Mission

The New England Legal Foundation is a 501(c)(3) not-for-profit public interest foundation whose mission is promoting public discourse on the proper role of free enterprise in our society and advancing free enterprise principles in the courtroom.

Since its founding in 1977, NELF has challenged intrusions by governments and special interest groups which would interfere with the economic freedoms of citizens and business enterprises in New England and the nation. Our ongoing mission is to champion individual economic liberties, traditional property rights, properly limited government, and balanced economic growth throughout our six state region.

New England Legal Foundation does not charge attorney’s fees for its legal services. Its operating funds are provided through tax deductible contributions made by individuals, businesses, law firms, and private charitable foundations who believe in NELF’s mission.

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To Our Friends and Supporters

The past year, as the year before, witnessed significant court decisions affecting the business environment in both state and federal appellate courts, including the U.S. Supreme Court. The importance of these judicial interpretations to the everyday lives of Americans received coverage in both the trade press and the general media, which closely followed several high profile business cases. Too often, that coverage appeared to be informed by an anti-business bias, often based on misconceptions about business that were no doubt fueled in part by the continuing impact of the 2008 world financial crisis. To date, the courts, and especially the U.S. Supreme Court, have for the most part remained aloof from such political pressures. But this cannot be taken for granted. We believe that one way to preserve the courts’ authority and ability to decide business issues based on the law, and not on politics, is to present to the courts the type of balanced approach for which NELF has consistently argued: one that balances the recognized need for regulation with the need also to maximize economic freedom within the regulatory framework.

NELF’s 2012 litigation docket reflected the challenges that businesses are facing in courts at all levels. In answering those challenges, NELF filed amicus briefs in New England state and federal courts and in the U.S. Supreme Court. We supported corporations’ First Amendment rights, argued for the enforceability of arbitration agreements and class arbitration waivers, opposed the expansive assertion of general personal jurisdiction over a foreign corporation in clear violation of the Due Process Clause, combatted judicial expansion by fiat of state statutes governing employment discrimination beyond the scope of the statutory language, and fought for the protection of private property rights against confiscatory state legislation. Among the amicus briefs we filed last year, four were in the United States Supreme Court. This reflects the often-observed fact that, under Chief Justice Roberts, the Highest Court has continued to grant certiorari in a number of major business cases that raise issues of relevance to our region.

In 2012 we also continued our emphasis on public programming and education. Our 2012 CEO Forum, entitled “Politics, Corporations, and the First Amendment,” which took place a month after the 2012 Presidential Election, presented a panel discussion on the Supreme Court’s controversial Citizens United decision and the issue of corporate speech in the political context. We were especially pleased that this event was moderated by former Massachusetts Chief Justice Margaret H. Marshall. The CEO Forum was supplemented by two breakfast panels on important business topics. In the spring our panel focused on the still-evolving law on the enforceability of class action waivers in arbitration agreements. Our fall program dealt with the ever expanding universe of whistleblower statutes and what every business and business lawyer should know if confronted with a whistleblower claim.

NELF’s vigorous advocacy of free market principles on so many different fronts, as in past years, was possible only because it enjoys the active support, commitment and hard work of the distinguished attorneys and other professionals who serve on the Board of Directors and the six New England State Advisory Councils. Despite full-time and challenging positions in law firms and businesses, these individuals take the time and make the effort to provide first rate governance to the Foundation. To these individuals, as well as to the companies, foundations and private citizens who support NELF, we give not only our thanks but a commitment to continue our dedication to the core values of our system of free enterprise in the years ahead.
CEO FORUM:
"Politics, Corporations, and the First Amendment"

NELF President Martin Newhouse welcomes guests at NELF’s 16th Annual CEO Forum on December 3, 2012.

Our Moderator for the evening, the Honorable Margaret H. Marshall.

Panelists Heather Gerken and Michael Macleod-Ball with Moderator Honorable Margaret H. Marshall, and Panelists Brian Mooney and the Honorable Christopher H. Shays.

NELF Chair Mark Beaudouin introduces the panelists and the topic of the evening: "Politics, Corporations, and the First Amendment."

Panelists Heather Gerken and Michael Macleod-Ball.

Panelists Brian Mooney and the Honorable Christopher H. Shays.

NELF President Martin Newhouse with NELF Board Member Don Frederico.

Foley Hoag LLP’s Andrew Schwartz with NELF Board Members Joe Blute and John Shope.

Panelist Michael Macleod-Ball with NELF Board Member & CEO Forum Co-Chair Mark Freel and PricewaterhouseCoopers’ James Agar.

State Senator Karen Skilpa, NELF Chair Mark Beaudouin, NELF Board Member Brian Leary, and Kit Beaudouin.

Alvarez and Marsal LLC’s Amy Goot with NELF Board Members Erik Skramstad and Pauline Booth.

Panelist Brian Mooney with NELF Board Member & CEO Forum Co-Chair Mark Freel.

Jackson Lewis LLP’s Andrew Pickett and CBIA’s Jennifer Herz with NELF Board Member John Rathgeber.

NELF Board Member Kimberly Train with Iron Mountain’s Paul Butler and NELF Board Members Lynda Harbold Schwartz and Garry Watzke.

EMC Corporation’s Krish Gupta, Chantal Lyon, Todd Jewett, Ellen McCabe, and Konrad Lee.

Demeo & Associates’ Joe Demeo, Allison Huppé, and Larry Defary.
Arguing Against an Overly Expansive Imposition of General Personal Jurisdiction Over a Foreign Parent of an Indirect California Operating Subsidiary

DaimlerChrysler AG v. Bauman
(United States Supreme Court)

In this case, DaimlerChrysler is seeking Supreme Court review of a Ninth Circuit decision which, in NELF’s view, dangerously and unconstitutionally expands the exercise of general personal jurisdiction over an out-of-state parent of an in-state indirect subsidiary. Because of the implications of the Ninth Circuit’s expansive jurisdictional ruling for those of NELF’s supporters who do business in California, NELF has filed an amicus brief in support of DaimlerChrysler, urging the Supreme Court to grant certiorari in the case.

The case was brought by 22 residents of Argentina, who sued DaimlerChrysler, a German corporation, in Northern District of California under the Alien Tort Statute of 1789 and the Torture Victim Protection Act of 1991, alleging that one of DaimlerChrysler’s subsidiaries, Mercedes-Benz of Argentina, engaged in human rights violations in Argentina during that country’s “Dirty War” in the 1970s and 1980s. DaimlerChrysler moved to dismiss the case for lack of personal jurisdiction. There appears to be no dispute that DaimlerChrysler has observed all the formalities of corporate separateness and, indeed, on that basis the district court granted DaimlerChrysler’s motion. However, after initially upholding the district court’s dismissal, the Ninth Circuit reconsidered and issued a decision finding that it had general personal jurisdiction over DaimlerChrysler based solely on the existence of a wholly-owned, indirect subsidiary in California that distributes DaimlerChrysler’s automobiles to dealers.

The Ninth Circuit reached its decision by entirely ignoring the fact that DaimlerChrysler and its subsidiary were separate corporate entities and eschewing the usual analysis of whether or not DaimlerChrysler had sufficient contacts with the jurisdiction to warrant the exercise of general personal jurisdiction (as opposed to special jurisdiction, which might arise from a specific transaction in the forum). Instead, the Ninth Circuit imposed general jurisdiction based solely on the facts that DaimlerChrysler’s operating subsidiary performed a “sufficiently important” function (such that the parent or some other subsidiary would have had to fulfill the task if the existing subsidiary did not exist) and that DaimlerChrysler exercised some control over the subsidiary (i.e., that it had a standard General Distributorship Agreement with the subsidiary). In its amicus brief NELF argued, inter alia, that the Ninth Circuit’s virtually limitless “test” defeats a corporation’s constitutionally protected, reasonable expectations concerning its amenability to suit in a remote jurisdiction and offends “traditional notions of fair play and substantial justice.” Although in its April 2013 decision in Kiobel v. Royal Dutch Petroleum the Supreme Court ruled that the Alien Tort Statute, which is at issue in this case, does not provide federal court jurisdiction for acts that occurred entirely outside the United States, as did the acts in this case, it nonetheless on the same day granted certiorari in this matter to address the jurisdictional issue that NELF briefed. NELF intends to brief the question again in an amicus briefs to be submitted on the merits.
Arguing That, Under the Supreme Court’s decision in *AT&T Mobility v. Concepcion*, the Federal Arbitration Act Requires That a Class Action Waiver in a Valid Arbitration Provision Must be Enforced Even Where There is No Preemption Because the Claim Arises Under Another Federal Statute

*American Express Company, et al. v. Italian Colors Restaurant, on Behalf of Itself and all Similarly Situated Persons, et al.* (United States Supreme Court)

In this case the Supreme Court has before it the important question whether, despite the Supreme Court’s broad decision in *AT&T Mobility LLC v. Concepcion* that class action waivers in arbitration provisions should be enforced under the Federal Arbitration Act, a court may nevertheless invalidate such a waiver when the claim at issue arises under a federal statute (in this case the Sherman Anti-Trust Act) and the plaintiffs claim they cannot vindicate their federal statutory rights individually because of their “small value” claims. The Second Circuit held that, notwithstanding *Concepcion*, it can invalidate the class arbitration waiver in these circumstances (as opposed to claims under state law, where the FAA would preempt state law). NELF, which initially filed an amicus brief in support of American Express’s Petition for Certiorari, subsequently filed another amicus brief on the merits after the Court granted certiorari to consider this important question.

In its amicus brief, NELF argues that the Supreme Court should clarify that, absent a “contrary congressional command” in the relevant federal statute, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), the FAA, as interpreted under *Concepcion*, should require the enforcement of class action waivers in the arbitration of federal statutory claims. NELF also argues that the Second Circuit has misinterpreted the Supreme Court’s vindication of rights test. Briefly put, in *Concepcion* the Court expressly rejected the “small claims” rationale for invalidating a class waiver. As Supreme Court precedent makes clear, a vindication of rights challenge to a class action waiver focuses solely on the unique costs of arbitration that are imposed by the agreement and would not exist in court. NELF notes that no such unique costs are challenged in this case.

Arguing That a Plaintiff Must Show Actual Injury to Establish Standing to Bring a Claim in Federal Court Under Article III of the United States Constitution

*First American Financial Corp. v. Edwards* (United States Supreme Court)

This case presented the issue whether Article III of the United States Constitution, which limits the federal court’s jurisdiction to “cases and controversies,” confers standing on a plaintiff who alleges a statutory violation but who cannot establish that the alleged violation caused any concrete injury. The statute at issue, the anti-kickback section of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2601 et seq., provides a private right of action for any homebuyer who merely establishes a violation of the statute, regardless of whether the homebuyer has been harmed by the alleged violation. In this case, in fact, the plaintiff homebuyer Edwards has conceded that she suffered no economic or other injury from the alleged statutory violation for which she has brought the action. After the Ninth Circuit ruled that, although Edwards had suffered no economic injury from the alleged violation of RESPA, she nevertheless had Article III standing to sue in federal court, First American Financial Corp.’s petition for certiorari was granted.

In its amicus brief on the merits in support of First American, NELF, on behalf of itself and co-amici United States Chamber of Commerce and Associated Industries of Massachusetts, analyzed judicial precedent (including the landmark *Marbury v. Madison*), and statutory and constitutional history to argue that the Court should reject any attempt by Congress to allow individuals who have not suffered a concrete, personal harm to sue in federal court. Despite having granted certiorari and notwithstanding the importance of the issue raised and the fact that the argument had been held, the Court, without explanation, dismissed the writ of certiorari on June 29, 2012, as improvidently granted.
Opposing on First Amendment Grounds the U.S. Department of Transportation’s Regulation of Truthful, Non-Misleading Corporate Speech

_Spirit Airlines v. U.S. Dep’t of Transportation_ (United States Supreme Court)

This case, in which NELF filed an amicus brief supporting the Spirit Airline’s Petition for Certiorari, dealt with the First Amendment’s protection of speech concerning an industry’s economic activity—an issue that follows from the Court’s recent and important decision in _Sorrell v. IMS Health_, in which NELF filed an amicus brief and NELF’s position supporting the business’s free-speech rights prevailed. In _IMS Health_ the Supreme Court invalidated, under the First Amendment, a Vermont statute prohibiting pharmacies from selling factual data to pharmaceutical marketers about doctors’ prescribing practices (data that revealed nothing confidential). At issue in this case was a Department of Transportation ("DOT") regulation whose stated purpose is to protect consumers from confusion about the total price of airfares. On that basis the regulation requires that airlines display prominently the total price that a consumer must pay for an airline ticket. The regulation, however, does not stop there, but aggressively regulates the manner in which airlines may advertise their competitive base fares and the substantial, applicable federal taxes and fees—i.e., the component prices that comprise the total price. Although, the DOT itself has found that these component prices are not the source of any consumer confusion, its regulation requires that, if an airline wants to list separately these component prices (the base fare and government charges), it may only do so literally “in fine print,” in “significantly smaller type” than the total price, and in a less prominent position in the advertisement.

NELF’s amicus brief in support of the airline argued that in this case the Supreme Court should be guided by its decision in _IMS Health_ and hold that, in this case as in _IMS Health_, a content-based regulation of speech concerning a business’ economic activity warrants heightened scrutiny. Moreover, under _IMS Health_, a regulation should fail heightened scrutiny where, as NELF argued is the case here, the regulation lacks a neutral justification. In short, NELF argued that, if the Court were to take the case, it would have had the opportunity to clarify the extent to which the First Amendment limits government action under the guise of consumer protection that has the purpose or effect of stifling an industry’s efforts both to promote its competitive prices and to hold the government accountable for its “cut” of the total price (i.e., the portion of the total price composed of government taxes).

Arguing That Reliance on the Expertise of an Intermediary Does Not Elevate an Arms’ Length Business Transaction into a Fiduciary Relationship

_Johnson et al. v. Priceline.Com Incorporated_ (United States Court of Appeals for the Second Circuit)

Priceline.com, Inc., ("Priceline") operates a website that provides travel related services. In one of its hotel reservation services, “Name Your Own Price” ("NYOP"), consumers bid to obtain a room in a designated city at a discounted rate that would not ordinarily be available to them. Using NYOP, the consumer may only specify the dates when the room is wanted, the geographical area, and the desired quality of the hotel; the consumer gives up the right to choose the hotel by name. The consumer then enters a “bid price” in the amount that the consumer wishes to pay per night, and Priceline attempts to find a room that matches the consumer’s bid price and other criteria. The plaintiffs commenced an action against Priceline in the Connecticut federal district court, alleging that although Priceline provided rooms at the bid price, the rooms actually cost Priceline less than what the plaintiffs had agreed to pay, and that the difference between the bid price and the price paid to the hotel was a “secret profit” that Priceline retained in violation of a fiduciary duty that it owed to the plaintiffs as their agent. After the trial court granted Priceline’s motion for summary judgment on the ground that no agent-principal relationship had been created between the plaintiffs and Priceline, the plaintiffs appealed to the Second Circuit.

In support of Priceline, NELF filed an amicus brief urging the Second Circuit to affirm the dismissal of the plaintiffs’ complaint. NELF argued, first, that under Priceline’s terms and conditions, Priceline agreed only to act as a self-interested service-provider functioning as an intermediary between the plaintiffs and the participating hotels, not as the plaintiff’s
Supporting the Enforcement of a Class Arbitration Waiver for Consumer Claims Under Massachusetts General Laws c. 93A

Feeney v. Dell
(Massachusetts Supreme Judicial Court)

The issue before the Massachusetts Supreme Judicial Court in this case was whether business parties could, by agreement, shorten the limitation period for actions arising out of their contract. The question was certified to the SJC by the U.S. District Court for the District of Massachusetts. It arose out of a dispute between a franchisor and the defendant, the former franchisee, which resulted in federal court litigation. After the franchisor sued the defendant for breach of the franchise agreement and other wrongs, the latter counterclaimed. Relying on a provision in the agreement that mandated a shorter limitation of action period than the six-years provided by the relevant statute of limitations, the franchisor moved to dismiss the counterclaims as untimely. This was, unconscionable all consumer class-arbitration waivers. Of key importance to this case, the Supreme Court explained that the FAA preempts California’s Discover Bank rule because it effectively requires all consumer arbitration agreements to offer class arbitration, and that class arbitration is antithetical to the

Supporting the Common Law Right of Contracting Parties in Massachusetts to Agree to a Reasonably Shorter Limitations Period for Claims Under the Contract Than That Allowed by Statute.

Creative Playthings Franchising Corp. v. Reiser
(Massachusetts Supreme Judicial Court)

At issue in this ongoing case is whether the decision of the Massachusetts Supreme Judicial Court (“SJC”) in Feeney v. Dell, Inc., 454 Mass. 192 (2009), remains valid after AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), discussed above. NELF had filed an amicus brief in the 2009 Feeney case, arguing that the consumer class-arbitration waiver at issue should be upheld under general Massachusetts contract law. In Feeney the SJC invalidated any class arbitration waiver in a consumer form agreement based on a fundamental Massachusetts public policy, embodied in Mass. G. L. c. 93A, favoring the aggregation of small-value consumer claims. In Concepcion, however, the Supreme Court held that the Federal Arbitration Act, 9 U.S.C. § 2 (“FAA”), preempted a similar categorical rule of decision, announced in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), that effectively declared as

“[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” Id., 131 S.Ct. at 1748. In the latest stage of this case, Dell has obtained interlocutory appellate review of a decision of the Superior Court denying Dell’s renewed motion, in light of Concepcion, to confirm the arbitrator’s original award enforcing the class waiver and dismissing the claim on its merits. The Superior Court disagreed that the SJC’s decision in Feeney has been overruled by Concepcion, and that Concepcion preserves challenges to class waivers under general contract defenses. The SJC has now taken the case for direct appellate review.

NELF has filed an amicus brief again in support of Dell, arguing that Concepcion should preclude any state-law challenge to a class arbitration waiver, be it a per-se rule of decision or a case-specific inquiry, and that the SJC should therefore reconsider its 2009 decision in light of Concepcion and vacate the lower court’s invalidation of the class waiver.

agent. NELF also noted that, contrary to the allegations in the complaint, Priceline never represented that all its compensation would be captured in its “fees and services” charge, rather than in the bid price; in fact, Priceline specifically stated that only “part” of its compensation was found the services charge. Moreover, NELF contended that the elements of the principal-agent relationship simply cannot be found in the actual conduct of the parties. In particular, NELF explained why the conduct of Priceline was indistinguishable from the kinds of ordinary retail customer services one finds in any arms’ length transaction between a customer and a merchant. NELF cautioned against the huge expansion of liability that businesses would face if such services were recognized by the court as fiduciary in nature. Finally, NELF explained why the conduct of Priceline was in the actual conduct of the parties. In particular, principal-agent relationship simply cannot be found in

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naturally, opposed by the franchisee. After concluding that there exists no Massachusetts precedent generally establishing whether such a contractual provision should be honored, the federal Magistrate Judge certified the question to the SJC.

As NELF pointed out in its amicus brief in support Creative Playthings, there is in fact a substantial body of Massachusetts law dealing with this question in a variety of contexts that supports parties’ freedom of contract in this area. Specifically, NELF demonstrated that the right of parties to contract for a shorter limitation period was discussed and recognized by the SJC as early as 1856 in an insurance case. NELF then traced subsequent 19th and early 20th century decisions of the Court that recognized the principle in a number of contexts and treated it as a general principle of contract law. In addition to its legal analysis, NELF noted the importance to commercial parties of having this particular form of freedom of contract as a tool to limit exposure and control costs, and it asked the Court to take the opportunity afforded by the case to clarify the general rule of contract law underlying its previous decisions. In its decision issued on November 21, 2012, the SJC agreed with NELF’s analysis, citing many of the cases brought to its attention by NELF. Noting that, despite its application of the principle in the past, it had never expressly stated a general contract rule, the SJC announced that “[w]hen a claim arises based on a contract, and the contractually shortened limitation period is reasonable and not contrary to other statutory provisions or public policy,” the shortened limitation period is enforceable as a matter of Massachusetts law.

Defending the Right of Contracting Parties Under Rhode Island Law to Agree to a Reasonable Limitation of the Time Within Which a Suit May be Brought

American States Insurance Co. v. LaFlam
(Rhode Island Supreme Court)

In this matter the Rhode Island Supreme Court has been asked to answer a question of Rhode Island that has been certified to it by the United States Court of Appeals for the First Circuit. That question raises essentially the same issue that was before the Massachusetts Supreme Judicial Court in the Creative Playthings case, namely, the extent to which parties to a contract are free to determine the time within which litigation may be brought on claims arising under the contract. The underlying case arises out of injuries suffered by the insured, LaFlam, in an automobile accident that occurred while she was driving a car insured under a policy issued to her employer by American States Insurance Company (“ASIC”). The policy indemnifies insureds like LaFlam from injuries caused by negligent underinsured motorists; it also contains a contractual limitation of action period of three years, displacing the statutory ten-year period for contract claims under Rhode Island law. The policy also provides that the contractual limitations period begins to run at the time of the accident. More than three years after the accident, LaFlam’s attorney sent ASIC a letter asserting a claim under the policy. Believing the claim to be time-barred, ASIC brought a declaratory judgment action in the Rhode Island Federal District Court seeking a declaration that LaFlam’s claim was unenforceable. The district court granted ASIC’s motion for judgment on the pleadings and LaFlam appealed to the First Circuit which, as noted, has referred the limitation period question to the Rhode Island Supreme Court.

Specifically, the First Circuit’s asked the Rhode Island Supreme Court: “Under Rhode Island law, may an insurance policy providing uninsured/underinsured motorist coverage limit the period for suit against the insurer to less than the ten-year statutory period...?” In the course of arguing her case as to how this question should be answered, LaFlam has taken the position that parties to a contract may not validly agree to shorten the statute of limitations period unless a statute expressly authorizes them to do so for that type of contract. Because of the importance of the freedom of contract issue presented, NELF filed an amicus brief in the case in support of ASIC pointing out, first, that for more than a century and a half the courts of Rhode Island have upheld as valid contractual agreements that reasonably shorten the statutory limitations period, a position from which the Rhode Island Supreme Court has never deviated. Importantly, to correct LaFlam’s misunderstanding of the relationship between statutes and the common law of contracts, NELF also argues that no statutory authorization is required to enable parties to exercise their common law right to agree freely in their contracts to a reasonable time limitation on the ability to sue under the agreement.
Arguing That, Under Connecticut Law, the Economic Loss Doctrine Should Apply to a Sale of Secured Property Under Article 9 of the UCC and that Connecticut Should Apply the Most Recent FTC Standard to Claims Brought Under the Connecticut Unfair Trade Practices Act

Ulbrich v. Groth
(Connecticut Supreme Court)

In this case, NELF addresses two issues in its amicus brief supporting the appellant T.D. Bank, N.A. (the “Bank”): first, whether, under Connecticut law, the economic loss doctrine should be applied to a sale of secured property under Article 9 of the UCC, and, second, whether, as required by Connecticut statute, the Connecticut courts should apply the most recent Federal Trade Commission standard to determine whether a violation of the Connecticut Unfair Trade Practices Act (“CUTPA”) has occurred. The case arose out of a 2006 foreclosure auction sale by the Bank of real and personal property which constituted a special events facility owned by the Groth Family Partnership and Mountainside Corporation (“Groth Corporation”). The Groth Corporation had defaulted on a loan secured by this property. The secured real estate, alone, had an appraised value of approximately 3 million dollars. At the auction, the successful bidder, Ulbrich, purchased both the real and personal property for 1.65 million dollars, substantially below the appraised value of the real estate alone. After the sale, Ulbrich sued the bank, alleging inter alia, violations of CUTPA, claiming that it had wrongly sold him certain items of personal property that had been leased by the debtor and, therefore, were not part of the security that the Bank could rightfully have sold. At trial the plaintiff received a total money judgment against the Bank of over $1.9 million (more than it had paid for the entire estate), made up in part of punitive damages under CUTPA.

NELF also supported the Bank’s argument that the trial court applied the wrong standard for assessing whether the Bank’s conduct violated CUTPA. Connecticut law, like Massachusetts law, requires that the courts, in construing CUTPA, to be guided by the interpretations given by the Federal Trade Commission. Here, the trial court applied the so-called “cigarette rule,” a standard that has been expressly rejected by the FTC and replaced by a more nuanced interpretation embodied in its Policy Statement on Unfairness adopted in 1980. The Connecticut Supreme Court, obviously cognizant of its responsibility under CUTPA to look to the FTC’s interpretation, has recognized on more than one occasion that “a serious question exists as to whether the cigarette rule remains the guiding rule utilized under federal law.” Glazer v. Dress Barn, Inc., 274 Conn. 33, 83 n. 34 (2008). Indeed, the Court has already adopted the FTC’s injury standard, not as a replacement for the cigarette rule, but rather as clarification of the third, “substantial injury,” prong of the rule. See Hartford Elec. Supply Co. v. Allen-Bradley Co., 250 Conn. 334, 368 (1999). NELF supported the Bank’s argument that the 1980 FTC standard should have been applied in this case.
Opposing a Town’s Attempt to Pay for its Sewer System’s Repair by Imposing an Illegal Tax on Property Developers

Denver Street LLC v. Town of Saugus
(Massachusetts Supreme Judicial Court)

The town’s sewer repair, which the town terms a “fee,” as a condition of being connected to the town’s sewer system. The developers have challenged this “fee” on the ground that it is actually an illegal tax, rather than a valid fee, under Emerson College v. Boston, 391 Mass. 415 (1984), in which the SJC announced a three-part test to guide courts in determining whether local government is exacting an unlawful tax in the guise of a permissible fee. The inquiry asks whether local government is providing a particular service that benefits the party subject to the monetary exaction (hence a valid fee), or whether local government is in fact requiring a small class of individuals to pay for government’s discharge of its general duties (hence an unlawful tax). Applying the Emerson College test, both the Massachusetts Superior Court and Appeals Court held that Saugus’s mandatory contribution is an unlawful tax.

The town obtained further appellate review from the SJC and NELF, joined by co-amicus NAIOP Massachusetts, filed an amicus brief supporting the developers. NELF argued in its brief that Saugus’s disputed “fee” fails the Emerson College test, and other applicable state law, because the town is not providing a “service” to the plaintiffs. Instead, the town is merely fulfilling its duties owed to DEP in the 2005 consent order, and the town’s attempt to defray the cost of compliance with those public duties in fact functions as a tax, which the SJC has defined as “[a]n enforced contribution to provide for the support of governm ent.” Doe v. Sex Offender Registry Bd., 459 Mass. 603, 610 (Mass. 2011). NELF also argued that the town’s exaction of a “fee” as a condition for property development violates the Takings Clause under Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994). Since there is no connection between the “fee” and any likely public impact caused by the plaintiffs, Saugus’s action fails under Nollan-Dolan and the Takings Clause.

In a decision issued on June 29, 2012, the SJC disagreed with both NELF and the lower courts and held that the charge at issue was a valid proprietary fee. The Court based its decision on its view of the 2005 consent order, which it said required a moratorium on any new connections to the sewer system unless Saugus established a “sewer bank.” Since, without the sewer bank, there would have been a complete moratorium and the Court concluded that the amounts paid by the developer in this case were connected to the sewer bank, it also concluded that the fee was a sufficiently particularized benefit to pass muster under Emerson College. In reaching this result the Court held that “[a] precise balancing or weighing of public benefits against a particularized benefit is not...
part of the first Emerson College.” Rather, the Court held, the relevant inquiry is “whether the limited group [here property developers] is receiving a benefit that is, in fact sufficiently specific and special to its members.” As the Court pointed out, it was the maintenance of the “sewer bank” that made the development at issue possible. Unlike both the Superior Court and the Appeals Court, the SJC apparently ignored the fact that the “fees” were used to benefit the entire population of Saugus and were used to fix a sewer system that the town itself had allowed to deteriorate.

**Fighting Against a Retroactive Rewriting of the Terms of a Testamentary Trust**


(Massachusetts Supreme Judicial Court)

This is a declaratory judgment action brought by a beneficiary under a 1941 Massachusetts testamentary trust created by her great-grandmother. It was taken by the Massachusetts Supreme Judicial Court (“SJC”) on direct appellate review, based on a reservation and report to the Massachusetts Appeals Court from the Massachusetts Probate and Family Court. At issue is the validity of a Massachusetts statute passed in 2010 that purports to change the meaning of the term “child” in such instruments (wills and trusts) retroactively, i.e., to cover all such instruments from the beginning of time that were in existence on the effective date of the statute. Specifically, prior to 1958 Massachusetts law provided that adopted descendants (other than the testator’s own adopted children) in Massachusetts were presumptively excluded from any bequest in a testamentary instrument, unless the contrary intent was clearly expressed in the document. In 1958, the Massachusetts Legislature reversed this rule of construction prospectively by expanding the default definition of “child,” and its equivalent terms, to include adopted descendants (unless defeated by the clear terms of the instrument), and by applying this default definition to instruments executed after the 1958 statute’s effective date (August 26, 1958). The 2010 Massachusetts statute applied this change to all such instruments in existence on July 1, 2010, regardless of their date of execution. The statute would thus retroactively change the meaning of the relevant term in the 1941 testamentary trust at issue, long after the death of the grantor, and require the proceeds under the trust to be divided among the plaintiff and her two adopted siblings (who, precisely because they were not beneficiaries under their great-grandmother’s trust, had received a separate bequest from their grandmother).

The retroactive application of the 2010 statute would alter the plaintiff’s grandmother’s distribution of her property after her death and therefore has important implications for individual property rights, a core area of NELF’s concern. NELF accordingly filed an amicus brief in support of the plaintiff, arguing that retroactive application of the 2010 statute would violate two fundamental rights under both the United States and the Massachusetts Constitutions. NELF argued, first, that the retroactive application of the statute violates the due process clauses of both the U.S. and the Massachusetts constitutions and, second, that it would constitute an unconstitutional taking of a property interest under both the U.S. and the Massachusetts constitutions. With respect to due process, NELF argued that retroactive application of the statute is unconstitutional because it serves no legitimate public interest. Briefly put, it is established that the legislature may not dictate how an individual should distribute her own private property upon her death. See *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Powers v. Wilkinson*, 399 Mass. 650, 652-54 (1987). At most, the legislature can provide a default definition of a term such as “child” and its equivalents, which individuals are free to accept or reject in their private instruments. *Watson v. Baker*, 444 Mass. 487, 495-496 (2005) Because the grantor in this case is long dead and, therefore, cannot decide for herself whether or not to accept the more inclusive definition set forth in the 1958 and 2010 statutes, retroactive application of the broader definition, in effect, to change how she left her property, clearly offends due process. Retroactive application would also violate the takings provisions of both the state and federal constitutions, because it retroactively impairs the vested property rights of the plaintiff, without compensation. This argument is supported by the SJC’s own decision, *Boston Safe Deposit & Trust Co. v. Fleming* 361 Mass. 172 (1972), which invalidated any retrospective application of the 1958 statute that first established the more inclusive presumptive definition of “child.” Although the Court in that decision recognized the humanitarian and beneficial effect of the more inclusive definition, it nonetheless rejected the taking of established property interests. NELF argued that, for the same reason, the retroactive aspect of the 2010 statute must be rejected.

On August 28, 2012, the SJC issued its decision, agreeing with NELF that the 2010 amendment could not be applied retroactively to any pre-1958 trusts. The Court invalidated the statute on state due
process grounds, applying its own balancing test. Among the factors mentioned by the Court was “the bedrock principle that a testator is entitled to rely on the state of law at the time of execution of a testamentary instrument.”

Urging the Supreme Court to Flesh Out the “Pretext” Exception to its Controversial Ruling in *Kelo v. City of New London*

**Ilagan v. Ungacta**
(United States Supreme Court)

In this case, NELF joined with a number of amici to urge the U.S. Supreme Court to grant certiorari for the purpose of clarifying how courts should analyze a case in order to determine when the government’s “public use” rationale for taking property for the purposes of private (as opposed to public) development is a sham or pretext intended to cover a scheme of private, third-party enrichment. In *Kelo v. City of New London* the Supreme Court ruled that a governmental taking of private property for private development would satisfy the “public use” requirement of the Fifth Amendment, so long as the private development was intended to benefit the public at large. In *Kelo*, the Court ruled that the taking at issue in that case did not violate the Fifth Amendment because New London’s purpose was for the private development of the property to provide increased local employment and tax revenues to the city. (In fact, to date the property taken has not been developed and remains a vacant lot and an eyesore, mainly because after the *Kelo* decision, Pfizer—whose presence in the city was a vital expectation for the development—made the corporate decision to leave New London.) However, in *Kelo* the Supreme Court did place an important limitation on such takings. With little elaboration, the Court stated that such a use of eminent domain would fall afoul of the Fifth Amendment if the alleged public purpose were merely a pretext, i.e., if the property was taken in actuality to benefit a particular private party, not the public at large. Since *Kelo*, both the lower federal courts and the state courts have adopted divergent approaches to determining whether the alleged public benefit is merely a pretext.

Fighting a State’s Unconstitutional Taking of Privately Owned Funds in Order to Use Them to Reduce the State’s Deficit

**Gallo & Co. v. McCarthy**
(Connecticut Supreme Court)

In this takings case, the plaintiffs are beverage distributors who seek declaratory and monetary relief from the state’s seizure of discrete funds of money owned by them. The money represents unclaimed “deposits” on bottles in which the plaintiffs sold their beverages. (“Deposits” is actually a misnomer. In 1980, when the state imposed the obligation on the distributors to pay five cents for each bottle returned to them, they chose to cover the additional expense by adding five cents to the selling price. The “deposits” that come into their hands, therefore, are simply an undifferentiated part of their sales revenues.) In 2009, a law was passed that required the plaintiffs to surrender money from special, segregated accounts that the state earlier ordered them to use to hold all incoming and outgoing “deposits.” The law required the plaintiffs to pay to the state not only the quarterly balances in these accounts from the effective date of the statute onward, but also balances owned by the plaintiffs before the effective date. The legislative history puts beyond doubt that the sole purpose of the law was to provide the state with additional revenues to reduce its large budget deficit.

The plaintiffs sued in the Connecticut trial court, and the state defended the law by arguing that they had no property interest in the money. The trial judge
found that, up to the effective date of the statute, the distributors had always owned the revenues generated by the additional five cents they charged and that the sole purpose of the new law was to lessen the budget deficit by causing “as much money as possible [to be] paid over to the state.” The state appealed, arguing for the first time that the law merely imposed a regulatory assessment.

NELF has filed a brief in the Connecticut Supreme Court in support of the plaintiffs in which it rebuts several of the state’s chief points. First, NELF shows that the facts of the case do not support a regulatory theory. Under U.S. Supreme Court law, where, as here, the state identifies a specific fund of private money as the only source from which it may be paid the money it demands, a taking occurs, not an assessment. NELF also explains that the state’s regulatory theory could not justify the retroactive reach of the law in the absence of any record evidence that the distributors had a history of shifting private costs to the public. Finally, addressing the deficit-reduction purpose of the law, NELF shows that the case falls squarely among those contemplated by the U.S. Supreme Court when it stated, in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), that the Takings Clause “bars the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” NELF illustrates the point further by discussing a case it briefed in 2009, Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association, 992 A.2d 624 (N.H. 2010), where the attempt was also made to seize private funds under regulatory pretense, whereas the real reason for the action was to reduce a state-wide deficit at private expense.

that excessive regulation may have on private property rights. The Massachusetts state building code identifies four kinds of systems as the only ones that may be used to notify a fire department of a fire in a building. The City of Springfield, Massachusetts, issued an ordinance restricting use within the City to only one of these four systems. In addition, the ordinance required removal and replacement of any of the other three systems whose use is permitted by the state building code. The St. George Greek Orthodox Cathedral of Western Massachusetts challenged Springfield’s ordinance in Superior Court and won. On appeal, the matter was taken by the Massachusetts Supreme Judicial Court (“SJC”), and NELF (joined by co-amicus NAIOP) filed an amicus brief in support of the Cathedral, arguing that the SJC should affirm because Springfield’s attempt to narrow the permissible range of systems thwarted the Massachusetts legislature’s intent to establish a comprehensive building code that is uniformly applicable across the Commonwealth. NELF also explained the ways in which the local restriction would conflict with other legislative goals, such as controlling costs and preventing unwarranted preferential treatment of devices and materials. NELF argued that, because the effect of the ordinance was to second-guess the discretionary decisions of the State Board of Building Regulation and Standards, the ordinance clearly was not local action authorized under the Massachusetts Home Rule Amendment, which grants certain rights to the Commonwealth’s cities and towns.

In its decision issued on May 4, 2012, the SJC, agreeing entirely with NELF, ruled that Springfield had exceeded its authority when it enacted the ordinance limiting which of the fire notification systems could be used within the city. Following very closely NELF’s reasoning in its brief, the Court rejected the ordinance, holding that, “[w]here the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment.”

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 has 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 has 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.” DEP has responded in a piecemeal fashion to NELF’s papers, raising various challenges to Ms. Hall’s experts’ methodology, the most significant concerning the historical location of the lighthouses that served as key demarcation points in the the expert’s determination of the historic mean high water mark. In the interim, the Administrative Law Judge (“ALJ”) ordered the parties’ experts to meet and discuss their differences, with their attorneys present. No resolution was reached. The ALJ then ordered counsel for the parties to submit proposed dates for the next status conference. Counsel complied with the order and is still awaiting a response from the ALJ.

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.

• Employer/Employee Relationships

NELF is committed to maintaining a proper balance between the rights of employers and employees so that business can flourish and provide employment opportunities.

Opposing the Imposition of Vicarious Liability on an Employer under Title VII Where the Defendant Employee Had No Power to Take Tangible Employment Action With Respect to the Plaintiff and, Therefore, Should Not Be Considered a “Supervisor” for Title VII Purposes

Vance v. Ball State University
(United States Supreme Court)

This case, which is before the Supreme Court on the merits, raises an issue of national significance, which is whether an employee who has no power to take any
“tangible employment action” against another employee (the plaintiff in this case) should be considered a “supervisor” for the purpose of imputing vicarious liability to the employer in a Title VII hostile work environment claim. We believe that the Supreme Court has taken the case in order to resolve the split that now exists among the federal courts of appeal on this issue. Specifically, the First, Seventh, and Eighth Circuits take the position that, for an employee to be a supervisor for Title VII purposes, he or she must have the power to affect directly the terms and conditions of the plaintiff’s employment, namely by firing, demoting, failing to promote, transferring, or disciplining the plaintiff. In contrast, the Second, Fourth, and Ninth Circuits use a broader definition of supervisor for Title VII purposes, taking the view that the term supervisor would include any employee who has the power to direct the plaintiff’s work activities, whether or not said employee has the power to take tangible employment action against the plaintiff. These circuits, therefore, would sanction the imposition of vicarious liability on the employer in a much broader range of cases.

NELF has filed an amicus brief on the merits in the case arguing in support of the employer, Ball State University (which won below), that, under the Supreme Court’s precedent, for the purpose of imputing liability to an employer under Title VII, the term “supervisor” should only be applied to individuals who can take tangible employment action against the plaintiff. We point out in our brief NELF’s view that this is an important and valid limitation on the imposition of vicarious liability.

Supporting Judicial Enforcement of a Choice of Forum Clause Requiring Plaintiff’s Claims Under the Massachusetts Wage Act to be Litigated in New York

Melia v. Zenhire, Inc. et al.
(Massachusetts Supreme Judicial Court)

At issue in this case was the enforceability of a forum selection clause in an out-of-state business’s employment contract with a Massachusetts executive employee. The plaintiff in the case is a Massachusetts resident; the defendant is his corporate employer, Zenhire, Inc., which is located in New York. Melia sued Zenhire in Massachusetts Superior Court for unpaid wages under Massachusetts law, even though his employment agreement requires all such claims to be adjudicated in the courts of New York and under New York substantive law. Despite the presumptive validity of forum selection clauses under Massachusetts law, Melia argued, in opposition to Zenhire’s motion to dismiss for improper venue, that the agreement’s forum selection clause should not be enforced because it operated in tandem with the choice of law clause to exempt Zenhire from liability under the Massachusetts Wage Act, contrary to Massachusetts public policy. The Superior Court rejected Melia’s arguments and enforced the forum selection clause, primarily because Massachusetts and New York both apply the same Restatement (Second) test in determining the validity of a choice of law clause. Melia appealed from the trial court’s dismissal, and the Massachusetts Supreme Judicial Court (“SJC”) took the case suo sponte for direct appellate review.

NELF filed an amicus brief in support of Zenhire, arguing that, since Massachusetts and New York follow the same Restatement (Second) test in determining the validity of a choice of law clause in a contract, enforcement of the forum selection clause was neither unfair nor unreasonable. That is, Melia would be just as free to challenge the validity of the New York choice of law clause in the courts of New York as in the courts of Massachusetts, and, for that reason, enforcement of the forum selection clause had no bearing on Melia’s challenge to the choice of law clause. Moreover, any doubts about the competence of the New York courts to recognize Massachusetts public policy in deciding the enforceability of the choice of law clause would be entirely speculative and would offend basic principles of interstate comity and reciprocity that animate both the United States Supreme Court’s and the SJC’s forum selection jurisprudence. NELF also pointed out that, consistent with the SJC’s instruction to evaluate the validity of a forum selection clause under the parties’ chosen law, the New York Court of Appeals has in fact rejected a virtually identical challenge to a forum selection clause brought by New York employees against their out-of-state employer. See Boss v. American Express Fin. Advisors, Inc., 844 N.E.2d 1142 (2006). Finally, NELF argued that a decision enforcing Zenhire’s forum selection clause would preserve the key principles of party autonomy and interstate comity that animate the modern view embracing forum selection clauses. On May 8, 2012, the SJC issued its decision agreeing with NELF’s analysis and enforcing the forum selection clause. The Court also announced a demanding three-part test which a Massachusetts employee must satisfy to defeat a forum selection clause.
Supporting the Enforcement of Class Arbitration Waivers in Employment Cases

*Machado v. System4*
(Massachusetts Supreme Judicial Court)

This case, which the Massachusetts Supreme Judicial Court (“SJC”) has paired for hearing with the Court’s reconsideration of its 2009 decision in *Feeney v. Dell* (in which NELF has filed an amicus brief in support of Dell, see above), raises the same essential issue—the enforceability of a class arbitration waiver—but in the context of employment. The dispute arises out of the plaintiff’s franchise agreement with System4 and NECCS, Inc. (collectively “System4”) to provide commercial janitorial services. The agreement included a mandatory pre-dispute arbitration clause that restricted arbitration only to individual claims (a class-arbitration waiver). In 2010, the plaintiff filed a putative class action in the Massachusetts Superior Court primarily alleging that System4 misclassified him and similarly situated individuals as independent contractors in violation of the Massachusetts Wage Act, G.L. c. 149, § 148B. System4 moved to stay the litigation so that arbitration could proceed, but the Superior Court denied the motion on the ground that the class-action waiver in the arbitration provision was contrary to public policy under *Feeney v. Dell*. The Superior Court subsequently denied reconsideration of this decision in light of the Supreme Court’s holding on the enforceability of class arbitration waivers in *AT&T Mobility, LLC v. Concepcion*. The SJC has taken the matter and has solicited amicus briefs in this case, as in *Feeney*, on whether the public policy exception announced in *Feeney* survives *Concepcion*.

NELF has filed an amicus brief in the case, arguing, as in *Feeney*, that the SJC’s invalidation of class arbitration waivers in the 2009 decision has been invalidated by *Concepcion*, which held that, under the Federal Arbitration Act (“FAA”), class arbitration waivers contained in valid arbitration agreements are uniformly enforceable. In this connection, NELF’s brief also criticizes the view recently expressed by the NLRB in its *D.R. Horton* decision that the National Labor Relations Act trumps the FAA. NELF argues that, to the contrary, the command of *Concepcion* is not limited to state law claims, but applies equally to class waivers in the arbitration of federal statutory claims, absent a “contrary congressional command” on the face of another federal statute that bars or limits the application of the FAA to disputes arising under that statute. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The NLRA’s general language protecting employees’ rights to engage in “concerted activity . . . for mutual aid and protection” falls far short, and is entirely unrelated to, the *CompuCredit* standard, which would have to expressly create a nonwaivable right to class actions to limit the FAA’s mandate under *Concepcion*.

Arguing That the Provision in the Massachusetts Wage Payment Act, Which Imposes Personal Liability on Certain Officers and Agents of a Corporation, Does Not Apply to Managers of a Limited Liability Company

*Cook v. Patient EDU, LLC*
(Massachusetts Supreme Judicial Court)

This case deals with the question of when, under the Wage Payment Act, those who run a business are personally liable for the business’s wage-payment obligations. The plaintiff argues that the Wage Payment Act, which requires the timely payment of wages, permits him to hold two managers of the limited liability company for which he once worked personally liable for the company’s alleged violations of the statute. The statute itself says expressly only that certain officers “of a corporation” may be held personally liable. The Superior Court construed the statute by its plain language and dismissed the plaintiff’s claim. The plaintiff argues that the corporate officer provision is merely illustrative, not limiting, and that the scope of personal liability is actually determined by the expansive opening phrase of the statute (“Every person having employees in his service shall, etc.”), now asks the SJC to reverse the dismissal. The predominate note struck by the plaintiff is that the statute should be read expansively because it is remedial, but he also argues that the true list of liable parties is given in a separate statute, to which the Wage Payment Act expressly refers for its civil fines and penalties. The importance of the issue is shown by the fact that the SJC took the appeal sua sponte from the Appeals Court and then issued a call for amicus briefing.

In its amicus brief supporting the defendants, NELF marshals a wealth of evidence from statutory history, case law, and contemporary usage from the time of the act’s enactment to prove that the opening phrase
of the statute means, and has always meant, only actual, literal employers. NELF also defends the trial court’s plain-language interpretation of the corporate officer provision, showing that it is only one of a number of such provisions in the Massachusetts statutes creating personal liability only for corporate officials for violation of employment and labor laws. Finally, NELF explains that the statute to which the Wage Payment Act refers for its penalties does not enlarge the list of parties liable for wage payment violations, as the plaintiff believes. Examining statutory language and statutory history, NELF shows that Wage Payment Act is one of several laws that look to that statute solely for penalties, not for persons liable. Moreover, the penalty statute is part of an entirely distinct comprehensive enactment dealing with public works and related public contracts; if it has any bearing on liability, it is limited to violations of employment laws that occur in the course of public works. Statutes not dealing primarily with public works borrow their penalties from it and nothing more.

Opposing Judicial or Agency Expansion of the Class of Persons Protected by Massachusetts G. L. c. 151B

(Massachusetts Supreme Judicial Court)

This case deals with the same unsettled question of Massachusetts anti-discrimination law as did Scott v. Encore Images, Inc., a Massachusetts Appeals Court case that NELF briefed in 2010. See 80 Mass. App. Ct. 661 (2011). Because the Appeals Court declined to rule on the question, no Massachusetts appellate court has yet ruled on whether an individual who is not handicapped has standing to sue for handicap employment discrimination under G. L. c. 151B, § 4(16) solely on the basis of that person’s association with someone else who is handicapped. Here, Flagg alleges that he was fired not because of his repeated absences from work, as his employer contends, but because his wife’s disability would cost his employer’s health plan a great deal of money. The trial court dismissed his claim on the grounds that Flagg was not handicapped and therefore lacked standing to bring a handicap discrimination claim on his own behalf. Flagg appealed to the Appeals Court, and the Supreme Judicial Court took the case suau sponte and issued a request for amicus briefing.

Flagg’s argument rests largely on the fact that the Massachusetts Commission Against Discrimination (“MCAD”), which is the agency charged with implementation of c. 151B, recognizes such associational standing and advocated for it vigorously in a letter the agency filed in the Scott case. NELF filed an amicus brief supporting AliMed and arguing that the plain language of the statute renders it impossible for Flagg to have a claim under c. 151B. As NELF demonstrates, the clear, unambiguous language of § 4(16) and related sections of c. 151B give only handicapped persons a claim for handicap employment discrimination, unlike the federal Americans with Disabilities Act, which expressly provides for claims based on association. NELF also argues that no deference is owed to the MCAD’s view of this issue because deference is not warranted where the language of a statute is clear and unambiguous, as here, much less when the agency’s reading of the statute is directly contrary to the statutory language, as is also the case here. NELF undertakes a rebuttal of the reasoning the MCAD used its administrative decisions recognizing this type of claim. Since Flagg has incorporated into his argument the letter the MCAD filed with the Appeals Court in Scott, NELF also rebuts the arguments the MCAD makes there. In both instances, the main theme of NELF’s rebuttal is that the agency’s view of the law is determined exclusively by broad policy considerations and that the agency has not paid even token heed to the actual text of the law.
Ripple Effects: The Enforceability of Class Action Waivers in Arbitration Agreements in the Wake of AT&T Mobility v. Concepcion

In April 2012, panelists at NELF’s spring breakfast program addressed the ongoing debate over the scope of the U.S. Supreme Court’s ruling in AT&T Mobility v. Concepcion that, under the Federal Arbitration Act, a class arbitration waiver in a valid pre-dispute arbitration agreement must be enforced. Courts across the country, including in New England, have divided on the question of whether grounds might still exist to challenge such waivers. In Massachusetts, for example, businesses and consumers eagerly await the result of the Supreme Judicial Court’s reconsideration, in light of Concepcion, of its 2009 ruling in Feeney v. Dell that class arbitration waivers were unenforceable in Mass. G.L. c. 93A cases. Moderating our panel discussion was NELF Board member Donald R. Frederico, Partner, Pierce Atwood LLP. Don was joined by Sarah G. Manchester, Vice President of Human Resources and General Counsel, Sappi Fine Paper North America, Katharine I. Rand, Partner, Pierce Atwood LLP, John A. Shope, Partner, Foley Hoag LLP, and John R. Snyder, Partner, Bingham McCutchen LLP.

Whistleblowing in 2012: What Every Business and Business Lawyer Should Know

Our fall breakfast program in October 2012 presented a panel discussion of the increasing reliance by government on “whistleblower” statutes and provisions to uncover fraud and other crimes. Recent amendments to the Federal False Claims Act, and statutory and regulatory enactments in the wake of the Enron scandal, and more recently, the financial meltdown beginning in 2008 have made it imperative for both businesses and their legal counsel to be aware of the new whistleblower provisions. With the aim of equipping those in attendance with the knowledge they need to be able to respond both to the new laws and to potential whistleblowers, Lynda H. Schwartz, CPA, CFF, CGMA, Founder, Upland Advisory, moderated a lively and informative panel discussion. Our panelists were Peter M. Acton, Jr., Director and Senior Counsel, Global Compliance, EMC Corporation, Brent R. Austin, Partner, Edwards Wildman Palmer LLP, Suzanne E. Durrell, Principal, Durrell Law Office, and Robert L. Ullmann, Partner, Nutter McClennen & Fish LLP.

2012 CEO Forum Politics, Corporations, and the First Amendment

With the 2012 Presidential Election barely a month in the past, NELF was pleased to present a panel discussion at our annual CEO Forum in December 2012 on the Supreme Court’s controversial Citizens United decision and the issue of corporate speech in the political context. We were especially honored to have former Massachusetts Chief Justice Margaret H. Marshall as the Moderator of our panel discussion. Chief Justice Marshall was joined by our panelists Professor Heather Gerken of the Yale Law School, Michael W. Macleod-Ball, Esquire, Chief Legislative and Policy Counsel at the American Civil Liberties Union Washington Legislative Office, former Boston Globe columnist and writer Brian C. Mooney, and the Honorable Christopher H. Shays, Member, United States House of Representatives (1987-2009). Our lively and vigorous discussion offered attendees an extraordinarily well-informed and thoughtful range of views and insights regarding the proper role of, and protections to be afforded to, corporate speech in our democracy.

NELF, as a public interest advocate for the business community and an advocate for market freedom, continued to encourage high level discussions of legal and other issues confronting businesses today. Our two formal breakfast presentations and annual CEO Forum are described below.

2012 YEAR IN REVIEW
While economic challenges continued in 2012, the majority of NELF’s supporters fulfilled their financial commitments. We are grateful for their continuing support and belief in NELF’s mission and work.

As in prior years, NELF continued to take a disciplined approach to expenditures. Nevertheless, our expenses in 2012 were modestly higher than in 2011 due both to factors beyond our control and to targeted expenditures aimed at improving fundraising and productivity.
NELF 2012 YEAR IN REVIEW

2012 Individual Contributors

Pamela Zorn Adams  Raymond A. Guenter  Sidney Rose
Susan H. Alexander  Ernest M. Haddad  Joseph D. Sargent
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# NELF 2012 YEAR IN REVIEW
## 2012 Corporate Contributors

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<td>EMC Corporation</td>
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