

2019 Carlton Fields Class Action Survey

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

**CARLTON
FIELDS**

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Introduction

Carlton Fields is pleased to share its eighth annual Class Action Survey, which provides an overview of important issues and practices related to class action matters and management. This annual publication reports on historical trends captured since the inception of the survey and includes information related to emerging issues in class action litigation.

Class action spending has increased for four consecutive years, and it is expected to continue to rise in 2019. Not only are companies handling a higher volume of class action matters than ever before, they are also facing higher financial exposure and growing complexity in the cases they handle. Corporate counsel are bringing on additional in-house lawyers to manage growing class action workloads.

The 2019 Carlton Fields Class Action Survey is based on interviews with general counsel or senior legal officers at 395 *Fortune* 1000 and other large companies across a variety of industries. They shared their thoughts about class action exposure and best practices for class action management. We thank you for taking the time to review our survey, and trust you will find valuable information that helps your company and its legal department manage these prevalent, costly lawsuits both effectively and efficiently.

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Executive Summary

In 2018, class action spending rose to its highest level since the recession, reaching \$2.46 billion. While the number of companies that reported facing class actions in 2018 dropped slightly to 54 percent, the average number of matters per company increased from 6.3 in 2017 to 7.8 in 2018. Spending and matters are expected to increase again in 2019.

Labor and employment, consumer fraud, product liability, and antitrust matters account for 75 percent of class action spending. Labor and employment cases remain the most common type of action, accounting for 28.7 percent of matters and 26.1 percent of spending. In the past five years, nearly two-thirds of companies have faced at least one labor and employment class action, and, overwhelmingly, companies report that wage and hour matters are their top concern in this category. Companies identified the most important factors they consider in selecting counsel to defend labor and employment class actions, and the top three considerations are the law firm's class action experience, understanding of the business, and subject matter expertise.

The percentage of companies predicting data privacy and security as the next wave of class actions nearly doubled from last year's survey, increasing from 28.9 percent to 54.3 percent. Most companies, however, have not faced a data privacy and security class action, and express moderate concern about facing one in the future. A large majority report that their company has an action plan in place to handle a data breach. Although 8.7 percent of companies identified collective actions under the European Union's new privacy regulation (the "GDPR") as the next wave, most are not concerned about GDPR exposure. Approximately two-thirds of companies, however, reported concern stateside about the California Consumer Privacy Act, a data privacy law that goes into effect in 2020.

The percentage of companies facing class actions that they consider complex, high-risk, or bet-the-company increased in 2018, while fewer companies report facing lower exposure cases. Each year since 2016, companies have categorized more than one fourth of their class actions as either "bet-the-company" or "high-risk" matters. In line with the increased risk, companies are expanding internal staffing dedicated to the defense of class actions. On average, four to five in-house lawyers per company are managing class action matters now, an increase from three lawyers in 2017, and the first increase of in-house class action attorney headcount in five years.

In weighing the variables they consider most important in evaluating class action risk, companies ranked exposure as 8.9 on a 1-10 scale of importance. Win probability, relevant case law and facts, and reputational impact also were





ranked as important risk variables. Increasingly, companies facing class actions employ a case-by-case approach to class action management. Only 10.6 percent say they prefer to settle such matters early, while 21.3 percent take an aggressive stance and 14.9 percent employ a “defend at all costs” strategy. Still, cases filed as class actions are most often resolved by settlement, with 53.1 percent of companies reporting that settlements typically occur pre-certification. Thirty-nine percent of matters filed as class actions are settled on an individual basis.

As expected, the use of arbitration clauses increased in 2018, and the percentage of companies that included class action waivers in their arbitration clauses increased to near 50 percent. More companies now use arbitration clauses that bar class actions than in any prior year of the survey. Companies report that their decision about whether to use arbitration clauses in their contracts is based on a variety of factors, with the containment of litigation costs cited most often. Many companies continue to monitor the political environment in Washington for its impact on the regulatory climate and changes at the Supreme Court.

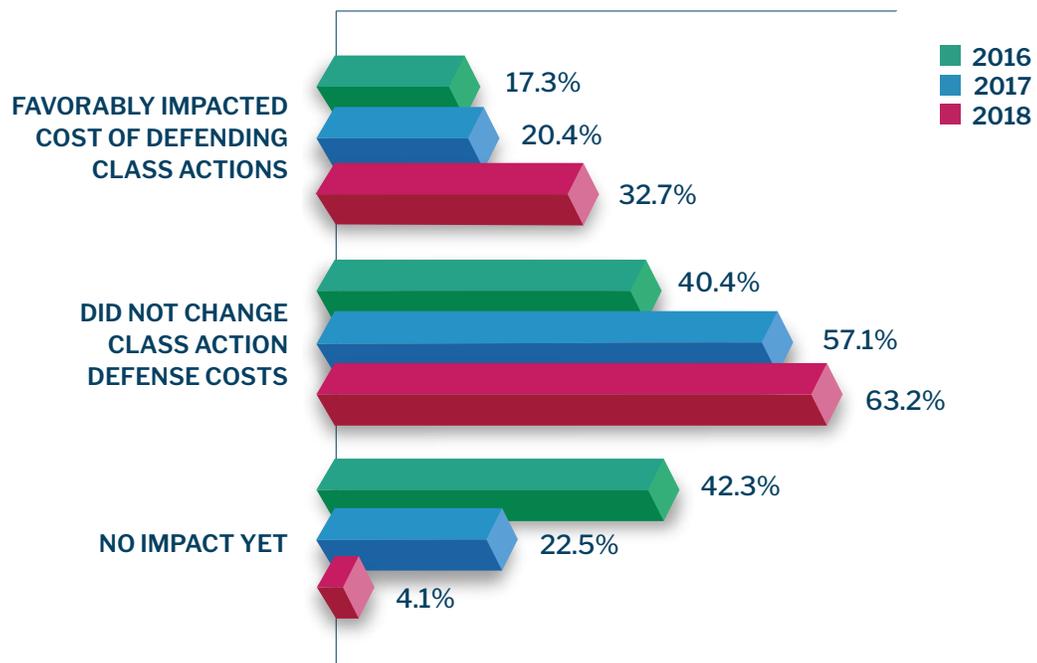
As companies work to contain costs and manage class action risk, nearly 90 percent now conduct early case assessments, and most use their outside law firms for this purpose. While many companies have routinely used outside counsel to assess case facts and exposure and develop strategy, in this year’s survey more companies report relying on outside counsel for an early assessment of win-loss probability. More than 95 percent of responding companies reported that they now rely on a small group of outside counsel to handle class actions, rather than a single firm or a large group of firms. The use of alternative fee arrangements (AFAs) in class actions declined slightly in 2018. More companies identified fixed fees as a successful type of AFA for class actions than any other category.

Finally, while most companies have not seen a reduction in class action discovery costs as a result of the federal proportionality standard, there are a host of strategies companies use to control electronic discovery costs in class litigation, including, among others, the aggressive negotiation of reasonable search terms, the use of a single e-discovery vendor, and the filing of motions to stay or for cost-shifting.

Amendments To The Federal Discovery Rules Have Not Meaningfully Changed The Defense Of Class Actions For Most Companies

In 2015, the Federal Rules of Civil Procedure were amended to add an express proportionality requirement to the scope of discovery. Companies are no longer on the fence about whether this change has had an impact on the defense of class actions. Sixty-three percent of companies now report that the proportionality standard has not favorably impacted the cost of defense in class actions, nearly double the 32.7 percent of companies that have noticed an impact. Many companies that have not seen proportionality as a positive development report there is a lack of enforcement at the district court level.

Impact of Changes to Federal Discovery Rules Percent of Companies



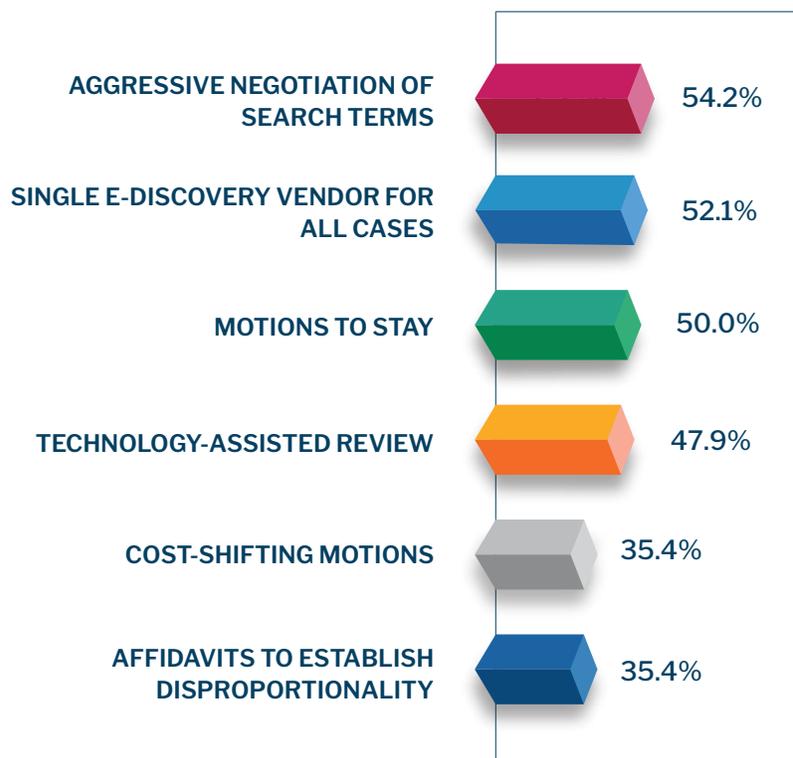
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Mitigating The Cost Of Electronic Discovery

Eighty-three percent of companies use a variety of strategies to control the cost of e-discovery, from the aggressive negotiation of search terms, to motions to stay discovery pending a ruling on a dispositive motion, among others.

Strategies Used

Percent of Companies



Note: Chart adds up to more than 100%. Multiple responses allowed.
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Methodology and Approach

The 2019 Carlton Fields Class Action Survey results were compiled from 415 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 retained an independent consulting firm to select the companies and conduct the interviews. 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.

Surveyed companies had an average annual revenue of \$14.8 billion, and median annual revenue of \$6.7 billion. They 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 35 years in federal and state courts across the nation. 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 **Julianna Thomas McCabe** at 305.347.6870, jtmccabe@carltonfields.com, or **Michael Wolgin** at 305.347.6880, mwolgin@carltonfields.com.

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