LITIGATION REPORT

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Recent Decisions

In a major victory for NELF and the business community, the Massachusetts Supreme Judicial Court agrees with NELF that, when a company has failed to pay an employee's wages, the Massachusetts Wage Act does not impose personal liability on a company's board members who are acting only in their capacity as board members, or on its investors who are engaged in ordinary investment activities.

Segal v. H. Fisk Johnson, et al. (Massachusetts Supreme Judicial Court)

At issue in this case was whether the directors and outside investors of a Massachusetts employer could be held personally liable for mandatory treble damages under the Massachusetts Wage

Act, G. L. c. 149, § 148, for the company's nonpayment of an employee's wages. This question arose because the Wage Act carves out a narrow exception to the bedrock principle of corporate *separateness* by imposing personal liability for a violation of the Wage Act on "[t]he president and treasurer of a corporation and any officers or *agents having the management of such corporation* . . . ." G. L. c. 149, § 148 (emphasis added). In its December 28, 2017 decision, the Court agreed with NELF that directors carrying out their management oversight and policymaking duties, and investors exercising the ordinary management of their investments, are *not* "agents having the management" of a corporation within the meaning of the Wage Act. They therefore may not be help personally liable for a violation of the Wage Act.

The plaintiff in this case, Dr. Andrew Segal, was the president, CEO, and, as the SJC emphasized repeatedly in its opinion, the sole officer "having the management of" a failed biotech start-up company called Genitrix, LLC. The SJC also emphasized that Segal himself admitted that he had decided to forgo his salary, for the benefit of another employee and the company's precarious financial state. Nonetheless, Segal prevailed in a jury trial in his claim to hold the defendants, H. Fisk Johnson, III and Stephen Rose, personally liable for Genitrix's nonpayment of his wages, as "agents having the management of" the company under the Wage Act. Neither Johnson nor Rose was ever the president, treasurer or officer of Genitrix. And neither was ever appointed an agent of Genitrix with regard to the company's management. Johnson was a one-time board member of Genitrix who had invested in Genitrix through his venture capital firm, Fisk Ventures LLC. Rose was a board member of Genitrix and managed Fisk Ventures for Johnson.

In its decision, the Court reversed the lower court's verdict for the plaintiff. Consistent with NELF's analysis, the SJC concluded that neither directors nor investors are ordinarily *agents* of the company, let alone agents "having the management of" the company, as required by the Wage Act. With regard to directors, the Court agreed with NELF that directors are, by definition, not agents of the company, because they are not under anyone's control and they do not act individually, but only as a collective body that supervises the company's activities. (In its brief, NELF surveyed several other related corporate statutes to show that the Legislature has consistently recognized the common law distinction between directors and agents, and to show that the Wage Act's omission of directors from the personal liability section was therefore deliberate.) The Court explained that a director can only become an agent of the company when, through mutual consent, the board has expressly or impliedly appointed him or her to that role. The Court concluded that the facts of this case fall far short of this high standard. The Court also emphasized that directors are *supposed* to exercise management oversight of the company, and that this high-level stewardship of the company is far removed from the day-to-day "management of the corporation" contemplated by the Wage Act.

As for outside investors, the Court adopted in some detail NELF's approach that investors and their managers should be allowed to take an active role in protecting the venture capital firm's investments without risking the loss of their *separate* legal identities and becoming "agents" of the employer under the Wage Act. As the Court aptly put it, "[m]uch like board members, investors invariably exercise some control over the businesses they invest in," especially when the business is failing and needs the injection of additional outside capital. As NELF had argued, the Court agreed that investors are permitted to specify the purpose of their capital contributions, to monitor the employer's performance, and to supervise its financial and capital budget decisions. As with directors, the Court explained that an outside investor may only become an agent if the board expressly or impliedly confers such authority upon the investor. Agreeing again with NELF, the Court emphasized that "the exercise of ordinary financial control over an investment does not give an investor the management of the company in which he or she invests."

Pending Cases

Arguing that the National Labor Relations Act does not override the Federal Arbitration Act's mandate to enforce class and collective action waivers in employment arbitration agreements.

Epic Systems v. Lewis; Ernst & Young LLP v. Morris; National Labor Relations Board v. Murphy Oil USA, INC. (United States Supreme Court on the merits)

On October 2, 2017, the Supreme Court heard oral argument in these three consolidated cases, in which NELF filed an amicus brief in support of the employers, both at the certiorari stage and on the merits. NELF argued that the Supreme Court should decide that the NLRA does not displace the FAA's mandate to enforce class action waivers in employment arbitration agreements. The FAA is the necessary starting point here, and the FAA requires the enforcement of a class action waiver that is contained in a valid arbitration agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."). The FAA's mandate to enforce class action waivers applies equally in "claims that allege a violation of a federal statute, unless the FAA's mandate has been ''overridden by a *contrary congressional command*." *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (emphasis added) (citation and internal quotation marks omitted). In this case, the burden rests on the employees and the NLRB, as the parties opposing the class action waiver, to show that the NLRA displaces the FAA's mandate to enforce that contract provision. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987). And to meet their burden, the parties must show that "such an intent [if any] will be deducible from [the NLRA's] text or legislative history, or from an inherent conflict between arbitration and the [NLRA's] underlying purposes." *McMahon*, 482 U.S. at 227. And even if this issue of statutory interpretation were a close one, any doubts should be resolved in favor of enforcing the class action waiver under the FAA. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring) ("[W]e resolve [any] doubts in favor of arbitration.").

The Seventh and Ninth Circuits in this consolidated case held that § 7 of the NLRA, enacted in 1935 at the height of the Great Depression, contains a "contrary congressional command" that displaces the FAA's mandate to enforce class action waivers in employment arbitration agreements. That section protects an employee's right to "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added).

NELF argued that neither the employees nor the NLRB can show that the NLRA displaces the FAA's mandate to enforce class action waivers in arbitration agreements. The residual phrase "other concerted activities," in § 7 of the NLRA, does not mean that employees have the right to join together and *sue* their employer. Quite to the contrary, this language simply means that employees have the right to join together *in the workplace* to discuss working conditions among themselves and with their employer, without having to form a union. Interpreting this catch-all phrase "other concerted activities" in isolation, as the lower courts have done, would contravene the basic canon of statutory construction that the specific governs the general. The enumerated examples of concerted activities in § 7 must limit the meaning of the residual phrase "other concerted activities" to similar conduct. And all of the enumerated examples address employees' right to associate in the workplace in order to form a union and *negotiate* a collective bargaining agreement with their employer.

The lower courts' interpretation of "other concerted activities" would also contravene the NLRA's statement of purpose, which is to avoid "industrial strife" (such as strikes and lock-outs) by promoting "the *friendly adjustment* of industrial disputes," chiefly by protecting employees' "full freedom of association" in the workplace, so that they may achieve an "equality of *bargaining* power" with their employer "for the purpose of *negotiating* the terms and conditions of their employment . . . ." 29 U.S.C. § 151 ("Findings and declaration of policy") (emphasis added). Clearly, the NLRA's stated purpose is to protect employees' freedom of association in the workplace, *not* in a courtroom or before an arbitrator, so that they may negotiate their differences, not litigate over them. Group legal action would be antithetical to this broad aspirational goal of achieving industrial peace through negotiation and compromise.

NELF also argued that there are other clear indications in the NLRA that Congress did not intend to endow employees with a nonwaivable right of group legal action against their employer. Most conspicuously, Congress chose the phrase "concerted *activities*," as opposed to "concerted *legal action*" or even just "concerted action"--phrases that could entail the right to sue. When Congress wants to protect or proscribe certain conduct, it uses the word "activity," as it has done here. But when Congress wants to create a right to sue, it generally uses the word "action," whether by itself or in such phrases as "civil action" or "cause of action." (And, in some instances, Congress has used both words--"activity" and "action"--in the same statutory section, precisely to distinguish between regulated conduct (the activity) and a right to sue over that regulated conduct (the action).) This point is reinforced by the fact that the NLRA does not provide employees with a private right of action against their employer. Instead, Congress saw fit to delegate exclusive enforcement powers to the NLRB to prosecute claims of unfair labor practices. *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . ."). It is unlikely, then, that Congress would have intended the term "other concerted activities" to include group legal action when Congress did not even allow employees to sue on their own behalf. Moreover, the NLRA was enacted in 1935, decades before the invention of the modern-day, Rule 23 class action, in 1966. Thus, it is unlikely that Congress would have considered group legal action as a form of "concerted activity" in 1935, since there was no such procedural mechanism as we now understand it.

The NLRA's legislative history also works against the employees' and NLRB's position. "Concerted activity" was a loaded word with a specific historical meaning when the NLRA was enacted. In the years preceding the NLRA's passage, workers were prosecuted under state criminal conspiracy laws, and even under the Sherman Antitrust Act, whenever they acted "in concert" in the workplace, whether to unionize or engage in any other kind of collective conduct. And so the term "concerted activities," which appeared in two other Depression-era federal labor statutes immediately preceding the NRLA, was intended to provide affirmative legal protection to collective workplace conduct that had been sanctioned in earlier years.

Finally, NELF argued that the Seventh and Ninth Circuits' reliance on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), is entirely misplaced. *Eastex* did not involve the FAA, did not involve a dispute over the NLRA's "other concerted activities" language, and it did not involve any judicial action taken by employees. Instead, that case decided the unrelated issue whether the *purpose* or object of certain concerted workplace activity satisfied the NLRA's "other mutual aid or protection" requirement. In particular, employees wanted to distribute a union newsletter in the workplace, during nonworking hours, urging employees to oppose recent legislative and executive action on wage and other work-related matters. The Court held that the political purpose of this concerted workplace activity did satisfy the "other mutual aid or protection" requirement.

Does the Dodd-Frank Act's whistleblower anti-retaliation provision apply to employees who have not reported a violation of the securities laws to the Securities Exchange Commission, when the Act defines a "whistleblower" as an individual who "provide[s] information relating to a violation of the securities laws to the Commission?"

Digital Realty Trust v. Somers (United States Supreme Court).

NELF, joined by Associated Industries of Massachusetts, filed an amicus brief in the certiorari and merits stages of this case, on behalf of the employer, Digital Realty Trust. The case was argued on November 28, 2017. At issue is the meaning of a subsection of Dodd-Frank's "Securities whistleblower incentives and protection" section, 15 U.S.C. § 78u-6, which protects "a whistleblower [from retaliation in the workplace] . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act [SOX] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6). SOX, however, affords protection to the employee who only reports a potential securities law violation to his employer. And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to his employer.

This case matters to NELF and its supporters because an employee who sues for whistleblower retaliation under Dodd-Frank is entitled to very generous remedies--a *six-to-ten year* limitations period, *double* back pay damages, and a direct right of action in federal court, without having to exhaust any administrative remedies. 15 U.S.C. § 78u-6(h)(1)(B)-(C). Dodd-Frank also awards the whistleblower a substantial monetary bounty if her reporting to the SEC results in a successful administrative or judicial enforcement action by that agency. § 78u-6(b). [1]

The lower court erred because it abandoned Dodd-Frank's clear provision that a "whistleblower" is an employee who reports to the SEC. This definition must apply whenever the word "whistleblower" appears in the disputed subsection of Dodd-Frank. And applying this definition to the disputed language yields only one meaning. The employee who reports information to the SEC is protected when he *also* reports that information to his employer and then suffers retaliation because of his internal reporting.

This subsection of Dodd-Frank therefore protects an employee who has reported to both the SEC and her employer, when the employer does not know that the employee has reported to the SEC. And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank. She would only be protected under SOX for her internal reporting. By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

The Ninth Circuit apparently rejected the statute's plain meaning. In that court's view, the disputed language identified a set of circumstances that was "narrow[] to the point of absurdity . . . ." Appendix to Petitioner's Petition for Certiorari 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort. Nor is it a court's role to conform an unambiguous statute such as this one to the court's own notion of what Congress may have had in mind.

But this is precisely what the Ninth Circuit did here, when it "interpreted" the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. The Ninth Circuit impermissibly substituted the word "employee" for the defined term "whistleblower." And Dodd-Frank's specific definition of a whistleblower excludes all other possible meanings of that term. Moreover, Congress chose the word "employee" in SOX's whistleblower provision but did not do so when it later enacted Dodd-Frank. It must be presumed that this choice was deliberate.

In any event, it is hardly absurd for Congress to assume that an employee may choose to report to both the SEC and her employer, and that the employer may not know that such an employee has reported to the SEC. Consistent with SOX's purposes, an employee may wish to report a potential violation to her employer, for speedy internal resolution of the matter. But, consistent with Dodd-Frank's purposes, that same employee may also wish to alert the SEC to the matter, to secure her right to pursue Dodd-Frank's special financial incentives (a potentially large bounty) and legal protection (including the right to recover double back pay). And the employer

[1] In particular, Dodd-Frank's whistleblower provision creates the SEC Investor Protection Fund, § 78u-6(g), and requires the SEC to pay employees between 10% and 30% of the penalties collected by the SEC in a "covered judicial or administrative action," which is defined as "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. § 78u-6(b).

may not know that such an employee has reported to the SEC because Dodd-Frank and the SEC regulations both preserve the confidentiality of a whistleblower's identity.

If allowed to stand, the Ninth Circuit's decision would certainly eviscerate Dodd-Frank's definition of a whistleblower. But in so doing, the lower court's approach would also contravene Congress' purpose of linking Dodd-Frank's special financial incentives with its enhanced remedial protection. In the lower court's view, an employee can sue for retaliation under Dodd-Frank even though he is not eligible for a bounty under that statute, because he has not reported to the SEC. But Dodd-Frank's incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting information to the SEC.

Arguing that an online business should be allowed to enforce its mandatory arbitration policy and class action waiver against a customer, when those contract terms are viewable by clicking on a clearly marked hyperlink to the business's "terms and conditions," and the business has clearly provided that the customer is deemed to accept those terms once she has created an account with the business.

Cullinane v. Uber Technologies, Inc. (United States Court of Appeals for the First Circuit)**.**

On October 2, the First Circuit heard oral argument in this case, which raises an important issue of online contract formation that arises from a large and growing category of online standardized consumer agreements. At issue is whether a business has provided the online customer with sufficient notice of its mandatory arbitration policy and class action waiver, and whether the customer has consented to those terms, when the arbitration provisions are viewable only by clicking on a hyperlink to the agreement's terms and conditions, and the customer is not required to check an online box indicating that she has accepted those terms. Instead, the business has clearly provided that the customer will be deemed to have accepted all of the contract terms once she has created an online account.

The defendant business in this case is Uber Technologies, Inc., the online ride-sharing service. When a customer creates an online account with Uber, Uber clearly states that "[b]y creating an Uber account, you agree to the **Terms of Service & Privacy Policy**." (Emphasis in original.) The words "Terms of Service" appear as a highlighted button with a hyperlink that, if clicked, opens a ten-page agreement containing a mandatory arbitration clause and a class action waiver, under the bold-faced heading, "**Dispute Resolution**."

The plaintiff and putative lead class representative, Rachel Cullinane, argues, so far *without* success, that she had inadequate notice of Uber's arbitration provisions because they were viewable only in a separate document, and because Uber did not require her to state affirmatively that she had accepted those terms. In essence, she argues that Uber structured the online sign-up process to discourage her from finding out about Uber's arbitration policy. Consequently, Cullinane filed a putative class action in court, rather than submit her underlying claim to individual arbitration. (In her underlying claim, she alleges that Uber imposed fictitious fees that were hidden in charges for legitimate local tolls to and from Logan Airport, in violation of Mass. G. L. c. 93A.)

NELF filed an amicus brief in support of Uber, arguing that, under well-established principles of Massachusetts contract law, a customer has indeed consented to a business's arbitration policy once the customer has indicated her consent to all of the terms contained in the agreement, in the manner of acceptance *defined by the business*. It is well settled in Massachusetts that a party who enters into a contract is bound by all of its terms, whether she has read them or not. That is, the contracting party is presumed to know all of the agreement's terms and has a *duty* to read them. This duty applies equally to contract terms that are incorporated by reference in that agreement, such as Uber's arbitration provisions that are viewable through a hyperlink in this case. It is also well settled in Massachusetts that the offeror, here Uber, controls the manner of acceptance. Accordingly, Cullinane accepted Uber's arbitration policy once she completed the online registration process, because Uber clearly stated that completion of that process would indicate her acceptance of Uber's contract terms.

In short, NELF argues that Massachusetts law treats contract formation as an *objective* process, in which the contracting party's actual state of mind is irrelevant once that party has manifested her consent to the terms of an agreement, in the manner of acceptance prescribed by the offeror. NELF points out that a decision in Cullinane's favor would contravene these bedrock principles of contract formation. Such a decision would allow a consumer to evade her contractual responsibility to read and understand the agreement's terms before she accepts them. She would then be free to attempt to undo the countless transactions that occur over the internet every day, by pleading ignorance of contract terms that she does not like. This, in turn, would disrupt and undermine free enterprise on the internet, to the financial detriment of the business community.

Arguing that a proposed ballot question approving an amendment to the Massachusetts Constitution that would impose an additional 4% tax on income above $1 million deals with "unrelated" subjects, in clear contravention of the constitutional prohibition on such initiatives.

Anderson v. Maura Healey (Massachusetts Supreme Judicial Court)

This case involves a highly controversial attempt to place on the November 2018 Massachusetts ballot a question in which voters would be asked to approve an amendment to the state constitution imposing an additional 4% tax on income above $1 million. This would be an historic departure from Massachusetts' longstanding flat-tax principles enshrined in its constitution. The amendment also states that the revenue raised by the tax "shall" be spent on public education and transportation infrastructure. After the Attorney General approved the question for inclusion in the ballot, this litigation ensued challenging her certification. Hence, the merits of the proposal are not before the Court. The sole question is whether or not the Attorney General was correct is certifying that the question met the constitutional requirements for ballot initiatives in Massachusetts.

The complaint advances three constitutional grounds for the Court to hold that the Attorney General was incorrect. NELF filed a brief devoted to one of those grounds, which we believe should be dispositive. Specifically, NELF believes that, contrary to an important constitutional limitation on such ballot initiative questions, the "millionaire's tax" ballot question involves three "unrelated" subjects, and thus would place voters in what the Court has called the "untenable position" of being forced to cast a single vote on two or more dissimilar subjects. As NELF points out, other than similarities pitched at a high level of abstraction, there is not much meaningfully relating public education to transportation infrastructure or, put differently, pre-schools to potholes. The only similarity found in the amendment itself is that education and transportation infrastructure are to receive the revenue generated by the third, no less unrelated subject of the initiative, the 4% surtax that is a departure from the state's historical flat-tax policy. This tax is clearly the center of gravity of the proposed amendment as it alone receives any detail and elaboration in the text, and it follows on five failed previous attempts to abandon the flat-tax policy.

NELF disagrees with the Attorney General's attempt to link these three disparate subjects by describing them as forming a "self-contained scheme" based entirely on their money nexus. NELF argues that the constitutional limits on the popular initiative would become meaningless were such arbitrary, mix-and-match pairings of revenue and expenditure deemed to be constitutionally acceptable. Addressing a defense of the proposed amendment that compares it to Article 104 of the Articles of Amendment, NELF points out that Article 104 requires certain transportation-related revenues to be spent on certain transportation-related budget items. For the comparison to work, NELF argues, the revenue source here would have to be as closely related to both public education and transportation infrastructure as Article 104's transportation-related revenues are related to its transportation-related recipients, and plainly there exists no such connection here. An even more telling contrast is that, while the Legislature retains discretion to decide how Article 104 revenues are to be spent within the area of transportation, it has no discretion to redirect the revenues to uses lying entirely outside the realm of transportation. Here, by contrast, the Attorney General argues that, despite the proposed amendment's command that the new tax revenue "shall" be spent on education and infrastructure, the Legislature would in fact retain "plenary spending authority" over the revenue. It follows that the voters of 2018 are to be asked to vote on a tax whose revenues could be expended as follows: (a) on public education; or (b) on transportation infrastructure; or (c) on both; or (d) on neither; or (e) on anything. For this reason the amendment does not represent a unified, coherent statement of public policy, for the voters could never be sure exactly what a yes vote would mean, other than a tax increase.

Indeed, in their public statements, distinguished supporters of the amendment view it principally as a repackaged, more targeted version of the five preceding graduated income tax amendments that have failed at the ballot box over the past 50 or so years. Public education and transportation infrastructure were chosen to be included in this amendment because diehard proponents of a graduated income tax hope that the prospect of funding of these two unrelated areas of the budget will prove to be more popular on the 2018 ballot than the graduated income tax has proven to be in the past when it appeared solo in a ballot question, and thus that these two causes will carry a graduated income tax along with them to victory. In fact, however, this blatant political "logrolling" has only succeeded in violating the constitutional requirements of a popular initiative.

For these reasons, NELF urges the SJC to hold that the Attorney General was in error when she certified the "millionaires tax" ballot initiative.

Attempting to defend the principal that there can be no claim under the Massachusetts Consumer Protection Act, M.G.L. c. 93A where there is no injury.

Dorrian v. LVHV Funding, LLC (Massachusetts Supreme Judicial Court)

In this case, NELF received approval from the Legal Review Committee to file a brief arguing that the plaintiff debtor class members had not suffered any cognizable injury under the Massachusetts Consumer Protection Act, M. G. L. c. 93A, merely because a "passive debt buyer" that purchases consumer debts and hires a duly licensed debt collection agency to conduct its business, has not itself obtained a debt collection license. NELF completed its amicus brief in a timely manner and, as is our custom, submitted it for review to counsel for the party we would have been supporting. Unfortunately, counsel for the defendant, the passive debt buyer, expressed its client's discomfort with NELF's approach--an approach not pursued by the defendant. Despite NELF's confidence in its persuasive brief, NELF honored the defendant's request not to file the brief.

Arguing that, when a minority member of a Massachusetts limited liability company opposes the company's merger, the minority member is limited by statute to "the exclusive remedy of . . . resign[ing] as a member and obtaining a judicial appraisal of his ownership interest.

Allison v. Eriksson (Massachusetts Supreme Judicial Court)

This case is before the Massachusetts Supreme Judicial Court on direct appellate review and will be argued on February 5, 2018. The Court requested amicus briefing on the issue of what remedies are available to a minority member of a Massachusetts limited liability company who alleges that the controlling members have structured a "freezeout" merger. NELF argues in its amicus brief that the Massachusetts Limited Liability Company statute disposes of this issue because it restricts such a plaintiff to the "*exclusive remedy* of . . . resign[ing] as a member," G. L. c. 156C, § 60(b), and obtaining a judicial appraisal and buyout of his ownership interest in the company. Section 60(b) of the LLC statute provides, in relevant part:

> The *exclusive remedy* of a member of a domestic limited liability company, which has voted to consolidate or to merge with another entity . . . , who objects to such consolidation or merger, shall be the right to resign as a member and to receive any distribution with respect to his limited liability company interest . . . ."

G. L. 156C, § 60(b) (emphasis added).

Notwithstanding this unambiguous statutory language, the Superior Court (Kaplan, J.) in this case held that a minority member may also sue the controlling members of the company for breach of fiduciary duty, under *Donahue v. Rodd Electrotype Co. of New England*, 367 Mass. 578 (1975), and its progeny. Accordingly, the lower court conducted a bench trial and found that Dr. Elof Eriksson, the defendant and controlling member of Applied Tissue Technologies, LLC (ATT), a failing Massachusetts biotech start-up, had breached his duties to the minority member, W. Robert Allison, a graduate of Harvard College and Stanford University Law School, when

Dr. Eriksson voted to approve a merger of ATT with another Delaware limited liability company ("llc") to salvage the company's business. The lower court found for Allison and ordered Eriksson to rewrite the terms of the merger agreement, to comport with the court's own conception of fairness.

Supporting reversal of the lower courts verdict, NELF argues, in support of Dr. Eriksson, that a judicial appraisal is the exclusive remedy for a minority member of an LLC who opposes a merger. The plain language of the LLC statute mandates this result and therefore precludes the LLC member from pursuing a *Donahue* claim against the controlling member and seeking broad equitable remedies. NELF also argues that, contrary to the Superior Court's view in this case, there is *no* SJC precedent that permits a trial court to set aside this exclusive statutory remedy under the LLC statute and review the overall fairness of an LLC merger under *Donahue*. In this regard, NELF carefully distinguishes two prominent SJC cases--*Coggins v. New England Patriots Football Club, Inc*., 397 Mass. 525 (1986), and *Pointer v. Castellani*, 455 Mass. 537 (2009)--upon which the lower court (erroneously) relied to support its decision. As NELF argues, neither of those cases is on point because neither involved a minority member's challenge to an LLC merger. For these and other reasons set forth in its amicus brief, NELF urges the Court to reverse the Superior Court's decision.

Arguing that legal precedent and public policy require that Chapter 93A consumer protection claims based on a home improvement project gone wrong are subject to the statute of repose governing tort claims arising from such subject matter.

Bridgewood v. A.J. Wood Construction, Inc. (Massachusetts Supreme Judicial Court)

The principal Massachusetts consumer protection law, G.L. c. 93A, has a four year statute of limitation, but no statute of repose. However, any tort action based on allegations of neglect in the design and construction of an improvement to real property is subject to a six-year period of repose, which commences with the opening of the improvement to use or the substantial completion of the improvement, whichever is the earlier. This case concerns the interplay between c. 93A claims that are based on precisely those kind of allegations and the statute of repose, G.L. c. 260, § 2B, that is normally applicable to them. Caught in between is G.L. c. 142A, which regulates home improvement contracting, and violations of which are per se violations of c. 93A.

The plaintiff suffered extensive property damage caused from a fire whose origin she traces back to supposedly faulty electrical work done in her ceiling eleven years before. Another four years after the fire, she brought c. 93A claims against the general contractor and the electrical subcontractor. The trial judge dismissed the action because he found that her c. 93A claims were essentially claims for breach of implied warranty and that therefore, under well-established precedent, they sounded in tort. He ruled that since the gist of the claims was tortious, they were extinguished by the six-year repose provision of § 2B, which applies only to torts. The plaintiff appealed, arguing that no such analysis should have been performed and that the judgment should be vacated. The Supreme Judicial Court called for amicus briefing on the issue, and NELF has answered the call.

NELF first defends the judge's analysis of Bridgwood's c. 93A claims for their gist. Reviewing cases dealing with a variety of claims that were analyzed by courts as to their gist in order to answer a various legal questions (duty to indemnify, timeliness, choice of law, etc.), NELF shows that c. 93A also claims have regularly been analyzed in this way. The case law shows that the fate of a c. 93A claim, whether considered in itself or in relation to other, accompanying claims on which it is based, is often determined by its "gist," "essence," substantive kinship, "substantive quality," etc. While "General Laws c. 93A is not subject to the traditional limitations of preexisting causes of action," *Canal Elec. Co. v. Westinghouse Elec. Corp*., 406 Mass. 369, 378 (1990), nonetheless "it often involves actions analogous to common-law tort and contract claim," *Stonehill College v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 591 (2004), and then its claims are to be treated accordingly. The judge, in analyzing Bridgwood's claims as he did, was therefore justified by solid precedent.

NELF then reviews the precedents that support the judge's dismissal of Bridgwood's c. 93A claims as untimely specifically under § 2B's repose provision. As the case law amply shows, the gist of her claims sound in the tort of negligence, and so the claims fall within the scope of § 2B's repose provision.

Next, NELF identifies the two errors underlying Bridgewood's position. First, she mistakenly believes that because c. 93A claims are not *limited* to traditional tort claims, no c. 93A claim can ever sound in tort. Case law says otherwise. Second, she confuses per se violation of c. 93A with per se c. 93A liability. Chapter 142 makes any violation of its legal requirements a per se violation of c. 93A, and with that as her sole springboard Bridgewood jumps to the conclusion that the defendants are liable to her and the case should not have been dismissed.

Finally, NELF reviews the pressing public policy concerns that led to the Legislature to enact the repose provision of G.L. c. 260, § 2B, in 1968, in order to afford a measure of relief to architects and other in the construction industry. Fifty years later, these concerns remains undiminished, and nothing in the text or legislative history of c. 93A indicates that its consumer protections are intended to suspend the operation of § 2B in cases where a c. 93A claim sounds in tort and deals with subject matter within the scope of § 2B.

Rejecting the Massachusetts Commissioner of Revenue's position that, under the Massachusetts Sales Tax Statutes, a purchaser of goods who believes she has been erroneously charged a sales tax may sue a vendor for breach of contract to recover the amount paid.

Worldwide TechServices v. Committioner of Revenue, et al. (Massachusetts Supreme Judicial Court)

This case, argued on November 7, 2017, arises from litigation related to the long-running dispute between Dell (the plaintiff in this case is a Dell subsidiary) and Massachusetts purchasers of Dell computers who allege allege that Dell improperly charged them a Massachusetts sales tax on service contracts that they purchased with their Dell computers. Initially, the purchasers attempted to bring a Mass. G.L. c. 93A class action in the Massachusetts courts. NELF was heavily involved in supporting Dell's eventually successful arguments before the Massachusetts Supreme Judicial Court that the dispute was subject to the service contracts' mandatory arbitration provision and class action waiver. Accordingly, the case was ordered to arbitration on an individual basis, and Dell prevailed before the arbitrator.

While the challenge to Dell's collection of sales taxes was pending in court and, then, in arbitration, Dell, as a protective measure, applied to the Massachusetts Department of Revenue ("DOR") for an abatement of the disputed sales taxes so that, if it lost on the merits, it would have funds to pay back the sales taxes it had collected. (This was done because, as required under Massachusetts law, Dell had already remitted to the Department of Revenue the disputed sales taxes that it had collected from its purchasers.) When the DOR denied the abatement request, Dell appealed that decision to the Massachusetts Appellate Tax Board ("ATB"). While Dell's appeal was pending before the ATB, one of the plaintiffs in the c. 93A action, Econo-Tennis Management Corporation, d/b/a Dedham Health and Athletic Complex ("Dedham"), successfully intervened in the ATB appeal. The ATB issued a preliminary decision finding that the sales tax had been wrongly collected by Dell.

Dell, having won in the arbitration, moved to dismiss its ATB appeal, with which motion the DOR concurred. The ATB dismissed the appeal over Dedham's objection.

The central issue before the Massachusetts court in this appeal is whether the ATB was correct in dismissing Dell's appeals, even though Dedham objected.

NELF's participation was requested because the DOR, in its brief supporting the dismissal of the cases, argued that, even if the ATB appeals were dismissed, Dedham still had a remedy. The DOR claimed that Dedham had a statutory right to sue Dell for the improper sales tax under a theory of breach of contract. Dell's attorneys asked NELF to file an amicus brief disputing the DOR's position on this issue.

In its amicus brief, NELFargued that neither the Massachusetts sales tax statutes nor the common law of agency authorizes a purchaser to sue a vendor to recover an allegedly erroneous sales tax, which the vendor has collected as an agent of the Commonwealth. Nowhere does the relevant provision of the sales tax code, G. L. c. 64H, § 3(a),[2] mention or even suggest any right of action

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[2] That section of the sales tax statute provides, in relevant part:

> [R]eimbursement for the [sales] tax hereby imposed [on the vendor under G. L. c. 64H, § 2] shall be paid by the purchaser to the vendor . . . and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

G. L. c. 64H, § 3(a).

by the purchaser against the vendor. By contrast, the plain language of § 3(a) protects the rights of the *vendor*, not the purchaser. Section 3(a) requires the purchaser to reimburse the vendor for the sales tax that the vendor must pay to the Commonwealth under § 2 of the same statute. Simply put, the sales tax statute establishes the respective obligations of the vendor and the purchaser in the payment of a sales tax to the Commonwealth. The statute creates a steady stream of revenue flowing from the purchaser through the vendor to the Commonwealth, and nothing more.

Indeed, the SJC recognized in an earlier stage of this very case that the sales tax statute places the vendor in the role of the Commonwealth's agent or trustee, for the purpose of collecting a sales tax from the purchaser and remitting it to the Commonwealth, as Dell has done here. *See Feeney v. Dell Inc*., 454 Mass. 192, 213 (2009) ("[V]endors who, on behalf of the Commonwealth, compute, collect, and file sales tax returns, and remit full sales tax for each customer transaction[,] serve as trustees for the Commonwealth's retail sales taxes . . . .") (citation and internal quotation marks omitted). Moreover, the Department of Revenue in this case expressly instructed Dell that, based on the Department's own regulation, Dell had the duty to collect the disputed sales tax.

Under these circumstances, it is black letter law that Dell, as an agent acting on behalf of the Commonwealth, the known principal, cannot be held liable for any acts performed within the scope of its authority. This foundational principle of agency law recognizes that Dell acted merely as a conduit between the purchaser and the Commonwealth, for the purpose of delivering the sales tax to the Commonwealth. Therefore, any dispute over this tax collection is between the Commonwealth (the principal) and the purchaser (the third party).

NELF also argued that adoption of the DOR's position would contravene the purposes of the tax statutes and would lead to untenable results. In particular, permitting purchasers to sue vendors every time there is a sales tax dispute would contravene the basic purpose of the sales tax statute, which is to secure a reliable stream of revenue for the Commonwealth. Recognizing such a right of action would actually encourage vendors to *under-collect* a sales tax whenever the tax law is unclear (a not infrequent occurrence), to avoid their potential exposure to civil liability. As a result, the Commonwealth could suffer a decrease in the amount of sales tax collected. And vendors would be forced to make the impossible choice of incurring either state penalties for under-collection or civil liability for over-collection. The Legislature could not have intended such absurd and draconian results.

In addition, the Commissioner's position would create the untenable result of allowing purchasers to sue vendors over a sales tax *after* the expiration of the time period for seeking an abatement of the sales tax. Specifically, an application for abatement must be made within one to three years of the disputed tax assessment, under G. L. c. 62C, § 37. Under the Commissioner's approach, however, a purchaser would have four or six years to sue the vendor over the validity of the same sales tax. *See* G. L. c. 106, § 2-725(1)(four-year statute of limitations for sale of goods); G. L. c. 260, § 2 (six-year statute of limitation for express or implied contract claim). As a result, a vendor could be exposed to liability over a sales tax long after the vendor's right to recoup the sales taxes from the Commonwealth has expired.

And finally, the Commissioner's position would allow a court to decide in the first instance whether a tax abatement is due. This would deprive both DOR and the ATB of their primary jurisdiction to decide such tax issues.

Urging the Maine Supreme Judicial Court to Adopt Reliance Damages As the Proper Measure of Compensation for Breach of An Agreement to Negotiate in Good Faith.

Eastern Maine Electric Corporative, Inc. v. First Wind Holdings LLC, et al. (Maine Supreme Judicial Court Sitting as the Law Court)

This case raises an issue of first impression in Maine, namely what should be the proper measure of damages where a court has determined that there has been a violation of a duty to negotiate in good faith. Here, the jury, after finding that the duty had been breached and over the defendants' objection, was permitted by the trial judge to award "lost profits" to the plaintiff. The appellant, Eastern Maine Electric Corporate, Inc., while not conceding that the jury finding that it had violated its duty was legally correct, also disputes that "lost profits" are a proper measure of damages.

While there is a split in the decisions on this issue throughout the country, NELF has filed an amicus brief urging the Maine Supreme Judicial Court to adopt a general rule that where, as here, a deal has never been finalized, the appropriate measure of compensation for the violation of a duty to negotiate in good faith, should strictly be reliance damages, and not lost profits. NELF relies on the reasoning of the New York court in *Goodstein Constr. Corp. v. City of New York*, which focused its legal analysis on the precise nature of the sole obligation that was breached, which was not a breach of a contract, but a breach of the duty of negotiate in good faith a contract not yet in existence. Since the contract was never executed, NELF argued that it would be anomalous to award expectancy damages for the breach of an agreement that was never finalized.

In addition, NELF pointed out several policy and logical reasons that dictate that reliance damages are the most appropriate form of compensation when there has been a failure to negotiate in good faith. Among these, NELF noted that holding "lost profits" to be the measure of compensation could have a deleterious effect on the use of term sheets and other interim agreements that are routinely used as the parties work through their negotiations; such a ruling would create an *in terrorem* regime in which such interim documents could be potential bases for "lost profits" damages, which are typically much larger than the actual costs that the parties have sunk into their contract negotiations. (In this case, the lost profits damage award was $13.6 million, which is exponentially larger than the costs actually incurred by the plaintiff in the negotiations, which were estimated to be not more than $350,000.)

Opposing Regulatory Encroachment on Coastal Property Rights.

Hall v. Department of Environmental Protection (Massachusetts Division of Administrative Law Appeals)

In 1991, the Massachusetts Department of Environmental Protection (DEP) adopted a new regulation under G. L. c. 91 that reversed longstanding common law presumptions about the ownership of shorefront property. Because the most common means of shoreline increase is accretion (slow and gradual addition of upland at the mean high tide line) and because it is so difficult to prove imperceptible, gradual growth, Massachusetts courts have adopted a rebuttable presumption that a shoreline increase is due to accretion. The presumption is important because accretion accrues to the property owner, whereas shoreline increases due to major storms or unpermitted filling do not. The 1991 DEP regulation, 310 CMR § 9.02, reversed this presumption and placed the burden on property owners to prove that all land seaward of the "historic high tide" level has resulted exclusively from "natural accretion not caused by the owner . . . ."

Following promulgation of its regulation, DEP suggested that owners of shorefront property seaward of the "historic" high tide line, as mapped by DEP, apply for amnesty licenses. NELF's client, Elena Hall, owns a parking lot on shorefront property in Provincetown that provides Ms. Hall with her sole significant source of income. Approximately one-third of the parking lot and a portion of a small rental cottage on the property are seaward of DEP's "historic" high tide line. Ms. Hall applied for an amnesty license and DEP issued a license imposing several onerous and costly conditions on Ms. Hall's right to use her property seaward of the "historic" line.

Ms. Hall filed an administrative appeal with DEP and NELF agreed to take over Ms. Hall's representation in this test case of DEP's regulation. During the administrative and any subsequent judicial proceedings in this case, NELF will challenge DEP's mapping of the "historic mean high water mark" and argue that DEP's regulation exceeds that agency's statutory authority and effects an unconstitutional taking of private property. NELF will further argue that a license condition requiring a four-foot-wide public access way across the entire width of Ms. Hall's upland property to the beach effects a taking of her property requiring just compensation. This is so because the public's limited rights in tidelands do not include a right of access across private upland property to reach the water or coastal tidelands. DEP has therefore imposed a license condition that bears no relationship to any recognized public right, let alone a public right protected under c. 91 and affected by the licensed use of Ms. Hall's property.

NELF filed a potentially dispositive memorandum of law, accompanied by a detailed and thorough expert affidavit, with multiple map overlay exhibits, arguing that DEP simply has no jurisdiction over Ms. Hall's property. In particular, NELF staff worked closely with the experts in scrutinizing carefully the historical maps pertaining to Provincetown Harbor and in determining that the application of the mean high tide line derived from the earliest reliable historical map to Ms. Hall's property leaves the disputed portion of her property free and clear of the designation "Commonwealth tidelands." NELF received a piecemeal, informal response from DEP challenging various aspects of NELF's expert's methodology.

The Administrative Law Judge then ordered the parties' experts to meet, with the attorneys present, to exchange opinions and determine whether settlement was possible. While the meeting was productive, settlement is not possible at this time. DEP's most salient challenge concerned the historic location of a lighthouse upon which Ms. Hall's expert relied in determining the location of the historic mean high water mark. This challenge led the expert to reexamine the historic location of other lighthouses which he used in his methodology. NELF has also researched and briefed potential legal challenges to DEP's regulation and license conditions under the Takings Clause and the *ultra vires* doctrine, which NELF would be prepared to reach should it not succeed on its position with respect to the historic high water mark.