Daubert challenges to financial experts

A yearly study of trends and outcomes (2000 - 2021)

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About the study

In 1993, the US Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals Inc*. addressed the admissibility of expert scientific testimony in federal trials, affirming a gatekeeping role for judges with respect to expert testimony. In 1999, the Supreme Court's decision in *Kumho Tire Co. v. Carmichael* clarified that the *Daubert* criteria were applicable to all types of expert testimony in federal jurisdictions, including financial expert testimony.

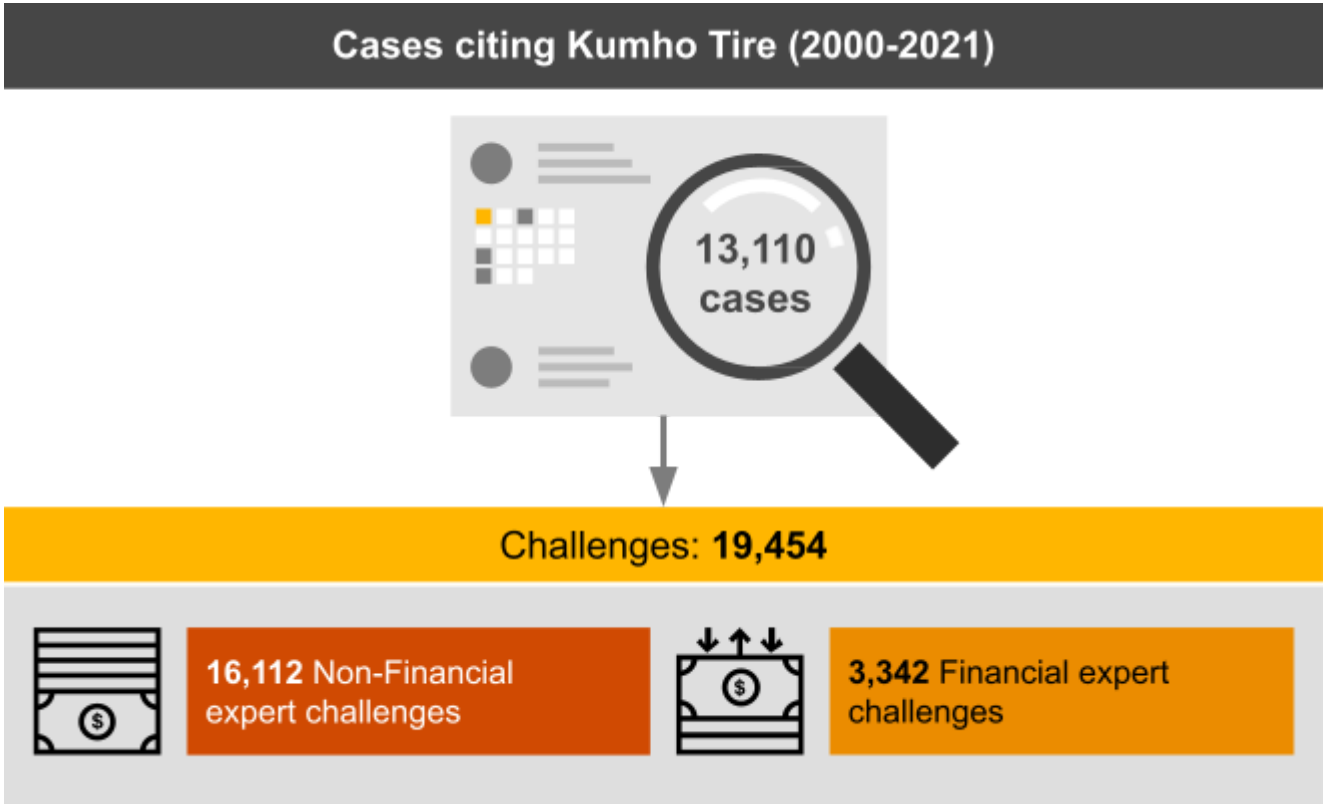
In this study, we analyze post-*Kumho Tire* challenges to financial expert witnesses under the *Daubert* standard. By examining these challenges, we seek to highlight trends in *Daubert* challenges to financial experts, and provide insight into the reasons behind expert exclusions.

To identify exclusions, we searched written court opinions issued between January 1, 2000, and December 31, 2021, using the citation search string "526 U.S. 137" (Kumho Tire v. Carmichael). Our search identified 13,110 cases that involved 19,454 Daubert challenges to expert witnesses of all types[1]. For each *Daubert* challenge, we classified experts into two categories: financial experts (accountants, economists, statisticians, finance professors, financial analysts, appraisers, business consultants, etc.); and non-financial experts (scientists, engineers, psychologists, etc.). As a result, we identified 3,342 Daubert challenges to financial experts between 2000 and 2021.

[1] Some case opinions citing *Kumho Tire* cover challenges to more than one expert, and some case opinions cite *Kumho Tire* but do not include a *Daubert* challenge.

Overview

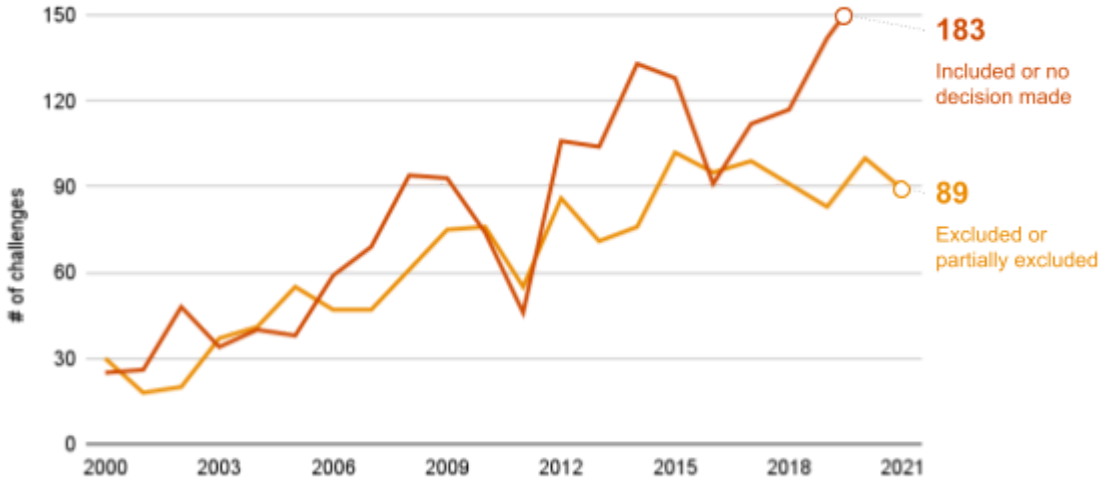
In the 22 years since the U.S.Supreme Court's 1999 ruling in *Kumho Tire Co. v. Carmichael*, we have analyzed 3,342 financial expert challenges, including 272 financial expert challenges decided during calendar year 2021

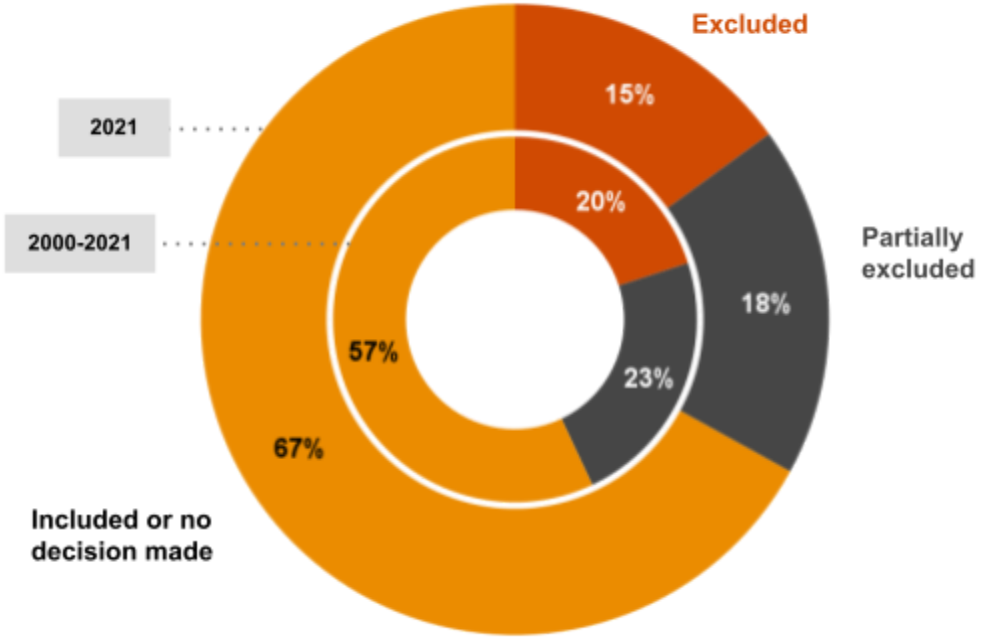


How have exclusion rates changed over time?

In 2021, there were 272 reported challenges to financial expert witnesses - an increase of 19% from 2020

Of the 272 challenges against financial expert witnesses in 2021, 89 challenges (33%) resulted in partial or full exclusion of the expert.





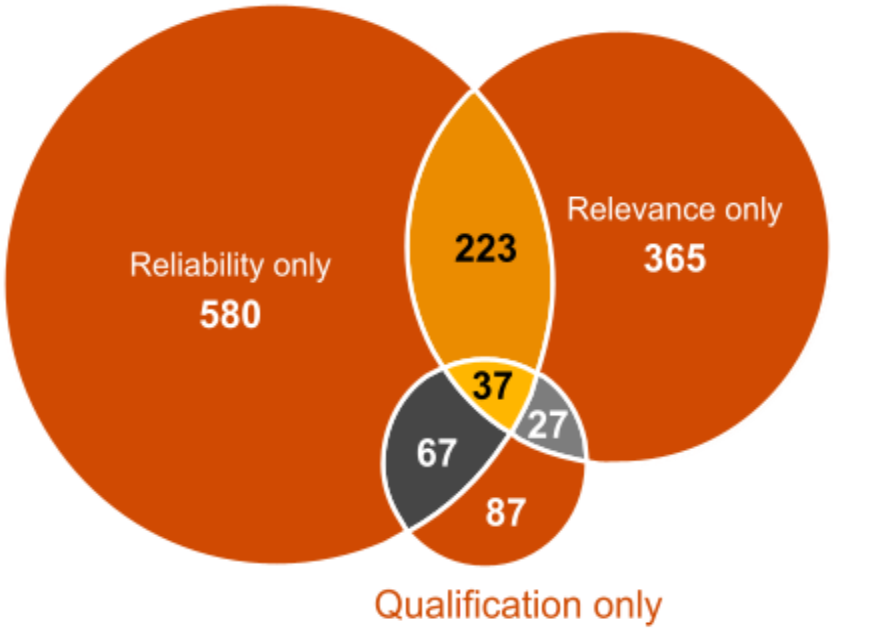
Why are financial experts being excluded?

Federal Rule of Evidence No. 702, “Testimony by Experts,” governs the admissibility of expert witness testimony and incorporates the precedent set by *Daubert*, *Kumho Tire*, and other rulings. Rule 702 provides that a qualified expert’s testimony is admissible if it is both relevant and reliable, and identifies criteria for evaluating relevance and reliability. We used the criteria from Rule 702 to evaluate the reasons for financial expert witness exclusions.

Lack of reliability, either on its own or in combination with other factors, has consistently been the main reason for financial expert witness exclusions over the course of our study. This pattern held true for 2021.

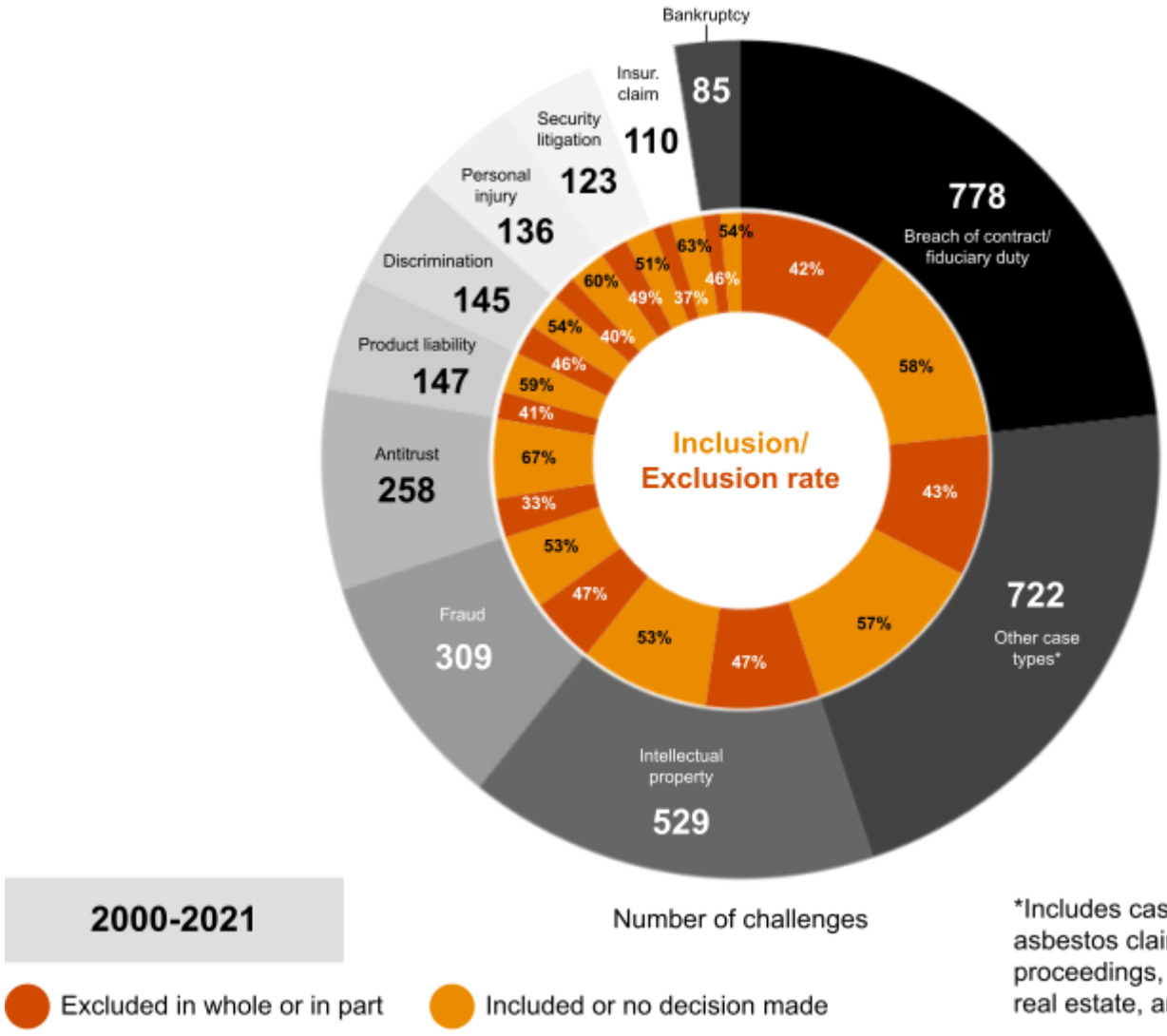
When excluding testimony due to a lack of reliability, courts most frequently cited a lack of sufficient data or the use of methods that are not generally accepted as reasons for exclusion.

The second most common reason for exclusion in 2021 was that the testimony was not considered relevant to the case. This, again, is consistent with historical trends. When a financial expert is excluded for lack of relevance, it is often caused by testimony that was beyond the scope of the financial expert’s role (e.g., testimony related to legal matters) or testimony that will not help the trier of fact (e.g., the opinion is not tied to the specific facts of the case).



What types of cases have higher exclusion rates?

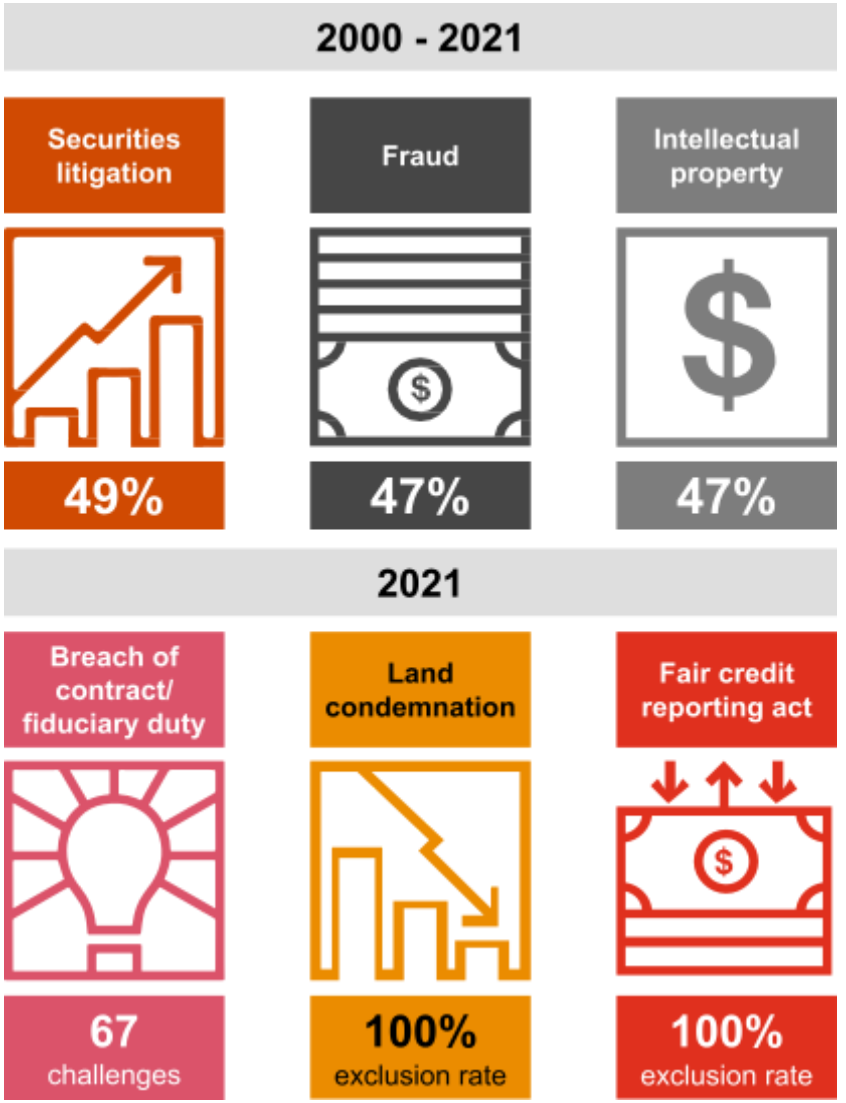
Financial experts testify in a wide range of disputes. The most common cases where we see challenges to financial expert witness testimony are ones arising from a breach of contract or of fiduciary duty, intellectual property, fraud, and antitrust matters.



What types of cases have higher exclusion rates?

For the 22 years captured in our study, securities litigation, fraud, and intellectual property cases have had the highest rates of exclusion for financial expert witness testimony.

During 2021, cases involving Breach of Contract/Fiduciary Duty resulted in the most challenges to financial expert witnesses. Land condemnation and Fair Credit Reporting Act cases had the highest exclusion rates.[2]

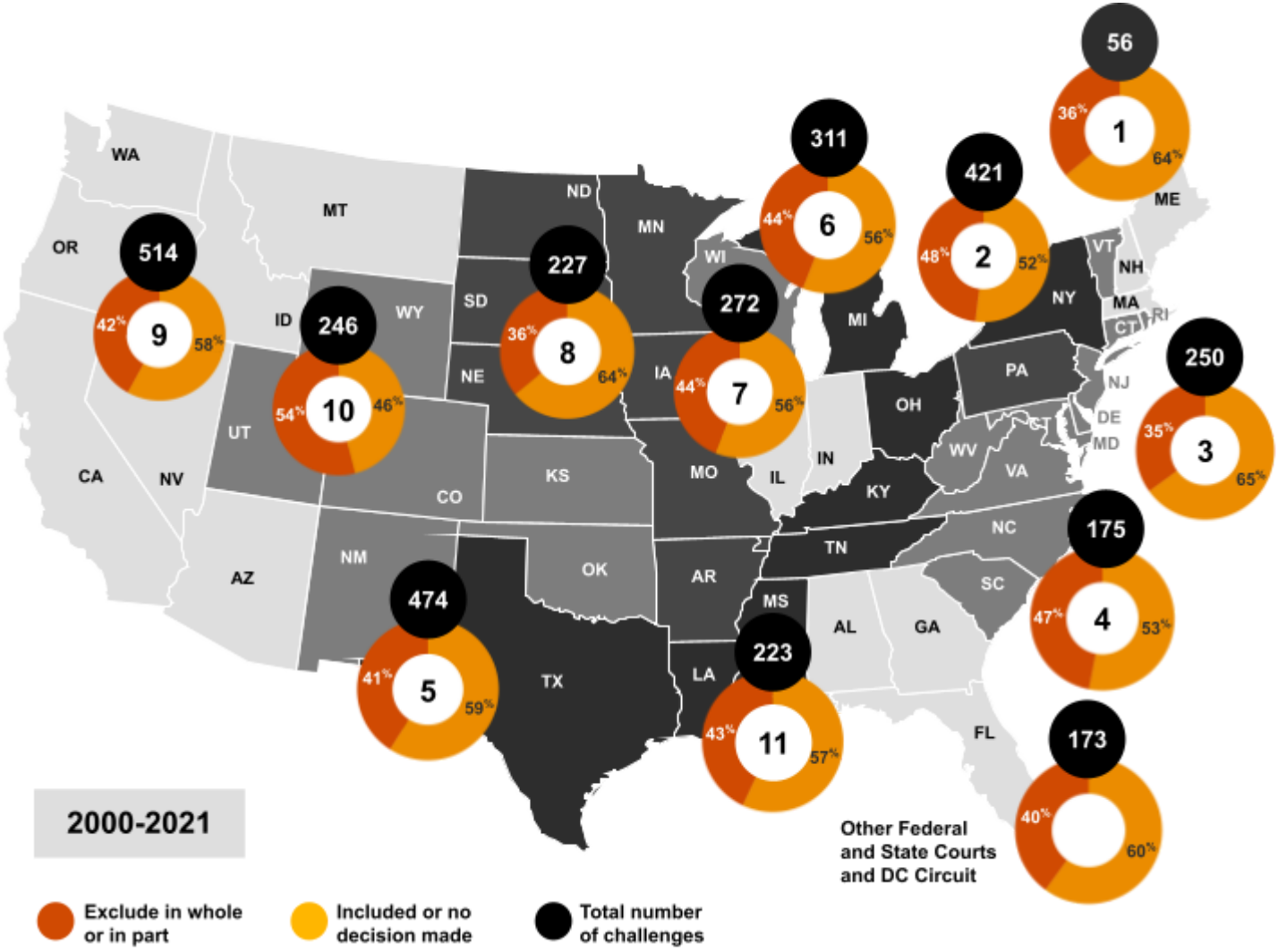


[2] There were only four challenges to a financial expert for land condemnation and Fair Credit Reporting Act cases in 2021.

Where are exclusion rates highest?

The *Daubert* criteria are the standard of review for the admission of expert witness testimony in the federal courts. Some states have also adopted *Daubert* factors as their standard of review.

Over the 22 years of our study, the Second, Fourth and Tenth Circuits have, on average, had the highest exclusion rates, while the First, Third, and Eighth Circuits have had the lowest.

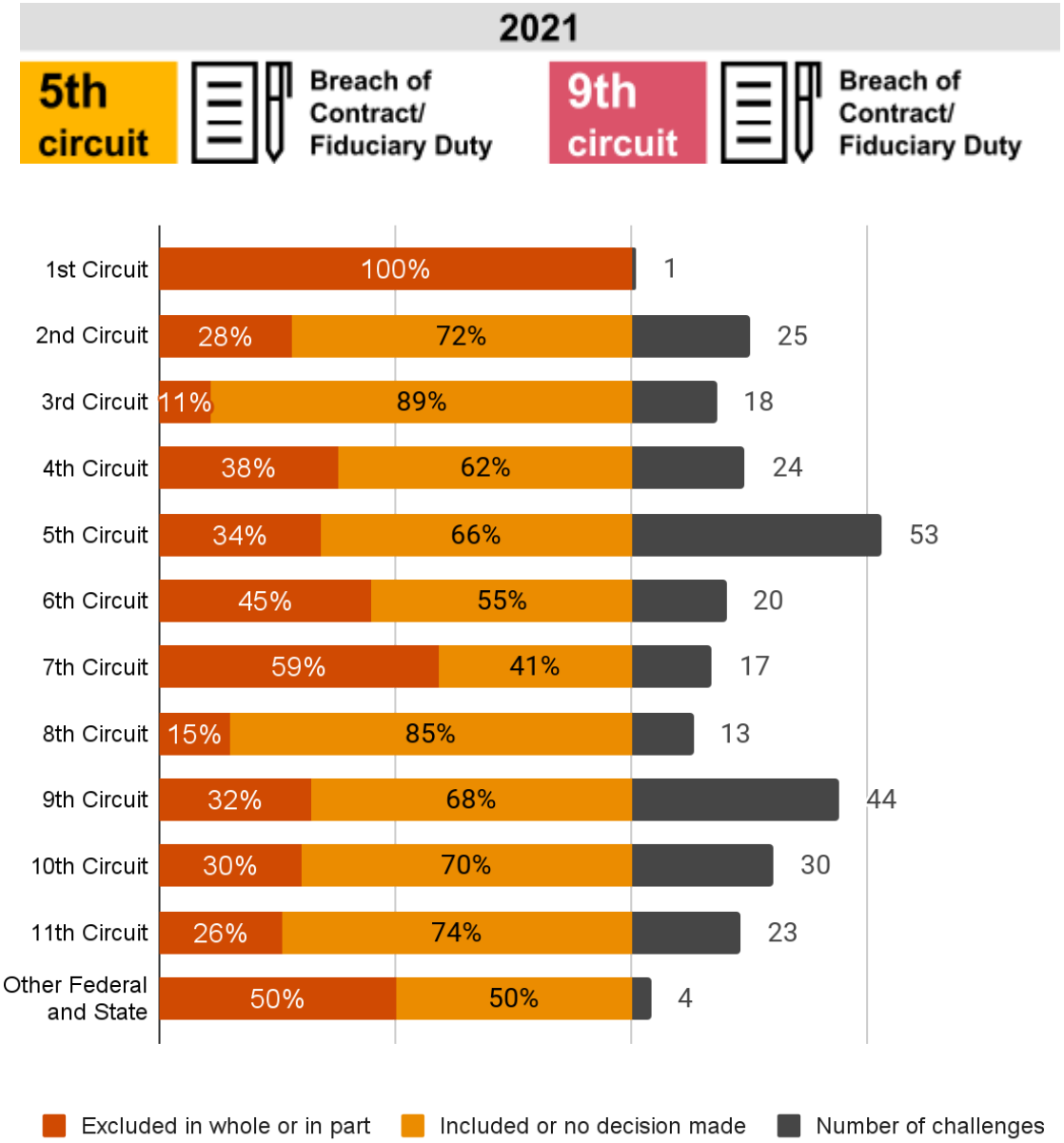


Where are exclusion rates highest?

In 2021, *Daubert* challenges to financial experts most frequently occurred in the Fifth and Ninth Circuits, which include Texas and California, respectively. The Ninth Circuit has seen the most challenges over the course of our study.

The most frequent case type in these jurisdictions in 2021 was breach of contract/fiduciary duty.

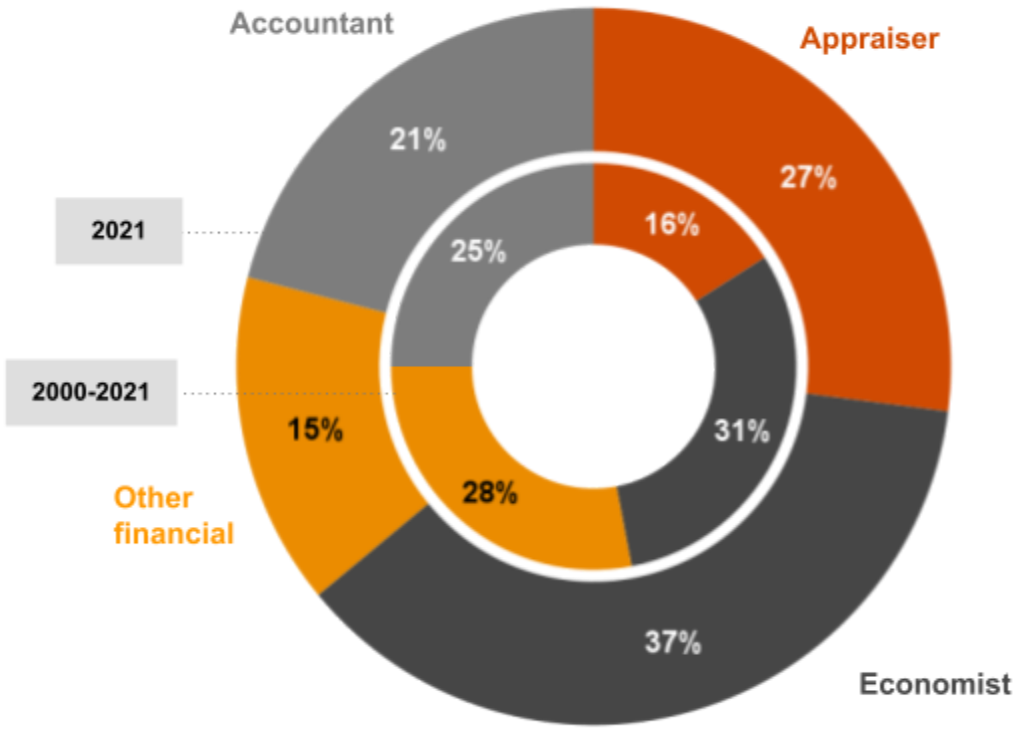
In 2021 the First Circuit and the Seventh Circuit had the highest exclusion rates while the Third Circuit and Eighth Circuit had the lowest exclusion rates.



Who experiences higher numbers of challenges – Accountants,appraisers, or economists?

The most common types of experts engaged to provide financial expert witness testimony are accountants, appraisers, and economists. We also see other financial experts such as statisticians, financial analysts, finance professors, etc.

Over the last 22 years, of the three most common financial expert types, economists have been the most frequently challenged experts. In 2021, economists faced the highest number of *Daubert* challenges.

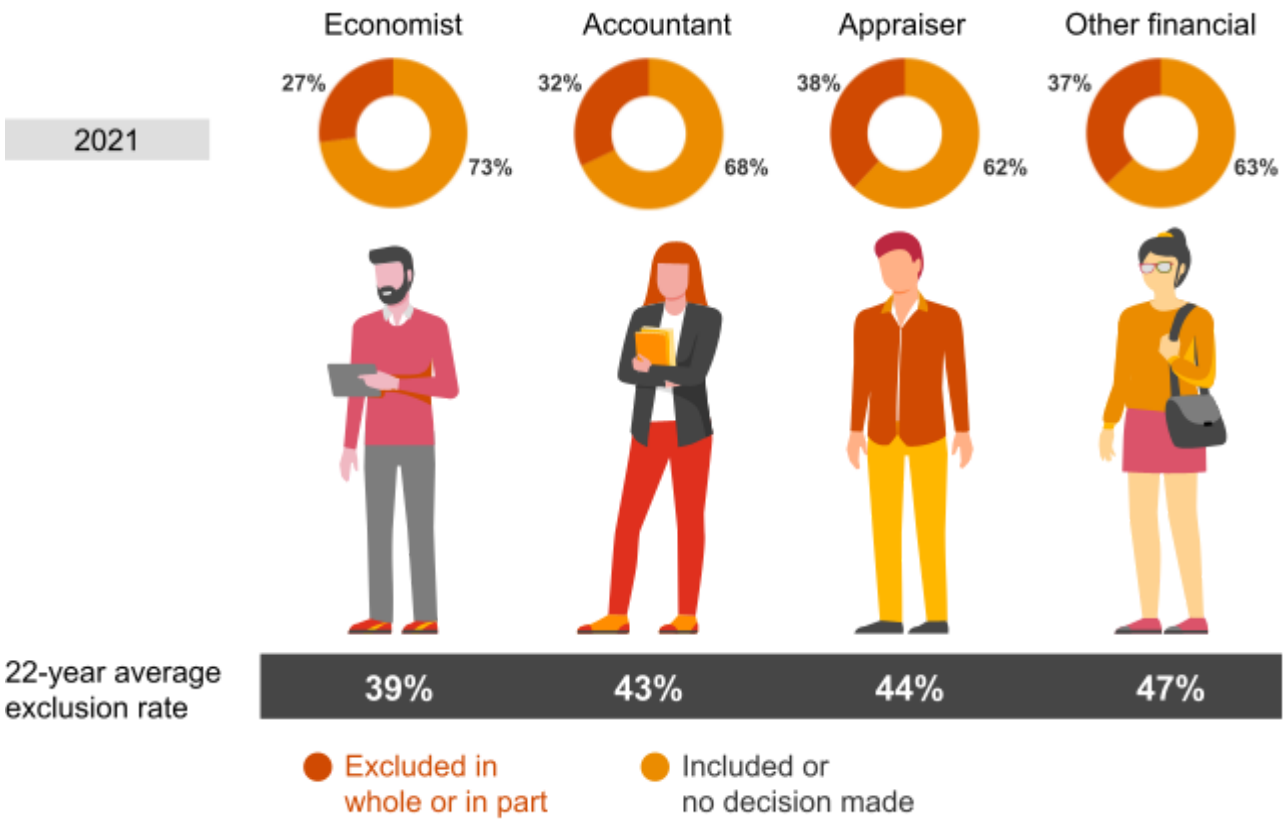


Who experiences higher exclusion rates – Accountants, appraisers, or economists?

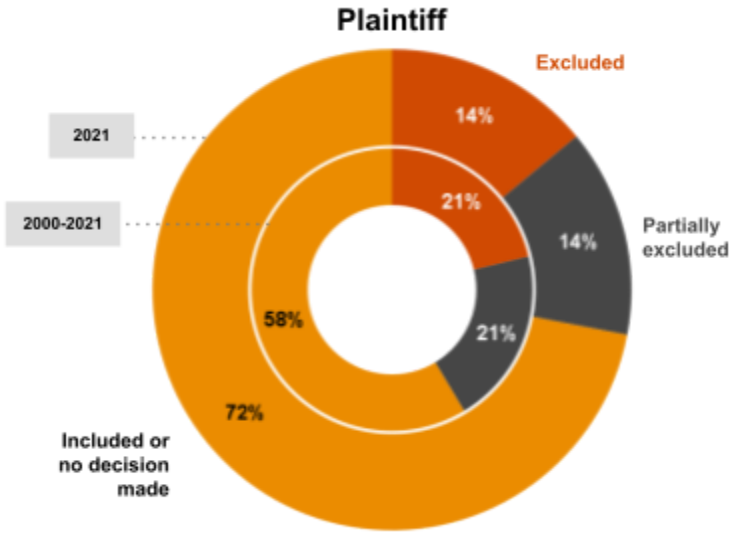
In 2021, appraisers and accountants had the highest exclusion rates of the three most common financial experts rates of 38% and 32%, respectively.

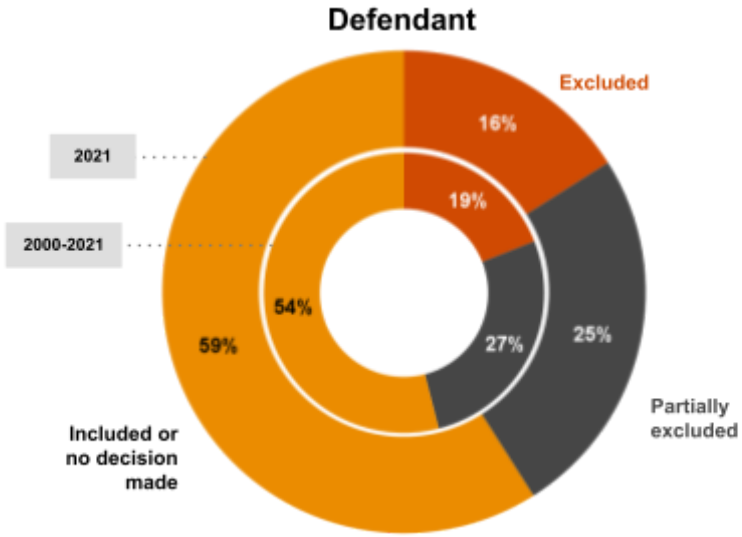
38% of *Daubert* challenges to appraisers resulted in full or partial exclusion during 2021, which is below the 22-year average exclusion rate for appraisers of 44%.

32% of Daubert challenges to accountants in 2021 resulted in full or partial exclusion - a rate 11% lower than the 22-year average.



Who experiences higher exclusion rates – Plaintiff- or defendant-side financial experts?

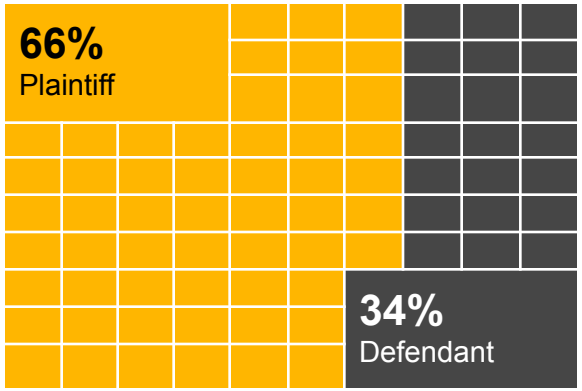




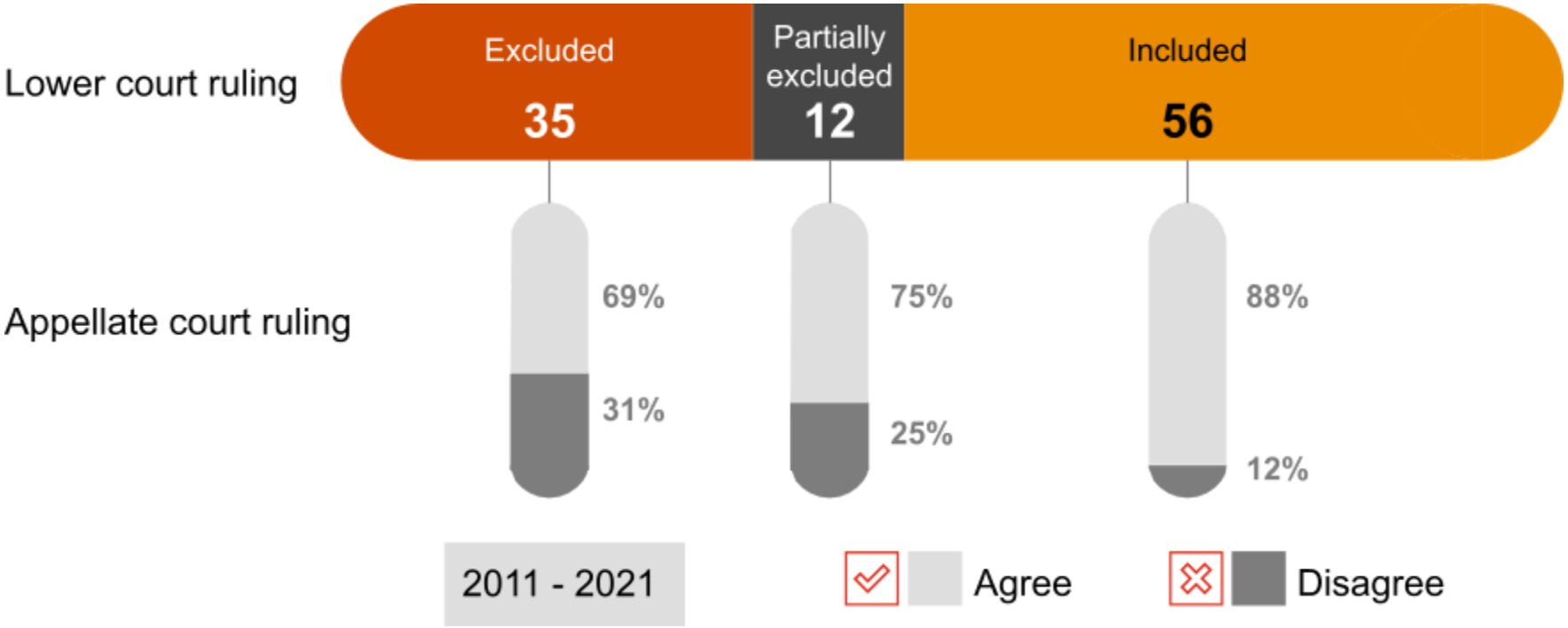
On average, defendant-side financial experts experience a marginally higher exclusion rate than plaintiff-side financial experts.

This trend held true in 2021 - 41% exclusion for defendant-side financial experts vs. 28% for plaintiff-side financial experts.

Over the course of our study, there have consistently been approximately twice as many *Daubert* challenges to plaintiff-side financial experts 66% as there have been to defendant-side financial experts 34%. This pattern held true in 2021.



When lower-court *Daubert* challenge rulings are appealed, how often are they overturned?



In 2011, we began analyzing the approach of appellate courts to lower-court rulings on financial expert *Daubert* challenges.

Between 2011 and 2021, there were 103 appeals of lower court rulings on financial-expert *Daubert* challenges. Nearly 80% of the appeals were related to financial experts whose testimony had been accepted by the lower court.

In the majority of appeals, the appellate court upheld the ruling of the lower court.

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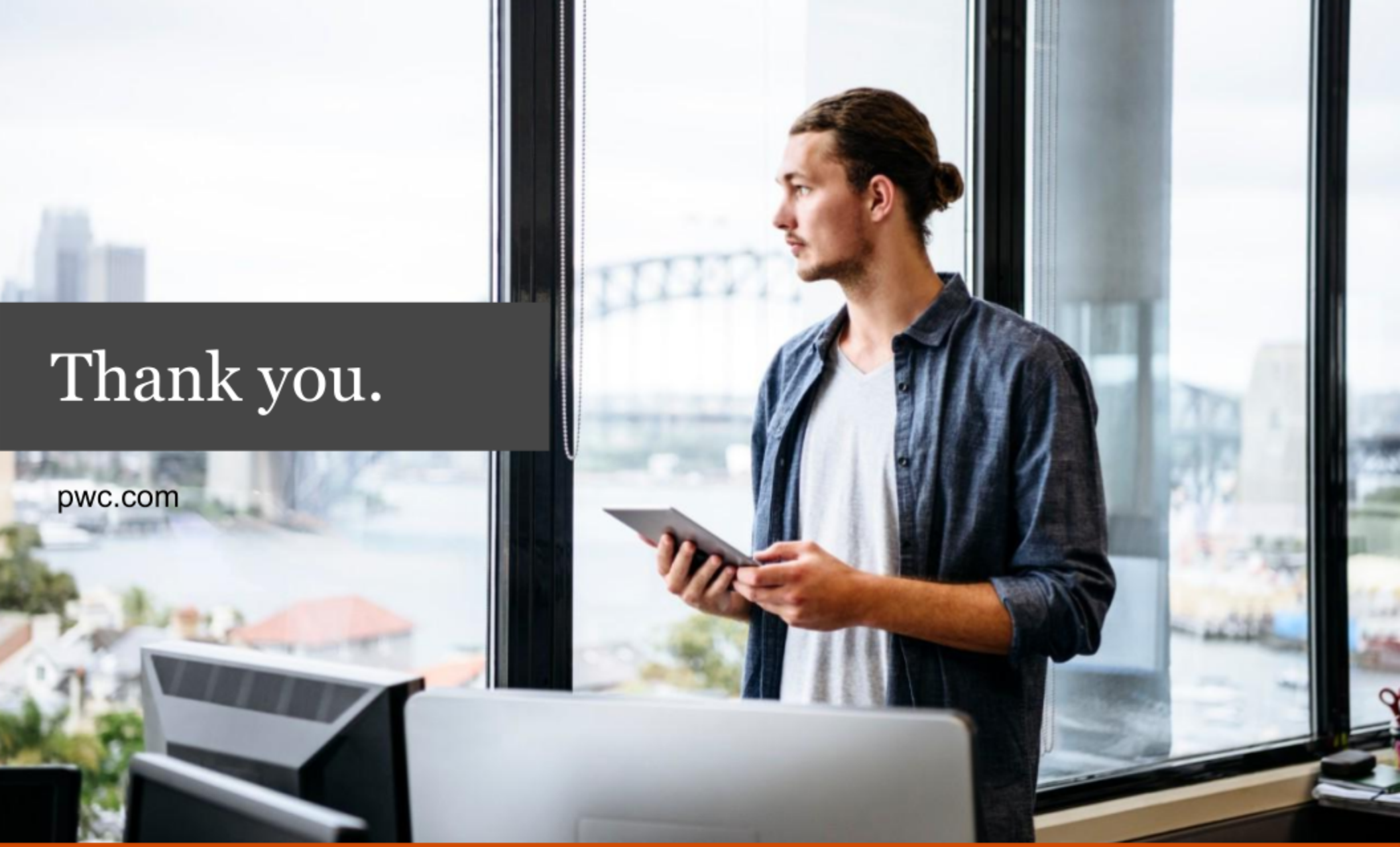

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