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Releasing Lex Machina's latest 2023 Antitrust Litigation Report

Join Anna Rathbun (Partner at Latham & Watkins) and Ron Porter (Lex Machina's Legal Data Expert in Antitrust Litigation), hosted by Aria Nejad (Lex Machina's In-House Counsel), as they discuss antitrust 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 also include a look at emerging trends in connection with federal appellate antitrust litigation.

Speakers:

Anna Rathbun
Partner
Latham & Watkins

Ron Porter
Legal Data Expert - Antitrust
Lex Machina

Aria Nejad
In-house Counsel
Lex Machina

Aria Nejad (00:00):

Okay, and welcome everyone to today's webcast, where we'll be introducing Lex Machina's newly released 2023 Antitrust Litigation Report.

(00:08):

My name is Aria Nejad. I'm in-house counsel here at Lex Machina, and I'm moderating today's webinar. I'll introduce our guests here shortly, who will be discussing antitrust litigation trends over the past five years, and they're going to offer insights on judges, venues, parties, law firms, and more.

(00:23):

Couple of quick housekeeping things before we get started. This will be a 25-minute presentation followed by answers to any questions submitted by attendees for up to about 30 minutes total. Please share your questions at any time, and we'll review them together at the very end of the presentation.

(00:38):

At the end of the presentation, we do have a short survey we would appreciate your feedback on for today's webcast. It takes less than one minute, and it really helps us improve our future webcasts, so please take that time to share your thoughts with us.

(00:51):

Little bit about Lex Machina. 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 as clients, in addition to companies of all sizes, from Fortune 50 companies to small businesses.

(01:12):

I'm joined today by my colleague, Ron Porter, Lex Machina's legal data expert in antitrust litigation. Before joining Lex Machina, Ron worked as a commercial and product liability lawyer at a mid-size Detroit law firm. Ron received his JD from the University of Michigan. Welcome, Ron.

Ron Porter (01:29):

Thank you very much. It's great to be here.

Aria Nejad (01:32):

My pleasure. We're also excited to have with us today Latham & Watkins partner, Anna Rathbun. She's with us today. Anna represents companies in high stakes antitrust litigation and investigations. Welcome, Anna.

Anna Rathbun (01:43):

Thank you. Happy to be here.

Aria Nejad (01:46):

Terrific. We're happy to have you. At this point, I'm going to turn the presentation over to you, Ron. Ron, go ahead and begin the presentation when you're ready.

Ron Porter (01:54):

All right, thanks Aria.

([01:57](#)):

We'll be looking at Lex Machina data in the federal courts involving antitrust cases, and most of the time we'll be looking at data that we have over the last 10 years. We're going to concentrate in these areas. First, we're going to take a look at filings in the federal courts. We'll look at courts and judges, parties, and the firms that represent them. We'll look at some timing data for antitrust cases in the federal court and then we'll turn to resolutions and damages. The first thing I want to say though is that we will be presenting only a tiny fraction of the data that is available in the report itself. So you may see things that pique your interest and you would like a deeper dive, and you can do that through the report and, of course, in our product.

([02:52](#)):

Let's turn first and take a look at the data on antitrust cases filed in the federal courts from 2013 to 2022. This is a overall chart which shows the last 10 years of filings. You can see, overall trend is a decrease in filings from 2013 to 2022. We're less than half in 2022 than we were in 2013.

([03:21](#)):

Sometimes the filing data can be a bit distorted by a multi-district litigation. So let's look at the filing data with the MDL cases factored out. It does reveal a bit of a different picture, although still a significant decline, particularly in the last three years.

([03:44](#)):

One of the types of data that we have in the antitrust vertical is cases involving enforcement actions. We can take a look at the trends in filing of enforcement actions, and a somewhat unusual pattern here. A bit of up and down, but again, a consistent decline in the last three years.

([04:11](#)):

We have one last chart on filings, which is appellate data. Or I'm sorry, MCL master cases filed. Here again, a little bit of a choppy record over the last 10 years, but again, a significant decrease in the recent years.

([04:35](#)):

Anna, I'd like to get your thoughts about what you see here, other than this rather consistent decline in antitrust filings.

Anna Rathbun ([04:48](#)):

Yeah. Thank you, Ron. It's a bit surprising to me to see the downward trend in the DOJ and FTC enforcement action slide and report, just because I think there is a sense from the antitrust bar that antitrust enforcement has really been heating up. There's a lot of aggressive rhetoric from the enforcement agencies about bringing lots of cases, bringing lots of action, taking a tough stance on antitrust enforcement. We're just not seeing that in the numbers in this report, which I think is very, very interesting. It may be because the agency's focus has shifted more towards merger litigations, as opposed to we're not seeing so much of the big price fixing criminal cartel investigations and prosecutions as we have in years past. So that might be contributing to some of the numbers. But it is very interesting to match the data up with what we're hearing from the DOJ and the FTC in terms of their aggressiveness.

Ron Porter ([05:59](#)):

I agree. That's one thing that jumped out at me is the decline in enforcement actions. I would've expected just the opposite in the last few years.

Anna Rathbun ([06:09](06:09)):

Exactly.

Ron Porter ([06:12](06:12)):

I think we have one more chart, and this is appellate cases originating as antitrust actions. Not a lot of change, although a steady decline. A little bit of an uptick in 2022. Surprising to me that appellate cases would stay more stable than the underlying case filings themselves, but that's what the data seems to show.

Anna Rathbun ([06:45](06:45)):

Yeah. I think in some sense we might start to see more of an uptick in the appellate issues as more of these novel antitrust theories from enforcers and from private plaintiffs make their way up the courts. So I'll be interested to see how this progresses, but it makes sense to me that it's just a steady drumbeat of appellate issues.

Ron Porter ([07:11](07:11)):

Let's turn from the filings to the cases to the courts and the judges who are handling all those filings. Again, this is a little more focused data, just the last five years, 2018 to 2022. It shows the most active districts handling antitrust cases in the federal courts. We see the Northern District of California, Northern District of Illinois, New York, Washington, and all the familiar courts in large urban centers and commercial centers being the center of antitrust litigation. One thing that does jump out to me is the-

Ron Porter ([08:02](08:02)):

And one thing that does jump out to me is the Northern District of California with a very large spike in 2020 along with the district court in DC. Anna, any thoughts about what, what's happening there?

Anna Rathbun ([08:17](08:17)):

I think this just reflects the tech cases in California, in the DDCC. I think that was the real freight MDL that they had there. So I think we're seeing some of the MDL activity and in the Northern Reserve California, the tech cases.

Ron Porter ([08:36](08:36)):

Yeah, I think that's right. And I think just because I'm in Detroit, I'll highlight the Eastern District of Michigan was very busy with the auto parts price fixing case, which occupied a couple of judges in that court for several years.

Anna Rathbun ([08:54](08:54)):

Yeah, still I'm surprised that, I guess, that one's been around for a long time and there's still a lot of cases-

Ron Porter ([09:02](09:02)):

Yes.

Anna Rathbun (09:02):

... Seemingly for that one, which is surprising.

Ron Porter (09:06):

Let's turn now. Yes, and thanks for highlighting those. Then we turn to where all of these cases go on appeal. Here are top five circuits for antitrust cases in the last five years. As you would expect from the district courts that are involved, we see a concentration in the ninth and the second. I do confess that I was surprised that the seventh circuit is not represented here, given that the Northern District of Illinois was one of the top districts. I don't know, Anna, do you have any thoughts about that?

Anna Rathbun (09:49):

Yeah, I was thinking maybe that could be due to... Because in the District of Illinois, it's sort of more MDL activity that maybe is less appealable or that those cases settle out more frequently, I think, than some of the more business to business cases with more sort of novel cutting edge issues. And so maybe that's why we're not seeing the seventh Circuit or maybe that just is taking its time to wind its way up through the [inaudible 00:10:19] process.

Ron Porter (10:22):

Well, let's turn now to the judges in those courts that are handling these cases. And I would have to say, given our court data, this is not a surprise and just this is the last five years including MDL cases. So you can see the effect of large numbers of cases in a particular year in a particular district, particularly with Beryl Howell in 2020. And some of the other big numbers there are caused by litigation that we've talked about, multi-district or consolidated case litigation.

Anna Rathbun (11:05):

I think we're seeing rail freight, the pork MDL, auto parts of course. And that's reflected in these numbers for sure.

Ron Porter (11:16):

Then just to take a look at the cases where we exclude the MDL, the filings, again, last five years, the thing that jumped out to me... I guess, so we're looking at cases that are more individual antitrust cases as opposed to these large groups of cases. And we see the Northern District of California has 5 of the top 10 judges. So that to me indicates that even aside from multi-district litigation, the Northern District of California is a very busy place with tech and pharmaceutical antitrust litigation. And then we do see kind of a surprising court there from the district of Connecticut. And again, these are not MDL cases. So a little bit of a mystery there. Anna, any thoughts about what's going on with Judge Nagala?

Anna Rathbun (12:21):

Yeah, so one of the trends that I've noticed over the past couple of years is that plaintiffs aren't necessarily taking advantage of or going through the MDL process to consolidate cases anymore. Sometimes they'll bring a lot of complaints just in one district and the cases get consolidated to one judge, but it never goes through the JPML. It's not classified as an MDL and it just sort of takes a different track. And so here, I think what we're seeing here with Judge Nagala is the follow on cases from the aerospace, no poach investigation and criminal action that the DOJ brought. And in that case, the plaintiff's terms filed a bunch of different complaints right in the district of Connecticut. They got

consolidated with Judge Nagala, but never went through the MDL process. I've noticed that happening more and more where for whatever reason there's just a coalescence around one district and it never sort of gets transferred anywhere else. So I think that's sort of what we're seeing reflected in some of these big numbers for specific judges.

Ron Porter ([13:29](#)):

Right. Very, very interesting. Very creative lawyering going on, creating non-MDL MDLs, I guess, MDL lites. Well, let's turn to the parties behind all this litigation. Here are most active plaintiffs by cases, antitrust cases, filed in the last five years. See some governmental entities. Of course the federal government, number one, a couple of, well the state government and a local government mixed in with some pharmaceutical and grocers. What's going on there? I did not expect to see kind of state litigants in federal antitrust litigation.

Anna Rathbun ([14:25](#)):

We're seeing more and more state AGs taking an active role in antitrust enforcement. Many times they will go along with the DOJ when it brings a case, but they're also proceeding on their own. There's the generics price fixing MDL is an example of this where there's a big group of states who are bringing a number of cases together without the US government involvement at all. And so I think we're definitely noticing an uptick in state AG enforcement and I expect to see that continue.

Ron Porter ([15:05](#)):

Yes. Interesting trend of the state government's jumping on the bandwagon. Let's take a look at plaintiffs excluding the MDLs. Not much of a difference here, although we do see, again, the usual retailers. Again, these are plaintiffs. So you see pharmacy retailers pre dominating here along with governmental entities.

Anna Rathbun ([15:39](#)):

Yeah, I mean, I think this is interesting too with the grocery stores and the retailers. They've allegedly been affected by some of these MDL conduct that's been alleged in these MDLs following on of DOJ investigations. Their generic drugs, they sell those, some of the...

Anna Rathbun ([16:03](#)):

Generic drugs, they sell those, they sell some of the food products that have come under fire recently, the chickens, the tuna, the pork, so I think they're taking an active role just because of the DOJ investigations that have trickled down into civil litigation.

Ron Porter ([16:25](#)):

Great insight. Let's shift to defendants here. And again, this is last five years and here we are. I think we're basically in two categories. Well, three categories, transportation, food, and of course, Google is, I guess, in its own category as a very active defendant in Antitrust Litigation.

Anna Rathbun ([16:54](#)):

Yeah, I think this echoes what I was saying earlier about the MDLs, and then the increased sort of focus on tech, and Google having quite a sharp uptick, I think, in the last couple of years with the lawsuits that it's facing. So, definitely not terribly surprising numbers here, I would say.

Ron Porter ([17:17](#)):

No, and when we filter out the MDL cases, let's look at the next slide. I believe we go all to food. Again, I think these are maybe some non-MDL, MDLs, so those interesting hybrid consolidated cases that suddenly lost popularity in 2022, but with a fairly precipitous drop in filings. But yeah, I think that's a trend that you put your finger on earlier, Anna.

Anna Rathbun ([18:00](#)):

Yep, I think that's right. I think that's what we're seeing here.

Ron Porter ([18:04](#)):

Well, we've done the parties, let's look at their lawyers. These are the most active firms representing the plaintiffs in Antitrust Cases in federal court, 2018 to 2022.

Anna Rathbun ([18:21](#)):

Yeah, this looks like a service list for many MDLs in one of my cases, so this is exactly who I'd expect to see. Great firms with national reach, they definitely show up a lot. And there's also DOJ here too, obviously, so I mean, this makes sense.

Ron Porter ([18:41](#)):

Right, and that's one of the thing I noticed about this chart is, the number of districts these firms have cases in. It's really a very broad geographic practice for all of them. Let's shift to defendants, lawyers and-

Anna Rathbun ([18:59](#)):

My joint defense group list.

Ron Porter ([19:04](#)):

Well, I'm glad our data is confirming your reality.

Aria Nejad ([19:11](#)):

Yeah.

Ron Porter ([19:11](#)):

And again, I notice the wide number of districts these firms have cases in, its nationwide practice for all of them.

Anna Rathbun ([19:22](#)):

Yep, that's right.

Ron Porter ([19:23](#)):

Let's shift and look at data on timing in Antitrust Cases to certain key events. This is, again, the last five years we've thrown out the MDL associated cases because they can really distort timing data. This is not MDL. And the thing that jumped out to me here was that these time periods seem extraordinarily long, 873 days to summary judgment, median basis, 1,066 to trial, not so unusual, 346 days to termination.

That counts a lot of cases that get dismissed or otherwise settled early on. But what's driving this relatively long time period for Antitrust Cases, and what kind of use can you make of data like this, Anna?

Anna Rathbun ([20:27](#)):

Sure, yeah. I mean, this slide really resonates with me because this has been my experience with a lot of these Antitrust Cases, apart from merger litigation, which goes much, much faster. And I think it's going faster and faster even these days than before. The Antitrust Cases take a lot of time, they're very discovery heavy. They can be very complex, especially in MDLs with multiple plaintiff groups, multiple defense, defendants, and a lot of different issues. They can span many, many, many years, a decade or more of time depending on the allegations.

([21:09](#)):

And so this is definitely consistent with my experience, that these cases just take a very, very long time. I think this type of data is extremely useful when you're talking to clients, whether they're considering bringing a lawsuit, or if they find themselves on the defense end of a lawsuit, and setting expectations about the time it's going to take and being realistic about that. That's one thing that I found that clients are very interested in is, well, how long is this going to be? Being able to have some sort of data about that, is extremely useful and helpful when you're planning the next couple of years after you bring, or defending a lawsuit.

Ron Porter ([21:58](#)):

And helps in budgeting, I would imagine.

Anna Rathbun ([22:00](#)):

Yes.

Ron Porter ([22:00](#)):

I know a lot of clients are very interested in a budget, and that it can depend a lot on the time.

Anna Rathbun ([22:07](#)):

Yeah, and it helps. Of course, when you're dealing with clients and talking about a budget, you want to be as accurate as possible, and what the actual time period is going to be, not over promise and under deliver. I think that this just shows that these cases do go for quite a few years, and the clients should expect that.

Ron Porter ([22:30](#)):

Let's look at how these cases resolve once they get to resolution. This is our resolutions chart. On the right side, you see the procedural resolutions and settlements, which total about a little over 80% of Antitrust Cases, excluding MDL in the last five years. We have on the left side, our decisions then involve some merits, so we have trial highlighted there, claimant wins. There were 34 trials in our time period, and claimants prevailed about 2% of the time, versus claim defendants prevailing at trial about 1%. The other thing that jumped out to me was, on the judgment of the pleadings seems to be a very successful technique for defendants in these cases to get the case dismissed on the pleadings.

Anna Rathbun ([23:37](#)):

Mm-hmm. Yeah. I mean, I think with respect to sort of motion to dismiss, sometimes we see, and I think often we see that there are multiple sort of shots at re-pleading, and so even when the defense is winning a motion to dismiss, that doesn't necessarily mean that the case is going away. It means usually there's going to be another... Plans are going to have a chance to replete, and sometimes they...

Anna Rathbun ([24:03](#)):

Another place you're going to have a chance to replead and sometimes they're able to do that better with discovery that happened in the interim. I was also surprised by the percentages of settlements. Some of these cases can be very, very... The threat of joint and civil liability and trouble damages can be a big threat to companies even where the allegations don't have much merit, and so I kind of expected that number to be a little bit higher. But it is interesting that 43% of the cases eventually settle out.

Ron Porter ([24:46](#)):

Let's turn to our next slide for appellate case resolutions. It shows about two-thirds of the antitrust cases that go upon appeal get affirmed. Make sure you get the result that you want at the district court because your odds on appeal probably are no better than one in three.

Anna Rathbun ([25:15](#)):

Yeah, that's a sobering slide for sure.

Ron Porter ([25:21](#)):

Let's go ahead and look at antitrust findings by judgment event. This is a very condensed chart. We have much more data in the report about findings. Lex Machina and does code findings that are made in antitrust cases in all of our cases. But we picked these because they're the three largest findings. Again, what jumped out to me was that the success that defendants are having at the pleading stage, getting cases dismissed because of inadequate allegations of violation or inadequate allegations of antitrust injury.

Anna Rathbun ([26:12](#)):

Mm-hmm. Yeah, I think the antitrust injury one is one that you see a lot just because in antitrust law you have to connect the injury that you suffer, the damages that you've suffered with the competition-reducing aspect of the conduct. So it sometimes can be hard for plaintiffs to plead that. I'm not surprised to see that being a very popular rationale for dismissal.

Ron Porter ([26:39](#)):

Let's take a quick look at damages that have been awarded in the last... This chart is last 10 years in antitrust cases. These are antitrust damages, wide variation. I guess the thing that jumped out to me was the number of cases that had damage awards in 2017. There were 93, yet the damages amount awarded was not that high. But if you go back to 2013, only 28 cases but over $9 billion in damages awarded. So to me, it shows damages can be highly unpredictable and you have to account for that when you're evaluating cases.

([27:33](#)):

And then take the look at our last slide here about damages, and this is for just the last five years. And at Lex Machina, we consider court-approved class action settlement amounts and we code those as

damages. I think what this shows is that both the number of cases and the amount of settlements in these cases sort of dwarfs the rest of the damage awards. Again, there's a lot more damages data in the report and in the product. This is just a highlight. And I will turn it back to you, Aria. I don't know if we left any time for questions, but if we do have it, we'll do them.

Aria Nejad ([28:31](#)):

Yeah. Thanks, Ron. Yeah, that was a great presentation. We do have just a couple quick questions here. It looks like this first question is for Anna. So, Anna, of everything that we've discussed here today, what information would you find to be the most useful in your own practice?

Anna Rathbun ([28:45](#)):

I think that the analytics related to the different judges, their experience with antitrust cases is extremely useful when thinking about strategy. The time that different antitrust cases take to go all the way through the merits is also very useful, all of these things that can help you sort of strategize and put forth the best plan for the client.

Aria Nejad ([29:11](#)):

Excellent. Yeah. Thank you. And just very quickly. This is the last question. Do you have any predictions for the next few years in antitrust litigation? Just looking into your crystal ball, like any major shifts or movements?

Anna Rathbun ([29:21](#)):

I think it's a really exciting time to be an antitrust lawyer right now because there are so many interesting questions about antitrust that are coming up. We'll be interested to see how the DOJ enforcement and FTC enforcement numbers go for the next couple of years. They do say that they've got a lot of things under investigation in the hopper, and so maybe we'll start to see that coming out in the next few years. But it'll be interesting to track those numbers.

Aria Nejad ([29:47](#)):

Awesome, thank you. Okay. Really, one of the most popular questions we get, we didn't see it in the chat today, but it's, "How do we get the report?" Well, first of all, I just want to thank everyone for joining us today. Really quickly, I mean, if you already are at Lex Machina customer, then you can log in and find the antitrust litigation report in the Help Center. It's in there right now. So just 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 Lex Machina customer, you'll receive an email with follow-up information as well. If you're not a customer, we do ask that you spend about 15 minutes with one of our legal experts before you receive the report, and then it's very easy to process to get it from there.

([30:24](#)):

So I want to thank Anna and Ron for all your expertise today. Thank you so much. And I want to thank everyone of those of you that are watching for joining us. So if you have any questions, reach out to us directly via the Lex Machina website and enjoy the rest of your day, everyone.

Anna Rathbun ([30:39](#)): Thank you.

Ron Porter ([30:40](#)): Thank you.