Vigorous Advocacy of Free Market Principles
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 once again witnessed significant, precedent-setting appellate decisions impacting business on a variety of fronts, with many of the most important decisions being handed down by the United States Supreme Court. And it was in the Supreme Court that NELF most strongly made its presence felt in 2013 as an advocate for business—filing 12 amicus briefs in the High Court, a new NELF record. Our briefs helped to achieve a number of significant, positive outcomes that confirmed the crucial role that amici curiae like NELF can often play in public interest advocacy. Indeed, in a number of cases where the Supreme Court agreed with NELF’s position, the Court’s majority opinion also closely tracked NELF’s arguments. These and NELF’s other cases in 2013 are described in detail in the Docket portion of this Year-in-Review.

As you will discover there, in 2013 NELF’s legal staff litigated a wide variety of important legal business and property rights issues. We filed amicus briefs in the New England state and federal appellate courts, as well as in the Supreme Court. Our cases ranged from defending private property against unauthorized use for political purposes, to arguing against a state’s confiscation of money to help with its fiscal crisis, to resisting an overly expansive assertion of general jurisdiction over a foreign corporation, to arguing for recognition in the federal change of venue statutes of business parties’ contractual choice of forum clauses, to advocating the balancing of rights between the holder of an easement and the owner of the underlying property. In all of these cases and others, we advanced a legal position that was based on a balanced approach to business and property law issues—an approach that maximizes freedom of contract and enterprise within a framework of reasonable regulation.

NELF also continued its program of public presentations during 2013 on topics of interest to the general business and legal communities. Our CEO Forum in December featured a timely and eye-opening discussion of the expected impact of the Affordable Care Act on New England’s businesses and workforce. As in prior years, our Forum was supplemented by two breakfast seminars. Our spring breakfast panel discussion focused on the duties and responsibilities of corporate leaders when confronted by the risks and realities of cyber-crime. At our fall breakfast another expert panel provided a timely review of the United States Supreme Court’s most recent business decisions. In addition to these public presentations, in the fall NELF also provided the opportunity to NELF’s Board and supporters for an informal discussion with the Massachusetts Speaker Robert DeLeo.

As in past years, NELF’s vigorous advocacy of free market principles on so many different fronts 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 challenging, full-time positions in law firms and businesses, these individuals devote the time and effort needed to provide first rate governance and guidance to the Foundation. To these individuals, as well as to the companies, foundations and private citizens who support NELF, we extend not only our thanks but also our commitment to continue our dedication to the core values of our system of free enterprise in the years ahead.
2013 CEO FORUM: "Crunched By Numbers: The Affordable Care Act’s Impact on Business and the Regional Workforce"
Arguing that the Federal Arbitration Act Requires Enforcement of a Class Action Waiver in a Valid Arbitration Agreement, even for Claims Brought under Federal Statutes, and that Only Congress Can Override the FAA’s Mandate in the Arbitration of Federal Statutory Claims

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, an important victory for NELF and the business community, the U.S. Supreme Court, in a 5-3 decision (with Justice Sotomayor recusing herself) agreed with NELF and held that the FAA mandates the enforcement of class action waivers in the arbitration of federal statutory claims. As NELF had argued, the Court concluded that courts have no discretion to override the FAA’s mandate even when it is alleged that the costs of proving a federal statutory claim on an individual rather than aggregated basis may be prohibitive. The Court reversed the decision of the Second Circuit, which had invalidated a class action waiver in the arbitration of federal antitrust claims under the Sherman Act, based on the plaintiffs’ projected expert costs in proving their case. The Court agreed with NELF that the Second Circuit failed to heed both AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), under which the FAA requires enforcement of class action waivers, and CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012), under which only Congress, and not the judiciary, can override the FAA’s mandate enforcing class waivers with respect to the arbitration of federal statutory claims. Congress has not exercised that power in the Sherman Act at issue here. Thus, the disputed class action waiver in this case had to be enforced. The Court also agreed with NELF that the FAA and Concepcion forbid both a per-se rule against class waivers (the issue in Concepcion) and a case-specific invalidation of a class waiver based on the plaintiff’s projected costs of proof (the issue in Amex).

As NELF had also argued, the court held that the Second Circuit misinterpreted the Supreme Court’s decisions in Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). In those cases, the Court stated that arbitration agreements should be enforced so long as they allow for the vindication of federal statutory rights. Agreeing with NELF, the Court held that, the “vindication” principle discussed in Mitsubishi and Green Tree does not consider the inherent costs of proving a claim, whether on an individual or class-wide basis. Those costs would apply as much in court as they would in arbitration. Once again agreeing with NELF, the Court noted that the antitrust laws do not guarantee an affordable procedural path and that the “effective vindication” exception does not refer to the expenses involved in proving a claim. Embracing NELF’s analysis, the Court limited the “vindication of rights” dictum to whether the arbitration agreement forgoes substantive statutory rights and also, possibly, to whether the agreement imposes prohibitive costs that do not apply in court litigation, such as arbitrators’ fees.

Advocating That Federal Courts in Diversity Cases Should Generally Enforce A Forum Selection Clause Designating a Federal Judicial District for Disputes Arising under a Business Contract

Atlantic Marine Construction Co. v. J. Crew Co., et al. (United States Supreme Court)

This case, which decided an issue of great importance to businesses through the country, decided whether a federal court sitting in diversity should presumptively enforce a forum selection clause contained within a
contract between businesses. Here the contracting parties had agreed that all disputes “shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.” When a dispute arose, J-Crew Management, Inc., performing construction work in Texas, disregarded the forum selection clause and instead sued Atlantic Marine Construction Co. in federal court in Texas. Atlantic Marine moved, under the federal transfer of venue statute, 28 USC § 1404(a), to transfer the case to the bargained-for federal court in Virginia. The District Court denied the motion, holding, first, that Atlantic Marine bore the burden of establishing that a transfer of venue would be proper, and, second, that the forum selection clause was but one of the public- and private-interest factors to be considered in ruling on the motion. The Fifth Circuit upheld the trial court’s decision. NELF filed an amicus brief in support of Atlantic Marine, arguing that federal courts should enforce forum selection clauses under 28 USC § 1404(a), unless the party resisting the clause, and not the party seeking enforcement of the clause, can show extreme hardship under the standard articulated by the Supreme Court in M/S Bremen v. Zapata Off-Shore Co. in 1972. In a unanimous decision that paralleled the reasoning of NELF’s brief, the Court held that a forum selection clause should generally be enforced in deciding a motion to transfer venue under 28 U.S.C. § 1404(a). As NELF had argued, the Court concluded that the parties to a forum selection clause have already selected the convenient or proper venue for the resolution of their disputes and that the party seeking to evade this contractual choice of venue has a high burden to prove why the contract should not be enforced. In short, a valid forum selection clause resolves in advance the “convenience of the parties” specified under § 1404(a). Accordingly, a federal court generally should not disturb the parties’ bargained-for choice of venue. The Court concluded that the sole remaining factor for consideration under § 1404(a) is “the interest of justice,” which rarely will override a valid forum selection clause.
Opposing a Forum State’s Imposition of Personal Jurisdiction in an Intentional Tort Case, Where the Acts Complained of Took Place in a Different State and the Defendant Did Not Intend to Harm the Plaintiffs in the Forum State

**Walden v. Fiore**
(United States Supreme Court)

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment permits a court of the forum state (i.e., where the plaintiff has sued) to exercise personal jurisdiction over a nonresident defendant who has allegedly injured the plaintiff in another jurisdiction, merely because the defendant knew that the plaintiff had connections to the forum state.

In the decision below, a sharply divided panel of the Ninth Circuit held that the federal court for the District of Nevada had personal jurisdiction over the defendant, a federal DEA agent in Atlanta, Georgia, who confiscated the $97,000 gambling earnings of plaintiffs, professional gamblers who were passing through the Atlanta airport, en route from Puerto Rico to Nevada. The agent (wrongfully) suspected that the money was connected to illicit drug activity. The plaintiffs sued the DEA agent in the District of Nevada alleging that personal jurisdiction over the DEA agent exists in Nevada because, although the agent’s actions took place in Atlanta, the defendant knew that his confiscation of their money would injure the plaintiffs in Nevada.

NELF has filed an amicus brief against this position, arguing that, under Supreme Court precedent, no personal jurisdiction can lie against an out-of-state defendant accused of an intentional tort unless he has “expressly aimed” the injury at the forum state by intending to harm the plaintiff in the forum state when he committed the alleged tort. *Calder v. Jones*, 465 U.S. 783 (1984) (Hollywood entertainer Shirley Jones had personal jurisdiction to sue Florida-based *National Enquirer* journalist and editor in California for defamation: defendants intended to harm plaintiff in California by “expressly aiming” content of false and harmful article at that state). NELF argues that, under *Calder v. Jones*, it is not enough to show that the defendant knew that the plaintiff had connections to the forum state at the time of the alleged misconduct and that the facts here fall far short of the “expressly aiming” state of mind required under *Calder v. Jones*. Consequently, the Ninth’s Circuit’s jurisdictional ruling is incorrect and must be reversed.

Arguing Against the Regulation of Truthful, Non-Misleading Corporate Speech

*Spirit Airlines v. U.S. Dep’t of Transportation*  
(United States Supreme Court)

In this case, NELF filed an amicus brief supporting two airlines’ Petition for Certiorari, arguing that the First Amendment should invalidate a Department of Transportation (“DOT”) regulation restricting how the airlines can advertise their airfares. The First Amendment’s protection of speech concerning economic activity received special attention in the Supreme Court’s recent decision in *Sorrell v. IMS Health*, in which NELF filed an amicus brief on the merits. In *IMS Health* the Court, agreeing with NELF, held that the First Amendment invalidates a Vermont statute prohibiting pharmacies from selling data to pharmaceutical marketers about doctors’ prescribing practices (data that revealed nothing confidential about patients or otherwise).

In this case, NELF argued that, similarly, the disputed DOT regulation warranted the “heightened scrutiny” announced in *IMS Health*, and clearly does not meet that standard of review, because the regulation lacks a neutral justification. The stated purpose of the DOT regulation 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, which is not objectionable, but the regulation also severely limits the manner in which airlines may advertise the component prices of the total price, i.e., the airlines’ competitive base fares and the substantial, applicable federal taxes and fees. The airlines challenged this regulation on First Amendment grounds, arguing primarily that the regulation must fail under strict scrutiny because, in obscuring the government’s “cut” of the total price, the rule restricts core political speech that is critical of government. NELF’s amicus brief in support of the airlines argued that the court should take this case to build on the groundwork already laid in *IMS Health*. NELF argues that, under *IMS Health*, the regulation at issue should be rejected because it lacks a neutral justification. Despite these arguments, the Supreme Court denied the petition for certiorari in this case on April 1, 2013.
Consistent with its longstanding support for the enforcement of valid arbitration provisions, NELF filed an amicus brief on the merits supporting the petitioner, Oxford Health Plans LLC, arguing for the reversal of an arbitration order of class arbitration where the parties had merely agreed to submit “any dispute under this Agreement” to binding arbitration, and nothing more. NELF argued that such a minimally worded arbitration clause could never provide the necessary “contractual basis” required under Stolt-Nielsen v. AnimalFeeds Internat’l Corp., 130 S.Ct. 1758 (2010) to authorize class arbitration. In this case, despite the Stolt-Nielsen holding, the Third Circuit invoked the Federal Arbitration Act’s (FAA) deferential standard of review to affirm an arbitrator’s “interpretation” of the parties’ generic “any dispute” arbitration clause as somehow providing a “contractual basis” authorizing class arbitration. NELF argued in its brief that, while Stolt-Nielsen did not require an express contractual reference to class arbitration, the Court did conclude that a mere agreement to arbitrate disputes could never support an implied agreement to class arbitration. NELF also argued that, if the Third Circuit’s decision were allowed to stand, not only the petitioner in this case, but countless other businesses that are subject to the same generic “any dispute” arbitration clause could face the significant burdens and financial risks associated with class arbitration. Despite NELF’s argument, the Supreme Court held, in a unanimous decision, that the FAA requires courts to defer to an arbitrator’s erroneous “interpretation” of an agreement as authorizing class actions. In a surprising about-face, the Court also apparently limited Stolt-Nielsen to its unusual facts, wherein the parties had apparently stipulated that there was no contractual basis supporting class arbitration.

NELF filed an amicus brief in support of Priceline urging the Second Circuit to affirm the dismissal of the plaintiff’s complaint, arguing, 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 agent. NELF also noted that, contrary to the allegations in the complaint, Priceline never represented that all of 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 many of the services one finds in any arms’ length retail 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 argued that because the plaintiffs freely chose to use the NYOP bidding method, they cannot now be heard to complain about the unremarkable fact that the bid price may exceed
the undisclosed minimum price the seller may be willing to accept (i.e., the reserve price).

In its March 2013 decision affirming the dismissal of the complaint, the Second Circuit expressly adopted NELF’s characterization of Priceline as a mere intermediary, not a fiduciary, and agreed that nothing in Priceline’s conduct went beyond ordinary customer service when Priceline used its expertise to check available hotel inventory against the plaintiffs’ requests for reservations. Finally, the court specifically cited NELF’s brief when adopting NELF’s argument about the significance of the reserve price to outcome of this case. After the decision issued, a request by the plaintiffs for a rehearing was summarily denied by the panel.

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 Under the Connecticut Unfair Trade Practices Act

Ulbrich v. Groth  
(Connecticut Supreme Court)

This appeal before the Connecticut Supreme Court arose out of a 2006 foreclosure auction held by the defendant bank of real and personal property at a former special events facility. The plaintiff, who was the successful bidder at the auction, later learned that much of the personal property he thought he had purchased was not owned by the defaulting debtor, but leased, and therefore not subject to the sale. The plaintiff sued the debtor, the defendant bank, and the auctioneer, alleging, inter alia, violations of Connecticut’s Unfair Trade Practices Act (“CUTPA”), under which both attorneys’ fees and punitive damages may be awarded.

The case was tried to a jury, which returned a verdict in favor of the plaintiff and awarded compensatory damages, which, after remittitur, amounted to $417,000. The trial judge subsequently added attorneys’ fees and punitive damages under CUTPA, bringing the judgment against the defendants, before interest, to $1.9 million, not only substantially in excess of the value of the leased personal property but also more than the amount that the plaintiff had paid at auction for the entire property, both real and personal.

In the appeal, NELF filed an amicus brief in support of the bank, arguing primarily that the economic loss doctrine, which is recognized in Connecticut, should apply to this case. The economic loss doctrine limits an injured party to its contract damages when its damages, as in this case, are entirely economic. In Flagg Energy Development Corp. v. General Motors Corp., 244 Conn. 126 (1998) (“Flagg Energy”), a sale of goods case, the Connecticut Supreme Court applied the doctrine to limit damages solely to those under the UCC. NELF argued that the plaintiffs should likewise be limited to their economic damages under the UCC, i.e., the value of the personal property that the plaintiff mistakenly thought he was buying at auction.

In a decision issued on November 12, 2013, the Supreme Court of Connecticut agreed with NELF and the Bank that the economic loss doctrine applies to sales under UCC Article 9—and, therefore, that the plaintiff’s tort claims were barred. However, at the same time the Court reversed its own holding in Flagg Energy and held that the economic loss doctrine does not bar a CUTPA claim. The Court reasoned that while all tort claims based on contract are barred by the economic loss doctrine, this does not apply to claims under CUTPA, which are not based on any contract. In short, although NELF and the Bank were victorious on the application of the economic loss doctrine, the massive judgment against the Bank was upheld.

Arguing That (1) The Default Rule Under the Federal Arbitration Act is that the Court Decides Whether a Valid Arbitration Agreement Exists, and (2) The Act Pre-Empts Any Massachusetts Policy Barring the Enforcement of Pre-Dispute Arbitration Agreements in Consumer Claims

Jane B. McNees v. LPL Financial LLC, et al.  
(Massachusetts Supreme Judicial Court)

The plaintiff, who died during this appeal, was a 78-year-old resident of Massachusetts who sued her former investment and financial affairs advisor as well as his firm in Massachusetts state court, alleging, inter alia, fraud and deceit, intentional misrepresentation, breach of fiduciary duty, and violation of the Massachusetts Consumer Protection Law, Mass. G.L. c. 93A. The defendants moved to compel arbitration on the basis of an arbitration provision contained in the contracts that the plaintiff entered into with LPL Financial. The defendants’ motion was denied on two grounds: first, that a question existed as to whether
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a valid arbitration agreement existed and, second, that under a 1982 Supreme Judicial Court decision, Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813 (1982), a pre-dispute agreement to arbitrate a consumer claim under c. 93A is unenforceable on the grounds of public policy.

The defendants appealed their loss to the Massachusetts Supreme Judicial Court, which issued an invitation for amicus briefs on the following two issues: (1) whether its 1982 Hannon ruling remained viable under later holdings by the United States Supreme Court, and (2) whether the existence of an arbitration clause is a question of fact to be determined in the first instance by a court.

Long a supporter of the freedom of contracting parties to enter into binding arbitration agreements, NELF filed an amicus brief supporting the defendants. First, basing its argument on established United States Supreme Court precedent, NELF argued that, except where the contracting parties have expressly agreed otherwise, under the Federal Arbitration Act (FAA), it is the role of the court, not of an arbitrator, to determine whether a valid agreement to arbitrate exists. Second, NELF argued that, as set forth clearly by the United States Supreme Court in Southland Corp. v. Keating, 465 U.S. 1 (1984), where, as in this case, the FAA applies, a court cannot refuse, on alleged state public policy grounds, to enforce an otherwise valid agreement to arbitrate some given category of claims.

In its August 2013 decision, the Court agreed with NELF that Supreme Court law had overruled Hannon, and the Court recognized that, where the FAA applies, any state rule of law that prohibits a trial court from compelling arbitration of state claims is preempted.

Supporting the Enforcement of a Class Arbitration Waiver for 93A Claims

Feeney v. Dell
(Massachusetts Supreme Judicial Court)

At issue in this ongoing case was whether the decision of the Massachusetts Supreme Judicial Court (“SJC”) in Feeney v. Dell, Inc., 454 Mass. 192 (2009), remained valid after AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), in which the Supreme Court held that the Federal Arbitration Act (“FAA”) preempted a California rule of decision that effectively invalidated class action waivers in all consumer arbitration agreements.

In Feeney I the SJC invalidated any class arbitration waiver in a consumer agreement based on the supposed Massachusetts public policy under Mass. G. L. c. 93A, favoring the aggregation of small-value consumer claims. Subsequently, however, in Concepcion, the Supreme Court held that the FAA preempted a similar rule of decision in California.

In this case, Feeney II, Dell sought a reconsideration of the issue decided in Feeney I based, inter alia, on Concepcion. NELF filed an amicus brief supporting Dell in its direct interlocutory appeal to the SJC of the trial court’s failure to apply Concepcion to enforce the class action waiver.

In its initial decision in Feeney II, decided before the Supreme Court’s decision in American Express, which is discussed above, the SJC agreed with the Superior Court and invalidated the class-arbitration waiver. The Court concluded that Concepcion did not preclude a case-specific invalidation of a waiver based on a plaintiff’s proof of the prohibitive costs of arbitrating on an individual basis. But then the Supreme Court decided in Amex that the FAA does not permit the invalidation of a class waiver in a valid arbitration provision, even under a case-specific challenge. Dell then filed a petition for rehearing, and the SJC reversed itself, in light of Amex. The class-arbitration waiver in Dell’s agreement may finally be enforced.

Seeking Supreme Court Review of an Arbitral Award of Class Arbitration that Was Admittedly not Based on the Parties’ Agreement but Was Instead Based Improperly on State Public Policy Favoring the Aggregation of Small-Value Claims.

Southern Communications Services, Inc., d/b/a SouthernLINC Wireless v. Thomas
(United States Supreme Court)

This case, which was before the United States Supreme Court on a petition for certiorari, raised what NELF believes is an important issue under the Federal Arbitration Act (“FAA”), namely whether the FAA permits an arbitrator to order class arbitration against a business without the business’s consent. Here, in plain violation of recent Supreme Court precedent interpreting the FAA, the arbitrator failed to identify
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any contractual basis in the parties’ agreement to justify his order of class arbitration. In NELF’s view, the 11th Circuit similarly violated the FAA by affirming this arbitral award of class arbitration without any contractual basis, under the mistaken belief that that the FAA required that result. To the contrary, as NELF argued in its amicus brief in support of the grant of Supreme Court review, “[c]lass arbitration is a matter of consent [and not coercion]: An arbitrator may employ class procedures only if the parties have authorized them.”


NELF was approached to participate in this case by counsel for the petitioner, Southern Communications Services, Inc., d/b/a SouthernLINC Wireless, based on the amicus brief that NELF had filed in Sutter, cited above. Unlike in this case, in Sutter the arbitrator awarded class arbitration based on a (strained) interpretation of the language of the arbitration clause at issue. Despite NELF’s and the Court’s apparent view that the arbitrator had misinterpreted the contract in Sutter, the Court nevertheless upheld the arbitral award under the FAA’s deferential standard of review. The Court in Sutter explained that the arbitrator had fulfilled his duty under Stolt–Nielsen to find a contractual basis supporting class arbitration. “So the sole question for us [when reviewing an arbitral award under the FAA] is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.” Sutter, 133 S. Ct. 2068 (emphasis added).

As amicus, NELF argued that, in sharp contrast to Sutter, certiorari should be granted here to vacate an arbitral award of class arbitration that, by the arbitrator’s own admission, lacked any contractual basis whatsoever. Instead, the arbitrator based his award entirely on state judicial decisions favoring class actions for plaintiffs with small-value claims. NELF argued that, in ordering class arbitration as a matter of public policy, i.e., on extra-contractual grounds, and not as a matter of the parties’ consent, the arbitrator exceeded his powers under the FAA in substantially the same way as the overruled arbitral panel in Stolt–Nielsen. Moreover, the public policy grounds that the arbitrator invoked are preempted by the FAA under Concepcion.

Despite the arguments of both the petitioner and NELF, the court denied the petition for certiorari on January 21, 2014.

Defending the Right of Parties to Contract for a Reasonable Shortening of the Time Within Which a Suit May be Brought on a Contract Claim

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

This matter raised essentially the same issue decided last year by the Massachusetts Supreme Judicial Court in Creative Playthings Franchising Corp. v. Reiser, 463 Mass. 758 (2012), in which NELF also participated. The issue was whether, under Rhode Island law parties to a contract are free to determine a shorter time within which litigation may be brought on claims arising under the contract than the time provided by the applicable statute of limitations.

The case arose out of injuries suffered by the insured, Joanne LaFlam, in an automobile accident while she was driving a car insured under a policy issued to her employer. The policy indemnified insureds like LaFlam from injuries caused by negligent underinsured motorists; it also contained a contractual limitation of action period of three years, displacing the statutory ten-year period. More than three years after the accident, LaFlam’s attorney sent the insurer, American States Insurance Company (“ASIC”), a letter asserting a claim under the policy. Believing the claim to be unenforceable because of the contractual limitations period, ASIC brought a declaratory judgment action in the Rhode Island federal district court seeking a declaration that LaFlam’s claim was time-barred. The district court granted ASIC’s motion for judgment on the pleadings, and LaFlam appealed to the First Circuit which referred the limitations question to the Rhode Island Supreme Court.

NELF filed an amicus brief supporting ASIC, pointing out that for more than a century and a half the courts of Rhode Island have upheld contractual agreements that reasonably shorten the statutory limitations period, a position from which the Rhode Island Supreme Court has never deviated. In addition to tracing some of the history of this ubiquitous and ancient Anglo-American common law right, NELF also argued that no statutory authorization is required to enable parties to agree to a reasonably shortened time for bringing suit on the contract. In particular, NELF rebutted LaFlam’s use of one section of the Rhode Island UCC, which she claimed was an example of the legislature granting permission to parties to shorten the limitations period. NELF also asked the Court to take the opportunity offered by the case to announce the precise common law rule, never previously formulated though implicit in its earlier decisions.
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Unfortunately, while the Court, in its July 2013 decision, resolved the insurance coverage questions before it by tacitly acknowledging the validity of agreements to shorten the contract limitations period (much as it had done in the past), it failed to take the occasion to clarify the general principles governing such agreements in Rhode Island.

II. Individual Economic and Property Rights

The right to work and the right to own and use property are essential to our economic strength. Protecting individual economic and property rights is a fundamental NELF goal.

Supporting the Ownership Rights of Landowners Whose Property Had Been Wrongly Claimed by the Government Pursuant to Congress’s “Rails to Trails” Legislation

Brandt v. United States
(United States Supreme Court)

This latest installment in the “rails to trails” litigation saga dealt with the question of who owns thousands of miles of rights of way, located all across the country, that have been abandoned by railroads. The rights of way are strips of land only a few hundred feet wide, and they were granted to railroads out of public land by the Federal Government under the General Railroad Right-of-Way Act of 1875 (“1875 Act”). Private property owners like the Brandts claim that the railroads received only easements under the Act and that, upon abandonment, the land occupied by the right of way reverted to the exclusive use and possession of the fee owner of the underlying land, who are now, typically, private parties like the Brandts.

Indeed, that was the position vigorously advocated by the Government itself seventy years ago in Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942), in which the Supreme Court agreed, rejecting the plaintiff railway’s position that it had received under the Act a limited fee with an implied reversionary interest in the United States. In more recent times, however, Congress has laid claim to these strips of land in order to convert them into public recreational trials. As a result, the United States flip-flopped, and its position now has become that these rights of way were granted to railroads as limited fees for the purpose of operating a railroad. On this view, the grant was entirely distinct from any grant of the fee interest in the abutting lands received from the United States by homesteaders or other private parties like the Brandts. On abandonment of use by the railroads, the Government now contends, the land reverts to it free of charge, and it may then freely convert the land to what use it chooses.

In 1976, the Brandts were granted fee simple title to public land in Montana. Across the land ran a right of way granted under the 1875 Act. When the right of way was declared abandoned in 2003, a dispute arose between the Brandts, represented by Mountain States Legal Foundation, who claimed ownership of the strip of land as an abandoned easement, and the United States, which denied their ownership and claimed the land for itself. After the federal district court found for the Government, the case went to the U.S. Court of Appeals for the Tenth Circuit. That court accepted the Government’s (current) legal and historical analysis and affirmed the lower court’s judgment, holding that Great Northern was not on point. The U.S. Supreme Court granted certiorari, the United States agreeing with the Brandts that review of the tangled legal history of the rights of way granted under the Act was needed.

NELF has previously been involved in “rails to trails” litigation. In 1996, NELF represented similarly situated property owners from Vermont. See Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). In that case, NELF argued that the rights of ways were easements and that the United States must pay just compensation if it wishes to take them for use as trails. In the Brandts’ case, NELF has filed an amicus brief rebutting the Government’s assertion that the exclusive control formerly exercised by the railroads over the rights of way demonstrates that the rights of way could not have been easements but must have been fee interests. NELF reviewed legal authorities from around the time of the 1875 Act and showed that they generally recognized that, under certain circumstances, the holder of an easement could sometimes exercise exclusive control, especially when used for a dangerous instrumentality like a railroad. NELF then rebutted the Government’s assertion that, in the debate on the 1875 Act, key House members had acknowledged that the Government would retain a reversionary interest in the rights of way. Conducting a close reading of the text of the debate, NELF showed that the debate actually revealed the members’ acknowledgement that the Act would depart from the prior practice of granting railroads fee interests and instead would grant easements, just as the Brandts argued.
Arguing that the Doctrine of Laches Should Be Applicable to Bar Stale Claims Brought Against a Business Under the Copyright Act’s “Rolling” Statute of Limitations.

(United States Supreme Court)

The question before the Supreme Court in this case is whether a laches defense can bar an otherwise timely claim of continuous copyright infringement where the plaintiff knew that her claim of copyright infringement first accrued 18 years before she filed suit, and the defendants have shown that her delay in bringing suit has caused them to suffer economic and evidentiary injury. The issue arises because courts have interpreted the Copyright Act’s three-year limitations period as restarting with each new alleged act of infringement. As a result, the plaintiffs in cases of continuous copyright infringement such as this one, where the plaintiff has an indefinite, rolling limitations period that allows them to assert a claim whenever they choose to do so and recover three years’ worth of the defendant’s profits.

Here the petitioner, Paula Petrella, alleges that MGM’s 1980 film Raging Bull infringes her inherited copyright in her late father’s 1963 screenplay about former boxer Jake LaMotta, the subject of the film. Ms. Petrella perfected her copyright in her late father’s screenplay in 1991. At that time, Ms. Petrella’s attorney notified MGM that she had an infringement claim against them, but she then delayed filing suit until 2009 – 18 years later – when the film was finally generating profits through the sale of digital copies (DVDs and Blu-ray discs).

MGM asserted a laches defense, which the Ninth Circuit agreed barred Ms. Petrella’s otherwise timely claim. Ms. Petrella appealed to the U.S. Supreme Court, and NELF has filed an amicus brief on the merits in support of MGM. In its brief, NELF argues that the laches defense is a crucial equitable safeguard in a case of continuous copyright infringement, such as this one, where the plaintiff has an indefinite right to sue on the same recurring claim of copyright infringement. Laches is a necessary defense to prevent the plaintiff from abusing this rolling limitations period, to the evidentiary and economic detriment of the defendant. Without the laches defense, NELF argues, the plaintiff can stand by and allow the same stale claim of copyright infringement to reaccrue repeatedly over a long period of time. Meanwhile, the witnesses necessary to the defendant’s case may no longer be available, evidence may have dissipated and the plaintiff (as in this case) can choose to sue just when the defendant’s investment of capital has made it profitable to do so. NELF also argues that the Court has, in effect, already decided that laches is available to prevent a plaintiff from abusing a rolling limitations period. In Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Court held that an employer may invoke laches to bar an otherwise timely claim of hostile work environment under Title VII, where the plaintiff has been on notice of the same, continuously accruing claim for a long time, and the plaintiff’s delay has caused the defendant to lose evidence that is essential to the its case.

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 determine when the government’s “public use” rationale for taking private property is in fact 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 in 2005 that a taking of private property for private (as opposed to public) development would satisfy the “public use” requirement of the Fifth Amendment, so long as the transfer of the property to a private development was intended to benefit the public at large. 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 just to benefit a particular private party, as opposed to the public at large.

Since Kelo, both the federal and state courts have adopted divergent approaches for determining when an alleged public benefit is merely a pretext. In the present case, involving property located in Guam, the Petitioners claimed that the taking of their property violated Kelo—i.e., that the public purpose alleged was actually a sham, under cover of which their property was taken to benefit the family of the local mayor.
The Guam Supreme Court was completely deferential to the municipal authorities in this instance, seeing little reason to sift through the powerful set of facts that the Petitioners presented to prove a pretextual taking. While there are other facts in the record that would perhaps validate the taking, the Guam Supreme Court performed no balancing of factors and did not look seriously at the plaintiffs’ case. In their brief, NELF and its fellow amici did not deal so much with the factual inquiry, as emphasize that this case provided an opportunity for the Supreme Court to clarify how lower courts should proceed analytically when faced with allegations of a pretextual taking under Kelo. Any such guidance would determine how inquiry should be conducted throughout the country, including New England.

Despite the importance of the question presented, the Supreme Court denied the petition for certiorari on April 15, 2013.

Arguing that Massachusetts Should Permit Servient Property to Attain its Highest and Best Use, When to Do So will not Prejudice the Easement Holder

Martin v. Simmons Properties, LLC
(Massachusetts Supreme Judicial Court)

In this case the plaintiff (Martin) owns a vacant lot that is only accessible via an easement (“Way A”) over property owned by the defendant (Simmons). Simmons’s property abuts and surrounds Martin’s property, and is burdened by Way A. (The technical terms are that, with respect to his easement, Martin is the dominant and Simmons the servient property owner.) Simmons’s and Martin’s properties, and Martin’s easement, were all registered with the Massachusetts Land Court, a proceeding that created an indefeasible title to the property of both parties. In August, 2007, Martin sued Simmons in the Land Court, alleging that Simmons had “interfered with his right of way by ...placing encroachments in, parking on, and improperly placing fill within” Way A. Martin requested that Simmons be ordered to remove all such alleged encroachments. After an extensive hearing and the submission of much evidence, the Land Court denied Martin’s request for relief and entered judgment in Simmons’s favor, noting among other things that Martin himself had conceded that none of the alleged encroachments had ever had any adverse impact on his ability to use Way A.

Martin appealed to the Massachusetts Appeals Court, which reversed the Land Court’s decision with regard to Way A, primarily on the ground that Martin’s easement was registered with the Land Court, and therefore in the Appeals Court’s eyes was inviolable. Simmons then sought further appellate review from the Supreme Judicial Court, which granted the application.

NELF filed an amicus brief in support of Simmons, in which NAIOP Massachusetts joined as co-amicus. In its brief, NELF called the Court’s attention to its own 2004 decision, M.P.M. Builders, LLC v. Dwyer, 442 Mass. 87, in which the Court adopted § 4.8(3) of the Restatement (Third) of Property (Servitudes), which states:

Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

442 Mass. at 91. While M.P.M. dealt with recorded (not registered) land, NELF argued that this difference concerns the defeasibility of title and has no bearing on the use of the Restatement to provide the rule of decision in this case.

Rather, NELF argued, what is important is the principal, recognized by the Court in M.P.M., that an appropriate balance must be struck between the rights and interests of dominant and servient property owners. As the SJC stated, “an easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.” M.P.M., 442 Mass. at 92. NELF contended that, in light of the fact that Way A has not been unreasonably burdened and Martin had never been inconvenienced in any way by Simmons’s improvements, the servient land should be permitted to attain its highest and best use since to do so will not adversely affect the dominant owner’s use of his easement. This would best implement the policy of § 4.8(3) and the rationale stated in M.P.M. NELF also urged, the SJC to reject the Appeals Court’s approach, which rested a mistaken understanding of the distinction between the registered land and recorded land.

In a victory for both Simmons and NELF, the SJC, on January 16, 2014, reversed the Appeals Court and
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affirmed the judgment of the Land Court. Agreeing with NELF, the SJC concluded that the fact that the land and easement in this case were registered with the Land Court made no difference to the analysis. The SJC expressly confirmed and expounded upon its adoption in M.P.M. of § 4.8(3) of the Restatement (Third) of Property (Servitudes) and agreed with the Land Court “that the width of the easement property may be reduced as the defendant has done here, since the plaintiff does not dispute that at all times he has been able to use the remaining unobstructed portion of the easement for the purpose of travel to and from his parcel.”

Defending the Right of Private Property Owners to Forbid Political Activity on their Premises

*Glovsky v. Roche Bros. Supermarkets, Inc.*
(Massachusetts Supreme Judicial Court)

The petitioner, Steven M. Glovsky, an attorney, sought to run for election to the Massachusetts Governor’s Council in 2012, and went to a Roche Brothers supermarket situated on a private 5-acre lot in Westwood, Massachusetts, in the hope of soliciting the nominating signatures he needed to get onto the ballot. The store, which has a policy against such solicitations, denied him permission. Glovsky later brought this *pro se* suit, alleging that Roche Brothers had violated his constitutional rights. He relies on the Massachusetts Supreme Judicial Court’s decision in *Batchelder v. Allied Stores Int’l, Inc.*, 388 Mass. 83 (1983). In *Batchelder* the SJC held that the owners of the 84-acre Northshore Mall had violated Batchelder’s rights under Article 9 (freedom and equality of elections) of the Massachusetts Declaration of Rights, when they prevented him from using certain common areas of the mall as a place to collect signatures to get on the ballot for legislative office. The Court’s focus was on the nature of the invitation extended to the public by the owners of the mall, not on the convenience of Batchelder; the Court found that the pre-existing uses made of certain common areas by the owners effectively created a public space, and hence one in which Batchelder had a right to exercise his Article 9 right.

NELF, joined by six co-amici, filed an amicus brief in support of Roche Brothers, arguing that the narrow holding in *Batchelder* does not apply to the modest property in this case and its small, purely utilitarian common area (the front entry way of the supermarket). NELF points out that crucial to the Court’s decision in *Batchelder* was its factual finding that large shopping malls, with their spacious common areas and numerous amenities intended to induce people to linger and congregate, sometimes may assume some of the functions of a traditional public downtown and therefore be deemed dedicated to the public as a practical matter. Nothing could be further from the facts of this case, NELF argues, where the property bears no resemblance to a “downtown,” lacks the scale of a place intended to draw the public to congregate and socialize, and possesses a common area that is a small utilitarian space completely devoted to facilitating shopping.

Of special concern to NELF is Glovsky’s request that the Court extend *Batchelder* to *any* commercial property that is, allegedly, the “best” place to gather signatures. NELF argues that such a view is inconsistent with the text and reasoning of *Batchelder* and would lead to absurd or unworkable results. Notably, such an approach makes an unwarranted shift in focus from the owner’s own pre-existing uses of the property to the mere convenience of individuals like Glovsky.

Fighting a State’s Confiscation of Privately Owned Funds In Order To Use Them to Reduce the State’s Deficit

*Gallo & Co. v. McCarthy*
(United States Supreme Court)

The petitioner beverage distributors in this case sought declaratory and monetary relief because of Connecticut’s seizure of discrete funds of money owned by them. The money represents so-called “unclaimed” bottle-return “deposits.” In late 2008, in response to a severe budget deficit, the Connecticut legislature passed a law mandating that the distributors use separate accounts to hold all incoming and outgoing “deposits.” The legislative history is unequivocal that the purpose of the law was solely to assist that legislature in determining the amount of unclaimed deposits so that it could decide whether it might be worthwhile to pass a later law escheating that sum for the purpose of reducing the state’s alarming deficit. After only three months of segregated accounts being used, and before the first report on account balances was even due, in early 2009 an escheat law was hastily passed redefining property rights in the “unclaimed deposits” and requiring the plaintiffs to surrender those from the segregated accounts to the state. The 2009 law required the plaintiffs to pay over not only the quarterly unclaimed balances in these accounts going forward,
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but also balances held there by the plaintiffs in the three months before the law’s effective date. The distributors objected to the latter demand, claiming it effected a taking of funds that had always been regarded, even by the state, as their property, right up to the effective date of the 2009 law.

The trial judge found for the distributors, but in an appeal in which NELF filed a brief supporting the distributors, the Connecticut Supreme Court adopted the state’s theory that the bottlers simply had no property interest in the first quarter’s funds. Refusing to inquire into the background history of “deposit” funds before the 2008 law, which demonstrated that the petitioners had owned the funds, the court held that the segregation of funds mandated by that law was proof enough that the bottlers did not own the money and that there could be no taking.

In late 2013, the distributors filed a petition for certiorari in the U.S. Supreme Court and NELF, together with three co-amici, has filed a brief in support. NELF argues that the seizure of the money, motivated, as the Attorney General freely admitted, by a severe budgetary crisis, is a classic instance of government unjustly imposing on a few persons an economic burden that should be borne by the public at large. Review by the Supreme Court, NELF argues, is all the more warranted because all three branches of state government were involved in the taking of the distributors’ established property rights, and the distributors had been left without a state remedy for violation of their federal constitutional rights.

NELF also points out that the state court reached its decision without proper examination of the history of the state “bottle bill” and its implementation, including the fact that the distributors’ established property rights had been acknowledged by the state agency charged with administering the bottle bill and that the state court, in denying these rights, adopted a forced and unnatural reading of the agency’s admission.

Opposing a Local Zoning Board’s Attempt to Block a Comprehensive Permit for Affordable Housing by Misinterpreting the Public Policy Underlying the Rules of the Housing Appeals Committee

At issue in this case was a developer’s attempt to secure a comprehensive permit under G.L. c. 40B for a multi-unit dwelling in Scituate that would include affordable housing. After protracted hearings, the local zoning board (“board”) denied the permit on the ground that a very small patch of the project site was defined as wetlands under the town’s regulations, and that local concerns therefore outweighed the regional need for affordable housing. The developer appealed to the Housing Appeals Committee (“HAC”), where the case was largely fought out over factual issues relating to the alleged wetlands. The developer won the appeal and obtained its permit, but the town zoning board appealed the HAC’s decision to the Land Court, where the developer won again.

The board then appealed to the Appeals Court, where it made two legal arguments. Of these, NELF’s amicus brief concentrated on refuting the board’s view of what a developer must do to make out a prima facie case when an appeal has been made to the HAC. The applicable regulation, 760 C.M.R. 56.07(a)(2), states that an appellant establishes a prima facie case by proving “that its proposal complies [with] the federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.” The town board contended that developers must prove compliance with restrictive local regulations as part of the prima facie case, not just with State and Federal law dealing with the same local concerns. NELF argued that, in making this argument, the board misconstrued the plain language of the regulation. Compliance with local regulations is not mentioned. In fact, compliance with restrictive local regulations is deliberately omitted, as a matter of policy, from the developer’s prima facie case because the validity of such local concerns is precisely what is put into question by c. 40B as a matter of law. Because there is a history of towns using restrictive local rules as a means to keep affordable housing from being built within their boundaries, the reasonableness of local rules and the validity of the local concerns they address are matters that must be established separately by a town, as part of its case, before the developer.
can be required to accommodate the local rules. The board’s approach would, in effect, present a great obstacle to developers seeking to construct housing that includes affordable units. NELF expressed its view that the board’s reading, if affirmed, could have a disastrous effect on most developers’ ability to stay in the HAC and get a full review of a permit denial.

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 had adopted a rebuttable presumption that a shoreline increase is due to accretion. The presumption was 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 represent Ms. Hall in this test case of DEP’s regulation. NELF’s position is that DEP’s mapping of the “historic mean high water mark” is defective and DEP’s regulation exceeds that agency’s statutory authority and effects an unconstitutional taking of private property. NELF also believes 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. Because in Massachusetts 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 attempted to impose 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.

To date, NELF has filed a potentially dispositive memorandum of law, accompanied by a detailed and thorough expert affidavit, 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 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.
III. 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 Against the Plaintiff and, Therefore, Should Not Be Considered a “Supervisor” for Title VII Purposes

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

In this case, another important victory for NELF, the United States Supreme Court, in a 5-4 decision, agreed with NELF that an employer cannot be held vicariously liable for an employee’s harassment of another employee under Title VII unless the harassing employee is capable of firing, demoting, or taking other such tangible employment action against the plaintiff employee. In this case, none of the harassing employees was capable of taking such tangible action against the plaintiff, and therefore, as NELF had argued, there was no basis for imposing vicarious liability on her employer. In agreeing with NELF, the Court resolved a nationwide Circuit split, explaining that it had effectively already answered the question of “who is a supervisor under Title VII” in a prior case from 1998, in which the Court had first announced the standards of employer liability for workplace harassment based on the status of the wrongdoer. As NELF argued, the Court stated that vicarious liability is justified only when the harassing employee has been delegated the official, and uniquely coercive, power to make binding economic decisions for the employer, such as firing or demoting an employee.

Arguing That An Employee Alleging Retaliation Under Title VII of the Civil Rights Act of 1964 Must Prove “But-For” Causation in Order to Prevail

University of Texas Southwest Medical Center v. Nassar
(United States Supreme Court)

In yet another significant victory for NELF, the United States Supreme Court embraced the arguments in NELF’s brief and held that an employee alleging retaliation under Title VII of the Civil Rights Act of 1964 must prove “but-for” causation (i.e., that the employer would not have taken the adverse employment action absent the retaliatory motive). The Court agreed with NELF in rejecting the alternative view, followed by many lower courts, that the employee need only prove that retaliation was a “motivating factor” in the decision, even if other, legitimate factors played a part. Under this lesser standard of “mixed motive” liability, the burden of proof then shifts to the employer to prove that it would have made the same decision absent the unlawful animus.

Agreeing with NELF’s application of a recent Court precedent, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (but-for causation applies to ADEA claims), the Court in this case held that, in the 1991 Civil Rights Act, Congress codified the Price Waterhouse mixed-motive standard, but only with respect to Title VII discrimination claims. Congress did not add the mixed-motive standard to the Title VII retaliation provision, or to any other federal anti-discrimination statute. Therefore, concluded the Court, the background common-law standard of but-for causation must apply to Title VII retaliation claims. Agreeing with NELF’s close reading of Gross, the Court held that Gross establishes that an employee suing under any federal employment discrimination statute must prove but-for causation, unless Congress has expressly provided otherwise.
Arguing That Sarbanes Oxley’s Protection for Whistleblowers Only Covers Employees of Public Companies and Does Not Cover Employees of Private Companies That Contract with a Public Company

Lawson and Zang v. FMR, et al.
(United States Supreme Court)

In this case, in which NELF, joined by Associated Industries of Massachusetts, has filed an amicus brief supporting FMR, the issue is whether the Sarbanes-Oxley (SOX) whistleblower anti-retaliation provision applies to employees of a privately owned company that manages the FMR family of mutual funds pursuant to a contractual relationship. The disputed language of the SOX whistleblower provides that “[n]o [public] company. . ., or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee who engages in protected whistleblowing activity].” The statute does not define the term “employee,” italicized above. At issue is whether “employee” applies only to employees of the public company, or whether it also applies to employees of contractors and subcontractors of the public company.

The case arises here in the unusual context of the mutual fund industry, since, while mutual funds are “public companies” under the SOX definition, they generally have no employees of their own so that, arguably, the provision at issue would have no application. Instead, mutual funds generally contract with investment management companies, which, as in this case, are often privately held. The complainants are two former employees of just such a management investment firm, FMR LLC and its subsidiaries (all of which are private companies). They sued under the SOX whistleblower protection provision, alleging that FMR unlawfully discharged them in retaliation for raising concerns about a draft SEC registration statement. The former employees prevailed in Federal District Court, which ruled that Congress intended to protect employees of private companies that contract with public companies, but the First Circuit, in a split-panel decision, reversed, holding that the disputed term “employee” applied only to employees of public companies.

NELF’s amicus brief in support of FMR seeks to demonstrate through textual analysis that, in fact, the SOX whistleblower provision does not protect the employees of a public company’s contractors or subcontractors but only those of the public company itself. This is because those entities are included in the statute solely in their capacity as representatives of the public company and not as employers in their own right.

NELF also argues that, while contractors and subcontractors are indeed separate entities from the public company, they also resemble a public company’s officers, employees, and agents because they are contractually bound to serve the public company’s interests. In fact, SOX was enacted precisely to prevent the accounting and reporting abuses that apparently arose from the contractual relationship between certain prominent publicly traded companies and their accounting firms. Hence, NELF suggests, it is not surprising that Congress has protected a public company’s whistleblowing employee from the potential adverse actions of both his employer and the employer’s contractor. NELF also points out that it should have been no surprise to Congress that many employees in the mutual fund industry, e.g. the employees of private investment advisors, would effectively fall outside the scope of the SOX whistleblower provision. Congress has understood and regulated the mutual fund industry for decades and, NELF concludes, was fully aware of the application of the SOX provision in a case like this one.

Seeking Supreme Court Review of the Massachusetts Supreme Judicial Court’s 2009 Decision in Warfield v. Beth Israel Deaconess Med. Ctrs., Inc.

Bingham McCutchen v. Harwell
(United States Supreme Court)

This case, which arose in California, was before the Supreme Court on a Petition for Certiorari brought by Bingham McCutchen, a Massachusetts law firm with California offices, seeking review of the Massachusetts Supreme Judicial Court’s 2009 decision in Warfield v. Beth Israel Deaconess Med. Ctrs., Inc. NELF filed an amicus brief in support of Bingham’s request for Supreme Court review of the SJC’s decision, with which NELF has long disagreed.

In Warfield, the SJC barred the arbitration of state-law employment discrimination claims unless the employer identified those claims “in clear and unmistakable
terms” in the pre-dispute arbitration agreement. In Warfield, the arbitration clause broadly covered all claims “arising out of or in connection with this [employment] Agreement . . . .” Long-established Supreme Court precedent establishes that, under the Federal Arbitration Act (FAA), such a broadly worded arbitration agreement should subsume all related statutory claims. Notwithstanding the Supreme Court’s FAA precedent on the issue, the SJC ruled that statutory discrimination claims were not included within an arbitration agreement unless they were expressly identified. Since the employer in Warfield did not seek Supreme Court review of the SJC’s decision, the Warfield decision has required employers in Massachusetts to add the SJC-mandated, special-notice language to arbitration provisions. However, NELF has long maintained that the Warfield requirement is preempted under the FAA because a broadly worded arbitration clause in an employment agreement subsumes all such employment-related disputes.

For these reasons, NELF argued as an amicus that certiorari should be granted to abrogate the Warfield “clear and unmistakable” rule under the FAA. NELF argued that the Warfield rule should be preempted because it defeats the FAA’s core purpose of ensuring the enforcement of arbitration agreements according to their terms. Where, as here, the terms of an arbitration agreement cover all claims arising from the parties’ employment relationship, the Supreme Court has long held that such an agreement includes all statutory claims falling within its scope. In fact, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), the Court considered and rejected a heightened notice requirement substantially similar to the Warfield rule.

NELF also argued that the Warfield rule cannot survive a preemption challenge under the FAA merely because the SJC has characterized it as a general rule of contract law; as NELF pointed out, the FAA preempts the Warfield rule, notwithstanding the Massachusetts court’s characterization, because the Warfield rule in fact relies on the uniqueness of an agreement to arbitrate. NELF argued further that certiorari was warranted to rectify the Warfield court’s mistrust of arbitration as an adequate forum for the vindication of statutory rights.

Despite these, and NELF’s and Bingham’s other arguments in favor of Supreme Court review, the Supreme Court denied certiorari in this case on January 13, 2014.

NELF filed an amicus brief in this case arguing again as in Feeney, that Concepcion overrules Feeney v. Dell. NELF’s brief addressed the recent ruling by the National Labor Relations Board, in D.R. Horton that the National Labor Relations Act’s protection of “concerted activity” trumped both the FAA and Concepcion. NELF argued that, to the contrary, 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” that bars or limits the application of the FAA to disputes arising under another federal statute. See 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” does not satisfy the CompuCredit standard, which in this case would require Congress to create a nonwaivable right to class actions under the NLRA.

This case, which the Massachusetts Supreme Judicial Court (“SJC”) paired for hearing with the Court’s reconsideration of its 2009 decision in Feeney v. Dell, discussed above, raised the same issue—the enforceability of a class arbitration waiver—but in the context of an employment agreement.

The dispute arose from the plaintiffs’ franchise agreement with System4 to provide commercial janitorial services. The agreement included a mandatory arbitration clause restricting arbitration to individual claims (a class-arbitration waiver). In 2010 the plaintiffs filed a putative class action in the Massachusetts Superior Court, alleging that System4 misclassified them 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 the SJC’s 2009 Feeney v. Dell decision. The SJC took the matter and solicited amicus briefs in this case, as in Feeney, on whether Feeney survived the Supreme Court’s decision in AT&T v. Concepcion, discussed above, which held that the Federal Arbitration Act (“FAA”) preempted state decisional law effectively invalidating class action waivers in all consumer arbitration agreements.
In a decision in this case issued before the Supreme Court's *Amex* decision, the SJC enforced the class-arbitration waiver. The SJC held that, although it interpreted *Conception* as permitting a case-specific challenge to class waivers, the plaintiffs in this case had failed to carry their burden of proof under such a challenge. Subsequently, the Supreme Court decided *Amex*. The SJC requested briefing to reconsider its decision after *Amex*. The SJC then affirmed its initial decision enforcing the waiver, but on the different ground that the FAA compels such a result.

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

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

This case dealt 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 argued that the Wage Payment Act, which requires the timely payment of wages, permitted 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. Moreover, there is a statute expressly granting immunity from civil suit to LLC managers (with a few exceptions, none relevant to this case). The Superior Court construed the Wage Payment Act by its plain language and dismissed the plaintiff's claim. The plaintiff, arguing 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.”), asked the SJC to reverse the dismissal.

The predominating note struck by the plaintiff was that the statute should be read expansively because it is remedial, but he also argued that the true list of liable parties is given in another statute, to which the Wage Payment Act expressly refers for its civil fines and penalties. The importance of the issue was 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 marshaled a wealth of evidence from statutory history, case law, and contemporary usage at the time of the act's enactment, to demonstrate that the opening phrase of the statute denotes, and has always denoted, only actual, literal employers, not managers or other decision-makers. NELF also defended 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 Massachusetts statutes creating personal liability only for corporate officials for violation of employment and labor laws and that nothing about its wording, history, or placement suggests it is to be understood as merely illustrative or as the beginning of an open-ended list of liable persons. Finally, NELF explained 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 had argued. Examining statutory language and statutory history, NELF showed 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.

In its July 2013 decision, the Court, while apparently agreeing that the corporate officer provision considered in itself has limited scope, nevertheless chose, for policy reasons, to read into the provision the broader scope of the following, unrelated provision dealing with the liability of public employers. On that basis, it found that a claim could be stated against the LLC’s managers. As a result of the decision, a new uncertainty looms over the scope of all the other corporate officer provisions found elsewhere in the employment statutes.

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

(Massachusetts Supreme Judicial Court)

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

Flagg’s argument rested largely on the fact that the Massachusetts Commission Against Discrimination (“MCAD”), which is the agency charged with implementing c. 151B, recognizes such associational standing and had advocated for it vigorously in a letter the agency filed in Scott.

NELF filed an amicus brief supporting AliMed, arguing that the plain language of the statute rendered it impossible for Flagg to have a claim under c. 151B. As NELF demonstrated, § 4(16) and related sections of c. 151B provided a handicapped person a claim for handicap employment discrimination only when the discrimination has occurred “because of his handicap.” In this, the Massachusetts statute differs from the federal Americans with Disabilities Act, which expressly provides for claims based on association.

NELF also argued that no deference is owed to the MCAD’s view of this issue where, as here, the statutory language is clear and unambiguous, much less when the agency’s reading of the statute is directly contrary to the statutory language, as is also the case here. NELF undertook a rebuttal of the reasoning the MCAD used in its administrative decisions that had recognized this type of claim. Since Flagg incorporated into his argument the letter the MCAD filed with the Appeals Court in Scott, NELF also rebutted the arguments the MCAD made there.

Rejecting NELF’s arguments, the SJC held in its July 2013 decision that Flagg stated a valid claim. Sidestepping the plain language of the statutes, the Court looked to a few select decisions decided under the “analogous” federal Rehabilitation Act. In those cases a handicapped person who was the primary object of the act’s protection was undisputedly discriminated against because of his handicap, and the cases dealt solely with consequential harms flowing to third parties from that clearly unlawful act. The Court did not explain in what way this was analogous to the present situation, in which no handicapped employee protected by c. 151B was discriminated against “because of his handicap.” The Court’s decision now creates a question about what grounds justify other rulings of the MCAD, unrelated to handicap discrimination, in which the agency has found associational standing, again, directly contrary to the plain language of c. 151B. Aware at least of the latter concern, in a concurrence Justices Gants and Cordy sought to limit the holding to the facts of the case.
Public Presentations and Seminars

During 2013 NELF continued its advocacy of market freedom and a balanced approach to business and economic issues outside the courtroom with two formal breakfast seminars, an informal discussion with the Speaker of the Massachusetts House of Representatives, and the annual CEO Forum.

Our spring breakfast program addressed what, in the context of the inevitability of cyber breaches, are corporate leadership’s responsibilities and duties both in preparing for such attacks and in dealing with them once they occur. Our program, entitled “Cyber Security: Advising Corporate Leadership on Critical Risk Issues,” was moderated by NELF Advisory Council member Elizabeth M. McCarron, Vice President and Assistant General Counsel of EMC Corporation. Liz was joined by Demetrios Eleftheriou, Senior Counsel, Global Privacy and Data Security at EMC Corporation, Michael Gibbons, Managing Director at Alvarez & Marsal, and Cynthia Larose, Member at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Attendees at our fall breakfast program were treated to an engaging discussion of the most significant business decisions by the United States Supreme Court during its 2012-2013 term, including decisions on arbitration, employment law, and intellectual property. Entitled “The Supreme Court Speaks: Key Business Cases From Last Term,” the program was moderated by Traci L. Lovitt, Partner-in-Charge Boston at Jones Day. Traci’s interlocutors were Mark C. Fleming, Partner at WilmerHale; Maura T. Healey, Chief of the Public Protection, Business, and Labor Bureau at the Office of the Massachusetts Attorney General; John A. Shope, Partner at Foley Hoag LLP; and Jeffrey F. Webb, Partner at Ropes & Gray.

In October, thanks to NELF Board Member Brian G. Leary and Holland & Knight LLP, NELF had the privilege of hosting an informal breakfast meeting with Massachusetts Speaker Robert A. DeLeo. This provided an opportunity for NELF’s Board members and guests to speak candidly with the Speaker about business issues and the health of the free market in the state.

Our annual CEO Forum in December, entitled “Crunched By Numbers: The Affordable Care Act’s Impact on Business and the Regional Workforce,” brought together a panel of experts in the provision of health services, health insurance, the regulatory creation of the ACA, and healthcare consulting to provide an objective assessment of the practical challenges presented by, and the expected effects of, the ACA’s full implementation. We asked our moderator and panelists to take an “objective” approach, i.e., to focus on the law’s requirements and how it would look in practice, rather than on its desirability. The result was a very informative presentation, which laid out the great complexities, uncertainties, and possible unintended consequences of this massive centralization of the nation’s healthcare. The CEO Forum was moderated by Brent L. Henry, Vice President & General Counsel of Partners HealthCare System, Inc. Our panelists included David Gruber, Director of Research, Alvarez & Marsal Healthcare Industry Group; Catherine E. Livingston, Partner, Jones Day LLP; Stephanie S. Lovell, Senior Vice President and General Counsel, Blue Cross Blue Shield of Massachusetts, Inc.; and Elizabeth Rae, Corporate Vice President of Human Resources, Waters Corporation.

In addition to these events, NELF’s Board members also enjoyed, at our Board meetings, presentations by and discussions with Boston Mayor Thomas Menino, Boston Globe Editor Brian McGrory, and Boston College Law School Dean Vincent Rougeau.
While economic challenges continued in 2013, 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. Partly as a result, our expenses in 2013 were modestly lower than in 2012.
New England Legal Foundation’s Directors, Trustees, and State Advisory Council Members constitute an all-volunteer force whose members represent distinction in law, business, and education. Many of these individuals further assist NELF by serving on one or more of the Foundation’s governing committees.

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{A} Agenda Committee. Proposes subjects of special interest for discussion at meetings of the Board of Directors.
{AU} Audit Committee. Oversees the preparation of NELF’s annual audit and performs other duties as assigned by the Board of Directors.
{D} Development Committee. Advises the President and the Board on fundraising strategies and development opportunities.
{C} 2013 CEO Forum Co-Chairs.
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2013 YEAR IN REVIEW

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{D} Development Committee. Advises the President and the Board on fundraising strategies and development opportunities.

{C} 2013 CEO Forum Co-Chairs.
NELF 2013 YEAR IN REVIEW

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NELF appreciates the hard work and dedication throughout 2013 of Staff Attorneys Ben Robbins and John Pagliaro, Office Manager Maria Karatalidis, and Office Assistant Meridith Halsey. Without their efforts, the accomplishments described in the 2013 Year in Review would not have been possible.