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## What's driving bet-the-company litigation?

*Posted: May 18, 2017*

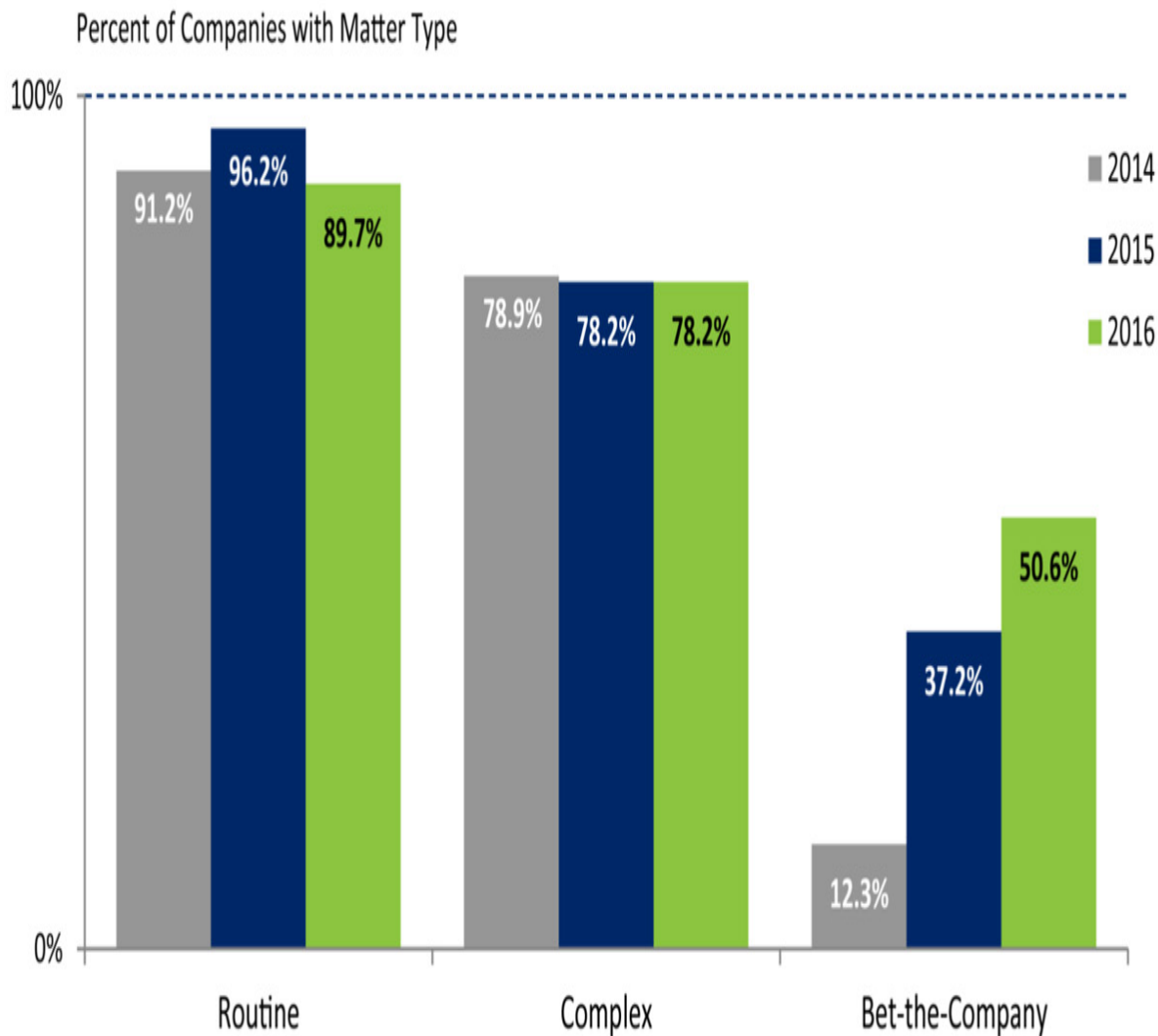
Although corporate litigation spending is flat (<http://www.bticonsulting.com/6-trends-shaping-litigation>), the number of companies managing “bet-the-company” litigation has quadrupled in the last two years, posing new challenges to corporate counsel, outside counsel and litigators.

Bet-the-company litigation can be any legal action that threatens the existence of the company or major line of business, whether or not the case goes to trial.

Legal department spending on bet-the-company litigation in 2017 is expected to reach \$1.42 billion, up from \$1.39 billion last year and \$1.26 billion the year before, according to the BTI Consulting Group (<http://www.bticonsulting.com/themadclientist/2016/9/28/6-defining-trends-for-the-litigation-market-ahead>) and Law 360 (<https://www.law360.com/articles/852647/the-5-practice-areas-poised-for-a-2017-growth-spurt>). More than half of large companies are actively managing a bet-the-company case:

What's driving the increase? A plethora of factors, including new laws, technologies, court decisions and complexity in all areas of business, including intellectual property, shareholders, class action, employment and financial services.

## COMPANIES WITH BET-THE-COMPANY WORK QUADRUPLE



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"You've got so many new business issues out there underlying these big matters, like very large supply chain matters that you didn't really have five to seven years ago and big cyber cases that are relatively new," BTI President and founder Michael Rynowecer told Law360 (<https://www.law360.com/articles/842062/how-to-win-a-piece-of-the-highest-stakes-litigation-work>). "These types of matters are spreading and, combined with increased government enforcement and reinterpretation, are driving bet-the-company work."

Says Law Practice Today (<http://www.lawpracticetoday.org/article/legal-opportunities-of-the-future/>), "Increasing regulatory enforcement combined with increasing business complexity and size of exposures is driving a marked increase in bet-the-company matters. Companies see more enterprise-level risk in M&A, accounting irregularities, changing regulatory interpretations, antitrust and activist investors. Bet-the-company litigation is especially prevalent in banking, financial services, health care and telecom."

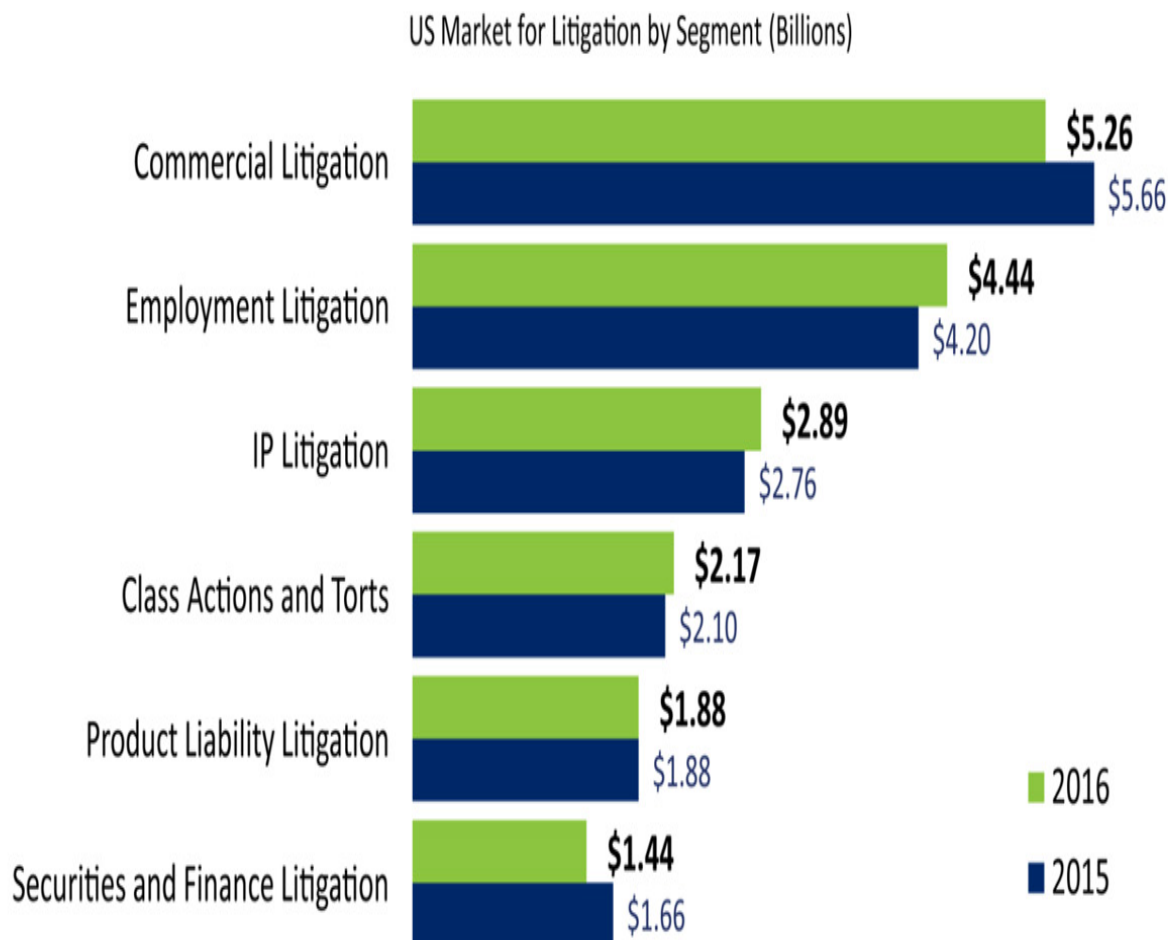
### **Fewer cases, same spending level**

As bet-the-company work increases, corporations are keeping more routine work in-house and handling off low-risk, high volume tasks to alternative legal service providers, according to the Legal Executive Institute (<http://legalexecutiveinstitute.com/litigation-trends-2016/>).

"Clients see fewer matters and no change in spending," says BTI. "This translates into more spending on the matters which do arise. Most of this is going to the higher-rate, complex matters."

Increases in litigation around intellectual property, class action and employment support the increase in bet-the-company work:

## EMPLOYMENT, IP & CLASS ACTIONS SEE RARE INCREASES IN SPENDING



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(<https://www.esquiresolutions.com/wp-content/uploads/2017/05/graph2.jpg>)

Workplace class action litigation has increased “geometrically” over the past decade and often poses bet-the-company risks, according to a Seyfarth Shaw law firm report

(<http://www.workplaceclassaction.com/wp-content/uploads/sites/214/2017/01/CAR-2017-Chapter-1->

## FINAL.pdf) (PDF):

An adverse judgment in a class action has the potential to bankrupt a business or eviscerate its market share. Likewise, the on-going defense of a class action can drain corporate resources long before the case reaches a decision point. Companies that do business in multiple states are also susceptible to “copy-cat” class actions, whereby plaintiffs’ lawyers create a domino effect of litigation filings that challenge corporate policies and practices in numerous jurisdictions at the same time.

Shareholder class actions can be another source of bet-the-company litigation. Insurer AIG (<https://www.aig.co.uk/content/dam/aig/emea/united-kingdom/documents/Insights/aig-claims-class-action-white-paper-final.pdf>) (PDF) has documented a rise in shareholder class actions in Europe, citing factors such as “the rise of shareholder associations and litigation funders and the precedent set by several high-profile cases currently working their way through the courts.”

The company analyzed 50 large shareholder claims among its insured. Sixty percent of the European collective shareholder claims were brought outside the U.S., versus 40 percent that involved a shareholder claim in whole or in part in the U.S. “Perhaps unsurprisingly, the biggest claims payouts during this seven-year period involved those with a U.S. element,” its report states. “These were responsible for 65 percent of the total AIG losses incurred.”

By definition, bet-the-company cases present enormous challenges – professional and existential – for corporate legal departments. With these challenges come considerable stress.

In future posts, we’ll address best practices for surviving bet-the-company litigation and using depositions to your advantage.

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**Ron Carey**

As Chief Revenue Officer at Esquire Ron is highly focused on delivering premium service to Esquire's legal clients so they can build a better bottom line. He has expertise in sales, marketing, product management and is extremely focused on creating value for clients through efficiency, innovation and strategic vision.

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