



## Contracts Litigation Report 2021

Lex Machina is excited to release its Contracts Litigation Report. The report surveys key trends and recent events in contracts litigation. Looking at cases with breach of contract and related tort claims, the report focuses on the last three years.

Watch this 30-minute on-demand webcast to hear from Karen Chadwick, author of the report and Legal Data Expert at Lex Machina, Case Collard, Partner at Dorsey & Whitney, and Neil Magenheim, Director of Client Relations at Lex Machina. During the webcast, they will discuss the latest findings and trends on top law firm and party data, timing metrics, case resolutions, damages, and more. Register now to save your seat and get your questions answered during this live event.

During this webcast our speakers will discuss:

- Latest findings and trends on top law firm and party data
- Timing metrics
- Case resolutions
- Damages
- And more

### Speakers:



Karen Chadwick  
Legal Data Expert  
Lex Machina



Case Collard  
Partner  
Dorsey & Whitney



Neil Magenheim  
Director of Client Relations  
Lex Machina

Neil Magenheim ([00:00](#)):

Hello everyone and welcome to the Lex Machina Contracts Litigation Report webcast. Really excited for our conversation today and I really love our report webcasts. They really are my favorite because they truly highlight the amazing value that our consumers get out of our data.

Neil Magenheim ([00:20](#)):

Before we get into the content of our webinar, I wanted to introduce our audience to Lex Machina very briefly. Lex Machina is legal analytics. Legal analytics help our clients win. You can see here many of the most recognizable companies throughout the world use Lex Machina to make those more informed data driven business decisions to help them optimize outcomes. Some of the largest law firms in the world and some solo practitioners and dual practitioners and hundreds in between use Lex Machina and our data to help them win. Help them win business and help them optimize outcomes on behalf of their clients and their firms.

Neil Magenheim ([01:04](#)):

My name is Neil Magenheim. I'm the director of client relations here at Lex Machina and I'm really excited to introduce our guest speaker, Case Collard and our legal data expert, Karen Chadwick. Case Collard is a litigation partner at Dorsey Whitney. He has litigated contracts related to everything from software, to the Cadillac of horse nutrition supplements. Case lives in the foothills outside of Denver and I a volunteer lieutenant with the Golden Fire Department. Karen is a legal data expert here at Lex Machina and the author of our contracts litigation report that we'll be going through. Karen is currently responsible for Lex Machina's torts and contracts data before coming to Lex Machina, Karen was a tenured professor of law at Cooley Law School. Karen also previously worked as a commercial litigator at a major Detroit law firm as in house counsel for a tier one and tier two automotive supplier in Detroit. Karen received both her undergraduate and law degrees from the University of Michigan.

Neil Magenheim ([02:09](#)):

Case, thank you so much for your time today. We really, truly appreciate it. We know how busy you are so we're looking forward to your insights. And Karen, thank you for all of your work, putting the report together and everything you do here at Lex Machina. We're looking forward to going through some of the details of this report. Before we get into the content of the report though, I'd like to talk kind of tee up a conversation starter for you, Case. If you wouldn't mind introducing yourself a little more detail to our audience and just talk a little bit more about how you use data in your practice.

Case Collard ([02:40](#)):

Thank you, Neil. Sure I would be happy to. A big part of everybody's practice is the idea that for us in private practice is that we need to go out and we need to find work. And pitching cases, one of the best ways to differentiate your pitch is to have specifics, to have details in the pitch. And if you are pitching a case that's already been filed, being able to look up data on the court, on that specific judge, about timelines and put that in your pitch materials. That's huge. That's something that we do and that I do every time that I'm looking at a case, especially if the case has already been filed. If the case hasn't been filed and there's a potential opportunity, it's great to use Lex Machina to compare venues on how quickly cases proceed, on what judge you might get. Other sorts of stats like that. And that's on the front end.

Case Collard ([03:37](#)):

And then on cases that you're already working on, it's really ideal to be able to get a sense of all different sorts of things through Lex Machina, who your opponent is, what sort of cases they're involved in, who the counsel

is perhaps on the other side and what sort of cases they do. And then, once you maybe get assigned a judge in a case, you can get a little ton of information about how that judge operates and likely timelines. Those are some of the key ways that I use Lex Machina and legal analytics to help me guide my clients through some of those things that can feel really uncertain when you're at the front end of a litigation and that hopefully we can provide some real answers about that, that have data behind them.

Neil Magenheim ([04:32](#)):

Case, that's amazing context. I really do appreciate that. We could spend the next 20 minutes just digging into everything you just laid out there but it provides a lot of context into what we're doing today. And before I hand it over to Karen I urge the audience to dig in a little bit to what Karen and Case are about to share but also I recommend that the audience reaches out to Lex Machina so we can take a deeper dive into some of those specific use cases that Case is talking about as it relates to your clients, your cases, your strategies, et cetera. We're happy to have those conversations as a result of this and Karen, over to you.

Karen Chadwick ([05:12](#)):

Hi. Thanks. Thanks a lot, Neil. Before we dive into the data, I wanted to give a brief overview of what data actually is in the contracts module at Lex Machina. The entire data set for contracts consists of over a 175,000 cases pending in federal district court from 2009 to present. All of the cases involve either a claim for breach of contract or a claim for a business tort such as fraud or tortious interference between two business entities. Any contracts case with a breach of contract or business tort claim between a business entity is tagged with our commercial tag so that you can filter out commercial disputes from other disputes. Jumping into the contracts report, this first slide shows contracts case filings from 2011 to 2020. The chart depicts a gradual decline in filings until about 2018 when the trend starts to reverse itself. Case, is this graph of filings consistent with what you're seeing in your practice?

Neil Magenheim ([06:27](#)):

I would say so. I guess one of the things that's surprising to me is the stability of the numbers here. The biggest drop over the last 10 years or the biggest change is about 700 cases, which is 5% or less and that was in 2012 to 2013. I find it to be remarkably stable, even in the face of the pandemic and having some of the 2020 data, which all of us are experiencing our first pandemic so we don't have a lot of history to go on but that could increase filings because of uncertainty around the pandemic and potential disputes but it could also decrease filings with parties wanting to not get involved in that during the pandemic. Seems like either those changes balanced out or didn't occur.

Neil Magenheim ([07:19](#)):

It's hard to tell but I think for my firm in the first few months of the pandemic, everybody thought, who knows what could happen? It was so uncertain. But then as the rest of 2020 played out, legal services were pretty stable from my perspective and that clients that had disputes were still calling and needing to get those resolved and couldn't wait just because there was a pandemic. And fortunately, lawyers around the country we're able to continue to provide those services, but me and my firm as well. It does track pretty closely, Karen, to what I saw.

Karen Chadwick ([07:58](#)):

Thanks, Case. It's a nice to know that it's business as usual in contracts litigation.

Karen Chadwick ([08:02](#)):

... it's business as usual in contracts litigation. The next slide shows us a little bit something different. This is looking at franchise agreement cases for the same time period, filings in franchise agreement cases over the last 10 years. Franchise agreement cases are cases that include a dispute over a franchise agreement. Kind of self-evident. Our franchise tag allows us to filter to just franchise cases if you're working on a franchise case.

Karen Chadwick ([08:32](#)):

As you can see, the rate of franchise case filings has been pretty steadily decreasing since 2011. However, in 2020 there was a rather significant drop in franchise case filings. That may at least in part be attributable to the fact that many franchisees are in the restaurant and hotel industry and were unable to operate for most of the year in 2020. Case, do you have any other insights as to why case filings in the franchise area might be declining?

Case Collard ([09:02](#)):

Well, one of the things that I think about this, Karen, is something I see with my franchise clients. They learned a lesson, right, at the last dispute and they update their franchise agreement, or they learn the lesson of other franchisors that get into disputes and try to update their franchise agreements to make things more clear and get out in front of those things. The overall trend at least brings to my mind, are franchisors getting a little more sophisticated?

Case Collard ([09:37](#)):

Are they getting out in front of some of these disputes and able to head them off without litigation? Perhaps, because we've ended up now over the last 10 years almost cutting it in half here on the number of franchise agreement case filings. So it'd be interesting to see how this maps to the broader business data about what's going on with franchises. But without that background, there are a number of explanations, but one could be that franchisors are getting a little more savvy.

Karen Chadwick ([10:12](#)):

Great explanation Case. It'll be interesting to look at this chart in another year or two. This is some new data that we've been developing at Lex Machina. This slide shows case filings for COVID cases since Q1 2020. When we talk about a COVID-19 case, what we're talking about is a case where either the dispute would not have occurred but for COVID, or a case where COVID has either exacerbated the damages or given rise to a defense. Currently there are over 1,400 COVID related cases in the contracts module. I think that there's been a lot of focus on what's happening with the COVID cases. Case, have you encountered any of these cases in your practice?

Case Collard ([11:03](#)):

I have. I'm in Colorado and I get a docket report every day. Certainly right around that time where you see the spike, Q2 2020 and into Q3, I saw a lot of those ski pass cases showing up every day where people were saying, "Well, I wasn't able to use my ski pass. The resorts got closed." That was certainly a big deal in Colorado for Colorado. That's where the pandemic started because so many visitors are here in March taking advantage of ski season. So I think that's one type of case, a COVID-related case, that obviously would not have a huge damages number unless it was a class action. So all COVID related cases are not going to be the same. There are going to be some canceled events canceled. You know, my tickets for this event. They're on a little bit smaller scale.

Case Collard ([12:02](#)):

But then obviously that could lead to huge force majeure issues. If you aren't able to staff a construction project and get behind because of a COVID outbreak, that could be a many multimillion dollar issue. So I think some of those old issues that maybe were a little less central in litigators' minds that come up in contracts, kind of niche things that you see only every once in a while like force majeure, maybe needs to come back to the forefront a little bit in these cases. But this graph doesn't surprise me. Huge spike and then obviously it's leveled off. But as much as we all want the pandemic to be over, it's not, and so it doesn't surprise me that we're still having a steady clip of COVID-19 case-related filings.

Karen Chadwick ([12:56](#)):

Good point. It's going to be interesting to see is how long that tail is of COVID cases in the future. This next slide is a high-level view of the most active districts and judges by cases filed from 2018 through 2020. It's not a surprise that if you look at the most active districts, Southern District of New York, Central District of California, and Northern District of Illinois, those aren't surprising districts. They're financial centers with a lot of contract activity.

Karen Chadwick ([13:32](#)):

Similarly, it's probably not surprising that five out of the top 10 most active judges are in the Central District of California, and other active judges are in areas where we expect a lot of contract activity. One feature of Lex Machina's analytics is that you can focus on the cases in a particular district or before a particular judge. Case, does that information play a role in your litigation strategy or preparation?

Case Collard ([14:03](#)):

Definitely. This is what I was getting at at the beginning in response to Neil's question. Is that having this information takes some decisions that can feel very uncertain and at least gives you some data to put behind your recommendations to the client. A lot of the decisions around venue and judge, to the extent you have a decision about a judge which you may not, are balancing. Right? Because it's good to have a judge that is busy and is experienced.

Case Collard ([14:37](#)):

It's bad to have a judge that's so busy that your case takes much, much longer than you want it to take to get to trial. I've experienced it, and there are lots of instances of a case taking three, four, five years to get to trial because summary judgment motions are sitting and the trial calendar is too backed up. So all of those things are a balance. But these tools of knowing how busy certain jurisdictions are, how busy certain judges are, certainly this is the type of data that you really want so that you can make more informed decisions.

Karen Chadwick ([15:17](#)):

Thanks Case. I like that insight into how to use that information. The next two slides have some high-level information about who are the most active plaintiffs' and defense firms. Here we're looking at the most active plaintiffs' firms and where they practice. Interestingly, you can see that the top plaintiff firm is only practicing in five districts, unlike most of the other most active plaintiffs' firms who are practicing in lots of different districts. If we take a look at the most active defendants' firm we're looking at the same information as we did at the plaintiffs' but-

Karen Chadwick ([16:03](#)):

We're looking at the same information as we did at the plaintiffs. But what I find interesting about this is that top two most active defendants firms, Greenberg and Gordon Rees, are also in the top five most active plaintiff's firms. Again, these are big picture trends about what law firms are doing, but Case, does this counsel data have value when you use Lex Machina?

Case Collard ([16:27](#)):

That's a really interesting question, Karen. And I want to point out that I think this both shows the utility of the data, and then also the utility of having someone who is experienced in these analytics to guide you through it. Because when we were prepping, I looked at this data and I said, "I don't know. Big law firms file a lot of contract cases." That's what I see. And I said, "I don't really know these firms, this particular plaintiff's firm. That's not one I've come across." And Karen, you were able to match what's happening with that plaintiff's firm to what's happening with the client, and that they have a client that has a lot of contract activity and so that's driving their number very high, even though they're a smaller firm than these other firms. And I thought, "Oh, okay, that's actually very interesting that you're then able to match that up, and that would be super useful to me if I found myself on the other side of that firm."

Case Collard ([17:23](#)):

Because I would be able to look and say, "Oh, this firm has the game plan for this case because they filed a hundred of them on behalf of this client," even though I don't happen to know that firm, would be very helpful context as I would be advising my client. Because I can say that we're not going to necessarily be on their game plan. We can have our own plan for the case, but they are going to be reluctant to deviate or make special exceptions for our case because they are doing this a hundred times a year or whatever it may be. So regardless of where that shows up, I mean, that showed up with the one of the firms on the plaintiff's list, but that type of insight to say, "This firm files a ton of cases of this type for this client," is a really valuable insight that you maybe don't get that every time. But if you do get it, you look like a rockstar because you're like, "Oh, we figured out what's going on here, that this case is part of a group of much larger cases."

Karen Chadwick ([18:31](#)):

Thanks. I'm going to move on here to some motion metrics. And this is something that I think is particularly interesting to practitioners. And I know that you mentioned timing when you were talking about how you use Lex Machina, but this first slide here is looking at the timing of the advancing contract cases with respect to cases that terminated in the last three years. And so our motion metrics tell you on average in contracts cases, well, this is how long it's going to take to reach a certain event in a case. So, if you look at this first box plot, 565 is the median for how many days it takes for a contract's cases to reach summary judgment. 847 is the median for when cases reached trial. And overall, 267 days is the median for when cases overall in contracts are terminated.

Karen Chadwick ([19:37](#)):

But compare that with this next slide, which just focuses in on one jurisdiction. And in this case, I picked the Northern district of Illinois. And you can see that it is taking significant longer in that jurisdiction to reach summary judgment and to reach trial. So, it's about three months longer in that jurisdiction for the median case to reach summary judgment or trial, as opposed to on average in the country. Case, I know that you use timing metrics in your practice. Do you find this useful to go by a jurisdiction or a particular judge?

Case Collard ([20:19](#)):

Yeah., I guess I would say I look at these slides and I see dollar signs, which is pretty important to both the firm and the client. And what I mean by that is, a longer case costs more, and this is a helpful budgeting tool, and the more detailed you can get, the better. And so you may do a budget knowing you're going to be in the Northern district of Illinois based on these numbers, but then once you get assigned to a judge you can run the numbers again, and you can revise your budget to say, "We're going to be able to probably reduce the budget because this case is going to move more quickly." And it's not a hard and fast rule, but it is just been my experience that the work of litigation, sort of like a gas, expands to fill its container.

Case Collard ([21:08](#)):

So, if you've got one of these five-year trials versus a trial that falls in the box, call it three years, even if the amount in controversy is the same, it's going to cost more to litigate that over five years than it would over three. And so I think that that's really important data because budgeting, it's one of the harder parts of my job. Because clients expect that budget to be right on, but litigation's inherently uncertain. It's really hard, especially at the outset, to get a good bead on what that budget is. This helps. And this helps to, when you need to make adjustments, because you can say, "This budget was a two-year budget. We got to take it to a three-year budget or a five-year budget or a four-year budget based on what we think is going to happen." And that gives you an ability to explain in a really understandable way, backed by data, to a client, why a budget is changing.

Karen Chadwick ([22:16](#)):

Case, it's great to hear how this tool is used in actual practice. Let me move on to case resolutions. This is some interesting culmination of data that we have. So, we call this the doughnut. It tells you how cases in the contracts module are terminated. So, if you look on the right-hand side, you can see that the vast majority of cases are settled. 62% of the contracts cases that terminated during that three-year period were settled. Another significant portion of them were resolved by procedural resolution. And that's represented in the doughnut by this green part. I think one of the other most interesting parts of our case resolution analytics is that on the left-hand side of this chart, you can see how claimants win and how claim defendants win.

Karen Chadwick ([23:13](#)):

So, on the left-hand side, you see that claimants win 13% of the time. Yay claimants. But how do they win? This chart also shows you that 6% of the time they're winning on default judgment, 3% on consent judgment. Claim defendants, on the other hand, only win 4% of the time, and they are not winning, really, much on default judgment or consent judgment. We see that they're winning on judgment on the pleadings and summary judgment. Let me just show you one more thing. I know that lay people who are not lawyers think that we all go to trial all the time, but how often do claimants win on trial? 1% of the time over this three-year period. How often did claim defendants win? Well, it didn't even reach a full percentage point.

Karen Chadwick ([24:03](#)):

... defendants when... Well, it didn't even reach a full percentage point. Case is this type of analysis and summary of how cases are resolved useful in your practice?

Case Collard ([24:13](#)):

So I advise clients... Well, let me go back. Certain clients are very savvy. They have legal departments that multiple lawyers that have been in outside practice and maybe are trial lawyers. And in that, we don't spend a lot of time talking about, a lot of cases are likely to settle because that's the most common outcome, but

sometimes you have a client that maybe has no in-house legal counsel, you're working directly with the CEO or a COO, and you really do need to talk to them about how litigation works. And so then talking about, look 95% of cases settle. That's my rule of thumb or what I would say. And I know that the settlement number here is 62, but I would say when I say that, that 95% of cases settle, I'm saying 95% of cases don't go to trial and that ends up being true. It looks like even higher than that. Maybe 98% of cases don't end up going to trial, which is really a high number.

Case Collard ([25:15](#)):

And then I also think, if you factor out how you highlighted, Karen, the default and consent judgements and look at claimant wins versus defendant wins, it's almost equal. It's about 4% each. And so I think that this sort of data is actually really useful. A little sort of how I practice is that I do go to trial. I am a trial lawyer and I think that that is important, an important distinction because there's lots of litigators who maybe don't go to trial very frequently and don't have that tool in their toolbox. But the best way to get to a good settlement is to prepare your case for a strong case for trial. And so this data kind of helps put that together to say, why am I doing this? Why am I preparing? You may have a client say, "You told me I'm not going to trial. Why do I have to prepare this way?" And so you have to tell them, "No, you want to have a favorable settlement. You want to have a favorable outcome on one of these motions, a summary judgment or judgment on the pleadings. Then you've got to prepare as if you're going to trial. That's how you do it."

Case Collard ([26:35](#)):

But this is really helpful to me to put some of those different pieces together about how a case might terminate, why you're putting together a good summary judgment motion. That's a great way to win, for claimant or for a defendant, why you're preparing for trial, all those things. I think it helps to me, provide that context around the advice we give clients.

Karen Chadwick ([27:00](#)):

Thanks, Case. Let me just quickly show you these next two slides. These slides summarize what our analytics regarding findings in the contracts vertical, the contracts database. So these are the contracts findings, and not surprisingly, most of the findings with respect to contract and contract breach have to do with contract and contract breach, but maybe a little bit surprising is that when contract breach is found, almost two thirds of the time that's on default judgment.

Karen Chadwick ([27:38](#)):

This next slide shows us that there are still a significant number of findings with respect to contract breach and no contract breach made at the summary judgment stage. We also have tort findings that are made with respect to the contracts case data set and not surprisingly, the two most common tort findings are either tortious interference findings or fraud findings. And again, if tortious interference is found, most of the time it's found on default judgment and similarly fraud and misrepresentation is most often found on default judgment. And again, many of these findings are also found at the summary judgment stage. I know this is really big picture information, but does this inform you about your practice at all, Case?

Case Collard ([28:43](#)):

Oh, sure. I think it reminds you of the tools at your disposal. Are you really thinking of motion for judgment on the pleadings? Are you crafting a strong summary judgment? There's a lot of ways to win and you have to be sure they're all at your disposal.

Karen Chadwick ([28:59](#)):

Thank you. Let me just move-

Neil Magenheim ([29:02](#)):

Karen, I do want to be sensitive to the time here, so maybe we just go through the damages quickly and then we can wrap up.

Karen Chadwick ([29:07](#)):

Okay. Last thing that I wanted to say is that we do have a summary of damages over the last three years. I think it's important to note that contract damages in the last three years, for cases terminating in the last three years are over \$6 billion. One other significant thing is that pre-judgment interest is over a billion dollars after contract damages and class action settlements. That is the largest body of awards. I think that probably speaks for itself. We could move onto Q and A.

Neil Magenheim ([29:43](#)):

There were a couple of questions that came in that, unfortunately, we're not going to have time to address here. We'll follow up with the attendees on those questions, Karen, if that's okay. Maybe we could just move on to, request the report slide. There you go. So a little bit more housekeeping here. We're putting the final touches on our contracts report. The report will be out on September 8th. You will get a follow up email with a link to this webcast, the transcript, et cetera. So please stay tuned for the report when it gets officially released on September 8th. And all we ask for in return is a little bit of time with our legal analytics experts, just so we can take a look at Lex Mach and through the lens of your cases. Karen and Case did such a great job looking at the data from a very high level, but let's take an opportunity to dig in on those entities that matter to you, the judges, the venues, the parties, the law firms, et cetera.

Neil Magenheim ([30:44](#)):

Case, I can't thank you enough. I have a whole page of notes here. Look like a rockstar. Use data to clear up uncertainty. You were a rockstar. You crushed it for us, Case. Thank you so much. We really appreciate that. Karen, great job on the report and thank you to our audience for spending some time with us together today. This does conclude the Lex Machina contract reports webcast. Thank you.