

THE 2023 LITIGATION RISK SURVEY

RESULTS & ANALYSES

 **CERTUM**
GROUP



CONTENTS

About The Survey	3
Summary Of Key Findings	4
Legal Department Staffing	5
Legal Department Budgets	6
Legal Operations	7
Litigation Volume	8
Outside Counsel	10
Alternative Fee Arrangements	11
Insurance	12
Decision Making	13
Litigation Risk Factors	14
Risk Tolerance	15
Litigation Risk Transfer Products	16
Affirmative Cases/early Monetization	18
Litigation Funding	19
Conclusion	20
About Certum Group	21

ABOUT THE SURVEY


The 2023 Litigation Risk Survey was commissioned by Certum Group, which provides bespoke solutions to companies seeking to remove the financial and operational volatility arising out of litigation by transferring the outcome risk.


General counsel and other in-house leaders across the globe were asked to respond to an online survey comprising of 57 questions related to their department’s litigation activities and legal spend, their tolerance for litigation risk, and their knowledge of the potential solutions available to help transfer the outcome risk of litigation.

In-house counsel from across the corporate spectrum completed the survey. Respondents hailed from a wide array of companies and industry sectors and were distributed among in-house departments large, midsize and small.

Fast Facts

About the Respondents

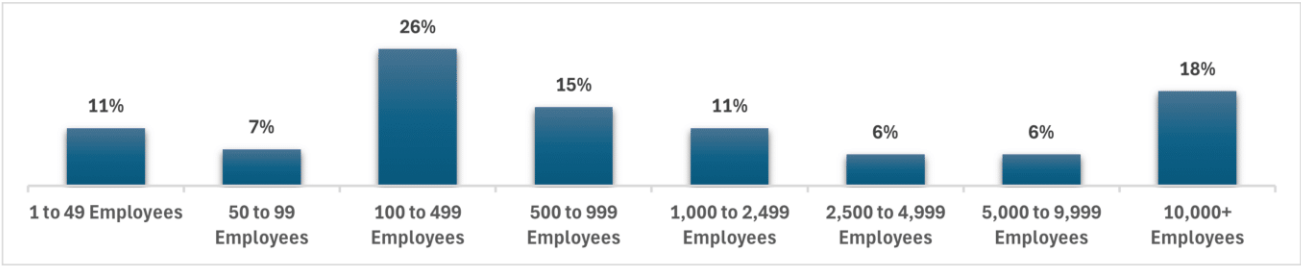
23 States + D.C. 

35+ Industry sectors 

Ninety-one percent of the respondents were based in the United States and the remainder worked in locations across the globe. While a few of the respondents worked for nonprofit organizations, most were at profit-making enterprises. Of those, 27 percent were employed by public owned companies and 58 percent were employed by privately owned companies.

As the numbers demonstrate, the survey elicited responses from a wide range of viewpoints. We believe such a diverse sampling enables us to present a unique portrait of the current thinking among in-house department leaders and should serve as a useful benchmarking tool for legal departments, as well as the law firms and companies who serve them.

A Diverse Range in Size of Companies



SUMMARY OF KEY FINDINGS

The goal of The Litigation Risk Survey was to better understand the broad array of risk-related issues facing in-house legal departments at companies across the United States and around the globe. The following 10 findings from the research stood out:

Resources

In-house departments—even at larger companies—are operating with small staffs and tight budgets. General counsel and staff are being stretched thin by increasing workload.

Legal Ops

The legal operations revolution is underway for a growing number of in-house departments — but many companies have yet to institute a legal ops team to support the legal department.

Litigation Volume

The vast majority of in-house teams face a daunting volume of cases. Most have active defense litigation and some are grappling with dozens of cases simultaneously.

Outside Counsel

While in-house lawyers say relationships still win the work, companies are sending strong signals about the need to hire litigation counsel based upon exposure and potential liability.

Alternative Fee Arrangements

A growing number of firms — though not all — is embracing alternative fee arrangements. Among those using AFAs, the majority are deploying them in both defense and plaintiff-side matters.

Risk Factors

The size of potential damages is the number one risk factor in-house counsel use to assess their response to defense-side litigation. With affirmative claims, the likelihood the claim will succeed is the most important issue.

Litigation Risk Transfer Products

The majority of law departments have yet to take advantage of litigation risk transfer products. Most say, however, they are open to using them—particularly to gain greater budget certainty around costs.

Affirmative Litigation

In-house leaders say they would be open to pursuing affirmative cases regardless of the size of the claim if they were made aware of them. However, few currently rely upon outside help to identify opportunities.

Litigation Funding

Law departments are aware of funding, though very few have used it to finance cases. When they do, they most often use non-recourse loan structures.

Insurance

Companies certainly have insurance that covers litigation expenses, but very few of them are actually using their policies. Most say insurance is used less than 10 percent of the time in litigation.

LEGAL DEPARTMENT STAFFING

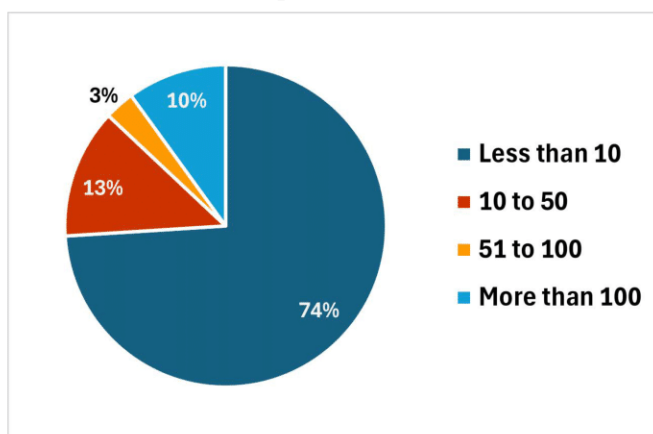
Are legal departments receiving the staffing resources they need to meet the challenges of defending and bringing litigation—not to mention reviewing contracts, overseeing regulatory compliance, handling labor and employment issues, vetting transactions, and managing the host of other corporate legal issues that routinely land on their plates?

Among our respondents, the numbers are not promising. The vast majority of respondents—74 percent—said their legal departments had fewer than 10 employees. While this may be an appropriate level of staffing for the smallest enterprises, more than eighty percent of the in-house department leaders responding to this survey are working for companies with more than 100 employees, and 41 percent said they work for organizations with more than 1,000 employees.

The results show that the size of the company and the size of the legal department do not necessarily correlate. And the responses lend greater credence to the numerous reports in the legal media and elsewhere of in-house lawyers and law departments being stretched thin.

According to a 2023 ALM Corporate Counsel Legal Department Trends [Report](#), legal executives are facing growing demands on their time and resources more than ever before. Increased environmental, social, and governance (ESG) pressures along with additional regulatory enforcement come amid rising lawyer exhaustion, increasing law firm rates, and stiff competition for legal talent. These combined forces are contributing to staffing, budget, and spending pressures on in-house departments which will continue for the remainder of 2024 and beyond.

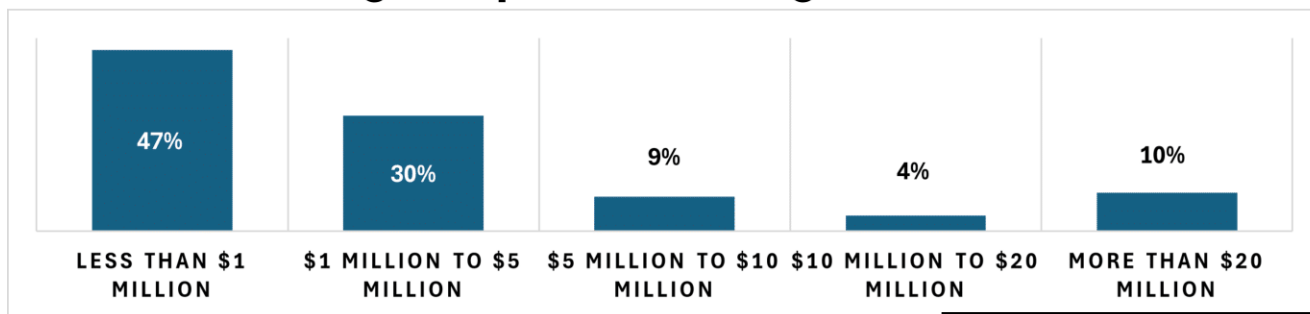
Attorneys in the Department



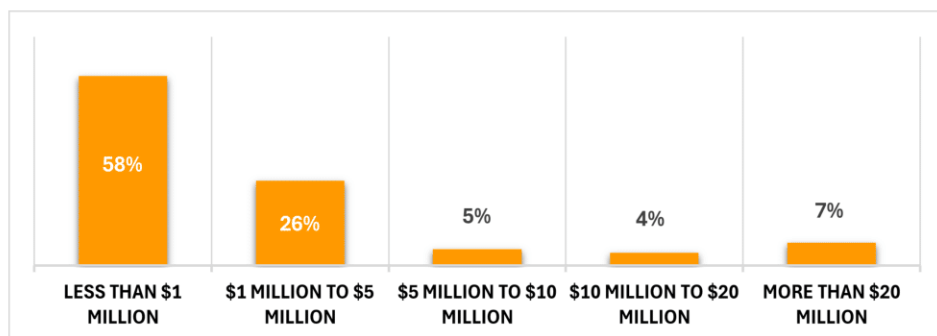
*The data supports reports of legal departments continuing the post-pandemic trend of **being stretched thin**.*

LEGAL DEPARTMENT BUDGETS

The Annual Legal Department Budget



Litigation Spending Last Year



Our survey respondents are operating with tight expense budgets, particularly for litigation. Sixty-two percent of in-house counsel said outside counsel/litigation expenses made up less than half of their annual legal department budget.

If legal departments are stretched thin in terms of the number of lawyers on staff, do they at least have the budget to hire additional support from outside counsel and others? Again, the responses were not encouraging.

The majority said their legal department budgets (excluding staff salaries and benefits) were less than \$1 million. Fewer than two in 10 worked for an organization with an annual legal department budget of more than \$10 million. This is in spite of the fact that four in 10 respondents are employed by companies with more than 1,000 employees, and nearly two in 10 are working for enterprises with more than 10,000 employees.

In fact, a recent [survey](#) of Chief Legal Officers conducted by the Association of Corporate Counsel found that forty-two percent said their legal department received a cost-cutting mandate over the past year. These budget cuts occurred at the same time that fifty-nine percent of CLOs reported having increased workloads. Moreover, Bloomberg Law's recent Workload & Hours [Survey](#) had similar findings, with almost seventy percent of in-house attorneys reporting that their workloads had increased over the last six months. Indeed, the restrictions on in-house budgets have led to in-house attorneys working longer hours and having a worse well-being than their law firm counterparts and without the opportunity for lockstep salary advancement and annual bonuses offered by many firms.

LEGAL OPERATIONS

For a growing number of in-house departments, legal operations teams are being deployed to provide strategic planning, financial management, project management and technology expertise to run departments more efficiently. The legal ops movement is likely to have a profound long-term impact on the way companies deploy their lawyers.

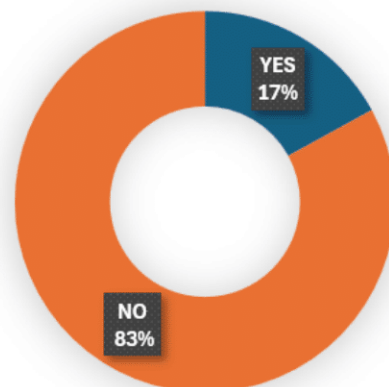
Just seventeen percent said “yes” when asked if they work with a legal operations team. However, we suspect this number will rise dramatically over time.

In fact, according to the Gartner Legal Budget & Efficiency [Benchmark](#) referenced in ALM's Corporate Counsel in order to ensure continued success through business cycle shifts and disruptions, legal leaders must make targeted investments in legal operations people, processes, and technology. As legal departments face increased workloads and decreasing lawyer headcount, investing in legal operations can offer relief for thinly stretched teams.

In the legal industry press and among law firms, much of the discussion about legal ops has focused on its role in selecting outside counsel. While counsel selection is an important issue, in-house leaders at companies that have instituted legal ops teams say their companies have prioritized other matters.

At the top of the list is finance, followed closely by technology. Those priorities suggest an emphasis on efficiency and modernization and aligning law departments more closely to the company's overall strategic business priorities. Requests for proposals, was the next most cited priority for legal ops teams. Among our survey takers, strategic planning, research and outside counsel selection ranked equally among the key activities legal ops teams are being asked to manage.

Does Your Company Have a Legal Operations Team?



How Companies Are Using Legal Ops to Support Law Departments

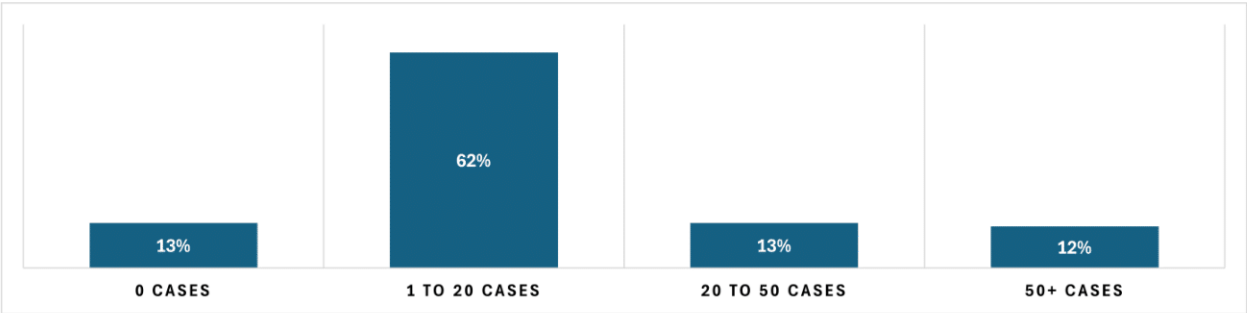


LITIGATION VOLUME

The in-house counsel we surveyed are bearing a substantial litigation workload. And if predictions for the rest of 2023 and 2043 come true, the amount of litigation work they face is likely to continue to surge.

Nearly ninety percent of our respondents said they are currently defending active litigation. And 25 percent of them have 20 or more cases on the docket. Twelve percent of respondents said they are fielding more than 50 active cases.

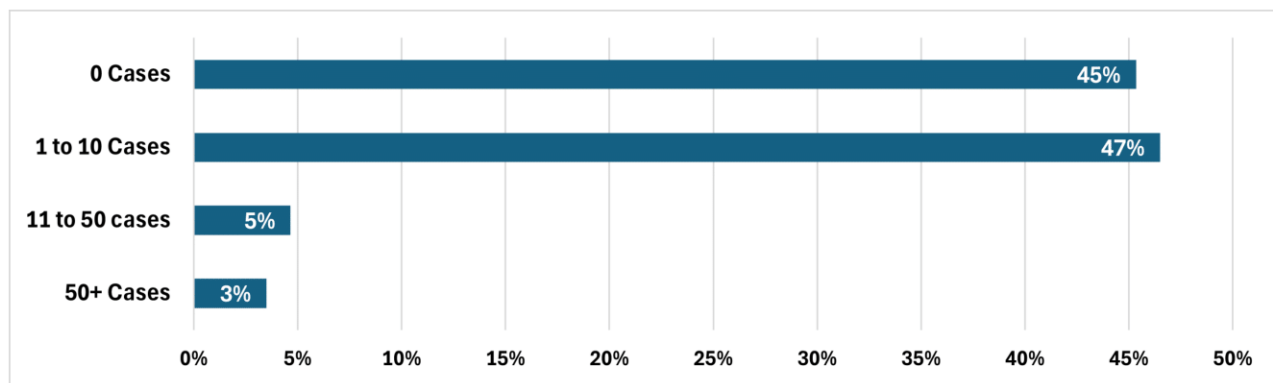
How Many Cases are Companies Defending?



Unsurprisingly, given the tight budgets and small staffs reported by in-house leaders, relatively few of the active cases are plaintiff-side matters. Nearly half of respondents said they are currently pursuing no active affirmative litigation. And of the remaining respondents, the overwhelming majority are engaged in only a handful of plaintiff-side matters.

By a wide margin, employment disputes and breach of contract cases are the most common types of suits companies are defending against, respondents said. Products liability, personal injury, class action litigation, and IP disputes rounded out the top five.

This large volume of litigation is consistent with other industry studies. According to the Thomson Reuters 2024 State of the Legal Market [Report](#), while last year's demand for legal services only grew 1.1% across the industry, litigation was the biggest driver of overall demand growth in 2023, growing by a 15-year high of 3.2%.



The types of litigation in-house counsel are likely to face may be shifting as well. In its recently released Annual Litigation Trends Summit, the global law firm Norton Rose Fulbright [reported](#) that disputes involving cybersecurity, regulatory proceedings, class action matters, ESG issues (environment and social governance), and the impact of artificial intelligence will dominate the litigation landscape.

Forty-two percent of the respondents said they anticipate more lawsuits against their organizations this year and only 14% expect a decrease. The industry sectors that anticipate the biggest increase in litigation include Technology and Energy, followed closely by Health Care and Financial Services.

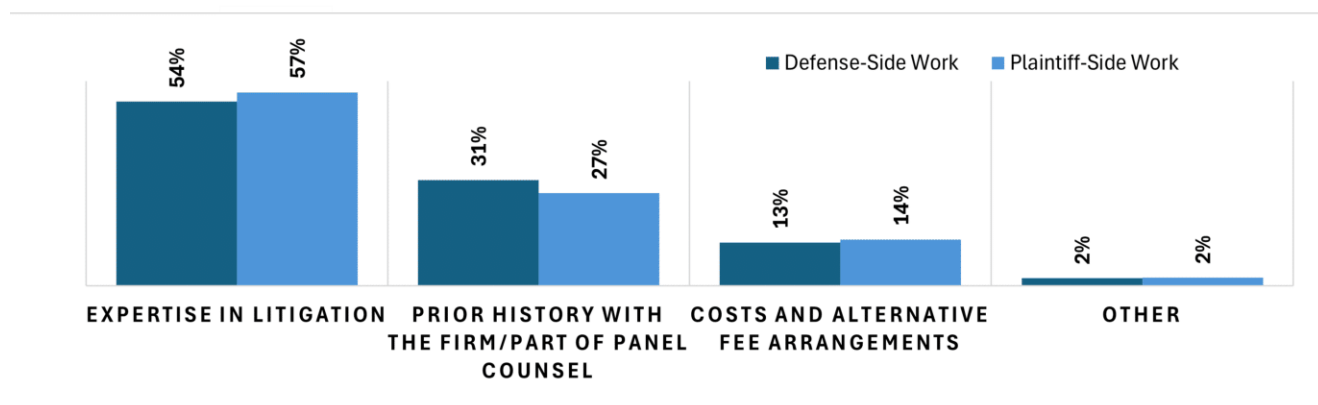
These surges in new areas of litigation explain why almost half the respondents are not pursuing any affirmative claims for relief and the other half are only pursuing 1-10 cases.

Top 5 Types of Suits Companies are Defending

Rank	Dispute Type
1	Employment
2	Breach of contract
3	Product liability/personal injury
4	Class Action
5	Intellectual property

OUTSIDE COUNSEL

Most Important Factors in Choosing Outside Counsel



How are outside counsel selected? The in-house lawyers we surveyed assert that expertise in litigation is the most important factor in the hiring process. A prior relationship with the law firm (or their inclusion as panel counsel) ranks second, respondents said. While cost is a consideration, as is the law firm’s flexibility on fees, only 13 percent of in-house leaders said these issues were at the top of their list when making an outside counsel hiring decision.

We suspect that our respondents are using “prior history” as a proxy for several factors, such as quality of representation and the institutional knowledge a firm possesses about the company and its legal issues. A Harvard Law School [study](#) on how chief legal officers at S&P 500 companies hire and evaluate outside counsel noted that, because evaluating the quality of lawyering prior to hiring may be difficult, CLOs relied on “personal knowledge—either their own experience with specific outside lawyers or law firms or their personal knowledge of the lawyers’ or law firm’s reputation.”

With that said, we also expect that in-house lawyers are making more nuanced decisions than our survey data on this question shows. The level of exposure and potential liability the company faces are certainly critical factors as general counsel and heads of litigation weigh hiring. As legal operations efforts gain further traction, alternative fee arrangements and the ability of the law firm to more rigorously account for its costs—even in unpredictable litigation scenarios —are likely to drive hiring decisions as well.

ALTERNATIVE FEE ARRANGEMENTS

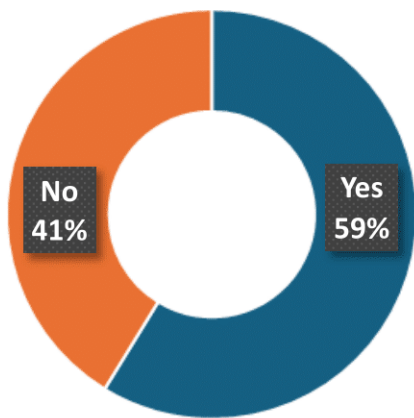
The billable hour is clearly still alive and well. However, over half of the in-house counsel who responded to our survey said they are currently utilizing alternative fee arrangements (AFAs) with outside counsel. This is an increase over previous surveys we have conducted and is consistent with the momentum from the legal media, law firms, and legal ops professionals advocating for AFAs.

Thirty percent of respondents said alternative fee arrangements are being deployed in defense-side litigation matters. The same percentage of respondents said AFAs are being used in their companies' plaintiff-side cases. Forty percent said they are using AFAs for both.

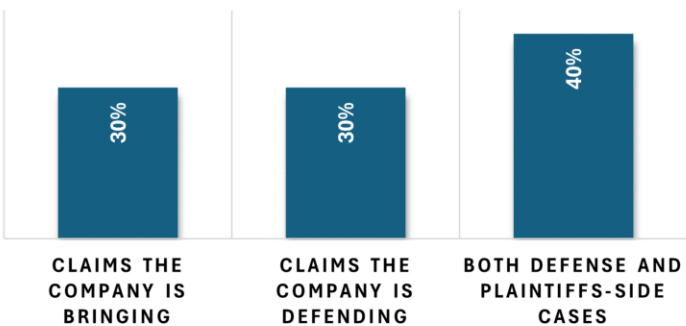
The results of a 2023 Bloomberg survey found similar results. Bloomberg respondents reported that just under one-third of their work is performed under alternative fee arrangements, accounting for just 23% of their overall workload. Perhaps the inability of the department to determine appropriate or accurate pricing is a barrier to wider [use of AFAs](#). Once there is greater historical data to help departments gauge the impacts of AFAs on their departments, usage is likely to increase in order to achieve greater cost savings, expense and revenue certainty, and overall department efficiencies.

As for the types of AFAs companies are negotiating, in-house counsel told Bloomberg that flat fees were the most commonly used form of alternative fee arrangement, followed by fixed fees by matter, fixed fees by phase, volume discounts, blended rates, and fee caps. This is consistent with data reported by legal media outlets, law firms, and legal ops professionals advocating for AFAs.

Do You Currently Use Alternative Fee Arrangements?



How are AFAs Being Used?



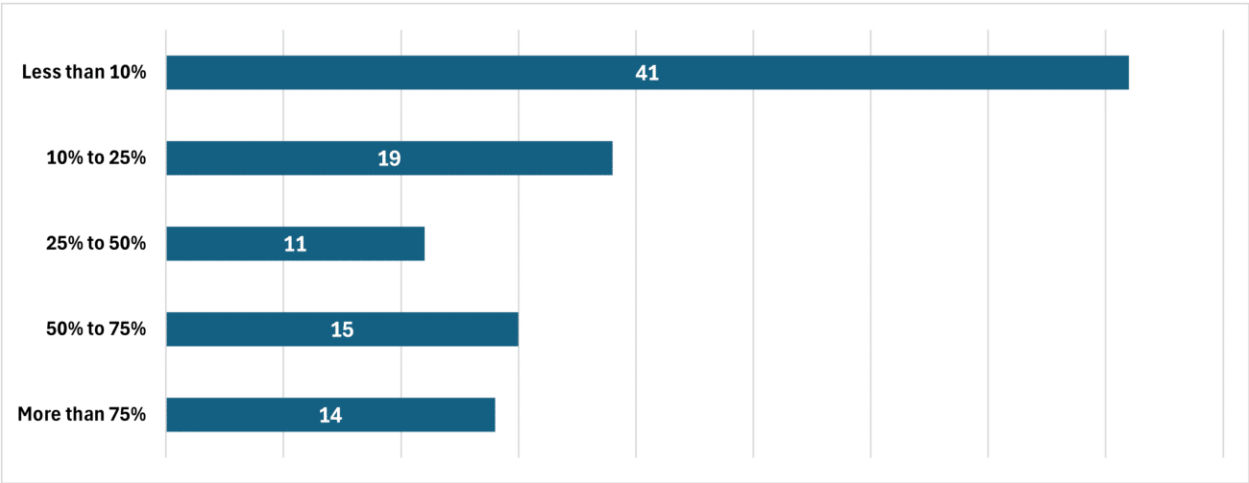
INSURANCE

In theory, an organization purchases commercial liability insurance to protect itself from the full cost of a potential claim against its business, employees, and executives. In reality, however, most of the time, insurance is only helpful to defray *some* of the costs of litigation. This is borne out by responses to our survey question, “what percentage of the time are you able to utilize an insurance policy to cover the costs of defending litigation?” By a wide margin, respondents said they relied upon insurance less than 10 percent of the time. Only one twenty-nine percent said they relied upon insurance policies to cover 50 litigation costs.

71% of in-house leaders said they used their insurance policies less than half the time to cover the costs of litigation.

The data suggests a few possibilities: in-house teams may view many of the cases as not worth the headache of involving an insurer; the company may be concerned about increasing its premiums; and insurers’ litigation guidelines may be restrictive regarding outside counsel fees, prompting organizations to take on greater out-of-pocket costs to hire the counsel they desire.

How Often is Insurance Used to Cover Litigation Costs?



DECISION MAKING

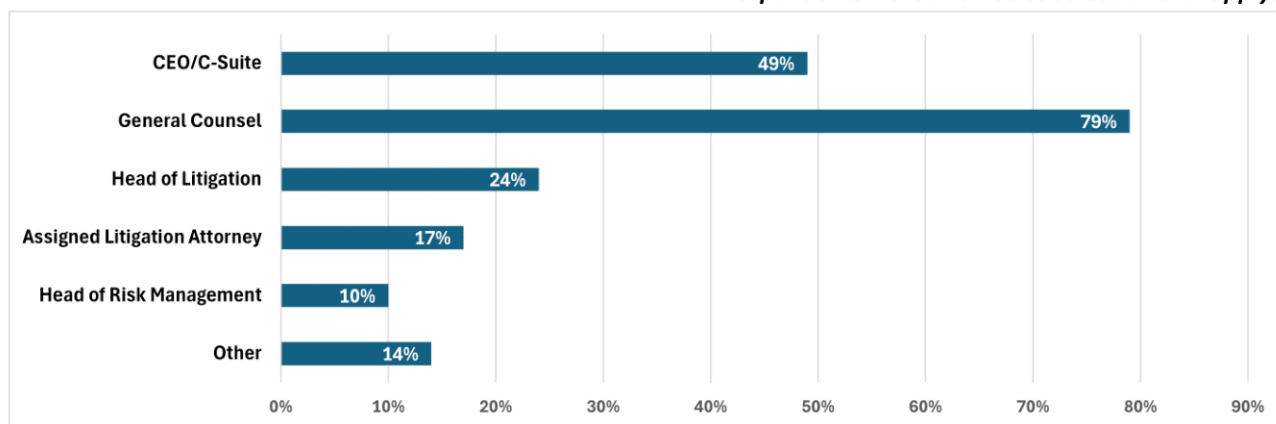
Assessing litigation risk remains a responsibility firmly in the hands of the general counsel, according to most of respondents we surveyed. Just under 79 percent said the GC always assesses the organization's litigation risk. At larger businesses a separate head of litigation may be in the driver's seat.

At almost half of companies, the CEO or other players in the C-suite also takes part in the decision-making process around litigation risk. Another 10 percent—again, larger companies—have moved risk assessment to a specialized head of risk management.

As discussed in a recent [article](#) by Thomson Reuters, in addition to serving as a legal advisor, corporate strategist, and crisis manager, the increasingly complex business environment necessitates spending more time serving as strategic risk mitigators. The article went on to state that "General counsel must maintain, improve and seek out solutions for regulation governance, risk, and compliance, all while establishing and educating corporate leaders and stakeholders on best practices. Being able to assess and solve potential corporate risks is mission critical for GC's as it can save the company substantial fines, and perhaps more importantly, save them from the possible hit on their reputation."

Who Assesses Litigation Risk?

Respondents were allowed to select all that apply.



LITIGATION RISK FACTORS

As we noted in our discussion of outside counsel hiring, we believe that the level of exposure and potential liability are critical components in the decision-making process when selecting a law firm to handle litigation. Our assertion is based, in part, by the responses we received to our questions regarding litigation risk factors.

We asked in-house counsel to rank several risk factors to determine which were the most important when they made decisions about defending a case or pursuing an affirmative claim. On the defense side, the “size of possible damages” and whether the matter is a “bet-the- company” case ranked first. The “likelihood of prevailing” in the case ranked second. In other words, as a company faces risk, general counsel and heads of litigation are more concerned about the company’s potential exposure. It logically follows that reputational risk would be strongly influenced by this factor as well.

When the company is considering bringing an action, however, the factors are reversed. By a wide margin, the likelihood of winning the case was the most important issue for in-house counsel when considering affirmative claims. The size of the claim and reputational risk were tied at a distant second. Other factors, such as cost, was more important in plaintiff-side matters. The relationship with a defendant was also a primary consideration for roughly 12 percent of in-house counsel when they decide to pursue affirmative claims. Obviously, suing business partners is a key consideration.

Top Risk Factors When Assessing Defense Cases

Rank	Risk Factor	% of Repondents
1	Size of damages/bet the company litigation	41.5%
2	Likelihood of prevailing	30.9%
3	Reputational risk	16.2%
4	Opposing counsel	7.0%
5	Cost to defend	5.9%

Top Risk Factors When Assessing Affirmative Claims

Rank	Risk Factor	% of Repondents
1	Likelihood of prevailing	32.8%
2	Size of damages and Reputational risk	16.9%
3	Cost to pursue the claim	15.9%
4	Relationship with defendant	12.3%
5	Opposing counsel	4.6%

RISK TOLERANCE

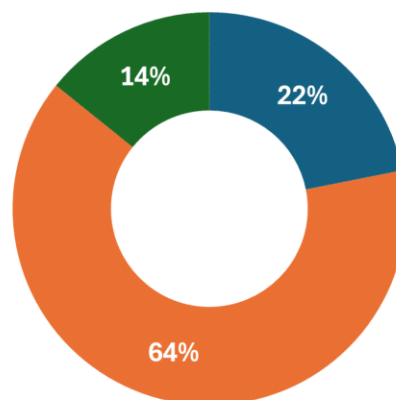
We asked in-house counsel to assess their companies' tolerance for litigation risk. Not surprisingly, given the inherent role of the legal department in reducing overall legal risk, there is not a particularly high tolerance for litigation risk among in-house counsel.

A solid majority—64 percent—of companies take a middle ground approach, saying they are “somewhat tolerant” of litigation risk. About one in five companies are “tolerant” of risk. This may suggest a few companies are leveraging affirmative litigation as a tool for revenue generation. At the opposite end of the spectrum, just 14 percent are “not tolerant at all” of litigation risk.

In-house counsel also responded to questions about the types of litigation about which they are most concerned. The answers aligned closely with the types of litigation they are defending the most: breach of contract and employment cases, followed by product liability/personal injury, intellectual property, and class actions.

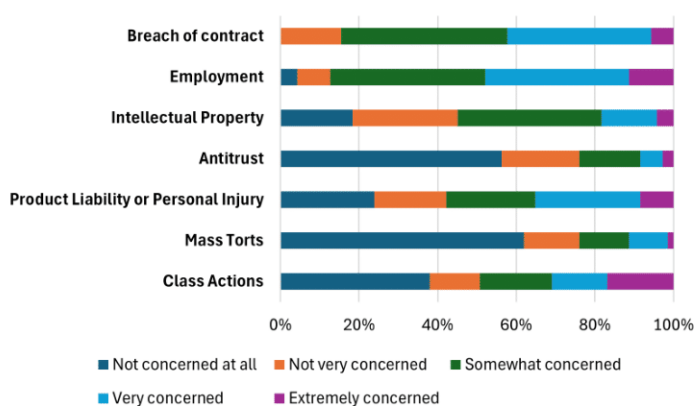
As we noted in our discussion of litigation volume, we suspect that environmental, social and governance (ESG) issues, cybersecurity and data protection, and employment disputes around diversity, equity and inclusion may soon join the list of litigation issues that cause law departments the highest levels of concern.

What is Your Company's Tolerance for Litigation Risk?



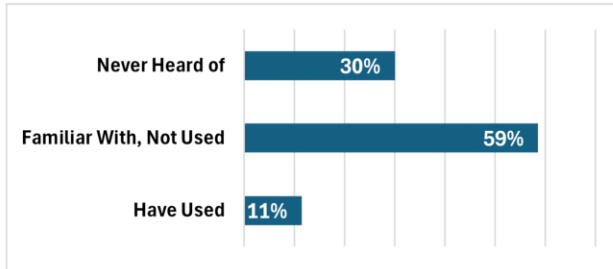
■ Tolerant ■ Somewhat tolerant ■ Not tolerant

Which Types of Litigation Cause the Most Concern?

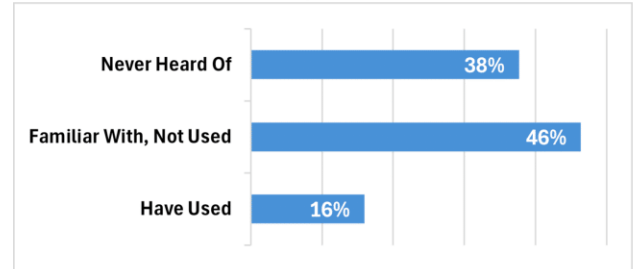


LITIGATION RISK TRANSFER PRODUCTS

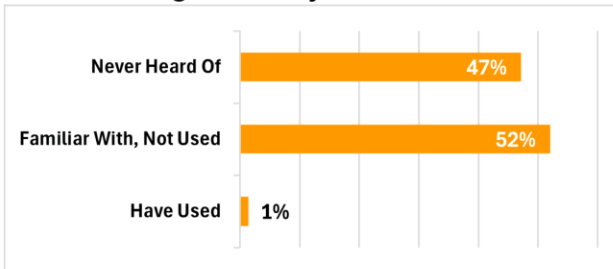
Class Action Settlement Insurance



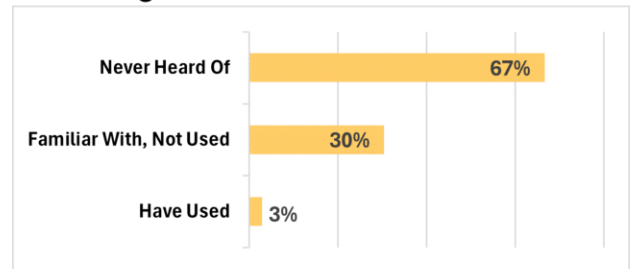
Adverse Judgment Insurance



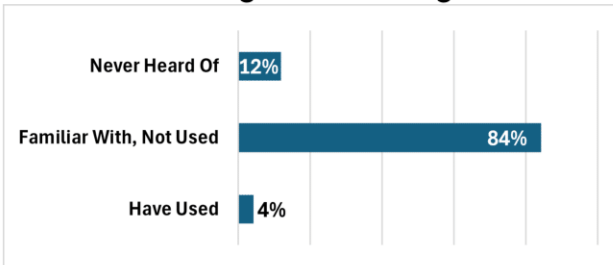
Litigation Buyout Insurance



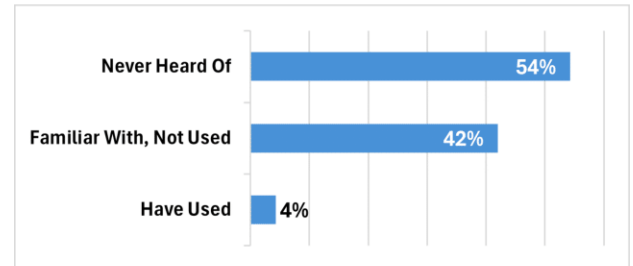
Judgment Preservation Insurance



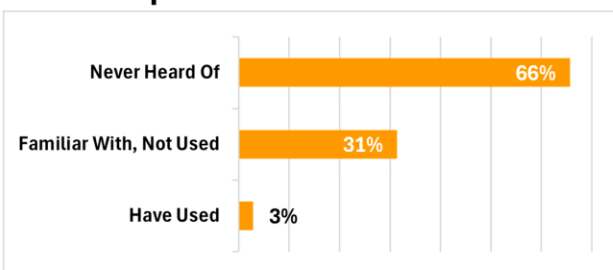
Litigation Funding



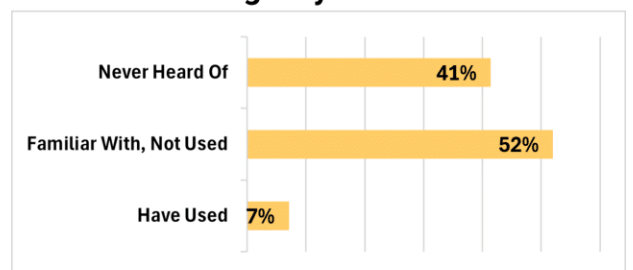
Affirmative Claim Monetization



Capital Protection Insurance



Contingency Fee Insurance



***Which litigation risk transfer products
are you familiar with?***

With that said, we also asked in-house counsel which litigation risk transfer products they would consider using in their businesses in the future. Litigation funding, adverse judgment insurance, and class action settlement insurance ranked in the top three.

In-house counsel also provided the most important reasons their companies might consider leveraging litigation risk transfer products. They are:

- 1) Cost certainty and to transfer the outcome risk of litigation (49% of respondents).
- 2) Cost savings (42% of respondents).
- 3) Avoiding P&L and/or balance sheet impairment (40% of respondents).

The results testify to the ongoing pressure in-house counsel feel to ensure the law department is adding value to the overall business. One of the primary stumbling blocks general counsel face is the unpredictability of litigation expenses and the fact that unexpected legal costs can have an immediate, negative impact on the bottom line. This can be a particular problem for general counsel at public companies and at private-equity portfolio companies, where a large influx of legal bills could help to undermine quarterly financial results.

Which Litigation Risk Transfer Products Would You Consider Using in Your Business?

Rank	Risk Transfer Product	% of Repondents
1	Litigation Funding	33%
2	Adverse Judgement Insurance	33%
3	Class Action Settlement Insurance	31%
4	Litigation Buyout Insurance	28%
5	Contingency Fee Insurance	27%
6	Judgement Preservation Insurance	25%
7	Affirmative Claim Monetization	25%

As discussed earlier in this report, according to the 2024 ACC Chief Legal Officer survey, more general counsel are focusing on high-level corporate strategy rather than taking on tactical legal issues, noting that operational efficiency is their top strategic initiative, followed by “right sourcing” of legal services, and managing legal talent.

It is probably safe to say that companies are likely to reward outside counsel with a greater share of the work if they understand these fundamental dynamics and proactively bring novel and alternative solutions to the table that are designed to assist the legal department in meeting its business and legal objectives.

AFFIRMATIVE CASES AND EARLY MONETIZATION

Are companies effectively leveraging potentially lucrative affirmative claims and monetizing those claims early when they have the opportunity? If not, would they do so if they could?

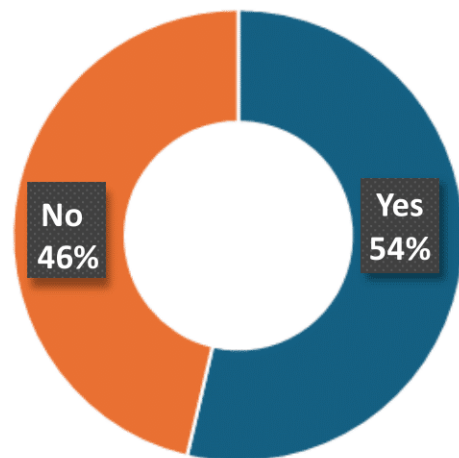
According to our survey, just over a third of in-house leaders said their law departments are actively pursuing affirmative cases. Given the budget constraints and staffing issues they have reported, this should come as no surprise. Even with those limitations, however, nearly half—54 percent—would pursue affirmative litigation if they were made aware of potential claims. Moreover, 46 percent said they would be interested in pursuing affirmative cases *regardless of the claim amount*. Another 23 percent said they would pursue a claim if it was less than \$1 million.

At present, most companies say they are attempting to locate claims themselves. Less than a quarter are receiving help in identifying claims from outside counsel and only a handful are receiving the assistance of an outside broker.

The data suggests that companies should rely more heavily upon outside help to bring affirmative claims to their attention and to pursue them on their behalf.

Effective claims monetization efforts could be critically important for GCs under pressure to modernize their law departments. In-house teams traditionally have been seen by companies as cost centers and litigation as a likely drag on the bottom line. Monetizing affirmative claims could help transform departments into corporate profit centers.

Would You Pursue Affirmative Cases if You Were Made Aware of Them?



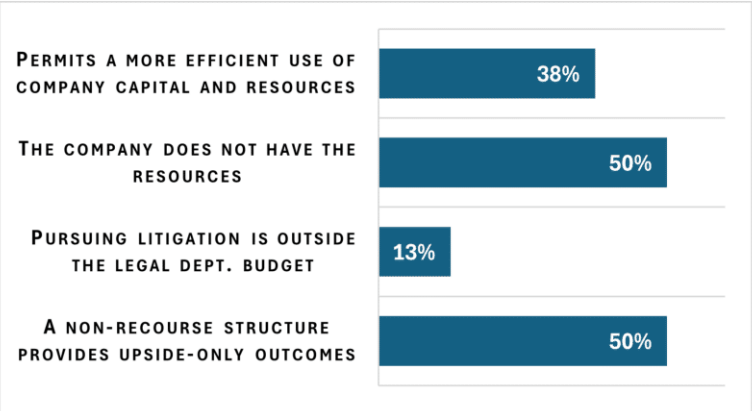
LITIGATION FUNDING

We asked in-house counsel a series of questions about litigation funding—whether they were aware of it, had used it, and if so, how they structured their funding deals. Among our findings:

- Nearly 85% of respondents said they were at least somewhat familiar with litigation funding. However, just 4% said they have used funding themselves.

- In-house departments identified funders primarily through referrals from business contacts and outside counsel. 29% received referrals from funding brokers. 14% of the respondents reached out to funders directly.

Why Did You Choose Funding? *Multiple answers were allowed.



- An equal number of in-house counsel said the recommendation by outside counsel, business partners and associates as well as the structure of funding were the most important factors when choosing among funders.

Of the in-house counsel who have worked with a funder, the following funding structures were most often used:

- *Non-recourse loan.* Potential proceeds from a recovery serve as collateral. The non-recourse nature of the loan means that the funder is owed nothing if the claim fails. As a result of the increased risk, interest rates for this arrangement are significantly higher than a traditional loan. Of the respondents who have funded cases, fifty percent have arranged non-recourse loan financing.
- *Recourse loan.* Sixty-seven percent of respondents said they had used a recourse loan structure— a more traditional loan that must be paid back no matter how the case is decided.



CONCLUSION

The 2023 Litigation Risk Survey provides a snapshot of the complex business and litigation landscape that in-house departments currently face. On a macro level, economic uncertainties driven by the geopolitical conflict, inflationary and labor market challenges, cybersecurity and ESG risks, and artificial intelligence disruptions are pressing companies to look to every corner of their organizations to find efficiencies and maximize revenues and profits. For law departments this means no end to the pressure to control costs, modernize processes, and seek revenue-generating opportunities. This includes looking to litigation, an often-overlooked asset class, and leveraging it more effectively with tools like funding, early monetization, and risk transfer insurance products.

However, many departments are operating with limited resources to pursue new ideas and additional revenue while handling the surge of defense-side litigation they are currently facing. Some legal departments are leading the way by embracing legal operations innovations and seeking assistance from trusted business partners and outside counsel to help them identify opportunities to manage litigation more effectively. Further, there are a host of litigation risk transfer products that can assist companies to control costs and shift the outcome risk to third parties. Utilizing such solutions may allow legal departments to operate from a position of strength by taking on the uncertainty of litigation.

ABOUT CERTUM GROUP

Certum Group provides bespoke solutions for companies facing the uncertainty of litigation. We are the leader in providing comprehensive alternative litigation strategies, including class action settlement insurance, litigation buyout insurance, judgment preservation Insurance, adverse judgment insurance, litigation funding and claim monetization. Our team of experienced former litigators, insurance professionals, and risk mitigation specialists helps companies remove the financial and operational volatility arising out of litigation by transferring the outcome risk.



certumgroup.com
(214) 570-3661

5717 Legacy Drive
Suite 250
Plano, TX 75024