



Releasing Lex Machina's 2022 Surety Bond Report

Join John Fouhy (Senior Counsel at Travelers) and Kristal Mendoza-Bautista (Lex Machina's Legal Data Expert in Surety Bond Litigation), hosted by Aria Nejad (Lex Machina's In-house Counsel), on December 8th at 9am PDT as they discuss surety bond litigation trends over the last five years and offer insights on judges, venues, parties, law firms, case filings, timing, case resolutions, findings, damages, and more. The webcast will include a look at case filing trends in connection with Miller Act cases. Register now to save your spot.

Speakers:



John Fouhy
Senior Counsel
Travelers



Kristal Mendoza-Bautista
Legal Data Expert
Lex Machina



Aria Nejad
In-house Counsel
Lex Machina

Aria Nejad (00:00):

Welcome everybody to today's webcast, where we'll be introducing Lex Machina's newly released 2022 surety bond report. My name is Aria Nejad. I'm in-house counsel here at Lex Machina, and I'm going to be moderating today's webinar. I'll introduce our guests here shortly who will be discussing surety bond litigation trends over the last five years, and they're going to offer insights on judges, venues, parties, law firms, and more. But first, a couple of quick housekeeping notes before we get started. This is going to be a 25-minute presentation, followed by answers to any questions submitted by attendees for up to 30 minutes total. So please share your questions at any time and we'll review them together at the end. At the end of the presentation we have a short survey we would really appreciate your feedback on. So it only takes about one minute and it helps us improve our future webcasts, so please take that one minute time to share your thoughts with us.

(00:48):

And a little bit about Lex Machina first. Lex Machina is legal analytics. It's our focus. Lex Machina provides legal analytics to companies and law firms, enabling them to craft successful strategies, win cases, and close business. We currently count over three quarters of the Am Law 100's clients, in addition to companies of all sizes, from Fortune 50 companies all the way to small businesses. Today I'm joined by my colleague Kristal Mendoza-Bautista. She's Lex Machina's legal data expert in surety bond litigation. Welcome, Kristal. We are also excited to have John Fouhy with us today. John is senior claim counsel in bond and specialty insurance at Travelers Casualty and Surety Company of America. He handles construction performance and payment bond claims. Welcome, John.

John Fouhy (01:37):

Thank you.

Aria Nejad (01:38):

So at this point I'm going to turn it over to you Kristal. Kristal, go ahead and begin the presentation.

Kristal Mendoza-Bautista (01:43):

Thanks, Aria. And thank you, John, also for joining us today. Hello, everyone. Good morning. Before we dive into the data, I want to give you a brief overview of what data actually is in the surety bond model at Lex Machina. The entire data set for surety bond currently includes approximately 10,000 cases pending in federal district court from 2009 to present. And our report contains an in depth analysis of case filings and data driven insights into the behavior of boards, judges, parties, and law firms, primarily focused on the five year period from 2017 to 2021. So this is our first slide and this shows us what's been happening with surety bond case filings in federal court over the last 10 years. Lex Machina defines a surety bond case as one involving a bonded construction contract in which either an obligee's claim against a construction bond or a Miller Act bond, or a principle or obligee is asserting a breach of construction contract claim, or a surety is alleging a breach of indemnity agreement against a principle and its indemnitors.

(02:54):

As you can see, it's been in a general decline over the period of time, dropping to a 10-year low of 409 cases filed in 2021. The next slide shows us a similar trend for Miller Act case filings. Miller Act cases are surety bond cases filed under the federal Miller Act statute or a state equivalent Miller Act statute. Over the last decade, the number of cases filed a [inaudible 00:03:21], as you can observe, has undergone a

general and steady decline as well. Those filed in 2021 with 163 cases was the lowest in the past 10 years. So John, are these case filing trends consistent with your experience in your practice? Do you have any thoughts as to why the numbers are declining over the decade?

John Fouhy ([03:40](#)):

Yeah, thanks Kristal. Yeah, I mean it is consistent with what we've seen and what I've experienced myself. I think sort of in terms of why this is happening, I think the early 2012, 2013 numbers are a little bit higher following that 2008, 2009 recession. You still have some impacts and follow up from that in the years proceeding. In the last few years, especially, you look at 2020 and 2021 and those very low numbers and you have impacts from COVID, both construction work itself as well as courts being closed and issues with filing. So COVID overall has just made it more difficult these last couple of years to file cases. PPP loans are helping contractors sort of weather the storm a little bit in terms of the economic uncertainty, maybe helping some things and reducing the overall number of cases. So yeah, I definitely think this matches what we're seeing, and sort of given the trends, it's not too surprising, but it makes some sense.

Kristal Mendoza-Bautista ([04:37](#)):

That is a very insightful response, John. I think it'll be interesting to look at this chart in the coming years. Moving on to the next slide, this is a high level view of the most active districts and judges by cases filed over the five year period. As you can see, the District of Maryland and the Eastern District of Virginia are at the top of the list with 132 and 114 cases total respectively. For the most active judges, it's probably not surprising that half of the 10 most active judges were located in the most active district, which is the District of Maryland. John, are there any surprises to you in the list? Does anything stick out to you in looking at this data?

John Fouhy ([05:18](#)):

Yeah, so I handle surety cases in the western United States, so Maryland and Virginia are not within my territory. So seeing those, initially at least, gives me some surprise. You look at the other districts, California, Texas, Florida, high populations, lots of construction projects, not quite as surprising, but then when you dig in and you think about all of the public infrastructure in that Maryland and Virginia area, government, military construction, you start to understand why those districts have a such high number of cases.

([05:48](#)):

In terms of judges, that's a little harder to say. Surety cases are fairly rare overall, so we don't have a lot of experience with one particular judge or another in different districts. So again, as you mentioned, Maryland and Virginia, it makes sense that judges in those districts would be on the top of the list. Otherwise, it's a little hard to say. It's kind of interesting. You look at Washington, which is within my territory, and that's surprising given that the cases aren't as high as some of the others. But yeah, no, like I said, I think when you think about where these cases are being filed, it makes sense in terms of what's going on and what districts they cover.

Kristal Mendoza-Bautista ([06:23](#)):

That's interesting. Thanks for sharing, John. For the next slide, we'll see high level data about the most active parties in surety bond litigation. For the top plaintiffs, you can see that the biggest insurance companies have filed the most surety bond cases over the past five years. Travelers, Fidelity, and Liberty

are on top of the chart. Before we comment on the most active plaintiffs, let's take a look at the right hand part of the slide, which presents the most active defendants during the five year period.

[\(06:54\)](#):

As you can observe, the top three defendants in the highest number of surety bond cases were also the most active plaintiffs. Now this is an interesting piece of information, but not surprising at all, since the significant amount of overlap between the two lists is primarily because insurance companies as sureties occupy multiple roles in the [inaudible 00:07:17] surety relationship. On one hand, they are defendants on bond claims with the obligee, and on the other hand they are defendants on bond claims [inaudible 00:07:26]. They are claimants for indemnity actions against their principals. So John, we noticed that Travelers is on the top of the two lists, which to us is an indication of how dominant Travelers is in the insurance sector. I assume you see several of your competitors in these lists as well?

John Fouhy [\(07:42\)](#):

Yeah, Kristal, for sure. I mean when you look at these lists, they pretty much match what we would expect for surety market share. So definitely not surprising to see the top names on this list in terms of what we understand as the surety market share. So yeah, no, definitely interesting to see.

Kristal Mendoza-Bautista [\(07:59\)](#):

It's absolutely fascinating to know, John. Thanks for sharing. Moving on to the next slide, it shows us the most active law firms in surety bond litigation. Here on the left side, you can see at the top of our chart Krebs, Farley, & Dry tied Watt, Tieder, Hoffer, & Fitzgerald as the firms who filed the highest number of surety bond cases on a plaintiff's behalf in the last five years. Rating it side by side with the most active defendants' law firms, you will notice that we see some of the same law firms in the two lists. As you can observe, the most active law firm representing surety bond defendants, Watt, Tieder, Hoffer, & Fitzgerald was one of the most active law firms representing plaintiffs. Do you recognize many of these firm names, John?

John Fouhy [\(08:46\)](#):

Yeah, absolutely. These are the surety firms that we're used to seeing in the industry. The surety firm market is pretty small overall and you see a lot of the same firms representing all the different sureties. So this is definitely not surprising and names that we're used to seeing.

Kristal Mendoza-Bautista [\(09:03\)](#):

Great. Thanks for that. Moving on. So this next slide is something that I think is particularly interesting to practitioners. Lex Machina also provides timing data, which tells you the time it takes to reach certain milestones in case. So if you look at the first box plot, 532 days is the median number of days it takes for a surety bond case to reach summary judgment, which is just under a year and a half. Cases reach trial in a median of 871 days, or over two years. And overall, surety bond cases are terminated in the median of 294 days. Could timing analytics like this be useful for you in your practice, John?

John Fouhy [\(09:50\)](#):

Yeah, I mean I think in a general sense and sort of setting expectations of if we see where cases may be going, having an understanding of where this goes. At the same time, I think in terms of an individual case that I might be working on, it's sort of hard to fit that into an average. I think maybe looking more at a particular judge that's handling the case and sort of their timing is a little more relevant to an

individual case. But again, I think sort of in an overall understanding of how these cases are being resolved and the timeframe that that's taking place in, it's interesting to know and sort of at least sets a general expectation of what we can think of going into a specific case.

Kristal Mendoza-Bautista ([10:30](#)):

It's great to hear how this tool is used in actual practice. Thanks, John. Let me move on to case with resolutions. So we call this the donut. This shows us the breakdown for all resolution outcomes over the past five years. I want to highlight a couple of points. So if you look on the right hand side, you can see that the vast majority of cases are resolved as stipulated dismissal or voluntary dismissal, which we classify as likely settlement. That is 75% of surety bond cases terminated in the last five years.

([11:06](#)):

What's even more interesting is the left side of the slide, which shows us what happens on the merits. You can see the payment's made 13% of the time, but how did it win? This chart shows you that 6% of the time they're winning on default judgment and 5% on summary judgment. Claim defendants, on the other hand, only win 1% of the time. Let me highlight to you one more thing. I know that non-lawyers tend to imagine that lawyers go to trial all the time, but how often do claimants win in trial? 1% of the time over the five year period. And how often do claim defendants win? Well, it didn't even reach a full percentage point. Is this data consistent with what you've experienced in your practice, John? In particular, are the small number of cases going to trial similar to what you would expect?

John Fouhy ([12:00](#)):

Yeah, absolutely, Kristal. I mean I think, as you mentioned, cases settle three quarters of the time. And as far as the surety industry is concerned, we don't want to go to trial. It's expensive, it's time consuming. We're making business decisions to try and get out of trial if we can. And I think on the other side they're doing the same. So I think, as I say, we're looking to avoid trial and this definitely matches what we're trying to do and get out of. So yeah, this isn't surprising to see and definitely is interesting to see the overall numbers.

Kristal Mendoza-Bautista ([12:34](#)):

It's very interesting to know. Thanks for sharing that, John. So in the last year Lex Machina released its appeals analytics, which provides a wealth of information about what happens in appeal in federal courts. We won't be diving into the details as much as in the report, but this next slide shows us the reversal rate for terminated surety bond cases in the last five years in which there was an appeal. So the reversal rate, which means cases that were reversed or reversed in part, is 31%. You can see that you are almost twice as likely to have the district court ruling affirmed on appeal based on this analytics. John, is the reversal rate for surety bond cases similar to what you would expect?

John Fouhy ([13:20](#)):

Yeah, it does. And sort of like we were talking about with trial, obviously appeals are really a small number of overall cases. That doesn't happen very often. And at least as far as the surety industry is concerned, I think we're only going to pursue an appeal if we're pretty certain about the likelihood of succeeding there. And they're so rare, I've not personally been involved in an appeal. So it's a really small number and I think the parties are going to be pretty smart about having a strong case if they decide to appeal. So yeah, this kind of fits what I would expect.

Kristal Mendoza-Bautista ([13:55](#)):

Thanks, John. I think that is really useful to think about, managing expectations. So on the next few slides, this highlights some of the findings that are made in surety bond cases. As a reminder, Lex Machina's findings data shows how the court ruled on specific issues or claims and at what stage of litigation. Our data team reviews important court orders to verify what happened in a case. So in looking at this chart, you can see the number of findings at specific litigation events. And on the very right, in the any column, you can see the total number of cases in which that specific finding was made. Note that the columns will not necessarily add up to the any column because a case may have findings at more than one judgment event.

[\(14:45\)](#):

Let's take a look at the three categories of surety bond findings, namely obligee findings, principle findings, and surety findings. Now these are all just general breach of contract claims, but Lex Machina captured what's been happening in the different claim directionalities involving these three parties. In the first chart we have the obligee findings. Courts found breach of bond by surety and no breach of bond by surety in equivalent numbers of cases terminated over the five year period, with 43 each, mainly a summary judgment and a trial. Now the most common obligee finding was breach of contract by principle, which courts found in 71 cases equivalently at default judgment and at trial.

[\(15:35\)](#):

With regard to principal findings on the next slide, courts found breach of contract by obligee in 29 cases, mostly at trial. So comparing these two breach of contract findings, it is clear that in a bonded construction contract dispute, courts more often found a principle to be in breach of its contract with the obligee than vice versa. Would these findings related to breach of contract by either the obligee or the principal be helpful to you, John, when you're preparing a case or perhaps in your bond claim investigation?

John Fouhy [\(16:10\)](#):

Yeah, Kristal. I mean, I think of the timing aspect we talked about before, it's definitely interesting to see these trends and sort of where cases end up, especially understanding their finding breach of contract by the principal more often than the obligee, which again, I think sort of speaks to parties are going to enter these cases when they feel like they have a pretty strong case, if the obligee is filing suit, for example. But again, it's sort of hard on an individual case level, which is so driven by the facts of that case and the particular contract we're dealing with and the applicable law to go from sort of these overall findings to what that means for one particular case. But again, it's definitely interesting to see and helpful to understand sort of these trends on an overall level, even if they can't necessarily apply too much to one particular case that I'm handling, but it's very nice to see this kind of combined data and understand how it fits together.

Kristal Mendoza-Bautista [\(17:08\)](#):

That is very informative, John. Great to hear those insights. So moving on to the next slide, we have here interesting data in surety findings, revealing that courts were far more likely to rule in favor of the sureties under indemnity actions. Courts found breach of indemnity by principle in 204 to one cases, primarily on default judgment and summary judgment. This data shows that sureties are successful over 98% of the time in indemnity actions against their indemnitors. Is this what you've also seen in your experience, John?

John Fouhy [\(17:43\)](#):

Yeah, Kristal, this is interesting too, and I think it sort of speaks to the surety industry and sort of how indemnity agreements have progressed and sort of how they fit in now. I think those agreements have fairly consistent terms across the whole industry, across sureties. And I think they've been tested in court, terms have changed based on findings and what's happened in court. So at this point they're fairly consistent, they're strong. It's essentially a guarantee without a lot of conditions, where a surety is going to file a case if the indemnitors haven't met their obligations under the indemnity agreement. And again, those agreements are pretty strong, again, across the industry. So yeah, it's a pretty straightforward ... as you can see with 98% success rate, it's a pretty straightforward obligation for the indemnitors and when those sureties are going to step into these cases. So yeah, no, this fits what we've seen.

Kristal Mendoza-Bautista ([18:42](#)):

Certainly, the sureties are winning. Thanks for that, John. So we're down to the last group of slides. In this next slide we see some damages data in surety bond litigation cases over the decade. As you can notice, the damages awarded per year rose and fell over the 10 year period, but what I find particularly interesting about this list is that in 2012, the amount awarded is almost the same as the total amount awarded in 2021, but the number of cases in which damages were awarded was significantly less in 2021 than it was 10 years ago. John, do you have any insights on possible factors for this?

John Fouhy ([19:24](#)):

Yeah, I think the list is interesting, Kristal. I mean, it's a little up and down over the 10 years and there's always the possibility ... surety is a very high severity prospect. I mean, when cases come in, they can be huge. If you have a large contractor that fails, you can have a huge number of losses and huge awards coming in. So in a particular year, it's hard to say if one or two or three, very few cases sort of skew the number upwards, but kind of looking just at 2012 and 2021 and sort of the difference in the number of cases.

([20:00](#)):

We talked about in terms of the number of cases overall, obviously filings are down over the 10 years, so that makes sense that there'll be fewer cases. And potentially the higher number reflects some of the recent costs in the industry and supply chain issues and sort of construction overall becoming a little more expensive for a lot of the reasons and factors that are impacting the construction industry. So that's one possibility, but again, it can be a few particularly high severity cases that sort of skew numbers upward potentially. So it's definitely interesting data to look at.

Kristal Mendoza-Bautista ([20:35](#)):

Thank you for that insightful response, John. So onto our next and last slide, which shows the damages by type awarded in the last five years. The highest total damages awarded in surety bond litigation was in the category of contract damages, with \$541 million in damages awarded in 318 cases. These were primarily awarded to sureties under indemnity actions against their indemnitors. John, does anything stick out to you in looking at this data? How might having damages data help your practice?

John Fouhy ([21:09](#)):

Yeah, I mean nothing is too far off of sort of expectations. Contract damages, that make sense that that's the top. We sort of looked at numbers and default judgment being the outcome in a lot of cases, so that number being high makes sense. I think the other pieces that we look at in terms of assessing value of cases and potential settlement would be attorney's fees in the cost as well as prejudgment

interest. So it's definitely interesting to see how those numbers fit in compared to the overall contract damages. And I think seeing what potential trends there are, especially in attorney's fees, can help us sort of assess if we decide we want to take a case further and if it's going to trial or what the potential settlement values are to kind of take those attorney's fees into account, both our own fees as well as what may we be responsible for in the case of an adverse outcome. So definitely interesting to see how those numbers fit in the overall damages award.

Kristal Mendoza-Bautista ([22:07](#)):

That's great. That's helpful. Thanks, John. Well, that ends my presentation. John, thank you so much for joining us today. I want to thank our listeners as well. Aria, I'll turn it over to you for some Q&A.

Aria Nejad ([22:19](#)):

Perfect. Yeah, thank you, Kristal. Thank you, John. That was so interesting, especially I thought it was very interesting a couple slides ago, just in terms of over the past 10 years, we see the cases have just a little bit ... I mean almost half, basically, but the damages remain the same. And just like you were pointing out, John, I think that really illustrates the fact that the rising cost of construction and just the new world that we're in. So thank you, that was an excellent presentation. I really appreciate you guys. Kristal, we had a couple questions come in. The first one I think probably is best directed towards you. Someone asked, is it possible to filter some of this data by specific judges or court?

Kristal Mendoza-Bautista ([22:53](#)):

Yes. It's one of the features of our product, to filter information about a specific judge's report. So it is one of the features that we have and you can definitely certainly filter some of this data with regard to that classification.

Aria Nejad ([23:06](#)):

Right, exactly. Well thank you for that. John, I believe this next question is best geared towards you. So a question is what are you predicting for the future of surety bond litigation filings? How will the trends continue?

John Fouhy ([23:19](#)):

Aria, it's obviously tough to predict the future and what the future may hold, but I think if we kind of look at the trends, the industry trends and sort of what we've talked about and what we're seeing, case filings being down, I think it's reasonable in the term to assume that we probably have some of the same economic factors and supply chain issues, potential workforce issues in construction that we don't know where it's going to go. We don't know, do owners sort of switch their perspective from being a little more understanding of these types of issues? Obviously COVID is sort of filtered out, we're at sort of an end to that so maybe we don't see quite as few number of case filings overall and they kind of start to go back up, but again, it's hard to say. I think some of the trends hold in the near term longer than that. It's really difficult to say, but impossible to predict the future, but I think we see some things that will continue and some things that probably change.

Aria Nejad ([24:20](#)):

Perfect. Yeah, thank you for that. It sounds like you do have a crystal ball back there though. I think that you're dead on about those predictions. Kristal, we have another question that came in. So the question

is what are some ways people are using these analytics? I know we've covered a few of them, but maybe you can give us some more detail.

Kristal Mendoza-Bautista ([24:37](#)):

Yes. So in general, our clients find timing and case resolutions very useful when it comes to advising their clients and crafting litigation strategies. While our information are data about the most active law firms and parties, those are instrumental in competing for a new business.

Aria Nejad ([24:57](#)):

Okay, perfect. Yeah, that sounds good. John, I know we just have a couple minutes. We're getting toward the tail end of the presentation, but if you don't mind just a quick question that came in, John, of everything you've discussed, what information would you find to be the most useful in your own practice?

John Fouhy ([25:13](#)):

Yeah, I mean I think as we talked about just a few slides ago, the kind of damages information is pretty helpful. As I said, it's sort of seeing the trends with overall damages and kind of where those were rewarded as well as the attorney's fees, cost portion of it and sort of seeing those trends and how that fits in and how we assess that information too. And then the industry can use that information to really assess whether to move forward, what to settle for. Different pieces like that are definitely helpful to have. So definitely nice to have sort of that combined data on damages.

Aria Nejad ([25:49](#)):

Perfect. Yeah, I appreciate that. Thank you, John, for that insight. Well we're towards the end of the presentation now. I really want to thank everyone for joining us today, in particular John and Kristal. Thank you so much for the insights that you've provided for us with the surety bond litigation report. A common question we get with these webcasts is how do I get a copy of the surety bond report? So really quickly, if you are already a Lex Machina customer, then you can log in and find the report in the help center right now. So go up to your name on the upper right hand corner and the help center is in that menu. And if you're not a customer, you can receive an email with follow up information as well.

([26:24](#)):

So if you're not a customer, we do ask that you spend a little bit of time with one of our legal data experts before receiving the report, but it's a pretty quick process and we can get you that report relatively quickly. Again, I want to thank Kristal and John for all your expertise. Thank you so much and thank you all at home for joining us. If you have any questions, don't hesitate to reach out to us directly via the Lex Machina website and enjoy the rest of your day everyone. Thank you.