



Washington
Legal
Foundation

2021

ANNUAL REPORT

Defending Economic Liberties Since 1977



“A headquarters befitting an established institution.”

In 1993, Washington Legal Foundation purchased the Alice Roosevelt Longworth House, a Beaux-Arts style townhouse built in 1881, to serve as its national headquarters. The unconventional daughter of President Theodore Roosevelt moved into the house in 1925 with her husband, Speaker of the House of Representatives Nicholas Longworth. For the next 60 years, Mrs. Longworth’s home was a salon from which she wielded influence over national politics, hosting presidents, cabinet secretaries, Members of Congress, scientists, authors, captains of industry, and diplomats. As WLF’s founder, Daniel J. Popeo, routinely quipped to visitors, “if only these walls could talk.”

“The other Washington monument,” as some called Mrs. Longworth, lived at 2009 Massachusetts Avenue until her death in 1980 at age 96. The charm and intricate detail of her home remain alive at WLF’s headquarters, and the organization embodies the well-informed skepticism and strong-willed advocacy of the building’s seven-decade owner.

WLF

Washington Legal Foundation is the nation’s premier public-interest law firm and policy center. Our mission is to preserve and defend America’s free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law. We **LITIGATE** precedent-setting issues before courts and regulatory agencies; **PUBLISH** and distribute timely and influential legal studies; and **COMMUNICATE** our message through webcast programs, blog commentary, editorials, and public-education campaigns.


To our
Friends and
Supporters

The unpredictable and unforgiving COVID-19 pandemic continued to disrupt our lives and the economy in 2021. Government, as is its nature, came forward with purported solutions. While granting the government’s good intentions, many business leaders also urged our public officials to first and foremost do no harm. Despite that plea, the nation spent 2021 in a constant state of legal and regulatory anxiety.

Having developed and deployed medical weapons against the virus, American free enterprise also kept people employed and connected. Even so, policy makers and opinion leaders across the spectrum increasingly demand that our engines of economic growth be brought to heel. With legislatures in perpetual gridlock, government regulators and activist lawyers have filled the void with overbearing rules, politically motivated enforcement actions, and a swarm of lawsuits.

These battles occur where Washington Legal Foundation’s unique approach to public-interest law—litigation, advocacy, and education—is squarely aimed: courts, administrative agencies, and the court of public opinion.

WLF was established in 1977 to both confront unelected regulators and legal activists in their own policy-making power centers and to positively advance respect for individual and economic liberties, limited and accountable government, and the rule of law. As this Annual Report details, in 2021 we made measurable gains in the fight to keep free enterprise free.

WLF’s dedicated and tireless Litigation Division team filed 47 *amicus* briefs and 12 regulatory comments in 2021. Federal and state judges embraced arguments in WLF briefs to uphold a business’s freedom to contract, to end class-action lawsuits where the plaintiffs suffered no harm, and to reject the use of tort law to address global policy concerns. We successfully supported certiorari petitions at the U.S. Supreme Court in two cases where the parties’ ability to resolve disputes through arbitration, rather than costly litigation, was at stake.

With a staunchly anti-business activist in charge at the Federal Trade Commission, WLF intensified its spotlight on the agency, supporting a successful Supreme Court challenge to the FTC’s sanction authority and formally opposing, through administrative comments, the FTC Chair’s drive to abandon the consumer-welfare standard for antitrust. Finally, as 2021 came to a close, WLF successfully urged the Supreme Court to stay and immediately hear a challenge to OSHA’s “emergency” COVID-19 employer vaccination mandate—perhaps the year’s most egregious abuse of agency authority.

Our Legal Studies Division released 44 original papers and posted 84 insightful commentaries to our blog, the *WLF Legal Pulse*. We also produced and livestreamed 14 Media Briefing and Webinar programs. We owe our productivity to the private practitioners, legal academics, fellow free-market policy experts, and corporate counsel who donated their time as writers and panelists. Nearly 120 different professionals wrote for WLF in 2021, and 30 participated in our programs. Two major areas of focus were junk science in the courtroom and antitrust regulation and enforcement. Our expert advocacy on scientific evidence supported a broader effort to amend the Federal Rules of

Evidence to fortify judges’ role as evidentiary gatekeepers. And our antitrust scholarship inspired one senior communications official at a heavily targeted business to remark, “We appreciate that WLF’s work remains dedicated to examining the actual implications of new ideas and defending first principles.”

We are grateful for those allies whose support and friendship make WLF’s unique work possible. We especially appreciate our volunteer Legal Policy Advisory Board for its counsel and encouragement during these trying times. And of course we never forget that WLF’s achievements exist due to the generous philanthropy of individuals, businesses, foundations, and associations.

Although this year was a productive one for WLF, our fight for economic freedom and a stable, predictable rule of law continues. We were honored to be appointed Executive Director and General Counsel, respectively, in February 2021. Together we have served WLF and the public interest for over four decades, and our promotion reflects both this organization’s continuity and its ability to change as it enters its 45th year.



Glenn G. Lammi

Glenn G. Lammi
Executive Director & Vice President of Legal Studies



Cory L. Andrews

Cory L. Andrews
General Counsel & Vice President of Litigation

Legal Policy Advisory Board

“At a time when our nation’s free-enterprise system is facing many challenges, Washington Legal Foundation speaks with a powerful voice in helping to shape a legal and regulatory environment conducive to economic growth and prosperity for all people. Join me in supporting this dynamic organization, the talented team at WLF that provides leadership, and the engaged network of committed professionals across the country whose pro bono efforts contribute mightily to the important work of this remarkable foundation.”

Jay B. Stephens
Chairman, Legal Policy
Advisory Board



Chairman of the Board

Jay B. Stephens
Kirkland & Ellis LLP

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The Honorable Dick Thornburgh
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U.S. Court of Federal Claims

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Gibson, Dunn & Crutcher LLP

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Vice President and General Counsel
Chevron Corporation

Carter G. Phillips
Sidley Austin LLP

Prof. Stephen B. Presser
Raoul Berger Professor of Law Emeritus
Northwestern Pritzker School of Law

Prof. George L. Priest
Edward J. Phelps Professor of Law and Economics
Yale Law School

Charles F. (Rick) Rule
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Evan M. Tager
Mayer Brown LLP

George J. Terwilliger
McGuire Woods LLP

Prof. Larry D. Thompson
John A. Sibley Professor in Corporate and Business Law
University of Georgia School of Law

Daniel E. Troy
Former Chief Counsel
U.S. Food and Drug Administration

Joe D. Whitley
Womble Bond Dickinson (US) LLP

Prof. Joshua D. Wright
University Professor of Law
George Mason University
Antonin Scalia Law School

Litigating

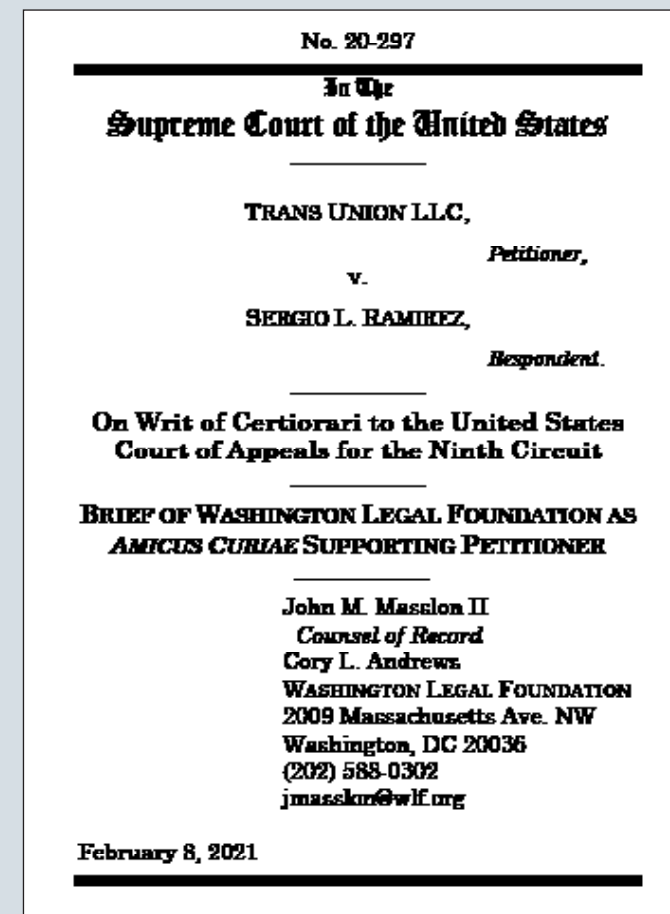
Our litigation team rigorously monitors and intervenes in cases, actions, and complaints that threaten the fundamental rights of hard-working Americans and the integrity of the country's legal system. When government agencies interfere with those rights, WLF's litigation team does not hesitate to challenge those agencies in court.

Washington Legal Foundation litigates at every level of the judicial system, from local courts to the U.S. Supreme Court. WLF also regularly initiates, or comments on, administrative proceedings to promote regulatory reform.

WLF participated in or obtained outcomes in 84 court cases and regulatory proceedings in 2021. WLF's 2021 briefs and regulatory comments are available at WLF.org.

"WLF's amicus brief was a real pleasure to read – it packs a substantive punch in persuasive and tightly written prose. It will be a great contribution to the cert effort."

**Pratik Shah, Akin Gump Strauss Hauer & Feld LLP
Counsel for Petitioner in *Bank of America v. Fund Liquidation Holdings LLC***



United States ex rel. Proctor v. Safeway

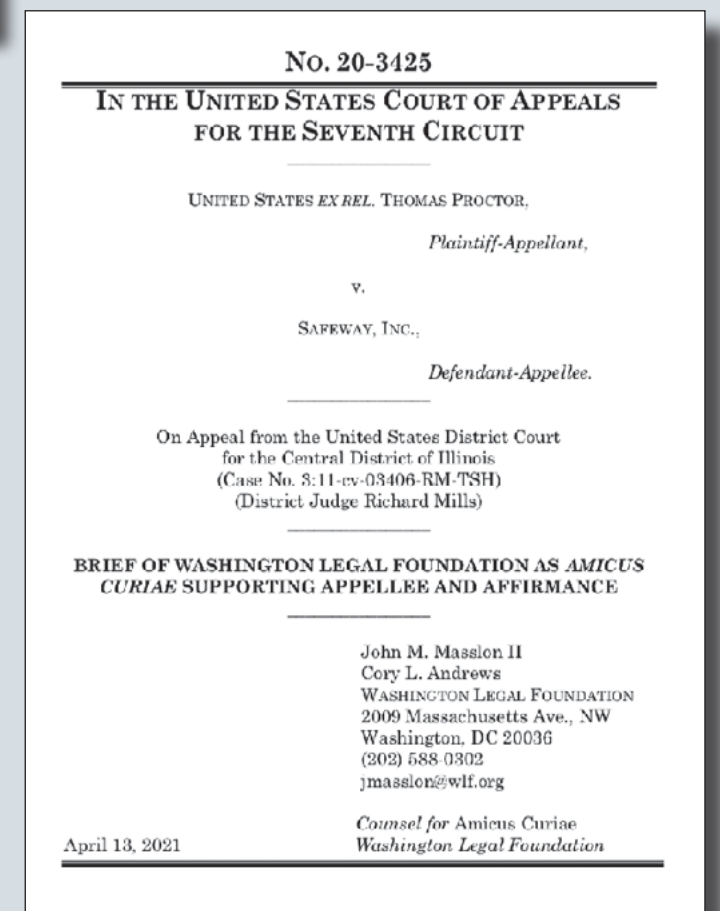
Bolstering the False Claims Act's scienter requirement

The False Claims Act (FCA) requires a plaintiff to prove that the defendant "knowingly" submitted a false claim for reimbursement. Every court of appeals to have considered the issue has held that the Supreme Court's test for willfulness in *Safeco* governs in FCA actions. As WLF's brief explained, applying the *Safeco* standard to the FCA is necessary to protect defendants' due-process rights.

TransUnion LLC v. Ramirez

Vindicating the separation of powers through Article III standing

Though Congress may create a statutory right of action for private citizens, it cannot alter the Constitution's fundamental separation of powers. As WLF's brief successfully argued, Article III bars courts from hearing any claim by any plaintiff who has not suffered a concrete injury. As the Supreme Court confirmed, this jurisdictional bar applies to class actions no less than to individual ones.



**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOHN S. HAHN,
Special Master,
BADER FARMS, INC.,
Plaintiff-Appellee,
BILL BADER,
Plaintiff,

v.
BASF CORPORATION,
Defendant-Appellant,
MONSANTO COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri
(No. 1:16-cv-00299-SNLJ)

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND DRI-THE VOICE OF THE DEFENSE BAR
AS AMICI CURIAE IN SUPPORT OF
DEFENDANTS-APPELLANTS AND REVERSAL**

Cory L. Andrews
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
Counsel for Amici Curiae

March 19, 2021

Bader Farms Inc. v. BASF Corp.

Insisting on causation as a crucial element of
tort liability

If there is one sacrosanct principle in the law, it is
that courts impose liability only on those who caused
the plaintiff's injury. Yet the trial court here awarded
the plaintiff tens of millions of dollars in damages
without proof that any defendant's product harmed
the plaintiff. WLF argued that there is no surer way
to generate unconstitutional tort awards than to
remove the element of causation from tort law.

CVS Pharmacy Inc. v. Doe
Opposing extra-statutory disparate-impact liability

WLF successfully urged the Supreme Court to
grant review to resolve a circuit split over whether
plaintiffs can assert disparate-impact claims under
Section 504 of the Rehabilitation Act of 1973. As
WLF's brief argued, Section 504's plain language
does not permit disparate-impact claims, and
recognizing such claims would impose astronomical
costs on a wide swath of businesses.

**In The
Supreme Court of the United States**

CVS PHARMACY, INC.; CAREMARK, L.L.C.;
CAREMARK CALIFORNIA SPECIALTY
PHARMACY, L.L.C.,

Petitioners,

v.

JOHN DOE, ONE; JOHN DOE, TWO; JOHN DOE, THREE;
JOHN DOE, FOUR; JOHN DOE, FIVE; ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND INDEPENDENT WOMEN'S LAW CENTER AS
AMICI CURIAE SUPPORTING PETITIONERS**

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S
LAW CENTER
4 Weems Lane #312
Winchester, VA 22601
(202) 429-9574
jennifer.braceras@iwf.org

JOHN M. MASSLON II
Counsel of Record
CORY L. ANDREWS
WASHINGTON LEGAL
FOUNDATION
2009 Mass. Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

April 30, 2021

**IN THE
Supreme Court of the United States**

BNSF RAILWAY COMPANY,

Petitioner,

v.

ROBERT DANNELS,

Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Montana**

**BRIEF OF WASHINGTON LEGAL FOUNDATION AND
ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

CORY L. ANDREWS
Counsel of Record
JOHN M. MASSLON II
WASHINGTON LEGAL
FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

September 24, 2021

BNSF Railway Co. v. Dannels

Supporting federal preemption of railway-worker
injury claims

The Federal Employers Liability Act (FELA) is
the exclusive remedy for railway-worker injury
claims. Yet Montana law permits employees to
supplement their FELA claims with a second
suit alleging bad faith in defending against those
claims. WLF urged the Supreme Court to clarify
that FELA preempts Montana law, which unduly
interferes with FELA's exclusive remedial scheme.

"WLF consistently submits top-flight briefs with distinct perspectives. Whenever I see a WLF brief, I know that it will be thoughtful and well written. And it is always a pleasure working with WLF's lawyers on my own cases."

Kannon K. Shanmugam
Chair of the Supreme Court and Appellate Practice Group
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Pro Bono Law Firms

We thank the following law firms for their attorneys' pro bono contributions to WLF *amicus* briefs, publications, and programs.

Arnold & Porter
Bahner & Stophel, PC
Baker Botts LLP
BakerHostetler
Beveridge & Diamond, PC
Bona Law PC
Bowman and Brooke LLP
Breazeale, Sachse & Wilson LLP
Brownstein Hyatt Farber Schreck
Bryan Cave Leighton Paisner LLP
Cahill Gordon & Reindell LLP
Chuhak & Tecson, PC
Cleary Gottlieb Steen & Hamilton LLP
Conn Maciel Carey
Covington & Burling LLP
Crowell & Moring LLP
Dechert LLP
DLA Piper LLP
Ellis & Winters LLP
Evans Fears & Schuttert LLP
Foley Hoag LLP
Gibson, Dunn & Crutcher LLP
Goodwin Procter LLP
Greenberg Traurig LLP
Hawkins Parnell & Young, LLP

Hollingsworth LLP
Homer Bonner Jacobs Ortiz, PA
Horvitz & Levy LLP
Hughes Hubbard & Reed
Hyman, Phelps & McNamara, PC
K&L Gates LLP
Keller and Heckman LLP
Kelley Drye & Warren LLP
King & Spalding LLP
Kirkland & Ellis LLP
Latham & Watkins LLP
Libby Hoopes Brooks, PC
Mayer Brown LLP
Nelson Mullins Riley & Scarborough LLP
Orrick LLP

Pillsbury Winthrop Shaw Pittman
Reed Smith LLP
Reeves Law LLC
Shearman & Sterling
Shook, Hardy & Bacon LLP
Sidley Austin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Stris & Maher LLP
Thompson Hine LLP
Tucker Ellis LLP
White & Case LLP
Wiley Rein LLP
Wilkinson Barker Knauer LLP
Williams & Connolly LLP
Winston & Strawn

“WLF is a thought leader on cutting-edge legal issues. Its team brings key legal insights and a valuable perspective to any case it becomes involved with. Its lawyers know how to get to the heart of an issue with clear, crisp analysis, and are always a pleasure to work with.”

*John C. O’Quinn, P.C.
Partner, Kirkland & Ellis LLP*

Litigation and Regulatory Reform

WLF participated in
or obtained outcomes
in 84 court cases and
regulatory proceedings.
Briefs and regulatory
comments filed by
WLF are available
at WLF.org.

1-800 Contacts v. FTC

U.S. Court of Appeals for the Second Circuit
Combatting FTC antitrust overreach

Abbo-Bradley v. City of Niagra Falls

U.S. Court of Appeals for the Second Circuit
Supporting the “revival doctrine” for federal removal

Adams v. Merck Sharp & Dohme

U.S. Court of Appeals for the Ninth Circuit
Supporting federal preemption under the Food Drug and
Cosmetic Act

Alphabet Inc. v. Rhode Island

U.S. Supreme Court
Opposing spurious securities class actions

Amazon.com v. Rittmann

U.S. Supreme Court
Limiting the Federal Arbitration Act’s “transportation
exception”

Amazon.com v. Waithaka

U.S. Supreme Court
Limiting the Federal Arbitration Act’s “transportation
exception”

AMG Capital Management v. FTC

U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Axon v. FTC

U.S. Court of Appeals for the
Ninth Circuit/U.S. Supreme Court
Securing a regulated party’s right to challenge an
agency’s structure

Bader Farms, Inc. v. BASF Corp.

U.S. Court of Appeals for the Eighth Circuit
Insisting on causation as a crucial element of tort liability

Banco Safra v. Samarco Mineracao

U.S. Court of Appeals for the Second Circuit
Opposing “foreign-cubed” securities suits

Bank of America v. Fund Liquidation Holdings LLC

U.S. Supreme Court
Supporting Article III standing requirements

BNSF Railway Co. v. Dannels

U.S. Supreme Court
Supporting federal preemption of state-law
railroad-injury claims

Boley v. Universal Health Services

U.S. Court of Appeals for the Third Circuit
Insisting on Article III standing in ERISA class actions

BP plc v. Mayor & City Council of Baltimore

U.S. Supreme Court
Supporting full review of federal-officer removal orders

Bristol-Myers Squibb Co. v. Connors

U.S. Supreme Court
Seeking to clarify the bounds of federal-court abstention

Burton v. Armstrong Containers

U.S. Court of Appeals for the Seventh Circuit
Supporting basic tort elements such as injury and
causation

Cal Cartage Transportation Express v. California

U.S. Supreme Court
Challenging state laws that conflict with the FAAAA

Calcutt v. FDIC

U.S. Court of Appeals for the Sixth Circuit
Combatting unconstitutional administrative law judges

California Trucking Association v. Bonta

U.S. Supreme Court
Challenging state laws that conflict with the FAAAA

Caremark v. Chickasaw Nation

U.S. Court of Appeals for the Ninth Circuit
Enforcing arbitration agreements as written

Cargill v. Doe I

U.S. Supreme Court
Opposing extraterritorial liability under the Alien Tort
Statute

Cessna Aircraft Co. v. Garcia

Texas Supreme Court
Limiting personal jurisdiction over nonresident
defendants

City of Austin v. Reagan National Advertising of Austin

U.S. Supreme Court
Challenging content-based restrictions on advertising

City of New York v. Chevron

U.S. Court of Appeals for the Second Circuit
Opposing judicial regulation of climate change

Coates v. R.J. Reynolds

Florida Supreme Court
Opposing unconstitutionally excessive punitive damages

Comcast v. Mills

U.S. Court of Appeals for the First Circuit
Supporting federal preemption under the
Federal Cable Act

Comcast v. Viamedia

U.S. Supreme Court
Opposing refusal-to-deal antitrust liability

Coverall v. Rivas

U.S. Supreme Court
Urging more FAA guidance for the Ninth Circuit

Cummings v. Premier Rehab Keller

U.S. Supreme Court
Cabining emotional-distress damages under the
Rehabilitation Act

CVS Pharmacy Inc. v. Doe

U.S. Supreme Court
Opposing extra-statutory disparate-impact liability

Dannels v. BNSF Railway Co.

Montana Supreme Court
Supporting federal preemption of state-law railroad-injury
claims

Dunn v. Genzyme

Massachusetts Supreme Judicial Court
Supporting federal preemption under the Food Drug and
Cosmetic Act

Facebook v. Duguid

U.S. Supreme Court
Urging courts to apply statutory law as written

Ford Motor Co. v. Montana Eighth Judicial District

U.S. Supreme Court
Limiting personal jurisdiction over nonresident
defendants

FTC v. Credit Bureau Center

U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Glaxo Group v. DRIT

Delaware Supreme Court
Preserving freedom of contract

***Goldman Sachs Group v. Arkansas Teacher Retirement
System***

U.S. Supreme Court
Opposing certification of an unwieldy nationwide class

In re Facebook, Inc.
Texas Supreme Court
Urging immunity under the Communications Decency Act

In re Packaged Tuna Antitrust Litigation
U.S. Court of Appeals for the Ninth Circuit
Opposing certification of an unwieldy nationwide class

In re Walmart, Inc.
Texas Supreme Court
Limiting the scope of discovery in premises liability cases

IQVIA v. Florence Mussat, MD, SC
U.S. Supreme Court
Opposing nationwide class actions against nonresident defendants

Janssen Pharmaceuticals v. A.Y.
U.S. Supreme Court
Supporting federal preemption under the Food Drug and Cosmetic Act

Johnson & Johnson v. California
California Court of Appeal
Protecting scientific speech under the First Amendment

Johnson & Johnson v. Ingham
U.S. Supreme Court
Limiting arbitrary and excessive punitive damages

Laramie v. Philip Morris USA
Massachusetts Supreme Judicial Court
Urging adherence to res judicata under the Master Settlement Agreement

Mallory v. Norfolk So. Railway
Pennsylvania Supreme Court
Opposing personal jurisdiction based on business registration

Mamani v. Berzain
U.S. Court of Appeals for the Eleventh Circuit
Cabining liability under the Torture Victim Protection Act

Monsanto Co. v. Hardeman
U.S. Supreme Court
Urging meaningful judicial gatekeeping for expert evidence

National Association of Wheat Growers v. Bonta
U.S. Court of Appeals for the Ninth Circuit
Combatting compelled speech under the First Amendment

National Federation of Independent Businesses v. OSHA
U.S. Supreme Court
Supporting stay of emergency temporary vaccinate-or-test mandate for most employers

Nestlé USA v. Doe I
U.S. Supreme Court
Opposing extraterritorial liability under the Alien Tort Statute

New York v. Scalia
U.S. Court of Appeals for the Second Circuit
Supporting Article III standing requirements

Northern Plains Resource Council v. Corps
U.S. Court of Appeals for the Ninth Circuit
Opposing nationwide injunctions

Oracle America v. DOL
U.S. District Court for the District of Columbia
Opposing administrative agency overreach

Pearlstein v. Blackberry Ltd.
U.S. Court of Appeals for the Second Circuit
Opposing certification of unwieldy class actions

Pivotal Software, Inc. v. Superior Court of California
U.S. Supreme Court
Applying the PSLRA discovery stay in both state and federal court

Publishers Business Services v. FTC
U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Pulse Network v. Visa
U.S. Court of Appeals for the Fifth Circuit
Enforcing antitrust standing requirements

Rocket Mortgage v. Alig
U.S. Supreme Court
Opposing certification of a class with many uninjured members

RJR Tobacco Co. v. Los Angeles
U.S. Court of Appeals for the Ninth Circuit
Ensuring uniform product standards through federal preemption

Southwest Airlines v. Saxon
U.S. Supreme Court
Limiting the Federal Arbitration Act’s “transportation exception”

Spegele v. USAA Life Insurance Co.
U.S. Court of Appeals for the Fifth Circuit
Opposing certification of a class with many uninjured members

Stars Interactive v. Kentucky
U.S. Supreme Court
Combatting excessive fines unmoored from actual harm

Stromberg v. Qualcomm
U.S. Court of Appeals for the Ninth Circuit
Opposing certification of an unwieldy nationwide class

TransUnion LLC v. Ramirez
U.S. Supreme Court
Vindicating the separation of powers through Article III standing

United States ex rel. Proctor v. Safeway
U.S. Court of Appeals for the Seventh Circuit
Bolstering the False Claims Act’s scienter requirement

United States ex rel. Sheldon v. Allergan
U.S. Court of Appeals for the Fourth Circuit
Bolstering the False Claims Act’s scienter requirement

United States ex rel. Yarberry v. Supervalu
U.S. Court of Appeals for the Seventh Circuit
Bolstering the False Claims Act’s scienter requirement

United States v. Facticeau
U.S. Court of Appeals for the First Circuit
Protecting truthful off-label speech under the First Amendment

United States v. Walmart Inc.
United States District Court for the District of Delaware
Opposing the government’s “collective knowledge” theory of scienter

Viking River Cruises v. Moriana
U.S. Supreme Court
Urging more FAA guidance for California courts

Walmart v. U.S. Drug Enforcement Administration
U.S. District Court for the Eastern District of Texas
Safeguarding the rule of law in federal regulatory actions

In re Amendment to Fla. R. Civ. P. 1.280
Florida Supreme Court
Urging adoption of the “apex doctrine”

In re Antitrust Standards for Pharmaceutical Mergers
Federal Trade Commission
Urging a fairly applied standard for scrutinizing mergers

In re Draft FTC Strategic Plan for FY2022-2026
Federal Trade Commission
Opposing extra-statutory agency overreach

In re FDA Amendments to “Intended Uses” Regulations
Food and Drug Administration
Opposing government restrictions on truthful speech

In re Fla. R. Civ. P. 1.510
Florida Supreme Court
Urging states to adopt the federal summary-judgment standard

In re Independent Contractor Status Under the FLSA
Department of Labor
Preserving independent-contractor classification

In re Letter Requesting Publication
California Court of Appeal
Urging publication of key products-liability precedent

In re Mass. R. Civ. P. 30 & 30A
Massachusetts Supreme Judicial Court
Urging sensible discovery limits

In re Proposed Civil Rule 7.1.1
U.S. District Court for the District of New Jersey
Requiring disclosure of third-party litigation

In re Rescission of 2015 FTC Statement on Unfair Methods of Competition
Federal Trade Commission
Urging agencies to adhere to their statutory authority when regulating

In re Rescission of Joint-Employer Rule
Department of Labor
Seeking much-needed guidance on joint-employer status

In re Revisions to Fed. R. Civ. P. 702
Administrative Office of the United States Courts
Urging meaningful judicial gatekeeping for expert evidence

Publishing

WLF established its Legal Studies Division 35 years ago to develop and disseminate persuasive, highly relevant, and timely publications. Our papers shape legal-policy debates where a free-enterprise perspective may not otherwise be considered. We deliver free-market advocacy to judges and other government officials before they make decisions affecting individual and economic liberties.

Enterprising Legal Advocacy

After our first decade of advocating exclusively in courts and administrative agencies, we recognized that WLF must also engage its adversaries in another forum: the marketplace of ideas. Activists and plaintiffs' lawyers flooded that battleground with a persistent stream of papers, op-eds, and conferences aimed at decision makers and opinion leaders.

WLF launched a new type of "think tank," the Legal Studies Division, to counter the pernicious influence of those anti-business voices.

Unlike traditional think tanks that employ a stable of in-house scholars to research and write, WLF's Legal Studies Division solicits outside experts to author our publications on a pro bono basis. This allows us to leverage relevant expertise and focus our resources on putting these intellectual tools into the right hands.

WLF has enlisted over 2,400 law-firm partners and associates; corporate executives; in-house counsel; eminent legal scholars; and federal and state judges,

regulators, and elected officials. These volunteers have helped us build what former U.S. Claims Court Chief Judge Loren Smith called "a true library for the defense of our free-enterprise system."

That library contains nearly 3,000 original papers in one of nine distinct publishing formats. This year, we added to the library **44** new papers authored by **60** different writers, **41** of whom were first-time contributors.

WLF's publications target highly selective legal policy-making audiences. We market our publications to federal and state judges and their clerks; influential journalists, bloggers, and media commentators; executive branch attorneys; legislative staff and counsel; academics; and in-house counsel. Our authors supplement WLF's targeted distribution with their own extensive marketing efforts. Many use our publications as third-party educational tools in legal-policy campaigns, handouts at conferences, references in court briefs and law review articles, and instructive materials in internal corporate-compliance programs.

Several WLF publications on the admissibility of expert evidence in civil litigation made a significant impact this year. Amendments to Federal Rule of Evidence 702 are currently pending before a committee of federal judges. A COUNSEL'S ADVISORY by GlaxoSmithKline General Counsel James Ford encouraged

his peers to submit comments supporting the amendments to the judicial conference. A WORKING PAPER by private practitioner Lee Mickus and Shell Oil Senior Legal Counsel Abigail Dodd presented a compelling case for reform, arguing that courts too frequently rely on outdated caselaw to justify admitting questionable expert testimony to the jury. Organizations supporting the Rule 702 amendment used the WORKING PAPER as a key educational tool in their campaign.

A complete list of 2021 publications categorized by area covered is available on pages 19-22.

"Lawyers for Civil Justice appreciates the timely legal studies WLF released in 2021 making the case for Rule 702 amendment. We have widely shared those papers, and believe that they have had a positive and substantial impact regarding the need to update the Rule."

H. Mills Gallivan
President, Lawyers for Civil Justice
Senior Partner, Gallivan, White & Boyd P.A.

Lawyers4CivilJustice @LCJReform · Sep 27
#Rule702 requires courts to exercise gatekeeping responsibility to ensure that proffered opinion testimony meets admissibility standards—including sufficient factual basis & reliable application of principles & methods—before allowing the jury to hear it: bit.ly/3iluTyf

“

“Rejecting challenges to an expert’s basis and application as bearing only on the weight of the evidence effectively casts the jury in the role of gatekeeper.”

LEE MICKUS

“GATEKEEPING REORIENTATION”
Washington Legal Foundation.

”



WLF's nine publishing formats target specific policy-making audiences. Each format presents single-issue advocacy on a meaningful legal topic.

Legal Studies Publications

Administrative Law and Procedure

Executive Orders: Deconstruction, Revocation, and the Need for Judicial Moats
Christopher H. Marraro, BakerHostetler, and Gary C. Marfin, Rice University (ret.)

Circulating Opinion: *Judge Rotenberg Educational Center v. FDA*
Digesting a majority opinion by The Honorable David B. Sentelle, U.S. Court of Appeals for the D.C. Circuit

Circulating Opinion: *Aposhian v. Wilkinson*
Digesting a dissenting opinion by The Honorable Timothy M. Tymkovich, Chief Judge of the U.S. Court of Appeals for the Tenth Circuit

Fifth Circuit Smackdown in *M.D. Anderson: Administrative State vs. Administrative Procedure Act*
Christopher Danley, Baker Botts LLP

Antitrust and Consumer Protection

U.S. Merger Review Process Changing Before Our Eyes
Steven Cernak, Bona Law PC

“Don’t Know Where We’re Going, But We’re on Our Way”: FTC’s Antitrust Remodeling Creates Chilling Uncertainty for Deal Making
Edward B. Schwartz and Gregory Vose, Reed Smith LLP

California Law Will Restrict Consumer-Product Recyclability Claims
Jean-Cyril (JC) Walker and Alexa Pecht, Keller and Heckman LLP

The FTC’s Rescission of its 2015 Policy Statement on Section 5: If Not Consumer Welfare and the Rule of Reason, What?
William Kolasky, Hughes Hubbard & Reed

FTC Breaks New Ground on Retention of Intellectual Property and Data in Everalbum App Settlement
Jason D. Haislmaier and Paul B. Sudentas, Bryan Cave Leighton Paisner LLP

Ninth Circuit Protects Federal Regulatory Regime that Promotes the Dissemination of Nutrition Information

Katie Bond, Lathrop GPM LLP, and Megan Olsen, Council for Responsible Nutrition (CRN)

Arbitration Rights

Circulating Opinion: *Chamber of Commerce, et al. v. Bonta*

Digesting a dissenting opinion by The Honorable Sandra S. Ikuta, U.S. Court of Appeals for the Ninth Circuit

Federal Court Finds Arbitration Act's Transportation-Worker Exemption Inapplicable to Local Delivery Driver

Brad Davis, Chambliss, Bahner & Stophel, PC

Business Civil Liberties and Criminal Liability

Consent Decrees' Hidden Costs to Businesses and Consumers

Thad H. Westbrook, C. Mitchell Brown, and Thomas Hydrick, Nelson Mullins Riley & Scarborough LLP

The Anti-Money Laundering Act of 2020: Broader Federal Authority and New Compliance Challenges

Stanley L. Garnett, Amanda K. Housea, and David A. Willner, Brownstein Hyatt Farber Schreck

The Due Process Protections Act: Congress Directs Judges to More Actively Prevent and Remedy Prosecutorial *Brady* Violations

Avi Weitzman and David Salant, Gibson, Dunn & Crutcher LLP

Civil-Justice Reform

Preserving Fair-Trial Rights in the Time of COVID and Beyond

Wendy Lumish, Amanda Heitz, and Daniel A. Rock, Bowman and Brooke LLP

Florida Supreme Court Amends Summary Judgment Rule to Conform with Federal Standard and Invites Public Comment

Howard S. Goldfarb, Homer Bonner Jacobs Ortiz, PA

Class-Action Litigation

Circulating Opinion: *In re: Zetia (Ezetimibe) Antitrust Litigation*

Digesting a concurring opinion by The Honorable Paul V. Niemeyer, U.S. Court of Appeals for the Fourth Circuit

Commercial Speech

Judge as Doctor and Legislator: A Case Study in the Consequences of Broader Public Nuisance Liability

Anthony T. Caso, Chapman University Fowler School of Law

Communications and Information Technology

Social Media and Common Carriage: Lessons from the Litigation Over Florida's SB 7072

Corbin K. Barthold, TechFreedom

The Fraught Path to a Federal Privacy Law Businesses Can Live With

Corbin K. Barthold, TechFreedom

Wolf in Sheep's Clothing—The "Data Accountability and Transparency Act"

Kirk Herath, CIPP/US, CIPP/G

Employment Law

The Ninth Circuit Properly Imposes Limits on Representative PAGA Claims in Federal Courts

Felix Shafir, John Querio, and Selene Houlis, Horvitz & Levy LLP

Environmental Regulation and Enforcement

EPA Accepting Comments on Unprecedented Use of Right-to-Know Law to Advance Environmental Justice Initiative

Peter Gray and Henry W. Leung, Crowell & Moring LLP

Court's Vacatur of Navigable Waters Rule Introduces New Level of Gamesmanship into Administrative Law

Jim Wedeking, Sidley Austin LLP

Environmental Justice: Origins, Background, and Site Selection Considerations

John B. King, Breazeale, Sachse & Wilson LLP

California Proposes to Once Again Revise Its Proposition 65 Warnings

Trent Norris and Peg Carew Toledo, Arnold & Porter

Expert Evidence and Junk Science

Trial Court's Evidentiary Ruling in "Natural Vanilla" Class Action Reflect Need for Changes to Rule 702

Lee Mickus, Evans Fears & Schutttert LLP

General Counsel Can Impact Rule 702 Amendment by Filing Comments and Testifying

James Ford, GlaxoSmithKline

Stop Calling Them "Daubert Motions": Federal Rule of Evidence 702 and Why Words Matter

Lee Mickus, Evans Fears & Schutttert LLP, and Abigail Dodd, Shell Oil Company

Federal Preemption

***In re Zofran*: When Arguing Preemption, the Best Defense May Be a Smart Regulatory Offense**

Daniel J. Feith, Sidley Austin LLP

Fourth Circuit Clarifies "Newly Acquired Information" for Changes Being Effected Drug-Labeling Purposes

Gordon D. Todd, J. Manuel Valle, and Alaric R. Smith, Sidley Austin LLP

Food, Drug, and Medical-Device Law

D.C. Circuit Corrects FDA's Abuse of Discretion in Drug vs. Device Determination

Sara W. Koblitz, Hyman, Phelps & McNamara, PC

"I'm very pleased with the published version of our 'Stop Calling Them *Daubert* Motions' WORKING PAPER. Many thanks for WLF's continued interest in this issue and civil-justice reform in general. Your efforts go far to keeping fairness and common sense in the courts a realistic aspiration!"

Lee Mickus

Partner, Evans Fears & Schutttert LLP

General Jurisdiction and Standing to Sue

DC Court of Appeals Abandons Article III Standing for Consumer Advocacy Groups

Cary Silverman and Thomas J. Sullivan, Shook, Hardy & Bacon LLP

The U.S. Supreme Court's *Ford Motor Company* Decision: Jurisdictional Sympathy Prevails Over Logic

David R. Geiger, Foley Hoag LLP

Government Contracting and False Claims Act

Res Judicata in *Qui Tam* Litigation: Why Government Should Be Bound by Judgments in Non-Intervened Cases

Stephen A. Wood, Chuhak & Tecson, PC

Appeals Court Discredits Weight of Government's Enforcement Actions For False Claims Act's Materiality Standard

Kristin Graham Koehler, Josh Fougere, and Alex Sirio, Sidley Austin LLP

Insurance

Colorado Supreme Court Decides Collateral Source Rule Does Not Apply in Workers' Compensation Subrogation Claim Cases

Thomas Watson, Karen M. Bray, and Sarah E. Hamill, Horvitz & Levy LLP

Texas High Court Rulings on Medical-Expense Damages Reel in Plaintiffs' Windfall-Profit Tactics

Lee Mickus, Evans Fears & Schuttert LLP, and Alexander G. Mickus, University of Iowa School of Law

Intellectual and Private Property Rights

Understanding the Bayh-Dole Act and March-In Rights Through a Historical Lens

Natalie Derzko and Kassandra Maldonado, Covington & Burling LLP

Occupational Safety and Health

Private Right of Action to Enforce Federal Workplace-Safety Law Would Benefit Lawyers, Not Employees

Eric J. Conn and Mark M. Trapp, Conn Maciel Carey

Product Liability and Safety

It's Time to Stop Blindfolding Juries in Medical Device Cases

Phil Goldberg, Shook Hardy & Bacon, LLP

Unsound Expansion of Strict Liability Failure to Warn in California: *Johnson v. Monsanto Co.*

Claire C. Weglarz, Hawkins Parnell & Young, LLP

Conversations With: Federal Preemption in Pharmaceutical Product-Liability Litigation

Daniel E. Troy, Valo Health; Robert E. Johnston, Hollingsworth LLP; and Daniel J. Feith, Sidley Austin LLP

New Jersey Appellate Court Holds Trial Courts Erred in Excluding FDA 510(k) Evidence in Pelvic Mesh Cases

Chilton Davis Varner and Franklin Sacha, King & Spalding LLP



We reach the judiciary.

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In high-profile legal matters, impact litigation and crisis-management situations, the WLF legal-PR team weighs in with authority. Our seasoned in-house attorneys, along with *pro bono* support from leading law firms, make us a powerful legal advocate for free enterprise. WLF influences public policy by hosting persuasive briefings, authoring national op-ed articles, publishing highly-regarded legal studies in nine different publication formats, and filing briefs in important, precedent-setting cases.

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2009 Massachusetts Avenue, NW
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202 588 0302

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Communicating

WLF's communications activities ensure that champions of free enterprise are equipped with the pertinent scholarship they need to become effective advocates. We believe that knowledge empowers citizens nationwide to recognize threats to their individual liberties.

Washington Legal Foundation broadcasts its message and influences public debate through in-house and online programming, timely blog posts, and rapid-response media engagement.

WLF Programming

WLF Media Briefings and Webinars are one-hour live broadcasts that address complex court decisions, legal-policy developments, and regulatory and judicial trends. Our panelists—law firm leaders, appellate specialists, in-house counsel, and legal scholars—participate virtually. This allows interested parties to do the same. We publish past programs on our website as on-demand videos, and add them to our YouTube library. A full list of participants in this year's programs is available on page 26.

In July, WLF began a series of programs focused on antitrust law and competition policy. Proponents of government regulation, public-policy pundits across the ideological spectrum, and even federal regulators have begun advocating a revolutionary redesign of what constitutes unfair or anti-competitive market behavior.

In the first three events in the antitrust series, two former FTC Commissioners, the President of the Bork Foundation, and several leading practitioners offered valuable insights on the consumer-welfare standard, the likely rise of rent-seeking activity under a "New Brandeisian" antitrust approach, and the chilling effect of new federal merger policies.

WLF Legal Pulse

In its tenth year, our blog, the *WLF Legal Pulse*, remains a valuable complement to WLF's more traditional publishing efforts. The blog features regular contributions from WLF attorneys and includes posts from leading private practitioners, academics, law students, and others as guest contributors.

We published 84 substantive blog commentaries, 71 of which were authored pro bono by guest contributors.

We are honored to have, among our guest contributors, ten attorneys from major law firms, one corporate counsel, and one contributor from a leading academic institution, all who volunteer to cover specific topic areas. We gratefully acknowledge these "Featured Expert Contributors":

- **Professor Stephen M. Bainbridge**, UCLA School of Law (Corporate Governance/Securities Law)
- **Gregory A. Brower**, Wynn Resorts (White Collar Crime & Corporate Compliance)
- **Megan L. Brown**, Wiley Rein LLP (First Amendment)
- **Frank Cruz-Alvarez**, Shook, Hardy & Bacon LLP (Civil Justice/Class Actions)
- **Joe G. Hollingsworth**, Hollingsworth LLP (Litigation Strategies)
- **Robert H. Quinn**, Wilkinson Barker Knauer LLP (Communications Law)
- **Anthony W. Swisher**, Baker Botts LLP (Antitrust & Competition Policy—DOJ)
- **Evan M. Tager**, Mayer Brown LLP (Judicial Gatekeeping of Expert Evidence)
- **Jim Wedeking**, Sidley Austin LLP (Environmental Law and Policy)
- **Matt Wetzels**, Goodwin Procter LLP (Life Sciences and Medtech Regulation)
- **Stephen A. Wood**, Chuhak & Tecson, P.C. (False Claims Act)
- **Robert H. Wright**, Horvitz & Levy LLP (Mass Torts—Asbestos)

In September, WLF began a year-long series of "frequently asked questions" about California's personal-data privacy laws. Each month, author and attorney David Zetony of Greenberg Traurig LLP

Springboard Initiative @springboardccia · Oct 13
The abandonment of the consumer welfare standard "serves neither consumers nor other intended beneficiaries of a Neo-Brandeisian approach to antitrust." Watch last week's @WLF panel with @ProfWrightGMU and @corbinkbarthold.



bigmarker.com
Special Interest Over Public Interest: Why a Return to Antitrust's Rent...
Antitrust "reformers" insist that big corporations' abuse of power and the accompanying societal ills compel abandonment of the consumer...

poses and answers a disputed question on the California Consumer Privacy Act or the California Privacy Rights Act. That series will continue in 2022.

WLF also maintained its long-running blog-publishing relationship with Forbes.com. The company maintains a contributor site within its network of blogs for WLF attorneys' commentaries. The staff-authored posts are first shared with Forbes.com and its vast readership, which increases the visibility of our online advocacy in web searches and expands our reach in legal debates.

Finally, WLF's presence on **Twitter** (@WLF), **Facebook**, and **LinkedIn** continues to grow and engage new audiences. The Twitter feed is followed by a steadily growing list of thought leaders who follow WLF's latest briefs, publications, regulatory filings, blog posts, and media programs.

Public Relations and Media Outreach

WLF and its attorneys shape the coverage of court decisions, lawsuits, regulations, and other specific legal developments, as well as broader, long-term debates by providing timely comments directly to print and broadcast media. WLF further advances the public's understanding and opinion of high-profile cases and legal policy matters by submitting our views via popular articles or web/radio programs.

Speakers

WLF is grateful for the pro bono participation of the following attorneys, academics, and other legal professionals in our **Media Briefing** and **Webinar programs** in 2021.

- Jurgita Ashley**, Thompson Hine LLP
- Corbin K. Barthold**, TechFreedom
- Patrick R. Bock**, Cleary Gottlieb Steen & Hamilton LLP
- Anastasia P. Boden**, Pacific Legal Foundation
- Marin Boney**, Kirkland & Ellis LLP
- Mark Davies**, Orrick, Herrington & Sutcliffe LLP
- Shay Dvoretzky**, Skadden, Arps, Slate, Meagher & Flom LLP
- Ilana H. Eisenstein**, DLA Piper LLP
- John P. Elwood**, Arnold & Porter
- J. Mark Gidley**, White & Case LLP
- Sarah M. Harris**, Williams & Connolly LLP
- Amanda Heitz**, Bowman and Brooke LLP
- Sherman Joyce**, American Tort Reform Association
- Kristin Graham Koehler**, Sidley Austin LLP
- Doug Lampe**, Ford Motor Company
- Wendy Lumish**, Bowman and Brooke LLP
- Roman Martinez**, Latham & Watkins LLP
- Daniel P. Mehan**, Missouri Chamber of Commerce and Industry
- Lee Mickus**, Evans Fears & Schuttart LLP
- Erin E. Murphy**, Kirkland & Ellis LLP
- Archis Parasharami**, Mayer Brown LLP
- Daniel A. Rock**, Bowman and Brooke LLP

- Lyle Roberts**, Shearman & Sterling
- Jay B. Stephens**, Kirkland & Ellis LLP
- Evan M. Tager**, Mayer Brown LLP
- Thomas N. Vanderford, Jr.**, Hyundai Motor America
- David Wilson**, Thompson Hine LLP
- Stephen A. Wood**, Partner, Chuhak & Tecson, PC
- Professor Joshua D. Wright**, George Mason University Antonin Scalia School of Law

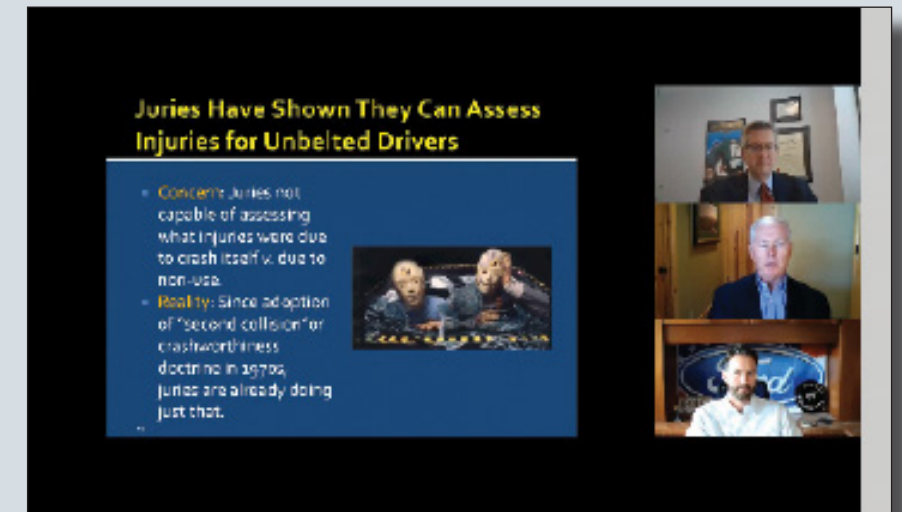
"I very much enjoyed participating in today's webinar on merger-review policy. I do a lot of these, and this was one of the most prepared panels I've ever been a part of. Great questions from WLF's moderator!"

*J. Mark Gidley
Chair, Global Competition Practice
White & Case LLP*

Informing the Media

Litigation Rule Relic: The Case for Ending Evidentiary Bans on Motorists' Failure to Buckle Up

Targeted and broad-based, WLF hosts Media Briefings on current legal issues to educate key decision-makers and opinion leaders. As an essential element of our outreach strategy, these briefings feature leading legal authorities addressing a wide variety of timely topics.



FCA State of Play: False Claims Regulation and Litigation in a New Era of Enforcement

Preserving Fair-Trial Rights in the Time of COVID and Beyond



Framing the Issues

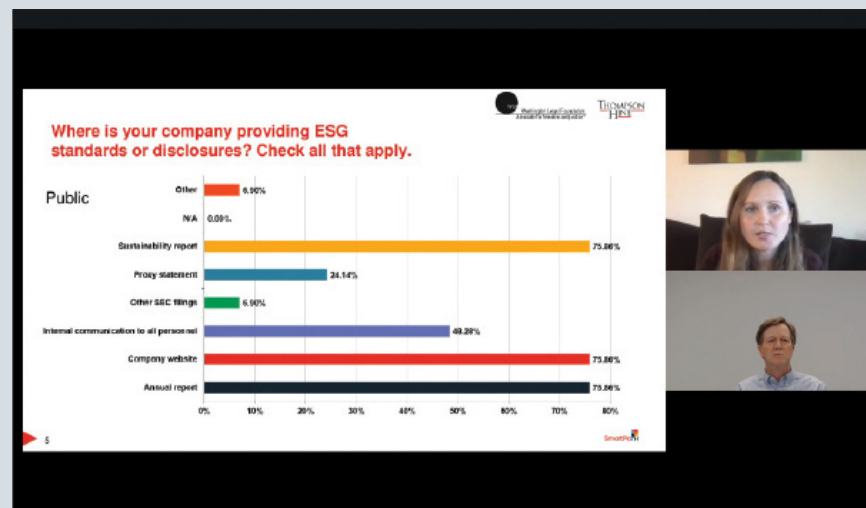
WLF's educational message reaches far beyond Washington, thanks to our webcasting capabilities. Decisionmakers and thought leaders around America and the world can tune in to our live briefings and seminars or visit WLF's website, where each program is conveniently archived.

Preemption in Drug Product Liability: The Latest on "Changes Being Effected" and the Impact of *Albrecht*



The Post-AMG Capital Path to Restitution: What Role for State AGs, Congress, and Alternative FTC Approaches?

ESG Internal Communication and External Disclosure: Tackle Them Before They Tackle You



Resources and Support

Washington Legal Foundation has an annual budget of \$3 million.

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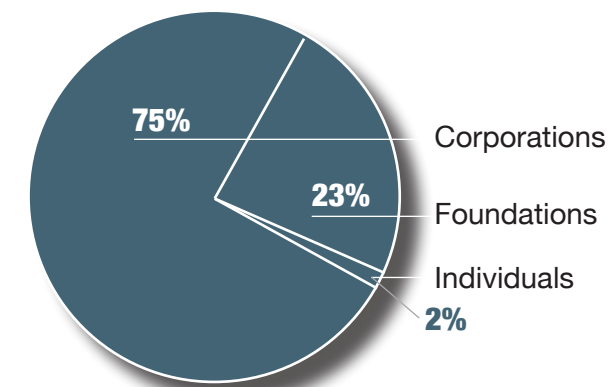
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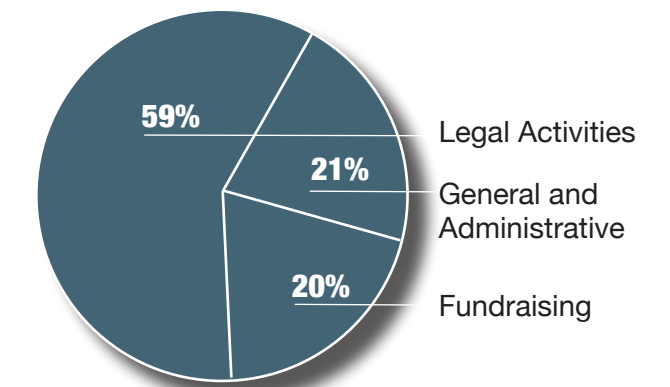
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2021 Support



2021 Expenses



*“The execution of the laws is more
important than the making of them.”*

Thomas Jefferson



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