

From COVID-19 to Defense Strategies: The Latest Class Action Trends

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Introduction

As we head to print on the ninth annual Carlton Fields Class Action Survey, the unprecedented COVID-19 health and related economic crisis has wrought permanent change to business practices worldwide. There is little doubt that litigation management and, as relevant to this publication, the management and risk reduction strategies for classwide litigation will also change. Already, corporate America faces a rising tide of more than 500 new class action matters stemming from the coronavirus outbreak, and as the country cautiously takes steps to reopen, new risks emerge. We hope that this year's survey serves as a resource while you navigate these changes. As in past years, this report provides an overview of important issues and practices related to class action matters and management. It summarizes historical trends captured since the inception of the survey and includes information related to emerging issues in class action litigation.

Even before the recent spike in class action filings related to the pandemic, corporations reported yet another annual increase in class action spending. Spending has increased for five consecutive years, and it likely will continue to rise in 2020. Companies are also handling a higher volume of class action matters than ever before, with complex and high-risk matters making up the bulk of existing cases.

The 2020 Carlton Fields Class Action Survey is based on interviews with general counsel or senior legal officers at more than 400 Fortune 1000 and other large companies across a variety of industries. We thank you for taking the time to review our report, and trust you will find valuable information that helps your company and its legal department manage these prevalent, costly lawsuits both effectively and efficiently.

Executive Summary

In 2019, class action spending rose yet again, reaching \$2.64 billion. The average number of matters per company increased from 7.8 in 2018 to 10.2 in 2019. Before the COVID-19 pandemic, companies reported that spending and matters were expected to increase again in 2020. In the second quarter of 2020, that expectation has become a reality. Facing a rash of new matters, 70 percent of legal decision-makers now expect an increase in class litigation this year, while virtually none report an expected decrease.

Insurance class actions are on the rise, accounting for 10.7 percent of matters and 14 percent of spending. As in past years, however, the highest percentage of matters and spending are attributable to labor and employment and consumer fraud actions. Labor and employment cases account for 26.9 percent of matters and 26.4 percent of spending. In the past five years, more than two-thirds of companies have faced at least one labor and employment class action, and, in this year's survey, contractor misclassification and employee data privacy matters emerged as new concerns on the labor and employment front.

The percentage of companies predicting data privacy and security as the next wave of class actions increased from last year's survey, from 54.3 percent to 58.2 percent. Companies point to new and anticipated state privacy legislation as an area fraught with class action risk. More than three-fourths of companies reported concern about the California Consumer Privacy Act (the CCPA), a data privacy law that went into effect in January 2020. One such survey respondent referred to the CCPA as a "walking lawsuit." The percentage of companies concerned about exposure resulting from the European Union's privacy regulation (the GDPR) increased by one-third. The overwhelming majority of companies, 93.8 percent, have not faced a class action lawsuit related to a data breach, and all have a data breach action plan either in place or in the works.

The percentage of companies facing class actions categorized as lower exposure matters increased to 63.5 percent, nearly 10 percentage points higher than last year's survey, and per company, the percentage of lower exposure class actions

increased for the first time in three years. Fewer companies were facing actions classified as complex, high-risk, or bet-the-company, with the percentage of companies facing bet-the-company cases declining to 10.6 percent, its lowest level since 2015. Insurance coverage for class litigation decreased this year, with only 22.2 percent of companies reporting that some portion of their class action defense costs were covered by insurance. Companies carrying insurance reported that higher deductibles and various exclusions limited coverage. With respect to staffing, an uptick in in-house resources reported in last year's survey was partially reversed this year as companies reported going from an average of 4.5 to 4.2 in-house lawyers dedicated to class action defense. Those attorneys spent an average of 12 hours per week managing class actions.

In weighing the variables they consider most important in evaluating class action risk, companies ranked exposure as 9.1 on a 1 to 10 scale of importance. Year over year, companies have consistently ranked exposure as having the highest level of importance over other risk factors. Assessing the risks early was a theme that resonated throughout this year's survey, with approximately 62 percent of companies reporting that they conduct an early exposure analysis to defend class action matters "at the right cost." Only 12.7 percent prefer to settle such matters early, while 10.9 percent reported a "defend at all costs" philosophy. While most class actions are eventually settled, often on an individual basis, companies reported that 8.5 percent of cases originally filed with class allegations are litigated through trial. This is a substantial increase over the 2 percent reported last year.

For many reasons, companies often favor individualized arbitration over class action litigation and, where possible, include arbitration clauses in their contracts as a "best practice." The percentage of companies that included arbitration clauses in their contracts increased to 77.1 percent this year, and 55 percent of those companies include class action waivers in their arbitration provisions.

The two most important elements identified by companies to control costs and manage class action risk are an early analysis of case facts and, based on those facts, a preliminary calculation of potential exposure. Companies also seek to control costs with alternative fee arrangements (AFAs), and AFA usage was up 13 percentage points over the prior year. As in past years, companies reported that they prefer fixed and phased AFAs, but they have also used caps, success awards, blended rates, and more sophisticated arrangements tailored to a specific case. Companies reported a more robust approach to controlling discovery costs in their class actions. Nearly 73 percent responded that bifurcating discovery is a beneficial class action management strategy. A higher percentage than in past years also reported using motion practice, an aggressive negotiation of search terms, and similar tools to combat overly broad or disproportionate discovery demands.

Finally, we asked companies participating in this year's survey to identify areas in which outside counsel can improve their performance and provide innovative solutions to class action management. Thirty-one percent identified excellent client service as an area for improvement, and 45.3 percent mentioned understanding the client's business risks as important to outside counsel's role. Companies also identified and elaborated on five sources of innovation for class action management: aggressiveness, strategic planning, immediate early case evaluation, scenario planning, and the implementation of thoughtful cost management strategies. Download the full report at www.ClassActionSurvey.com.

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