



Webcast: Torts Litigation in Federal District Court Report

We've released our latest practice area report, Torts Litigation in Federal District Court. In this 30-minute recorded webcast you will hear our speakers discuss the new report. Learn about the latest trends and insights for Torts litigation, including a look at premises liability, motor vehicle, medical malpractice, Federal Tort Claims Act, and mass torts cases. See how you can get quantified insights about judges, courts, law firms, attorneys, and parties, and get your questions answered by our speakers. Discover the value of Legal Analytics to make informed Torts litigation decisions.

Speakers:



Christina L. Capobianco
Partner
Goldberg Segalla



Anne Kann
Legal Data Expert
Lex Machina

Anne Kann ([00:00](#)):

Recorded. My name is Ann Wise Kann, and I'm a legal data expert here at Lex Machina and I'll be hosting our webcast today. Lex Machina is a legal analytics company that helps users win. And that means winning cases, winning negotiations, and winning business. So everything that you see in this presentation today, and a report will be available on our platform.

Anne Kann ([00:31](#)):

Lex Machina is used by about a third of annual 100 law firms, as well as many major companies worldwide. This slide is just an example of some of our prominent customers. I have with me today, Christina Capobianco, a partner at the law firm of Goldberg Segalla practicing in their Philadelphia office. Christina, if you could please introduce yourself and maybe give us a little bit of background on your torts practice

Christina Capobianco ([01:01](#)):

Good morning or good afternoon, everyone. My name's Christina Capobianco, as Anne said. I am a partner in Goldberg Segalla's Philadelphia office. I also practice in New Jersey. I practice in both Pennsylvania and New Jersey state and federal courts. And I've been in practice for about 15 years. My practice primarily focuses on the transportation industry. I work primarily for trucking companies and I also do civil defense work for general liability, slip and fall and other civil tort matters.

Anne Kann ([01:33](#)):

Thank you, Christina. And as I said previously, my name is Anne Wise Kann. I help develop and implement the torts practice area here at Lex Machina, and I got very familiar with [inaudible 00:01:45] during that process before working for Lex Machina I practiced law for several years in Atlanta, Georgia. In our webcast today, we will review torts case filing trends, top districts for torts filings, most active law firms and most active defendants, timing data to a certain litigation milestones case, resolution data, court findings in tort cases, damages and expert witness data. We will also hold a Q & A at the end of the presentation. And in your Zoom window, there is a Q & A chat box if you would like to submit a question.

Anne Kann ([02:29](#)):

As we define it at Lex Machina, a torts case is a case in which a party seeks compensation for loss or harm caused by personal injury or reputational harm to an individual. This harm may be caused by intentional or unintentional torts. So put in another way, this practice area essentially encompasses personal injury towards cases.

Anne Kann ([02:54](#)):

The first figure we have here shows overall case filings in the torts practice area from 2010 to the end of 2019. While they were holding steady early on, we can see a little bump in the middle, but about 2014 and 2015. And that is due to the DuPont C8 mass tort litigation campaign. Now at Lex Machina, when we see significantly increased filing activity surrounding one tort event, we will assign a mass tort tag to those cases. What those tags do is they allow users to filter out the mass tort cases if they want to, once they were filed as part of a larger litigation campaign so that users can see data that isn't skewed by those large number of cases being filed in the same district or before the same judge.

Anne Kann ([03:44](#)):

So these next two figures are a good illustration of how our mass tort tags work. So this one and the next one, they both show filings by quarter from 2018 through 2020 Q3. So as you can see in this one, there's a noticeable increase in filings beginning in 2018 Q3, and then it kind of settles back down 2020 Q2. But if we exclude mass tort cases, which we've done in this slide, the case filings have been a whole lot more steady over the last couple of years. So Christina, a lot of people predicted a downturn in filings generally due to the COVID pandemic, but we aren't really seeing that here based on the data from 2020, what's been your experience practicing during this pandemic?

Christina Capobianco ([04:33](#)):

So I think from the data there, you can see there was kind of a slight downturn quarter 2 of 2020, and I think that was just because at the beginning of the pandemic, when everything shut down, even the courts and the court staff had to work remotely and there was kind of a lag time where the courts were trying to figure out how to accept filings and things like that remotely. And then since that, since everyone's kind of now adapted to the staying at home environment and the work from home, the filings have gone back up. We haven't seen any sort of decrease in the number of filings. However, I would say that in the tort practice, obviously there's statute of limitations, and I think that any slowdown from COVID and from the stay-at-home orders probably won't be reflected for another year or two.

Anne Kann ([05:28](#)):

That makes sense. So our next figure shows the district courts with the most case filings from 2015 to 2019. And as we can see here, the top district is the Eastern District of Louisiana with nearly 7,800 cases. This district was the seat for the Deep Water Horizon mass tort litigation campaign so that explains those numbers. The total case numbers in this chart are subdivided based on subject matter, including cases brought under the Federal Tort Claims Act. So that's the FTCA column, medical malpractice cases, cases involving motor vehicles and premises liability cases. And we divide cases up using markers that we call case tags that get applied to relevant cases. Christina, you practice primarily, as you said, in Pennsylvania and in the district of New Jersey, can you talk a little bit about your experience in these districts and why we might be seeing so many motor vehicle and premises cases there?

Christina Capobianco ([06:33](#)):

So I am lucky enough to practice in two jurisdictions that are considered judicial hellholes as there's been some articles authored. Actually Philadelphia was rated the number one judicial hellhole, which is located in the Eastern district of Pennsylvania and has these high number of vehicle and premises cases filed there. And I think primarily one of the reasons for that is because of the very plaintiffs' friendly nature, as defense lawyers like to think of it in Philadelphia. We try very hard to remove cases to federal court, if at all possible. Same thing in the district of New Jersey, you have some very plaintiff friendly high verdict jurisdictions there in Newark and in Camden. And so any case that can be removed to federal court, that's filed in those jurisdictions, defense lawyers try to remove those into the federal courts.

Anne Kann ([07:31](#)):

Okay, thank you. So moving on to law firms. Next, we've got the top most active law firms in the country. So not surprisingly the top three firms on the plaintiff's side, up here at the top, were active in mass tort litigation. Now by contrast, the top firm representing defendants was the DOJ. Under the Federal Tort Claims Act or FTCA, claims can be brought against the federal government in tort. And so in

those cases, the DOJ is responsible for the defense. Under the FTCA, we see a lot of motor vehicle tort cases involving postal vehicles, and we see medical malpractice claims brought against the VA. You can see under the nine remaining firms in the top 10 defendants, eight of them participated in mass tort defense. So this is just some of the law firm data we have at Lex Machina. Christina, how is this data relevant to your practice?

Christina Capobianco ([08:36](#)):

So especially in trucking litigation, it is a very specialized practice area. And in my practice as a defense lawyer, I like to look at the plaintiff's firm that's representing the plaintiff to determine if they have a lot of experience tracking litigation, if they are a high volume firm that is knowledgeable about this, so that I can inform my clients, the type of opposition that we'll be facing and whether or not they're going to be knowledgeable about trucking regulations and things like that. So it's important for me to advise my clients about the law firm on the other side and the type of work that they're doing. And I think this data would help me to do that.

Anne Kann ([09:20](#)):

Okay. So moving on to the top most active defendants in tort cases nationally, and this figure that we're looking at now, excludes mass tort cases. We're seeing some retail defendants here, which typically will defend in apprentices liability cases. And then we're also seeing some pharmaceutical companies and they're often added as defendants in med mal tort suits. And then you'll see at the bottom of the chart, the number 10 top defendant is the NCAA. And this is due to a multi-district litigation class action case for concussive injuries resulting from playing college sports. Christina, does any of this data about defendants come as a surprise to you at all?

Christina Capobianco ([10:11](#)):

So it's definitely not a surprise to see Wal-Mart and Target at the top of this list. They are obviously very large, big box stores that have locations in many locations all across the country. So it's not surprising to see them have active litigation all across the country in many districts and especially premises liability, because obviously that would be the target for a tort litigation. The one thing that I would add is that although they probably are sued the most and are listed here with the top cases, in my experience, Wal-Mart and Target are not usually the ones defending these cases that have been filed because they do have very strong usually identification language in their contracts with snow removal contractors, or parking lot sweepers or security. And typically they are able to get those companies to identify them and defend them in those lawsuits.

Anne Kann ([11:08](#)):

Oh, interesting. I did not know that. Okay. So moving on to timing, Lex Machina also provides case timing data to certain litigation milestones. And our customers will use that data for things like forecasting, calendaring and budgeting. So we convey this data using thoughtful box blocks. The blue line, and the blue whiskers represent the lower and upper quartiles. And then the middle box represents the middle 50% of cases. And the median timing number is highlighted there in the middle. It's scuppered boxes around it now. So this particular figure shows timing to summary judgment, timing to trial, and to overall case termination in cases terminated in 2015 to 2019, excluding mass torts. And we excluded the mass torts here because those cases can take a very long time to resolve. Christina, could you talk about time and data in so far as it relates to getting back value to your clients?

Christina Capobianco ([12:14](#)):

So as a defense lawyer, usually the very first thing I'm asked when a case comes in the door by a client is how much is this going to cost to defend? And how long is it going to take to wrap this case up? And so we try to provide clients, because we know it's important to them, accurate reporting and budgeting about how much the case is going to cost to defend and how long the case will likely take to wrap up based on whether or not we see it as a summary judgment case or a case that we're going to take to trial. So this data really gives us some data specific reporting tools to tell our clients, this is typically this type of case, it's typically going to take this long and to help us formulate our budget.

Christina Capobianco ([12:59](#)):

It's also kind of valuable, especially right now in the COVID times, because a lot of clients are trying to figure out alternative fee arrangements and trying to negotiate different ways to pay their attorneys other than just a flat hourly rate. And we can kind of use this as a tool to figure out whether or not that's a doable situation where we can charge a flat fee for up until summary judgment and another flat fee up until trial. And this kind of gives us a tool to see how long that's likely to take based on the data that you have from around the country.

Anne Kann ([13:34](#)):

Okay, thank you. All right. So our next section is case resolutions and this section includes a figure showing our round donut chart with just how we present our case resolution data. So this donut shows data for all cases terminated again, between 2015 and 2019, including mass tort cases. And on the right hand side, we'll see that the vast majority of these cases either settle out, so that's around 60% of them, or they come to some other kind of procedural resolution. But over on the left-hand side, I think the obvious takeaway there, and this should come out as no surprise to torts practitioners is the frequency with which we see defendants prevailing in torts cases that do come down to a judgment on the merits as opposed to plaintiffs. So while nationally, we only reach a substance of judgment in 5% of cases, the data shows that defendants will prevail 4% of the time, while plaintiffs prevail only 1% of the time. Christina, can you expand here on how resolutions data might help you again, continue to give back value to your clients?

Christina Capobianco ([14:49](#)):

Sure. I mean, so one of the things that, in most torts cases, the reason that you're practicing in federal court is because you've removed the case from state court based on diversity jurisdiction. Sometimes there's federal statutes involved, but most of the time it's based on that. And we're really trying to help our clients make the best decision about the forum that they're going to be in and whether or not it's a good idea to remove the case to federal court from state court. So if you have a summary judgment type of case or a case that you think is strong, that you want to file judgment on the pleadings, this kind of gives you a way to advise your clients on the likelihood that you would be successful on one of those motions in federal court, versus if you stayed in state court.

Christina Capobianco ([15:34](#)):

And another thing that I find interesting about this chart is that when you look at, and like you said, most cases don't go to trial. They usually settle. But the cases that do go to trial here, it looks like plaintiffs and defendants are prevailing almost equally if the cases do go to trial. So as you're trying to advise your clients whether or not this is the type of case that you go to trial, it seems like overall, most

parties are picking the ones that should go to trial and that both sides are prevailing equally when the cases do get tried,

Anne Kann ([16:07](#)):

That's true. Thank you for pointing that out. So next, we're going to go over our findings data or data that reflects how the case resolves on certain tort specific issues. So this chart shows findings on negligence claims. And as we can see here out of about 3,300 cases where the court found that there was no negligence, nearly half of those findings were no negligence under the breach portion of the negligence analysis. Christina, how can findings data color your litigation strategy?

Christina Capobianco ([16:50](#)):

So certainly when you're putting together your case strategy and you're figuring out what your strongest defenses are, and I know I'm talking a lot about defense, but that's because I'm a defense lawyer. But as you're looking at this, you can kind of see which arguments are the strongest and which ones are being granted summary judgment most often. And it looks like from this chart, that if you have a breach argument, that there was no breach that that's more likely to prevail on a summary judgment motion, than say if you were making an argument that you had no duty. So that's really helpful in trying to advise your client about the likelihood that you're going to prevail on a motion for summary judgment or motion for judgment on the pleadings.

Christina Capobianco ([17:35](#)):

Something else that I found really interesting about this chart was the way the numbers decrease for trial. So basically if you lose your summary judgment motion and you were making that motion based on no duty, you're probably not going to win a trial on that argument because you've already tried it on motions and it's not been found as a matter of law. So it really helps to kind of articulate to your clients why maybe this case is one that should settle if you don't win on your motion.

Anne Kann ([18:12](#)):

Got it. Excuse me. Okay. So next we have a chart showing damages awarded again between 2015 and 2019, broken down by damage type. So in torts, we typically see large dollar amount damage awards awarded in a small number of cases. Pain and suffering and punitive damages were the largest categories by dollar amount and most of those damages were awarded on default. Many of these large default damage awards came out of terrorism cases against foreign governments that were filed and then the foreign government never responded to the case. Christina, would this damage data shed any light for you in preparing a case for trial?

Christina Capobianco ([19:04](#)):

I mean, certainly one of the most important things that you're trying to do in a case when you're advising your clients and deciding which cases are going to go to trial is to figure out the value of what you think a jury might do if you take this case to trial. So the lost wage is a medical expenses. Those are the kinds of damages that you can put a finger on, and you can have an economist or an expert to testify about them, and they're pretty much capped. You can kind of give a reasonable explanation to your client about why the damages are the number that they are, and you can kind of bank on what a jury is going to do with that number.

Christina Capobianco ([19:41](#)):

Pain and suffering and punitive damages, however, are kind of the wild cards. And at least in my jurisdiction, as counsel, you cannot give the jury a suggestion even about how much should be awarded for pain and suffering, about how much should be awarded for punitive damages. And so really as an attorney, trying to figure out what we think these values are, really all we have to go on is past experience and other jury verdicts to kind of help us figure out what we think is going to happen if the case goes to trial. So these numbers are extremely important to help us figure out what we think a jury might do with the pain and suffering and a punitive damages claim.

Anne Kann ([20:21](#)):

Thank you. Awesome. Okay. And lastly, this chart shows the most active expert witnesses participating in tort cases nationally from 2015 to 2019. Now in medical malpractice cases in particular, expert witnesses play an important role in establishing the duty of care and in some jurisdictions they're actually required to establish a duty of care, but experts are also tapped to provide testimony in many other kinds of torts cases. So Lex Machina collects data on how many times a certain expert has been submitted to give his or her opinion in torts cases and how many times that opinion has been admitted, limited or excluded.

Anne Kann ([21:04](#)):

So this chart also includes the case types and the number of districts where the given expert witness has appeared. So for example, our most prolific expert witness is Robert E Borison who worked on the Deep Water Horizon litigation. And so out of 13 cases, his testimony was admitted in four, limited in four and excluded in five. Christina, could you talk a little bit about the importance of expert witnesses in your practice?

Christina Capobianco ([21:35](#)):

Sure. So I'll go through my two main practice areas and talk about the difference in the two. In the trucking industry, we're seeing a rise in experts being used for trucking company's compliance with the OT regulations and for federal motor carrier safety regulations. And so we're seeing a lot of experts that are being used on that side. And so it's important in my practice to be able to know who these experts are, their expertise in that area, if their testimony has been admitted before, or if it's been excluded before, because I need to know that in order to depose that witness and to possibly make any motions to exclude their testimony. And then in premises liability cases, and I would point out on this list, there's the Russell Kendzior is listed here for six cases. He is known as the slip and fall guy. And that's how he advertises himself. He puts himself out there. He's written many books and he advertises himself as the preeminent expert for slip and fall cases. So that's why you see him here so many times.

Christina Capobianco ([22:47](#)):

But as most practitioners know in slip and fall cases that that's sometimes not seen as an area where you need an expert, because it is sometimes found from judges to be common sense that we don't need an expert to tell us that the floor is slippery or that the store should have cleaned up the puddle on the floor. And so it's not surprising for me to see that his testimony on this chart was excluded three times and limited two times and only flat out admitted one time. So that's the kind of information that's important for you to have going into a deposition, or even if selecting your expert on the defense side if you were thinking about using an expert, you might want to make sure that it's the type of case where the testimony is going to be admitted by the judge at trial.

Anne Kann ([23:37](#)):

Okay. I didn't know that about Mr. Kendzior. I'm glad you appeared on our chat today. All right. Well, that concludes the planned portion of our presentation, and now we can go into the Q & A. So let's see if we've gotten any Q & A questions.

Anne Kann ([24:06](#)):

How do we get a copy of the report? So if you are a current Lex Machina user, the report is available in the help section on Lex Machina's platform. If you aren't a user, yet you will receive an email after this webcast. I believe it's going to go out tomorrow morning and there will be information and links in there on how to get a copy of the report. Christina, do you have any final thoughts before we conclude?

Christina Capobianco ([24:53](#)):

So generally, I think that we're all looking for ways to give our clients value and as attorneys, we have certain instincts and we think that we have a certain experience that we can give our clients, but a lot of times they want some data to back that up and they want to see some kind of hard facts. And well, we don't always have hard facts for everything, there are data sources that we can go to kind of back up our instincts and our thoughts from our experience. And I think the information and the data that you have is kind of a way to back up or to see if we're wrong about some of what our instincts are and what our experiences are when we're litigating cases.

Anne Kann ([25:41](#)):

Okay.

Anne Kann ([25:42](#)):

Thank you very much Christina for joining us and being our guest speaker today at the torts litigation practice area webcast. And thank you all for coming. Have a wonderful rest of your week.

Christina Capobianco ([25:54](#)):

Thank you.