LITIGATION REPORT

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Recent Decisions

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

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On Monday, May 21, 2018, the Supreme Court issued its decision in this case, with the majority agreeing with NELF that the National Labor Relation's Act's protection of employees' "right . . . to engage in . . . concerted activities. . . ." does not implicitly repeal class arbitration waivers contained in valid arbitration provisions must be enforced. The decision was a major victory for NELF and its supporters, upholding freedom of contract and maintaining the high bar that must be satisfied for a finding that any federal statute overrides or impliedly repeals any portion of the Federal Arbitration Act.

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

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

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

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

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

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

The Court's decision agreed with NELF on several of these points.

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

Allison v. Eriksson (Massachusetts Supreme Judicial Court)

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

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

G. L. 156C, § 60(b) (emphasis added).

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

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

Supporting reversal of the lower courts verdict, NELF argued, in support of Dr. Eriksson, that a judicial appraisal is the exclusive remedy for a minority member of an LLC who opposes a merger. The plain language of the LLC statute mandates this result and therefore precludes the LLC member from pursuing a *Donahue* claim against the controlling member and seeking broad equitable remedies. NELF also argued that, contrary to the Superior Court's view in this case, there is *no* SJC precedent that permits a trial court to set aside this exclusive statutory remedy under the LLC statute and review the overall fairness of an LLC merger under *Donahue*. In this regard, NELF carefully distinguished two prominent SJC cases--*Coggins v. New England Patriots Football Club, Inc*., 397 Mass. 525 (1986), and *Pointer v. Castellani*, 455 Mass. 537 (2009)--upon which the lower court (erroneously) relied to support its decision. As NELF argues, neither of those cases is on point because neither involved a minority member's challenge to an LLC merger. In particular, NELF argued that, unlike the llc statute, the business corporation statute (c. 156b) at issue in *Coggins* expressly provides for an "illegality or fraud" exception to the exclusive remedy of a judicial buyout, which the Court interpreted as incoporating the *Donahue* duties. For these and other reasons set forth in its amicus brief, NELF urged the Court to reverse the Superior Court's decision.

In its decision issued on May 30, 2018, the SJC, disagreeing with NELF, held that, in the circumstances of this case, the judicial buyout provided by G.L. c. §60(b) was not the exclusive remedy for a minority member challenging the merger. The Court based its decision on its [arguably strained] interpretation of § 60(b), which states that the merger has been conducted "under the provisions of sections fifty-nine to sixty-three . . . ." The Court read this quoted language as requiring the majority member's *compliance* with the cited statutory provisions in order to invoke § 60(b) as the minority member's exclusive remedy. In particular, § 63(b) provides that, "[t]o the extent that, at law or in equity, a member or manager has duties, including fiduciary duties, and liabilities relating thereto to a limited liability company or to another member or manager, . . . the member's or manager's duties and liabilities may be expanded or restricted by provisions in the operating agreement." Applying § 63(b), the Court concluded that the operating agreement had created protections for Allison, the minority member, which were "akin to those provided at law to a close corporation," and that Eriksson had breached those duties (even though, as NELF had argued, the agreement did *not* address the circumstances of a merger.) Therefore, reasoned the Court, Eriksson's purported breach of his contractual duties when he structured the merger constituted, in effect, a breach of his *Donahue* duties owed to Allison, thereby excusing Allison from pursuing his exclusive statutory remedy of a judicial buyout under § 60(b).

Recent Settlement

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

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

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

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

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

Shortly after the NELF Board meeting on March 12, 2018, we were advised that this case had settled. We were also advised that the settlement was likely due "in significant part" to NELF's efforts.

Pending Cases

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

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

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

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

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

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

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

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

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

Did the United States Fish and Wildlife Service act beyond its authority when it designated private property as a critical habitat for a creature that does not live on the property and would die if placed there?

Weyerhauser Company v. United States Fish and Wildlife Service (United States Supreme Court)

This case concerns the Fish and wildlife Service's (FWS) promulgation of regulations that are, we believe, ultra vires and encroach unlawfully on property rights.
At the center of the case is the dusky gopher frog, an endangered species that can survive only in habitat that contains three very specific criteria: (i) small, isolated, ephemeral ponds for breeding; (ii) a non-breeding habitat consisting of an upland, open-canopy forest located close to the ponds; and (iii) terrain like that described in (ii.) but connecting its non-breeding grounds to the ponds where it breeds. Crucial to any understanding of the case is that all three features must be present if a successful breeding population of the frogs is to be establish on any site.

The legal dispute now before the court concerns the "critical habitat" designation of 1,544 acres of privately owned forest ("Unit 1") in Louisiana. The frog neither lives there nor could live there, because the land does not contain all three of its habitat requirements. For it to be otherwise, the entire forest of loblolly pine there now would have to be cut down and the land replanted with saplings of a different species, which would then take years to mature before a population of frogs could be moved there. The cost would run into the millions of dollars, and none of the private owners has any interest in rendering their land unusable, at great cost, except to the frogs, and the government has not offered to buy the land in order to construct a habitat for the frogs at its own cost.

NELF's objection to FWS's designation of Unit 1 as critical habitat is that the Endangered Species Act does not authorize it, while it does not benefit the frogs in the least and prevents the land from being put to its highest and best use. The only land FWS is authorized to designate as critical habitat is limited to "any *habitat* of [an endangered species] which is then considered to be critical *habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review by the Fifth Circuit explained, that plain language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be at present "a place where the species" does or could "naturally live or grow." It is undisputed that Unit 1 does not fit that description.

In addition, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation* of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no sensible reading of that phrase that includes areas that are simply uninhabitable by the species, i.e., places where the frog would *perish*. To add insult to injury, the FWS also claims that its designation is unreviewable.

The Supreme Court granted certiorari on January 22, 2018, and on April 30, 2018, NELF joined the Cato Institute on its amicus brief. In addition to making the criticisms mentioned above, the brief also argues that FWS's expansive definition of "critical habitat" implements the Endangered Species Act far beyond any reasonable reading of the Commerce and Necessary and Proper Clauses. Specifically, the regulation is not necessary because Unit 1 doesn't play any role in the frog's conservation, and is not proper because it infringes on state land-use regulation without sufficient justification. Moreover, the mere existence of land like Unit 1 does not constitute "economic activity" under the Commerce Clause. In short, the courts below sanctioned a rewriting of the ESA when they granted *Chevron* deference to the FWS.

Arguing that the Federal Arbitration Act's exemption for "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce" applies only to contracts establishing an employer-employee relationship and not to independent contractor agreements.

New Prime, Inc. v. Oliveira (United States Supreme Court)

NELF has filed an amicus brief in this case, in which the United States Supreme Court will decide the scope of the Federal Arbitration Act's exemption for "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). Does this exemption apply only to contracts that establish an employer-employee relationship, or does it also apply to independent contractor agreements? *In Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001**)**, the Court held that the exemption applied only to interstate transportation workers, not to all workers generally. (In that case, the Court was not asked to interpret the "contract of employment" language that is now in dispute.) At issue, then, is whether the FAA exempts the *entire* interstate transportation workforce from its scope, or whether the exemption applies only to those transportation workers who are subject to an employer-employee agreement. This case matters to NELF and its supporters because an unduly broad interpretation of "contracts of employment" would mean that no interstate transportation carrier could ever enforce its arbitration agreements and class action waivers against any of its workforce under the FAA, be they employees or independent contractors.

The First Circuit in this case concluded that the term "contract of employment" was sufficiently ambiguous, especially at the time of the FAA's enactment in 1925, to embrace any contract to perform work, regardless of the legal status of the worker. Accordingly, the lower court held that the FAA exempted the Independent Contractor Operating Agreement that the plaintiff, truck driver Dominic Oliveira, had signed with New Prime, Inc. ("Prime"), the operator of an interstate trucking company. That agreement specified the terms of Oliveira's independent contractor relationship with Prime. It also required Oliveira to arbitrate all work-related disputes on an individual basis. Notwithstanding the parties' agreement, Oliveira filed a putative class action against Prime in the federal district court for the District of Massachusetts, alleging that Prime had misclassified him, and all other similarly situated truck drivers, as independent contractors, in violation of the Fair Labor Standards Act. Because the First Circuit concluded that the FAA exempted independent contractor agreements, the court denied Prime's motion to compel arbitration on an individual basis and allowed Oliveira's putative class action to proceed in court.

In its amicus brief, NELF argues that the phrase "contracts of employment" should be interpreted in its immediate context, under the rule of *noscitur a sociis* ("it is known from its associates"). The phrase modifies "seamen" and "railroad employees," two prominent classes of transportation employees. This indicates that "contracts of employment" must establish an employer-employee relationship. This meaning is confirmed by applying the related rule of *ejusdem generis* ("of the same kind"), to the residual phrase "any other class of workers," which immediately follows seamen and railroad employees in the exemption. In *Circuit City*, the Court applied *ejusdem generis* to narrow the meaning of that residual phrase "any other class of workers" to other transportation workers only, because the phrase followed specific examples of transportation workers. Here, application of *ejusdem generis* takes the analysis one step further, by limiting the same residual phrase to other transportation workers who are employees, because seamen and railway employees are specific examples of transportation workers who are employees. These rules of statutory construction serve the overarching purpose of the FAA. The exemption is embedded in a statute whose purpose is to ensure the judicial enforcement of arbitration agreements according to their terms. This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA.

In its brief, NELF also offers a plausible historical explanation for this exemption. The FAA's exemption for the employment contracts of seamen and railroad employees was apparently intended to leave undisturbed those employees' statutory right, under the Jones Act and the Federal Employers' Liability Act (FELA), respectively, to sue their employer in court for work-related injuries. The FELA and the Jones Act granted those transportation employees a liberalized tort remedy, due to their particularly hazardous working conditions and the inadequacy of state tort law to compensate them for their injuries. Since independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the FAA's scope.

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

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

On October 2, 2017, the First Circuit heard oral argument in this case, which raises an important issue of online contract formation that arises from a large and growing category of online standardized consumer agreements. At issue is whether a business has provided the online customer with sufficient notice of its mandatory arbitration policy and class action waiver, and whether the customer has consented to those terms, when the arbitration provisions are viewable only by clicking on a hyperlink to the agreement's terms and conditions, and the customer is not required to check an online box indicating that she has accepted those terms. Instead, the business has clearly provided that the customer will be deemed to have accepted all of the contract terms once she has created an online account.

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

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

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

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

Does the Federal Arbitration Act permit an arbitrator to certify a class that includes tens of thousands of absent class members, when the arbitration agreement in dispute does not authorize the arbitrator to decide whether the agreement permits class arbitration, and only the named parties in the case agreed to submit the issue to the arbitrator?

Jock v. Sterling Jewelers Inc. (United States Court of Appeals for the Second Circuit)

In this case, the Second Circuit will decide whether an arbitrator "exceeded [her] [contractually delegated] powers," under § 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), when she certified a class of employees that included approximately *70,000* absent class members, even though the arbitration agreement at issue did not authorize the arbitrator to decide whether the agreement permitted class arbitration, let alone even mention class arbitration. The defendant, Sterling Jewelers Inc., is a nationwide retailer and employer. Sterling Jewelers required all of its employees to sign the same employment agreement, which contained a standard "all disputes" arbitration clause. The agreement was silent on the issue of class arbitration.

The plaintiff, Laryssa Jock, and other named plaintiffs, brought a putative class arbitration against Sterling, alleging gender discrimination under Title VII. Sterling argued that the agreement did not permit class arbitration, and the parties agreed to submit that issue to the arbitrator. The arbitrator concluded that the arbitration agreement authorized class arbitration and subsequently issued an award of class certification that included approximately 70,000 *absent* class members--i.e., employees who were *not* parties to the arbitration. At issue, then, is whether the arbitrator's determination that the arbitration agreement authorizes class arbitration, and her subsequent award of class arbitration, can bind absent class members who, though signatories to the same arbitration agreement as the named plaintiffs, never agreed to submit the issue of class arbitration to the arbitrator in the first place. The federal district court for the Southern District of New York agreed with Sterling Jewelers that the arbitrator had no contractual authority to bind any employees who were not parties to the arbitration, or who had not since affirmatively opted in to the proceedings. The court therefore vacated the arbitral award of class certification with respect to those approximately 70,000 absent class members, under § 10(a)(4) of the FAA. The named plaintiffs appealed the lower court's decision to the Second Circuit, where the case is now pending.

While this case arose from the Southern District of New York, the Second Circuit's decision will affect *all* businesses within that federal circuit, including in Connecticut and Vermont, that use standard arbitration agreements such as the one at issue here. Therefore, the Second Circuit's decision matters to NELF and its supporters because it will determine whether businesses in those New England states could suffer a comparable arbitral award of classwide arbitration that includes a vast number of absent class members.

NELF wrote an amicus brief in support Sterling Jewelers, arguing that an arbitrator has no authority to bind absent class members when, as here, the arbitration agreement does not delegate that issue to the arbitrator, let alone mention class arbitration at all. See *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring) (concluding same). This is because the issue of class arbitration should be presumptively decided by a *court*, as a so-called "question of arbitrability," unless the parties have clearly and unmistakably submitted that issue to the arbitrator (as did the named parties in this case, but not the absent class members). Although the Supreme Court has not yet decided the issue, the Court's recent FAA opinions strongly indicate that class arbitration is a substantive question of arbitrability for a court, not a procedural question to be decided by an arbitrator (unless the parties clearly say so). In deciding *who* should decide preliminary matters arising in arbitration--a court or an arbitrator--the Supreme Court has drawn a bright line between procedural questions that grow out of the arbitration, which the arbitrator presumptively decides, and substantive questions of arbitrability (such as the validity or scope of the arbitration agreement), which a court presumptively decides. And the Court has drawn this line based on the parties' *consent*. Since the parties have consented to arbitrate disputes, they have "implicitly authorize[d] the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement." *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp*., 559 U.S. 662, 684-85 (2010).

But the Court has also concluded that class arbitration is *not* such an implied procedural term, and that an arbitrator may therefore not freely inject the term in any arbitration agreement. "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties *consented* to it by simply agreeing to submit their disputes to an arbitrator." Stolt-Nielsen, 559 U.S. at 685 (emphasis added). Because class arbitration is not an implied procedural term that rides piggyback on the arbitration agreement itself, the parties never impliedly consented to have the arbitrator decide the issue. Without the parties' express consent, then, the issue of class arbitration belongs in court. But the absent class members here never consented to submit the issue to the arbitrator, because the parties' arbitration agreement makes no mention of class arbitration whatsoever. Therefore, the arbitrator had no authority to bind absent class members in her award of class certification, and the Second Circuit should affirm the lower court's decision.

Unfortunately and for no apparent reason the attorney for Sterling Jewelers decided at the last minute that he did not want NELF to file its brief, despite the fact that the same attorney had actively sought NELF's participation in an earlier stage of the same case, and despite the fact that NELF had sent the attorney a detailed email several weeks in advance of the filing deadline, setting forth NELF's proposed arguments and expressly asking whether the attorney's client would be amenable to amicus support in the case.

Urging rejection of a proposed Massachusetts ballot question approving an amendment to the Massachusetts Constitution that would impose an additional 4% tax on income above $1 million because, in clear violation of the Massachusetts Constitution, it deals with "unrelated" subjects.

Anderson v. Maura Healey (Massachusetts Supreme Judicial Court)

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

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

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

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

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

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

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

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

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

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

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

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

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

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.