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Lex Machina's 2024 Antitrust Litigation Report

Read the transcript of Lex Machina's2024 Antitrust Litigation Report webcast. Join Anna Rathbun (Partner at Latham & Watkins) and Ron Porter (Lex Machina's Legal Data Expert in Antitrust Litigation), hosted by Gloria Huang (Lex Machina's Product Marketing Manager), as they discuss antitrust litigation trends over the last three 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 general antitrust cases, DOJ/FTC enforcement contested cases, MDL Master cases, antitrust class action cases, and federal appellate cases.

Speakers:

Anna Rathbun
Partner
Latham & Watkins

Ron Porter
Legal Data Expert - Antitrust
Lex Machina

Gloria Huang
Product Marketing Manager
Lex Machina

Gloria Huang (00:00):

Welcome to the 2024 Antitrust Report webcast. My name is Gloria Huang and I'm the product marketing manager at Lex Machina. I'd like to welcome everyone to today's webcast on the 2024 antitrust report. Today we're going to be discussing the report and insights into antitrust litigation over the past three years. I'm joined by a fantastic guest speaker, as well as one of Lex Machina's own legal data experts who will introduce in that moment. But before I introduce our speakers for today, I'd like to quickly address the webcast format. So this will be a 30 minute discussion with our guest speaker, and if there's time remaining at the end, we'll take a few questions from the attendees. You can submit your questions into the q and a window at any time during the webcast, and if we don't have time to get to your question, we'll reach out to you afterwards.

([00:43](#)):

First, a little bit about Lex Machina. We're a legal analytics company that helps our clients win in the practice and business of law. Everything you see during this webcast or in our report is available on our platform. We count over 80% of the Am Law 100 as our clients, so it's important to know the advantages that using Lex Machina and gain for organizations like yours. Now I'm really excited to introduce our speakers for today. We're lucky to be joined by Anna Rathbun and Ron Porter. Anna is a partner at Latham & Watkins, and she represents companies in high stakes antitrust, litigation and investigations, helping her clients in a wide variety of criminal and civil antitrust matters, including government investigations, class actions, and merger challenges. She's also a valued regular speaker on our antitrust report webcast, so we're excited to welcome her back. Today. Ron is a legal data expert at Lex Machina specializing in antitrust insurance and product liability. He previously practiced as a product liability attorney for an automotive company, and prior to that practiced commercial and product liability law at a mid-size Detroit law firm. Welcome, it's great to have you both with us today.

Ron Porter ([01:51](#)):
Thank you.

Gloria Huang ([01:53](#)):
Great. Ron, I'll pass it over to you and Anna now.

Ron Porter ([01:57](#)):
Thanks Gloria, and thanks to everyone for joining us, and it's a pleasure to be able to present highlights from the 2024 Lex Machina antitrust litigation report. We'll be looking at data in these areas. First, we'll take a look at court filings. We'll look at courts and judges parties and the firms that represent them. We'll look at the timing of certain key events in antitrust cases overall, and then we'll take a look at how antitrust cases are resolving and the damages that have been awarded in those cases. First, let's take a look at our big picture antitrust case filings over the last 10 years, and here you can see antitrust case filings have declined somewhat over the period peaking in 2015 with over a thousand cases and descending to a low of 447 in 2022 with a slight uptick in 2023. As I said, this is antitrust cases generally. Let's take a look at some individual case types within that data dataset. So now we're looking at antitrust case filings, excluding MDL associated cases over the same 10 year period and a similar trend, although a little bit more stable from beginning to end. You can see that antitrust cases, excluding MDL peaked in 2019, declined again through the pandemic era of 2020 and 2021 and have picked up a little bit in 2023. Let's look.

Anna Rathbun ([03:53](03:53)):

Sorry. I think this is consistent with how we've been feeling, at least in my practice. It's starting to get busier, which is always good for us and interest practitioners. I think maybe some of these ebbs and flows are caused by big government investigations that then lead to follow on actions, and so that's why we're kind of seeing the auto parts case and the generics case sort of filtering through this timeline, but it is starting to pick up. So that's good news.

Ron Porter ([04:22](04:22)):

And thanks for bringing up the DOJ cases. So let's look at contested DOJ FTC enforcement cases and here kind of a very erratic pattern, but I guess overall you'd have to say a bit of a decline, particularly from the peak in 2019, although we do see a pickup again in 2023 from the prior year.

Anna Rathbun ([04:54](04:54)):

Yeah, I mean, I think with the new administration coming in and talking a big game on antitrust enforcement, it was a bit surprising to see this downturn. Lina Khan was just on John Stewart's show the other night and things like that, so they're definitely active, and so maybe we'll see some of this uptick now in 2023 and beyond, but we didn't really see much of an uptick with the new administration right out of the gate. So it'll be interesting to watch.

Ron Porter ([05:25](05:25)):

Indeed. And let's take a look now at another type of case within our dataset, the MDL master case. And here this is just the data over the last 10 years of master cases master dockets created in each year. I think it's hard to draw much from this data just because the numbers are so small, so small one or two cases really makes a difference in how the data looks from each year. But again, we do see a pickup in 2023, although small.

([06:12](06:12)):

So let's go to our next category of cases, class actions. So these are antitrust class actions filed in the past 10 years. Again, a peak in the early years, somewhat steady, and then the decline possibly pandemic related in 2020, 2021. And again, we see our now welcome increase in 2023. That's right. So let's take a look at the appellate case that are cases that have been docketed in the past 10 years, and I guess you'd have to say you expect to see this given the general decline, overall decline in the number of filings in the district court, I think totally expected to see this decline over the years in cases that go up on appeal.

([07:19](07:19)):

So let's turn now to where these cases are filed, the district courts across the country, and we'll narrow our data to the last three years. So we're looking at 2021, 22 and 23, and you can see that the Northern District of California is at the top of the list and then several other large busy courts that you would expect to see on the list. The District of Minnesota is a bit of a surprise, and when you drill down into that data a little bit, you see that that's largely a result of cases dealing with the meat industry and an MDL related to eyewear that are pending in the District of Minnesota. So let's look then at the appellate circuits where the district court cases head on appeal. Again, we can see the Ninth Circuit is in the lead with 25% of all the appeals antitrust appeals are docketed in the ninth circuit. I guess not a surprise given the prevalence of the Northern District of California among district courts.

([09:01](09:01)):

So let's look now at the most active judges. Again, we're looking at the last three years, we see Judge Tunheim of the District of Minnesota, again getting a number of cases each year dealing with the meat, beef and pork industry and consumer eyewear litigation. And then we see a number of cases assigned in the Northern District of California as you would expect to judges there handling the large antitrust cases dealing with the tech industry. One interesting thing to note is you can see some judges like Judge Durkin, his cases are mostly clustered in 2021, and several other judges have kind of an unusual concentration. And in a particular year, we noted last year that we had seen creation of informal MDLs by plaintiff's filing related actions in one jurisdiction. And I guess Anna, is that something that you continue to see happening in your practice?

Anna Rathbun ([10:32](#)):

Yeah, that's been a more recent trend I would say that I've noticed is just that instead of having plaintiff's firms file in a bunch of different districts, they sort of coalesce in one place, file all the same in the same district, and there never is a JPML process, but the complaints all get consolidated in front of the judge there. So that's been interesting and I think I've noticed that happening a bit more.

Ron Porter ([11:00](#)):

So let's look at this data, judge data, but exclude our MDL cases through the formal MDL cases. And here we can see the trend, I think really a full display with Judge Nagala who has a number of cases dealing with alleged anti-competitive hiring practices in the aerospace industry. Judge Durkin has a number of related cases dealing with the chicken and poultry industry, and then Judge Chen has a number of cases dealing with generic drugs, and in particular Teva and other drug manufacturers alleged uncompetitive practices.

Anna Rathbun ([11:59](#)):

Yep, that's exactly right. This is definitely an example of that sort of informal MDL process, informal consolidation that's been happening.

Ron Porter ([12:08](#)):

Now let's look at the most active parties in litigation, and we'll start with the plaintiffs. And again, this is the last three years and you can see the dominance really of governmental entities and it seems like the increasing role of states in addition to the United States of America and the FTC as parties in antitrust litigation. Anna, do you see that trend increasing or what are your views about that?

Anna Rathbun ([12:52](#)):

Yeah, I think we are starting to notice the attorneys general getting much more active in this space. They're continuing to join litigations with the FTC and the DOJ, but also to bring cases on their own a lot more frequently than I think we saw in the past asked. Another interesting one for me here is looking at Kroger and Albertsons as being some of the top antitrust plaintiffs. I think this has to do with their position as buying a lot of consumer products like the pork and the pharmaceuticals and things that are involved in some of these large MDLs, but it'll be interesting to see if they continue that this year. I mean, they're in their own merger litigation right now, and so we'll see if that has any sort of dip in the coming year with respect to their own activity. It'd be interesting to see how that trends for them.

Ron Porter ([13:52](#)):

Very interesting trend for an active antitrust plaintiff to now be in the focus of the FTC as an antitrust defendant. So that's right. Look how that turns out. Let's turn now to the most active defendants, again dominated by food companies and agricultural product companies. I was surprised not to see some of our prominent tech and social media companies on this list. Google is there at number eight, I believe, and then a company called RealPage jumped me. What's the story with RealPage?

Anna Rathbun ([14:45](#)):

Yeah, so RealPage is a very interesting new trend I think that we will see in the next year and moving forward related to algorithmic tools, both tools that recommend prices, recommend wages, recommend, other sort of just the way that company's crunch data and where that data's coming from and is it exchanged, is it non-public data that's being exchanged with other companies? And is that use of an algorithm, algorithmic tools? Is that algorithmic price fixing? I think this is something that the agencies have said they're looking at very closely. There's been some increased activity from plaintiff's firms and bringing these cases related to algorithms. And so I think we will see a lot of this touching a lot of different industries. I mean, I think use of algorithmic tools is sort of ubiquitous now and more and more tools are being created, the AI tools and machine learning tools, how does that all play in the antitrust space? I think that's going to be a fascinating topic in the years to come, and we're going to see a lot more of these algorithmic antitrust cases for sure.

Ron Porter ([15:58](#)):

Well, that is interesting, and we will have the data next year to see how the trend is going. So let's turn to our most active law firms representing plaintiffs, not surprisingly, since governmental entities are parties, you see some of that flowing over to this list of the non-governmental entities, Berger Montague, Hagens Berman, and Specter Roseman and Kodroff are the top three law firms representing plaintiffs over the last three years. Let's take a look now at the most active law firms representing defendants. Again, we see Latham & Watkins at the top, Gibson Dunn & Crutcher, Williams & Connolly, and many large firms whose names are very familiar.

Anna Rathbun ([17:05](#)):

Yes, those are my joint defense group buddies for sure.

Ron Porter ([17:10](#)):

The things that strikes me about this chart is, or one of the things is that the number of districts in which the big firms have cases, it clearly is a nationwide practice with the firms that have multiple offices and lawyers representing lots of parties in lots of cases all across the country,

Anna Rathbun ([17:40](#)):

Even having to schlep to Minnesota like we saw before as native Minnesotan. I'm glad that we are stimulating the Minnesota economy, but

Ron Porter ([17:49](#)):

Yes,

Lex Machina

Anna Rathbun ([17:51](#)):

Antitrust lawyers get sent all over the world.

Ron Porter ([17:57](#)):

And now let's take a look at individual attorneys, the most active attorneys representing plaintiffs. And again, some of the firm names as you would expect are the same in this identify. We have data down to individual attorney at Lex Machina and we see Steve Berman, David Mitchell, Kristin Gore as the top lawyers. Anna, what sort of use can a practitioner make of this sort of data of finding out by individual lawyer their involvement in past cases?

Anna Rathbun ([18:40](#)):

Yeah, I think this can help you when you have the complaint comes across, you see the names. I mean, many of these people are obviously very well known throughout the antitrust bar, but being able to pull up what they've done, how many other cases they and their firms have been involved in, I think it'd be very useful to help with strategy and talk to clients about, Hey, these folks are well known. I mean, this one made me laugh a little bit because actually Steve Berman very, very plaintiff's attorney in the antitrust bar, he actually gotten a little hot water this year because he had been filing for Pro Hac Vice motions in so many cases in California that the judges sort of pushed back and wouldn't even, were like, Hey, man, maybe it's time to take the bar. Maybe you have to become a full fledged California attorney here. So that just made me laugh. He definitely, we see him a lot and his firm as well as all these others, and it can be very useful when you're thinking about, okay, here's who we've seen come in, especially in an MDL. Here's what firms we might expect to come in shortly so that we know are the filings winding down? Can we expect more? It's very, very helpful.

Ron Porter ([19:55](#)):

And can provide a little bit of a check on when that lawyer who is filing a Pro Hac files his certificate of cases, you can kind of make sure that it's complete.

Anna Rathbun ([20:07](#)):

That's right. There you go.

Ron Porter ([20:11](#)):

So let's turn to the most active attorneys representing defendants. Again, the firm names certainly match our top 10 firm list. And again, this data gives you, as Anna said, a good insight into individual lawyers' experience and outcomes when you dive into it at Lex Machina. So very practical use for this kind of data. So let's turn now to another practical issue, which is how long do certain events take as a rule in antitrust cases? And so we're looking at timing data from 2021 to 23. We've excluded MDL associated cases because those tend to go on their own unique time schedule. And here we have our chart that shows median times to key events in antitrust cases, and this is for all districts. So 875 days median to summary judgment over a thousand days median to trial and for any kind of termination, whether by settlement judgment on the pleadings, whatever, a median time of 380 days to terminate. I made the bold assertion that this was practical data.

Anna Rathbun ([21:59](#)):

II think this is one of the most helpful. This is really helpful data I think when talking to clients on either sides of the V. Honestly, if somebody's thinking about becoming a plaintiff in an antitrust case, I think they might not understand how long of a haul it could be to get into that and sort of how long they'll be opening up their business to that. And as a defendant just being sued in antitrust case, understanding the realistic timing for a lot of these very complex big ticket matters is very useful to clients as they're thinking about, okay, how do I deal with this? What should I expect? Sort of making sure that they have realistic expectations about what it's going to be for both plaintiffs and defendants I think is very, very useful for us as practitioners.

Ron Porter ([22:54](#)):

Let's look at timing in appellate cases. So again, this is a time to termination of appeals and it's about a year for your typical antitrust case to reach termination on appeal 342 days. I will. One thing I wouldn't note for both this data and the district court timing data, this is overall data. You can in Lex Machina going to find this timing data for your judge for your court. You can get down very granular to understand the timing of your case. Let's move on now to one of my favorite parts of the report is the resolution chart, and just to provide some background on this chart on the left side, our resolutions of antitrust cases in the last three years where there was some determination on the merits of an antitrust issue. So we have the claimant win and the claim defendant win on the left side. On the right side, we have cases where there was no resolution on the merits of an antitrust issue. So settlements and procedural resolutions. The interesting numbers here to me are claim defendants when there's a resolution on the merits claim, defendants win about twice as often as claimants win and that a lot of those wins occur early in the case on judgment of the pleadings. In particular, some on summary judgment, but really judgment on the pleadings more frequently than summary judgment.

Anna Rathbun ([25:03](#)):

Yeah, I think that is probably consistent with what you see I think is the plaintiffs bring a complaint. Sometimes they have difficulties on their first try pleading all the elements of an antitrust violation, particularly antitrust injury I think can be a hangup for a lot of plaintiffs just because they need to show not only harm to themselves but harm to competition. How is this an antitrust violation as opposed to just something maybe that you thought a company or a defendant did to you personally so that they're able to plead once then motions to dismiss happen, I think reasonably successful in getting motions to dismiss granted on the first round. But then plaintiffs have an opportunity to replete and usually do, and by that point they kind of have fixed whatever needed fixing and then the case may go on. So this definitely makes sense to me from that perspective and also that these are big cases and a lot of them end up settling.

Ron Porter ([26:07](#)):

Let's take a look then at resolutions of the DOJ FTC enforcement cases as quite a different picture. On the right side, we see our settlements and procedure, procedural resolution quite low, only about a third. And on the left side, the judgments that involve some determination on the merits and mostly consent judgments. You can see 16 consent judgments out of the 19 claimant wins claim defendants. These are contested cases of course, and claim defendants do win sometimes, but not nearly as frequently as what we categorize as a claimant win.

Anna Rathbun ([27:02](#)):

Although I will say it looks like we're 50 50 for trial, which as a trial attorney is, I take pride in. So it's not hopeless. It's not hopeless.

Ron Porter ([27:12](#)):

Yep, yep, absolutely. So let's move on to the appellate resolutions. And here we see about a 30% reversal rate, 70%. So I guess my takeaway from this was if you're a party at the district court, you better make sure you win on appeal or you win at the district court because your odds are not that great going up on appeal.

Anna Rathbun ([27:44](#)):

Yeah, I think it's hard to overcome the findings of fact that the factfinder makes at the district court level in these antitrust cases. And I mean I think that's just, it can be an uphill, an up appeal battle, but certainly not impossible, but definitely better to win at trial.

Ron Porter ([28:07](#)):

So let's look at the findings, antitrust findings, and these are just the top five findings as you would expect. They revolve, revolve around whether or not there is a Sherman Act violation, either a section one or a section two. They're heavily in favor of the claim defendant, as you would expect, having seen the resolution data. The one that jumps out at me is something Anna mentioned earlier, which is the number of no antitrust injury findings at the JMP stage. It appears to be quite a successful tactic for defendants to claim or to show that the plaintiff hasn't adequately pled the required injury to proceed in an antitrust case.

Anna Rathbun ([29:05](#)):

Yep, that's right.

Ron Porter ([29:09](#)):

So let's look briefly at damages, and this is antitrust damages awarded in last 10 years. The numbers are pretty variable. One thing I would say is a trend is that the number of cases in which damages are awarded has generally declined throughout the period, which I think is consistent with what we're seeing in terms of cases being filed, but obviously significant damages available to successful antitrust claimants. And let's take one more look at damages, and this is just the last three years. These are the types of damages that are awarded in antitrust cases. One interesting thing I see here is that the approved class action settlement damages are quite a bit higher than even the damages awarded by a judge or a jury. So it shows to me that there's a lot of very high stakes settlements in antitrust class action, and we hear of course about those on the news.

Anna Rathbun ([30:44](#)):

And I think nobody in a big class action like that, there's usually a big group of defendants. Nobody wants to be left holding the bag at trial. And so there's definitely very high incentives to settle in those cases.

Ron Porter ([30:59](#)):

Exactly. Well at time, we might have time for a few questions and I will turn it back to Gloria.

Gloria Huang ([31:11](#)):

Thanks so much, Anna and Ron, I want to thank you both actually for joining us today. It's been so great to hear all your thoughts and insights on all this data. Intriguing, enlightening. Ron is right. We are actually at the end of our allotted time and I want to be respectful of everyone's time, but if I could trespass a little bit longer, I see a few questions will come through and I'd love to just squeeze in one of them. The questions for Anna and the question is, what do you anticipate are some key trends in 2024, presumably in antitrust litigation? I know you mentioned the algorithmic kind of issues, but I'd love to hear more for this speaker.

Anna Rathbun ([31:46](#)):

Yeah, I think the algorithmic price fixing allegations will definitely we'll see more of those. It'll be interesting to see how the law develops around the initial cases that we've seen so far. I think that will sort of guide how these cases develop over time and what companies are in the cross hairs of those. I think another interesting thing that I've noticed recently is follow on litigations of private plaintiffs from DOJ and FTC merger challenges. We're seeing a few firms bring private lawsuits in connection with merger challenges for injunctive relief and things like that to stop mergers. Even if for whatever reason the FTC or DOJ process doesn't work, they kind of piggyback off of those guys. And so that's been really interesting to follow too. And I think we probably will see more of that as plaintiffs firms, plaintiffs are trying to get part of that sort of merger, private merger litigation action. Really interesting.

Gloria Huang ([32:49](#)):

For sure. Thank you. Thank you Anna, and thanks for all the questions. If we didn't get to yours, my apologies, and we will be reaching out to you after the webcast. I do see a couple that are asking the same thing, which is actually what I'm about to say next. It says, great presentation. Thank you. Is this report available for distribution at Lex Machina or otherwise? So I do want to say that yes, the highlights that we've covered today are only a small selection of what's covered in the report. So we would definitely encourage you to check out the full report. Everyone on this call will be receiving an email that explains how to get the report. And if you're already a customer, the report is actually already available in the help center on our platform right now. So I want to again, thank everyone for joining us today. If you have any additional questions, please feel free to reach out to anyone on the Lex Machina team. Thank you again to Anna and Ron and I hope everyone has a great day. Take care. Be well. Thank you. Thanks.