LITIGATION REPORT

June 2019

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NEW ENGLAND LEGAL FOUNDATION

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Recent Decisions

In A Victory For NELF And Its Supporters, The United States Supreme Court Holds That Mere Ambiguity In An Arbitration Agreement Does Not Satisfy The Federal Arbitration Act's Requirement That Parties Must Consent To Class Arbitration.

Lamps Plus, Inc. v. Varela (United States Supreme Court)

At issue in this case was whether the Federal Arbitration Act (FAA) permits a court to order class arbitration when the parties' agreement makes no express mention of class arbitration, but the court concludes nonetheless that certain contractual language is ambiguous and *could* be interpreted to support class arbitration. Nearly a decade ago, in *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662, 684 (2010), the Supreme Court held that, because class arbitration is so inimical to the individual arbitration contemplated by the FAA, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (Emphasis in original). In that case, however, the Court did not have to explain what constitutes a "contractual basis" authorizing class arbitration because the parties had *stipulated* that there was none. (Not only was their agreement silent on the issue, but the parties in *Stolt-Nielsen* also made the unusual stipulation before the arbitral panel that this silence meant that they had not agreed to class arbitration.) Faced in this case with an arbitration agreement that was purportedly ambiguous on the issue of class arbitration, the Court had to decide whether contractual ambiguity alone could provide the necessary contractual basis authorizing class arbitration under *Stolt-Nielsen* and the FAA.

Lamps Plus and one of its employees, Frank Varela, executed the company's standard arbitration agreement, in which the *two* parties ("I" and "the company") agreed to "resolve[,] by final and binding arbitration as the exclusive remedy," "all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship . . . ." The agreement also provided Varela with express notice that, by agreeing to arbitrate all employment-related disputes, he was thereby waiving his right to sue in court and obtain a jury trial for those claims. (E.g., "I agree that arbitration shall be in lieu of any and all lawsuits *or other civil legal proceedings* relating to my employment." (emphasis added.)). The agreement further provided Varela with detailed notice of the kinds of employment-related claims that he was agreeing to arbitrate with his employer.

Notwithstanding the parties' arbitration agreement, Varela filed a class action complaint in federal court for the Central District of California, alleging that Lamps Plus, through one of its employees, had wrongfully disclosed personal identifying information of its employees, in a mistaken response to a phishing scam requesting such information. Lamps Plus moved to compel arbitration on an individual basis. The district court ordered arbitration, but on a

classwide basis. The Ninth Circuit affirmed, crediting Varela's argument that there was contractual language (namely, "lawsuits or *other civil legal proceedings*," quoted above) that could be interpreted to include class arbitration. (Needless to say, Lamps Plus argued strenuously that the agreement contemplated individual arbitration only.) The Ninth Circuit resolved this purported ambiguity by construing it against the drafter, Lamps Plus, under California contract law. Accordingly, the lower court held that the parties had consented to class arbitration.

NELF filed an amicus brief supporting Lamps Plus's position, arguing that, in fact, the parties' standard arbitration agreement provided *no* contractual basis supporting class arbitration. NELF argued that the agreement *unambiguously* provided for individual arbitration only. It was a simple contract between *two* parties to arbitrate their disputes, and nothing more. Not only was the agreement dead silent on the issue of class arbitration, but also, NELF argued, none of its boilerplate language could reasonably be interpreted to permit class arbitration. In particular, NELF argued that the language purportedly authorizing class arbitration ("lawsuits or *other civil legal proceedings*") added nothing new to the agreement. That language merely explained to the employee what it meant to agree, in the first sentence of the agreement, to submit *all* employment disputes with his employer to binding and final arbitration.

In a 5-4 decision issued on April 24, 2019, the Court agreed with NELF that the arbitration agreement at issue did not authorize class arbitration, but for different reasons. Surprisingly in NELF's view, the Court, in a majority opinion by Chief Justice Roberts, deferred to the Ninth Circuit's conclusion that the agreement was ambiguous on the issue of class arbitration, as a matter of California contract law (identifying such deference to state law as the Court's "normal practice"). In NELF's view, however, the entire question of whether an arbitration agreement supplies a contractual basis for class arbitration is a matter of *federal* law under the FAA. Even though the Court did defer to state law on that issue, the Court nonetheless went on to hold that this purported ambiguity made no difference under *federal* law, because neither contractual silence *nor* contractual ambiguity is sufficient to authorize class arbitration under the FAA. "Like silence," the Court explained, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage[s] of [individual] arbitration" contemplated by the FAA, namely, "its speed and simplicity and inexpensiveness." (Citation and internal punctuation marks omitted). In short, a court may not presume that a party has consented to the costly, burdensome and virtually unreviewable procedure of class arbitration, based on merely ambiguous contract language.

Importantly, the Court also held that the FAA preempted the lower court's attempt to resolve the purported contractual ambiguity on class arbitration by applying the general rule of state contract law that construes an ambiguity against the drafter. As the Court explained, that rule resolves a contractual ambiguity as a matter of public policy, based on considerations of relative bargaining strength. It does not address in any way what the parties actually agreed to. The FAA, however, requires the parties' consent to class arbitration. Therefore, the application of that general rule of state contract law to resolve the purported ambiguity would have impermissibly imposed class arbitration without the parties' consent. This the FAA does not permit

While the Court did hold that neither silence nor ambiguity is enough to satisfy the FAA, the Court never did state affirmatively what contractual language *is* required to warrant class arbitration under the FAA. At the very least, such language would have to be *un*ambiguous, but most likely it would have to be clear and unmistakable, given the high stakes involved in submitting to class arbitration. Notably, the Court relied for support on an analogous area of its FAA jurisprudence, in which the Court requires "clear and unmistakable" contract language to overcome the presumption that certain "gateway" issues of arbitrability (such as the validity and scope of the agreement) should be decided by a court, not an arbitrator. Just as the Court will not presume that parties who have agreed to arbitrate have also agreed to class arbitration,

> [W]e presume [in our related FAA cases] that parties [to an arbitration agreement] have not authorized arbitrators to resolve certain "gateway" questions . . . . Although parties are free to authorize arbitrators to resolve such questions [or to conduct a class proceeding], we will not conclude that they have done so based on "silence or ambiguity" in their agreement . . . . Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.

In another victory for NELF and its supporters, the Massachusetts Supreme Judicial agreed with NELF that an employee bringing a class action under the Massachusetts Wage Act must satisfy the requirements of Mass. R. Civ. P. 23, even though the Wage Act independently provides that an employee may sue "on his own behalf, or for himself and for others similarly situated."

Gammella v. P. F. Chang's Chinese Bistro, Inc. (Massachusetts Judicial Supreme Court)

This case raised the important question whether the Massachusetts Wage Act, which provides that an employee may sue "on his own behalf, or for himself and for others similarly situated," M. G. L. c. 149, § 150, permitted employees to pursue a class action without satisfying the class action requirements of Rule 23 of the Massachusetts Rules of Civil Procedure. Rule 23governs all class actions in the Massachusetts courts, unless the Legislature expressly provides otherwise. In this connection, the plaintiff here argued that the Wage Act's "similarly situated" language indicated such a legislative intent, because the Legislature added that language to the Wage Act in 1993 when it created a private remedy, even though Mass. R. Civ. P. 23 (adopted in 1973) already existed.

NELF submitted an amicus brief in support of the employer, urging the SJC to reject the plaintiff's argument and affirm—as the Court already had done by implication in at least one decision—that Rule 23's requirements must apply to a motion for class certification under the Wage Act.

In a unanimous decision issued on April 12, 2019, the SJC agreed with NELF and held that Rule 23 governs class actions brought under the Massachusetts Wage Act. As NELF had argued, the Court held that, far from announcing a different standard for class certification, the statute's "similarly situated" language merely clarified that, for the first time in the Wage Act's history, employees had the private right to pursue both individual *and* class claims under that statute.

(Indeed, as NELF also had pointed out in its brief, and as the Court had noted in prior decisions, the Wage Act was an exclusively *criminal* statute until the 1993 amendment.)

As NELF had also argued, the Court explained that, when the Legislature has intended to depart from the general court rules governing civil actions, it has done so expressly, and in some detail. Notably, when G. L. c. 93A, § 9, was amended in 1969 to provide a private remedy for both individual and class claims, the Legislature provided, in a separate paragraph, the specific class certification requirements for a consumer wishing to pursue a c. 93A claim on behalf of "numerous other persons *similarly situated.*" Those requirements, drafted before Massachusetts had adopted the rules of civil procedure, incorporated Fed. R. Civ. P. 23(a), but *not* Fed. R. Civ. P. 23(b)(3) (predominance and superiority). No such detailed and selective language occurs in the Wage Act.

Finally, the Court agreed with NELF that "it is clear from our previous application of rule 23 to class actions brought under the wage laws in *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 371-372 (2008), that rule 23 has the necessary structure and adaptability to advance the very legitimate policy rationales underlying the Legislature's decision to provide for class proceedings under the Wage Act." Indeed, the Court and NELF quoted the same language from *Salvas* praising the efficacy of Rule 23 for Wage Act claims: "One of the great strengths of the rule 23 class action device is its plasticity. Case-by-case considerations of practicality and fairness have enabled rule 23 certification decisions to adapt appropriately to a variety of contexts, even within the same litigation." *Salvas*, 452 Mass. at 371.

Ironically, after agreeing with NELF that Rule 23 applies to the Wage Act, the Court concluded that the plaintiff *had* satisfied Rule 23's requirements for class certification, contrary to the lower court's ruling. Therefore, the Court reversed the lower court's denial of class certification. Nonetheless, the decision is a victory for employers because the Court rejected the plaintiff's effort to provide an essentially "free form" class action procedure under the Wage Act.

Declining to rule on the proper standard of causation, the Massachusetts Court, while acknowledging NELF's brief on the issue, holds that the "but-for" standard of causation was satisfied in this case of alleged retaliation brought under the federal Family and Medical Leave Act and so there was no prejudice to the defendant.

DaPrato v. Massachusetts Water Resource Authority (Massachusetts Supreme Judicial Court)

This case raised an issue of first impression in Massachusetts in an important area of federal employment law. The question was whether a plaintiff who alleges that his employer fired him for his having taken medical leave under the federal Family and Medical Leave Act (FMLA) may prove his claim by showing that the leave counted as a merely negative factor against him or must he show that leave was a but-for cause of the retaliation.

Confusion about causation has arisen because the Department of Labor's implementing regulation states that "employers cannot use the taking of FMLA leave as a *negative factor* in employment actions." 29 C.F.R. § 825.220(c) (emphasis added). This means that a retaliation

claim may be proved if leave acted even to the slightest degree as a *negative* factor in motivating the employer's action. On the other hand, the U.S. Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), held that by default but-for causation must be used for federal tort-like antidiscrimination claims, whenever another standard is not indicated in the statute. Courts have generally deferred to DOL's view on the grounds that the FMLA is "ambiguous" and so courts must give *Chevron* deference to DOL's resolution of the "ambiguity."

In 2014 Richard DaPrato informed the Massachusetts Water Resource Authority, for which he worked, that he would require a series of leg surgeries and wanted leave under the FMLA. He was granted leave for the first surgery, but there followed a complicated series of events involving, according to whom you choose to believe, either honest misunderstandings or unfair treatment of DaPrato based on a prejudiced investigation of the facts. Events culminated in DaPrato's being fired "because of," as the MWRA said at the time, DaPrato's alleged dishonesty about his entitlement to pay and his fitness to work. In December of 2015, DaPrato sued under the FMLA, alleging that he was fired in retaliation for taking leave. A jury found for DaPrato, and a judgment of about $2 million entered. On appeal, the MWRA argued, in part, that the judge's instructions to the jury, which were arguably at least somewhat confusing, improperly permitted the jurors to find for DaPrato even if FMLA leave was not a but-for cause of his being fired, but merely a negative factor motivating the decision.

NELF filed a brief arguing that but-for causation must be proved. NELF noted that courts go stray by failing to evaluate *Nassar* in the same terms in which it is written. The key passages of *Nassar* analyze the causation of federal statutes that sound in tort, including workplace anti-discrimination laws, in terms of background common law principles, interpretive presumptions, default rules, and what would be sufficient to overcome them. Specifically, *Nassar* holds that Congress legislates against the background of common law tort, whose implied, default standard is but-for causation; hence, in order to be applicable, but-for causation need not be spelled in words like "because" or "because of." Rather, the *Nassar* court ruled that it is departures from the implied, default rule that must be written into statutes, i.e., the common law background principle applies, "absent an indication to the contrary in the statute itself." Understood in these terms, *Nassar* established the crucial point that *silence in a statute does not create an ambiguity when there exists a default presumption of but-for causation.* As NELF documented, the Supreme Court has long required that a departure from background common law principles must be stated in clear and unambiguous language in a statute before it will be recognized by courts. Equally, the Court has held elsewhere that a silence filled with a unexpressed default rule or background common law principle cannot support a reading that departs from "ordinary" principles and cannot be construed as creating an ambiguity.

NELF then traced the history of DOL's regulation to two sections of an FMLA statute, and demonstrated that the sections are (i.) silent on causation, or (ii.) contain a casual term ("for") that means but-for causation, or (iii.) contain language to the "contrary," i.e., language clearly rejecting but-for causation. Noting that *Nassar* teaches that the silence is filled with a presumption of but-for causation, NELF concluded that there exists no ambiguity justifying *Chevron* deference to DOL; that "for" is the identical word found in the phrase "but-for causation" and betokens the same by dictionary definition; and that the absence of clear language

"to the contrary" requires the background principles of causation to apply. Moreover, the only rationale that the DOL has ever offered for its choice of causation is that FMLA retaliation causation should track that of Title VII retaliation claims, which was assumed at that time to be negative factor causation. In its brief NELF pointed out that since that rationale was offered by DOL in 1993, the *Nassar* Court decided that Title VII retaliation claims require but-for causation.

Finally, NELF examined briefs filed by the DOL in two post-*Nassar* cases, in which it appeared as amicus in order to defend its choice of causation. NELF critiqued the DOL's reasoning for failing to understand the principles of *Nassar* and for straining to rationalize its mistaken choice *ex post facto*.

On June 5, 2019, the SJC issued its decision. It ruled that the judge's instructions, considered as a whole, sufficiently set out a but-for standard. The Court, although expressly acknowledging NELF's "extensive analysis contending for 'but-for' causation," declined to rule that but-for was the correct standard of causation, noting that the MWRA received the benefit of the higher standard and yet lost anyway and so was not prejudiced.

Disagreeing with NELF, the Massachusetts Court holds that a private public-service corporation that owns a utility cover in a public way, despite being responsible by city ordinance for maintenance and repair of that portion of the road, does not get the benefit of Mass. G. L. c. 84, under which anyone allegedly injured by a defect in a public way must provide notice within 30 days of the injury to the "person by law obligated" to repair the way.

Meyer v. Veolia Energy North America LLC (Massachusetts Supreme Judicial Court)

This case arose out of a bike ride gone bad. Meyer was injured when his bike hit a defect on the surface of Sudbury Street in Boston. Apparently, a small utility cover marked TRIGEN – BOSTON and owned by the defendant Veolia was not lying flush with the road surface. (Veolia is in the business of delivering steam heat to Boston buildings.) The legal questions in the case revolved around a plaintiff's statutory obligation to provide notice of his injury within thirty days to the "person by law obligated" with keeping in repair that part of the roadway. Meyer gave notice on day thirty-six.

Two questions were posed . First, was Meyer excused from providing the notice because it was allegedly "impossible" for him to do so? Meyer claimed that the supposedly insuperable difficulty of identifying the "person" entitled to notice fit within the statutory tolling provision for mental and physical incapacity.

Second, does a private corporation have a right to notice if it is legally "obligated" to repair the roadway? *See* G.L. c. 84, § 18 (injured party "shall, within thirty days [of the injury], give to the county, city, town or person by law obliged to keep said way in repair" notice of the injury). In answering no, Meyer engaged in a lengthy and involved review of the notice statute's origins in the Massachusetts Bay Colony, and he claimed to show that "person" in this legal context has always meant an agent of government, as the preceding terms might suggest. In order to deal with cases in which the Supreme Judicial Court has long ruled that railroad corporations count as

such persons, Meyer argues that from the late-19th century on railroads have been so intensively regulated that they are what he calls "quasi-governmental corporations."

NELF filed an amicus brief in which it first set out a number of ways in which, using readily available public sources, Meyer could have easily identified Veolia as the successor of Trigen and owner of the utility cover. Hence, there was no "impossibility" and no mental or physical incapacity justifying a tolling of the running of the thirty days.

Next, NELF rebutted Meyer's convoluted historical arguments. First, NELF reviewed 18th century dictionaries, as well as the definitional sections of the Massachusetts General Laws from 1836 to the present, in order to show that commercial corporations have long been recognized as full legal "persons." Then NELF undermined Meyer's argument about why the SJC long accorded railroads the right to notice. NELF showed that the rationale of the railroad decisions rested simply on the definitional principle under which it is "unquestionable" that corporations are civilly legal "persons"; the rationale of those decisions had nothing to do with railroad corporations uniquely or with extent of regulation.

NELF made another important correction to Meyer's argument. NELF showed that the legislature classifies railroads and companies like Veolia as "public service corporations." As the SJC has long ago recognized, these are privately owned, publicly regulated entities that distribute services broadly to the general public by making permissive use of the public streets; consequently, they are "more than affected with a 'public interest,'" in the SJC's own words. Hence, even were a "quasi-governmental" character required in order to have a right to notice, it would be found in public service corporations.

Finally, NELF discussed the historical background the notice statute. NELF demonstrated that both in colonial times and at the time of the earliest relevant statute, Stat. 1786, c. 81, the legislature was perfectly well aware that under English common law the duty to both repair and maintain public ways was not always and everywhere solely the responsibility of the local government parishes and their agents. These duties could, and did devolve, on private parties, as explained in old British legal treatises NELF cites. NELF also cited an important 1883 Massachusetts case, overlooked by the parties, in which Judge Holmes, writing for the Court, invoked the common law to explain that private persons could indeed be entitled to Chapter 84 notice.

In its May 8, 2019 decision the Court found that Veolia, as a private party, was not entitled to notice. The Court first decided from elsewhere in the statute that the right to notice was understood to be available only for a party that was obligated to both maintain and repair the way. The Court then misinterpreted the common law background as excluding private parties from having an obligation to maintain a public way, and it rationalized the railroad cases as based on the fact that railroads were uniquely delegated the governmental power of eminent domain.

Pending Cases

Arguing that. when an employer has breached the employment contract of a research professional, by withdrawing its promised support of the research laboratory that the employee had established with federal grant money, resulting in the loss of the lab, the employee is not entitled to damages for the cost of replacing the lost lab, but is instead limited to damages for her *expected use* of the lost lab.

Lynn Hlatky, ph.D. v. Steward Health Care System, LLC (Massachusetts Judicial Supreme Court)

This case is before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review, and the Court has requested amicus briefing on an important issue of Massachusetts contract law. Simply put, what is the proper measure of damages when an employer has breached the employment contract of a research professional, by withdrawing its promised support of the laboratory that she had established (with no money or property of her own) to conduct her scientific research, resulting in the loss of the lab? Is such an employee entitled to a multi-million-dollar damages award equal to the replacement value of the lost lab, as the trial court concluded here? Or is the employee limited instead to compensation for her *expected use* of the lost lab to conduct her research? This would include any demonstrable economic harm to her professional career, such as the loss of identifiable future earnings.

The plaintiff is Dr. Lynn Hlatky, a radiobiologist who established a laboratory to conduct her cancer research several years prior to her employment with the defendant, Steward Health Care System LLC. Hlatky conceded that she had no ownership interest in the lab, which she had established with federal grant money a and with institutional support from her prior employers. Hlatky brought the lab's equipment, staff, and grant money with her when she became an employee of Steward. Hlatky entered into a written employment contract with Steward, in which Steward promised to "continue to provide support and suitable office space" for the lab. However, Steward soon withdrew its support, reallocating funding to clinical trial research. As a result, the lab became mismanaged and was ultimately dissolved in a federal bankruptcy proceeding. Hlatky was no longer able to pursue her research.

Hlatky sued Steward for breach of contract and sought damages for the cost of replacing the lost lab. The jury found for Hlatky and awarded her nearly *$23,000,000*, representing the cost of reconstituting the lab and running it for six more years--the length of time that Hlatky had expected to continue her research before retiring. On remittitur, the trial court reduced the award to $10,000,000 (based on Hlatky's testimony of the cost of reestablishing the lab) and excluded the future costs of running the lab.

Steward appealed the damages award--but *not* the finding of liability--arguing that Hlatky was only entitled to damages for her personal financial losses (such as , not for the lost lab itself. Accordingly, Steward now asks the SJC to vacate the $10 million damages award and either (1) reduce the award to Hlatky's $200,000 out-of-pocket mitigation expenses or (2) remand the case to the trial court to determine whether Hlatky had submitted sufficient evidence of her future lost earnings.

NELF will argue, in support of Steward, that Hlatky is only entitled to recover for her *expected use* of the lost lab, not for the lost lab itself. It is black letter contract law that Hlatky can only recover "the value of the *bargained-for benefit* of which [she] ha[s] been deprived." *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374 (2008) (emphasis added). Hlatky bargained for Steward's support of the lab, so that she could continue with her cancer research there. That alone was her compensable expectation interest under the agreement. She did not bargain for ownership of the lab. She only bargained for her uninterrupted *access* to the lab. Accordingly, Hlatky can only recover for that lost access to the lab. To be sure, the trial court may have been correct when it stated that Hlatky "had an expectation interest in the continuation of the research program that she created." But this can only mean that, since her lab research was the mainstay of her career, Hlatky's damages could entail any demonstrable and foreseeable economic harm to her career, such as the lost growth in her earning capacity, or the loss of identifiable future earnings. Clearly, the trial court erred when it concluded that Hlatky's expectation interest in the continuation of the lab warranted damages for the cost of replacing the lab itself, as if Hlatky's creation of the lab were tantamount to outright ownership of the lab.

Arguing that, when an employee sues her employer under the Massachusetts Wage Act, she cannot also sue an affiliated corporate entity and its management, unless she can prove sufficient facts to warrant piercing the corporate veil that separates that entity and its management from her employer.

Cerulo and another v. Herbert G. Chambers, et al. (Massachusetts Judicial Supreme Court)

The Massachusetts Supreme Judicial Court (SJC) has taken this case for direct appellate review and has requested amicus briefing on an important issue of corporate (and ensuing individual) liability under the Massachusetts Wage Act, G. L. c. 149, § 148. When an employee brings a Wage Act claim against his employer--i.e., the entity that pays him for his services--under what circumstances, if any, can the employee also sue an affiliated corporate entity and its managing officers for the same alleged violation? As the Superior Court in this case aptly put it, the issue is "whether and when an officer of Company A must answer to a Wage Act claim lodged by a person who gets his paycheck from Company B, an affiliate of Company A." Stated more precisely, the question here is, *how much* direction and control can one entity and its management exercise over another entity before they become a co-employer of the other entity's employees under the Wage Act?

The plaintiffs are Cooper Cerulo and Jordan Tetrault, who were each employed as a car salesperson by a Herb Chambers auto dealership located in Massachusetts. Cerulo and Tetrault filed a putative class action complaint against the dealerships, alleging that they failed to pay their employees overtime pay and Sunday premium pay, in violation of Massachusetts wage laws. But the plaintiffs also sued Jennings Road Management Corp. (JRM), a Connecticut corporation registered to do business in Massachusetts as "The Herb Chambers Companies," and JRM's top-ranking executives. The plaintiffs argue that those parties were their co-employer under the Wage Act because they allegedly directed and controlled the Massachusetts dealerships' business operations, including the terms and conditions of the plaintiffs' employment with those dealerships. (The plaintiffs do

not specify the corporate relationship between JRM and the dealerships, other than alleging vaguely that the Massachusetts dealerships were "subcorporations" of JRM.)

JRM and its named executives filed a motion to dismiss, arguing that the dealerships were the plaintiffs' sole employer under the Wage Act. The defendants also argued that the plaintiffs' allegations of direction and control were insufficient to pierce the corporate veil that separated the defendants from those dealerships. The plaintiffs argued in opposition that they did not need to satisfy the veil-piercing test. Instead, they argued that the so-called "independent contractor" statute, G. L. c. 149, § 148B(a), should determine whether the defendants had established an employer-employee relationship with the plaintiffs. And under that statutory provision, argued the plaintiffs, the defendants had allegedly exercised sufficient direction and control to constitute their employer.

The Superior Court agreed with the defendants and dismissed them from the case. The court also concluded that the independent contractor statute was irrelevant to resolving the *inter-corporate* issue that the plaintiffs had raised. As the court observed: "[T]he issue [addressed by the independent contractor statute] is whether a person is an employee or an independent contractor . . . . Whether and when the term 'employer' should extend to corporate affiliates, however, is not addressed in [that statutory provision]."

NELF will argue, in support of the defendants, that an employee cannot sue a corporate entity and its management who are allegedly affiliated with his employer unless he can *pierce the corporate veil* that separates those third parties from his employer. The SJC has held the Wage Act should be interpreted "to avoid doing violence to bedrock principles of corporate law." *Segal v. Genitrix, LLC*, 478 Mass. 551, 563 (2017) (internal quotations omitted). One such principle is "that corporations--*notwithstanding relationships between or among them*--ordinarily are regarded as *separate and distinct entities*." *Scott v NG U.S. 1, Inc.*, 450 Mass. 760, 766 (2016) (emphasis added). Accordingly, the SJC has held that a plaintiff suing more than one entity under the Wage Act cannot "characteriz[e] the defendants as a singular employer" without first piercing the corporate veil. *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 328 (2015). But the plaintiffs' mere allegations of pervasive control in this case fall far short of the "dubious manipulation and contrivance and finagling" required by that demanding test. *Scott*, 450 Mass. at 768.

NELF will also argue that the independent contractor statute is irrelevant here because it serves the unrelated purpose of characterizing the relationship between a worker and the entity that has engaged him for his services, as opposed to characterizing the relationship between that entity and another corporate entity. "[That statute's] underlying purpose . . . is to protect workers by [presumptively] classifying them as employees, and thereby grant them the benefits and rights of employment . . . ." *Sebago*, 471 Mass. at 327 (citation and internal quotation marks omitted). No one disputes that the plaintiffs in this case are indeed employees of the dealerships and are therefore protected by the Commonwealth's wage laws. Hence the independent contractor statute's purpose has already been fulfilled, and that statute should play no role here.

The plaintiffs also argue that the independent contractor statute should apply to their claims because they are employees of the dealerships, and those dealerships are subject to the direction

and control of the defendants. But neither the statute nor corporate law would recognize an employer-employee relationship between the plaintiffs and the defendants merely because they were each associated with the dealerships in some way. *Cf. Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n*, No. SUCV201302229C, 2014 WL 7506345, at *9 (Mass. Super. Aug. 18, 2014) (Gordon, J.) ("[T]he fact that [an individual] had an arguable affiliation with each of these two [corporate] parties will not . . . supply the connective tissue for an . . . . *If statutory liabilities could pass between businesses in such circumstances, corporate law as we know it would cease to exist.*") (emphasis in original).

Urging the United States Supreme Court to overrule the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that requires property owners to exhaust state court remedies before a federal takings claim will be deemed to be ripe for federal court adjudication.

Knick v. Township of Scott (United States Supreme Court)

The issue before the Court on the merits in this case—the correctness of the so-called "Williamson County state litigation ripening requirement"—is an issue concerning which NELF and the other major public interest law firms dedicated to supporting traditional property rights have long and repeatedly sought, over many years, Supreme Court review.

What is this ripening requirement? More than a quarter of a century ago, the Court ruled in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a federal takings claim against a non-federal government defendant cannot be brought in federal court until after the property owner has sued for compensation in state court and lost. Only then, the Court reasoned, would the "State" have definitively denied the plaintiff its Fifth Amendment right to just compensation, and only then would the takings claim be ripe for resolution in a federal court. Typically, however, after the property owner dutifully later files an action in federal court, the supposedly ripe claim is dismissed because the state court's adverse final judgment is found to have preclusive effect and must be accorded full faith and credit under 28 U.S.C. § 1738. Incredibly, this morass has been the state of the law for more than twenty-five years. The Court has at long last now agreed to review this requirement.

The case arises out of a local zoning ordinance of the town of Scott, Pennsylvania. The regulation requires that any private property on which the town finds a burial site be freely open to the general public at all times. On June 5, 2018, NELF filed an amicus brief supporting the petition of a landowner who had been cited for violation of the regulation.

NELF argues that the "adequate process" for obtaining just compensation which is discussed in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984), and which is fundamental to the *Williamson County* Court's reasoning, does not support the state litigation requirement because it refers to private negotiations and arbitration, not to court proceedings. In addition, that process determined only the extent of any taking that occurred, and so cannot support a state litigation requirement which hinges on the separate takings issue of denial of just compensation.

For the same two reasons, *Monsanto* does not support the next step in *Williamson County* reasoning, either, i.e., that federal litigation under the Tucker Act ripens federal takings claims for just compensation. Litigation under the Tucker Act cannot *ripen* a takings claim because its purpose is to *resolve* such claims. Hence, any analogy to the supposed ripening power of state litigation fails.

Moreover, NELF observes, the Court, despite clearly stating earlier in *Williamson County* that exhaustion of remedies is not required for a 42 U.S.C. § 1983 takings claim, required precisely that when it set out the state litigation requirement. It did so in the mistaken belief that a state court's final judgment denying money damages is merely the judicial analog of local government's failure to pay just compensation. In adopting that belief, the Court brought to a head its blurring of the distinction between ripening a claim and judicially resolving it.

Finally, NELF argues that underlying the erroneous reasoning of *Williamson County* is the unexamined assumption that payment of just compensation under the Takings Clause is a remedy. It is not; it is a constitutional condition placed upon the power of government to take, as the Court has stated repeatedly throughout its history. Only when just compensation has *not* been paid does there arise an injury requiring a remedy, as the Court has also repeated declared. Hence, cases dealing with post-deprivation procedures regulating merely the timing, amount, and manner of the payment of *just compensation* confessedly owed by the state do not support the Court's conclusion that a state court post-deprivation lawsuit for a *money damages remedy* ripens a takings claim by finally determining that the "State" refuses to pay just compensation.

This case was argued before an eight-justice Supreme Court on Wednesday, October 3, 2018. At the Court's own request, a reargument was held before a full bench on January 16, 2019.. The reargument was directed to certain issues previously identified by the Court.

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.