



False Claims Litigation Report

Join us for a 30-minute recorded webcast, where our panel will be discussing the latest litigation trends under the False Claims Act and related state law claims. Lex Machina is releasing its 2021 False Claims Litigation Report, the first in this exciting new practice area.

Brenna Jenny, Partner at Sidley Austin, and Laurence Freedman, Member at Mintz, will join Lex Machina's Ellen Chen, Legal Data Expert and report author, and Neil Magenheim, Director of Client Relations at Lex Machina. During the webcast, they will discuss the latest findings and trends in False Claims litigation, including top law firm and party data, timing metrics, case resolutions, damages, and more. The speakers will show how using litigation analytics can enhance your practice when litigating False Claims disputes.

Speakers:



Brenna Jenny
Partner
Sidley Austin



Laurence Freedman
Member
Mintz



Ellen Chen
Legal Data Expert
Lex Machina



Neil Magenheim
Client Relations Director
Lex Machina

Neil Magenheim (00:00):

Hello everyone, and welcome to the Lex Machina false claims litigation report webcast. Before we get started, two quick housekeeping announcements. One, this webcast is being recorded and two, we will be taking questions and answers at the end of our session. So please use the Q&A feature at the bottom of the Zoom screen.

Neil Magenheim (00:25):

By way of introduction, Lex Machina is legal analytics. Legal analytics help our clients win. So you'll see here in a second, the various companies that use Lex Machina, most of the most recognizable brands in the world use Lex Machina to make more informed data-driven business decisions to help them identify the best outside counsel to work with, to help them to figure out how to inform their litigation strategy and their case strategy, understand things from a budgeting perspective.

Neil Magenheim (00:58):

Hundreds of law firms use Lex Machina in a similar capacity, to make those more informed data-driven decisions that help them win, help them win business by using data to demonstrate their areas of expertise, which ultimately helps them differentiate their service offering, and also use data to optimize outcomes on different types of cases, on behalf of their clients and their firms.

Neil Magenheim (01:21):

My name is Neil Magenheim. I'm the Director of Client Relations at Lex Machina, and I'm really excited to welcome our guest speakers today. Star-studded panel here, we have Brenna Jenny. Brenna is a partner at Sidley Austin and Brenna previously served as the principal deputy general counsel at HHS, and the chief legal officer for the Centers for Medicare and Medicaid Services.

Neil Magenheim (01:47):

Prior to serving at HHS, Brenna also worked in the civil division of the Department of Justice and in both roles, she worked on false claims act matters. At Sidley, Brenna leverages her government experience to represent clients in the healthcare industry and government enforcement actions, internal investigations, and compliance reviews. Brenna, thank you so much. We know you're super busy. We really do appreciate your time and insight today.

Neil Magenheim (02:13):

Also, joining us is Larry Friedman. Larry is a member at Mintz Levin. And Larry has defended and enforced false claims act cases for 30 years. In private practice for the past 15 years, Larry has defended clients in FCA investigations and litigation and advises on related internal investigations and compliance.

Neil Magenheim (02:33):

Prior to his defense practice, he was an assistant director and a trial attorney in the civil fraud section at the DOJ, where he handled and supervised hundreds of qui tam cases and other FCA cases, including high profile cases, such as operation lab scam, Columbia HTA, HealthSouth, various pharma cases and other multi-district complex FCA cases. Larry also led DOJ's efforts to report annually, the statistics on new filings, interventions, and settlements.

Neil Magenheim ([03:05](#)):

Finally, rounding out the panel here is the Lex Machina false claims litigation report author and legal data expert, my friend and colleague, Ellen Chen. Ellen is a legal data expert here at Lex Machina in the areas of false claims and tax. Prior to joining Lex Machina, Ellen worked as an eDiscovery attorney and a specialty tax consultant. Ellen has a JD from Loyola University New Orleans College of Law, and a BA in psychology and sociology from the University of Texas in Austin.

Neil Magenheim ([03:35](#)):

Again, all three of you, thank you. This truly is a star-studded panel. We're looking forward to a very engaging conversation. And with that Ellen, I turn over to you.

Ellen Chen ([03:45](#)):

Thank you, Neil. So on this slide, I wanted to show the case filing trends from 2011 to 2020. Lex Machina defines false claims as a publicly released, unsealed case in which the federal or state government or later on behalf of the government, alleges a violation of the False Claims Act or an equivalent state and equivalent false claim statute. Hence why we've named this practice area false claims as opposed to False Claims Act.

Ellen Chen ([04:10](#)):

Worth noting, we've excluded pro se cases from our case set. So with that, just bear in mind that this chart is dynamic and we expect the numbers for more recent years to rise, as more qui tam cases are unsealed and filed into public record. As former government officials, what trends do you anticipate seen with the new administration, Brenna?

Brenna Jenny ([04:29](#)):

I do expect that FCA cases are going to increase over the next few years. And in fact, we do know from statistics DOJ releases that they were up in 2020. So what you see here, is really just the tip of the iceberg because of the reason Ellen mentioned, that time lag. FCA cases are dominated year over year by the healthcare industry. It's the favorite target of DOJ. And now Secretary Bissera was very active in healthcare enforcement in his prior role as a California AG. So I expect that we'll see him bring that experience to bear and actively work with DOJ to cultivate healthcare False Claims Act cases.

Brenna Jenny ([05:07](#)):

We know that the longer an investigation drags on, the less likely companies are to emerge without a settlement. And so in the current environment, it's going to be really important, more than ever, to be strategic and assertive in raising all of your best defenses as early as you can with the government.

Ellen Chen ([05:22](#)):

Thank you for sharing that Brenna. Larry, do you anticipate something similar?

Larry Friedman ([05:27](#)):

Yes, I do. And I agree with Brenna. I expect an uptick in both qui tam filings by relators and by DOJ government litigated cases. In particular, in the second category, government is actually finally effectively using data mining to initiate cases on their own that aren't triggered by qui tam filings.

Larry Friedman ([05:53](#)):

On the qui tam side, I believe the relators bar anticipates a receptive justice department, an aggressive justice department and a receptive agency to their allegations of the potential fraud. So I think on both sides, there will be an uptick in filings and reactive for years.

Ellen Chen ([06:16](#)):

Great. Thank you for sharing that insight. So on this next slide, just wanted to share with you the most active districts by cases filed from 2016 to 2020. Down the center, we have the number of cases filed and then to the right, we have the percentage of all false claims cases filed in this time period. We see that the middle district of Florida, is on the top of the list with 191 cases. Larry, is this consistent with what you've seen or are there any surprises on this list?

Larry Friedman ([06:45](#)):

Yeah, thanks. So the list is pretty consistent with what most of us in the bar have thought had been the most active districts over many, many years, with some notable districts. So it's a bit of a surprise to me to see the middle district of Florida, which I would consider an active district. But it's interesting to me that it's case numbers are skyrocketed and involve any other one. [inaudible 00:07:14] is really what's behind that.

Larry Friedman ([07:16](#)):

Interestingly, Massachusetts, which is obviously a very active district and has been for many decades, it's not on the list. I don't think that indicates they're less active. I think it's just a function of numbers, maybe they have fewer bigger cases. But those two jump out at me a bit, in otherwise pretty much the usual districts. Illinois, I know they're not usually thought of as active, but they are. And the southern district used to be not so active on the civil side of healthcare [inaudible 00:07:54] cases. And that has changed over the years, very, very aggressive [inaudible 00:00:07:58] there. So that that's my quick observations about the top eight or 10.

Larry Friedman ([08:03](#)):

That's my quick observation's about the top eight or 10 districts.

Ellen Chen ([08:06](#)):

What about you, Brenna, are there any surprises on the list for you?

Brenna Jenny ([08:10](#)):

I was also surprised not to see district of Massachusetts on the list. And I think I agree with Larry, it may be a function of quality over quantity. The district of Massachusetts was one of the earliest drivers of false claims act litigation. They pioneered the use of the false claims to police off-label enforcement by drug manufacturers, and they really consider themselves and I think rightfully so some of the premier prosecutors in the country on healthcare fraud and abuse matters. So I think that they are still getting in some of the big cases, but they don't have as high of a volume because I think the type of cases you see in the middle district of Florida often relate to fraud kind of from smaller, probably defendants than what you see on average in the district of Massachusetts targeted at a very significant senior population there. And there are pros and cons to being in one of these hot areas.

Brenna Jenny (09:04):

I think it can be a significant benefit if you're dealing with sophisticated prosecutors who are used to healthcare fraud and know the false claims act like the district of Massachusetts, they're going to cut to the issues right away. They're not going to get distracted by side arguments, but the downside is if you're in a place like D Mass or the district of Pennsylvania, those prosecutors are probably going to find an issue if there is one. So I think knowing whether a district is a hotbed area for false claims act litigation can feed into your strategy and should feed into your strategy when you're responding to a government subpoena.

Ellen Chen (09:40):

Great. Thank you for sharing that. So on this next slide, we are looking at the most active plaintiff law firms by cases filed from 2016 to 2020. So we have Phillips & Cohen as number one, then Brown LLC, then Mahaney Law. As expected, there are a number of whistleblower firms listed here, but there also seems to be quite a few number of plaintiff, just general plaintiff litigation firms and employment firms. Brenna, why do you think that is?

Brenna Jenny (10:08):

I do think there's a bigger employment firm presence on this list, more so than you would've seen even a decade ago. And I think that's because employment law firms are building up their whistleblower practices. It's a supplemental practice. So when someone walks in the door with a retaliation claim, they're starting to build up that capability to assess should this just be a retaliation employment issue, or should we also work with this person to file substantive claims under the false claims act for violations relating to fraud because that's really where the money is too for the law firms.

Ellen Chen (10:44):

What about you, Larry? Do you have any thoughts?

Larry Friedman (10:48):

Yeah. I find this list very interesting. To me, there are three groups of firms. One is specialized [inaudible 00:10:59] like Phillips & Cohen and others. Second and granted there's much more presence of general of employment law firms that have got the news area. But the third group is I think general plaintiffs firms bring a lot of different claims plaintiffs, maybe class actions and have also gotten into this area. And so I think it's interesting because I usually think of just [inaudible 00:11:26] firms, the specialist firms as the ones driving the filings. But that clearly is not the case. There's this three buckets of firms and lots of ones that aren't specialized [inaudible 00:11:38] firms. In cases, which I, granted that could affect substantially how to deal with the leaders council, they become an important part of the litigation. They have very, very different perspectives.

Ellen Chen (11:52):

Great. That's really interesting about employment firms starting to specialize in QTM litigation. Thanks for sharing that. And just wanted to briefly show the most active defendant law firms by cases filed in this timeframe. Just wanted to note that there are some well known litigation firms on the defendant's side.

Ellen Chen ([12:13](#)):

So on these next three slides, I wanted to talk about time to events for false claim cases that terminated in 2016 to 2020. The DOJ's investigatory period from the filing of the sealed [inaudible 00:12:25] case to the unsealing and filing into public record is included in these time analytics. We observed that most clerks backdated filings to the original filing date of the sealed complaint.

Ellen Chen ([12:40](#)):

So here I just wanted to show that out of the 3000 terminated cases in this timeframe, 239 reach summary judgment, whereas a mere 27 cases reach trial. And this next slide has the median time to event for these events. So for terminated cases, for the median it's around 822 days, compared that with consumer protection cases, usually that the median for that is 155 cases. So you can see for false claims, it's significantly longer because of the investigation period presumably. For cases that are reaching summary judgment, the median days to that event is almost four years. And then for the trial, the medium time to event for a trial is over four years. So Brenna, do you think the filing under seal requirement is the only factor behind this timing?

Brenna Jenny ([13:35](#)):

I think it's doing the vast majority of the work. We know, for example, that 40% of cases investigated by DOJ are still being investigated two years after the relater files this complaint. So you can really think of chopping off your timeline, chopping off those first two years. And it's incredibly unusual in most other areas of law to have a total standstill for the first two years of the life of a matter. And I think it really highlights how unique false claims act litigation is because you have this whole phase before the court facing litigation where you're essentially engaging in soft litigation negotiation with the government. And that in a lot of ways is the most important phase because whether or not the government intervenes in the case at the end of the matter significantly drives the likelihood of whether there's going to be a settlement and the size of the settlement at the end of this process.

Ellen Chen ([14:28](#)):

Larry, do you have any further thoughts to this, especially with the small amount of cases going to trial, any thoughts of that or anything else in general?

Larry Friedman ([14:36](#)):

Yeah. So just briefly, I find these very interesting statistics and I haven't seen them anywhere but from you guys, so start at the bottom, the termination, I think reflects that by and large most cases are concluded at the end of a investigation and a sealing including can be a settlement or declination and dismissal. And looking at this, the two and a half years determination makes sense to me because it's a lot of cases that again are unsealed with dismissals and or settlements. And then it looks like there's another, if you takeaway sort of a two year seal period or two and a half years, another couple of years of litigation to get to summary judgment or maybe three years to get to trial, which I think just reflects that these are complex litigations. And it's very useful to know, I didn't know before seeing these statistics that it's sort of a two to three year or average time period from unsealing to trial. It's useful to know. It makes sense to me.

Ellen Chen ([15:47](#)):

Great. So speaking of settlements here, we have the Lex Machina resolution chart that shows breakdown for all resolution outcomes in 2016 to 2020. I know this is a lot of information, so I just wanted to highlight a couple of points. So on this next slide, we'll see.

Ellen Chen ([16:03](#)):

Wanted to highlight a couple of points. So, on this next slide we'll see that, much like other Lex Machina practice areas, the majority of false claim cases resolve as stipulated dismissal or voluntary dismissal, which we classify as likely settlement. That's 77% of cases. However, procedural dismissals, which we define as court dismissing the claims because of a procedural defect, such as failure to prosecute, it's 7% with 200 cases and that's higher for this practice area compared to other practice areas.

Ellen Chen ([16:32](#)):

Also wanted to show that for the cases that do end up resolving on more substantive damage types, claim defendants win twice as much as claimants. Brenna, what do you think accounts for the notable amount of procedural dismissals in this practice area?

Brenna Jenny ([16:49](#)):

I think in a number of these cases it's the relater walking away from the case. I see this is my practice sometimes. Following the government's declination, decision not to intervene, the relater and his counsel sometimes try and get a small cost of litigation settlement out of the defendant. But if they ask for too much, the defendant calls the bluff. But once the relater's council sees the defendant preparing for litigation or perhaps even sees the motion to dismiss, they decide they don't want to invest further resources in the case and they withdraw.

Ellen Chen ([17:20](#)):

That makes sense. Larry, does anything from this chart stand out to you? Anything you want to comment on?

Larry Friedman ([17:27](#)):

Yeah, again, this is incredibly interesting. Just two points. The big green swath, likely settlement that you mentioned or dismissals or settlements ... Excuse me. I'll turn that off. That corresponds with my experience and statistics over the years that the majority of cases are settled or dismissed, again at the time of unsealing, and those are in the likely settlement. I would just consider those all closures without litigation [inaudible 00:18:05] settlement and that makes sense because it's big. [inaudible 00:18:08] I'm fascinated with the claim of the litigations, defendants do well [inaudible 00:18:15] win substantially more than the government relaters. To me that reflects that defendants, my clients, Brenna's clients, typically very reluctant to litigate if it's possible to resolve things. But the ones we litigated we probably, with our clients, selected [inaudible 00:18:36] very strong defenses and this bears out that litigated one [inaudible 00:18:43] district. But those are relatively rare, but I'd love to see that the ones with litigated defendants as well [inaudible 00:18:43].

Ellen Chen ([18:43](#)):

Great. Thank you for sharing your insight. And so on this next slide I wanted to highlight just some of the liability findings that we provide for cases, such as false and fraudulent claim liability, false statement

liability, this is on the left side. And then across the top we have the judgment events. Just wanted to point out for cases that do have substantive findings there's a significant amount of judgment on the pleadings from claim defendants. For both of our speakers is this data relevant to your own experience in practice, Larry?

Larry Friedman ([19:32](#)):

Yeah. This is, again, incredibly interesting and I think it shows that the defendants do awfully well at the motion dismiss stage looking at your highlighted box there, extremely well at getting matters dismissed at that stage. And then the far right column is incredibly interesting as well, which is even going to trial the defendants generally do well. So, again, to me it means that of the cases that get litigated through whatever selection process that is, the defendants tend to do well. The cases are settled obviously there's all this pressure is resolve things and most go that way, but this is pretty interesting. I've never seen anything quite like this. Appreciate it.

Ellen Chen ([20:21](#)):

Thank you. Brenna, do you have any thoughts as to this chart?

Brenna Jenny ([20:25](#)):

Yeah, I think this is a reminder that while the False Claims Act poses its own unique hurdles for defendants, there are some potential opportunities to win on the pleadings and that comes in the form of the special defenses the False Claims Act offers such as the public disclosure bar which says that relaters can't bring cases that are based on previously disclosed information. Or the first to file bar which says that while basically a similar case is pending another relater can't bring the same case. And I've had a lot of success reasoning those arguments at the motion to dismiss stage. And the good thing is they're not particularly fact intensive and to the extent that the public disclosure, for example, is, judges generally allow a lot of those facts brought in through judicial notice.

Brenna Jenny ([21:09](#)):

And so it's a reminder to make sure if you have a False Claims Act case that's been unsealed, in this day and age with the internet where there's so much information around, 10 years ago it was a lot harder to raise a public disclosure argument, for example, and win on the pleadings. But now you can google it and there's probably a news story of someone doing something similar that gives you a basis to mount one of those challenges. So, just a reminder to make sure you're being creative in your legal defenses even at the pleading standard.

Ellen Chen ([21:37](#)):

That's very fascinating that's become more easily detected. It's more commonly seen with the modern day technology and accessibility. I do want to mention that our product does offer analytics on public disclosure and first to file bar. So, let's go ahead and move on to the last group of slides, and this is damages by type awarded.

Ellen Chen ([22:01](#)):

So, here at Lex Machina we do like to break down damages into a number of different types. The reason being false claims can result in a myriad of different damages and we wanted to be able to provide as much granularity as possible when it comes to these large amounts awarded. Just wanted to draw attention to the fact that there is a significant amount being recovered in restitution damages through

consent judgments. And also wanted to highlight the very tremendous amount of treble damages. We expect it to be large because it is a punitive type of damage, but even for default judgments it's just a very, very incredible amount. Brenna, do you have any thoughts as to the damages breakdown here?

Brenna Jenny ([22:42](#)):

What really jumped out at me is the amount that's not just the actual damages but the treble damages, which refers to the multiple that is being applied on top of damages. The False Claims Act authorizes up to treble damages, and there's almost always some damages multiple that's applied. And that's the really devastating part of the False Claims Act for defendants, and it really drives the pressure to settle. Because when you're negotiating or engaging with the government you can come up with creative damages models and help both sides get to resolution that they feel like is a win. But you lose that ability and that control when you go to trial, which is why it's such a difficult decision for most companies to actually litigate one of these False Claims Act cases.

Ellen Chen ([23:26](#)):

Great. Thank you for sharing. Larry, do you have any insight as to these damages?

Larry Friedman ([23:32](#)):

Yes. This is interesting and it does highlight the risk of going through to judgment here, as Brenna mentioned, it's the case the statute makes treble damages and penalties mandatory. There's no discretion about this, mandatory in the event of a judgment against a defendant. The amount of the penalty has range, but the fact of a penalty and more devastatingly the treble damages is-

Larry Friedman ([24:03](#)):

Or devastatingly, trouble damage is mandatory. So it's a huge lever for the government or relaters in terms of going to trial. I'm a little surprised the penalties aren't even forward through here because healthcare cases like defense procurement cases, where the act being in 1986, the penalties can be tremendous and because a number of reimbursement claims and even dwarf damages. But the trouble damages drives the settlement discussions and provides risk for our clients as well.

Ellen Chen ([24:41](#)):

Great. Thank you so much for sharing that. And so this concludes the presentation from the report. Wanted to turn it over to Neil.

Neil Magenheim ([24:51](#)):

Yep. Great job, Ellen. Thank you, Brenna and Larry, for all of your insight. It spurred some interest in the audience here. We have a couple interesting questions that I'd like to, I think maybe ask Ellen this first one and there's a couple other ones we'll get to for Brenna and Larry as well. Isn't it true that many voluntary dismissals are due to relaters decision not to litigate after the government declines, whether or not they get an actual settlement. So what's the basis for assuming that a volunteer very dismissal is a likely settlement?

Ellen Chen ([25:26](#)):

So for purposes of our analytics, we have included voluntary dismissals and stipulated dismissal into one umbrella, just because again, like we don't know necessarily the reason for dismissal and whether there

was an exchange of monetary settlement. So for cases where it just shows that the court is dismissing because of a stipulated agreement between the parties or the plaintiff has just voluntarily dismissed, we go ahead and just annotate that in our product as likely settlement, unless there's any sort of discussion of liability, admission of liability and the consent judgment. Anything outside of that, we go ahead and just, we don't want to state anything that's not true in terms of what happened and the outcome of the case.

Neil Magenheim ([26:18](#)):

And we could follow up as well with the person that asked a question to dig in a little deeper if we like. Another question that came in and maybe we'll start with Brenna is how is this type of data applicable to your practice? Like how can you see it bringing value to your practice Brenna?

Brenna Jenny ([26:39](#)):

I think a really helpful use is to be able to understand the specific false claims act decisions of your judge. One of the first things that I always do when I get a new false claims act case that I'm litigating is understand which judge it's been assigned to. And then how they've come out on false claims act cases, what cases are tend to be, or which arguments tend to be winning arguments before them.

Brenna Jenny ([27:06](#)):

For example, some judges really like to focus on the absence of any submission of a false claim, some really like the 9B heightened pleading standards. So just figuring out what do they view as the big vulnerability is really important as well. And then looking at the particular cases more broadly in that jurisdiction and understanding what have other judges found, how are they interpreting the key circuit court cases is also really important. I think more and more over the years as false claims act litigation has become such a big business, is we're seeing a higher volume of cases litigated and thus we're seeing more divergent approaches and circuit splits in terms of how courts approach different issues such as materiality. And so understanding the state of play on those really important issues is also really key use for this.

Neil Magenheim ([27:55](#)):

That's awesome. Larry, I'm going to pass it over to you quickly here. We have a couple minutes left. Now, one thing that Brenna just mentioned, I just wrote it down, is big business. And generally speaking, I think we all live in a very data driven world right now. When I hear the term big business, I think about dollar signs, I think about what's at risk, what's at stake, how important these types of matters are, what's your opinion on that, Larry? Anything you'd like to expand upon?

Larry Friedman ([28:21](#)):

Sure. I think it's an unfortunate development in this area of law that over the past number of years, and in fact, decade or more on the plaintiff's side, relater side, it actually has become big business. And what I mean by that is typically, or maybe just often relaters law firms, relaters have investors, have different splits among firms, it's not transparent to the government or defendants. And so literally it's big business in terms of people are investing in these matters and seeking a return.

Larry Friedman ([29:01](#)):

I think that's inconsistent with our conception of really how the adversarial system works. I think it's unfortunate. I think it's not transparent. So it's very big business on that side. Even without that,

because of the small number of very large awards and they're not that many of them, but the small number of very large awards are a beacon and attract, not really a business matter, but attract a lot of people who think they have allegations of fraud and some might have merit and lots typically don't and that's another just huge driver here. And that's really the way the act was supposed to work, which is monitor incentives are supposed to incentivize hopefully good allegations of fraud proper insiders, and that happens a bit and doesn't happen more often.

Neil Magenheim ([29:54](#)):

That's great. I wish we could go on and on. So much unique and powerful insight from both Brenna and Larry. Thank you. Ellen, maybe just move on to the next slide real quick. Ellen and our team of legal data experts have done a fantastic job compiling this report, making it really useful, making it really impactful for our audience. How do you go ahead and get it? You can visit www.lexmachina.com. All we have is a small ask in return is that our legal analytics experts spend a few minutes with you, walk you through Lex Machina, through the lens of your cases, your clients, the combinations of criteria that matter most to you. And in return, we'll share the report. Again, wish we have more time. Larry and Brenna, I can't thank you enough. Super busy, but amazing job today. Ellen, thank you for putting this together and driving the conversation. Thank you to our audience for joining us. And this does conclude the Lex Machina 2021 False Claims webcast. So thank you everyone.