



October 26, 2016

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The Chamber of Litigation

Despite routinely condemning civil lawsuits and lobbying to restrict access to the courts, the U.S. Chamber of Commerce is itself a prodigious litigator

Acknowledgments

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I. Introduction

The United States Chamber of Commerce is well known as the nation's largest lobbyist, having spent over \$1.2 billion on lobbying since 1998.¹ The Chamber is also infamous for the huge sums of secret money it spends on elections, totaling more than \$130 million since the 2008 election cycle.² And while the Chamber's [Institute for Legal Reform](#)—which spends tens of millions of dollars³ lobbying to prevent so-called frivolous lawsuits against corporations by seeking to drastically limit individuals' access to the courts—regularly garners headlines and attention, much less well known is another division of the Chamber: the [U.S. Chamber Litigation Center \(USCLC\)](#).

Despite its small size and low public profile, the USCLC is in fact a key part of the Chamber's strategic arsenal. Along with lobbying and election spending, the Chamber uses litigation to advance its pro-big business, anti-consumer, anti-worker, anti-environmental, anti-regulatory agenda. Indeed, as shocking as it may seem for an organization that spends much of its time and money seeking to prohibit litigation, the Chamber itself is a remarkably litigious organization; in the last ten years, the Chamber has been involved in over 1100 lawsuits, either as a plaintiff or as an *amicus curiae*.^{4,5}

This report examines the 501 most recent cases⁶ in which the Chamber is either a plaintiff or an amicus. It presents a statistical analysis of the courts in which the Chamber filed, the types of parties with which it filed or allied itself, the legal issues it raised, the industries and companies it supported, the governments and agencies it opposed, and the outcomes it obtained.

This report is the first of a two-part series on the Chamber's litigation. A forthcoming second report will examine in greater detail the arguments it made in its briefs and petitions.

II. Executive Summary

If one were to write a recent history of notorious civil cases in the United States, the United States Chamber of Commerce would be entitled to a starring role. While its involvement in the *Citizens*

¹ Influence & Lobbying Top Spenders, 1998 – 2015, Center for Responsive Politics, <http://bit.ly/1T4DpdA> (viewed on April 21, 2016).

² Outside Spending, by Group, Center for Responsive Politics, <http://bit.ly/1NTjCwn> (viewed on April 21, 2016).

³ U.S. Chamber Institute for Legal Reform Lobbying Summary, Center for Responsive Politics, <http://bit.ly/1SK8kip> (viewed on April 21, 2016).

⁴ Recent Court Activity, U.S. Chamber Litigation Center, <http://bit.ly/1Omz1FJ> (viewed on April 21, 2016).

⁵ An *amicus curiae*, or friend of the court, is someone who is not a party to the case but who files a brief arguing for a legal point or points. While in theory, an amicus brief may not support a particular party or parties, in practice, the Chamber's amicus briefs were almost always filed in support of one or more parties.

⁶ As of April 18, 2016.

United case that expanded the ways it and other corporate interests purchase vast influence over our political system is well known, less well known is its involvement in several other egregious civil cases of recent years:

- **Litigation related to the Deepwater Horizon oil spill in the Gulf of Mexico.** The Chamber filed an amicus brief on behalf of BP *on 4 separate occasions*, arguing for legal technicalities that would eliminate or reduce civil fines and penalties that government agencies sought to impose upon BP as well as obstruct class action litigation brought by small businesses against BP.
- **Litigation related to the Buckyball magnetic toy responsible for injuring thousands of children.** The Chamber filed an amicus brief in support of one of the owners of the company that sold Buckyballs and argued that he should not be personally liable for recall costs in spite of the fact that he had had ample warning of the danger posed by the toy and had indeed fought earlier recall efforts, resulting in a delay that led to further sales—and further injuries.
- **Litigation related to alleged fraud committed by Maurice Greenberg, the disgraced former CEO of AIG, one of the Wall Street firms most responsible for the 2008 Financial Crisis.** The Chamber filed *twice* as an amicus on behalf of Greenberg in a civil fraud case brought against him by the New York Attorney General.
- **Litigation related to for-profit Corinthian Colleges' fraudulently misleading students.** The Chamber filed an amicus brief in support of Corinthian Colleges' effort to prevent former students from suing it in court for fraud despite the fact that fraud at Corinthian was so widespread that the company was forced to close after several government investigations.
- **Litigation related to the Obama administration's Clean Power Plan (CPP).** The Chamber along with other plaintiffs filed suit to prevent the implementation of the CPP, which would limit greenhouse gas emissions in accord with the [Paris Agreement](#).

Most of the cases in which the Chamber has been involved are less prominent than these. In order to provide a more complete view of the Chamber's litigation strategy, [Chamber Watch](#) examined 501 of the Chamber's most recent cases. Our analysis looked at the outcome of the case, the court in which it was filed, the role played by the Chamber, the identity and type of any co-filants, the legal issue(s) raised, the industry(ies) involved, the identity of the opposing government and/or agency, and the identity and size of the corporate litigants supported. Our results can be summarized as follows:

- **Frequency:** The Chamber files a case or amicus brief roughly every other day of the 5 day work week.
- **Legal Issues:** The number one legal issue addressed by the Chamber is restricting access to the courts, defined for the purposes of this analysis as issues relating to arbitration

and/or class actions. More than a fifth of Chamber cases dealt with such civil justice issues. Employment and labor relations issues were second. Environmental issues were third.

- **Industries:** The industry most frequently assisted by the Chamber's litigation efforts is the financial services industry, supported in a total of 88 cases. Energy & utilities is next at 80 cases, and Pharmaceuticals and healthcare is third at 50 cases.
- **Big Business:** Of the 426 cases in which the Chamber's filings directly supported one or more clearly identifiable corporate litigants, it filed amicus briefs in support of at least one Fortune 500 company almost 60% of the time. 126 individual Fortune 500 companies (25% of the list) and 35 Fortune 50 companies (70% of the list) directly benefited from the Chamber's litigation. Ford was the company most frequently directly assisted by the Chamber. State Farm and Dow tied for second. ExxonMobil was third. Koch Industries and Bank of America tied for fourth.
- **Small Business:** In comparison, the Chamber filed in support of at least one small business⁷ only 7% of the time. Only 29 of the roughly 28 million small businesses (0.0001%) directly benefited from the Chamber's litigation.
- **Foreign Multinationals:** The *United States* Chamber of Commerce filed a brief in support of foreign multinationals (57 times) more often than it did on behalf of domestic small businesses (29 times).
- **Litigation Posture:** 55% of the cases we looked at involved one or more individuals litigating against one or more businesses. Roughly 30% involved one or more businesses litigating against a government or government agency.
- **Opposing Government Party:** Of the 176 cases in which the Chamber opposed an agency of the federal government or a state or local government, the most frequently opposed agencies were the Environmental Protection Agency (EPA), the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and the Internal Revenue Service (IRS). 22 states also found themselves on the opposing side of the Chamber.
- **Federal vs. State Courts:** Almost three quarters of cases in which the Chamber became involved were filed in federal court. Of the remaining cases, all but one were filed in state court. One case was pending in a foreign court.

⁷ For the purposes of this report, a small business was defined as a business having fewer than 500 employees. This definition is one of several used by the Small Business Administration. For more information, see, <http://1.usa.gov/236lzga>.

- **Federal Courts & Tribunals:** In the federal courts, roughly half of Chamber cases in courts of appeals, roughly 40% were before the Supreme Court, and the remaining 10% were split between district courts and other federal tribunals.
- **State Courts:** The Chamber was active in 33 states. More than a quarter of the Chamber's state-level litigation was before the California courts. New York and Texas were second and third, respectively.
- **The Chamber's Role in the Case:** The Chamber was a plaintiff in 5% of the cases. In the remaining cases, it was an amicus.
- **Alone vs. In Coalition:** The Chamber filed its amicus brief or lawsuit alone roughly 40% of the time. Sixty percent of the time it filed in coalition.
- **Types of Co-filants:** The most frequent type of litigation partner for the Chamber were other trade associations, which joined the Chamber in 80% of the cases in which it filed in coalition. Legal advocacy groups were the next most common partner.
- **Identities of Co-filants:** The Chamber partnered with 439 different litigation partners in the 308 cases in which it filed in coalition. The National Association of Manufacturers was its most frequent partner, joining it in 96 cases. The National Federation of Independent Business was second, joining it in 65 cases.
- **Case outcome:** Roughly one quarter of the cases we examined were still pending. Of the remaining decided cases, the Chamber or the legal position for which it advocated carried the day approximately 35% of the time. It lost on the merits in roughly 30% of decided cases, and a request for further review was denied in just under a quarter of decided cases.

III. Methodology

This report examined a sample of 501 cases in which the United States Chamber of Commerce was either a party or an amicus. They were chosen based date; we selected the 501 most recent cases⁸ as listed in the U.S. Chamber Litigation Center's [online archives](#)⁹. The archives is organized in roughly reverse chronological order according to filing date for pending cases and resolution date for decided and settled cases. The sample of 501 cases examined covers roughly the period from March 12, 2013 through April 18, 2016, or 37 months. Of course, because the archives mixes pending and decided/settled cases, the Chamber's initial involvement in many of these cases predates this period, and extends as far back as May 2008.

⁸ As of April 18, 2016. A small number of cases are included in the archives despite the fact that the Chamber did not take a position on them. These cases were excluded from the sample.

⁹ Recent Case Activity, United States Chamber Litigation Center, <http://bit.ly/1WpRiIT> (viewed May 6, 2016)

Information on each case in the sample was obtained (where available) for each of the following categories: name of the case; date of the Chamber's initial involvement in the most recent phase of litigation; date the case was resolved; status of the case; jurisdiction hearing the case; if a state court, the state; if a federal court, the federal court; whether the case was an appeal or not; whether the Chamber supported the plaintiff or defendant; if an appeal, whether the lower court ruling was for the plaintiff or defendant; whether the Chamber was a party to the case; the identities of any co-filants; the type of co-filants; the law firm representing the Chamber; the legal issue(s) raised by the Chamber; the industry(ies) represented by the parties to the case that the Chamber supported; the posture of the case; the government or government agency opposed by the Chamber; the corporation(s) supported by the Chamber; whether at least one of the corporations supported by the Chamber was a Fortune 500 company; whether at least one of the corporations supported by the Chamber was a small business.

IV. The Chamber of Litigation

When it comes to litigation, the Chamber's motto might as well be "do as I say, not as I do." For while the Chamber and its Institute for Legal Reform never cease to denounce the "costly" American legal system and the multitude of "frivolous" lawsuits¹⁰, the Chamber itself is a prodigious litigator. Because the Chamber's archives mixes both closed and pending cases in its reverse chronological listing of cases, and because it uses the resolution date for closed cases and the filing date for pending cases, it is difficult to obtain an exact figure for the frequency with which the Chamber files cases or briefs. However, if you only look at closed cases and assume that the frequency with which a Chamber case is resolved does not greatly differ from the frequency with which the Chamber files cases or briefs, then a good estimate of the frequency with which the Chamber files a case or brief is *almost every other day of the work week*.¹¹

Chamber President Tom Donohue has even copped to the Chamber's penchant for litigation, stating, "We spend half of our time trying to reduce the number of suits by class-action lawyers and the other half of our time suing the hell out of the government. We sue the federal government and units of the federal government and some state governments, 180-90 times a year."¹² As we will see in Part VIII, this statement is not exactly true, for with the notable exception of the EPA, the Chamber doesn't often sue the government; instead, it assists large multinational corporations in their legal battles against various federal agencies, local and state governments, individuals, and sometimes even small businesses.

¹⁰ See, e.g., U.S. Chamber of Commerce position on legal reform, <http://uscham.com/1VCcjkR>.

¹¹ During the 37 month period covered by our sample of 501 cases, 363 were resolved. This estimate actually *underestimates* the frequency with which the Chamber files cases or briefs because the Chamber filed multiple briefs for a non-trivial number of cases in the sample.

¹² Sean Higgins, Comrades in Arms, WASHINGTON EXAMINER (May 18, 2015) <http://washex.am/1c1e4Db>.

V. Close the Courts to Consumers, End Worker Protections, and Pollute, Pollute, Pollute: The Holy Trinity According to the Chamber

In the 501 cases that we analyzed, the Chamber litigated a total of 60 different legal issue areas. Our case analysis shows that of these 60 issue areas, three qualify as *idées fixes* for the Chamber: restricting access to courts, employment/labor relations, and the environment. The Chamber litigated a total of 112 cases (over 20% of the total) where access to the civil justice system was one of the primary legal issues involved. [Table 1] For the purposes of this study, we defined “court access” as including legal disputes relating to whether or not forced arbitration clauses would be enforced and whether or not a class action lawsuit would be allowed to proceed.

The second most frequently-litigated issue was employment/labor relations. The Chamber litigated 84 cases (17%) that focused on this issue. For the purposes of this study, we classified any case that addressed the relationship between employers and employees as dealing with employment/labor relations. This definition encompasses a wide variety of sub-issues including the definition of employer, compensation, the right to overtime pay, increases to the minimum wage, the definition of independent contractor, job discrimination, unionization, and H2-B visa regulations.

The third most frequently-litigated issue was the environment. The Chamber litigated 61 cases (12%) that dealt with challenges to environmental regulations. As with employment/labor relations, the environment includes many different sub-issues including laws and regulations dealing with regional haze, greenhouse gas emissions, wetlands protections, air pollution, the cleanup of the Chesapeake Bay, water pollution, fracking, ozone, air quality, groundwater pollution, waste incineration, oil pipelines, mercury, civil penalties for oil spills, and mining discharges.

Table 1: Most Litigated Issues

Issue	Number of Cases
Court Access	112
Employment/Labor Relations	84
Environment	61
Product Liability	45
Jurisdiction	27
Federal Preemption	24
Financial Regulation	23
ERISA	22
Tax	17
Damages	16
False Claims Act	13
Commerce Clause	7
Takings Clause	6
Attorney Fees	6
Alien Tort Statute	6
Corporate Free Speech	5

In our forthcoming second report on the Chamber's litigation, we will delve into much greater detail on the positions the Chamber has taken in many of these cases.

VI. United States Chamber of Commerce or Wall Street Chamber of Big Oil?

The Chamber of Commerce holds itself out as the representative of American business writ large, and it puts a particular accent on small businesses, especially in its communications and lobbying activities, where it makes frequent mentions of "mom and pop shops" and small businesses whose interests it claims to represent.¹³¹⁴

If the Chamber were truly so concerned with advocating for the best interests of small business, one would expect that this concern would extend to its active litigation practice. After all, who better to help than small businesses embroiled in expensive litigation, small businesses that probably don't have the money to hire top flight legal talent the way big companies do?

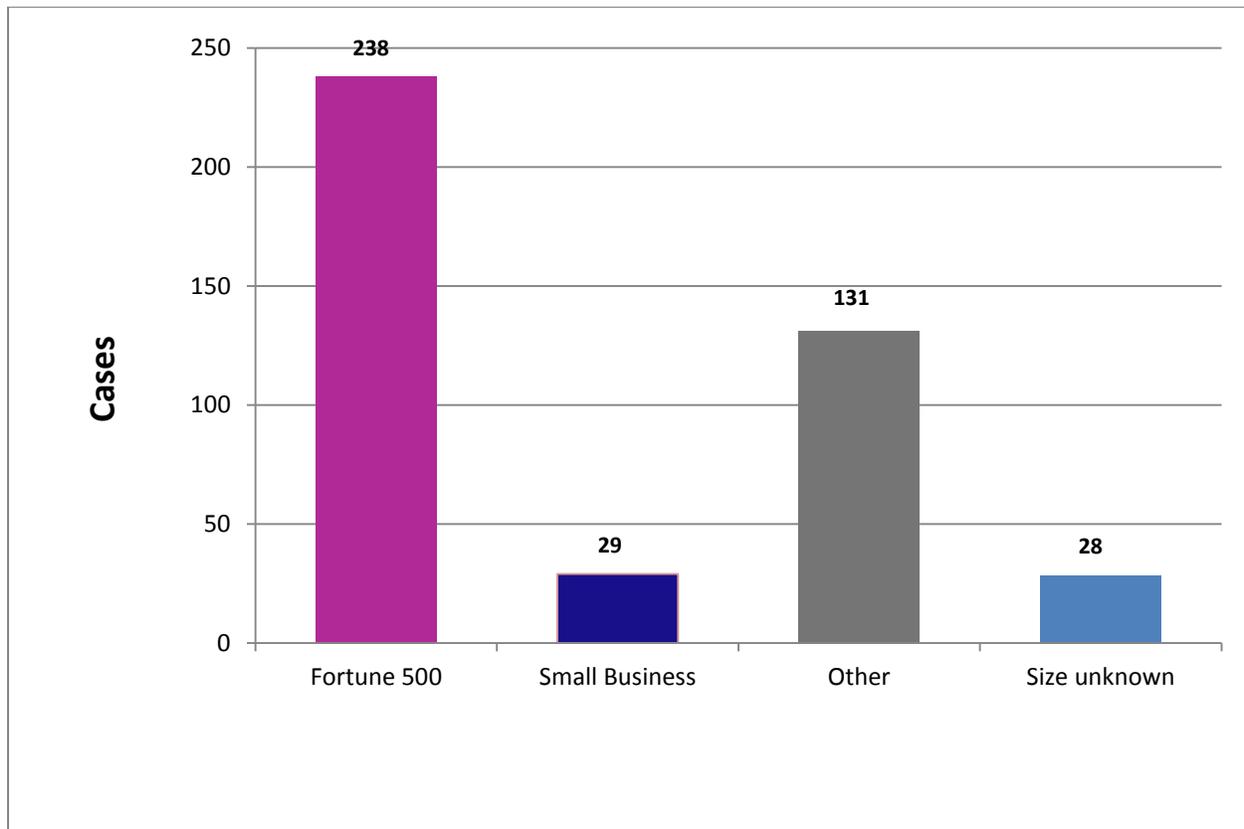
Such a hypothesis is not born out by the facts. Of the 501 cases we examined, the Chamber intervened on behalf of a corporate party in 426 cases (85%). Out of these 426 cases, the Chamber's litigation supported one or more small businesses¹⁵ in only 29 cases, or less than 7% of the time. On the other hand, the Chamber supported at least one Fortune 500 company in 238 cases or over 55% of the time. Of the remaining cases, the Chamber supported companies that were neither Fortune 500 companies nor small businesses in 131 cases. In 28 cases, it was not possible to ascertain the size and/or ownership of the company. [Figure 1]

¹³ See, e.g., About the U.S. Chamber, U.S. Chamber of Commerce, <http://uscham.com/1N7Jz0s> (viewed on April 29, 2016) and Statement of the U.S. Chamber of Commerce on Assessing the Effects of Consumer Finance Regulations, U.S. Chamber of Commerce, <http://1.usa.gov/1N5n1b2> (viewed on April 29, 2016).

¹⁴ For a detailed analysis of the Chamber's preferred communications strategy of using small businesses to advocate for policies that benefit Big Business, see BARTLETT NAYLOR & DANIEL DUDIS, PUBLIC CITIZEN, SACRIFICING THE PAWNS (June 2016), <http://bit.ly/28N1dnh> (viewed on June 22, 2016).

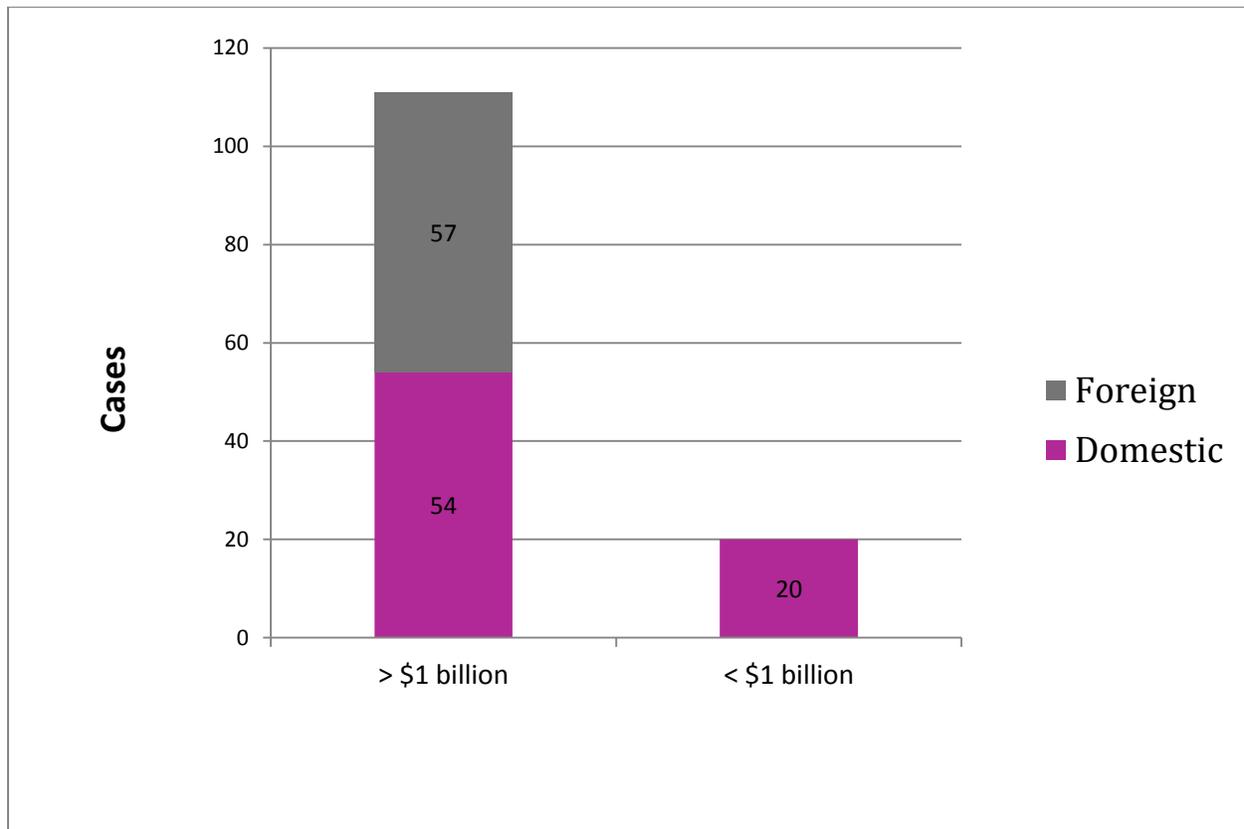
¹⁵ For the purposes of this report, a small business was defined as a business having fewer than 500 employees. This definition is one of several used by the Small Business Administration. For more information, see, <http://1.usa.gov/236lzga>.

Figure 1: More Multinational than Mom & Pop



The “other” category contains many very large companies as the Fortune 500 list does not include companies with their headquarters overseas nor does it include many large, privately held American companies. A closer look at the “other” category reveals that in 111 of these 131 cases (85%), at least one of the corporate litigants supported by the Chamber had 2015 revenues of over \$1 billion dollars.¹⁶ Moreover, in 57 of these cases (44%), the corporate litigant supported by the Chamber was a foreign company. [Figure 2] Many of these foreign companies supported by the Chamber are among the largest multinationals in the world, including Barclays Bank, Deutsche Bank, BP, Shell, Nestlé, AstraZeneca, Samsung, Softbank, Daimler, LG, Mitsubishi, and Hyundai. Incredibly, the entity that calls itself the *United States* Chamber of Commerce filed amicus briefs supporting foreign multinationals in more cases than it filed in support of American small businesses.

¹⁶ The threshold for making the Fortune 500 in 2015 was \$5.2 billion in revenues. See, Fortune 500 No. 500, McGraw Hill Financial, <http://for.tn/1W49f1t> (viewed May 2, 2016).

Figure 2: International Diplomacy

Shifting from the size of the companies supported by Chamber litigation to their identities, it is no surprise that the Chamber's litigation has supported a who's who of corporate America in addition to the huge foreign multinationals mentioned above. Ford has benefited from the Chamber's litigation in the most cases, at 14. State Farm and Dow tie for second, with nine cases apiece. ExxonMobil is third, with eight cases while Koch Industries and Bank of America share fourth place, with seven cases each. Goldman Sachs, Reynolds American, and KBR round out the top five, with six cases each. [Table 2]

Table 2. Most Aided Companies

Company	Number of Cases
Ford	14
State Farm Insurance	9
Dow	9
ExxonMobil	8
Koch Industries	7
Bank of America	7
Goldman Sachs	6
Reynolds American	6
KBR	6
Walmart	5
Allstate	5
BP	5
Berkshire Hathaway	5
AT&T	5

Teva Pharmaceutical Industries	5
Deutsche Bank	5
Altria	4
Citigroup	4
Microsoft	4
PPL	4
Shell	4
Pfizer	4
Wells Fargo	4
Google	4
AIG	4
Halliburton	4
JPMorgan Chase	4

As one can see, the financial services industry (State Farm, Bank of America, Goldman Sachs, Allstate, Berkshire Hathaway, Deutsche Bank, Citigroup, Wells Fargo, AIG, and JP Morgan Chase) and the Energy & Utilities industry (ExxonMobil, Koch Industries, BP, PPL, and Shell) dominate the top spots on the list of most aided companies. Pharmaceuticals & Healthcare (Teva and Pfizer) and Tobacco (Reynolds American and Altria) are also well represented.

In total, the Chamber's litigation directly supported 126 companies (25%) on the Fortune 500 list and fully 35 companies (70%) on the Fortune 50 list of the very largest companies. By way of comparison, the Chamber's litigation directly supported only 29 of the estimated 28 million small businesses in the U.S. or 0.0001%¹⁷

With respect to the industries most frequently directly supported by Chamber litigation, Financial Services comes out on top, having been aided in 88 cases (or just over one fifth of the 426 cases in which the Chamber supported one or more corporate litigants). Energy & Utilities was in second, with 80 cases (19%) and Pharmaceuticals & Healthcare was in third, with fifty cases (12%). [Table 3]

Table 3: Most Aided Industries

Industry	Number of Cases
Financial Services	88
Energy/Utilities	80
Pharma/Healthcare	50
Retail	38
Transportation	37
General Manufacturing	35
Automotive	23
Technology	21
Food/Beverage	19
Telecommunications	17
Professional Services	14
Chemicals	14
Hospitality	10

¹⁷ Frequently Asked Questions, Small Business Administration Office of Advocacy, <http://1.usa.gov/1DwAMOY> (viewed May 2, 2016).

Tobacco	9
Electronics	9

VII. Far More than Just the Supreme Court

To the extent that people may be familiar with the Chamber's litigation, they have likely heard that the Chamber is active filing amicus briefs before the U.S. Supreme Court, as it did in *Citizens United*. However, the Chamber's U.S. Supreme Court litigation represents less than 30% of the cases in which it participates.

Overall, 363 cases (72%) of Chamber cases in the sample were before the federal courts while 137 (28%) were before state courts. One case was before a foreign court, in this case, the Supreme Court of Canada. (Figure 3) Of the 363 federal cases in the sample, only 150 (~40%) were before the United States Supreme Court. Circuit Court cases represented half of the Chamber's federal litigation activity. The remaining 10% was split between the District Courts and other Federal Tribunals such as the National Labor Relations Board and the Occupational Safety and Health Review Commission. (Figure 4)

Figure 3: Court of Jurisdiction

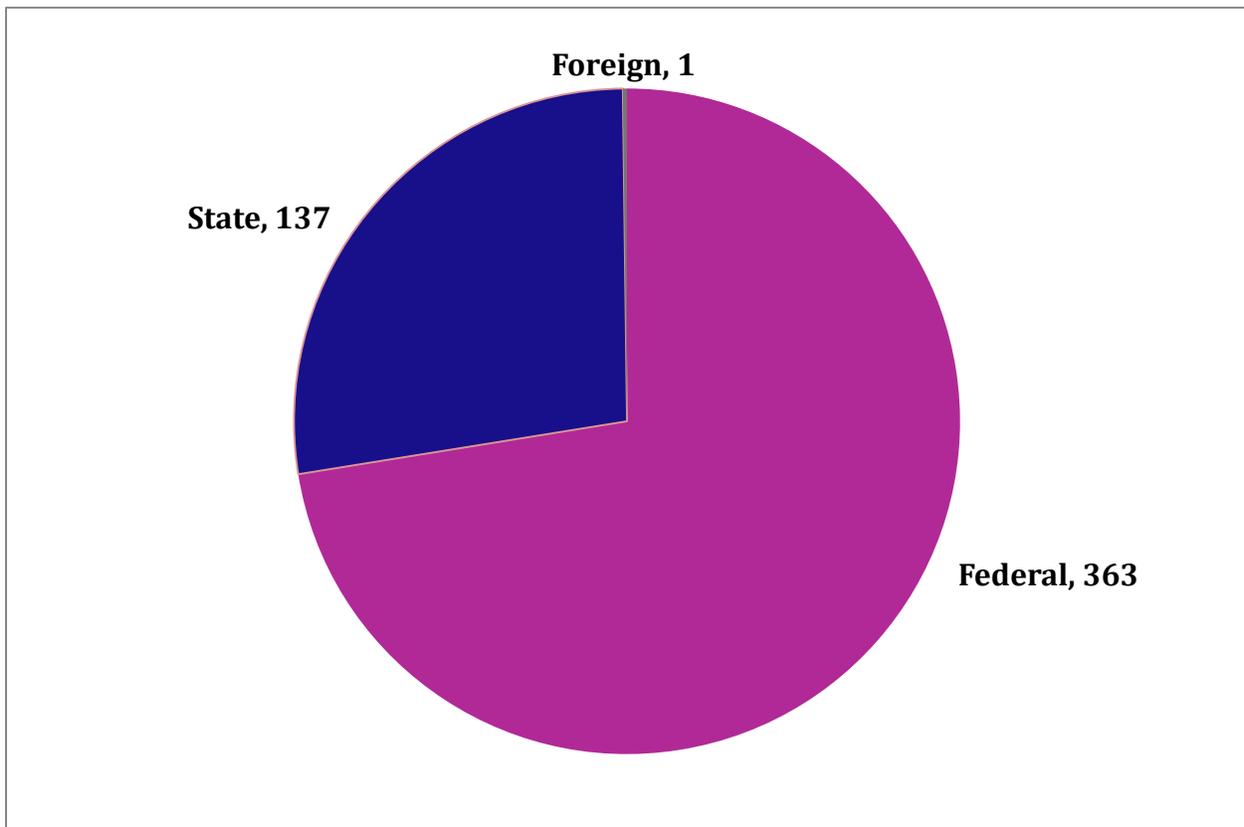
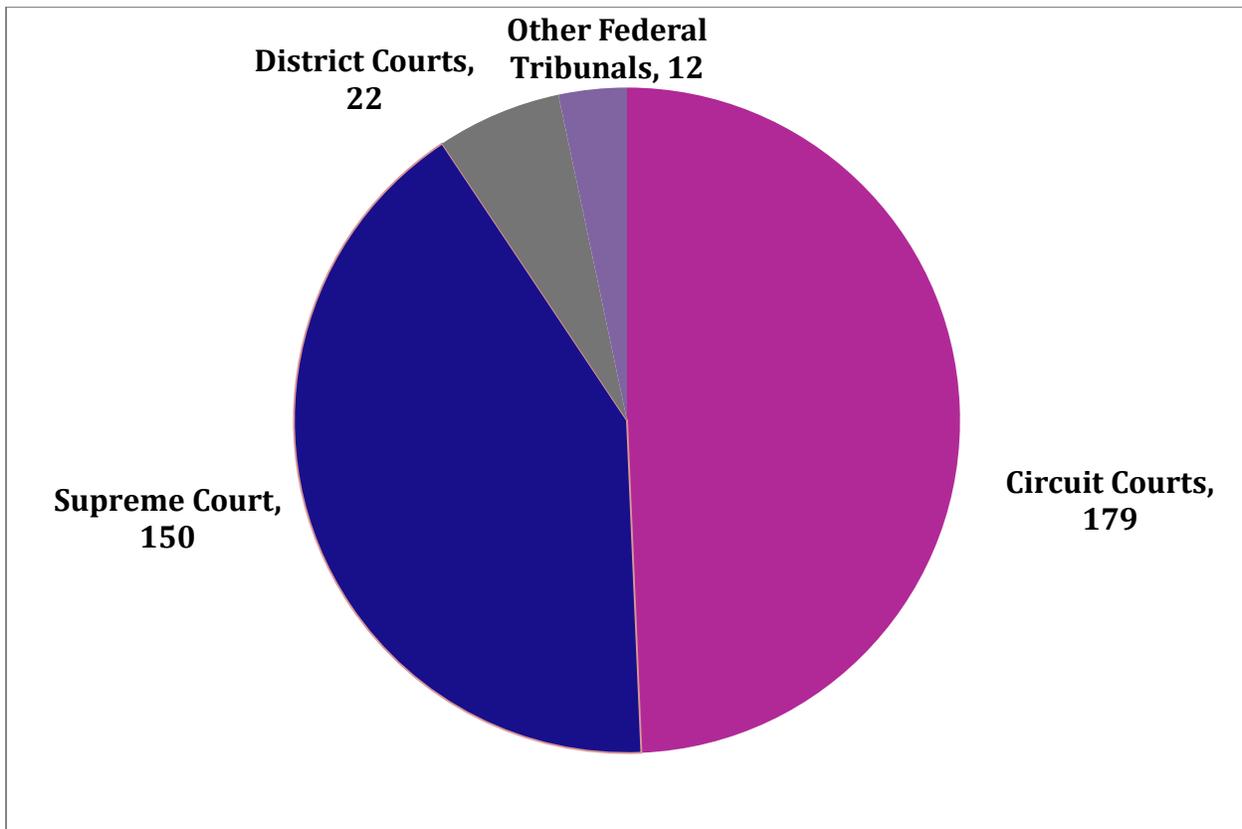


Figure 4: Federal Court



With respect to the Chamber's federal appellate court cases, distribution among the thirteen different federal circuits was very unequal. (Table 4) Perhaps not surprisingly, the Chamber litigated the most cases in the District of Columbia Circuit. The DC Circuit is where most federal regulations are challenged, and the Chamber has repeatedly railed against alleged over-regulation.¹⁸

Table 4: Distribution of Cases by Circuit Court

Court	Number of Cases
District of Columbia Circuit	35
Ninth Circuit (San Francisco)	33
Second Circuit (New York)	32
Fifth Circuit (New Orleans)	18
Fourth Circuit (Richmond)	15
Sixth Circuit (Cincinnati)	9
Eighth Circuit (St. Louis)	8
Eleventh Circuit (Atlanta)	8
Third Circuit (Philadelphia)	7

¹⁸ See, e.g., Above the Fold – Restoring Regulatory Sanity, U.S. Chamber of Commerce, <http://uscham.com/1Uhi327>.

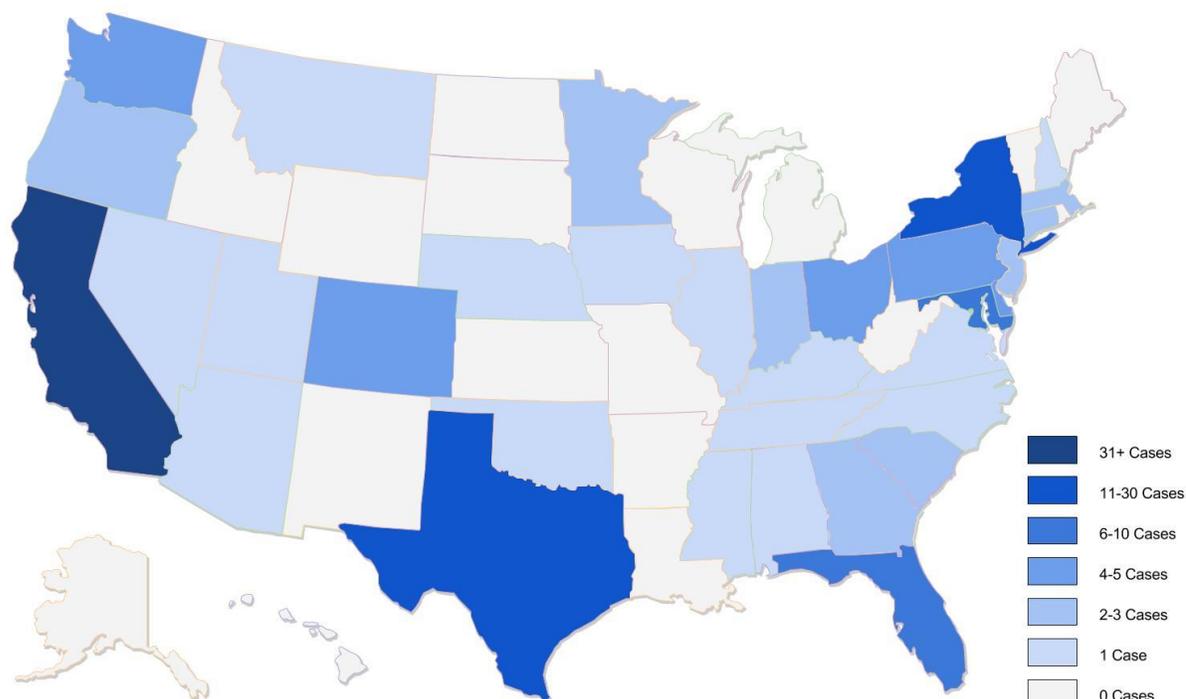
First Circuit (Boston)	5
Tenth Circuit (Denver)	5
Third Circuit (Chicago)	4
Federal Circuit (Washington, DC)	0

In second place is the Ninth Circuit, which covers California and much of the West. Here, the Chamber has been particularly active arguing that California laws designed to preserve access to the court system are preempted by the Federal Arbitration Act.¹⁹ Close behind in third place is the Second Circuit, based in New York. Much of the Chamber's litigation here focused on issues of interest to the financial services sector, in particular financial reform and tax law.

Turning our attention to the states, the Chamber engaged in litigation before the courts of 33 states, or 66% of the 50 states. As with the Circuit Courts, the bulk of the Chamber's state court litigation was concentrated in a few jurisdictions. California courts bore the brunt of the Chamber's litigation, with 40 cases or briefs filed. Like in the Ninth Circuit, the Chamber's litigation in the California courts also focused on seeking to limit consumers, employees, and small businesses' access to the court system through the enforcement of forced arbitration clauses and class action bans. In addition, the Chamber was active in the areas of product liability (much of it asbestos-related) and employment and labor relations. New York, with 17 cases, was second, while Texas, with 12 cases, was third. (Figure 5)

¹⁹ The California Legal Remedies Act, §1750 et seq California Civil Code, <http://bit.ly/1Xd54zm>, prohibits forced arbitration if it would be unconscionable. It also contains a provision favorable to class actions.

Figure 5: From California to the New York island...



In sum, the Chamber’s litigation strategy is both diversified—roughly evenly split between the state courts, the federal Circuit Courts, and the U.S. Supreme Court—and targeted in states and federal circuits that have jurisdiction over areas of particular interest or concern to the Chamber and its Big Business constituents, namely federal regulations, legal issues affecting the financial services sector, and California laws on access to the civil justice system. As was discussed in Part V, civil justice and environmental and financial regulations are some of the legal issues that the Chamber has most actively litigated.

VIII. When Your Bête Noire is Green: The Chamber v. The EPA

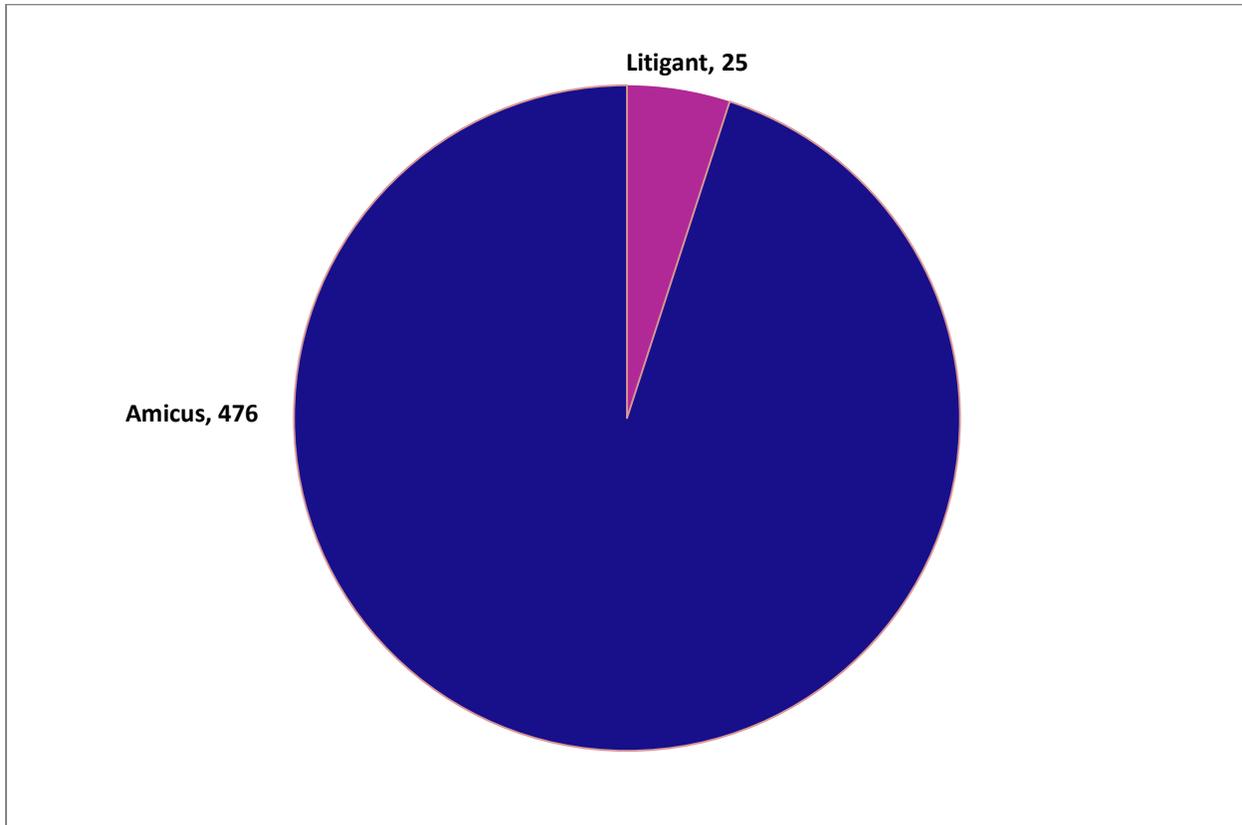
While the Chamber’s considerable appetite for litigation almost certainly qualifies it as a legal gourmand, the doctrine of standing²⁰ limits the number of cases the Chamber itself may bring. As a trade association, the Chamber does not have standing to challenge all government actions. Moreover, given the nature of its work, it will not typically find itself a party to cases focusing on

²⁰ Standing usually requires that the plaintiff show that it has suffered or will suffer some sort of direct harm from the action it seeks to challenge. For more information on this legal doctrine, *see, e.g.*, <http://bit.ly/26uRpYq>.

arbitration, class actions, employment law, labor relations, product liability, ERISA, and so many of the other legal issues it cares about.

Perhaps because the Chamber cannot itself sue on so many of the issues it cares about, it has become an incredibly prolific filer of amicus briefs. Indeed, 95% of the cases in our sample are cases where the Chamber is not a party to the case but has instead filed an amicus brief supporting one or more of the parties. (Figure 6)

Figure 6: The Chamber's Role in the Case



The fact that the Chamber is a party to the lawsuit in only 5% of the cases in which it is involved should not be seen as minimizing the influence of these cases. When the Chamber sues to block regulations or legislation, these suits can have an enormous impact on policy.

One area where the Chamber has filed cases is with respect to challenging environmental regulations. Of the 25 cases in the sample where the Chamber is a party to the lawsuit, 15 (60%) are cases where the Chamber has sued the EPA. The Chamber has challenged EPA regulations issued under the Clean Air Act and the Clean Water Act. It has challenged regulations imposing pollution limits on boilers and waste incinerators. It has sued to overturn regulations limiting particulate emissions, ozone levels, and greenhouse gas emissions from a variety of different sources. Sometimes, it has sued multiple times to prevent the implementation of the same rule! Our second report on the Chamber's litigation activities will dive into more detail on the arguments the Chamber advanced to try and halt rules designed to protect and improve the quality of the air we

breathe and the water we drink as well as take a closer look at its unceasing litigation to stop regulation aimed at combatting climate change, as most recently exemplified by its suit to strike down the Clean Power Plan.

It should also be noted that the Chamber's numerous lawsuits challenging environmental and other regulations run counter to its oft-stated wish for "regulatory certainty."²¹ The Chamber's legal challenges to the Clean Power Plan have resulted in regulatory limbo of the sort that harms companies' ability to plan intelligently for the future.

Where the Chamber is not itself a party to the litigation, the amicus brief provides the Chamber with an opportunity to simultaneously influence the course of litigation, and with it, the law itself, as well as to curry favor with the sort of large multinationals that make up its donor base.²² By means of filing amicus briefs, the Chamber is able to address legal issues that it would otherwise not have a platform to address were it limited to litigating cases in the areas where it has standing to file suit. Moreover, the Chamber provides valuable support to the parties it supports in its briefs. As the United States Chamber of Commerce, it can claim to represent the views of over 300,000 members, including most importantly, small businesses. For a large multinational corporation litigating a case against individuals or a small business or the government, a supporting brief from the Chamber can provide it with a patina of grassroots support. In cases where a big company is litigating a case against individuals or a small business, Chamber support can also work to blur the power differential between the two opposing parties.

This last point is particularly important, given that over half of the cases (276) in the sample involve a legal dispute between a business and an individual. The Chamber supported the business in all of these cases.

Another 19 cases involved a legal dispute between two businesses. In 16 of these 19 cases, the Chamber supported a Fortune 500 company, foreign multinational, or large American privately held company over a much smaller company. In one of these cases, the Chamber supported British energy giant BP in its litigation against a group of much smaller businesses and individuals harmed by the Deepwater Horizon oil spill. The Chamber argued that these small businesses and individuals should not have been certified as a class for their claims against BP. In another, the Chamber took the side of American Express against a group of small merchants who sued, claiming that American Express abused its monopoly power in the business travel market to charge merchants more than other credit cards. The Chamber argued that these merchants shouldn't be allowed to sue American Express because they had signed a forced arbitration clause.

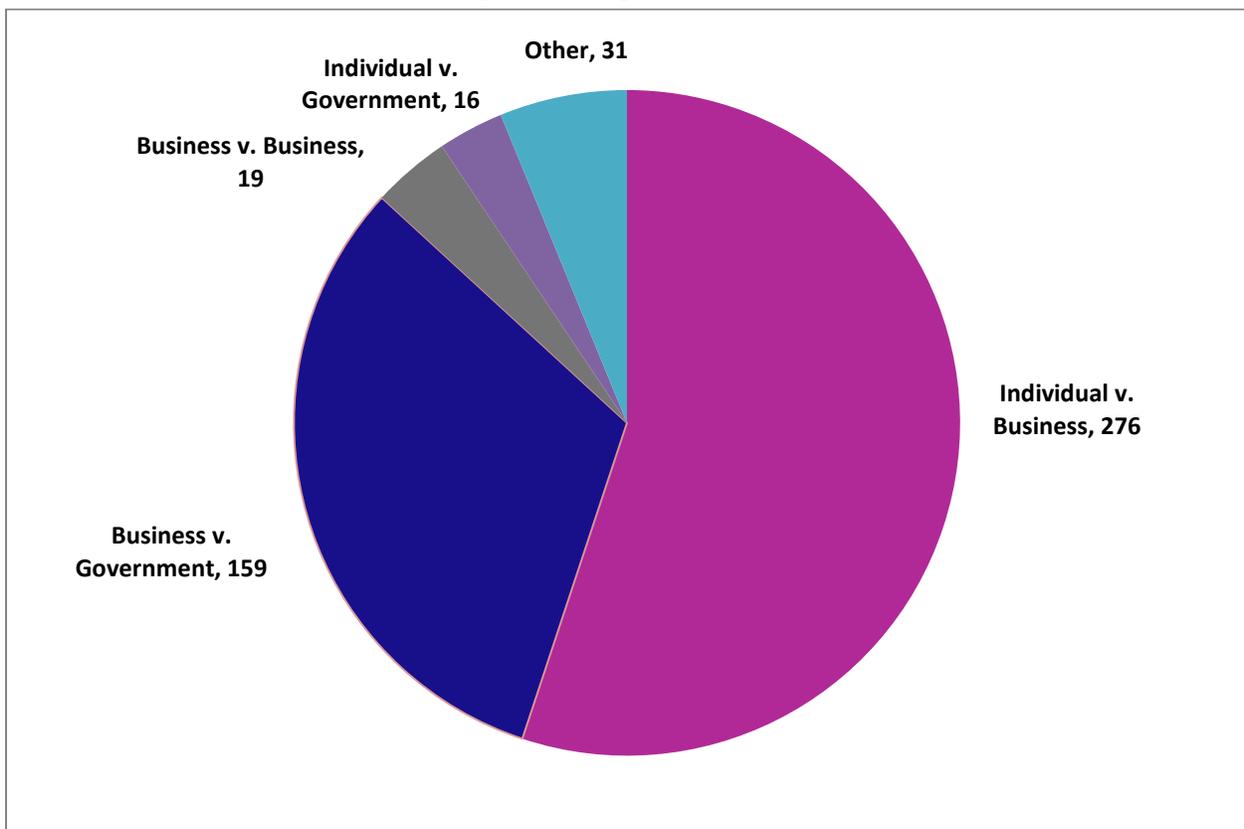
²¹ See, e.g., U.S. Chamber seeks regulatory certainty, resource access, U.S. Chamber of Commerce Institute for 21st Century Energy, <http://bit.ly/2808WmX> (viewed June 22, 2016)

²² While the Chamber, as a 501(c)(6) trade association does not have to reveal its donors, a previous Chamber Watch investigation revealed that more than half of the Chamber's annual budget came from just 64 donors. See, SAM JEWELER, PUBLIC CITIZEN, THE GILDED CHAMBER, at 3 (February 2014), <http://bit.ly/1QBfcdA>.

In these 292 cases (~60% of the total sample) involving a legal dispute between a business and an individual or between a big company and a small company, the Chamber's support could be valuable in showing that an unsympathetic corporate litigant enjoyed broad-based support in the business community, including, critically, from small businesses.

While lawsuits pitting individuals against businesses accounted for the largest fraction of Chamber cases, lawsuits between businesses and government also made up a large portion of the sample. The Chamber was involved in 159 cases such cases, including the 25 in which it filed suit. Business versus business disputes, with 19 total cases, were the third most common type of dispute in the sample and individual versus government was the fourth most common litigation posture for a Chamber case to take. The remaining cases involved non-profit organizations or various combinations of government, business, individuals, and organizations on the same side of the case. (Figure 7)

Figure 7: Litigation Posture



With respect to the governments or government entities opposed by the Chamber, its particular focus on the EPA carried over into the cases in which it filed amicus briefs, as the EPA was targeted an additional 11 times, for a total of 26 cases. In second place was the NLRB, opposed in 19 cases. The EEOC was opposed in 13 cases and the IRS was opposed in 12 cases. The Chamber opposed a total of 22 separate federal agencies. The Chamber also took on 22 states as well as 23 local government or territorial entities. (Table 5)

Table 5: Most Opposed Governments/Government Agencies

Agency	Number of Cases
EPA	26
NLRB	19
EEOC	13
IRS	12
Department of Labor	9
DOJ	8
New York State	6
FTC	5
SEC	5
Los Angeles	4
Department of Agriculture	4
Seattle	4

IX. The Usual Suspects

Filing a brief or lawsuit every other day is tough work, and the Chamber has found some eager helpers. The USCLC lists only six attorneys and one consultant on its webpage.²³ Six attorneys are quite obviously not capable of researching and writing the voluminous number of legal filings the Chamber makes, and so the Chamber has outsourced this work to many of America's largest and most prestigious law firms.

For the 501 cases in our sample, the Chamber hired 106 different law firms as well as calling on the services of three law schools and/or professors affiliated with these law schools—the University of Georgia, Ohio State University, and Cornell. The law firm most frequently hired to litigate on behalf of the Chamber was Mayer Brown, with 46 cases or almost 10% of the cases in the sample. Shook Hardy & Bacon, with 29 cases, was the second most utilized firm while Jones Day, with 26 cases was third. [Table 6]

Table 6: Most Hired Law Firms

Law Firm	Number of Cases
Mayer Brown LLP	46
Shook Hardy & Bacon LLP	29
Jones Day	26
Sidley Austin LLP	24
Horvitz & Levy LLP	21
Gibson Dunn & Crutcher LLP	18
Consovoy McCarthy	15

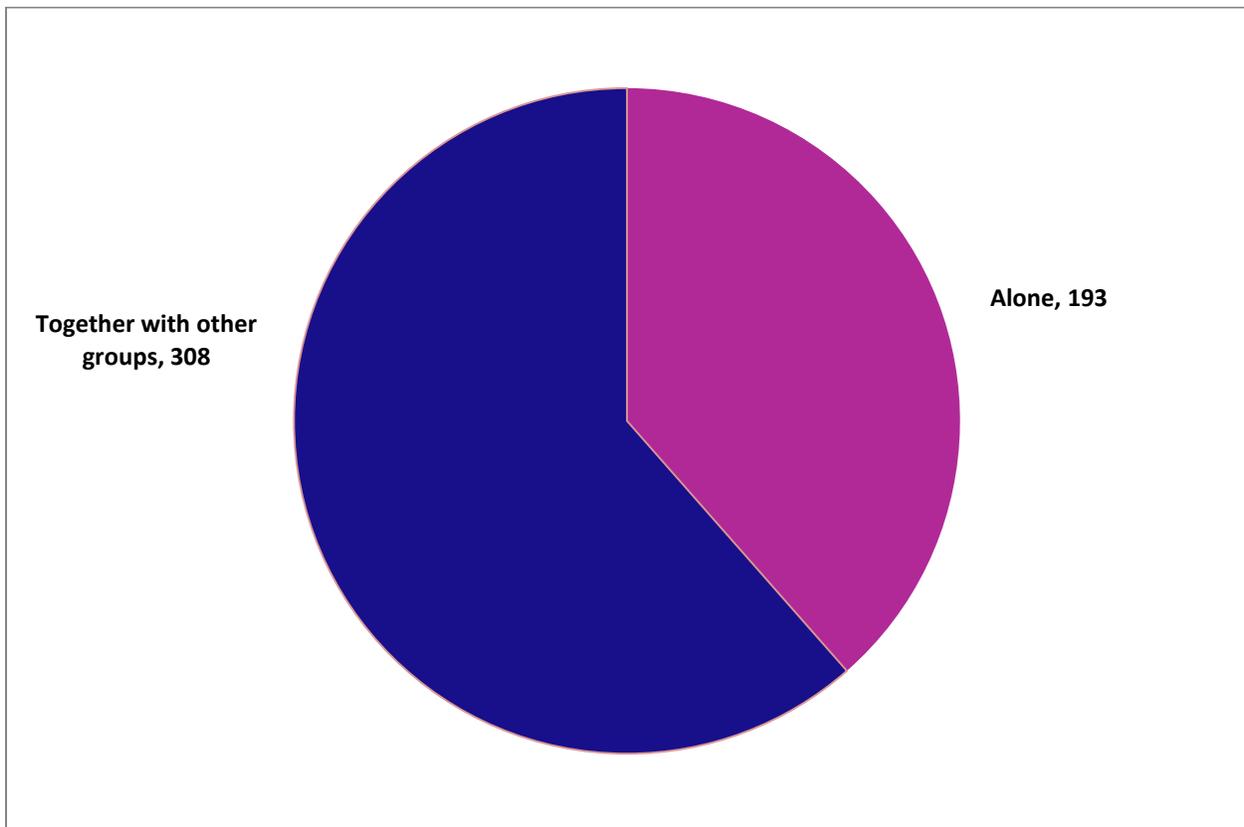
²³ U.S. Chamber Litigation Center, <http://bit.ly/21hKFJz> (viewed on April 27, 2016).

Wilmer Cutler Pickering Hale and Dorr LLP	14
King & Spalding LLP	12
Hunton & Williams LLP	11
Hogan Lovells	10
Munger Tolles & Olson	10
Vinson & Elkins LLP	10
Proskauer Rose LLP	10
Covington & Burling LLP	9

Just as the Chamber's litigation supported a disproportionately large number of very big companies, a disproportionately large number of the Chamber's hired legal guns came from the very biggest law firms, with 32 of the largest 50 U.S. law firms having litigated on behalf of the Chamber and 44 of the largest 100 having done so.²⁴

Beyond having outsourced the actual litigation work, the Chamber also frequently litigated in coalition with other groups. The Chamber joined with other groups roughly 60% of the time and litigated alone in just under 40% of cases. [Figure 8]

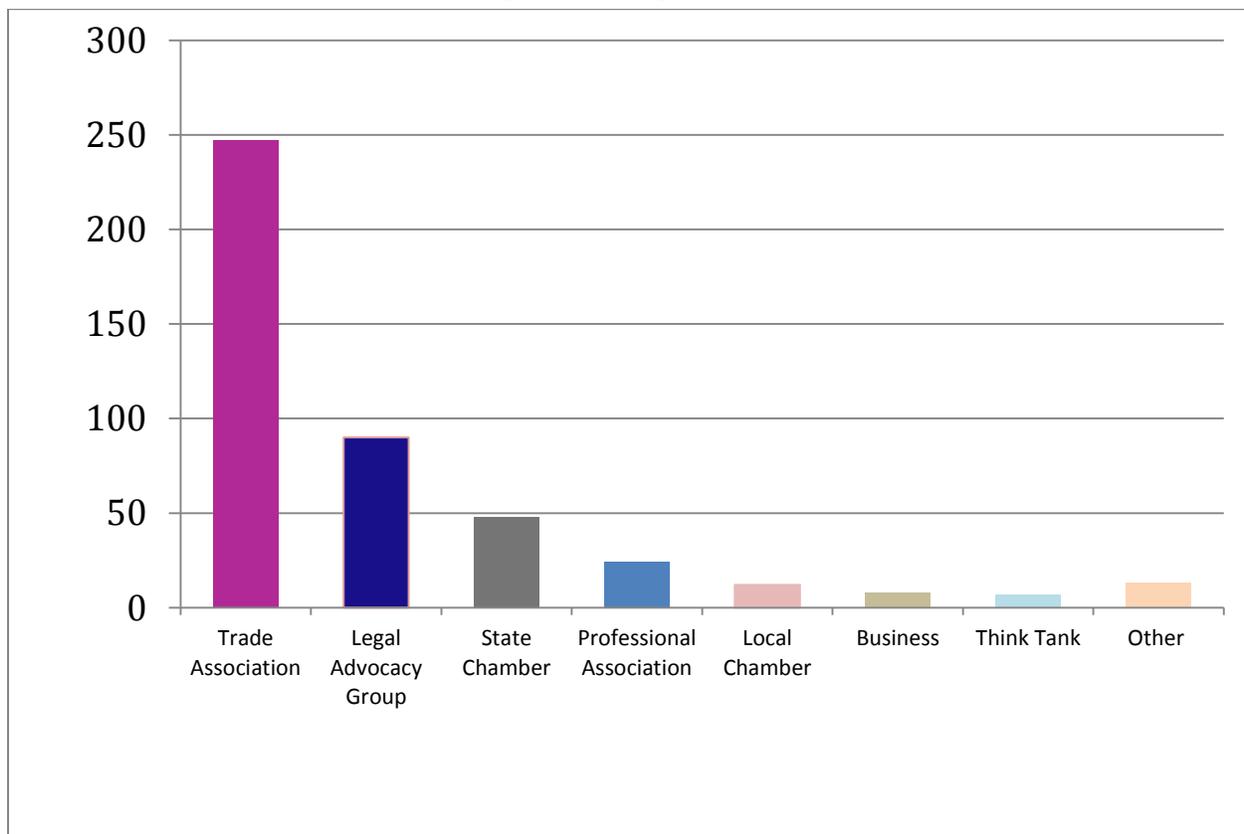
Figure 8: Filing Status



²⁴ Law firms ranked by 2014 gross revenue. See, the 2015 AmLaw 100, THE AMERICAN LAWYER, <http://bit.ly/1OfrjZO>

To better understand the makeup of the Chamber’s litigation coalitions, we looked at the types of groups that joined the Chamber in the 308 cases it litigated in coalition. We found that other trade associations were by far the most frequent litigation partners for the Chamber, having joined it in roughly 80% of the cases it filed in coalition. The next most common partners were industry-funded²⁵ legal advocacy groups such as the [American Tort Reform Association](#), which joined in 29% of the cases it filed in coalition. State Chambers joined in only 16% of coalition cases. [Figure 9] Other, less frequent litigation coalition partners included professional associations, local chambers of commerce, businesses, think tanks, state governments, minority chambers of commerce, unions, individuals, a foundation, a foreign chamber of commerce, a benefits administration association, and a local government.

Figure 9: Filing Partners



So who are these trade associations and legal advocacy groups that frequently partner with the Chamber? A total of 439 different entities joined the Chamber on at least one case. The National Association of Manufactures (NAM) was the Chamber’s most frequent partner, having joined it in a total of 96 cases, or almost 20% of the cases in the sample and fully 30% of the cases in which the

²⁵ Fact Sheet: American Tort Reform Association, Center for Justice & Democracy at New York Law School, <http://bit.ly/1rlGnnX> (viewed on April 28, 2016).

Chamber litigated in coalition. After NAM, the National Federation of Independent Business and its affiliated Small Business Legal Center was the next most faithful partner, having joined the Chamber in 20% of the cases it litigated in Coalition. The Business Roundtable, American Chemistry Council, and American Tort Reform Association rounded out the top 5. [Table 7]

Table 7: Most Frequent Litigation Partners

Litigation Partner	Number of Cases
National Association of Manufacturers	96
National Federation of Independent Business	65
Business Roundtable	29
American Chemistry Council	27
American Tort Reform Association	26
Pharmaceutical Research and Manufacturers of America	25
American Petroleum Institute	23
Coalition for Litigation Justice Inc.	22
Retail Litigation Center Inc.	22
American Insurance Association	18

X. Win, Lose, or Draw? The Chamber's Mixed Record of Success

Of the 501 cases we analyzed, 128 (26%) were still pending. [Figure 10] Of the remaining 373 cases, the Chamber's position carried the day just over 35% of the time while the Chamber lost slightly less than 30% of cases. In just over 20% of cases, the Chamber argued unsuccessfully that a higher court should accept to hear an appeal of a lower court's ruling. Most of these cases were appeals on a writ of *certiorari* before the U.S. Supreme Court. The remaining cases were either settled, resulted in a split decision where the Chamber prevailed on some of its arguments but not on others, or resulted in some other outcome. [Figure 11]

Figure 11: Case Outcome

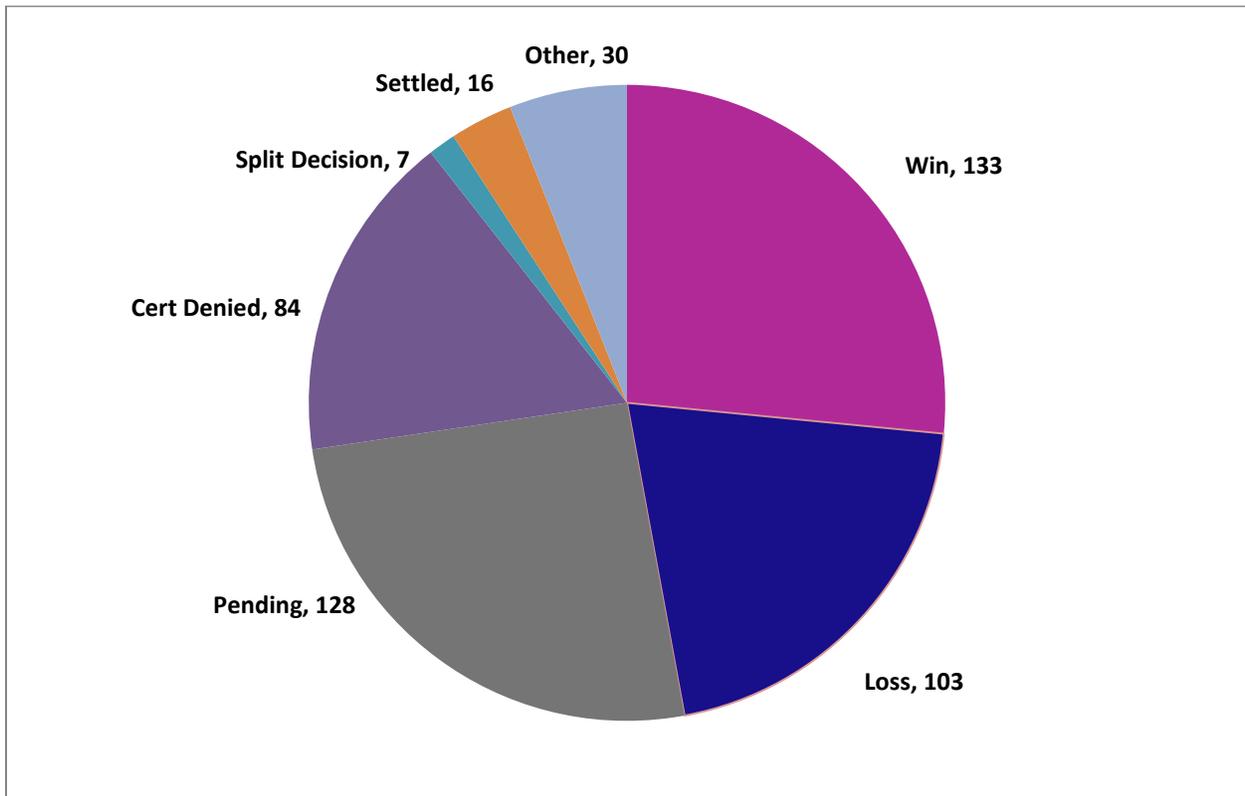
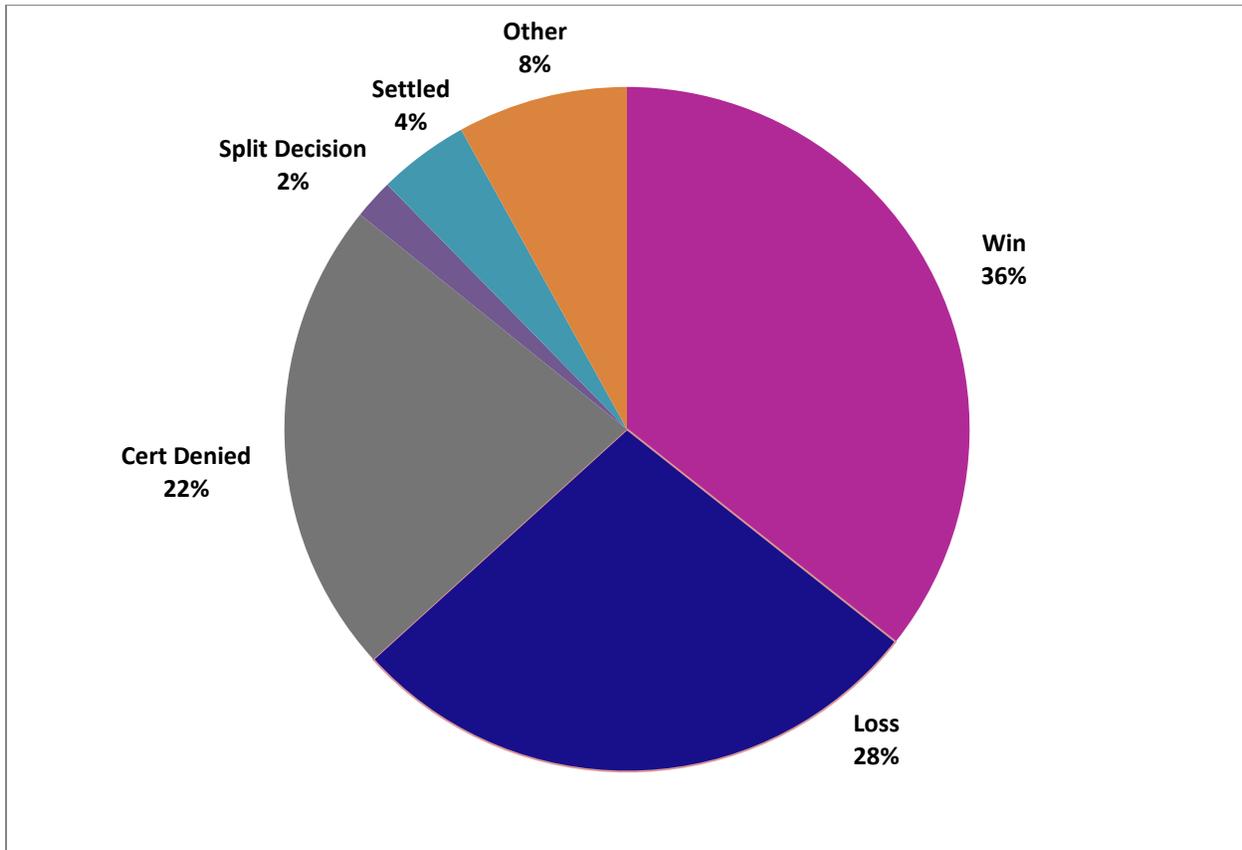


Figure 12: Outcome of Resolved Cases

While having won only 35% of the cases it litigated might at first blush seem like a disappointing outcome, it is important to keep in mind that if you remove cases settled out of court, those disposed of for other reasons, and those where the Chamber urged a court to hear an appeal and instead only analyze those 243 cases decided on a question of law, then the Chamber has won a slim majority (55%).

Is a 55% win rate high or low? Since the vast majority (roughly 90%) of the cases in the sample involved appellate litigation, the relevant comparison point would be the overall success rate of appellate litigation. Academic research shows that success rate on appeal differs significantly depending upon whether the judgment being appealed is for the plaintiffs or the defendants. Judgments for plaintiffs that are appealed are affirmed roughly 60% of the time while judgments for defendants are affirmed over 80% of the time.²⁶

An analysis of the 211 cases in the sample that were appealed from a judgment and resulted in an appellate judgment reveals that in cases where the Chamber argued for affirmance of the lower tribunal's judgment, its success rate was only average when it supported the plaintiff and

²⁶ Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES, 659 – 658, 671 (2004), <http://bit.ly/1q15Q4M>.

significantly below average when it supported the defendant. On the other hand, in cases where the Chamber argued that the lower tribunal's judgment should be reversed, its success rate was significantly above average, irrespective of whether it supported the plaintiff or the defendant.²⁷

What to make of these mixed results? Of course, it is impossible to know what precise part the Chamber's role played in the outcome of these cases, and it is important to remember that as an amicus in most of these cases, the Chamber gets to pick and choose the cases in which to get involved. One possible Chamber strategy that might explain these results is that it selectively targets cases where it believes that the lower tribunal ruling may be vulnerable on appeal, and therefore its success rate when arguing for affirmance is lower than average while its success rate when arguing for reversal is higher than average. It is also worth pointing out that the average affirmance rates calculated by Professor Eisenberg are based on a large sample of over 2 million civil cases in the federal courts, while the sample of Chamber cases includes cases litigated in the state courts, a large number of cases litigated against a government or government agency, and a large number of cases litigated in front of a supreme court. As such, the Chamber sample may bear little resemblance to the much larger sample of civil cases examined by Professor Eisenberg.

XI. Conclusion

The Chamber's turbo-charged litigation practice is an essential part of its overall strategy to defend the interests of Big Business and thwart government efforts to preserve the environment, safeguard workers' rights, secure the financial system, and protect consumers. When the Chamber's vaunted lobbying and election spending operations are unsuccessful at blocking progressive legislation or regulations such as the Dodd-Frank Act or the Clean Power Plan, litigation offers the Chamber an additional opportunity to kill, or at the very least delay, the implementation of such important reforms. Given the important role that the American courts play in deciding questions of public policy, litigation also offers the Chamber the opportunity to shape public policy in an extraordinarily broad range of domains, often in areas that may not present many opportunities for legislative or executive action. Moreover, because many issues of interest to the Chamber are questions of state law, litigation gives the Chamber the chance to shape public policy at the state level, an opportunity it has clearly seized, having litigated cases in two thirds of the states.

The nature and frequency of the Chamber's litigation also helps to reveal the true face of the Chamber. While the Chamber's entire communications strategy is based upon having people believe that it represents the entire American business community and in particular small businesses, its

²⁷ Of these 211 cases, the lower tribunal found for the plaintiff in 109 cases and for the defendant in 102 cases. Of the 109 cases appealed from a ruling for the plaintiff, the Chamber supported the plaintiff 18 times and won 11 of those cases for a 61% affirmance rate. In the other 91 cases appealed from a ruling for the plaintiff, the defendant supported by the Chamber won 62% of the time, which translates to a 38% affirmance rate for the plaintiff, significantly below the 60% average. Of the 102 cases in which the lower court ruled for the defendant, the Chamber supported the defendant in 72 of those cases. 51% of those judgments for the defendant were affirmed. In the remaining 30 cases where the Chamber was the plaintiff or supported the plaintiff (the defendants in these cases were almost all governments or government agencies), the Chamber won 60%, which translates to a 40% affirmance rate for the defendant.

litigation choices suggest otherwise. Its focus on defending forced arbitration, often used by Big Business at the expense of small businesses, restricting unionization, and fighting environmental regulations all suggest an agenda that caters to the interests of large corporations, in particular the Big Banks that have embraced forced arbitration and the fossil fuel industry which detests any and all efforts to limit greenhouse gas emissions. Even more telling is the fact that in case after case, the Chamber has supported large corporations while almost completely ignoring small businesses who could benefit the most from the expensive legal assistance the Chamber offers. It is rather remarkable that an entity that calls itself the *United States* Chamber of Commerce has supported foreign multinationals more often than it has supported American small businesses.

Finally, for an organization that loves to decry the insidious role played by civil litigation in the United States, the Chamber's busy litigation practice suggests that its true view of litigation is that it's an important tool to be wielded on behalf of Big Business against government, workers, and consumers, and is only to be decried when those same government agencies, workers, and consumers use it to protect their own interests or those of the broader society.

In the second report in this series, Chamber Watch will examine the arguments made by the Chamber in dozens of briefs. We will show that the Chamber doesn't hesitate to take inconsistent positions from one case to another, nor does it shy away from defending some of the most notorious companies, business practices, and businesspeople of recent times. Stay tuned.