

Lex Machina *Commercial Litigation* *Report 2017*



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Lex Machina's Commercial Litigation Report surveys and summarizes the key trends that have emerged since 2009.

Based on the same data driving Lex Machina's platform, this report examines filing trends, top districts and judges, top law firms, legal findings, case resolutions, timing, and damages to showcase the power of Legal Analytics.

Executive Summary

Lex Machina's first Commercial Litigation Report examines the key trends in the legal landscape since 2009, showcasing the value of Legal Analytics® in informing business and strategic decisions about litigation.

This report provides insight into the quantitative aspects of commercial litigation. Practitioners can find data to give them an edge at all stages of a case: from top parties and firms for business development or outside counsel selection, to jurisdictional analysis, case timing, breakdowns of findings and resolutions, all the way to data on damages. Regardless of which side of a complaint (or retainer agreement) one finds oneself, understanding the data behind the business of commercial litigation has become indispensable to assessing strategic opportunities and risk, and to budgeting accordingly.

This report examines the key axes of legal data and their interactions, drawing upon Lex Machina's platform, and focuses exclusively on litigation in the federal U.S. District Courts.

Key trends and highlights from the report include:

Filing Trends:

- Since 2009, the number of commercial cases filed each year has declined. As the economy has recovered from the recession, fewer business are suing on contract or business tort claims.
- Most commercial cases involve either a breach of contract claim (44%), or both a breach of contract claim and a business tort claim (38%); only about a fifth involve a business tort claim without an accompanying breach of contract claim.
- Over 20% of commercial cases also involve an IP claim, and 2.6% of commercial cases also involve a securities and/or antitrust claim.
- The majority of commercial litigation originates in the federal courts, with just 23% coming from state court via removal.

Districts and Judges

- The Central District of California has had the most cases since 2009 (4,257 cases, or about 8%), followed by the Southern District of New York (3,855), the Northern District of Illinois (2,546), and the District of New Jersey (2,438).
- The decline in litigation since 2009 has been felt across all the top districts.

- The judges with the most cases filed since 2009 overwhelmingly come from the Central District of California, and have typically seen between 150 and 200 cases over that time frame.

Parties

- The Federal Deposit Insurance Corporation (FDIC) is the leading commercial plaintiff, but most other top parties are large banks, financial services companies, or insurance companies with some nationwide retail on the defendant side (Ross Stores, Home Depot, Amazon) and textile pattern companies on the plaintiff side (Star Fabrics, L.A. Printex, Unicolors; but only due to commercial claims in their copyright cases).

Law Firms

- The law firm Greenberg Traurig is the leading firm by cases filed since 2009 regardless of whether representing plaintiff (333) or defendant (401). The presence of Doniger Burroughs in the lists for cases representing plaintiffs is due to its representation of the textile pattern companies above.
- Among firms representing defendants in cases since 2009, DLA Piper (299 cases) and Reed Smith (280 cases) are the second and third ranked firms after Greenberg. More recently, in cases filed since 2016, Morgan Lewis is the leading firm (57 cases).

Findings, Resolutions, and Timing

- Most Contract Breach findings occur on consent judgment, but of the remainder a finding at summary judgment is almost twice as likely as a finding at trial. For Tortious Interference, defaults and consent judgments constitute nearly 2/3 of the cases with that finding.

Damages

- The most common type by dollars awarded is Contract Damages, with just under \$6.5 billion in damages awarded (in cases terminating 2009-2017Q2), followed by Tort Compensatory damages, order-of-magnitude smaller at \$798 million awarded over the same period.
- Looking across all the different commercial damages types, the median total awards per case has risen since 2009 to reach about \$230,000 in recent years.
- Nearly half of the dollars (45.1%, or \$3.5b) awarded in commercial damages have been awarded on default judgment. The remainder is split roughly 3:2 between judicial judgments on the merits (e.g. judgment on the pleadings, summary judgment, JMOL) and jury verdicts.
- Hemlock Semiconductor Corporation has won more commercial damages over this period than any other party, but these damages come only from two cases.

In sum, this report illustrates the impact that Legal Analytics can have on key aspects of the business and practice of commercial law in generalized way. The full power of Legal Analytics is revealed, though, when users engage with the platform, tailoring their analysis to produce the tactical or strategic insights particular to their circumstance. When users have the ability to “twist the dials,” the results provide a competitive advantage in landing clients, winning cases, and closing deals by making data-driven decisions.

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Lex Machina's Data, Methodology, and Terminology

This report draws on data from Lex Machina's proprietary intellectual property litigation database. Although some of our data is derived from litigation information publicly available from PACER (federal court system), Lex Machina applies additional layers of intelligence to bring consistency to, and ensure the completeness of, the data. Beyond the automation, key areas of Lex Machina's data are either human-reviewed or hand-coded by a dedicated team of attorneys to ensure accuracy.

This report analyzes trends in commercial litigation. Lex Machina actively analyzes complaints to ensure that cases filed under appropriate CoA/NoS codes (or a CoA/NoS code corresponding to a different claim) are neither missed nor falsely included.

Moreover, due to inherent design limitations, PACER often shows inaccurate or corrupted information for older terminated cases. For example, when a lawyer leaves one firm for another, PACER may show closed cases that the lawyer worked on at the old firm as having been handled by the new firm. When combined with law firm splits, acquisitions, and mergers, these inaccuracies accumulate to render PACER data less reliable for older cases. Lex Machina, however, has a historic record going back to the first days of electronic filing on PACER (and other data going back even further). These snapshots, unique to Lex Machina, give us access to normalized contemporary data and enable us to provide more accurate data for older cases than someone using PACER today.

Lex Machina's data is focused on the U.S. District Courts, and does not include appeals, or modifications of judgments on appeal, or state court cases.

What is a Commercial case?

A case in which two business entities are litigating claims involving breach of contract or business torts.

- Contract claims include contracts governed by the Uniform Commercial Code (UCC) and contract-like claims, such as restitution for unjust enrichment.
- Business torts include claims in which the essence of the alleged wrongdoing involves a disruption of commercial relations. These torts are primarily common-law torts, but we do include statutory claims about misappropriation of trade secrets. To see the business torts included in this definition, see the Findings section below.
- Business entities include corporations, partnerships, LLPs, and other legal entities that operate under a trade or business name other than that of an individual. We do not consider the following entities to meet this definition: government entities, labor unions litigating labor disputes, law firms litigating malpractice disputes, or insurance companies litigating contribution or indemnity claims.

Note that this case type does not include claims brought under maritime law, shareholder disputes, cases where one party is seeking to enforce a judgment, or surety cases in which there is no business relationship between the parties. As mentioned above, this case type does not include most statutory tort claims, such as unfair/deceptive business practices statutes or industry-specific statutes (e.g. state franchise laws or auto-dealer regulations).

Commercial Case Tags

- Breach of Contract: Commercial cases involving a claim for breach of a contract. Contracts can be written, oral, implied-in-law, or implied-in-fact.

- **Business Tort:** Commercial cases involving a claim for conversion, fraud, misappropriation of trade secret, misrepresentation, negligence, business defamation or trade libel, occurring between business entities.

Commercial Findings

- **Contract Breach:** A breach of contract or promissory estoppel.
- **Contract Existence:** A declaration affirming a contract's existence. This finding only applies when a court rules on a declaratory judgment cause of action.
- **Contract Termination:** A declaration affirming that an existing contract was terminated by operation of the contract terms and/or the conduct of the parties to the contract. This finding only applies when a court rules on a declaratory judgment cause of action.
- **Unjust Enrichment:** A finding that a party was unjustly enriched. Also referred to as quantum meruit.
- **Contract Defense:** A defense to a breach of contract claim. There are many defenses, such as duress, misrepresentation, statute of limitations, impossibility, estoppel, etc.

Commercial Damages

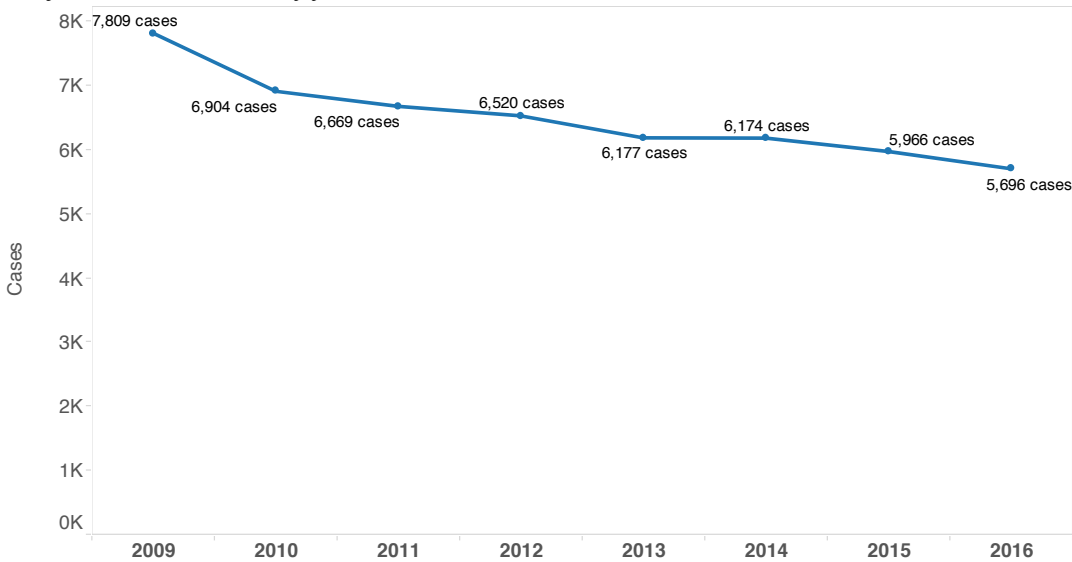
- **Contract Damages:** Damages that give the recipient either “the benefit of the bargain” of the contract, or the injured party’s “out-of-pocket” costs.
 - Certain attorneys’ fees are included in Contract Damages. Attorneys’ fees incurred in connection with a breach of contract (e.g., paying an attorney to help with the sale of collateral) are included here. However, attorneys’ fees incurred as a result of litigation are not included here; they are included in the General Damage type “Attorneys’ Fees”.
 - Liquidated damages are included in Contract Damages. Liquidated damages represent an amount agreed upon by the parties to be paid in the event of a breach. Liquidated damages are a predetermined amount that the parties agree will satisfy claims arising under the contract in the event of a breach. Liquidated damages are either specific amounts set forth in the contract or amounts that can be determined pursuant to a formula set forth in the contract.
 - Damages against or to individuals are omitted unless the individual is in an official capacity (for a business) or a business is jointly and severably liable.
- **Restitution:** Damages that return the injured party to a position as if they had never entered into the contract. Restitution is the remedy for claims of unjust enrichment. Unlike damages which focus on a plaintiff’s loss, restitution focuses on a defendant’s gain.
- **Tort Compensatory Damages:** Damages to compensate for loss, injury, or harm resulting from tortious conduct.
- **Punitive Damages:** Additional damages awarded for willful tortious conduct, intended to deter future tortious conduct.
- **Enhanced Damages:** Statutory enhancement of damages for breach of contract or tortious conduct.

Note on potential number differences between this report and law.lexmachina.com:

When viewing live analytics, please note that numbers may vary from those captured in this report as a result of Lex Machina’s ongoing data quality improvement efforts, as well as due to our addition of new practice area modules (which may contain additional cases that overlap with our Commercial criteria).

Case Filings and Districts

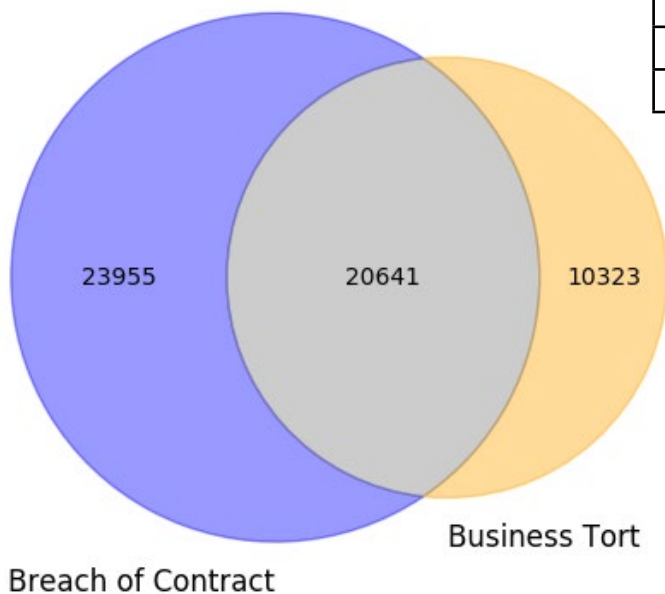
Figure 1: Cases filed, 2009-2017Q2, by year



Lex Machina defines commercial litigation as business-to-business cases involving a breach of contract and/or a business tort claim (as shown in the breakdown below).

Since 2009, the number of commercial cases filed each year has declined. As the economy has recovered from the recession, fewer business are suing on contract or business tort claims.

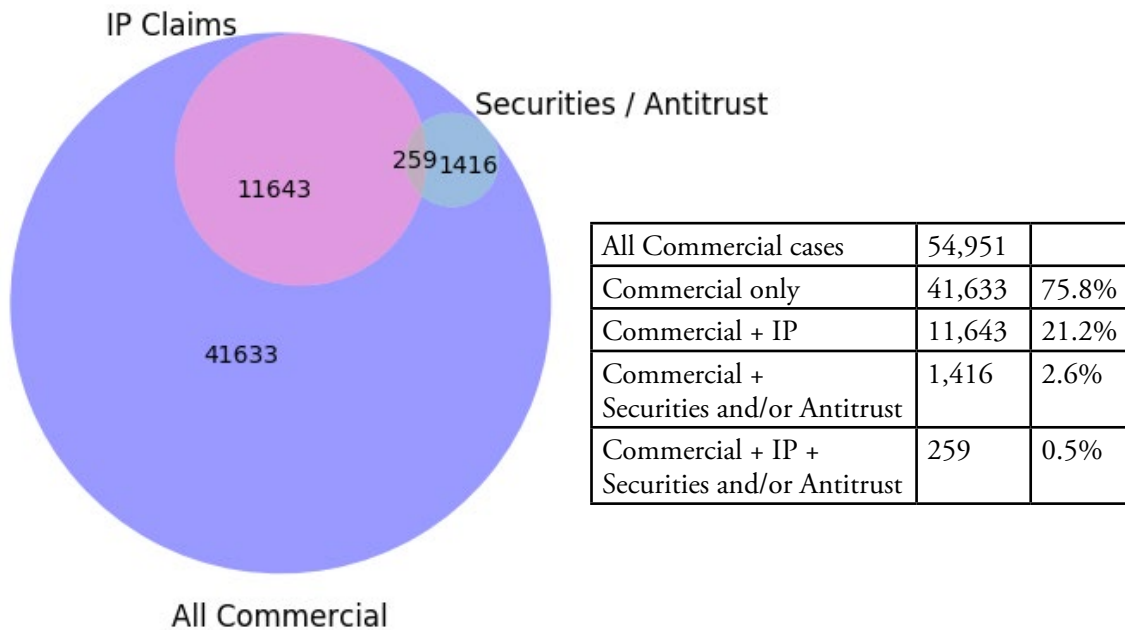
Figure 2: Commercial tags, by cases filed 2009-2017Q2



Total cases	54,951	
Breach of contract only	23,955	44%
Business tort only	10,323	19%
Both	20,641	38%

Note: All charts reflect commercial litigation in the U.S. District Courts. State court cases are not included. See Data, Methodology, Terminology section for more detail on breach of contract and business torts.

Figure 3: Cases filed, 2009-2017Q2, commercial overlap with other practice areas

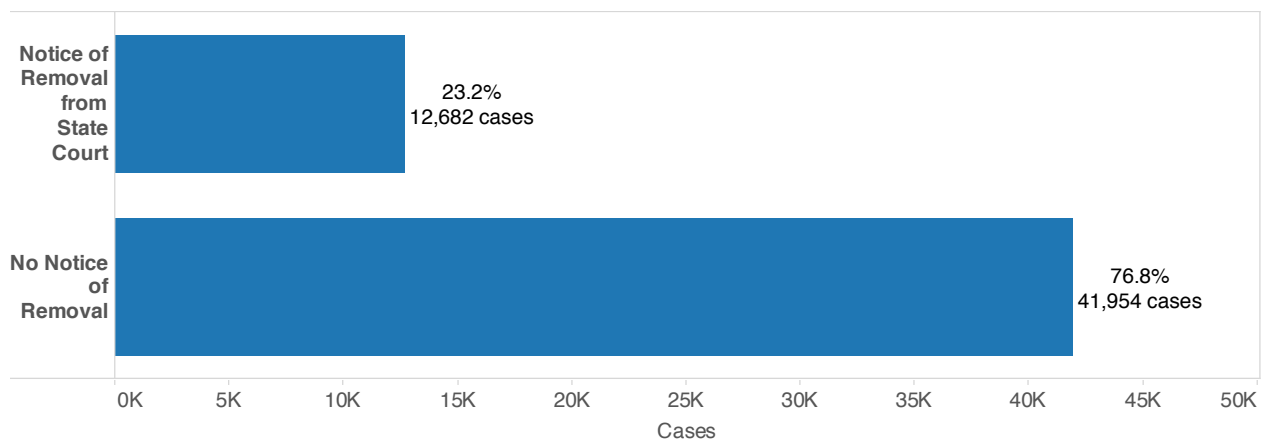


Cases in the IP, securities, and antitrust modules but not in commercial are omitted above.

Many commercial cases involve claims from other practice areas. The leading overlap practice areas are in IP (over 20% of commercial cases involve an IP claim), followed by Securities and Antitrust (about 3%). This is important for litigators - excluding overlap cases can produce better analysis for a case with no such claims, while the reverse is true as well: focusing on similar overlap cases yields more accurate data when those claims are at issue.

The majority of commercial litigation originates in the federal courts, with just 23% coming from state court via removal.

Figure 4: Cases filed, 2009-2017Q2, notice of removal



Districts and Judges

Figure 5: Cases filed 2009-2017Q2, by district

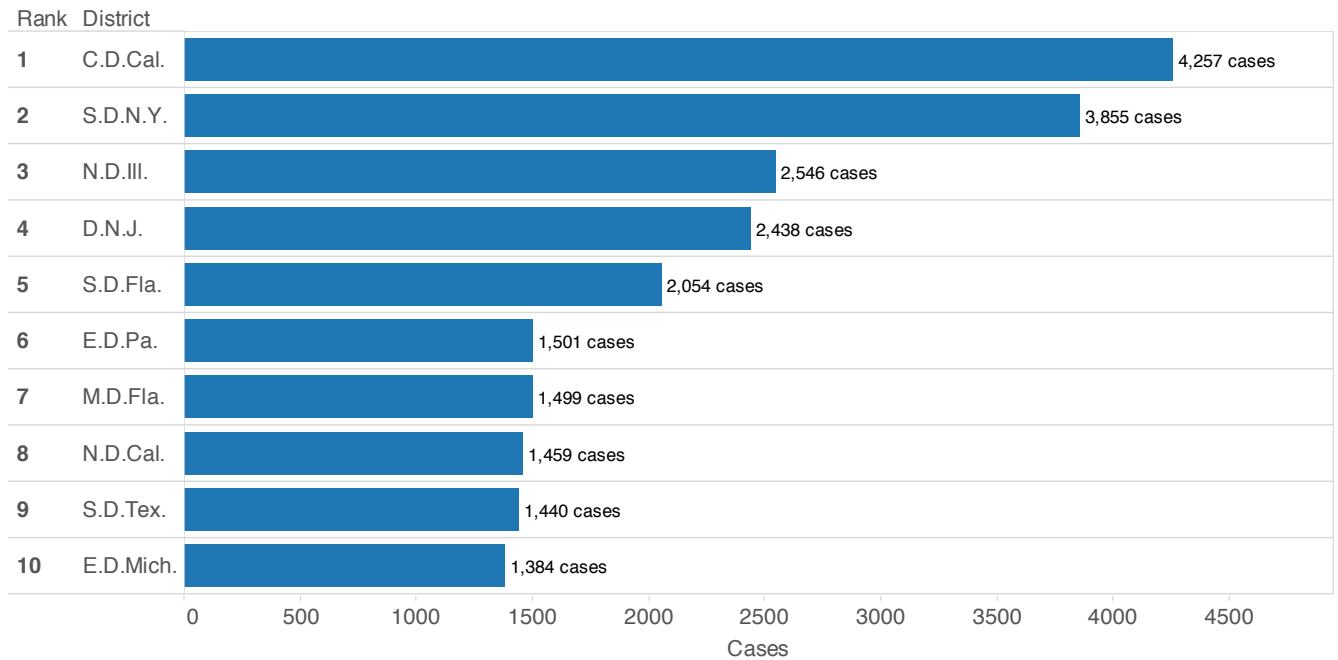
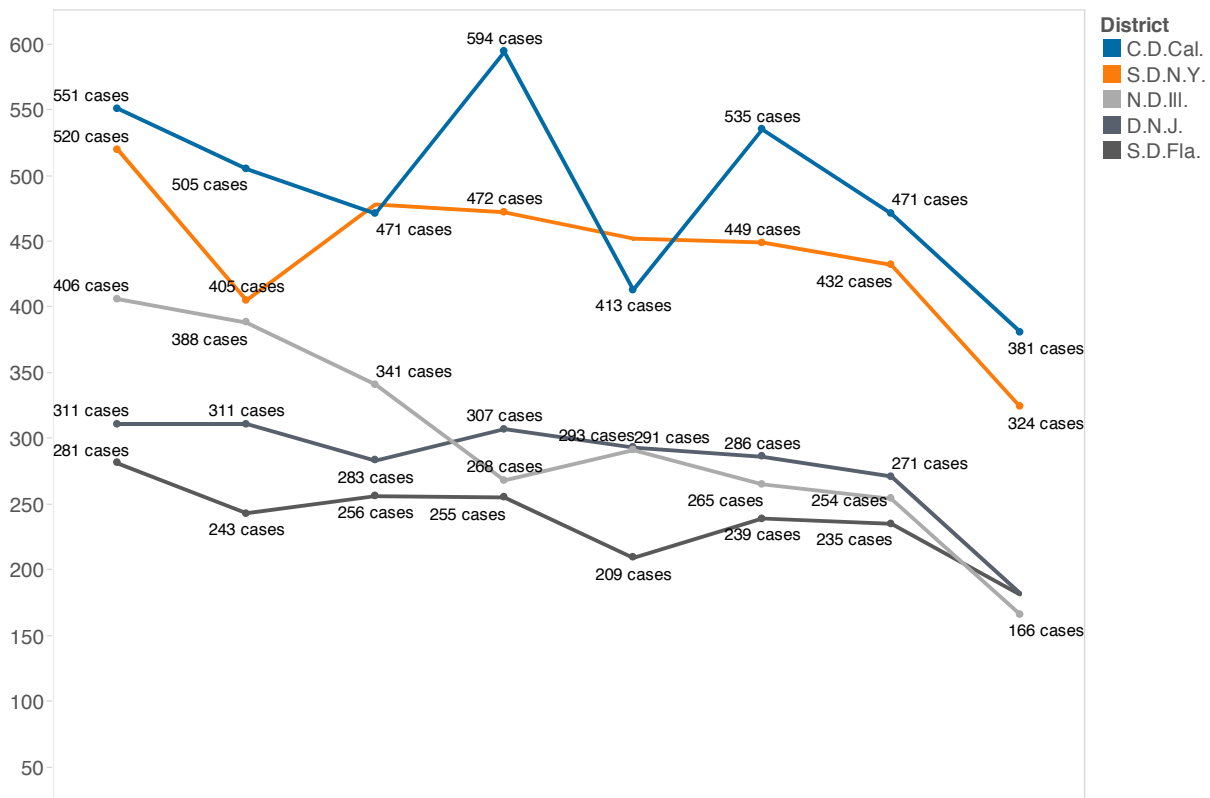


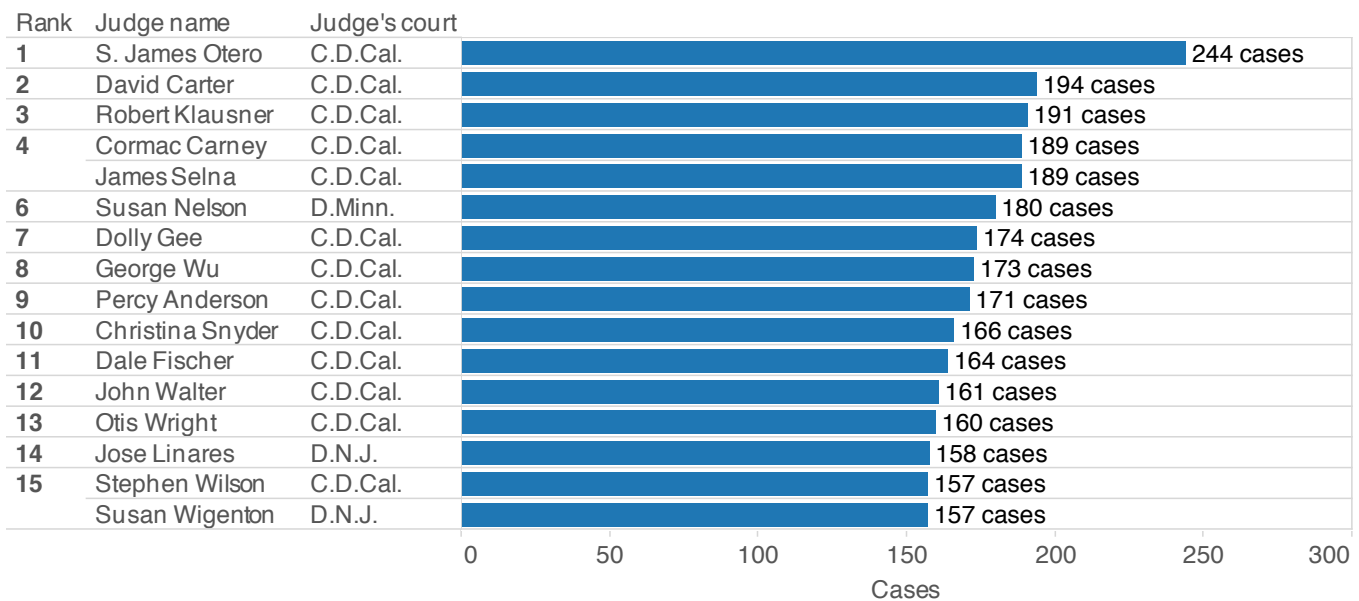
Figure 6: Cases filed, 2009-2017Q2, by top district and year



The top districts reflect the major metropolises where the most business occurs. The Central District of California has had the most cases since 2009 (4,257 cases, or about 8%), followed by the Southern District of New York (3,855), the Northern District of Illinois (2,546), and the District of New Jersey (2,438). The decline in litigation since 2009 has been felt across all the top districts.

The judges with the most cases filed since 2009 overwhelmingly come from the Central District of California, and have typically seen between 150 and 200 cases over that time frame.

Figure 7: Top judges, by cases filed 2009-2017Q2



Parties and Law Firms

The Federal Deposit Insurance Corporation (FDIC) is the leading commercial plaintiff, but most other top parties are large banks, financial services companies, or insurance companies, with some nationwide retail on the defendant side (Ross Stores, Home Depot, Amazon). On the plaintiff side, two groups appear due to overlap cases: textile pattern companies (Star Fabrics, L.A. Printex, Unicolors; but only due to commercial claims in their copyright cases), and brand holding companies (DD and BR IP Holder for Dunkin Donuts and Basking Robbins, due to commercial claims in their trademark cases).

The law firm Greenberg Traurig is the leading firm by cases filed since 2009 regardless of whether representing plaintiff (333) or defendant (401). The presence of Doniger Burroughs in the lists for cases representing plaintiffs is due to its representation of the textile pattern companies above.

Among firms representing defendants in cases since 2009, DLA Piper (299 cases) and Reed Smith (280 cases) are the second and third ranked firms after Greenberg. More recently, in cases filed since 2016, Morgan Lewis is the leading firm (57 cases).

Figure 8: Top plaintiffs, by cases filed 2009-2017Q2

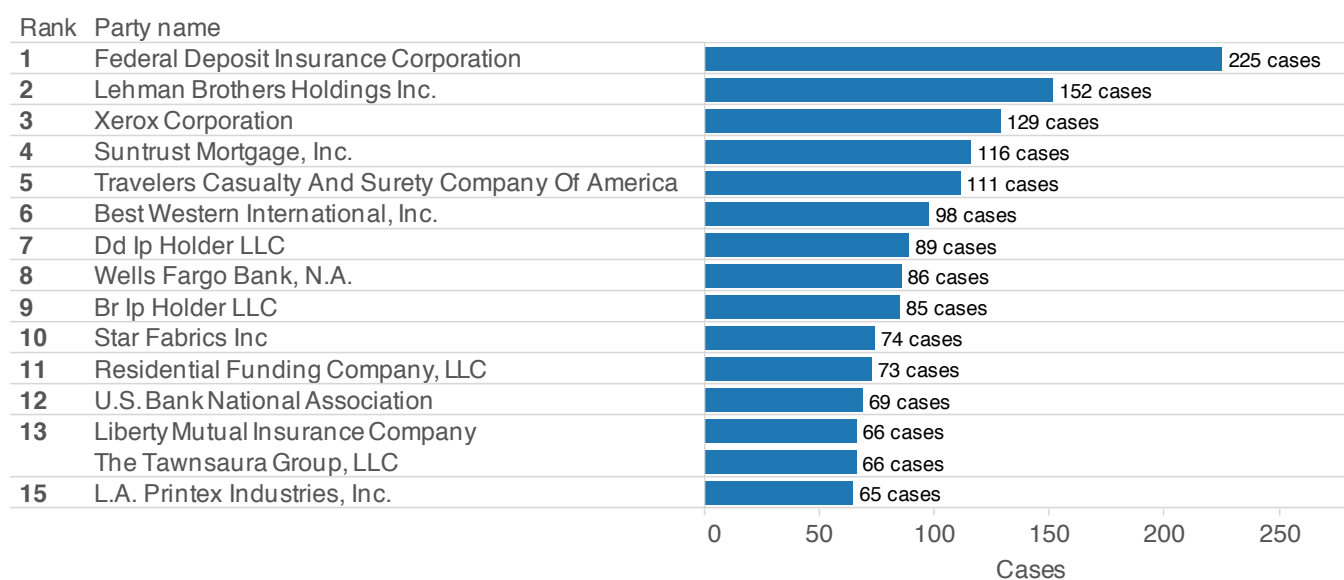


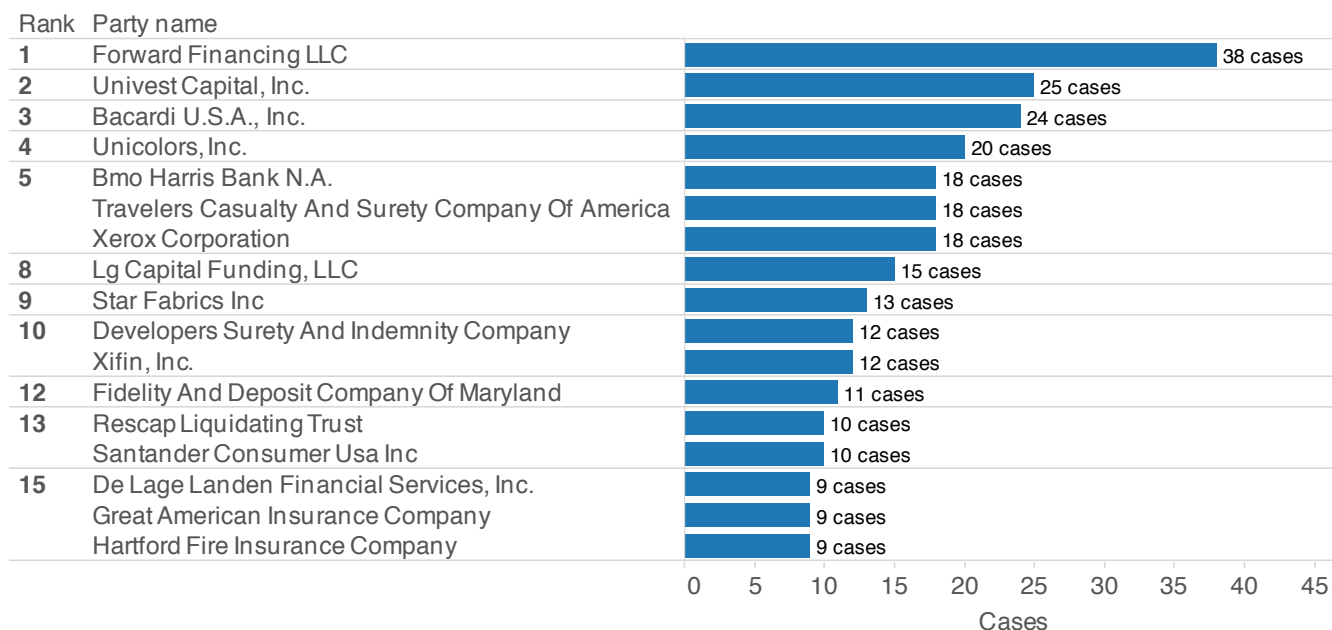
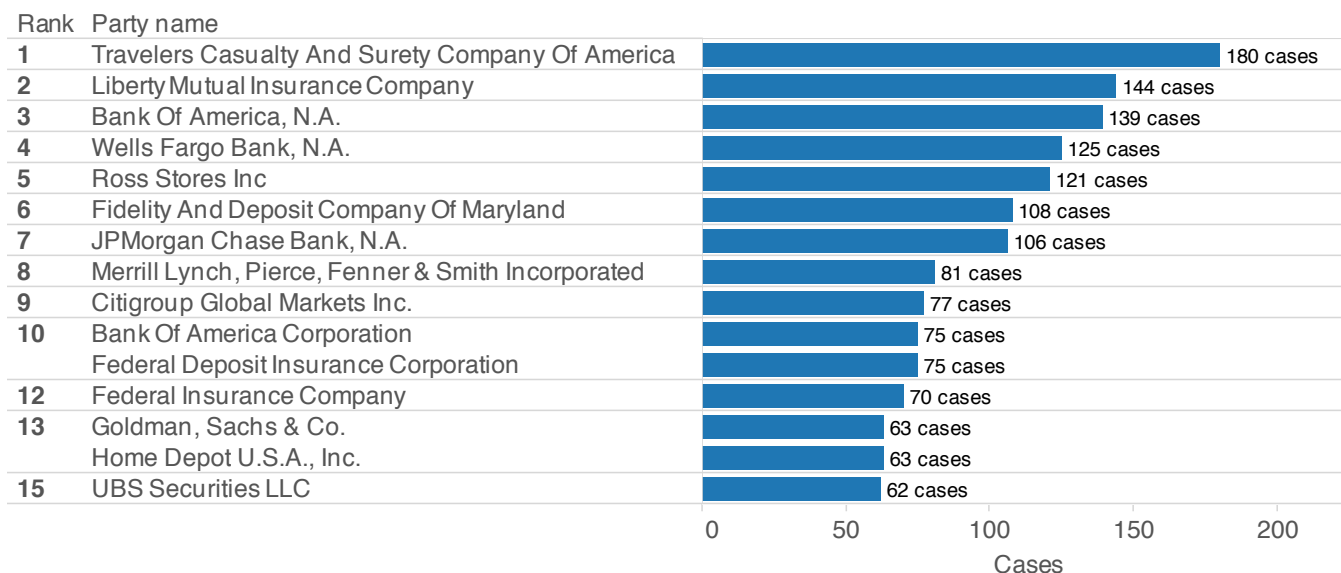
Figure 9: Top recent plaintiffs, by cases filed 2016-2017Q2*Figure 10: Top defendants, by cases filed 2009-2017Q2*

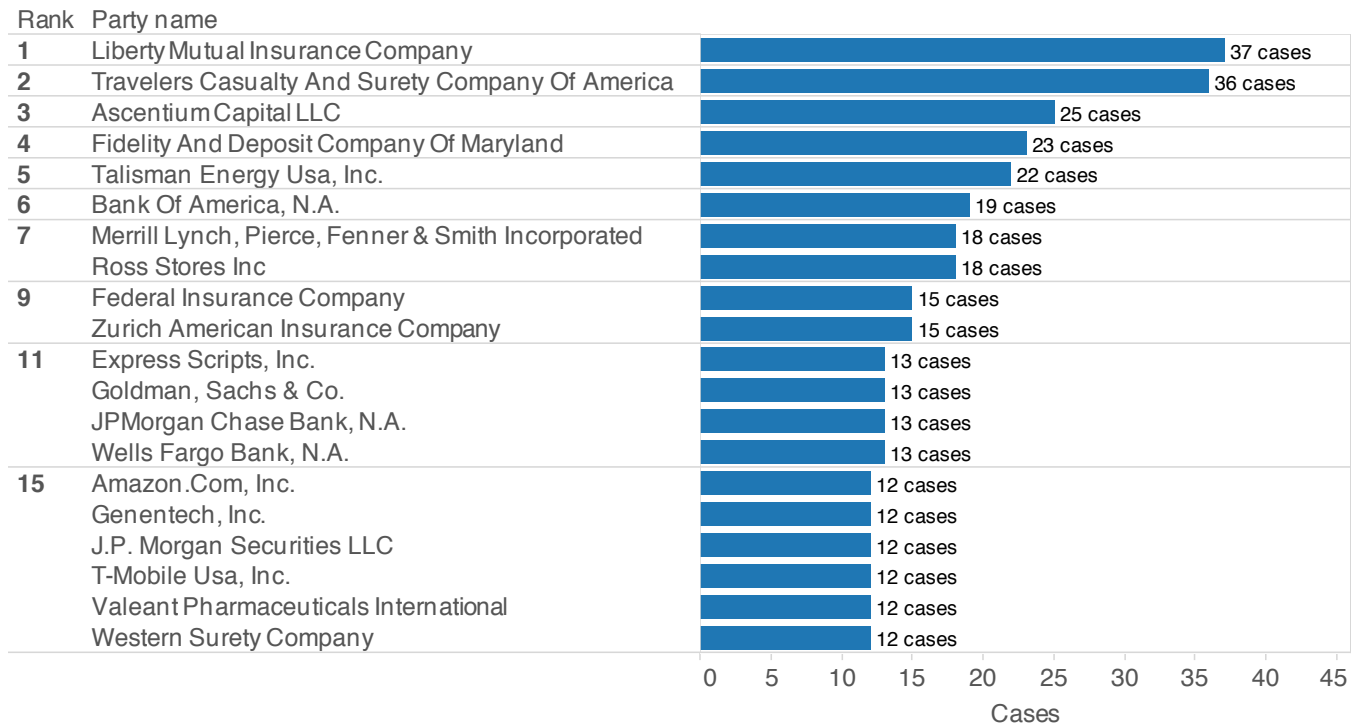
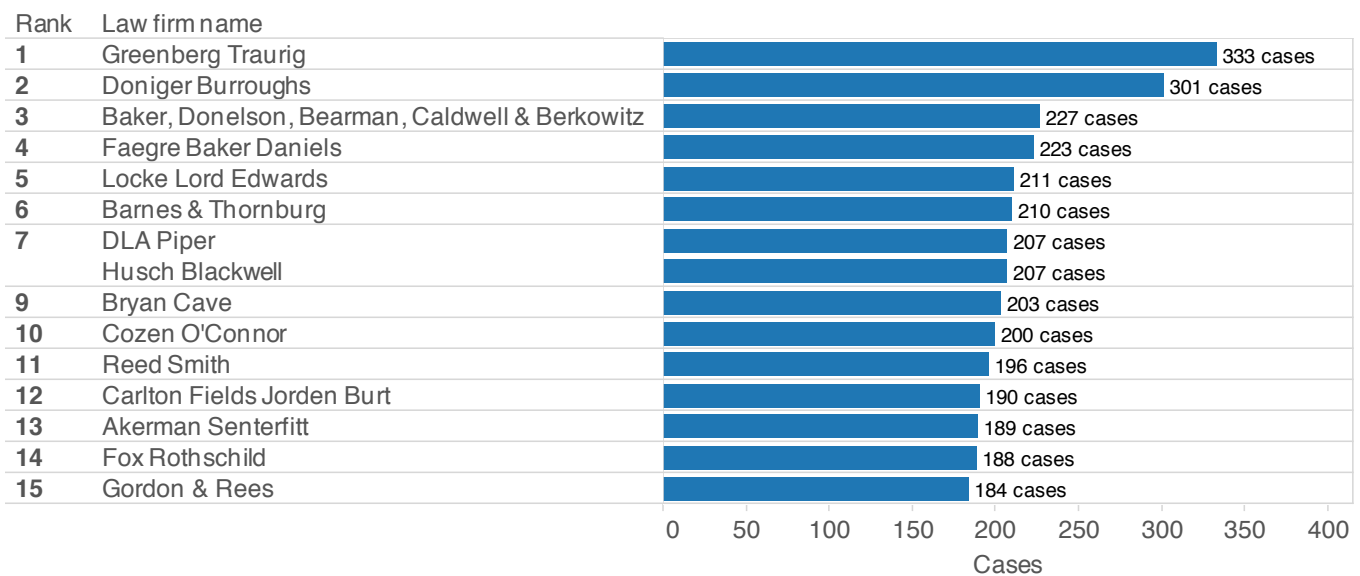
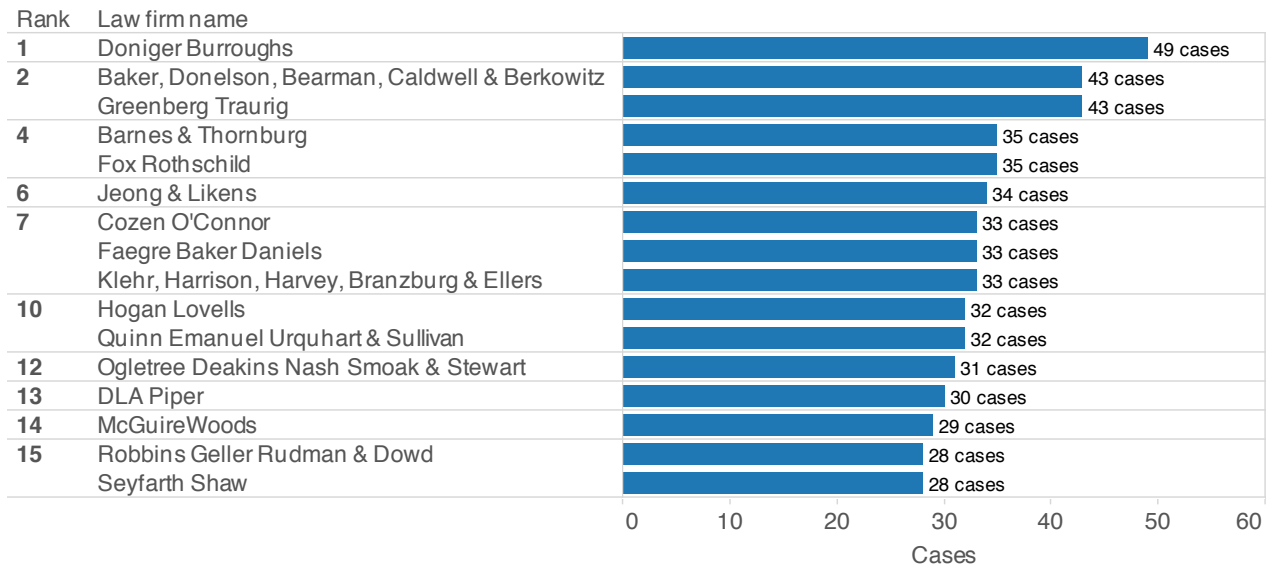
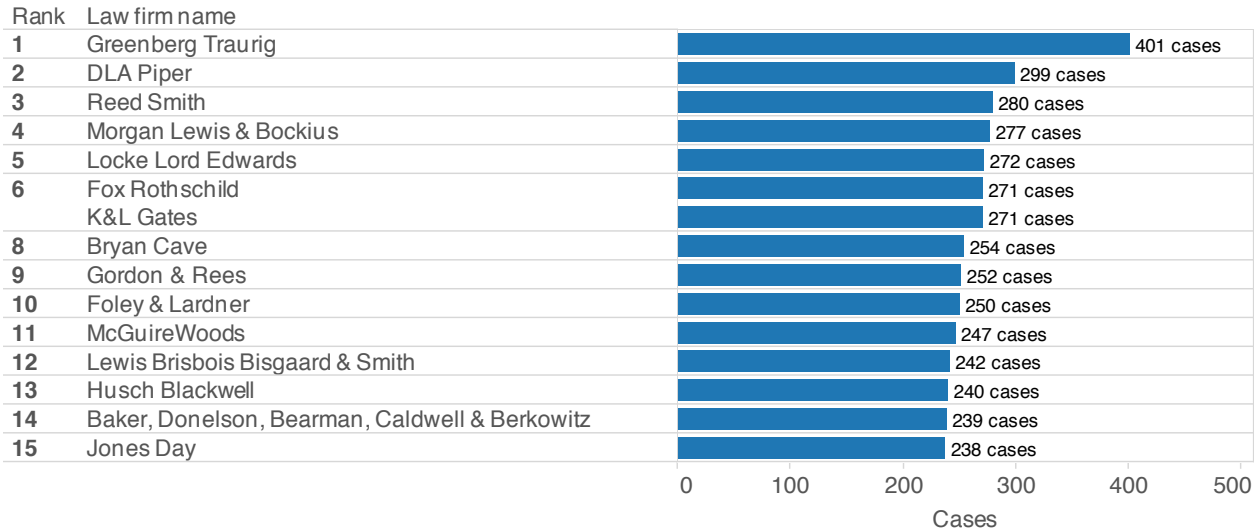
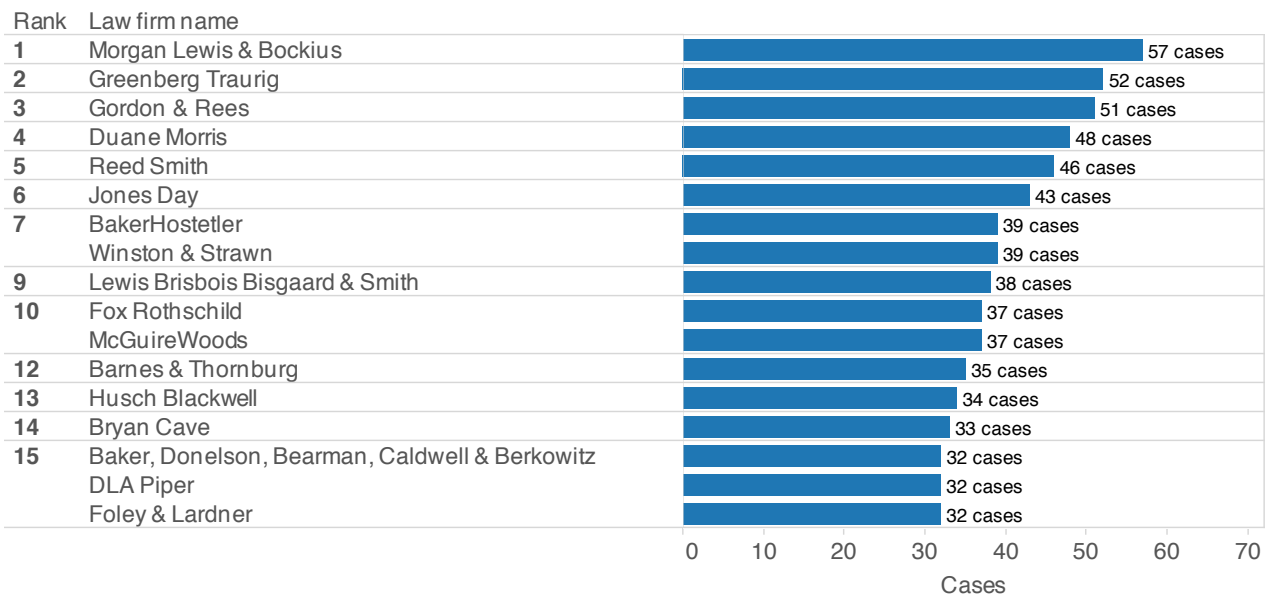
Figure 11: Top recent defendants, by cases filed 2016-2017Q2*Figure 12: Top law firms, by cases filed 2009-2017Q2 representing plaintiffs*

Figure 13: Top recent law firms, by cases filed 2016-2017Q2 representing plaintiffs*Figure 14: Top law firms, by cases filed 2009-2017Q2 representing defendants**Figure 15: Top recent law firms, by cases filed 2016-2017Q2 representing defendants*

Findings, Resolutions, and Timing

Figure 16: Findings in cases terminated 2009-2017Q2

		Default Judgment	Consent Judgment	Judgment on the Pleadings	Summary Judgment	Trial	JMOL
Finding of	Contract Breach	3,529 cases	582 cases	34 cases	1,514 cases	732 cases	10 cases
	Contract Defense	5 cases		18 cases	239 cases	30 cases	1 cases
	Contract Existence	5 cases	3 cases		38 cases	5 cases	
	Contract Termination	6 cases	1 cases	1 cases	35 cases	7 cases	1 cases
	Conversion	258 cases	76 cases	1 cases	52 cases	36 cases	
	Defamation / Trade Libel	12 cases	5 cases		5 cases	10 cases	
	Fraud / Misrepresentation	425 cases	95 cases		76 cases	84 cases	
	Misappropriation of Trade Secret	40 cases	47 cases	1 cases	21 cases	46 cases	
	Negligence	79 cases	16 cases	1 cases	29 cases	32 cases	
	Tort Defense	1 cases		4 cases	95 cases	13 cases	
	Tortious Interference	134 cases	127 cases	1 cases	36 cases	72 cases	
	Unjust Enrichment	392 cases	119 cases	1 cases	73 cases	64 cases	1 cases
Finding of	No Contract Breach	17 cases	18 cases	55 cases	1,538 cases	442 cases	25 cases
	No Contract Defense	1 cases		2 cases	81 cases	57 cases	2 cases
	No Contract Existence	8 cases	1 cases	6 cases	63 cases	13 cases	
	No Contract Termination				11 cases	2 cases	
	No Conversion	3 cases	4 cases	7 cases	180 cases	39 cases	2 cases
	No Defamation / Trade Libel			2 cases	69 cases	10 cases	2 cases
	No Fraud / Misrepresentation	6 cases	4 cases	31 cases	592 cases	132 cases	11 cases
	No Misappropriation of Trade Secret	2 cases	2 cases	1 cases	141 cases	44 cases	1 cases
	No Negligence	2 cases	1 cases	8 cases	176 cases	39 cases	2 cases
	No Tort Defense				9 cases	6 cases	
	No Tortious Interference	3 cases	7 cases	23 cases	463 cases	83 cases	10 cases
	No Unjust Enrichment	3 cases	1 cases	18 cases	389 cases	75 cases	7 cases

Lex Machina recognizes findings on commercial issues, namely Contract Breach, Existence, Termination, and Defense, and Unjust Enrichment for contract cases, as well as business tort findings including Conversion, Defamation / Trade Libel, Fraud / Misrepresentation, Negligence, Tortious Interference and a Tort Defense.

Combined with Lex Machina's judgment events above, this data shows practitioners what findings are reached in commercial cases, and how those findings were reached.

For example, most Contract Breach findings occur on consent judgment, but of the remainder a finding at summary judgment is almost twice as likely as a finding at trial. For Tortious Interference, defaults and consent judgments constitute nearly 2/3 of the cases with that finding.

While the above chart shows a general roadmap of how findings are reached by judgment event, the real power of this data comes from being able to filter it by other criteria. For example, an attorney can find how often in previous cases a particular claim has succeeded by excluding default and consent judgments if those situations are not relevant. Given a particular court or judge, an attorney can quickly narrow the search down to only those cases, yielding not only the likelihoods but also concrete examples of cases going each way.

Figure 17: Case resolutions, cases terminating 2009-2017Q2

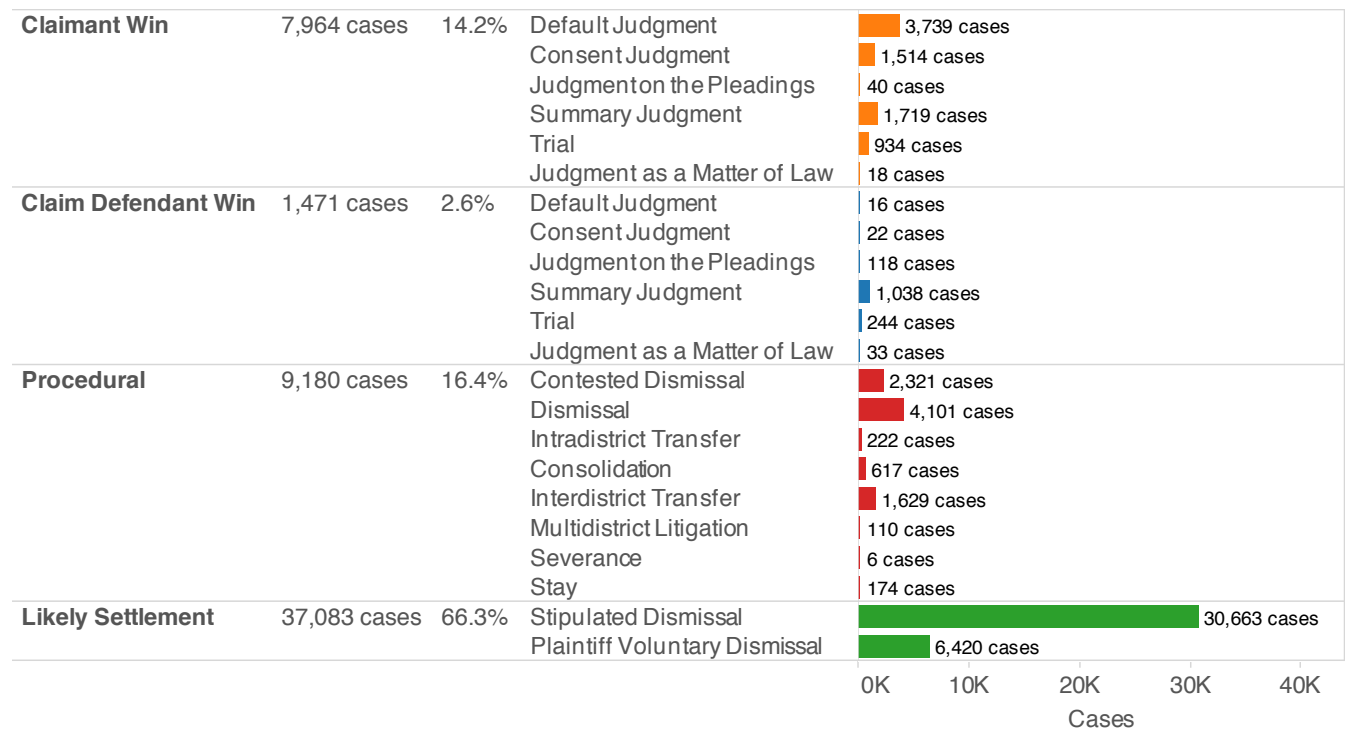
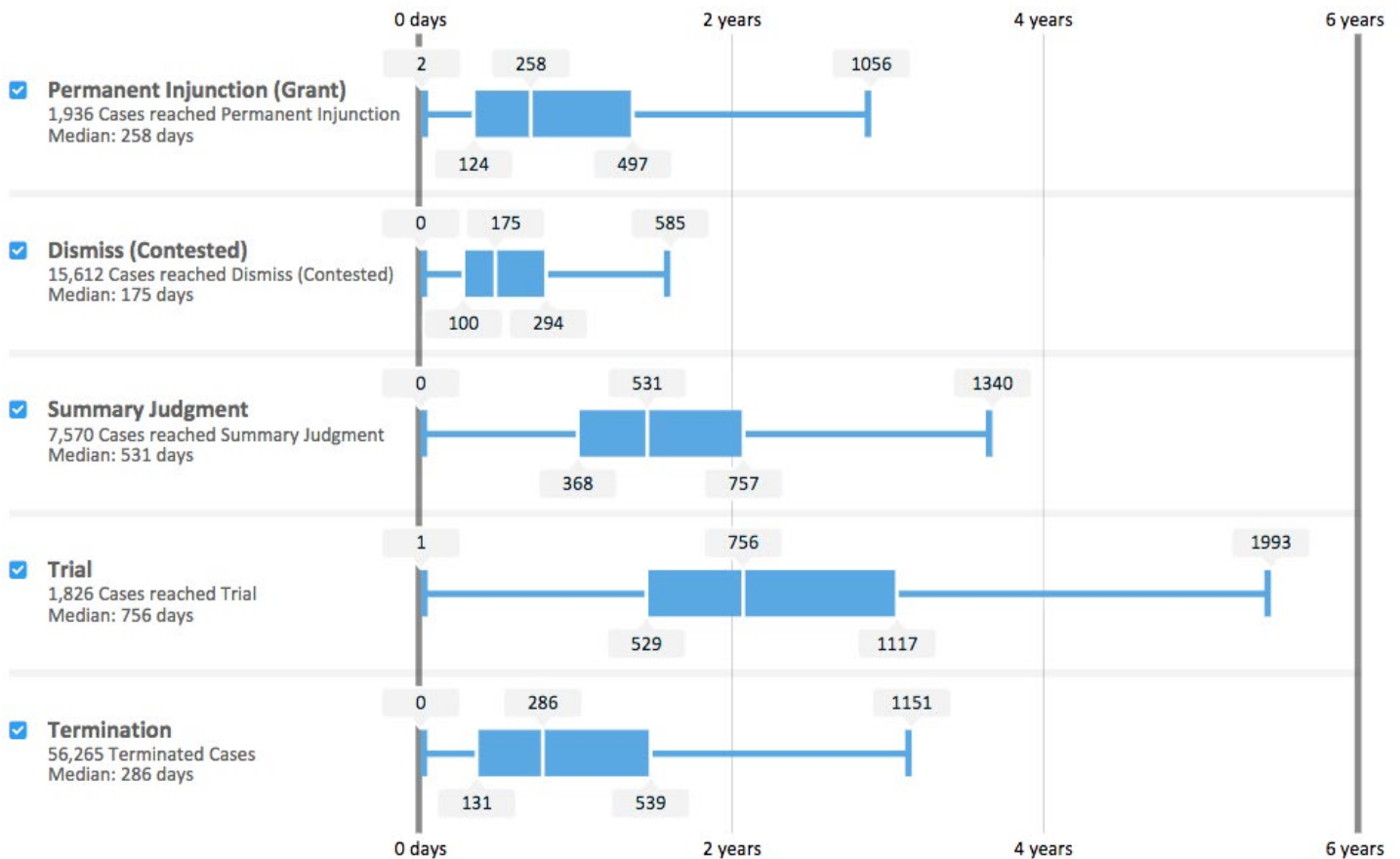


Figure 18: Time to termination, cases terminating 2009-2017Q2

Showing 56,265 Commercial cases; filed between 2000-01-01 and 2017-08-01 ; terminated between 2009-01-01 and 2017-06-30 .



Understanding timing data is one of the best uses of Legal Analytics - knowing how long a case is likely to last makes for better decision-making: clients can know what to expect in their bills, lawyers can plan their schedules with greater confidence, and budgets can accurately account for the costs.

These charts show the timing to various key events in commercial cases.

The median (shown above each bar in the middle, and at the left) is the middle-most value, where as many cases took longer than the median as took shorter than the median, and serves as a simple and useful average. The median time to summary

judgment is 531 days, or just under a year and a half.

On the Lex Machina site, users can combine various filters (for case filing or termination, case type, party or law firm involvement, and much more) and view the timing data specific to that list. This level of control provides new insights - for example, in to the relative speediness of two law firms, or the likelihood of being in litigation a year from today with a breach of contract dispute.

See the section entitled “Understanding Boxplots” at the back of this report to get more from these charts!

Damages

To make it easier to analyze the cases that matter most to practitioners, Lex Machina breaks down damages awards in commercial litigation, recognizing five types of damages (in addition to cost and fees, excluded in these charts): Contract Damages, Tort Compensatory Damages, Restitution, Punitive Damages, and Enhanced Damages.

Quantifying the types and amounts of damages that have been awarded gives practitioners an edge in understanding how much their cases are likely to be worth under different theories.

By far the most common type by dollars awarded is Contract Damages, with just under \$6.5 billion in damages awarded (in cases terminating 2009-2017Q2). By contrast, Tort Compensatory damages are an order-of-magnitude smaller, with \$798 million awarded over the same period. The other types accounted for even less.

Looking across all the different commercial damages types, the median total awards per case has risen since 2009 to reach about \$230,000 in recent years.

Nearly half of the dollars (45.1%, or \$3.5b) awarded in commercial damages have been awarded on default judgment. The remainder is split roughly 3:2 between judicial judgments on the merits (e.g. judgment on the pleadings, summary judgment, JMOL) and jury verdicts.

Hemlock Semiconductor Corporation has won more commercial damages over this period than any other party, but these damages come only from two cases (a summary judgment in *Hemlock Semiconductor Corp. v. SolarWorld Industries GmbH* (E.D. Mich. 1:13-cv-11037), and a default judgment in *Hemlock Semiconductor Corp. v. Global Sun Ltd. et al.* (E.D.Mich. 1:13-cv-11881)).

Aside from Hemlock Semiconductor and Spherx Biopharma, most of the other top parties by awards won are banks or financial services companies.

Figure 19: Damages by type, cases terminating 2000-2017Q2, by type

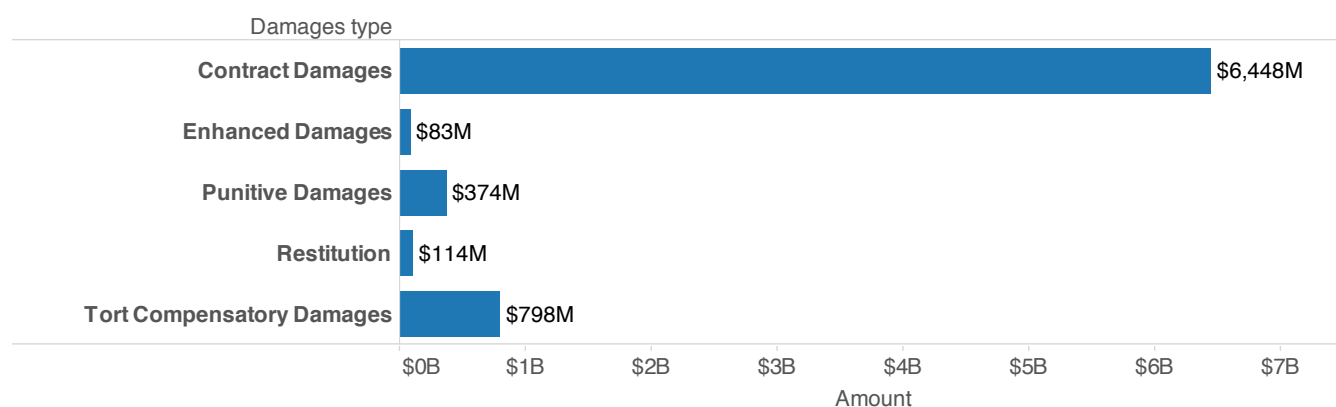


Figure 20: Median damages by year of last award, cases terminating 2000-2017Q2

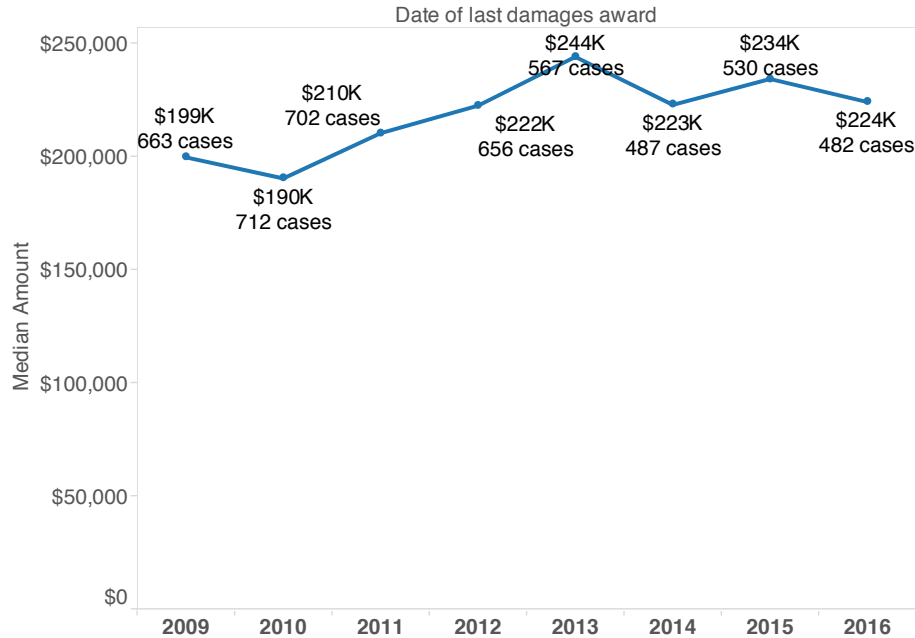


Figure 21: Damages by judgment event, cases terminating 2009-2017Q2

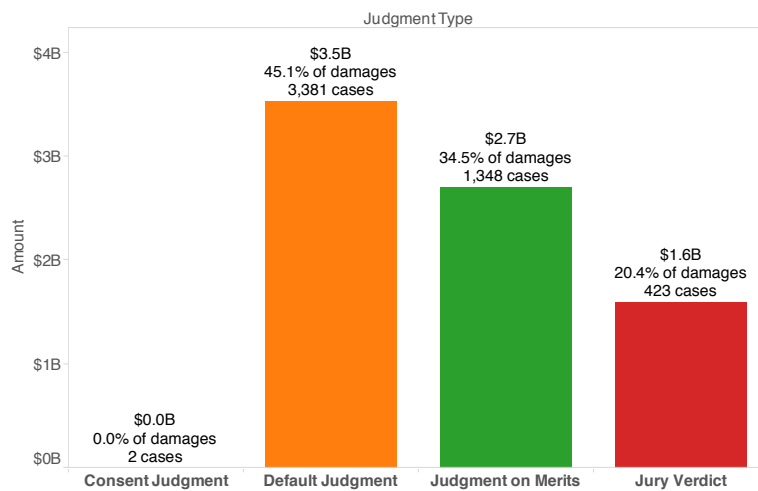
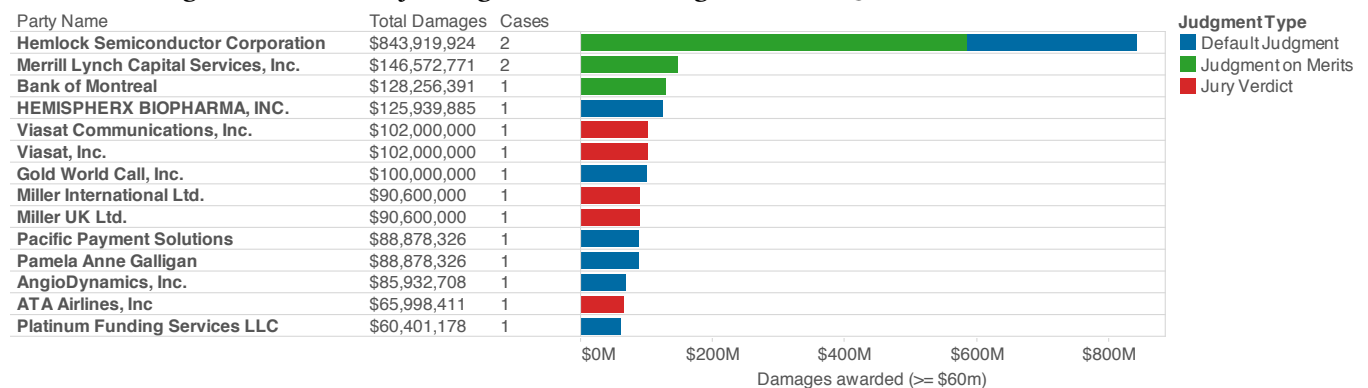


Figure 22: Parties winning more than \$60m of damages, cases terminating 2009-2017Q2



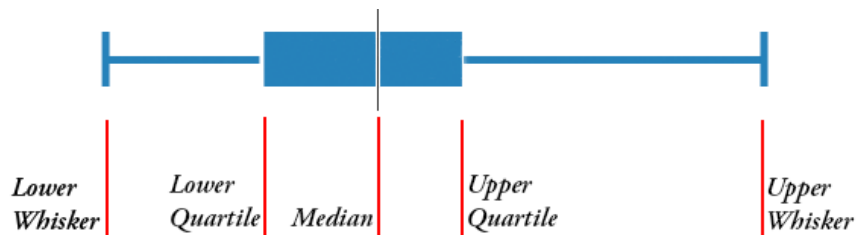
Note: In cases where multiple damages awards were made in separate years, the total sum is reflected under the most recent year. Damages charts exclude damages for other practice areas (e.g. reasonable royalty patent damages) in overlap commercial cases.

Using Boxplots to Understand Timing

Lex Machina's analytics use a data visualization known as the boxplot to convey information about the timing of significant events in a case. Knowing how to interpret this data gives you an advantage when it comes to strategy, budgeting, and setting expectations, as well as in other decisions that involve case timing.

Consider a newly filed case: Regardless of whether you're an outside counsel, say, trying to determine how large of a flat fee to charge or trying to make sure two trials don't overlap, or an inside counsel estimating legal spend and evaluating a firm's proposed budget, case timing matters. Knowing the lower and upper bounds of how long it may reasonably take the case to reach injunction can give both kinds of counsel a strategic advantage over opponents lacking such nuanced information. Moreover, knowing the best and worst case scenarios for timing, or exactly how likely it is that a case will be active in 6 months enables more far-sighted contingency planning.

A boxplot summarizes a series of data points to help you understand the shape, or distribution of the values in those points. The boxplot is drawn based on five numbers: the median, the upper and lower quartiles, and the whiskers for a distribution.



Paying attention to these key parts of the plot will help you quickly understand what you need to know. Although boxplots provide a wealth of information, the four observations below, in order from simplest onwards, are all one needs to easily grasp the significance of a boxplot.

Median: the middle dividing line of the box splits the data points evenly so that 50% fall to either side. It's a form of average that gives a single number representation of what to reasonably expect.

Box bounds: the box encloses the middle-most 50% of the datapoints (from the 25th percentile to the 75th), with 25% of the datapoints falling outside to either side. This makes the box a good representation of the range one can reasonably expect.

Box compressed or elongated: a more compressed box means that more datapoints fall into a smaller range of time and therefore are more consistent; in contrast a longer box means that the datapoints are spread out over a wider time period and are therefore less predictable.

Whiskers: Whiskers are drawn to show the outside bounds of reasonable expectation, beyond which datapoints are considered outliers.¹

¹ By statistical convention, boxplots define outliers as points beyond more than 1.5 times the width of the box (sometimes called the "interquartile range").



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