



Lex Machina's 2023 Product Liability Litigation Report

Read the transcript of Lex Machina's new 2023 Product Liability Litigation Report webcast featuring Robbie Jost (Counsel at Crowell), Richard North, Jr. (Partner at Nelson Mullins), and Ron Porter (Lex Machina's Legal Data Expert in Product Liability Litigation), hosted by Aria Nejad (Lex Machina's In-house Counsel).

During the webcast, the speakers discussed the latest findings and trends in product liability litigation, including case filing, most active judges and venues, top law firms and parties, timing, case resolutions, findings, damages, and more. The discussion looks at emerging trends in federal appellate product liability litigation.

Speakers:



Robbie Rogart Jost
Counsel
Crowell & Moring



Richard B. North, Jr.
Partner
Nelson Mullins



Ron Porter
Legal Data Expert - Insurance
Lex Machina



Aria Nejad
In-house Counsel
Lex Machina

Aria Nejad ([00:00](#)):

And welcome everyone to today's webcast where we'll be introducing Lex Machina's newly released 2023 product liability litigation report. My name is Aria Nejad. I'm in-house counsel here at Lex Machina and I'll be moderating today's webinar. I'll introduce our guests here shortly who will discuss product liability litigation trends over the last three years, and they're going to offer insights on judges, venues, parties, law firms, and more. A couple of quick housekeeping notes up top before we get started. This will be a 25-minute presentation followed by answers to any questions submitted by attendees for up to 30 minutes total. Please share your questions at any time and we'll review them together at the end of the presentation. And at the end of the presentation, we do have a short survey. We would really appreciate your feedback on today's webcast, takes less than a minute and it helps us improve our future webcast. Please take that time to share your thoughts with us.

([00:53](#)):

A 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 and law firms of all sizes, from Fortune 50 companies to small businesses and even solo practitioners. I'm joined today by my colleague Ron Porter, Lex Machina's legal data expert in product liability litigation. Before joining Lex Machina, Ron worked as a product liability lawyer for an automotive company, and prior to that he worked as a commercial and product liability lawyer at a mid-size Detroit law firm. Welcome, Ron.

Ron Porter ([01:39](#)):

Great to be here.

Aria Nejad ([01:41](#)):

Yep, it is great to be here. We are also excited to have two terrific guest speakers joining our panel today. From Crowell and Moring, we have Council Robbie Jost with us. Robbie represents clients across numerous industries in a diverse array of commercial class action, multi-district healthcare and products liability litigations in state and federal courts. Welcome Robbie.

Robbie Jost ([02:02](#)):

Thank you, Aria. It's good to be here.

Aria Nejad ([02:04](#)):

Great to have you. Thank you for joining us. And we're also very fortunate to have with us Richard North Jr. With us today. Richard is an accomplished trial lawyer at Nelson Mullins law firm in the areas of medical device, pharmaceutical and aviation litigation with a national practice. Welcome, Richard.

Richard North ([02:20](#)):

Thank you, Aria.

Aria Nejad ([02:21](#)):

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

Ron Porter ([02:28](#)):

Thanks Aria, and good day everyone. These are the areas we're going to be covering today. We'll be looking at filings and court data. We'll take a look at the judges who are handling the product liability cases and the parties and the law firms who are involved in the cases. We'll take a brief look at some timing data and then look at how the cases are resolved and what damages have been awarded. With that, let's just go into the filing data. Aria? This chart shows the product liability case filings over the last 10 years excluding the MDL associated cases. And we do that, exclude those cases because the numbers can overwhelm the data, so to speak, and it is meaningful to look at those two types of cases separately in many instances. Here you can see a fairly flat trend early in the period increasing beginning in 2017.

([03:41](#)):

I think a pandemic dip in 2021 and then a increase in 2022. The data in 2022 may overstate the number of non MDL filings simply because there seems to be a delay at the JPML in associating some paraquat cases to that MDL. They're currently showing up as non-MDL cases, but we expect in the future they will show up as associated to that MDL. Let's look at cases that include MDL associated filings. Oh, I'm sorry, this is just the MDL associated. And here we see a slightly different trend with a fairly flat range at the beginning from 2013 to 2019, and then very pronounced increase in filings in 2020 and 2021. Now, when you look at the data, those peaks are mostly related to the 3M earplug litigation and all the direct actions that were filed in that MDL in the northern district of Florida. Richard, I know you did a little research into those numbers and there might be something else contributing to that.

Richard North ([05:11](#)):

There are a couple of other MDLs, but they pale in comparison to the 3M one, but the C.R. Bard hernia mesh and also the Johnson and Johnson talc litigation during these same time periods had some filings. But in their heyday, those MDLs had 20 to 40,000 cases where 3M has or has had over 350,000. But I'd mentioned one other thing, Ron, in the preceding slide-

Ron Porter ([05:37](#)):

Oh, absolutely.

Richard North ([05:39](#)):

The comparison between the preceding slide and this slide I find very interesting because we hear so much about how federal court cases are moving towards centralization in the MDL. But the one-off or non-MDL cases have gone up 75% over this time period where other than the 3M blip, these MDL cases have been almost static.

Ron Porter ([06:03](#)):

That's a very interesting observation. Appreciate that. Lex Machina enables users to look at cases according to the type of product involved in the case. Let's take a look at filings, excluding MDL in cases that involve a medical device or a pharmaceutical. And echoing Richard, when you look at this, early years were steady and quite grouped around a thousand cases a year. We saw a big peak in 2018, '19 and '20, and now they've returned back to that level of somewhere around a thousand. Maybe that indicates that at least for Med Pharma cases, the action is moving to the MDL format.

([07:10](#)):

Now, in addition to the Med Pharma products, you can also look at Lex Macina data involving vehicle cases. And here we see a very pronounced trend from 2013 to 2022 of increasing number of product

liability cases involving vehicles. Again, we had a little dip in 2021, but in general it's very clear that the trend is upward. And I think part of this is that as vehicles become more expensive and repairs become more expensive, the exposure for the manufacturer in the case is larger. And more of these cases can exceed the jurisdictional limit to move it federal court, and particularly in the cases involving-

Ron Porter ([08:03](#)):

... move it to federal court and particularly in the cases involving a breach of warranty allegation like a Magnuson Moss case or in California the... Go to the next chart. If you filter out those warranty cases, we see product liability cases involving vehicles have remained pretty much the same over the past 10 years with only minor fluctuation. Robbie, I think you had a theory about the vehicle cases as well, and would you share that with us?

Robbie Jost ([08:45](#)):

Sure. In particular, going back to the last slide where you see an increase over time, I agree with Ron that I think this might be partly driven by increased damages at issue, which is helping these cases to get into federal court. I think that an additional trend that we're seeing is that there's more technology that's being developed and more technology that's being put into vehicles, which means, of course, more things with the potential for something to go wrong to lead to litigation. And so I wouldn't be at all surprised to see the trend continue to have an increase in the numbers of vehicle related products liability cases over time.

Ron Porter ([09:35](#)):

That's a great insight and one we can also-

Richard North ([09:37](#)):

Well, Ron, I do think it's interesting-

Ron Porter ([09:38](#)):

Oh, yeah, Richard.

Richard North ([09:40](#)):

I'm sorry. I do find it interesting that the product liability vehicle cases when you exclude warranty claims are essentially static over the years as compared to the pharmaceutical medical device trend, which goes up pretty pronounced.

Ron Porter ([09:56](#)):

Yes. I think the focus of many plaintiff lawyers has shifted from vehicles to the med pharma area and I think that's... It's sort of a chicken and egg scenario I guess, which came first? But I think my perception at least is, and I would defer to the practitioners, but that a lot of the organized plaintiff's bar has shifted focus to those types of products.

([10:34](#)):

So let's take a look at appellate filings in the last 10 years in federal product liability litigation. A pretty consistent flat trend around 300 filings each year except for 2014, which saw an extraordinary number of appeals, so I don't really know what to make of 2014. I would point out that in the report, all the

numbers are clickable and further research on that 875 is pretty easy. Just by clicking on that number, you can look at those cases and analyze and look for trends.

[\(11:29\)](#):

Let's move on to the most active districts, excluding MDL associated cases. So these are the five districts in which... Let's go forward, Aria, if you would. Keep going. There we go. Top five districts in the last five years for product liability cases, excluding the MDL associated cases. As it turns out, the Southern District of Illinois is the leader, but it's based very much on two years, 2018 and 2022. The 2018 saw a number of cases involving Depakote filed in the Southern District of Illinois, and then 2022 is a large number. We expect that to be reduced as those cases are associated with the Paraquat MDL. So we're seeing the effect of that delay in getting those cases formally associated to the Paraquat MDL. The other... Richard? Yes?

Richard North [\(12:56\)](#):

I'm sorry. I find it interesting and I have really no theories other than speculation as to why these specific areas or venues have the most cases. I mean, I think it makes sense with New Jersey because that's the corporate home of so many drug and medical device companies, but as far as the other venues, I find it fascinating as to why they made the cut of the top five.

Ron Porter [\(13:24\)](#):

I can say that simply based on my experience looking at other data, these are very busy federal courts in large urban areas, and they are the leaders in a number of different types of litigation. It is not surprising that those large urban federal courts lead in product liability filings.

Richard North [\(14:03\)](#):

Right.

Robbie Jost [\(14:04\)](#):

Ron, I think it also could be driven, at least in some small part, by the fact that many of those jurisdictions at the state court level are also popular venues for products liability litigation. California, Pennsylvania, Illinois. And so it's possible that some of these numbers are being driven up by removals by defendants in those jurisdictions.

Ron Porter [\(14:27\)](#):

That's a very good point. So let's move on and we'll look at the top federal circuits for appellate cases in the last five years. So the 9th Circuit is at the top of the list, which I think is expected given that two of the top five district courts for most PL filings are in the 9th Circuit. So I think that's to be expected in terms of the 9th Circuit's leadership.

Richard North [\(15:13\)](#):

Ron, with regard to the 11th Circuit, I found it interesting. It would've been just in the middle of the pack except for a big number in 2021, and I would suspect that may be related to the 3M earplug MDL, which is pending in Pensacola, which is in the 11th Circuit.

Ron Porter ([15:31](#)):

Yes, That's a good point. When there's a big case in the district court, it tends to cause activity in the appellate court. So let's move on and look at our most active judges in non-MDL associated cases. Our top two, I guess given the earlier-

Ron Porter ([16:03](#)):

This is our top two. I guess given the earlier charts are not a surprise. Two judges from the Southern District of Illinois and again based on large numbers for Judge Herndon in 2018 with the Depakote matters and then Judge Rosenstengel with the Paraquat matters in 2022. And you can see in all of the judges on this list, significant peaks out of the ordinary case filings in one particular year.

Richard North ([16:46](#)):

Ron, I can speak from personal experience with Judge Scholer in Dallas from the Northern District of Texas. Her big blip in 2020 of 496 cases was related to about 450 barred IVC filters that were filed in state court in Dallas and then removed to her courtroom or to her court and the Northern District of Texas centralized all IVC filter cases in front of Judge Scholer.

Ron Porter ([17:19](#)):

Yeah, that's an interesting trend that we've seen in some of the other practice areas of large groups of cases ending up before a particular judge and court sort of informal MDLs or consolidated cases. And I think those types of strategic decisions show up in this data with Judge Carney and Judge Martinotti as well. So let's turn to the defendants most active defendants in product litigation over the past five years. And here we see the effect of the Syngenta litigation. The top three defendants are all involved in that matter in the southern district. And then Richard I think we see in 2020 with a thousand cases with Bard. Part of that I think is the Northern District of Texas matter that you spoke of earlier.

Richard North ([18:38](#)):

But I think you're absolutely correct. But in addition to that, the MDL for Bard IVC filters wound down about 2019 or 2020. And the Judge David Campbell, Judge David Campbell from Phoenix, he remanded well over a thousand cases to various courts throughout the country. And those very easily could show up in the data as not MDL associated since they would be opening up for the first time in a separate district

Ron Porter ([19:08](#)):

In that district, right? Correct. So let's go back to the med pharma cases for just a moment. Yeah, that's good. So Richard, I think this is something you spoke about earlier. Here we see the total cases involving the top five med pharma defendants filed from 2018 to 2022 and broken out by, so you see the total number of cases, that's MDL and non-MDL. Then we have a column showing the MDL and what struck me about this was just the number of cases involving these defendants just in the last five years. It strikes me as a lot of litigation or these defendants to be dealing with and it appears most of it is MDL associated for the top five. And I guess I'd ask Robbie and Richard, any thoughts on this? I know you both practice in this area. What is this consistent with your day-to-day life?

Robbie Jost ([20:42](#)):

I'll jump in. I would say yes. I think a lot of the actions, so to speak in the medical device and pharmaceutical products' liability litigation context is in either the federal court MDLs or in state parallel

consolidations. So that's very consistent with my practice. I agree with what Ron said earlier that what's really striking here is just the numbers. These numbers are huge and quite burdensome and I think that the primary driver from my perspective is that the medical device and pharmaceutical products, liability actions usually sound in personal injury, which are not usually able to be class actions. And so I think as a result you see the number of filings is just huge compared to some other contexts where you can bring class actions. So I think that's in part the driver of the total numbers here.

Richard North ([21:41](#)):

And I would just add that I think all of these defendants have had major MDLs pending against them for those reasons in the last several years.

Ron Porter ([21:55](#)):

Great insights. So let's move now and look at the most active law firms representing the plaintiffs. This is excluding MDL because if we included MDL, the numbers would just overwhelm the data. So here we see a bit of the similar trend that we see in some of the other charts with large numbers of filings by these firms in one particular year as there are related litigation filed by these firms involving various products. And then turning to the most active defendants, actually a very similar trend where we see one year in dominating in 2022 for our top four firms. That was by far the largest number of filings for each firm. When you look at number five on the list, Shook, Hardy and Bacon, some fluctuation from year to year in terms of cases, but certainly more even distribution over the period.

Richard North ([23:27](#)):

And Ron, I also noticed that the fifth law firm on that list also by far had cases pending in more jurisdictions than the others.

Ron Porter ([23:36](#)):

Good point. Good point. Suggesting a more spread out practice both over the years and geographically. So let's move on and look at our timing chart. So this chart shows the median time to certain key events in product liability cases. We're excluding the MDL. We see a median 617 days...

Ron Porter ([24:03](#)):

... median 617 days to summary judgment, 850 days to trial, and 277 days determination. Robbie, what are your thoughts in using this data with clients? Or just in general, what's the usefulness of this kind of timing data?

Robbie Jost ([24:26](#)):

Yeah, I mean, I think that for purposes of advising clients, this data really demonstrates what many of us in the profession advise our clients all the time, which is that if you're hoping to resolve a case on summary judgment or before a jury or bench trial, it's probably going to take longer. I think this also shows that to the extent the cases are being terminated before summary judgment and before trial, parties aren't necessarily waiting until those mile markers. So I think that this data could be helpful for advising clients and helping to match their goals with what timing might look like.

Ron Porter ([25:24](#)):

That's great. Let's move on. Unfortunately, we're getting kind of short on time, but here's our resolution data for product liability cases over the past five years. On the right are the procedural and settlement

resolutions, and that's about 94% of the cases, which is typical for our federal courts. On the left side are cases decided on the merits, and you can see the claim defendants win about five times as often as the claimants. Typically, those wins take place at either a pleading stage or summary judgment. Interestingly, when you get to trial, it's a much more balanced in terms of resolutions, the defendants win about 56% of the time if the case proceeds to trial.

Richard North ([26:29](#)):

Ron, I thought this was interesting, but it points out the fact that, procedurally, as we all know, plaintiffs just don't have as many arrows in their arsenal to win a case short of going to trial.

Ron Porter ([26:42](#)):

Right. Let's move to our next slide. So these are the findings, the top findings in product liability cases in the last five years. It also shows at what stage of the litigation the finding is rendered. So echoing Richard's point, these findings are all defense findings, or most of them are. So if you look at the summary judgment and judgment on the pleading stage, you'll see heavily weighted towards the defense. No breach of warranty, 309 times at summary judgment; no negligence, 44; and for breach of warranty, a total of 530 overall findings, and that was our top finding in the product liability area.

([27:43](#)):

Now let's move on to damages. This is our damages in product liability cases over the last 10 years. Big blips in 2016 and 2017, and I think that shows just the unpredictability of product liability litigation, and damage awards can be quite unpredictable.

([28:16](#)):

Let's then move to our last chart of showing product liability damages by type. The two numbers of the kinds of damages that have been awarded that jump out at me are the punitive damages, over \$200 million in the period, and the class action settlements, again, are also over 200 million. So those are the big drivers of the damage awards in this period. So that concludes our presentation. I'll turn it over to Aria if we still have any time for questions.

Aria Nejad ([29:03](#)):

Yeah, thank you, Ron. Thank you, Richard and Robbie. That's always interesting, just as more of a layman in terms of product liability litigation to hear some insights why are we seeing these spikes. You read the report, and it's always nice to get some expert opinions on what's happening from practitioners. So thank you so much.

([29:19](#)):

We have a couple questions. We probably have time for maybe one of them since we're at time. But one of the questions that came in is, this is for our guest speakers, Richard or Robbie or both, feel free to jump in on this but, looking into your crystal ball a little bit, do you have any predictions for the next few years in product liability litigation? Any major shifts or movements?

Richard North ([29:39](#)):

I'll try, Aria. I just believe that we'll continue to see more and more cases in MDLs. We saw that big spike in 3M, otherwise it's been relatively static, but I think we're going to see that trend line going up in the years to come.

Aria Nejad ([29:56](#)):

That makes sense.

Robbie Jost ([29:59](#)):

Yeah, I would agree with that.

Aria Nejad ([30:02](#)):

Great. Yeah, thank you so much. Well, I appreciate everyone. I know that we're out of time. We didn't have time to get to all the questions. We appreciate all of the audience members participating. I want to thank everyone for joining us today. Really quickly, if you are already a Lex Machina customer, then you can log in and find a product liability litigation report in the help center right now. You just go up to your name on the upper right-hand corner, and the help center is in that menu. If you're not a customer, you'll receive an email later this morning with a follow-up information as well. If you're not a customer, we do ask that you spend about 15, 20 minutes with one of our experts before receiving the report, and then the report is yours. I want to thank Ron and Robbie and Richard for all your expertise this morning. Thank you so much. And to all of our attendees, thank you for joining us. If you have any questions, reach out to us directly via the Lex Machina website. Enjoy the rest of your day, everyone.

Richard North ([30:53](#)):

Thank you.

Robbie Jost ([30:53](#)):

Thank you.

Ron Porter ([30:53](#)):

Thank you.