LITIGATION REPORT

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NEW ENGLAND LEGAL FOUNDATION

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Recent Decisions

The First Circuit agrees with NELF that, under Massachusetts law, a college's officers and trustees do not owe a fiduciary duty to the college's students; they owe fiduciary duties solely to the institution that they serve.

Squeri et al. v. Mount Ida College (Federal Court of Appeals for the First Circuit)

This appeal was before the First Circuit on an important issue of individual liability under Massachusetts nonprofit corporate law. The case arose from the sudden announcement in May 2018 by Mount Ida College, located in Newton, Massachusetts, that it would be closing down permanently, and that its students could transfer to the University of Massachusetts to complete their education. The plaintiffs, certain former students of Mount Ida, alleged that they were injured because U. Mass did not offer their areas of study and because Mount Ida's abrupt announcement, at virtually the end of the academic year, did not afford them sufficient time to transfer to other schools. The students sued Mount Ida and various named officers and trustees in the United States district court for the District of Massachusetts, raising a host of Massachusetts statutory and common law claims, including breach of contract, violation of G. L. c. 93A, and breach of a fiduciary duty owed to them as students. The District Court dismissed all of the students' claims. In its decision of March 25, the First Circuit affirmed the District Court's decision in its entirety.

NELF had filed an amicus brief in support of the defendant trustees and officers, focusing solely on the students' claim that these defendants had breached a fiduciary duty owed to them in the handling of the school's closing. NELF argued that the lower court correctly dismissed the claim because, under clearly established Massachusetts law, the officers and trustees only owed fiduciary duties to the college, whose best interests they were required to serve. Indeed, the Massachusetts nonprofit corporation statute, G. L. c. 180, expressly codifies the three fiduciary duties that officers and directors owe to the nonprofit corporate entity they serve--a duty of good faith, a duty of care, and, central to this case, a duty of *loyalty*:

> A director, officer or incorporator. . . shall perform [their] duties . . . [1] in good faith and [2] in a manner [they] *reasonably believe*[] to be *in the best interests of the corporation*, and [3] with such care as an ordinarily prudent person in a like position with respect to a similar corporation organized under this chapter would use under similar circumstances.

Mass. Gen. Laws ch. 180, § 6C (emphasis added).

Accordingly, NELF argued, the officers and trustees had the sole fiduciary duty to serve the best interests of Mount Ida in their management of the college's affairs during the weeks leading up to its closing. They owed no separate fiduciary duty to the plaintiffs. To be sure, NELF pointed out, Mount Ida's officials could, consistent with their duty of loyalty to the college, also consider the students' interests when they made management decisions concerning the college. Nonetheless, the appellees were duty-bound to give priority in their decision making to those actions they reasonably believed were in the college's best interests.

NELF also argued that the plaintiffs' position, if accepted, would contravene this core principle of undivided corporate loyalty because the students' interests were arguably in conflict with those of the institution. Adopting the students' position would therefore invite the possibility that Mount Ida's officers and trustees would have been required "to serve two masters whose interests [were] antagonistic." *Spiegel v. Beacon Participations, Inc., et al.*, 297 Mass. 398, 411 (1937). Longstanding principles of corporate governance, applicable to both for-profit and nonprofit entities, would reject the imposition of any such conflict of interest on corporate decisionmakers.

For the same reasons, NELF argued, the students erred when they relied on certain Massachusetts cases for the proposition that a fiduciary duty may arise under the common law when one party reposes trust and confidence in another. None of those cases involved a defendant who owed a statutorily mandated fiduciary duty to serve the best interests of another party, whose interests could conflict with those of the plaintiff. Clearly, in this case, the Legislature has, "by necessary implication," preempted the possibility of recognizing any such competing common-law fiduciary duties. *See Chelsea Hous. Auth. v. McLaughlin*, 482 Mass. 579, 591 (2019) ("A statute preempts a common-law doctrine *by necessary implication* where the doctrine is so repugnant to and inconsistent with the statute that both cannot stand.") (emphasis added) (citations and internal quotation marks omitted).

NELF also argued that Massachusetts law is crystal clear that the Commonwealth's Attorney General has the exclusive and discretionary statutory authority, under Mass. Gen. Law ch. 12, § 8, to sue the defendants for allegedly breaching the duties that they owed to Mount Ida:

> [T]he plaintiff does not have standing to bring an action to protect the public interest in the efficient and lawful operation of a charitable corporation, or to correct any abuse or error in the administration of that corporation. . . . [Instead,] [i]t is the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings under G.L. c. 12, § 8. It is her duty to see that the public interests are protected and to proceed in the prosecution *or to decline so to proceed as those interests may require*.

Estate of Moulton, 467 Mass. at 492, 5 N.E.3d at 921–22 (emphasis added) (citations and internal punctuation marks omitted). Indeed, the Attorney General's exclusive oversight of charitable corporations "[under] G .L. c. 12, §§ 8-8[M], has for many years constituted a *comprehensive system for the regulation of charitable organizations in the Commonwealth*."

Mary C. Wheeler Sch., Inc. v. Bd. of Assessors of Seekonk, 368 Mass. 344, 352 (1975) (emphasis added).

Moreover, this comprehensive statutory scheme builds on a venerable Anglo-American tradition that has long recognized the Attorney General's exclusive standing to sue the directors and officers of a charitable corporation on behalf of that corporation and the public interest that it serves. Notably, as the press widely reported after Mount Ida College closed, the Attorney General *did* exercise her exclusive statutory enforcement powers, under Mass. Gen. Laws ch. 12, § 8H, and conducted a civil investigation of the circumstances surrounding Mount Ida's closing. However, as reported in the press and not contradicted by the Attorney General, she concluded that it would not be in the public interest to sue Mount Ida's officials.

Accordingly, NELF argued, a decision allowing the plaintiffs to sue Mount Ida's former officers and trustees for breach of fiduciary duty would contravene not only basic principles of Massachusetts corporate law but also the Attorney General's exclusive statutory power to bring such a suit. Such a decision would also countermand her exercise of discretion in this case *not* to file suit. In short, the plaintiffs could not invoke a purported theory of liability under the common law to override "a comprehensive [statutory] system for the regulation of charitable organizations in the Commonwealth." *Mary C. Wheeler Sch.,* 368 Mass. at 352.

In its unanimous decision, the First Circuit panel (Lynch, J.) agreeing with NELF on all key points, affirmed the dismissal of the plaintiffs' fiduciary duty claim, along with the rest of their complaint. From the outset, as NELF had argued, the Court readily acknowledged that Mount Ida's officers and trustees had a statutorily codified fiduciary duty to serve the best interests of the college, and that this statutory duty of undivided loyalty precluded the recognition of a potentially competing fiduciary duty owed to the students under Massachusetts common law. On this point, the Court did not mince any words when it wrote that "[t]he interests of the students alleged on the facts here are *in direct conflict* with those of the institution. Early disclosure of financial distress might well have endangered the ability of the institution to recover and made the financial distress even worse." (Emphasis added). The Court also took note of the significant fact that, pending the appeal of this case, the Massachusetts Legislature enacted a new statute in response to Mount Ida's abrupt closing. *See* 2019 Mass. Acts ch. 113 ("An Act to Support Improved Financial Stability in Higher Education") (effective November 14, 2019). As the Court pointedly observed, nowhere does this new statute impose any fiduciary duties on a higher education institution's officers or trustees with respect to its students. Instead, the law imposes new financial disclosure and reporting requirements, both on the institution's website and to the Massachusetts Board of Higher Education.

Accordingly, the Court rejected the plaintiffs' call for it to expand upon the trustees' and officers' exclusive statutory duties owed to the institution, by recognizing an additional and competing fiduciary duty owed to *them* under Massachusetts common law. As the Court aptly put it, "[c]ommon law courts are not free to impose additional and likely conflicting fiduciary duties not imposed by statute." Moreover, the Court recognized that a federal court in particular cannot expand state common law, especially in the face of competing state statutory and decisional law.

Finally, as NELF had argued it should do, the Court deferred to the detailed statutory scheme that vests in the Massachusetts Attorney General the exclusive right to oversee and enforce the fiduciary duties that the defendants owed to the college. "Massachusetts law restricts to the [Attorney General's Office] the ability to pursue claims of mismanagement of charitable organizations."

The United States Supreme Court agrees with NELF that the participants in an ERISA defined benefit plan do not have standing to sue under Article III of the United States Constitution when they merely allege that the plan administrators' alleged breach of their ERISA duties caused a funding shortfall in the plan, without alleging how that loss harmed their pension benefits in any way.

Thole v. U.S. Bank (United States Supreme Court)

The United States Supreme Court granted certiorari in this important case and *sua sponte* requested the parties to brief the issue "[w]hether petitioners have demonstrated *Article III standing*" when they filed suit. Focusing solely on this question, NELF filed an amicus brief in support of U.S. Bank arguing that the petitioners, retired employees of U.S. Bank who are participants in their employer's defined benefit plan, had not demonstrated the necessary "injury in fact" under Article III. They had merely alleged that the respondents breached their ERISA duties owed to the plan, causing the *plan* to suffer a financial loss, whereby its liabilities exceeded its assets for a few consecutive years. But the petitioners had failed to allege how a funding deficiency, standing alone, created the real risk of harm to their pension benefits.

Article III of the United States Constitution limits the federal courts' jurisdiction to "cases" or "controversies." And the Supreme Court has repeatedly held that this requires the plaintiff to establish an *injury in fact* (along with causation and redressability of the injury through litigation). An injury in fact, in turn, requires the plaintiff to establish a concrete and *particularized* harm that is actual *or imminent*, not conjectural or hypothetical. *See, e.g*., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (in which NELF had filed an apparently influential amicus brief). At minimum, then, the plaintiff must demonstrate the imminent risk of harm to her own personal interest. Petitioners are retired employees of the respondent, U.S. Bank, one of the nation's largest banks. Petitioners are also vested participants in their employer's "defined benefit pension plan," which is heavily regulated under ERISA, precisely to minimize (if not *eliminate*) the risk of any financial loss to plan participants. Under ERISA's comprehensive statutory scheme, the plan participant in a defined benefit plan (unlike the now more common defined contribution/individual account plan, such asa 401(k)), the plan participant has no claim to any of the plan's assets. Instead, the participant only has a personal stake in receiving her fixed periodic payments guaranteed under the plan. This reflects the fact that ERISA requires the employer to bear the entire risk of maintaining adequate funding in the plan at all times. Accordingly, ERISA imposes stringent and detailed *minimum funding requirements* on the employer to restore any loss to the plan whenever there is a funding deficiency, i.e., whenever the present value of the plan's assets is less than the present value of all benefits that have vested or accrued at the beginning of each plan year (i.e., 100% actuarial funding)., Moreover, if an employer does not or *cannot* fulfill its minimum funding requirements when the plan suffers a deficiency, and the plan must be terminated, Congress has created the elaborate safety net of the FDIC-like *Pension Benefit Guaranty Corporation* (PBGC), to assume all payment obligations under the plan, up to a certain monthly amount (According to the respondents, the petitioners in this case would have been covered 100% by the PBGC if that had ever been necessary.) In short, ERISA does all that it can do to *eliminate* the risk of any actual or imminent harm to plan participants by ensuring their uninterrupted receipt of pension benefits, *even* under dire financial circumstances (which were not alleged here).

This case revolved around the stock market crash of 2008, and how that event, combined with the plan administrators' alleged breach of various ERISA duties, substantially reduced the value of the plan's assets for a few consecutive years and caused a funding shortfall for a few consecutive years (apparently this was the common fate of nearly 80% of all such plans at the time, according to U.S. Bank). Petitioners sued their employer in federal court for the District of Minnesota, alleging that, in so breaching their ERISA duties, the plan administrators increased the risk of plan default.

U.S. Bank moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of Article III standing/subject matter jurisdiction, and the federal district court *denied* the motion. The court concluded that the petitioners alleged a sufficient risk of harm to satisfy Article III when they alleged that the plan administrators' breach of their ERISA duties caused a substantial loss to the plan's assets. While the court acknowledged U.S. Bank's countervailing arguments--primarily that it was in *full compliance* with ERISA's minimum funding requirements, and that it had more than sufficient liquid assets to cover any loss to the plan's assets--the court nonetheless allowed the petitioners to proceed with their case.

However, months after the complaint was filed, the value of the plan's assets increased and the plan enjoyed a funding surplus, whereby the plan's assets exceeded its liabilities. Accordingly, U.S. Bank moved to dismiss again, this time on Article III mootness grounds. This time the district court allowed the motion. The Eighth Circuit affirmed, but on statutory grounds, not constitutional grounds. That is, the court concluded that the petitioners were no longer within the area of concern of ERISA's civil remedies provisions, because the plan surplus eliminated any risk of harm, and because the employer alone enjoyed the benefit of the plan's surplus value. Petitioners then sought certiorari solely on this more recent mootness stage of the case. However, as noted above, the Court granted cert. and asked the *additional* question whether the petitioners had ever demonstrated Article III standing from the beginning of the case, when they first filed suit.

In its amicus brief, NELF argued that the petitioners had not alleged an injury in fact because they failed to allege how the respondents' alleged misconduct caused any imminent risk of harm to their pension benefits. Instead, the petitioners merely alleged that the respondents caused a funding deficiency in the plan. And ERISA is a comprehensive statutory scheme that virtually *eliminates* the risk of any financial loss to the participants in a plan with a funding shortfall. As the Court itself has explained:

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex

> minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance.

LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 255 (2008).

That is, a funding deficiency is an unremarkable and fully *anticipated* occurrence under ERISA, which responds with *exhaustive* remedial measures to prevent any financial loss to plan participants. It is these very remedial measures that negate any showing that there is a "substantial risk" of financial harm to plan participants, or that such harm is "certainly impending." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of *future injury* may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.") (citation and internal quotation marks omitted). First and foremost, ERISA requires employers to restore any financial loss to the plan, in order to establish at least 100% funding. (The petitioners do not allege that the respondents had failed in any way to fulfill their ERISA funding obligations once the plan suffered a shortfall. Indeed, the subsequent history of this case indicates that the respondents had complied with their ERISA duties and had succeeded in restoring a *surplus* to the plan's funds). Second, ERISA further reduces the risk of harm to plan participants by providing for "termination insurance" via the PBGC, which is empowered to take over a financially troubled plan and pay participants their benefits, in the event that the employer fails to fulfill its funding obligations (again, *not* alleged here). In sum, Congress has done all that it could do in ERISA to eliminate the risk of harm to plan participants when there is a funding deficiency. Therefore, a bare allegation of a funding shortfall cannot establish an injury in fact.

Notably, Congress itself does *not* consider a plan to be "at risk" or "underfunded" unless the plan's liabilities exceed its assets by more than 20%. 29 U.S.C. § 1083(f)(3)(C)(ii) (plan becomes "underfunded" when liabilities exceed assets by more than 20%), (i)(4)(A)(i) ("A plan is in at-risk status for a plan year if . . . the funding target attainment percentage for the preceding plan year . . . is less than 80 percent"). Nowhere do the petitioners allege that the plan's funding level ever fell below 80%. Therefore, in Congress's *own j*udgment, the plan's funding shortfall did not put the petitioners at any cognizable risk of losing their pension benefits. *See Spokeo*, 136 S. Ct. at 1549 ("In determining whether an intangible harm constitutes injury in fact," federal courts should consult "the judgment of Congress.").

In short, a mere funding deficiency in an ERISA plan, standing alone, cannot establish an Article III injury in fact, let alone the "significant risk of plan default" that the petitioners allege. Both ERISA and the employer here have responded thoroughly to this accounting shortfall and have staved off any risk of default, rendering such an occurrence a remote and unlikely possibility. Indeed, a plan participant would need to allege *additional* facts to show that she faced the imminent risk of losing her plan benefits. In fact, such a risk of harm could only arise *if* the employer either refused or was unable to meet its ERISA funding obligations, *if* the plan then faced the likelihood of a "distress" termination (29 U.S.C. § 1341(c)), and *if* the PBGC, in assuming management of the plan, could not cover the full amount of the participants' pension payments. Nowhere did the petitioners in this case allege *any* one of these additional facts. And even if they had, such a "theory" of standing would remain an incurably "speculative chain of possibilities . . . . [It] does not satisfy the requirement that threatened injury must be *certainly* *impending*." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013) (emphasis added) (discussing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

NELF also argued that the petitioners have misinterpreted *Spokeo* to justify their heavy reliance on the common law of trusts, and its long recognition of representational standing on the part of a trust beneficiary to sue on behalf of an injured trust, even without showing any personal loss. *See Spokeo*, 136 S. Ct. at 1549 (courts may consider traditional Anglo-American common law when deciding whether a violation of a statutory duty, by itself, may establish a "concrete intangible harm"). Contrary to the petitioners' reading of *Spokeo*, nothing in that case relaxes or weakens in any way Article III's "particularization" requirement--a showing of an actual or imminent *personal* loss to the plaintiff. Indeed, *Spokeo* emphasizes that "[f]or an injury to be 'particularized,' it *must* affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (emphasis added) (citation and internal quotation marks omitted). Instead, the issue in *Spokeo* was Article III's "concreteness" requirement, which is not at issue here.

In that connection, it is of little consequence that Congress has permitted plan participants to sue on behalf of the entire plan whenever they allege that the plan's trustees have breached their ERISA duties owed to the plan. This is because Article III demands that a federal court engage in an independent inquiry to determine whether a statutory claim causes the plaintiff to suffer an actual or imminent personal harm. "Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547-48 (citation and internal punctuation marks omitted).

Finally NELF argued that, even though a plan participant may not have Article III standing to sue under ERISA on behalf of the plan, that should not prevent the Secretary of Labor from doing so. *See* 29 U.S.C. § 1132(a)(2) ("A civil action may be brought . . . by *the Secretary*, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [29 U.S.C. § 1109].") (emphasis added). Moreover, an Article III injury is *presumed* whenever the United States brings suit to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. *See also Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that" federal government suffers "injury to its sovereignty arising from violation of its laws . . . ."). Indeed, any other judicial interpretation of Article III would obstruct the federal government's exercise of its Article II duty to ensure compliance with federal law. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) ('[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."' (citation and internal quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive Branch] . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3.'"). In short, public enforcement of ERISA duties is always an option if a private party cannot establish Article III standing.

On June 1, 2020, the Supreme Court agreed with NELF, 5-4, that the plaintiffs in this case lacked Article III standing. Writing for the majority, Justice Kavanaugh concluded that the plaintiffs simply have no stake in the outcome of this case because they have received all of their pension payments to date, and they have a lifelong *contractual* right to continue receiving those fixed payments, regardless of the performance of the plan assets, over which they have no ownership interest. As NELF had stated in its brief, the Court emphasized that the employer must make up for any plan shortfall and enjoys the benefit of any plan surplus. While the plaintiffs had focused primarily on *the risk of plan default* when they first litigated the issue of Article III standing in the District Court, Justice Kavanaugh observed that the plaintiffs were not pressing that theory of standing before the Supreme Court. Therefore, in his view, the plaintiffs' lack of standing was cut and dried. However, because the plaintiffs' amici *did* brief that theory of standing extensively (as did NELF), the Court nonetheless addressed and rejected it for the same reasons that NELF had briefed, including the statutory safety net of the PBGC in the (here unalleged) event that the employer were to fail in fulfilling its funding obligations. As the Court observed, in language substantially similar to that contained in NELF's brief, "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

Asking the Court to clarify whether statutory ambiguity truly exists when a *Chevron* deference analysis includes the common law presumption canon, which provides a clear rule of law but applies only in cases of statutory silence

Baldwin v. United States (United States Supreme Court)

This case, which was before the Supreme Court on a Petition for Certiorari, concerned *Chevron* deference and whether statutory silence always equals statutory ambiguity. *Chevron* deference requires a two-part test under which a court will uphold a federal agency's interpretation of a federal statute in preference to its own if (i) the statute is ambiguous on the legal question at issue and (ii) the agency's interpretation of the statute is at least reasonable. Since its adoption in 1984, *Chevron* deference has been controversial on several grounds, in particular because it arguably cedes Article III judicial functions to Article II executive agencies and because it enshrines merely reasonable interpretations of statutes at the expense of the best interpretations.

In asking the Supreme Court to grant certiorari in order to clarity that the traditional tools of statutory construction include the common law presumption canon, NELF identified a problem encountered frequently when courts do a *Chevron* deference analysis. That problem is whether a statute's silence on an issue always equates to ambiguity and leaves the statutory issue open for agency determination, to which courts must then defer. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (deference applies when statute "silent or ambiguous"). The question is especially pressing where, as here, the silence actually means that Congress legislated against background common law principles, which by definition exist only in the silence of a statute.

The facts of the case were as follows. In 2011 Howard and Karen Baldwin filed for a refund of $167,663 on their 2005 income tax. Four months before the October 15 filing deadline, they mailed their paperwork to the Internal Revenue Service by regular first-class mail.

The IRS later said that it never had received their claim, and it refused to pay them. The Baldwins sued the IRS in federal court in California. There appeared to be an easy way for them to prove that they had mailed the documents before the deadline. Under the relevant statute (26 U.S.C. § 7502), Ninth Circuit precedent, and the traditional common law mailbox rule, the Baldwins were permitted to prove, by means of extrinsic evidence, the postmark date, which by operation of law would thereby be deemed to be the date of delivery.

Nearly twenty years earlier, in *Anderson v. United States*, 966 F.2d 487 (9th Cir.1992), the Ninth Circuit had reaffirmed the vitality of the common law mailbox rule. The common law has long held that timely mailing of a document raises a rebuttable presumption that it is timely received by the addressee and that such mailing may be proven by extrinsic evidence. *See Rosenthal v. Walker*, 111 U.S. 185, 193 (1884) (rule "well settled"). In *Anderson,* the Ninth Circuit examined the "statutory mailbox rule" set out in 26 U.S.C. § 7502, which provides that the postmark date will be taken as the date of delivery and that, alternatively, certified and registered mail receipts may serve as prima facie evidence of delivery. Because the statute neither directly disallows use of the common law mailbox rule nor clearly indicates that the statutory methods are exclusive of any other, the *Anderson* court saw no clear intent to supplant the common law mail box rule, and so it permitted proof of delivery to be rebuttably established by that means as well.

This was the basis upon which the Baldwins won at trial. The IRS then appealed and on appeal the Ninth Circuit abandoned *Anderson*. By the time of the Baldwins' lawsuit, the IRS had put in place a 2011 regulation interpreting § 7502. The regulation strictly provides that other than certified and registered mail receipts, "No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered." 26 C.F.R. § 301.7502-1.

The Ninth Circuit, granting *Chevron* deference to the 2011 regulation, set aside *Anderson*. The appeals court held that the statute's silence created an ambiguity about the status of the common law rule and that it was permissible for the IRS to resolve the ambiguity by declaring that forms of proof not expressly authorized by § 7502 are prohibited. In addition to *Chevron*, the court cited *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (only prior court holding that statute is unambiguous forecloses later agency interpretation based on asserted ambiguity).

In support of the Baldwins' Petition, NELF made the following arguments. First, NELF argued that, before a court applies *Chevron* deference, it must first exhaust its legal toolkit for statutory construction. As the Supreme Court observed in *Kisor v. Wilkie,* 139 S.Ct. 2400, 2414-15 (2019):

> [T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it – genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. . . . And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. . . . For again, only when that legal toolkit is empty and the interpretative question still has no simple answer [i.e., is unambiguous] can a judge conclude that it is more one of policy than law.

NELF explained how the Ninth Circuit fell far short of that standard when it conducted only a cursory examination of the statute before pronouncing it ambiguous and deferring to the IRS's reading of the law.

Next, NELF argued that, as this case so clearly shows, statutory silence does not always equate to ambiguity. In particular, one of the most important traditional tools of statutory construction—the common law presumption canon—can exist only in the silence of a statute. This canon exists because the common law forms the historical legal background against which some statutes are drafted. *See,* e.g., *Staub v. Proctor Hospital,* 562 U.S. 411, 417 (2011)("we start from the premise that when Congress creates a federal tort it adopts the background of general tort law").

Indeed, although silent and unexpressed, a common law principle will not be read out of a statute unless Congress's intention to supplant it is made clear. *See,* e.g., *United States v. Texas,* 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.")

Finally, NELF pointed out that where the common law has long been applied as a silent background principal, as it undeniably has been here, the Supreme Court has openly recognized that the silence creates no legal ambiguity. Furthermore, neither the Ninth Circuit nor the IRS could point to a single "clear and explicit" word in the statute that could reasonably convey the intent to supplant the common law rule.

In short, NELF argued, the Ninth Circuit erred in failing to harmonize the common law mailbox rule and the statute; the circuit court should not have adopted the IRS's view and read the statute to conflict with and supplant the common law.

Despite NELF's vigorous and detailed arguments, the Supreme Court denied certiorari on February 24, 2020, with a dissent by Associate Justice Thomas.

The Massachusetts Court disagrees with NELF's argument 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 was before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review, and the Court requested amicus briefing on an important damages question under Massachusetts contract law: 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 cost 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, including any demonstrable economic harm to her professional career, such as the loss of identifiable future earnings. In its decision of April 29, 2020, the SJC unanimously held that such an employee is entitled to a damages award in an amount sufficient to recreate the lost lab, which, the Court opined, represented the life work of the plaintiff, Dr. Lynn Hlatky, a radiobiologist.

Dr. Hlatky had established a laboratory to conduct her cancer research when she was employed at Harvard University, 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 and with institutional support from her prior employers. Consistent with the accepted industry practice, Hlatky had brought the lab's equipment, staff, and grant money with her when she became an employee of Steward. Hlatky entered into a written three-year employment contract with Steward (renewable by mutual agreement), in which Steward promised to "continue to provide support and suitable office space" for the lab. The contract also stated that it was Steward's "vision" that under Hlatky's leadership, the Center would "evolve into an internationally competitive program." 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, and she lost all of the cell samples that her lab had developed. Steward did not renew her employment contract.

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 $10.2 million (based on Hlatky's testimony of the cost of reestablishing the lab, and her proven out-of-pocket mitigation costs) 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 her $200,000 mitigation costs), but not for the lost lab itself. Accordingly, Steward asked 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.

In its amicus brief in support of Steward, NELF argued that Hlatky was only entitled to recover for her *expected use* of the lost lab, not for the lost lab itself. NELF pointed out that it is black letter contract law that Hlatky should only recover "the value of the *bargained-for benefit* of which [she] ha[d] 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, NELF argued, Hlatky should only recover for that lost access to the lab. NELF acknowledged that the trial court might have been correct when it stated that Hlatky "had an expectation interest in the continuation of the research program that she created." But, NELF argued, this only meant 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. In other words, NELF argued, the trial court had 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.

In its decision, the SJC recognized that it was difficult to apply traditional contract principles to this unique set of facts. Nonetheless, the Court concluded that, under those traditional principles, Hlatky had a compensable expectation interest that Steward would properly support the lab throughout her term of employment and that, at the end of her employment with Steward, she would still have a fully functioning lab and cell samples to take with her to her next place of employment. The Court also concluded that, while Hlatky did not own the lab, she "personally suffered harm from the foreseeable destruction of her life's work." As the Court explained:

If Steward had fulfilled its obligation to provide support to the Center, Hlatky reasonably would have expected, at minimum, to have at the end of the three-year contract access to a functioning, turnkey laboratory with the capacity to continue the cancer research that had become her life's work. Because of Steward's breach, Hlatky lost her laboratory, equipment and, most importantly, the cell samples--the culmination of twenty-five years of work.

Accordingly, the Court unanimously affirmed the $10 million damages award, which represented Hlatky's estimate for the cost of reconstituting the lab.

However, the Court's opinion did not stop there. In an unanticipated twist, the Court was evenly divided (among the six members of the Court who participated in the decision) on the unprecedented issue of whether it should impose conditions on the damages award, to ensure that Hlatky use the $10 million for its intended purpose--the recreation of the lab--and not for an unrelated purpose, such as personal use. Justice Gants, joined by two other Justices, opined that the Court should impose such conditions, to avoid unjustly enriching Hlatky, while Justice Lenk, joined by the two remaining Justices, disagreed and opined that damages should be awarded with no strings attached, as per usual. Since the Court was equally divided on the question, the Court affirmed the Superior Court's unconditional damage award. In NELF's view, the Justices' dispute on this issue underscores the doctrinal tension inherent in awarding (substantial) contract damages for the cost of replacing something that was never the plaintiff's personal property to lose. Only time will tell what precedential power the Court's opinion will have. As Justice Lenk aptly observed, "[t]hat similar situations could well arise again in our research-rich environment is hardly unthinkable," in light of the Commonwealth's numerous teaching hospitals, acute care hospitals and educational institutions.

Recent Settlement and Dismissal

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

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

The Massachusetts Supreme Judicial Court (SJC) took this case for direct appellate review and 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?

In a potentially dangerous argument, the plaintiffs argue that the determination of co-employer status should be based on Massachusetts' independent contractor statute, which defines employment status (employee versus independent contractor) based on how much control is exercised by the employing entity. NELF's amicus brief in support of the defendants is aimed at driving home the arguments that (a) the Wage Act presumes that the "employer" is the person or entity that has hired a worker and has paid him for his work; (b) the only way that a plaintiff can seek to impose Wage Act liability on another corporate entity is by piercing the corporate veil separating his employer from that other entity; and (c).the independent contractor statute is irrelevant to this issue because it serves the unrelated purpose of characterizing the relationship between a worker and the entity that has hired him, as opposed to characterizing the relationship between that entity and another corporate entity.; and

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 argues in its amicus brief, submitted in support of the defendants, that the "employer" under the Wage Act is the person or entity that hires a worker and pays him for his work. Moreover, 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.

As indicated above, NELF also argues 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.

As noted, the plaintiffs 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).

NELF has been aware that the parties to this case have sought to reach a settlement, and the parties filed a stipulation of dismissal on May 20, 2020. As a result, the important question of law at stake remains undecided.

Pending Cases

Urging the First Circuit not to undermine the rule that there is no general duty to disclose to the public all ongoing communications exchanged by a company and its regulatory agency

Securities and Exchange Commission v. David Johnson (United States Court of Appeals for the First Circuit)

This case arises out of the attempt to secure regulatory approval of a cancer drug manufactured by Aveo Pharmaceuticals, Inc. (Aveo). The Securities and Exchange Commission (SEC) alleges that Aveo's former CFO David Johnston made materially misleading statements to investors about the content of Aveo's communications with the Food and Drug Administration (FDA) concerning the drug.

In May of 2012, representatives from Aveo met with FDA in advance of submitting an application for approval of the drug tivozanib (Tivo), which was intended to treat renal cell carcinoma. The minutes of the meeting indicate that the FDA voiced doubts about both the drug's safety and its efficacy and recommended that Aveo conduct a second adequately powered randomized clinical trial because of problems raised by the existing clinical trial.

After the meeting, Johnston and others in Aveo allegedly drew up a "script" of talking points in order to limit the company's disclosures when questioned publicly about the meeting and any need for a second clinical trial to address FDA concerns. The SEC later alleged that Johnston and Aveo specifically withheld the fact that, as sign of the seriousness of those concerns, the FDA had recommended that a second, entirely new clinical trial would be in Aveo's "best interests."

In January of 2013 Aveo filed a prospectus in anticipation of offering 6,667,000 shares of common stock, priced at $7.50 per share. Aveo raised $53.8 million from the offering. Thereafter, in advance of Aveo's meeting with an FDA advisory panel in May of 2013 , the FDA released a briefing book in which it disclosed that it had previously recommended that the company should conduct a second trial. Upon this disclosure, Aveo's stock price plummeted by 31%. The outside panel voted 13 to 1 against approving Tivo, and in the following month the FDA denied approval to the drug.

In the present action SEC alleges that Johnston's selective disclosures, once he chose voluntarily to communicate information to the market about the meeting with the FDA, were misleading by material omission. In late 2018, a jury found Johnston liable for securities fraud. He timely appealed. In his appeal, Johnston relies on the well-establish securities law principle that there is no general duty compelling disclosure of "interim" communication with a regulatory agency like the FDA, even when investors might deem the information material.

NELF has filed an amicus brief in support of Johnston on that point, urging the First Circuit to be careful not to undermine that principle when ruling on Johnston's appeal.

NELF notes that under securities law, a duty to disclose material nonpublic information exists only (1) if a regulation, statute or rule requires it, or (2) if disclosure is required to prevent a public statement from being misleading, or (3) if a defendant is engaged in insider trading.

Otherwise, it remains well-settled law that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5" and Section 10(b) and does not constitute fraud. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)).

Hence, in the absence of one of those three duties, "firms are entitled to keep silent (about good news as well as bad news)," *Gallagher v. Abbott Labs*., 269 F.3d 806, 808 (7th Cir. 2001), even if the information is something "a reasonable investor would very much like to know," *In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1432 (3d Cir. 1997) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).

Indeed, NELF recalls to the First Circuit that it has previously acknowledged as much in an FDA medical device case, and that it has explained, as the rationale for this important rule, that the burden and risks to management of an unlimited and general obligation would be extreme and could easily disadvantage shareholders in numerous ways. Ongoing disclosures, NELF cautions, could also disrupt the FDA review process and confuse the public more than inform it.

For all of the above reasons, NELF argues that the Court should be mindful that the absence of a sweeping, tell-all rule mandating disclosures, including of the "ongoing" "regulatory back-and-forth" between an agency like the FDA and the businesses they regulate, operates as a crucial firebreak to avoid premature or hasty disclosures.

Supporting enforcement of an online company's mandatory arbitration policy

Kauders v. Uber Technologies, Inc. (Massachusetts Supreme Judicial Court)

This case, which is before the Massachusetts Supreme Judicial Court (SJC) on *sua sponte* direct appellate review, involves the same issue of online contract formation concerning the same business defendant, Uber Technologies, Inc., that NELF briefed in *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 55 (1st Cir. 2018) (holding that Uber's smartphone registration process did not create a binding contract under Massachusetts law). That issue is whether an online company can enforce its mandatory arbitration policy against a customer who has signed up for the company's services, when the company's smartphone registration process clearly states, on the final registration screen, that "[b]y creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." The words "Terms & Conditions and Privacy Policy" appear prominently on the screen as a clickable hyperlink button to those contract terms, which, in turn, contain a mandatory arbitration clause.[1] The customer completes the registration process by

[1] Uber's arbitration clause provides:

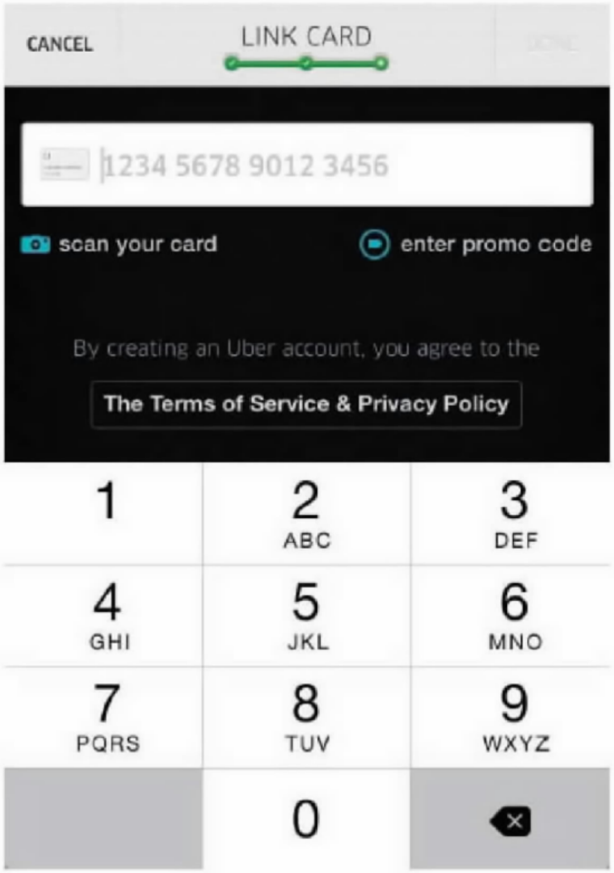
> Dispute Resolution
>
> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement,

entering her credit card information and clicking the "Done" button on this screen. Thus, Uber has put the potential customer on notice that, when she clicks the "Done" button, she has done two things at once: she has created an Uber account and she has also agreed to Uber's applicable terms of service.

Notwithstanding these facts, the Superior Court in this case followed the First Circuit in *Cullinane* and held that Uber had not formed a binding agreement with the plaintiff, Uber customer Christopher Kauders. Therefore, the lower court denied Uber's motion to compel the arbitration of Kauder's claims against Uber, which are discussed below. The SJC took this case *sua sponte* for direct appellate review. NELF learned about this case on its own initiative, by reviewing the SJC's online docket and amicus announcements.

Since a picture is worth a thousand words, NELF will reproduce in its brief the screen shot immediately below of the disputed registration screen in the First Circuit *Cullinane* case. While NELF could not locate a screenshot of the disputed registration screen in this new case before the SJC, based on the Superior Court' description, the screen at issue is substantially similar to the one in *Cullinane*. Note that the "Done" button appears faintly on the upper right-hand corner of the screen in the screenshot because the credit card information field has not yet been filled in. The "Done" button becomes **bold-faced** once the customer enters her credit card information:

> interpretation of validity thereof or the use of the Service or Application (Collectively "Disputes") will be settled by binding arbitration . . . . You acknowledge and agree that you and Company are each waiving the right to trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.
>
> . . .
>
> Arbitration Rules and Governing Law
>
> The arbitration will be administrated by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. . . . The Federal Arbitration Act will govern the interpretation and enforcement of this Section.



In *Cullinane*, the First Circuit held that this last registration screen did not create a binding contract between Uber and the plaintiff customer under Massachusetts law. Therefore, the court denied Uber's motion to compel arbitration under its mandatory arbitration policy. From the outset of its opinion, the court expressed its disapproval of Uber's use of this ubiquitous kind of online consumer agreement, which combines signing up for a company's online services with acceptance of the company's terms of service. (This is to be contrasted with another kind of online consumer agreement, which requires the customer to check a box indicating that she has agreed to the company's terms of service before she can sign up for its services. *See* *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 386, 398 (E.D.N.Y. 2015)) (Weinstein, J.) (discussing common types of online consumer agreements).

According to the First Circuit, the above screen failed to provide the reasonable smartphone user with sufficient notice that she was agreeing to Uber's terms and conditions when she clicked the "Done" button and created an account, or with sufficient inquiry notice of what those contract terms were. In particular, the court criticized as relatively inconspicuous the font size, color and placement of the language telling the customer that "[b]y creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." The court also concluded that the "terms of service" hyperlink was deficient because the text did not appear in blue lettering and was not underlined. The Superior Court in this case has, in turn, followed the *Cullinane* decision closely and has denied Uber's motion to compel arbitration for the same reasons.

In this case, the plaintiff, Christopher Kauders, is legally blind and uses a guide dog. (Kauders does not allege that he could not see Uber's smartphone registration screen.) He alleges that, on three separate occasions, Uber refused to allow him into an Uber vehicle because of his guide dog, in violation of the Massachusetts public accommodations statute, which is enforceable under G. L. c. 151B. He also alleges that his wife and daughter were with him on at least one of those occasions. Kauders sued Uber in Superior Court, and Uber moved to compel arbitration and dismiss the complaint. Initially, the Superior Court granted Uber's motion to compel, and the case proceeded to arbitration. The arbitrator ruled in Uber's favor. While the arbitrator found that the Uber drivers had violated state law, the arbitrator also concluded that Uber lacked a sufficient connection with the drivers' actions to be liable in its own right. (Presumably the arbitrator found that the drivers were independent contractors, and not Uber's employees.)

Subsequently, the First Circuit decided the *Cullinane* case, and Kauders moved for reconsideration. In the wake of *Cullinane*, the Superior Court granted his motion for reconsideration and reversed its order that had granted Uber's motion to compel arbitration, concluding that there was no binding agreement to arbitrate. In the alternative, the court also *affirmed* the arbitrator's decision in Uber's favor, in the event that its denial of Uber's motion to compel arbitration is reversed on appeal. In affirming the arbitrator's decision, the court recognized that its hands were tied by the Massachusetts Arbitration Act and that it had no power to review the arbitrator's decision for errors of law or fact.

NELF intends to argue, in support of Uber, that its sign-up process has indeed created a binding agreement to arbitrate disputes under Massachusetts law. Uber reasonably communicated to Kauders both the terms of that contract and the means of acceptance, and Kauders clearly manifested his assent to the contract's terms by creating an Uber account. Uber has concealed nothing from Kauders, or from any other potential customer who is interested in signing up with Uber. The company has put its potential customers on clear notice that they must accept Uber's terms of service in order to receive its services. Uber has also put its potential customers on inquiry notice of what those terms are, by providing a prominent hyperlink button to those terms. In so doing, Uber has satisfied the well-established principles of contract formation under Massachusetts law.

To begin with, Uber's online agreement contains an arbitration provision and therefore falls under § 2 of the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA").[2] Under § 2, "courts . . . should apply ordinary state-law principles that govern the formation of contracts" to decide whether, in this case, Kauders agreed to Uber's terms of service agreement, which include the mandatory

[2] That section provides, in relevant part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

arbitration provision. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (emphasis added). And the parties do not dispute that Massachusetts contract law applies to the formation of Uber's service agreement.

Under basic Massachusetts law, the formation of an executory contract,[3] such as this one, simply requires an offer, acceptance, and consideration. *Quinn v. State Ethics Comm'n*, 401 Mass. 210, 216 (1987) ("This arrangement has all the essential elements of an executory contract, a bargained-for exchange—offer, acceptance, and consideration.").[4] Uber's online registration process clearly satisfies these three essential elements. The registration process effectively states that, if the potential Uber customer provides the requested personal financial information and agrees to Uber's terms of service by clicking the "Done" button, she will be able to open an Uber account and use its ride-sharing services. And there is no dispute here that the plaintiff did click the "Done" button to create an Uber account. Therefore, Uber and the plaintiff have entered into an enforceable contract under Massachusetts law, and Uber's mandatory arbitration policy should be enforced.

This conclusion is supported by other well-established principles of Massachusetts contract law. For one, Uber, as the offeror, had the exclusive power to define how Kauders, the offeree, would manifest his acceptance of the terms of the agreement. "It is an elementary principle in the law of contracts that in order to constitute a valid agreement the acceptance must be in accordance with the terms of the offer." *Lawrence v. Rosenberg*, 238 Mass. 138, 141 (1921). Stated otherwise, Massachusetts has long adhered to an objective rule of contract formation. Once the offeree's actions manifest acceptance of the agreement according to the offeror's instructions (here by clicking the "Done" button), the offeree has bound himself to all of the contract's terms, regardless of his actual state of mind about those terms. "The [contracting party's] subjective intent is irrelevant when she knows or has reason to know that her objective actions manifest the existence of an agreement." *T.F. v. B. L.*, 442 Mass. 522, 527 (2004). *See also Hobbs v. Massasoit Whip Co*., 158 Mass. 194, 197 (1893) ("[C]onduct which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party . . . .") (emphasis added).

Moreover, Massachusetts contract law has long recognized "the presumption that a person signing a written instrument knows its contents." *Richardson v. Richards*, 226 Mass. 240, 245 (1917). That person is on inquiry notice of all the terms contained in the agreement, whether or not he has actually read the terms. "Typically, one who signs [or otherwise executes] a written

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[3] This is simply a contract that will be performed in the future, according to its terms, once stated conditions have been fulfilled.

[4] This principle of contract formation applies equally to a unilateral contract such as this one. *See Oxford Glob. Res., LLC v. Hernandez*, 480 Mass. 462, 466 (2018) ("[n]oting our general rule that contracts of adhesion are enforceable unless they are unconscionable, offend public policy, or are shown to be unfair in the particular circumstances.") (citation and internal quotation marks omitted). The plaintiff does not raise any such challenge to the enforcement of Uber's agreement. He only challenges the formation of that agreement.

agreement is bound by its terms *whether he reads and understands them or not*." *St. Fleur v. WPI Cable Sys./Mutron*, 450 Mass. 345, 355, 879 N.E.2d 27, 35 (2008) (emphasis added). *See* also Restatement (Second) of Contracts §211, cmt. b ("[C]ustomers do not in fact ordinarily understand or even read the standard terms [of a contract] . . . . [T]hey understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose."). Consistent with this presumption, a contracting party has the duty to read and become familiar with all of the terms of an agreement before accepting them:

> The enforceability of unread terms is applicable across the board, across contracts contexts, and with almost no exceptions. . . . 'The duty to read doctrine is contract law's analog to the assumption of risk doctrine in tort law. A buyer who could have read but did not *assumes the risk of being bound by any unfavorable terms*.'

Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. Pa. L. Rev. 2109, 2112 (2015) (quoting Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545, 549 (2014) (emphasis added)).

These long-established principles of Massachusetts contract law should apply as much to online agreements as they do to paper agreements. "[T]he pertinent legal principles [of contract formation] do not change simply because a contract was entered into online." *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 574 n.12 (2013) (holding that forum selection clause in online agreement should be evaluated under same rules applicable to such clause in traditional paper contract). *See also id.* (surveying cases from other jurisdictions that enforce electronic agreements so long as "the terms of an online agreement [are] *reasonably communicated and accepted*.") (emphasis added).

A decision in Kauders' favor would contravene these bedrock principles of contract formation. If left in place, the Superior Court's decision could allow customers to undo the countless transactions that occur over the internet every day, by pleading ignorance of contract terms that they did not read and do not like. This, in turn, could disrupt and undermine free enterprise on the internet, to the financial detriment of the business community.

NELF also intends to take the Superior Court to task on various dubious assumptions that it has made with respect to the appearance of Uber's registration screen. For one, the lower court has followed the First Circuit in *Cullinane* by presenting a fussy and arguably outmoded and misinformed critique of the "terms and conditions" hyperlink button, notably by observing that the language does not appear in blue and is not underlined. First, the court failed to recognize that the words "terms and conditions" do not appear in isolation but instead appear within a prominent rectangular box, drawn with thick borders. This rectangular frame has the familiar and unmistakable look of a clickable hyperlink button. Moreover, hyperlinks are now ubiquitous and appear in all shapes, colors, and sizes. The average internet user probably *expects* to see hyperlinks appearing on a company's website, whether as freestanding text or in a button format, such as in this case. *See Selden v. Airbnb, Inc.*, 2016 WL 6476934, at *5 **(**S.D.N.Y., June 26, 2017) (Cooper, J.) ("The act of contracting for consumer services online is now commonplace in the American economy. Any reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider. Notifications to that effect—*be they check boxes or hyperlinks*—abound.") (emphasis added).

Indeed, courts from other jurisdictions have recognized an enforceable agreement to arbitrate disputes arising from companies' similar online "signup wrap" registration pages, which also combine signing up for services with acceptance of terms of service, and which also provide a comparable hyperlink button to those terms. See, e.g., *Selden*, 2016 WL 6476934, at *5 (enforcing agreement to arbitrate under California law, due to clear language stating that "By signing up, I agree to Airbnb's Terms of Service," and due to prominent hyperlink button to those terms); *Phillips v. Neutron Holdings, Inc.*, 2019 WL 4861435, at *1, 3 (N.D. Texas 10/02/2019) (holding same under Texas law).

Perhaps more importantly, the Superior Court mischaracterized Uber's registration page as a "browsewrap" agreement, which refers to the most passive kind of online agreement, in which an individual is deemed to agree to a website's terms and conditions as soon as he uses that site. "Browsewrap agreements, by contrast, do not require an express manifestation of assent; rather, a party gives his or her assent simply by using the website." *Phillips v. Neutron Holdings*, 2019 WL 4861435, at *3 (citations and internal punctuation marks omitted). Nothing could be further from the truth here. Uber has indeed required its potential customers to take affirmative steps to manifest their assent to its terms and conditions, first by entering personal and financial information to create an account, and then by clicking the "Done" button to complete the process.

NELF will also argue that arbitration provisions have been a staple of consumer form agreements for several years now, and they have received considerable attention and validation from no less than the United States Supreme Court. *See AT & T Mobility LLC, v. Concepcion,* 563 U.S. 333 (2011). *See also* Laura Cicirelli, *Online Shopping: Buy One, Lose Legal Rights for Free*, 46 Seton Hall L. Rev. 991 (2016) ("Consumer products, services, employment, and even medical contracts of adhesion have all been littered with arbitration provisions. A 2008 empirical study revealed that 76.9% of the consumer contracts studied contained mandatory arbitration provisions, and . . . this percentage will likely continue to increase.").
The reasonable consumer in the post-*Concepcion* era is therefore on notice that most any standardized agreement will contain terms of service that include a mandatory arbitration provision. For better or worse, the day has long passed when a consumer could claim unfair surprise by the inclusion of such a provision in the lengthy body of a form agreement, or could argue that a business such as Uber had "snuck in" an arbitration provision through the back door of abbreviated online contract formation.

Finally, NELF will echo the astute practical observations of one federal judge and will argue that this case is arguably much ado about nothing. *See Selden,* 2016 WL 6476934, at *5 ("There is also a wider point to be made . . . . The act of contracting for consumer services online is now commonplace in the American economy. Any reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider. Notifications to that effect—*be they check boxes or hyperlinks*—abound. To be sure, few people may take time to actually read the user agreements. But ignorance of the precise terms does not mean that consumers are unaware they are entering contracts by signing up for internet-based services.") (emphasis added).

In particular, Kauders rests his case entirely on the mere fact that Uber has combined signing up for its services with acceptance of the terms of service. In effect, the plaintiff argues that this two-in-one step of contract formation has deprived him of meaningful notice of those terms and a reasonable opportunity to read them. According to the plaintiff, then, Uber would have resolved all of its alleged defects of contract formation if it had required him to spend an extra split second of his time to click a separate box indicating that he agreed to the company's terms of service before he could sign up with Uber. But this is arguably a distinction without a difference. The truth is that most of us do not read the online terms of service, no matter how they're presented to us. *See* Restatement (Second) of Contracts §211, cmt. b ("[C]ustomers do not in fact ordinarily understand or even read the standard terms [of a contract] . . . . [T]hey understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose."). We are generally impatient to sign up in order to receive the company's services, and we realize that we have no power to negotiate those terms anyway. We simply hope that a dispute will not arise in the future that will implicate any of those terms of service. In the final analysis, most internet users are aware of the fact that they are agreeing to certain terms and conditions, even if they don't know or even care what those terms are:

> All of us who have signed up for an online service recently will recall the experience. After entering the service provider's website, we were presented with a "sign up" or "create account" button prominently displayed on the screen. Next to the button . . . was the ubiquitous advisory that, by signing up, we would be accepting the provider's "terms of service." Perhaps there was a separate check-box prompting us to indicate our agreement to those terms. Regardless, *eager to begin using the service and realizing that the provider's contractual terms are non-negotiable, most of us signed up without bothering to click the accompanying link to reveal the contractual terms.* Those who did undoubtedly found numerous pages of legalese. The intrepid few who actually read all the terms almost certainly learned that one of them requires users to relinquish their right to have a jury resolve any dispute with the provider. And that another bars class actions.

Selden, 2016 WL 6476934, at *1 (emphasis added).

Arguing that the federal Labor Management Relations Act (LMRA) preempts a claim of retaliation brought by a union employee under the Maine Whistleblowers' Protection Act (MWPA)

Nadeau v. Twin Rivers Paper Company, LLC. (Maine Law Court)

This case is before the Maine Law Court (the state's highest court) and presents an important issue of federal preemption of state employment law. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA), preempts any state law claim that "depends upon the meaning of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 405-6 (1988).[5] Section 837 of the Maine Whistleblowers' Protection Act (MWPA),[6] in turn, provides that "[t]his subchapter shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." 26 M.R.S. § 837. The issue, therefore, is whether the LMRA preempts a MWPA claim brought by a union employee. The Maine Superior Court concluded that it did and dismissed the MWPA retaliation claim brought by the plaintiff, Bernard Nadeau, a union employee and Maine resident, against his employer, Twin Rivers Paper Company, LLC, a Maine company.

In particular, Nadeau sued Twin Rivers under the MWPA, alleging that he was disciplined and eventually terminated because he raised a grievance about allegedly unsafe working conditions in the company's paper mill (pertaining to allegedly toxic chemicals and dust). Twin Rivers denied any such retaliatory motive and asserted that it discharged Nadeau because he had a long history of violating the company's safety standards, which constituted grounds for discharge under the collective bargaining agreement [CBA] negotiated by Nadeau's union and Twin Rivers management.[7]

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[5] Section 301 of the LMRA provides the federal district courts with original jurisdiction over contract disputes arising under collective bargaining agreements that affect commerce:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185. Based on this statutory language, the Supreme Court has developed a preemption doctrine under the LMRA that bars state law claims that require the interpretation of collective bargaining agreements, to ensure national uniformity in the interpretation of collective bargaining agreements, and to ensure the enforcement of the arbitration provisions that are universal to those agreements. *See Lingle*, 486 U.S. at 404,

[6] The Maine Whistleblowers statute prohibits an employer from retaliating in any way against an employee for engaging in certain protected activity, such as when "[t]he employee, acting in good faith, . . . reports to the employer . . . what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." 26 M.R.S. § 833(1)(B).

[7] Most recently, Nadeau failed to comply with the terms of the CBA when he was operating a forklift in the mill. In particular, Nadeau was disciplined under the CBA for unloading a tractor-trailer with a forklift without first locking the brakes and chocking the wheel, a violation of the company's safe truck operation policy. This incident warranted his discharge under the CBA. However, Twin Rivers exercised its managerial discretion under the CBA and offered Nadeau one more chance, formally called a "last chance agreement" under the CBA. Nadeau voluntarily signed that new agreement. Under the terms of the agreement, any future safety violation would result in Nadeau's summary termination, and Nadeau would waive the right to arbitrate such

Independent of these legitimate, non-retaliatory reasons for its decision, Twin Rivers moved for summary judgment on the sole basis that Nadeau's whistleblower claim was preempted by the LMRA. The Superior Court agreed and granted Twin Rivers' motion. The court concluded that, since the MWPA "shall not be construed to diminish or impair the rights of a person under any [CBA]," 26 M.R.S. § 837, the court was thereby required to interpret the terms of the CBA to determine whether there was any potential conflict between that contract and the MWPA. But, as the court recognized, § 301 of the LMRA preempted any such interpretation of the CBA under state law, thereby requiring the court to dismiss Nadeau's claim. *See Lingle*, 486 U.S. at 405-6. The case is now before the Maine Law Court on Nadeau's application for further appellate review.

NELF argues, in support of Twin Rivers, that § 301 of the LMRA preempts Nadeau's whistleblower claim because § 837 of that statute makes his whistleblower claim *depend on* an interpretation of his union's collective bargaining agreement. That is, the Maine Legislature has *invited* LMRA preemption by conditioning the enforcement of Nadeau's whistleblower claim on the absence of any conflict between the MWPA and his union's. 26 M.R.S. § 837 ("This subchapter shall not be construed to diminish or impair the rights of a person under any [CBA].").

This express statutory restriction on the MWPA's scope would require a court to engage in a preliminary interpretation of the CBA to determine whether there were in fact a conflict between that statute and the contract. But § 301 of the LMRA forbids any such interpretation of a CBA under state law. "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted." *Lingle,* 486 U.S. at 405-6. Indeed, *Lingle* anticipated the very issue presented in this case when the Court explained that the LMRA would preempt the enforcement of a state employment statute of general application when that statute required a court to interpret the terms of a CBA in certain cases. "[I]f a law applied to all state workers[8] but required, at least in certain instances, collective-bargaining agreement interpretation, *the application of the law in those instances would be pre-empted.*" *Lingle*, 486 U.S. at 407 (emphasis added).

Stated otherwise, § 837 of the MWPA invites preemption under § 301 of the LMRA because it conditions the enforcement of Nadeau's whistleblower claim on the absence of any conflict between his rights under the MWPA and *management's rights* under the collective bargaining agreement, thereby requiring an impermissible interpretation of that agreement. Indeed, § 837's plain language protects the collective bargaining rights of both employees and employers. Notably, the statute provides that it "shall not be construed to diminish or impair the rights of *a*

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termination. Subsequently, Nadeau committed another safety violation when his forklift collided with a core saw and he failed to report the incident. Management later determined that he had damaged the core saw, and that his failure to report the accident violated the CBA's disciplinary rules and warranted his termination. Nadeau then sued Twin Rivers in Maine Superior Court, alleging a retaliatory discharge under the MWPA.

[8] It is clear from its context that the term "state workers" means the workers within a particular state, and not that state's government workers.

person [and not just an employee] under any collective bargaining agreement." Moreover, the MWPA defines "a person" broadly to include "an individual, sole proprietorship, partnership, *corporation*, association or *any other legal entity*." 26 M.R.S. § 832(3) (emphasis added).

Therefore, § 837 would require a court to determine whether Nadeau's statutory remedies and protections under the MWPA might conflict with the collective bargaining rights of his employer, defendant Twin Rivers Paper Company. This would include management's right to discipline an employee and ultimately to discharge that employee for cause. In fact, the parties' collective bargaining agreement in this case contains a broad "management rights" section, which allows the employer to discipline an employee and to terminate that employee for just cause. These bargained-for rights to exercise management prerogative might conflict with Nadeau's statutory right to engage in a wide range of protected activity under the MWPA, and to sue Twin Rivers for discharging him allegedly because of this activity. However, § 301 of the LMRA bars this kind of probing state- law inquiry into management's negotiated rights under the collective bargaining agreement.

Nevertheless, the Maine Legislature retains the right to amend the statute, such as by repealing § 837. Alternatively, Nadeau's union and Twin Rivers could negotiate an amendment to the parties' collective bargaining agreement to clarify that nothing contained within that agreement is intended to interfere in any way with an employee's rights under the MWPA. *See Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40, 44 (1st Cir. 1997) (suggesting similar contractual language to avoid LMRA preemption of Massachusetts Workers' Compensation Act claims, where that statute contains similar proviso avoiding conflict with collective bargaining agreement). However, unless and until any such changes are made to the MWPA or the parties' agreement, § 301 of the LMRA should preempt Nadeau's MWPA claim.

NELF also rejects N arguments that the Superior Court's decision violates certain United States Supreme Court federal labor law precedents. First, he argues that the Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), had, *sub silentio*, implicitly concluded that § 301 of the LMRA did not preempt a statutory proviso contained in Hawaii's whistleblower protection statute that is substantially similar to § 837. To be sure, the Court held that the employee's whistleblower claim was not preempted. However, neither the Court nor the parties ever raised the statutory proviso in the Hawaii statute that resembles § 837. And the Court itself has emphasized that, in our adversary system, it is up to the parties themselves to protect their rights by raising arguments to the Court's attention. Second, Nadeau argues, apparently for the first time, that the Superior Court's decision would violate his rights under § 7 of the NLRA (the right to concerted activity for mutual aid or protection) because it would deny him whistleblower protection under the MWPA due to his union membership. But the employee in *Martin*, cited above, raised the *same* argument, and the First Circuit rejected it, for reasons that apply with equal force here. Section 837 does not discriminate against union-represented employees because nothing in that section prevents the union and the employer to agree *to leave undisturbed* an employee's statutory rights under the MWPA. Nowhere does § 837 set any limits on the scope of the employee's rights under the collective bargaining agreement. Instead, § 837 merely bars a conflict between an employee's statutory rights and management's collective bargaining rights.

Supporting the statutory requirement that the New Hampshire Department of Environmental Services must perform a cost-benefit analysis before establishing maximum levels of a contaminant in the public water supply

Plymouth Village Water & Sewer District, et al. v. New Hampshire Dept. of Environmental Services (New Hampshire Supreme Court)

This interlocutory appeal arises out of an action brought by the plaintiffs, including 3M Company, to enjoin the enforcement by the New Hampshire Dept. of Environmental Services (DES) of its recently adopted rules governing the maximum contaminant levels (MCLs) of certain chemicals found in public water supplies. In its amicus brief NELF supports 3M on the sole issue on which the plaintiffs prevailed below, i.e., whether DES should have performed a fully quantified cost-benefit analysis before setting MCLs and imposing substantial compliance costs on the public and businesses.

On July 10, 2018, the governor of New Hampshire signed a law aimed at regulating PFAS (per- and polyfluoroalkyl substances) contamination of the public waters of the state. As relevant to NELF's amicus brief, the statute (RSA 485:3, (I)(b)) requires the DES to set MCLs after "*consideration* of the extent to which the contaminant is found in New Hampshire, the ability to detect the contaminant in public water systems, the ability to remove the contaminant from drinking water, *and the costs and benefits to affected parties that will result from establishing the standard*." (Emphasis added.)

On January 4, 2019, the DES published proposed MCLs and set a schedule for public hearing and comment, noting that very recent research might cause it to set substantially lower final MCLs. After the hearing and comment period, on June 28, 2019, the department's final rulemaking set MCLs substantially lower than originally proposed. DES stated that the principle reason for this was new evidence that PFAS were passed from mothers to their breastfeeding infants. With the change, the estimated range of compliance costs rose from $7-14 million for the proposed MCLs to as much as $190 million for the final ones.

At issue on appeal is what the statutorily mandated "consideration" of costs and benefits means. In its amicus brief, NELF argues that RSA 485:3, I(b) should be understood not only textually, but also against the background of the costs DES has historically imposed by its regulations. DES has a history of skirting the state's constitutional ban on unfunded mandates being imposed on political subdivisions of the state. In the past, for example, DES argued that functions, such as water and sewer, because undertaken by private entities as well as municipalities, are excluded from the ban. This led the legislature to enact RSA 541-A:25, in which it reinforced and broadened constitutional prohibition and included "sewer and water" functions specifically. It is consistent with this background, NELF argues, to read RSA 485:3, I(b) as expressing the legislature's intent that DES account in the most punctilious and most thoroughly documented manner for any proposed fiscal impositions stemming from MCLs. That means a consideration of costs and benefits specifically in the form of a full cost-benefit analysis. The judge was therefore entirely correct when he said of the DES's predominantly qualitative consideration of "costs and benefits," "Any rational interpretation of the statute requires more."

Indeed, as NELF lays out in detail in its brief (on which the Business and Industry Association of New Hampshire was co-amicus), from its first step in the rule-making process DES openly acknowledged that its methodology would fall far short of an adequately quantified cost-benefit analysis. It stated, as it has throughout the course of this dispute, that the data necessary for such an analysis are lacking, and yet it proceeded undaunted by this critical shortcoming. For example, in a report issued at that time, it told all "affected" stakeholders what to expect and what not to expect, and specifically that they should expect a merely "qualitative description of anticipated costs" because it was unable to "determine[e] costs associated with a number of different potential standards and captur[e] marginal costs." Similarly, on the benefits side of the analysis, DES announced that its informed rule-making would be analytically hobbled there too. "In general," DES wrote "it is difficult to quantify the monetized benefits for environmental and public health standards."

As NELF recounts, DES's approach remained unchanged in June 2019, when it issued the final MCLs, with their hugely increased costs compared to those of the proposed MCLs. Despite the glaring analytical deficiencies of its approach, DES confidently opined that "after considering what currently is known about costs and benefits NHDES believes that the benefit of adopting these rules is not outweighed by the costs of implementing the proposed health based standards."

NELF observes that, when the judge granted the injunction, DES should not have been surprised. It had repeatedly, from the initiation of its rule making, declared that it lacked the data needed to conduct the statutorily mandated cost-benefit analysis; yet, undeterred, it proceeded to issue extraordinarily costly MCLs in the unsubstantiated belief that the costs do not outweigh the benefits. Consequently, the injunction was justified and should be upheld, NELF tells the New Hampshire Supreme Court.

Arguing that the Securities and Exchange Commission may not seek and obtain a court order for disgorgement as a form of "equitable relief."

Liu v. Securities and Exchange Commission (United States Supreme Court)

This case, which is before the Supreme Court on the merits, raises an important question of securities law, namely, whether the Securities and Exchange Commission (SEC) may obtain a court order for disgorgement as a form on nonpunitive, "equitable relief" for a securities law violation. Given that courts sitting in equity traditionally have aimed to restore the status quo after wrongdoing and not to punish the wrongdoer, penalties are foreign to traditional principles of equity. For this reason, NELF has filed a brief supporting the Petitioners in their argument that the SEC may not seek such disgorgement from the equitable powers of a court.

Because the question presented in this case is purely one of law, the factual background of the dispute is not important to summarize here. The importance of the case is shown by the fact that for decades the SEC has invoked the equitable powers of federal courts in order to obtain judgments for the "disgorgement" of funds allegedly acquired through the violation of federal securities laws. This remedy traces back to a 1970 district court decision, and the amounts won by the commission in this way now total billions of dollars annually. Surprisingly, then, in 2017, when the Supreme Court was considering what limitations period applies to these disgorgement suits, the justices found themselves wondering aloud during oral argument as to where exactly the SEC was authorized by statute to sue for this remedy.

> Justice Kennedy: Is it clear that the district court has statutory authority to do this? . . . [I]s there specific statutory authority that makes it clear that the district court can entertain this remedy?
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> . . . .
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> Justice Sotomayor: Can we go back to the authority? . . . [I]f they're not doing restitution, how could that be the basis of disgorgement?
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> . . . .
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> Justice Alito: [I]t would certainly be helpful and maybe essential to know what the authority for [disgorgement] is. . . .
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> . . . .
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> Chief Justice Roberts: [T]he SEC devised this [disgorgement] remedy or relied on this remedy without any support from Congress.
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> . . . .
>
> Justice Gorsuch: Well, here we don't know [when the disgorged money goes to the victim], because there's no statute governing it. We're just making it up.

Oral Arg. Tr. 7-9, 13, 31, 52, *Kokesh v. Securities and Exchange Commission*, No. 16-529 (April 18, 2017). When it issued its opinion on the limitations question, the Court inserted a significant footnote:

> Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.

Kokesh v. Securities and Exchange Commission, 137 S.Ct. 1635, 1642 n.3 (2017). It is the question raised by this footnote that this case should answer.

While the SEC depicts *Kokesh* as irrelevant to this question, in its amicus brief in support of the Petitioners NELF argues that the Supreme Court's ruling in *Kokesh*, an enforcement action, virtually compels the conclusion that disgorgement may not be granted by a court as an equitable remedy in cases like this one. NELF shows that the *Kokesh* Court's reasoning did not depend on any aspect of the law of limitations of actions, but was merely applied to a limitations question. Hence, there are no fetters on that reasoning, and it should be held to apply with equal force to the present action, which the SEC itself characterizes as also an enforcement action.

NELF refutes in detail two additional arguments made by the SEC. First, NELF examines the SEC's claim that long ago, in *Porter v. Warner Holding Co*., 328 U.S. 395 (1946), the Supreme Court recognized that federal courts have inherent equitable powers to grant this form of relief. But, as NELF explains, in that case *restitutionary* disgorgement was ordered for the benefit of specific injured persons in order to restore the status quo ante; the relief was not a punitive disgorgement where, as here, the disgorged funds are to be kept by the government. Moreover, the *Porter* court itself distinguished the disgorgement ordered there from punitive remedies.

The SEC's second argument asserts that Congress ratified punitive disgorgement as equitable relief when it enacted certain related provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Those provisions were enacted, supposedly, against a settled "backdrop" of decisions in which the Supreme Court had "repeatedly characterized disgorgement as an equitable remedy," as the SEC puts it. The SEC invokes the canon of prior construction and claims that the Court's supposed prior recognition of equitable "disgorgement" is now, with Sarbanes-Oxley, essentially baked into the securities statutes. In rebuttal, NELF points out that the SEC's argument flunks every requirement for correct use of the canon. NELF also demonstrates in detail that the cases cited by the SEC do *not* show that, before the enactment of Sarbanes-Oxley, the Supreme Court had reached a clear, settled view that punitive securities disgorgements, or any other kind, were relief available under the equitable powers of the federal courts. In fact, the cases cited by the SEC do not support the existence of a settled decisional "backdrop" of punitive disgorgements any more than does *Porter*, on which three of them in fact rely.

Arguing that corporate officers may not be held personally liable under the Massachusetts Wage Act for a violation of the Massachusetts Prevailing Wage Act

Donis v. American Waste Services, LLC (Massachusetts Supreme Judicial Court)

This case is before the Massachusetts Supreme Judicial Court (SJC) on further appellate review, and the Court has requested amicus briefing on the following important issue of personal liability under Massachusetts wage laws. When an employee sues his employer under § 27F of the Massachusetts Prevailing Wage Act, G. L. c. 149, § 27F, a detailed statute that regulates the wages of employees performing under certain public works contracts, can that employee also sue the employer's "president and treasurer . . . and any officers or agents having the management of such corporation," as provided under the general Massachusetts Wage Act, G. L. c. 149, § 148? Section 27F contains its own liability and private remedies provisions, which do not impose any such personal liability on corporate officers.

Nonetheless, both the Superior Court and the Appeals Court in this case held that the plaintiffs, ten former employees of American Waste Services, LLC (AWS), a company that contracts with cities and towns, under § 27F, for trash and recycling services, could sue both AWS and AWS's officers, under the Wage Act. As a result, the Appeals Court affirmed a final judgment of mandatory treble damages ($357,108, representing three times actual damages of $119,036) against defendants Christopher Carney and Michael Galvin, who were the co-owners and, respectively, AWS's president and vice president.

Moreover, the facts of this case are particularly troubling, because AWS violated the Prevailing Wage Act through no fault of its own. Instead, it is undisputed that certain town officials who awarded the contracts to AWS failed to fulfill their statutory obligation, under § 27F, to obtain from the Commonwealth's Division of Labor Standards a current prevailing wage rate schedule to attach to each contract when it was renewed or extended. As a result, AWS was unknowingly paying less than the prevailing wage on some of its renewed or extended contracts. Nevertheless, § 27F imposes liability on "whoever pays less than said rates of wages," and the Appeals Court interpreted this language to establish strict liability.

NELF has filed an amicus brief in support of the defendants, arguing that § 27F of the Prevailing Wage Act should be deemed the *exclusive remedy* for employees who perform under those public works contracts that are regulated by that statute. Under § 27F, "[a]n elaborate and comprehensive statutory system has been established fully and completely dealing with the subject matter [of certain public works contracts]. It was intended to be an exclusive remedy. The legislative intent cannot be thwarted [by allowing an employee to bypass that statute and sue under the Wage Act]." *Huff v. City of Holyoke*, 386 Mass. 582, 585 (1982) (citation and internal quotation marks omitted) (discussing G.L. c. 84, § 15, which provides exclusive remedy for claim of personal injury or property damage against governmental entities responsible for defects in a way).

Indeed, § 27F is a comprehensive and *self-contained* statute, with its own detailed liability and remedies provisions. Moreover, the statute focuses narrowly on the prevailing wages and other contractual requirements pertaining to certain non-construction public works contracts. By contrast, the Wage Act is a general, catch-all statute ensuring the timely payment of wages earned, affording a statutory remedy to the employee who has no other specific statutory remedy available. See *Crocker v. Townsend Oil Co.*, 464 Mass. 1 (2012) (employees who proved misclassification as independent contractors but whose claims for nonpayment of premium overtime, under G. L. c. 151,§ 1A, were time-barred could nonetheless pursue timely Wage Act claims to recover unpaid overtime hours worked, but at regular rate of pay). Therefore, the employees' claims in this case should be governed by the liability provision of the Prevailing Wage Act, not the broader liability provision of the Wage Act. *See Monell v. Bos. Pads, LLC*, 471 Mass. 566, 577 (2015) (applying "the familiar canon of construction providing that a specific statute . . . controls over the provisions of a general statute," and holding that real estate licensing statute, not general independent contractor statute, determined proper classification of real estate agents as independent contractors, even though real estate statute required real estate brokers to *supervise and control* agents' work, and such control would have rendered agents employees under general independent contractor statute).

In addition, the Legislature's omission of any personal liability provision in § 27F should be deemed a deliberate policy choice that must be honored, especially because the Legislature did include a personal liability provision in the general Wage Act *and* in a neighboring, related section of the Prevailing Wage Act that regulates construction contracts. G. L. c. 149, § 27 ("The president and treasurer of a corporation and any officers or agents having the management of such corporation shall also be deemed to be employers of the employees of any corporation within the meaning of sections 26 to 27B, inclusive."). Accordingly, "[t]he omission of particular language from a statute is deemed deliberate where the Legislature included [the] omitted language in related or similar statutes." *Commonwealth v. Johnson,* 482 Mass. 830, 835 (2019) (citation and internal quotation marks omitted). Since the omission of a personal liability provision in § 27F was clearly intentional, only the Legislature could change this. "If the Legislature intentionally omits language from a statute, no court can supply it." *Doe v. Superintendent of Sch. of Worcester,* 421 Mass. 117, 128 (1995). If allowed to stand, however, the lower courts' decisions would contravene this core principle of statutory construction by allowing an employee who falls under § 27F, and is therefore limited to suing his employer, to bypass § 27F and sue the employer's officers under the Wage Act. As a result, the Prevailing Wage Act's detailed liability and remedies sections would be rendered virtually meaningless. This result would violate "[the] common tenet of statutory construction, that, wherever possible, no provision of a legislative enactment should be treated as superfluous." *Monell*, 471 Mass. at 576.

Finally, NELF has argued that the Appeals Court misinterpreted the SJC's decision in *Crocker v. Townsend Oil*, quoted above, to support its holding that an employee suing his employer under the Prevailing Wage Act can also sue his employer's officers for personal liability under the Wage Act. *Crocker* does not support that holding and actually defeats it. In that case, the SJC actually held that an employee could *not* evade the restrictions of a specific wage law by attempting to recover the specialized wages available under that statute as if they were regular "wages earned" under the Wage Act. In particular, the plaintiffs in *Crocker* argued that they had been misclassified as independent contractors and that they were therefore entitled to recover for the nonpayment of overtime hours worked as employees, at the premium statutory rate of time-and-a-half, under G. L. c. 151, § 1A. However, the two-year statute of limitations had already run for any overtime claims, under G. L. c. 151, § 20a. Accordingly, the plaintiffs attempted to avoid that limitations period by suing under the Wage Act, which has a three-year limitations period, and by arguing that their claims for time-and-a-half overtime were really just claims for the nonpayment of regular "wages earned" that were recoverable under the Wage Act.

The Court in *Crocker* rejected the plaintiffs' argument outright and embraced the employer's argument that "[a]llowing the plaintiffs to assert claims for unpaid overtime under the Wage Act has the practical effect of obviating the Legislature's determination that a shorter limitations period should apply for unpaid overtime claims under G.L. c. 151, § 1A.". As a result, the Court held that the plaintiffs could only recover "for unpaid overtime work at the regular rate under the Wage Act," not at the premium rate under the overtime statute. In so holding, the Court in *Crocker* made it clear that an employee who seeks to recover specialized wages available under a specific wage statute cannot avoid the restrictions of that statute by seeking to recover those specialized wages as if they were regular "wages earned" under the Wage Act.

The SJC has scheduled oral argument for February 13.

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.