New 2020 Product Liability Litigation Report

In this recording, Owen Byrd, Alicia Donahue, and Ron Porter presented jointly by Lex Machina and PLAC, releasing Lex Machina's **New 2020 Product Liability Litigation Report**.

Lex Machina's Owen Byrd moderated a discussion with report author Ron Porter, Alicia Donahue from Shook Hardy & Bacon, and Gary Wolensky from Buchalter. They analyzed federal product liability litigation trends and offered insights about judges, parties, lawyers, and law firms.

Speakers:

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Gary Wolensky
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Owen Byrd ([00:05](#)):

Hello. Welcome to today's webcast on product liability litigation trends. Announcing the 2020 report on product liability litigation presented by Lex Machina. My name is Owen Byrd. I am the Chief Evangelist and General Counsel of Lex Machina. Lex Machina is the inventor and provider of legal analytics, a resource for lawyers that enables lawyers to engage in data-driven lawyering, by using insights into the behavior of judges, and parties, and lawyers, and other organizations and players in the litigation ecosystem, that can be layered on top of traditional legal research and reasoning to help lawyers win clients and win cases.

Owen Byrd ([00:57](#)):

Lex Machina is used by the leaders in litigation, both in-house and at-law firms, and makes it more likely that companies and law firms can succeed in litigation. I'm delighted today to have a distinguished panel join us to unpack the litigation trends and the products in federal product liability litigation. Starting with my Lex Machina colleague, Ron Porter, who is our product liability Legal Data Expert. Ron, before he was with us at Lex Machina, had 30 years as an attorney at General Motors managing product liability cases. We also have Alicia Donahue, the Co-chair of the Product Liability Litigation Practice Group at Shook, Hardy & Bacon, as well as Gary Wolensky, a Shareholder at Buchalter, who's also the chair of the Product Liability Practice Group there. Ron, Alicia, and Gary, thank you very much for joining us on this webcast today.

Owen Byrd ([02:08](#)):

This webcast will take a look at trends in federal product liability case filings. The districts and judges that are seeing the most product liability litigation. The top defendants, the top law firms, as well as taking a look at the resolutions, findings, and damages that are emerging in these cases. So we're going to start by taking a look at product liability case filing trends, and for that, I'm going to ask my colleagues, Ron Porter, to explain what the data includes and what the trends look like. Ron, take it away.

Ron Porter ([02:49](#)):

Thanks Owen. And it's a great pleasure to be talking with everyone today about the 2020 product liability report. I want to emphasize that what you'll be hearing today is just a very small portion of the data that you'll find in the report, which will be sent to everyone on this call as soon as the report is available.

Ron Porter ([03:12](#)):

So turning to some data on product liability case filings. The first thing to talk about is that during this webcast, we'll be showing slides that sometimes are all case filings, and sometimes are either MDL related case filings or non-MDL related case filings. So it's important to keep that distinction in mind, because oftentimes when you look at MDL case data, it can just overwhelm the data set, and it can be very valuable to look at the non-MDL case set for certain things. So we'll start off with case filings. And again, this is all product liability cases in the federal courts between 2010 and 2019. We see a very distinct trend in the last five years, and particularly in the last year, of an increase in filings; very substantial from 2018 to 2019. Now, one thing to keep in mind is that because we are looking at all data, this does include filings in multi-district litigation, but-

Owen Byrd ([04:42](#)):

Ron, if we move on to the next slide.

Ron Porter (04:45):

Yeah, but on to the- [crosstalk 00:04:47]

Owen Byrd (04:47):

[crosstalk 00:04:47] -it's been excluded.

Ron Porter (04:50):

Yes. We've excluded our MDL cases. We see perhaps even more pronounced trend of increase in filings. One caveat here is that some of those 2019 filings, that are not currently associated to an MDL, may be associated at some point. There can be a delay of getting that data from the JPML. We try to anticipate that by doing some processing of the cases to identify those that are likely to be associated, but it is possible that that peak in 2019, in non-MDL cases, may not be quite as distinct but I don't think it will change the overall trend.

Owen Byrd (05:45):

Well, Ron let's invite Alicia and Gary in to comment on these trends, both the overall uptake in product liability litigation, as well as this even greater uptick when exclude the multi-district litigation. Alicia does this square with what you and your practice group at Shook, Hardy are experiencing?

Alicia Donahue (06:08):

Yes, good morning everyone. [It's nice to be here 00:00:06:09]. These trends definitely are reflected in our practice. I think it's worth noting that one reason, I believe why we're seeing an uptick, especially in non-MDL cases is, I think the federal courts are getting better and better and at the complex litigation model, such that many times an MDL isn't required anymore. Even when there's a significant volume of cases, which I speak from the Pharma-Medical device perspective, which there usually is some volume in, whether you're in an MDL or not. So I think that's worth mentioning, we're seeing a much more sophisticated capability in a number of quarks, with a number of judges experienced in complex litigation.

Owen Byrd (07:06):

And Gary, you're our panel expert, especially on vehicle product liability litigation. From your practice perspective do these trends make sense?

Gary Wolensky (07:19):

Yes, and thank you, Owen and Lex Machina, and the fabulous job that Ron Porter did; and always did and does in slicing and dicing the data. I will tell you that in my practice, this chart we're looking at definitely squares with our automotive practice. And I think it really has to do ... If you look at it closely from 2016/2017, all the way up to 2019. And we've been in a fabulous economy, which means that there are a lot more cars being sold. More vehicles sold, more vehicles on the road, and as a result ... when there's more product out there, there's going to be more incidents and more accidents for various reasons. I think the other reason for the spike in the automotive side of things, is because of the tremendous onslaught the automotive industry's been seen in terms of filing of these warranty, and lemon law cases in various States such as in California, as we'll see in a little bit. So yeah, this is data that definitely squares with our experience.

Owen Byrd (08:52):

Well then let's turn now to the data at the district level. And as we do let me remind, or invite, the audience to submit questions through the question dialogue box that you see on your screen. We'll do our best to answer

some questions, if they're of a general nature at the end, or even try to answer any in real time that we can, while we further unpack this data. This slide, Ron, shows the most active districts. And can you explain it to us a little bit?

Ron Porter (09:35):

Yeah. So as Owen said, this is the most active districts in the last five years in product liability cases. As one would expect the top three jurisdictions are the pending large MDLs involving Med-Pharma. You can see that Med-Pharma column with some truly astounding numbers, that account for almost all of the product liability dockets in the top three jurisdictions. So this is one example where, looking at the data from our all product liability filings point of view, really allows you to perceive the dominance of multi-district litigation.

Ron Porter (10:29):

Going down the chart a little bit further, you see courts that you would expect to see in major economic centers. I will point out [inaudible 00:10:44] one interesting development down [inaudible 00:00:10:46]. The Northern district of Florida, which we cut the data off at December 31st, 2019, but what you're beginning to see there is filings in the 3M Combat Arms Ear Protection mitigation. Which began a substantial flow in the fourth quarter of 2019. And just as a preview of what the data's going to look like in 2020, I can tell you that the Northern district of Florida is headed up this chart very substantially and could well be near the top for next year.

Owen Byrd (11:35):

[crosstalk 00:11:35] I saw an ad on TV just last night from a plaintiff's lawyer about 3M Combat Arms Ear Protection litigation, so I bet you're right.

Ron Porter (11:52):

The pace of filings, in the first quarter of 2020 ... the first half has been astounding. Turning to the next chart looking at judges, and here we're excluding MDL to get a picture of what courts are handling the most non-MDL associated product liability cases. Picking up on a point that Alicia made earlier, about the federal courts becoming more adept at handling mass mitigation outside of the MDL format. We see Judge Herndon and Rosenstengel in the Southern district, [inaudible 00:12:35] now far ahead at the top of this chart. And that's almost exclusively because they are handling Depakote cases in, what I would refer to as a mini MDL. So they have a large number of cases that they are working through, and that puts them way at the top of this chart. Going down the list further, really no surprises. You see the cases concentrated in the federal courts that handle a lot of litigation. Interesting that four judges in the top 10 are in the Central District of California, which is an interesting phenomenon. Perhaps something, reflecting what Gary mentioned, with respect to vehicle warranty litigation.

Owen Byrd (13:38):

Alicia, how does this judge specific data actually help you in practice? Everyone loves when Ron produces our report each year, because practitioners in this area love to see the trends, and who's proves most active, but ultimately the use of the data is to enable you to gain competitive advantage in your cases. And so being able to drill into the data about a particular judge ... Other than knowing for example, that Herndon and Rosenstengel handle a lot of these Med. device and Pharma. cases, how do you employ these insights about judges in your cases?

Alicia Donahue (14:28):

I think that what's probably most important about knowing about just ... Seeing what's reflected in the chart on the judges. It enabled you to do quick and deep research into how effectively they are managing their litigations. What their protocols and procedures are because, ultimately from a client perspective, time from when you get designated complex in that first case management conference, to whatever resolution is actually going to occur; be it through settlement, be it through [a science day 00:00:15:06] , be it through summary judgment. Whatever you ultimately decide, along with the client, from the perspective to get the litigation ended, knowing that timing and what the averages are with any particular judge is key. That sum of the most important strategic decisions that are made in the course of a litigation. So I think that's really, from my perspective, ultimately the most important thing about knowing the details on the judges and their assignments and their [crosstalk 00:15:43] experience level.

Owen Byrd (15:45):

Gary, when you see this data and you see judges that you've practiced in front of, does it give you confidence that the judges that are frequent flyers in this product liability practice area, that they will be able to better handle their cases? Just from experience or does it really depend on the judge?

Gary Wolensky (16:12):

Well, it depends on the judge. And let me just start off by saying from the vehicle side of things, you see that there are five federal court judges in California, one in the Northern district. And so that's half the judges. But more importantly than that, really with respect to the vehicle products cases, 81% of vehicle products cases in federal courts are handled in California. And that's pretty significant, and there's reasons for that. My experience with all these judges in California and outside ... Harvey Bartel and I practically grew up together in the Eastern district of Pennsylvania. And it really depends on the judge, that's it. I have great regard for all the federal court judges, but some of them are just better than others because of how they come to the bench and how they handle these cases. So that's my view, but let me also say finally that I do agree with everything Alicia just said.

Owen Byrd (17:49):

Terrific. Let's keep moving and shift our gaze from districts and judges, to parties. And Ron, before I ask you to comment on this list of most active defendants that excludes the MDL, I do want to point out that we say that Lex Machina and legal analytics is valuable. Not just for the practice of law, but for the business of law. And especially in these uncertain COVID era at times that we are in, with law firms needing to not only serve their existing clients well, but also prospect for new clients. This data can be enormously valuable to law firms who are targeting their outreach and their marketing, to keep their folks busy. But let's start, Ron, with you telling us a little bit more about this list of most active defendants.

Ron Porter (18:54):

Sure. So as Owen said, this is excluding MDL associated cases, and if we had included them in research, then as you would expect from seeing the filing data, Med-Pharma defendants would take all top 10 positions on this list. So looking at the 10 here, you do see a substantial number of pharmaceutical companies and device manufacturers, because they do have cases other than cases that ended up getting associated with MDL. But you also see two vehicle manufacturers, Ford and FCA. And familiar names in the asbestos world with CVS, Crane, General Electric, all have substantial numbers of asbestos cases. But for me, the really interesting thing about this chart is to look at the district and you see a large ... all the dependents facing cases all over the country.

Owen Byrd ([20:17](#)):

Alicia, does it surprise you that many of these top defendants are active on cases in so many districts? And when they are, how do you position your law firm to say, "We are the best possible outside counsel for you.", because you are fighting a multi-front war here, and seeing cases about medical devices or pharma that are appearing in so many different districts.

Alicia Donahue ([20:56](#)):

Yeah. So it doesn't surprise me that there's cases in so many different districts, and that the top of the lists are generally Pharma and Med. Device companies. I think, as mentioned earlier, that someone has decided about advertising. I think the level of advertising that's being done by the top plaintiff's firms, or really all plaintiff's firms that are handling pharma and medical device cases is very effective. Therefore you're seeing this volume and you're seeing it in multiple jurisdictions. How this is helpful, in terms of being ready from a law firm's perspective is really ... Many of us are national firms and we feel as though we can go in, and practice, and try cases really everywhere and anywhere, which we certainly can, but there's ... The local angle is still very, very important. Relationships are key, too. Relationships with judges. Relationships with the local plaintiff's counsel.

Alicia Donahue ([22:01](#)):

So I think what this helps us do is know what we need to do to have boots on the ground in various jurisdictions, where we may not have an office. Find out early on who the lawyers that we would want to be working with in the local jurisdictions are, and getting those relationships cemented early on. The other part of this that is also important, I do believe, is experts. I think it's always important to be able to at least consult with, and hopefully have some local experts, on your expert disclosure list and be there for the jury to hear from, and the judge to hear from. Because again, local relationships are very meaningful in these litigations.

Owen Byrd ([22:48](#)):

Well, people may think that Alicia and I conspired on this one, but we didn't. Alicia, thank you for mentioning experts because we do have a legal analytics in the Lex Machina platform, about experts in the product liability space. And that's another place where engaging in data-driven lawyer and can really be to your advantage, because you can see just how experts have been treated in prior cases, and inform your selection of experts, or challenges to the other sides experts based on their actual track record and not just their CV. So Gary, you've got some major vehicle manufacturers on here. Any surprises around who shows up on the list? Or who you might have expected to be on the list who's not?

Gary Wolensky ([23:47](#)):

No surprises with respect to Ford and FCA. I would have expected one or two other automotive manufacturers on here, because of the great influx of these warranty cases that are daily being removed to federal court. Along the lines of the question also that you asked Felicia. I agree with what she says, it's really important. First of all that the companies, in the industry, you specialize in, they clearly know the capabilities. And we have to just keep doing the work efficiently. Getting the best results across the country that we can. And also utilizing the very best local firms in order to get the best advice, if we don't have an office in a particular state. And finally, with respect to experts, there are the tried and true experts. But if you can find a great local expert, that's very helpful also.

Owen Byrd (25:21):

Well, perfect transition from parties to law firms. Ron, here is the list that you and your team assembled as the most active plaintiff law firms. And I'm assuming there are no surprises on this list for our attendees who see these firms repeatedly. Ron, anything here before I move on to the list of the top defendant law firms?

Ron Porter (25:52):

No Owen, we can move on and talk about these two charts together, because to me ... Although the names ,I'm sure, are familiar to everyone on both charts. What jumps out at me, particularly for the defense firms, the number of districts in which these firms are handling cases. Again, just to emphasize: For the largest firms, it's a national practice in product liability, and these firms are appearing in cases all over the country every day.

Owen Byrd (26:38):

And Alicia, there you are top of the list, Shook Hardy.

Alicia Donahue (26:43):

So proud!

Owen Byrd (26:44):

27,000 cases, 76 districts.

Alicia Donahue (26:51):

That's us.

Owen Byrd (26:51):

So what templates are available, Alicia, to gather information about districts and judges that may be far from home, and where you may not have practiced before? Do you find that the legal analytics data is at least one tool, in that tool kit, to orient you to a district and a specific defendant?

Alicia Donahue (27:15):

Yeah, there is no doubt that analytics give us a great advantage. I think our early advantage often ... I have to be honest and say, our clients are very interested in legal analytics and expect us to have a grasp of them. We obviously are very tied in with Lex Machina, but we also have in house folks that are looking at this as a data for us on a daily basis. So I don't think we can understate the importance of being able to dig into the data, because it's really ... litigation is more and more ... Litigation strategy, I should say, is just becoming more and more data driven. So yeah, the answer's yes.

Owen Byrd (28:02):

Well, we have just a couple of minutes left and so I want to move fairly quickly into a deeper level of that data, and take a look at case resolutions and case findings. And Ron, maybe you can narrate this one pretty quickly. Here is the data for case resolutions, excluding the MDL cases.

Ron Porter ([28:23](#)):

Yes. And these two parts are closely linked because the resolution data [inaudible 00:28:29] cases are being [inaudible 00:28:36]. You'll see the procedural and settlement depositions, which come [inaudible 00:28:43] from them.

Owen Byrd ([28:48](#)):

Ron, you're breaking up just a little bit.

Ron Porter ([28:51](#)):

Sorry. All right. Hopefully that [inaudible 00:28:57]

Owen Byrd ([28:56](#)):

Well, while Ron's audio comes back, Gary, let me ask you. When you see this national data, does it square with what you experienced in practice? Because here we've got claim defendants prevailing substantially more often on the merit than plaintiffs.

Gary Wolensky ([29:21](#)):

Yes and no. First of all, what caught my eye, being a trial lawyer, is the small percentage of cases. 1% trial where the claimant wins.