

Companies Battle Rising Class Action Costs With Aggressive Management

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Companies spent about \$2.5 billion defending class actions in 2018, the fourth year of increased class action costs. Carlton Fields shareholder Julianna Thomas McCabe says companies are responding aggressively.

It is now a protracted trend: In 2018, companies spent more to defend class actions than in the previous year.

This was the fourth consecutive annual increase in an upward cost spiral for class action litigation that began in 2015. All told, companies spent \$2.46 billion defending class actions in 2018, and they expect to spend more in 2019. This follows four consecutive years of *decreasing* expenditures from 2010-2014.

The rising cost and complexity of U.S. class actions is reported in the eighth annual [Carlton Fields Class Action Survey](#), which is based on interviews with general counsel or senior legal officers at 395 *Fortune* 1000 and other large companies across more than two dozen industries.

The reversal is partially explained by the reported increase in an average number of class action matters being managed on an annual basis per company surveyed, from 5.1 in 2014 to 7.8 in 2018. Moreover, today's class actions have trended toward more complex issues, presenting higher-risk than companies reported in past years.

More In-House Counsel

As a result, after five years of decreased staffing, companies are now hiring additional in-house counsel to manage these matters. On average, companies reported four to five in-house lawyers

manage their class action caseloads. Most companies reported that they rely heavily on a small stable of trusted outside law firms to assist them in conducting early case assessments, developing case management strategies, and defending these costly litigation matters.

Labor and employment cases top the categorical list of class actions defended (28.7%) with nearly two-thirds of the surveyed companies facing at least one labor and employment class action in 2018. By far, wage and hour matters represent the biggest Labor and Employment concern.

The percentage of companies predicting data privacy and security as the next wave of class actions nearly doubled from last year's survey, from 28.9% to 54.3%. This increase can be attributed, at least in part, to a palpable concern regarding data privacy statements, such as the California Consumer Privacy Act, a data privacy law that goes into effect in 2020. Approximately two-thirds of companies in the Carlton Fields survey cite this new law as high on their list of concerns.

Companies are responding to the increased class action matters, cost, and complexity with requisite aggressiveness. In addition to expanding internal staffs, companies are increasingly engaging outside counsel to make an early assessment of case facts and win-loss probabilities. And more companies are now using arbitration clauses that ban class proceedings than reported in any previous survey.

Companies Experimenting

Companies also continue to experiment with a variety of cost management approaches. Nearly 40% of surveyed companies say that at least some of their class action defense costs are covered by insurance.

Many companies also continue to use alternative fee arrangements (AFAs), but the number of companies using AFAs declined slightly in 2018. Fixed fees are reportedly the most successful type of AFA.

Finally, companies have pursued multiple avenues of cost containment for class action discovery, including, among others:

- the retention of a single e-discovery vendor;
- aggressive negotiation of reasonable search terms with their opponents; and
- the use of motions to stay discovery or to shift costs.

Increasingly, companies facing class actions use a case-by-case approach in formulating defense strategy. Fifty-three percent of surveyed companies defend their class action matters “at the right

cost,” assessing each case separately, and despite rising costs, only 10.6% say they prefer to settle class action matters early.

Approximately 21% consistently take an aggressive stance, and 14.9% employ a “defend at all costs” approach. Still, 73.1% of cases filed as class actions were resolved by settlement, either on an individual or class-wide basis, and just 2% were reportedly tried.

The [2019 Carlton Fields Class Action Survey](#) provides these and additional insights into emerging issues and best practices in the management of class action litigation.

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