PLAC

MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

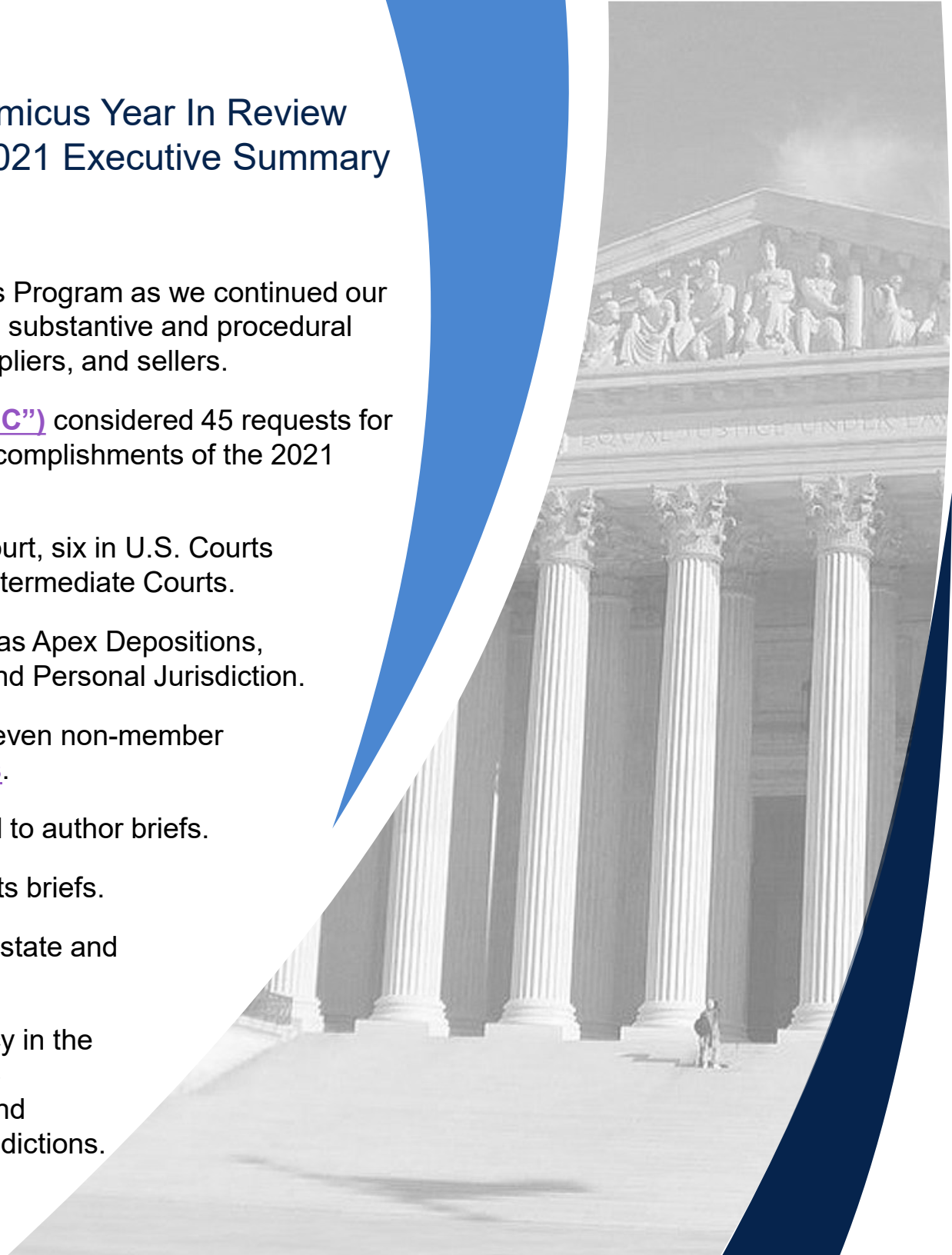
Amicus Year In Review 2021 Executive Summary

2021 was another busy year for PLAC's Amicus Program as we continued our mission to help shape the jurisprudence of both substantive and procedural issues important to product manufacturers, suppliers, and sellers.

The **Amicus Case Selection Committee ("CSC")** considered 45 requests for briefs and approved the filing of 25. Notable accomplishments of the 2021 Amicus Program included:

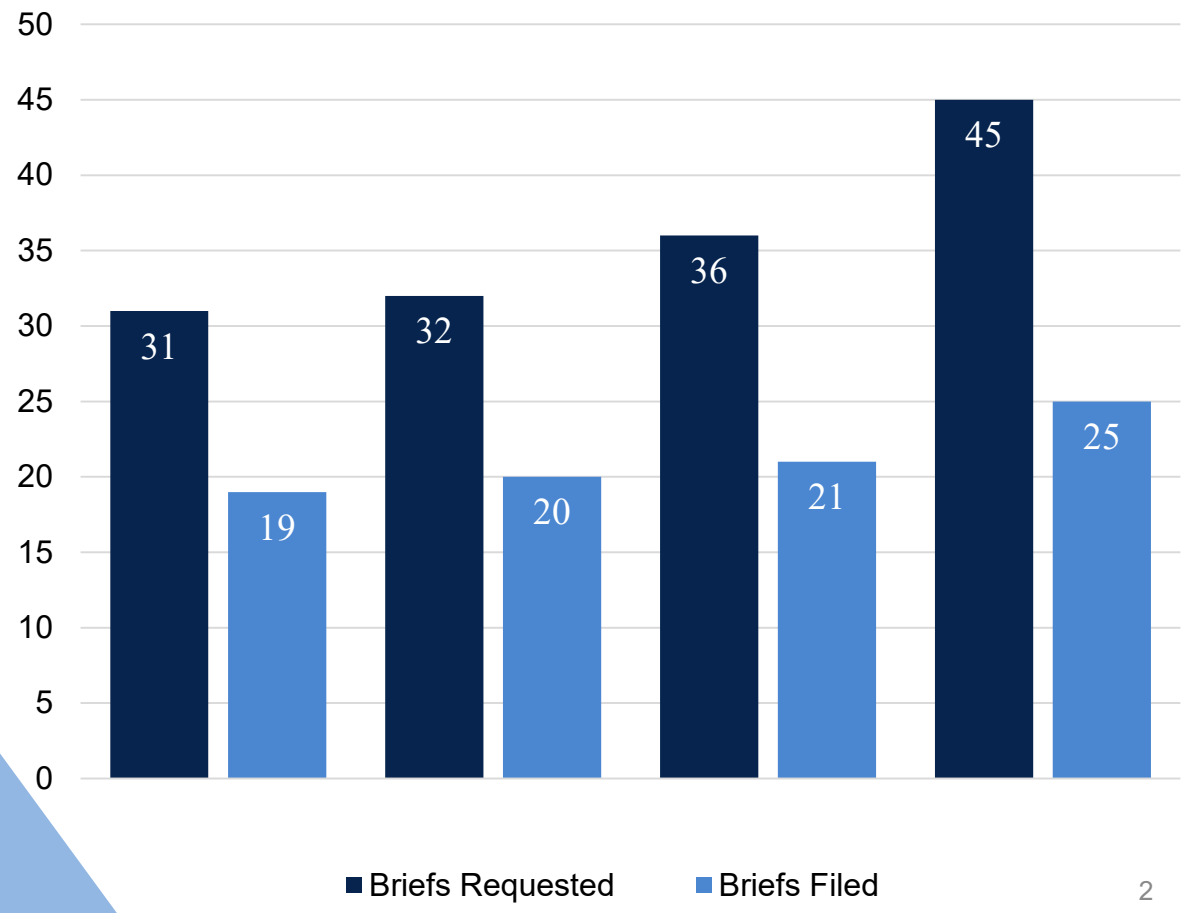
- Filing eight briefs in the U.S. Supreme Court, six in U.S. Courts of Appeal and 11 in state Supreme and Intermediate Courts.
- Addressing a wide range of **issues** such as Apex Depositions, Standing in Class Actions, Preemption, and Personal Jurisdiction.
- Supporting 19 member companies and seven non-member companies across 14 different **industries**.
- Engaging distinguished appellate counsel to author briefs.
- Enjoying a 75% success rate on our merits briefs.
- Advocating for **rules changes** in federal, state and Canadian provincial jurisdictions.

Read on for 2021 highlights of PLAC's advocacy in the courts, significant decisions in cases that PLAC briefed, and PLAC's comments on draft rules and procedures in federal, state, and provincial jurisdictions.



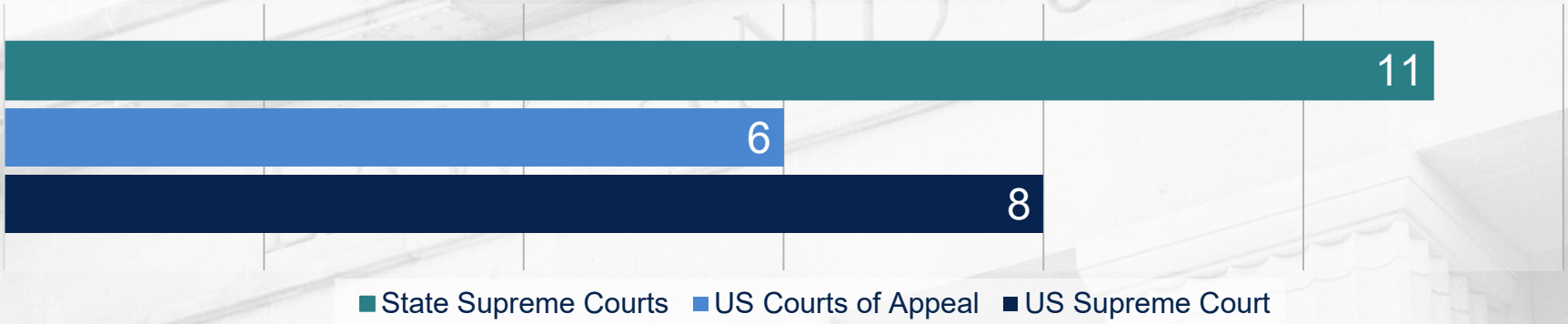
Amicus Briefs: 2018 - 2021 by the Numbers

Requests for PLAC briefs have been increasing steadily over the past four years, with 2021 alone seeing an almost 25% increase. The CSC agreed to file briefs in just over half the cases.

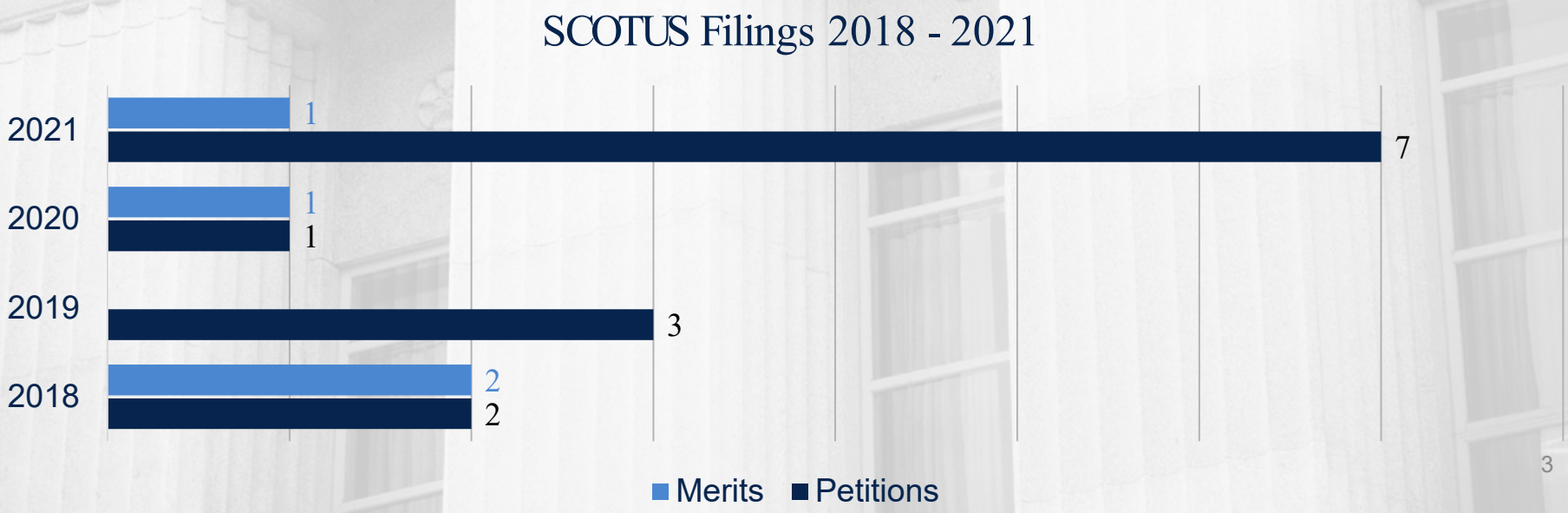


Amicus Briefs: Court Filings

2021 filings included eight U.S. Supreme Court briefs as well as six U.S. Court of Appeals and 11 state Supreme and Intermediate Appellate Court briefs.



PLAC filed nearly as many U.S. Supreme Court briefs in 2021 as in the three prior years combined.



PLAC's Advocacy at a Glance: Select Issues Briefed in 2021

Federal Rules of Evidence 702	PLAC urged the U.S. Supreme Court to review the Ninth Circuit's standards for admitting expert testimony that would exclude expert testimony only if it amounts to "junk science" or "nonsense." ***Monsanto Company v. Hardeman*, No. 21-241 (U.S. filed Oct. 1, 2021)**
General Personal Jurisdiction	PLAC advocated for U.S. Supreme Court review of a Georgia Supreme Court decision finding general personal jurisdiction by consent over a non-resident corporation based on its mere registration to do business in the state. ***Cooper Rubber and Tire v McCall* No. 21-926 (U.S. filed Jan. 21, 2022]**
Federal Preemption of State Law	PLAC submitted five briefs addressing federal preemption, including one urging U.S. Supreme Court review of a Mississippi Supreme Court decision finding a state consumer fraud failure-to-warn action was not preempted by the FDA's rejection of a citizen's petition seeking the same warning. PLAC argued FDA labeling decisions preempted state law demands for warnings the agency has found scientifically unsupported. ***Johnson & Johnson v Fitch*, No. 21-348, *cert. denied*, 142 S. Ct. 732 (U.S. Dec. 13, 2021)**
Consolidated Jury Trials	PLAC urged the U. S. Supreme Court to review the Missouri Supreme Court's decision upholding a consolidated jury trial of 22 separate asbestos-in-talc plaintiffs with disparate injuries and product use. PLAC argued that such consolidated trials pose severe threats to defendants' due process rights to a fair trial. ***Ingham v Johnson & Johnson*, No. 20-1223, *cert. denied*, 141 S. Ct. 2716 (U.S. 2021)**
Offensive Estoppel in MDL	PLAC supported DuPont's appeal to the Sixth Circuit from a district court decision affording non-mutual offensive collateral estoppel following a limited number of MDL bellwether trials. PLAC argued the ruling represented a dramatic transformation of well-established MDL processes and posed serious implications for bellwether trial practice in other MDLs. ***Abbott v. E. I. du Pont de Nemours & Co.*, No. 21-3418 (6th Cir. filed July 28, 2021)**

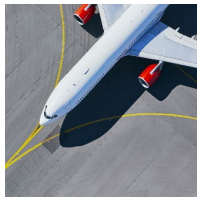
Amicus Briefs: Industries Supported in 2021

PLAC filed briefs on behalf of companies from the wide variety of industries represented by its members as well as some companies outside our core membership of product manufacturers, suppliers and retailers.

The complete list of industries, and briefs filed on behalf of each, may be found here.

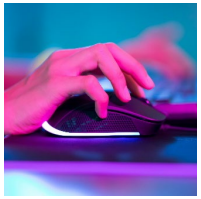
Automobile

Agrochemical

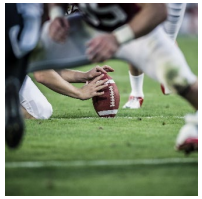


Aviation

Consumer Products



Computer

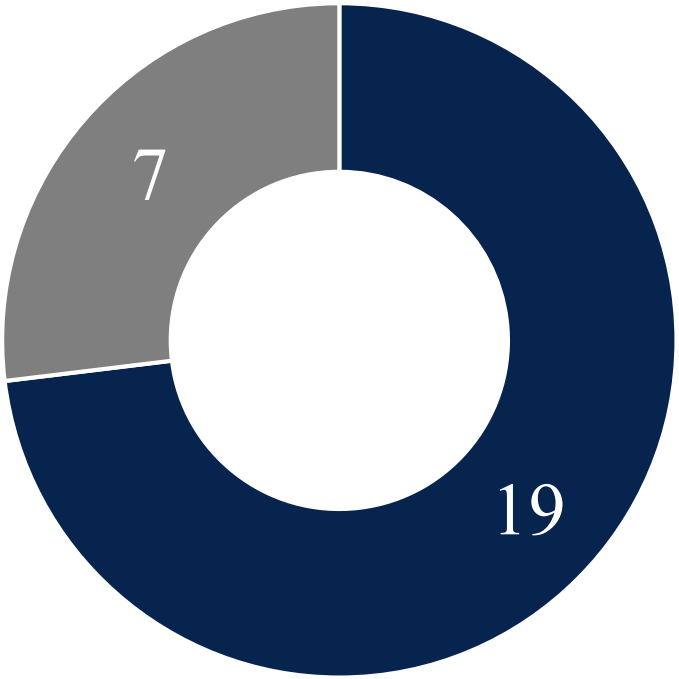


Collegiate Sports

Medical Devices

Pharmaceutical

Tobacco



Amicus Briefs: Stewardship of Membership Dollars

The CSC maximized the impact of its 2021 Amicus budget by engaging distinguished appellate counsel who support PLAC's mission by serving as brief writers at rates substantially below market compensation.

Where appropriate, PLAC has partnered with other distinguished defense organizations, such as the US Chamber of Commerce, the National Association of Manufacturers, the Motor & Equipment Manufacturers Association, and the Alliance for Automotive Innovation, to co-sponsor briefs on issues of concern to both organizations.

In most instances, PLAC took the lead on those joint briefs.

NATIONAL ASSOCIATION OF Manufacturers

ALLIANCE FOR AUTOMOTIVE INNOVATION

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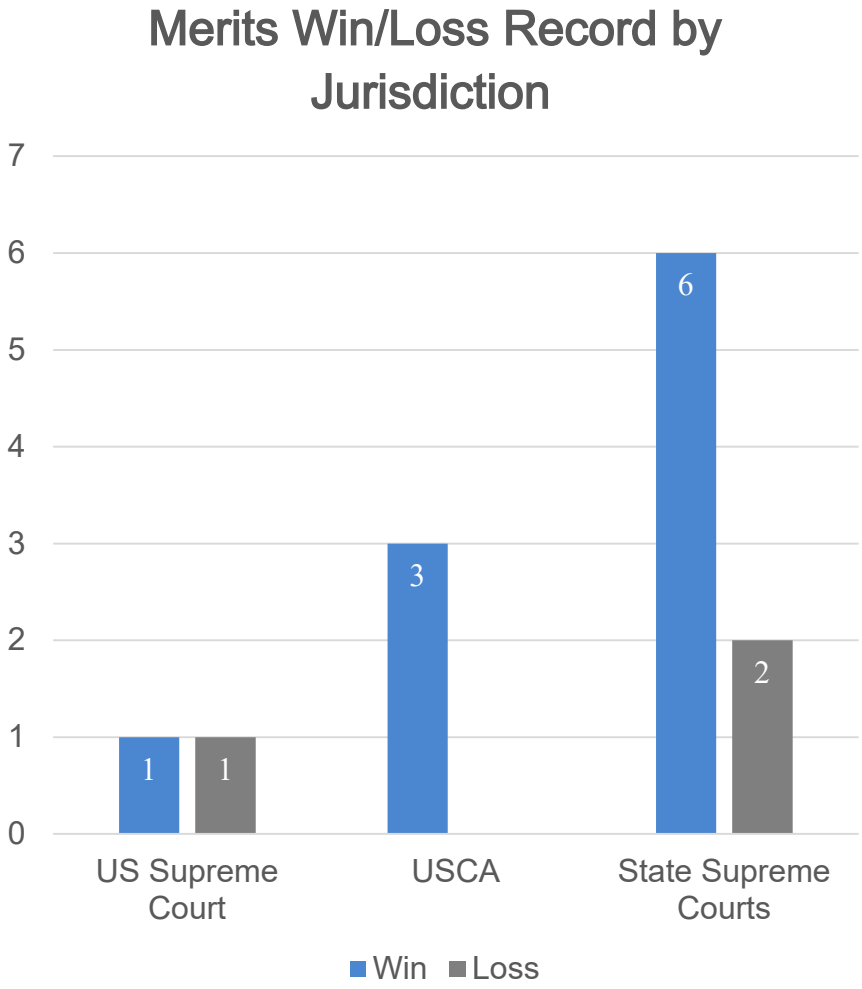
U.S. Chamber of Commerce

MEMA®

Successful Advocacy: Court Decisions Issued in 2021

During 2021, courts issued decisions in 25 cases where PLAC filed amicus briefs. The full list of decisions can be found here.

We enjoyed a high rate of success on our merits briefs, prevailing in 10 of 13 merits decisions.



Successful Advocacy: Select Decisions in Cases PLAC Briefed

Class Members - Standing Rejected	The U.S. Supreme Court issued an important decision addressing standing of class members, holding that a threatened injury was not sufficient to establish a concrete injury-in-fact and class members lacked Article III standing where the risk of harm was too speculative. ***TransUnion LLC v. Ramirez*, 151 S. Ct. 2190 (2021)**
Expert testimony excluded under FRE 702	In two cases, PLAC helped establish important precedent under FRE 702, including in both the Fourth Circuit (***Sardis v Overhead Door Corp.*, 10 F.4th 268 (2021)**) and the Seventh Circuit (***Burton v E.I. DuPont de Nemours & Co.*, 994 F.3d 791 (2021)**).
Rejection of Public Nuisance Doctrine for product liability claims	The Oklahoma Supreme Court rejected application of the public nuisance doctrine in opioid litigation. ***State ex rel. Hunter v Johnson & Johnson, et al.*, 2021 OK 54 (2021)**
General Personal Jurisdiction: Registration to do business	The New Mexico Supreme Court held New Mexico courts do not have general personal jurisdiction over non-resident corporations merely because they register to transact business or appoint a registered agent in the state. ***Chavez v Bridgestone Ams. Tire Operations, LLC.*, 2021 N.M. Lexis 74, 2021 WL 5294978 (2021)**

Advocacy for Rules Change

PLAC advocated for important changes in rules governing litigation practices in both the United States and Canada.

Federal Rules Advisory Committee: Proposed Amendment to FRE 702:

- PLAC submitted **comments** strongly supporting amendments to Fed R. Evid 702 proposed by the Federal Rules Advisory Committee in an effort to improve the rule's application. PLAC performed an extensive analysis of federal court decisions from each circuit to illustrate how reliance on obsolete case law, rather than the current rule's text and explanatory comments, has regularly resulted in the rule's misapplication. PLAC urged adoption of the proposed amendment to clarify Rule 702's standards and interrupt the cycle of judicial error that has undermined its purpose.

Federal Rules of Civil Procedure:

- PLAC was a signatory to a **letter** to the Advisory Committee on Civil Rules urging institution of a one-year pilot program requiring disclosure of third-party funding in civil litigation matters.

Florida Rules of Civil Procedure:

- PLAC joined an **industry letter** to the Justices of the Florida Supreme Court supporting the Court's decision to codify the "apex doctrine" for determining when to permit the deposition of a high-level corporate officer or employee in Florida state court litigation matters.

Government of Quebec:

- PLAC joined several U.S., Canadian and international defense organizations to offer comment on reforms being considered by the Quebec legislature to class actions under the Quebec Code of Civil Procedure. The **letter** commented in particular about how various proposed protocols would affect the legal and judicial framework governing class actions in Quebec.

Resources

Briefs and decisions are sorted by **jurisdiction**, **issue** and **industry** on the attached Appendices.

We welcome your comments and questions regarding PLAC's Amicus Program generally as well as our work in 2021. Please contact us by email or phone.

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