Lex Machina's 2024 Securities Litigation Report

Read the transcript of Lex Machina's2024 Securities Litigation Report webcast. Kevin McDonough (Partner at Latham & Watkins) and Laura Hopkins (Lex Machina’s Legal Data Expert in Securities Litigation), hosted by Aria Nejad (Lex Machina’s In-House Counsel), discuss securities 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 federal appellate securities litigation.

Speakers:

Speaker
Kevin McDonough
Partner
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Speaker
Laura Hopkins
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Moderator
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Aria Nejad (00:00):

Welcome everyone to today's webcast where we'll be introducing Lex Machina's newly released 2024 securities 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 shortly who will discuss securities litigation trends over the last three years, and they're going to offer insights on judges, venues, parties, law firms, and a lot more than that. A couple of quick housekeeping notes 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 end of the presentation. At the end. We do have a short survey. We'd appreciate your feedback on today's webcast. It takes less than one minute. It helps us improve our future webcasts, so please take the time to share your thoughts with us at the end.

(00:48):

For those of you that aren't familiar with us, I'd like to introduce Lex Machina quickly. I'll keep it really simple. Lex Machina is Legal Analytics and Legal Analytics helps you win. If you don't remember anything else about Lex Machina, I hope you remember this. Lex Machina helps you win more business and win more cases. So specifically, we enable you to make data-driven decisions to answer questions like how's a judge likely to behave in a certain scenario or what's the best winning strategy for my particular case? How's opposing counsel behaved in cases like mine? How do I convince my client that I'm the best law firm to represent them? In this case, what litigation trends should I know about to best serve my clients and best manage my firm or in-house legal department? And we call these capabilities legal analytics. We currently count over 80% of the AM Law 100 as clients in addition to companies and law firms of all sizes, from Fortune 500 companies to small firms and organizations. I'm joined today by my colleague Laura Hopkins, Lex Machina's legal data expert in securities litigation. Before joining Lex Machina, Laura served as a civil litigator and bankruptcy practitioner for over 13 years in the Western District of Pennsylvania and District of Maine until she joined Lex Machina in 2017. So welcome Laura.

(02:01):

We're also excited to have a terrific guest speaker joining our panel, Kevin McDonough. Kevin is a partner in Latham's New York office and a member of the firm securities Litigation and Professional Liability and white Collar Defense and investigations practices. The New York Law Journal has named Kevin as a winner of Attorney of the Year in the past. I feel worth knowing Kevin has served as pro bono counsel to the commission on New York City criminal justice and incarceration reform, and also serves on the board of New York Lawyers for the Public Interest. Thought that was very interesting. Welcome Kevin.

Kevin McDonough (02:30):

Thanks, Ari. Great to be with you.

Aria Nejad (02:32):

Thanks. Great to have you. So, at this point I'm going to turn the presentation over to you, Laura. Laura, go ahead and begin the presentation when you're ready.

Laura Hopkins (02:39):

Thanks, Aria, and thanks Kevin. Welcome. It's a pleasure to have you on. So today we're going to discuss securities case filing numbers. We're going to discuss courts, judge, data parties, firms, timing case resolutions and damages. So, it's a lot to get through. So, let's start by sharing our initial data, and I just want to tell you a little bit more about Lex Machina's securities cases. So, our securities data focus on federal district court securities cases, which Lex Machina defines as federal case filings with one or more claims of securities law violations brought under the Securities Act, the Exchange Act, or another federal securities law such as the Commodity Exchange Act. In addition to classifying these cases as securities cases, Lex Machina also categorizes cases into subcategories through tagging or tags. Some of our tags for the securities case for the securities module include shareholder derivative suits, class action lawsuits, and those are just a few securities fraud and some others. And you will see these throughout the program and obviously in the report as well. So, let's get started because we have a lot to get through. So, in this figure, we're seeing a general upward trend peaking in 2021 and then dropping back down in 2022 and 2023. Kevin, let's open it up to you. Is this what you're seeing in your practice? Any insights on what's happening here?

Kevin McDonough (04:09):

Sure, Laura. Thanks. So, I think part of what we're seeing in this increase from 2020 to 2021 is what I would call the COVID bump when there was such uncertainty and disruption in the market that some companies experience volatility in their stock price performance, and that almost always leads to securities litigation. So, I think that accounts for some of the bump to 2021 as well as some of the macroeconomic trends that were affecting large companies. And so, it's not surprising we've had a little bit of a dip since then, since the market has settled in and life is mostly back to normal. I do think though, based on how my year has started out so far, we're going to see an uptick in 2024.

Laura Hopkins (04:51):

Okay, interesting. We may hold you to that. So, moving forward to, and again, mentioning our tags, these are shareholder derivative suits in securities case filings. Here we're looking at a more dynamic picture. We see a pretty significant increase from 2016 to 2020 followed by a pullback in 2021 and a little bit of an uptick here in 2023, and maybe that's that increase you're talking about starting. Kevin, what are we looking at here?

Kevin McDonough (05:21):

Yeah, so I think there's two things going on here over the longer-term trend line. The uptick following 2016 I think is in part a reaction on the part of the plaintiff's bar to the Trulia decision in the Delaware Court of Chancery where a lot of security suits that were filed after the announcement of a merger acquisition, those had to move to federal court by and large because the Court of Chancery was not accepting what we call disclosure only settlements, whereas the federal courts will. The other interesting thing we saw in our practice is in this time period where you see a gradual uptick from 2016 through 2020 is a reaction to the Supreme Court's decision. In the Scion case, which held that Securities Act cases, cases that were filed under the Securities Act of 1933 could be filed in state court and those cases could not be removed to federal court.

(06:19):

And so after that decision, we saw a phenomenon where for one a 33 Act event, an IPO that went bad or something similar, we would see at least two cases, one in federal court and one in state court, which could not be removed and consolidated with the federal court case. So, there was a duplication that it lasted for a number of years. I think that's starting to trend down because companies have taken a look at their corporate bylaws and they've determined thanks to some favorable court decisions that companies can state in the bylaws that securities class actions must be filed in federal court, which removes this problem of duplication across state and federal courts.

Laura Hopkins (07:03):

That's very interesting. Thanks. So then moving forward to are there tag class action securities case filings? There was a pretty big surge there from 2016 to 2017 where the case has almost doubled, followed by basically a decline ever since with a little uptick there in 2023. Kevin, in these reports we've always talked about, we've always sort of thought that that uptick from 2016 to 2017 was a big exodus, kind of like you referred to in Trulia from the Delaware state courts into the federal courts. But what are your, I mean you sort of elaborated in the shareholder derivative suits, but what about class actions here?

Kevin McDonough (07:43):

Yeah, so I think same here, and this is probably more acutely reflecting what I would call the Scion phenomenon, where securities class actions in particular were being filed in at least two courts. So, you'd have two and sometimes multiple cases within those two courts before consolidation. So, I think this trend line is consistent with the observation that companies have now gotten their arms around how to deal with the Scion case, and that's led to a decline in securities class action violence.

Laura Hopkins (08:13):

Interesting. Yeah. Thank you. So then moving forward, this next slide focuses on cases relating to cryptocurrency. And what we did to isolate this dataset was we used our keyword search across securities pleadings to search for the keywords, cryptocurrency, blockchain, Bitcoin, Ethereum, or crypto. And this was the resulting trend that we saw just across those pleadings. I don't think it's surprising given crypto's increase in popularity and also degree of volatility, but Bitcoin is up right now. So, Kevin, what do you think about this trend? Is crypto here to stay in securities litigation?

Kevin McDonough (08:53):

So I think it is Laura and agree this is the hot area right now, or one of them, I think both governments, especially the SEC from the regulatory perspective, but governments outside of the US and civil litigants are trying to get their arms around cryptocurrency, and it's become such a high profile area for both regulatory investigation and enforcement and civil litigation that this data is not surprising at all, and I do think we will see this continue for the near future.

Laura Hopkins (09:24):

Cool. So, we did the same thing for SPAC cases as we did for the crypto cases, just using the keyword search across the pleadings, looking for those key terms, there really was relatively nothing until 2021, which I think the markets told us what happened and now there's a decrease. Kevin, what do you think is in store for the SPAC cases?

Kevin McDonough (09:49):

So, I think the decrease in new SPAC filing cases is probably going to continue because there was a period where SPACs were very popular, and I think we're moving beyond that. What I do find really interesting about the SPAC set of cases is by and large, they've proven difficult to resolve on the pleadings. So, lots of folks have filed motions to dismiss. They have not been granted in many cases. And so, I think we're going to see the litigation of SPAC issues continue significantly into the future, although I don't think we'll see new violence.

Laura Hopkins (10:24):

Okay, thanks. So, moving from our line charts, we next have the top five most active districts. These are where securities cases are being filed over the last three years and their totals and also the percentage that they represent of the whole. So, the most significant change to me is in the Eastern District of New York and also the Southern District of New York that are seeing, obviously the Eastern District of New York is seeing a SPR decline. What are your thoughts on these drops, Kevin?

Kevin McDonough (10:55):

Sure. Yeah, so interesting to see a decline in the Southern District of New York, which is many think of as the court for federal securities litigation, although I'm not surprised that the SDNY continues to hold a very significant percentage of the cases overall. I think though the decline in the Eastern district is really interesting because you can see, especially compared to the filings in the SDNY, there's now been a real significant drop off in 2023. And my sense for my practice having litigated a fair amount in the Eastern district over the past couple of years is that there was an interest on the part of the plaintiff's bar to see how case law would develop in the district court in the Eastern District of New York, especially with a number of new judges coming onto the bench. And what I think has happened is the cases now have by and large moved back to the Southern District of New York because the experience has been that the new judges understand this area of the law the same way the Southern District of New York judges do.

(12:00):

And in either venue at the district court level, you have the application of Second Circuit precedent. So, I think the case law has been consistent across the two districts. And so, to the extent there was a desire to test the waters in the Eastern District of New York, I don't think that's going to continue to be the case by and large. Then the district of Delaware, I would expect will always be in or near the top five just because of the high number of stockholder derivative cases that are filed in the district of Delaware in addition to the chance report from Delaware. And the Northern District of California I think is a mainstay because of the tech economy there. And we've seen some disruption in the market for tech companies, and that's led to a number of security suits.

Laura Hopkins (12:47):

Right. Interesting. Yeah, thank you. So then turning to most active judges, it's probably no surprise that again, district of Delaware, the two most active districts are represented in the judges hearing cases. So, shifting to more of our software. Kevin, how do you use this judge data? Do you use it in your practice and what do you do?

Kevin McDonough (13:11):

We do and we love it. So, we use it from the very earliest stage of a new case to try to understand the particular characteristics of the judge, what seems to be working in front of the judge that's assigned to our case, what may not be working, what sort of predictive analysis we can do for our clients based on that data. And for us, I mean it's been really a game changer. Frankly. When I was a younger associate at Latham, we had a partner who was a retired Southern District of New York judge, and he pulled me aside one day and he said, people always call me the night before a hearing in the Southern District of New York or a day before, and they say, what can you tell me about the judge? His perspective was, that's too late. If you're asking that question right before the hearing, it's too late because you should have gotten that information before you filed your motion papers so that you would know what kind of story or strategy you want to advocate in front of that judge. So now that we have, I always took that to heart and we now have the data so we're not relying on just anecdotal experience in front of various judges, and when we can look at what kind of cases these judges are seeing, how they're resolving them, it allows us to develop a strategy that's tailored specifically to that judge, and we found it to be really effective.

Laura Hopkins (14:35):

That's great. Thank you, Kevin. So, looking more towards parties now, we see most active plaintiffs over the last three years with the total and the number of districts that they're showing up in. Kevin, any comments on top parties?

Kevin McDonough (14:54):

Well, no surprise with the SEC, and I think that that dovetails also with the amount of cryptocurrency cases we're seeing, but they will always be at the top given their mandate as to the individuals. It's always interesting to see who finds it an interesting hobby to be a plaintiff over and over again. But no real takeaways from this slide other than that.

Laura Hopkins (15:16):

Yeah, yeah, I've become quite familiar with a lot of these names over the years doing these reports things. And again, then most active defendants. Any surprises here? Why are these financial companies on this list?

Kevin McDonough (15:30):

Yeah, no surprises. And I think almost each year you'll see the large banks and brokers at the top of the list because almost whenever there is a case filed under the Securities Act of 1933 arising from an initial public offering, the underwriters for that offering will almost always be named as defendants. And so that's going to be the big bulge bracket banks and the list here is certainly at the top of that.

Laura Hopkins (16:01):

Right, right. Thank you. So then looking to the law firms that represent those parties first, we have top plaintiff's law firms. SEC is probably no surprise, anything to add here on the most active plaintiffs?

Kevin McDonough (16:16):

So, I think the middle three is consistent with our experience. Those are those firms largely focused on stockholder derivative cases, and we are seeing those get filed almost anytime there's a securities plus action. And so there continues to be a proliferation of stockholder derivative cases and they tend to be brought by a core set of firms that specialize in those cases. This is exactly who I would expect to see on that list.

Laura Hopkins (16:45):

Gotcha. And moving to top defendant law firms, there's a name we recognize. Congratulations. Kevin. Any comments on our most active defendant law firms?

Kevin McDonough (16:57):

Thank you. Well, we're proud to be at the top and of the list, and that is consistent with how busy I have felt over the past couple of years. We do like to say our focus is more on the quality of our representation and the outcomes more so than the quantity of the cases. But securities litigation has been a strategically important practice for us. We've really invested in it because our clients need representation in those cases and they're complex and interesting, and our lawyers really like to work on them. So, this, I think for all of these firms, securities litigation will continue to be a focus going forward.

Laura Hopkins (17:37):

Right. Well, your hard work is paying off, so congratulations. Take the lab. Okay. So, moving forward, Lex Machina offers timing data based on the time takes to get to certain milestones and litigation such as the time a case will go to trial. We show these box slots with the median here in red, and this data can be, I'm sorry, so on if you're not familiar with box slots, this larger box represents the 25th to 75th percent court tile, and then the red is the median time to number of days to that event. So, this data can be very useful when breaking it down by judge court or specific type of case such as class action or securities fraud or any of those different securities sub classifications that we have. So here we're seeing timing to different milestones pertaining to securities cases. So, we're talking about time to class certification, time to class action settlement, which is a new feature we've just recently added at the end of 2023. We also have time to a decision on summary judgment, which we're seeing, sorry, I'm not telling you the time, but you can't see them, but that's a little over two years. And then time to termination. So that also includes it's on the lower end that also includes dismissals for lack of prosecution or a quick settlement and so on. So, Kevin, can you tell me how would you use this timing data in your practice?

Kevin McDonough (19:12):

Yeah, so we find this timing data really important, and especially when we break it down judge by judge, because so often our clients want to know if the case survives a motion to dismiss. What are the milestones after that point? What are my potential off-ramps in the case and how long will it take to get to each one of those? And that becomes important for clients and their insurance carriers and everything from how they're going to message what's happening in the case internally and to external stakeholders also to figure out budgeting and cost, and that also can drive the strategy. So, we find it really important to have a roadmap for what's going to happen in the next six to 18 months, and we use this data all the time to develop that roadmap.

Laura Hopkins (19:58):

Great. Thank you for that. And then to supplement that timing data, we also have appellate data in our software. And again, so this is time determination in securities originating federal appellate cases. That just means it was a securities case that was taken up on appeal, not necessarily on a securities issue. However, and the time that the appellate court is taking to come to a decision on that, the median time is 336 days, so almost a year. Kevin, is that what you're seeing with the appellate courts? Is that consistent?

Kevin McDonough (20:32):

It is with the caveat that we sometimes see the appellate panels act very quickly if they're not going to publish a decision and issue something that's quite short and limited. But we do see the appellate panels really take their time if they're presented with an issue of first impression or they intend for another reason to publish a decision on the issue, and then we do see this longer timeframe.

Laura Hopkins (20:56):

Great, thank you. Turning to case resolutions, this is a lot of data, so you'll have to check out the report if you want to dive further into it, but I do want you to focus on the colors of our donut. And I've highlighted claimant wins here and defendant wins at 11% and 5% of the cases seen here. And then also the green represents 66% of the cases that are settling and 18% that are resolving on a procedural resolution. Kevin, any thoughts on this chart? There's a lot to digest here, but any additional comments on this data?

Kevin McDonough (21:36):

Well, I'll just say it tells me we have some work to do to get that 5% defendant win higher, and we will get right on that.

Laura Hopkins (21:44):

Cool. Thanks. So then to go with that, then we see reversal rates on some of those case resolutions and findings, which we'll see in a second. But so, the dark red, the reversal rate is 26%, the affirmance rate is 74%, and then that part in the middle there, that lighter red color, and that is affirmed in part and reversed in part. So, you can also break this data down. It's very helpful to break it down in terms of judge, in terms of district court in terms of issue. So, you can really slice this data as where you can get pretty close to your set of facts to talk to your clients sometimes and to learn yourself about whether or not an appeal would be a good idea. Kevin, any other thoughts on this?

Kevin McDonough (22:44):

This is pretty consistent with our experience, and we do find there to be a high affirmance rate in part because there's such a well-developed body of case law insecurities that the district court judges by and large understand that case law very well have experience with it, and their application of it is well reasoned and well explained in their decisions.

Laura Hopkins (23:06):

Great, thank you. So, Lex Machina manually codes certain findings that judges rule on this can be particularly helpful when researching a particular judge or district to narrow in on past findings by that judge or in that district. Here we're looking at findings on securities and exchange act violations as well as other securities violations, and at the top we're seeing the type of event where that finding was made. Kevin, I've highlighted the judgment on the pleadings because the numbers are not similar on the Securities Act violations versus the Exchange Act violations. Can you tell me more about what's happening there or what do you take from this?

Kevin McDonough (23:44):

Sure. Yeah. One of the takeaways from this I think is just the difference in the pleading standard that applies to Securities Act cases versus Exchange Act. It's a lower burden for the plaintiffs in a Securities Act case. The Securities Act also has fewer elements to plead. And so as much as we like filing motions to dismiss in those cases, we find that it's a taller task than achieving dismissal in an Exchange Act case.

Laura Hopkins (24:11):

Right. Yeah, I understand. Thanks. Since we're about at time, I'm going to take us through these next two slides and then ask you to jump in there, but so here the last two slides, we're talking about damages. These are the last 10 years of damages and here, so you're seeing the total amount awarded and the number of cases in that year. And then also we're seeing the number of cases that are reversed and the reversed amount. So generally, it looks like in the last five years, damages have gone up to a high in 2023. While this number of cases seems relatively level, and now perhaps I'll admit, maybe some damages are still being appealed in 2022 or 2023, so that number may change a little bit, but so far it looks like damages are going up relative to the same number of cases. And then also with our software, you can slice damages by the event that they were awarded, default judgment, consent, judgment on a verdict, jury verdict, or on the merits by a judge in a bench trial or something like that. Or also we consider approved class action damages on the merits since they are evaluated by a judge. So, Kevin, how might you use damages data in your practice? What are your thoughts on the damage data here? Sure,

Kevin McDonough (25:37):

Yeah, thank you. It is critically important to us in our practice because our clients want to know really at the earliest stage, what's the magnitude of the risk that I'm dealing with here. Insurance carriers are keenly focused on that as well. And so, figuring out damages can be important and how we counsel our clients, but also in how we will determine our strategy for the case and in particular for a mediation or other settlement negotiation if we get to that stage.

Laura Hopkins (26:06):

Cool. Thank you. So that's the end of our presentation. Kevin, thank you so much. This was really fun, and thank you to our listeners. It's always exciting to hear from you and present to you. As I mentioned earlier, what you see in this webcast is really just some of the content that is in the entire securities litigation report. The full report has more details. And Aria, I'll turn it over to you for questions. Thank you. Great.

Aria Nejad (26:30):

Yeah, thank you. Very interesting conversation so far. Just a couple questions that have come in here. One, I believe this one's directly addressed to you, Kevin. So, of everything discussed in the report, what information would you find to be the most useful in your own?

Kevin McDonough (26:44):

So, for me, the information I find most interesting and most helpful is the judge-specific data. How likely a judge is to grant a motion to dismiss what are that judge's, what are the potential off ramps with that judge after a motion to dismiss based on the statistics and really getting behind those numbers and understanding how the judge is likely to view requests for dismissal at the pleading stage at summary judgment, we really look hard at that to figure out what our strategy is going to be in the short term for the case, but also for the long term.

Aria Nejad (27:18):

Very interesting. Yeah, we've heard that a lot about the judge analytics, how useful. It's one more question here. So, Kevin, do you have any predictions for the next few years in securities litigation looking into the crystal ball, like any major shifts or movements?

Kevin McDonough (27:31):

Sure. Yeah. Well, I keep hearing just given that the market seems to be in a good place, that there will be a large number of IPOs this year, just that there are companies in the pipeline who've just been waiting for the market to stabilize in order for them to go public. So, I think we'll see a lot of IPOs this year, and I think that means we'll see a lot of IPO litigation, which will be Securities Act suits filed to the extent that companies don't perform up to expectations once they're public.

Aria Nejad (28:00):

Interesting. Yeah, definitely something to look out for there. We'll keep an eye on that with all the IPOs. So really, I just want to thank everyone for joining us today. A reminder that if you are already Lex Machina customer, you can access the securities litigation report we were just talking about by logging into the help center right now. That report is available for you right this second. Just go up to your name on the upper right hand corner at the help center. The help center is in that menu. And if you're not a customer, you'll receive an email with follow-up information about receiving the report as well. If you're not a customer, we do ask that you spend about 20 minutes with one of our experts before we give you the report. I want to thank Laura and Kevin for all of your insights today. Very interesting conversation. 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. Bye.

Kevin McDonough (28:49):

Thanks all.