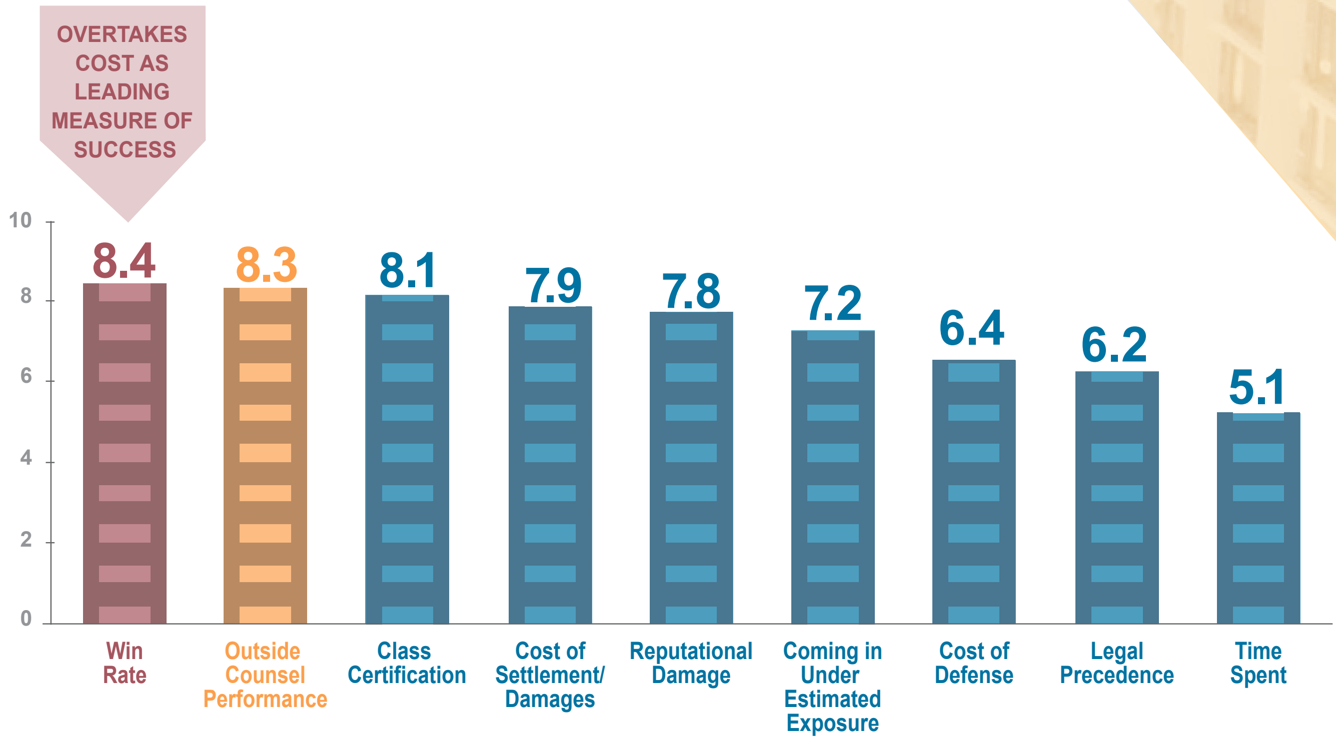
> “Assess the case early but be willing to defend in the long run to minimize costs of settlement and lower risk of future litigation in the long term.”
>
> – **Associate General Counsel**
>
> *Fortune 100 Diversified Chemicals Producer*

Win Rate Ranks as Most Important Success Metric, Outside Counsel Performance a Close Second

Companies defending class actions measure their success in a variety of ways. When asked to assign importance to various success metrics on a scale of 1-to-10, corporate counsel on average gave the highest rating, 8.4, to win rate. They gave the second highest rating, 8.3, to outside counsel's performance, which they assess in terms of delivery, client service, process, efficiency, value delivered, and investment.

Importance of Success Metrics

1-10 RATING



Best Practices to Control Class Action Costs

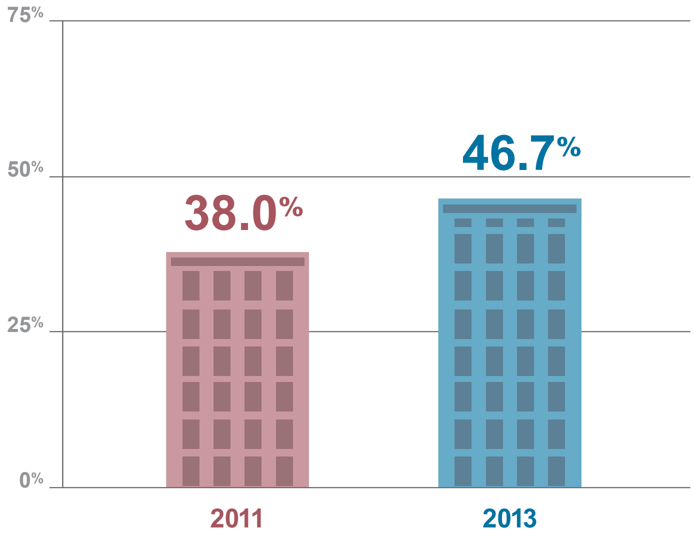
COST CONTROL THROUGH ACCOUNTABILITY AND RIGOROUS CASE ASSESSMENT

More Companies Have a Single Individual Accountable for Class Action Outcomes

Forty-seven percent of companies, up from 38 percent in 2011, make a single individual accountable for the outcome of their class action lawsuits. Having a single individual accountable reduces both overall and outside counsel class action spending, and the amount of time devoted to class action management.

Make a Single Individual Accountable for Class Actions

PERCENT OF COMPANIES

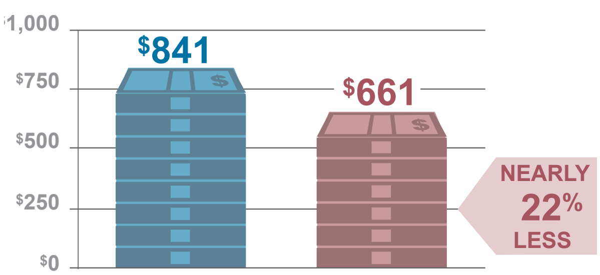


Companies that Make a Single Individual Accountable Save $800,000 Annually

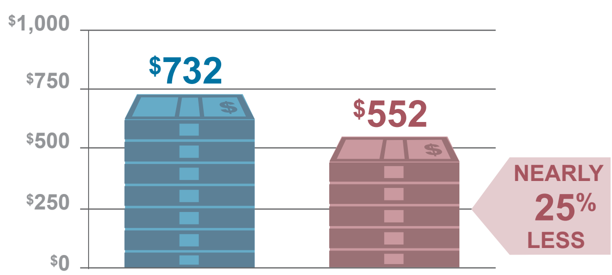
Companies that make a single individual accountable for class action outcomes spend almost 22 percent less per class action suit than those that don't. They also spend 25 percent less per class action suit on outside counsel. For each class action managed (4.2 annually) they save $180,000, which translates to savings of nearly $800,000 per year. Similarly, making a single individual accountable cuts the amount of time invested per attorney per week per suit, from 11.3 to 10.4 hours.

Annual Spending and Time Spent on Class Action Matters

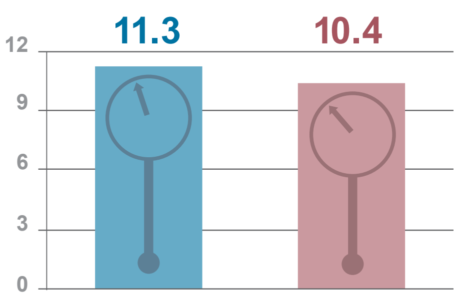
SPENDING PER CLASS ACTION SUIT
(IN THOUSANDS)



OUTSIDE COUNSEL SPENDING PER
CLASS ACTION SUIT (IN THOUSANDS)



AVERAGE HOURS PER ATTORNEY
PER WEEK PER SUIT



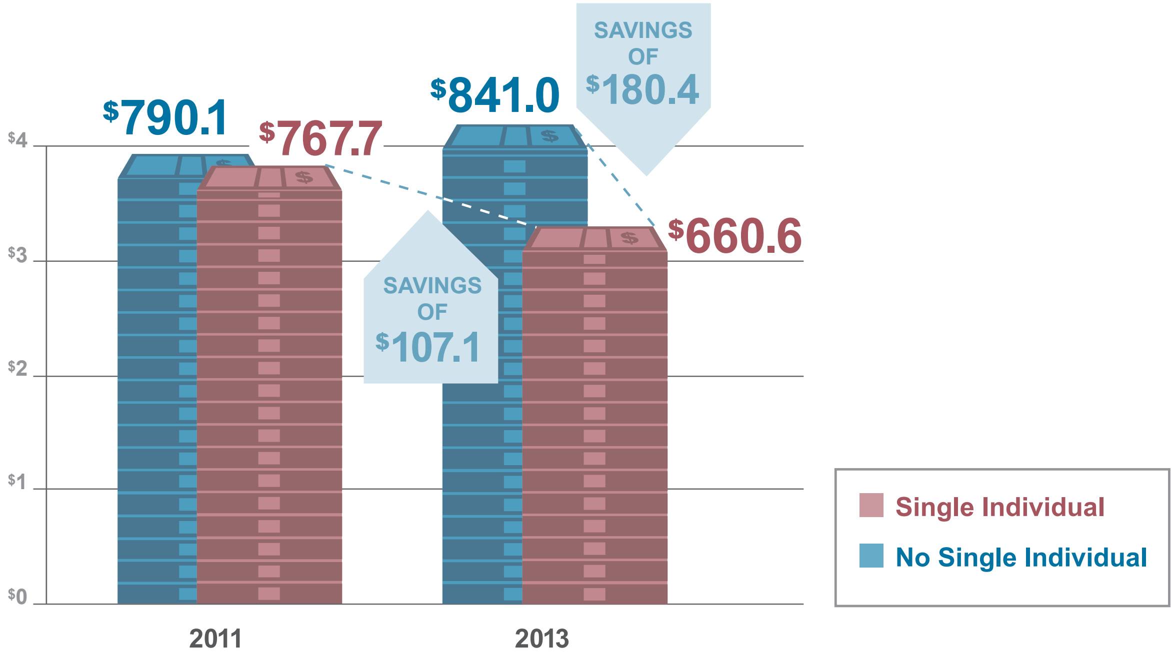
Single Individual
No Single Individual

Individual Accountability Creates Savings in Class Actions

Companies that make a single individual accountable for class actions spent 14 percent less per case in 2013 than they did in 2011. On the other hand, companies with no single individual accountable saw a 6.4 percent increase. The resulting 2013 numbers translate to an annual saving of more than $180,000 compared to organizations that do not make a single individual accountable.

Total Spending per Class Action Suit

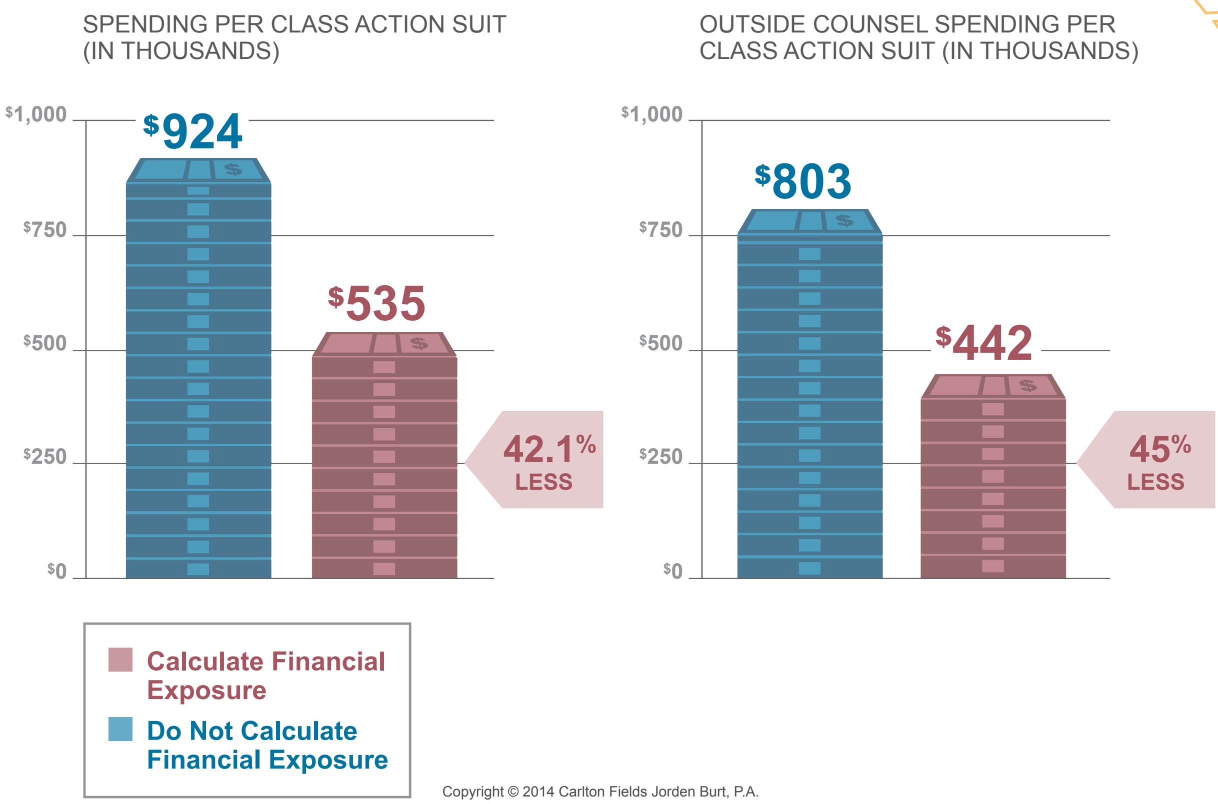
IN THOUSANDS



Companies That Determine Financial Exposure Save $1.6 Million

Forty percent of companies have a formal system in place to determine, early on, the potential financial exposure from a class action suit. Annually, these companies spend 42 percent less per class action suit than those with no formal system. This translates into large annual cost savings: nearly $400,000 per suit, or $1.6 million per company.

Annual Spending on Class Action Matters

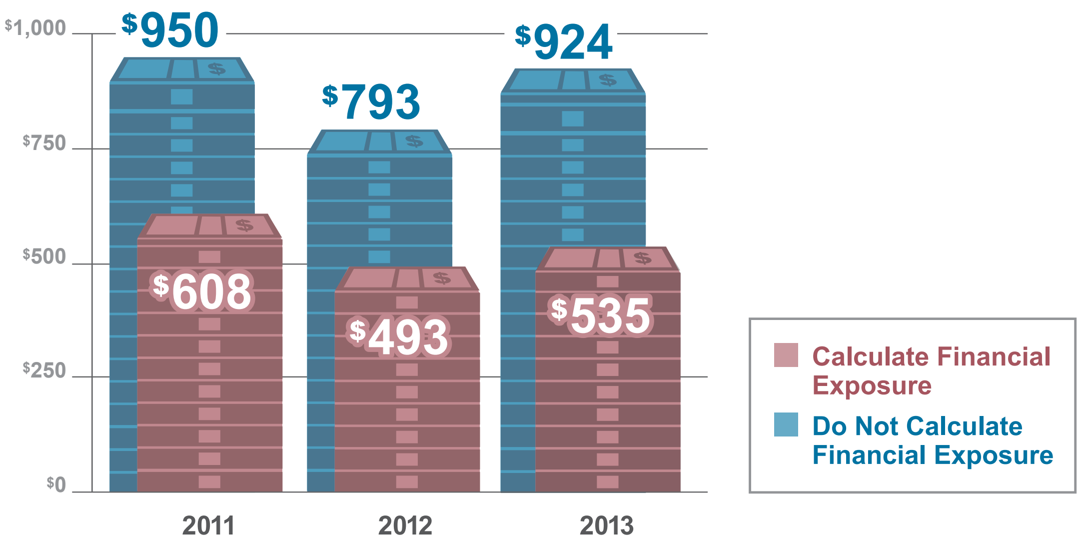


Spending Gap Widens Between Those Determining Financial Exposure and Those Who Do Not

The spending gap between companies that calculate financial exposure and those that do not has widened since 2011. During this time, spending decreased 12.0 percent per suit for those that calculate financial exposure, and decreased only 2.7 percent for those that do not. Although there was an increase from 2012 to 2013, it was significantly less for those who calculate financial exposure (8.5 percent versus 16.5 percent).

Spending per Class Action Suit

IN THOUSANDS



COST CONTROL THROUGH THE USE OF AFAs

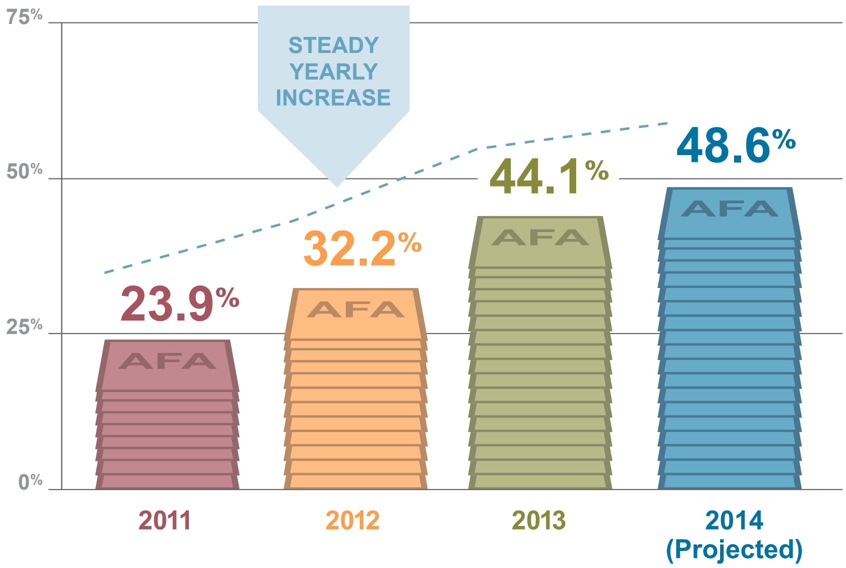
AFA Usage Nearly Doubles Between 2011 and 2013; Projected to Approach 50% in 2014

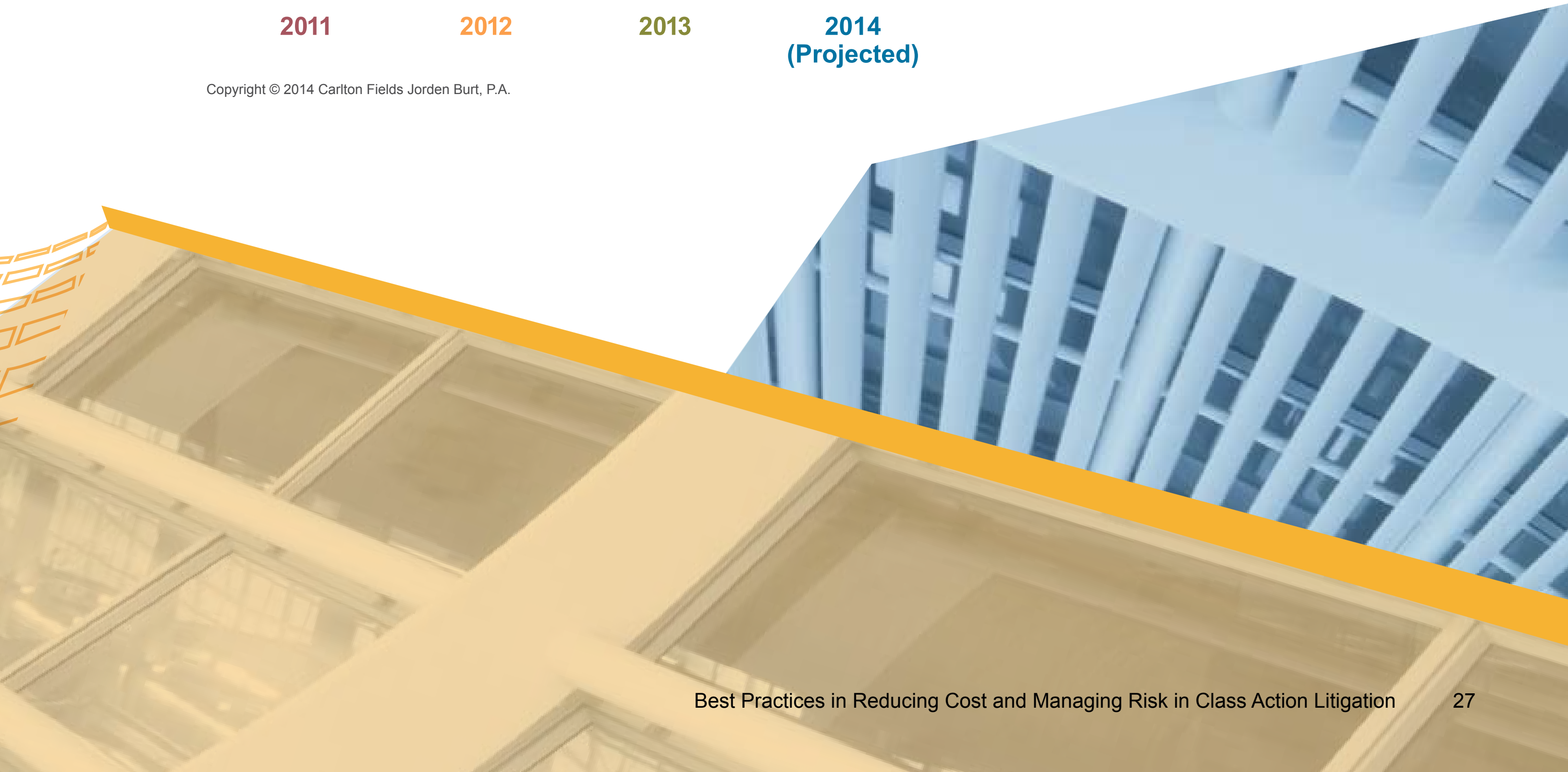
The use of alternative fee arrangements (AFAs) in class actions has risen steadily since 2011. More than 44 percent of companies that manage class actions now rely on them, up from 32 percent in 2012. This 12 percent increase reflects the high priority clients place on managing costs and making them more predictable.

Projections indicate that nearly half of all companies will use AFAs for their class actions in 2014. Clients use AFAs to drive better understanding of goals, mitigate cost run-ups, deliver cost savings, share risk between in-house and outside counsel, promote predictability, and encourage efficiency from outside counsel.

Alternative Fee Arrangement Use in Class Actions

PERCENT OF COMPANIES





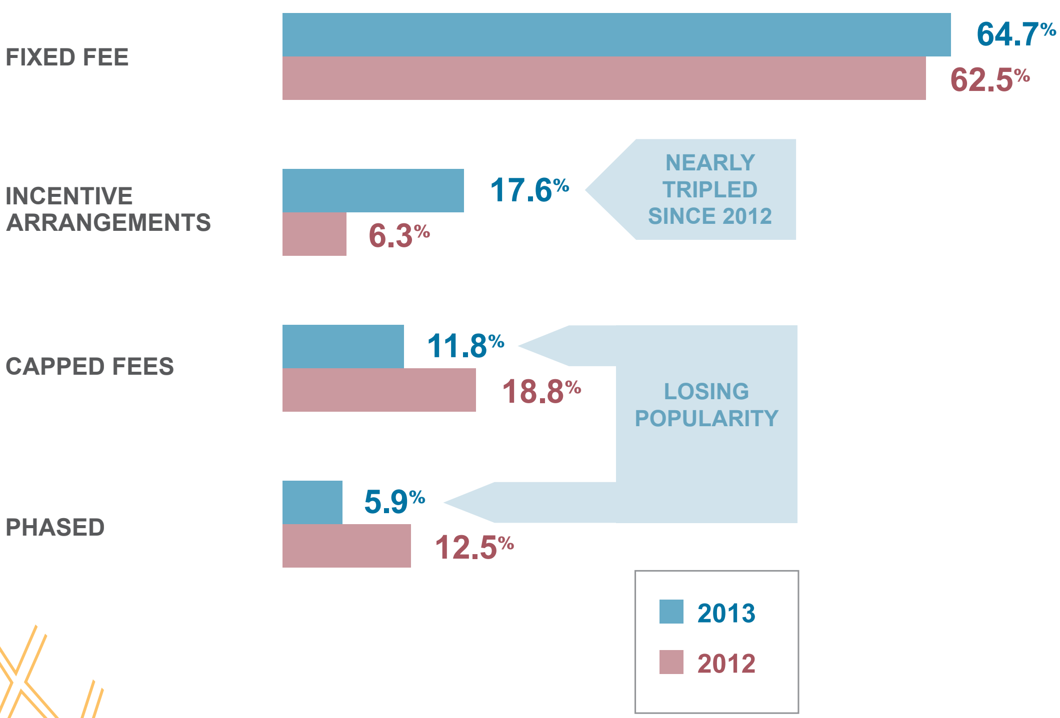
Fixed Fees Remain Top AFA Vehicle; Incentive Arrangements Gain Popularity

Fixed fees remain the most popular choice for companies that use AFAs to manage their class actions. In 2013, 65 percent of companies using AFAs relied on them, up slightly from 63 percent in 2012. Fixed fees offer these companies a clear understanding of their defense costs. Incentive arrangements, used by 18 percent of companies, also gained in popularity since 2012, when just 6 percent of companies relied on them. Their increased use indicates clients are seeking to share risk with their law firms.

Since 2012, the use of capped and phased fees has declined. In 2013, 12 percent of companies used capped fees, down from 19 percent in 2012. Just six percent of companies used phased fees, down from 13 percent in 2012.

Alternative Fee Arrangement Types in Class Actions

PERCENT OF AFAs



The Impact of Recent Class Action Rulings

Wal-Mart and *AT&T* Remain Impactful, Joined by *Comcast*

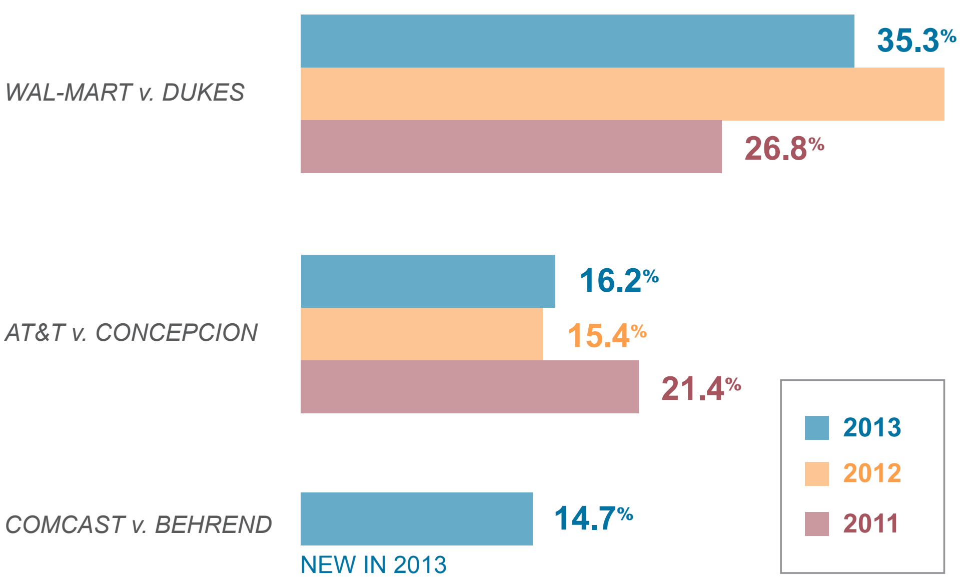
The 2011 Supreme Court cases, *Wal-Mart v. Dukes* and *AT&T v. Concepcion,* continue to influence class action strategy, as does the Supreme Court's more recent decision in *Comcast v. Behrend.*

In 2013, 35 percent of corporate counsel reported being influenced in their defense of class action suits by *Wal-Mart v. Dukes*, which placed a greater burden on plaintiffs seeking class certification. Additionally, 15 percent indicated that the 2013 *Comcast v. Behrend* decision, which heightened the requirement that plaintiffs put forward a realistic classwide damage approach tailored to their claim, was already influencing defense strategy. Also, 16 percent reported that *AT&T v. Concepcion*, which increased the likelihood that an arbitration clause could be designed to preclude a class action, was also important.

In response to these cases, companies have changed their approach to class actions. These changes frequently include enhancing arguments opposing class certification and putting plaintiffs to their burden of proof; revising contracts, especially to add mandatory arbitration clauses that preclude class representation; and augmenting the risk review and assessment process companies undertake in analyzing class action suits.

Recent Impactful Class Action Rulings

PERCENT OF COMPANIES



"In light of the *Comcast* decision, we are more aggressive in defending against damages."

– **Chief Litigation Counsel**
Fortune 500 Food Products Manufacturer

"The *Wal-Mart* case gives us more ammunition in fighting class certification."

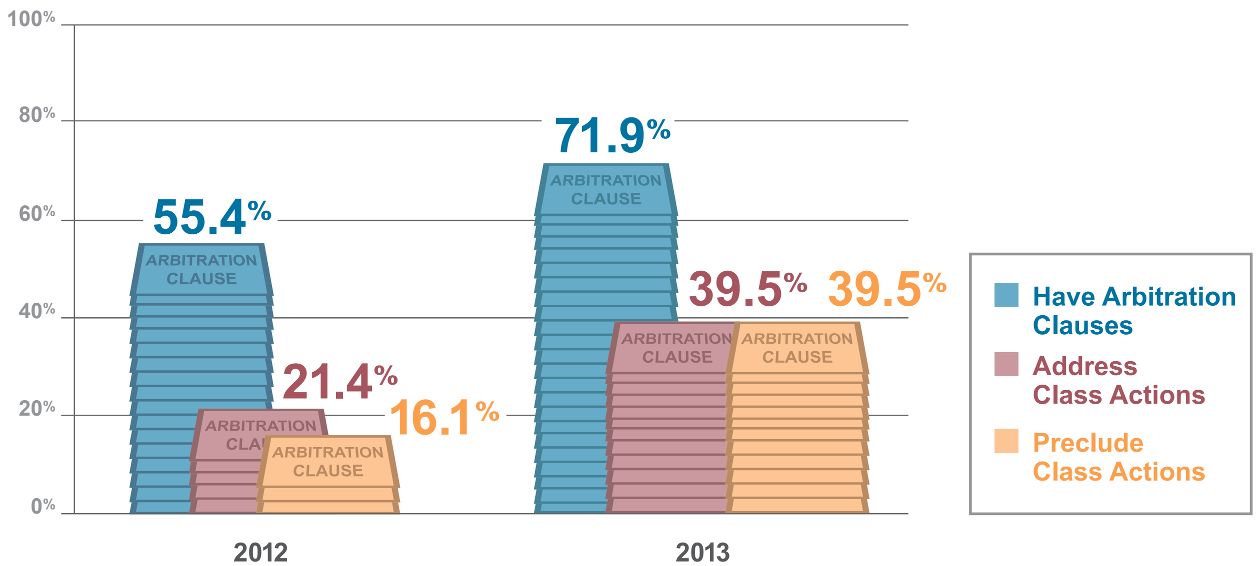
– **Chief Litigation Counsel**
International Insurance Products Provider

Use of Arbitration Clauses Soars

The use of arbitration clauses has soared. Seventy-two percent of companies report including them in their contracts, up from just 55 percent in 2012. The arbitration clauses of a growing number of companies address class actions, and virtually all of those preclude them. In 2013, class actions were precluded in arbitration clauses by 40 percent of surveyed companies, more than double the percentage seen just a year earlier.

Arbitration Clause Usage

PERCENT OF COMPANIES



Methodology and Approach

The 2014 Carlton Fields Jorden Burt Class Action survey results were compiled from 346 in-depth interviews with general counsel, chief legal officers, and direct reports to general counsel of 326 companies. Consistent with the approach used in past years, to control for bias and assure objectivity, Carlton Fields Jorden Burt retained an independent consulting firm to select the companies and conduct the interviews. The consulting firm provided only aggregate data to Carlton Fields Jorden Burt. All individual responses and company names were kept confidential and excluded from the survey results.

Survey participants' companies had average annual revenue of $18.6 billion and median annual revenues of $4.5 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 Jorden Burt

Carlton Fields Jorden 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 impact you, or to discuss the Carlton Fields Jorden Burt class action practice, please contact **Chris S. Coutroulis** at ccoutroulis@CFJBLaw.com or 813.229.4301.

To obtain additional copies of this report, visit www.ClassActionSurvey.com

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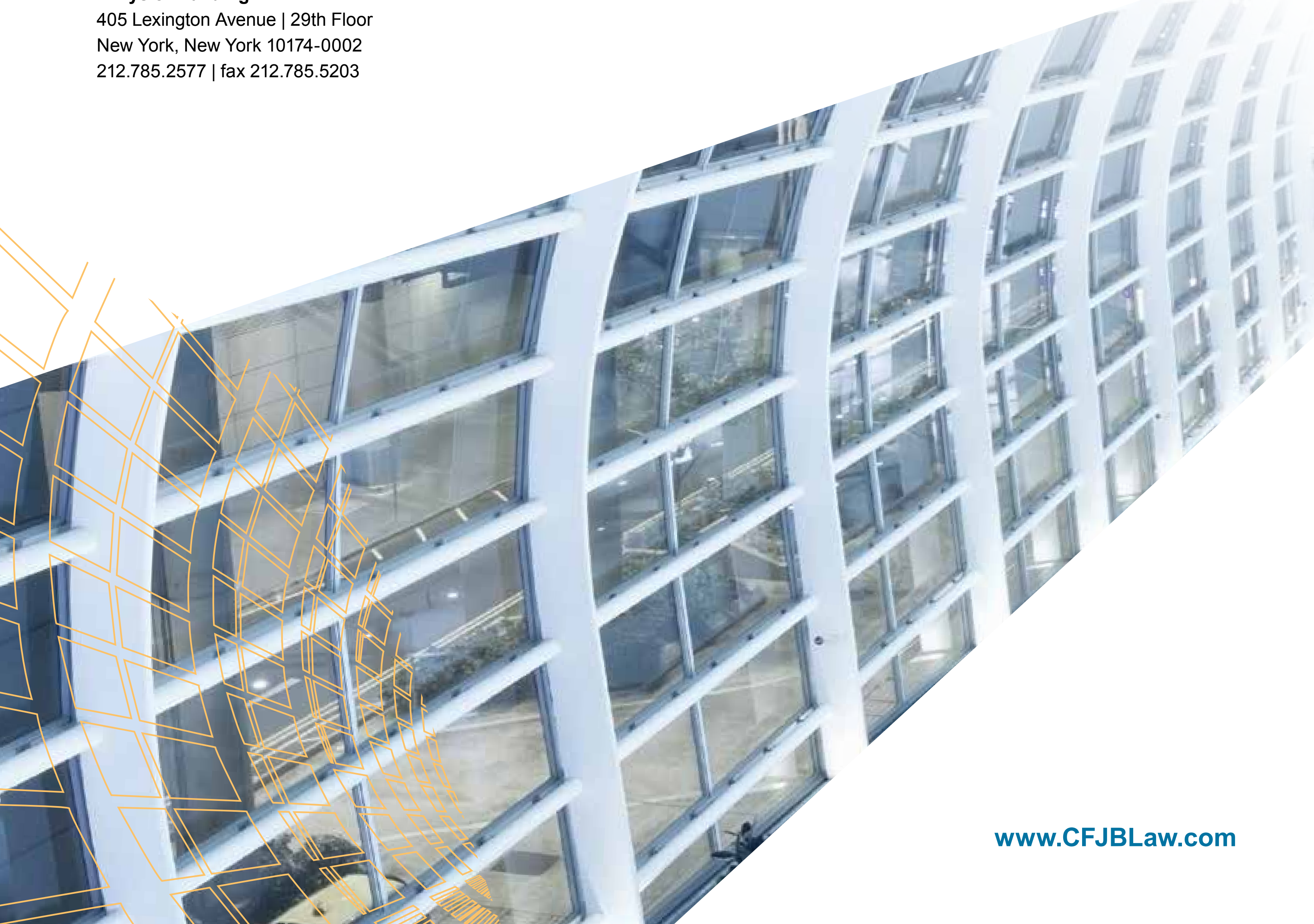

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