New England Legal Foundation

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.
2017 marked the New England Legal Foundation’s 40th year of promoting balanced economic growth for New England and the nation, protecting the free enterprise system, and defending economic and property rights. Over these eventful four decades of our nation’s history, NELF has established itself as the premier courtroom public interest advocate for the business and property owning communities in New England. Outside of the courtroom, NELF has also established itself as a respected and credible public resource on important business law and property rights issues through its public presentations and occasional publications.

In 2017 NELF maintained a steady pace in its core activity of filing amicus briefs in potentially precedent setting appellate cases dealing with business regulation, administration of justice, employment, other business issues, and property rights. Under the supervision of NELF’s President, NELF’s Senior Staff Attorney Ben Robbins and Staff Attorney John Pagliaro filed outstanding amicus briefs on a wide range of subjects, including employment discrimination, regulatory taking, class arbitration waivers in employment agreements, the scope of personal liability for corporate officials under the Massachusetts Wage Act, whistleblower protection under the ‘Dodd Frank Act, contract formation in online transactions, a vendor’s legal liability when a customer challenges the collection of a sales tax, and the issue whether a proposed ballot measure in Massachusetts seeking to impose a 4% additional tax on all income over $1 million passed constitutional muster.

As discussed in the pages that follow, in one of our 2017 cases we achieved a significant victory for the business community when, in December, the Massachusetts Supreme Judicial Court agreed with NELF that, when a company has failed to pay an employee’s wages, the Massachusetts Wage Act does not impose personal liability on a company’s Board members or on outside investors who are engaged in ordinary investment activities. This important decision cleared up, with NELF’s help, a question that had long been in doubt. Another significant victory came with the Massachusetts Court’s March 2017 seminal decision in IBEW Local NO. 129 Benefit Fund vs. Tucci, holding, as NELF had argued in its 2016 brief, that a director of a Massachusetts public corporation owes a unitary fiduciary duty to the corporation itself, to the exclusion of any separate duty to all its shareholders.

Our public programming in 2017 included a breakfast seminar in the spring discussing the IBEW Local No. 129 decision and its implications for the legal and business communities. And in October, we held our fourth annual John G.L. Cabot Award Dinner honoring Brent L. Henry, a former member of NELF’s Board, and the retired Vice President and General Counsel of Partners HealthCare System, Inc., the largest healthcare provider in New England. Over 300 guests drawn from distinguished national law firms and businesses joined us to honor Brent as he received his richly deserved award. We are already planning the fifth annual John G.L. Cabot Award Dinner in October 2018, and are working hard to ensure its success.

As in past years, NELF’s vigorous advocacy of free market principles on so many different fronts is made possible only because it enjoys the active support, commitment, and hard work of the distinguished attorneys and other professionals who serve on our Board of Directors and our six New England State Advisory Councils. Despite holding challenging, full-time positions in law firms and businesses, they graciously devote the time and effort needed to provide first rate governance and guidance to the Foundation. To them, as well as to the companies, foundations and private citizens who support NELF with their generous financial contributions, we not only extend our sincere thanks but also make a commitment to continue our dedication to the core values of our system of free enterprise in the years ahead.
New England Legal Foundation held its fourth annual John G.L. Cabot Award Dinner at the Fairmont Copley Plaza in Boston. The evening’s guest of honor was Brent L. Henry, Vice President and General Counsel (Ret.) of Partners HealthCare System, Inc.

NELF President Martin Newhouse presents the Cabot Award to Henry.

Henry with his wife, Minnie Baylor-Henry.

Sara Jane Shanahan of Sherin and Lodgen with Dan Tigh of Prince Lobel Tye.

NELF President Martin Newhouse (left) with John A. Slope of Foley Hoag (center) and Kevin Martin of Goodwin Procter.

Rachelle Cohen of the Boston Herald (center) with Tom Eberhardt (left) and retired Associate Justice of the Supreme Judicial Court Robert Cordy of McDermott, Will & Emery.

Joe Blute of Mintz Levin (center) with his wife, Jayne R. Blute, and Mark Beaudoin of Waters Corporation.

Natalie Cappellazzo (left) with Charles Pierre and Mara O’Malley of Nutter McClennen & Fish.

Former U.S. Attorney Wayne Budd of Goodwin Procter (left) with John G.L. Cabot Award honoree Brent L. Henry.

Jay B. Stephens, 2014 Cabot Award honoree and retired Senior Vice President, General Counsel and Secretary at Raytheon, congratulates Henry.

Henry addresses the guests.
Urging Rejection of a Proposed Massachusetts Ballot question approving an amendment to the Massachusetts Constitution that would impose an additional 4% tax on income above $1 million because, in clear violation of the Massachusetts Constitution, it deals with “unrelated” subjects.

Anderson v. Maura Healey
(Massachusetts Supreme Judicial Court)

This case involves an attempt to place on the November 2018 Massachusetts ballot a question asking voters to approve an amendment to the state constitution that would levy an additional 4% tax on income above $1 million. If approved, the measure would be an historic departure from the longstanding flat-tax principles enshrined in the Massachusetts constitution. The proposed ballot question also states that the revenue raised by the additional tax “shall” be spent on public education and transportation infrastructure. Before the Massachusetts Supreme Judicial Court is a challenge to the Massachusetts Attorney General’s certification of the ballot question for inclusion in the November ballot. The sole question before the Massachusetts Court is whether the Attorney General erred in finding that the proposed question satisfied the Massachusetts constitutional requirements for ballot initiatives.

NELF has filed an amicus brief in support of those challenging the proposal arguing that, contrary to the Attorney General’s certification, the proposed ballot initiative violates the constitutional requirement that it not involve “unrelated” subjects. NELF argues that, in clear violation of the Massachusetts Constitution, the “millionaire's tax” ballot question impermissibly involves three “unrelated” subjects, namely the proposed surtax itself, proposed spending on transportation infrastructure, and proposed spending on public education. Thus, NELF argues, the question, if included on the November 2018 ballot, would place voters in what the Massachusetts Court has called the “untenable position” of being forced to cast a single vote on two or more dissimilar subjects. As NELF points out, other than similarities pitched at a high level of abstraction, there is not much meaningfully relating public education to transportation infrastructure or, put differently, pre-schools to potholes. The only similarity found in the amendment itself is that education and transportation infrastructure are to receive the revenue generated by the third, no less unrelated subject of the initiative, the 4% surtax that is a departure from the state’s historical flat-tax policy. This tax is clearly the center of gravity of the proposed amendment as it alone receives any detail and elaboration in the text, and it follows on five failed previous attempts to abandon the flat-tax policy.

NELF thus disagrees with the Attorney General’s attempt to link these three disparate subjects by describing them as forming a “self-contained scheme” based entirely on their money nexus. NELF argues that the constitutional limits on popular initiatives would become meaningless were such arbitrary, mix-and-match pairings of revenue and expenditure deemed to be constitutionally acceptable. The Attorney General argues that, despite the proposed amendment’s command that the new tax revenue “shall” be spent on education and infrastructure, the Legislature would in fact retain “plenary spending authority” over the revenue. But NELF demonstrates that fallacy of this argument. The Attorney General is saying in essence that the voters would be asked to vote on a tax whose revenues could be expended as follows: (a) on public education; or (b) on transportation infrastructure; or (c) on both; or (d) on neither; or (e) on anything. For this reason, NELF argues, the amendment does not represent a unified, coherent statement of public policy, for the voters could never be sure exactly what a yes vote would mean, other than a tax increase.

Based on these arguments, NELF urges the SJC to hold that the Attorney General was in error when she certified the “millionaires tax” ballot initiative.
Arguing that Massachusetts legal precedent and public policy require that Chapter 93A consumer protection claims based on a home improvement project gone wrong be subject to the statute of repose governing tort claims arising from such subject matter.

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

The principal Massachusetts consumer protection law, G.L. c. 93A, has a four year statute of limitation, but no statute of repose. However, Massachusetts law provides that any tort action based on allegations of neglect in the design and construction of an improvement to real property is subject to a six-year statute of repose, see G.L. c. 260, § 2B, which commences with the opening of the improvement to use or the substantial completion of the improvement, whichever is the earlier. In contrast to the a statute of limitations defense, which is waived if not affirmatively pleaded, a statute of repose bars, as a matter of law, the bringing of any action after a certain number of years.

This case thus concerns the interplay between c. 93A claims that are based on precisely those kind of allegations covered by G.L. c. 260, § 2B, and the statute of repose itself, which is normally applicable to them. Caught in between is G.L. c. 142A, which regulates home improvement contracting, and violations of which are per se violations of c. 93A.

The plaintiff’s c. 93A claim is based on extensive property damage caused from a fire whose origin she traces back to allegedly faulty electrical work done in her ceiling eleven years before. The trial judge dismissed the action. Finding that the gist of the plaintiff’s c. 93A claim sounded in tort, the judge held it was extinguished by the six-year repose provision of § 2B. The plaintiff appealed, and NELF has filed an amicus brief in support of the defendants.

NELF first defends the judge’s “gist” analysis of Bridgewood’s c. 93A claims by showing that c. 93A claims have regularly been analyzed in this way and that the fate of a c. 93A claim, whether considered in itself or in relation to other, accompanying claims on which it is based, is often determined by its “gist,” “essence,” substantive kinship, “substantive quality,” etc. The judge, in analyzing Bridgewood’s claims as he did, was therefore justified by solid precedent. NELF then reviews the precedents that support the judge’s dismissal of Bridgewood’s c. 93A claims as untimely specifically under § 2B’s repose provision. As the case law amply shows, the gist of her claims sound in the tort of negligence, and so the claims fall within the scope of § 2B’s repose provision. NELF also reviews the pressing public policy concerns that led the Massachusetts Legislature to enact the repose provision of G.L. c. 260, § 2B, in 1968, in order to afford a measure of relief to architects and other in the construction industry. Fifty years later, these concerns remains undiminished and, NELF argues, nothing in the text or legislative history of c. 93A indicates that its consumer protections are intended to suspend the operation of § 2B in cases where a c. 93A claim sounds in tort and deals with subject matter within the scope of § 2B.

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

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

This case raises an important issue of online contract formation in the context of the large and growing category of online standardized consumer agreements. At issue is whether a business—in this case Uber Technologies, Inc.—has provided the online customer sufficient notice of its mandatory arbitration policy and class action waiver, and whether the customer has consented to those terms, when the arbitration provisions are viewable only by clicking on a hyperlink to the agreement’s terms and conditions, and the customer is not required to check an online box indicating that she has accepted those terms. Instead, the business has clearly provided that the customer will be deemed to have accepted all of the contract terms once she has created an online account.
Specifically, when a customer creates an online account with Uber, Uber clearly states that “[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy.” (Emphasis in original.) The words “Terms of Service” appear as a highlighted button with a hyperlink that, if clicked, opens a ten-page agreement containing a mandatory arbitration clause and a class action waiver, under the bold-faced heading, “Dispute Resolution.”

The plaintiff, Rachel Cullinane, filed this putative class action in Federal District Court, rather than submitting her claim to individual arbitration, arguing that she had inadequate notice of Uber’s arbitration provisions because they were viewable only in a separate document, and because Uber did not require her to state affirmatively that she had accepted those terms. (She alleges that Uber imposed fictitious fees in violation of Mass. G.L. c. 93A.) After her complaint was dismissed, Cullinane appealed to the United States Court of Appeals for the First Circuit, where NELF has filed an amicus brief supporting Uber.

NELF argues that, under well-established principles of Massachusetts contract law, a customer has indeed consented to a business’s arbitration policy once the customer has indicated her consent to all of the terms contained in the agreement, in the manner of acceptance defined by the business. It is also well settled in Massachusetts that a party who enters into a contract is bound by all of its terms, whether she has read them or not. This rule applies equally to contract terms that are incorporated by reference in that agreement, such as Uber’s arbitration provisions that are viewable through a hyperlink in this case. It is also well settled in Massachusetts that the offeror controls the manner of acceptance. In short, NELF argues that Massachusetts law treats contract formation as an objective process, in which the contracting party’s actual state of mind is irrelevant once that party has manifested her consent to the terms of an agreement, in the manner of acceptance prescribed by the offeror. NELF argues that a decision in Cullinane’s favor would contravene these bedrock principles of contract formation, and urges the First Circuit to affirm the dismissal of the action.

Arguing that a shareholder does not have a right under the Massachusetts Business Corporation Act to inspect a corporation’s books and records after the board of directors has refused his litigation demand concerning alleged corporate wrongdoing.

Chitwood v. Vertex Pharmaceuticals (Massachusetts Supreme Judicial Court).

The question before the Massachusetts Court in this case was what constituted a “proper purpose” allowing a shareholder to inspect a corporation’s books and records after the board of directors had refused his litigation demand concerning alleged corporate wrongdoing. The Massachusetts Business Corporations Act, G. L. c. 156D, § 16.02(1), give a shareholder the right to inspect certain corporate books and records if he establishes a “proper purpose” with “reasonable particularity,” among other statutory requirements. The trial court had permitted the requested inspection, and NELF filed an amicus brief in support of Vertex Pharmaceuticals on appeal, arguing that there could be no proper purpose to the shareholder’s request in this case because a “demand refused” shareholder should not be permitted to inspect the board’s books and records unless he can show that the board’s decision-making process may have lacked the good faith and diligence necessary to warrant protection under the business judgment rule. NELF argued that there had been no such showing in this case.

While in its March 20, 2017, decision the Massachusetts Supreme Judicial Court rejected NELF’s arguments and did not, as NELF had requested, reverse the ruling below, the Court, in effect narrowed the shareholder’s right of inspection to a nullity. The Court held that both the shareholder and the company (and NELF) had interpreted the right of inspection too broadly and that, under the statute, “a shareholder is entitled to inspect the original minutes of a board of committee meeting only to learn what action was taken at those meetings,” and nothing else. Thus, the Court found that where a shareholder’s derivative action demand has been declined, the shareholder has a proper purpose in asking to inspect “excerpts of the original minutes of the meeting of the board of directors and the special committee that reflect the actions taken...” As the Court noted:

“The minutes may well say nothing different regarding these actions from what the corporation’s attorney described in the letter informing the shareholder of the corporate decision to decline to proceed with the derivative action, but the shareholder is entitled, as the Russian proverb says, to ‘trust but verify.’”

Thus, although NELF’s views did not prevail, the case provided an importance gloss for companies and their shareholders on the statute at issue.
Arguing that, Under Massachusetts Law, a Director of a Public Corporation Owes a Fiduciary Duty to the Corporation Itself, and Not Its Shareholders.

**IBEW Local NO. 129 Benefit Fund vs. Tucci**
(Massachusetts Supreme Judicial Court)

This significant business case arose out of the $64 billion cash-out merger of publicly-traded EMC Corporation with Dell. After the transaction was announced in 2015, certain EMC shareholders sued EMC’s directors directly in nine separate actions. They alleged that the directors had violated the fiduciary duties that they owed to them as shareholders by failing to obtain a higher price for their interests by selling the company’s divisions and subsidiaries separately rather than selling the company as a whole. The Superior Court ruled that the plaintiffs’ claims could only be brought as derivative claims because they alleged breaches by the EMC directors of their duty to the corporation, not to the shareholders. Since the plaintiffs had sued the EMC directors directly, rather than derivatively, the Superior Court dismissed their complaints. The shareholders in three of the actions appealed, and the Massachusetts Supreme Judicial Court (“SJC”) accepted the case for direct appellate review. In its decision issued on March 6, 2017, the SJC affirmed the dismissals of the plaintiffs’ complaints.

The plaintiffs made three arguments to the SJC for why their complaints directly against EMC’s directors should be reinstated. First, they argued that both the Massachusetts Business Corporations Act, c. 156D, and prior decisions by the SJC itself established that a corporation’s directors, even, as here, directors of a publicly traded corporation, always owe a direct fiduciary duty to shareholders. Second, they urged the Court to follow the Delaware cases that seem to establish that principle as Delaware law. Finally, the plaintiffs argued that, even if they might have been required to sue the directors derivatively, once the merger had been completed during the pendency of their appeal, they should have been allowed post-merger direct standing, since otherwise they would have no remedy for the alleged wrong.

NELF filed an amicus brief in support of the directors, refuting two aspects of the plaintiff’s arguments. First, NELF demonstrated that the plaintiffs’ attempt to rely on a prior SJC decision for their claim that Massachusetts law already recognized a fiduciary duty owed by directors of a public corporation to the shareholders was misplaced. The plaintiffs claimed that *Coggins v. New England Patriots Football Club, Inc.*, 397 Mass. 525 (1986), established that directors of a Massachusetts publicly held Massachusetts corporation “always” owe fiduciary duties “directly” to shareholders. To the contrary, NELF argued, and the SJC agreed, that *Coggins* does not stand for, or in any way exemplify, any such principle. Rather, in *Coggins* the Court clearly sought to separate the duties owed to minority shareholders by the controlling shareholder in that case from the duties that same individual owed to the corporation in his capacity as a director. Nowhere did the Court hold that a defendant acting solely in his role as a director of a publicly held corporation could be liable for breach of fiduciary duties owed directly to shareholders. Indeed, despite the fact that *Coggins* involved a public corporation, the Court noted at the beginning of its analysis in that case that it would be guided by Massachusetts close corporation law, which recognizes the fiduciary duties shareholders owe to one another in such an entity.

Second, NELF demonstrated, and again the SJC agreed, that the plaintiffs’ claim of post-merger standing to sue the directors directly was also flatly wrong. For this contention the plaintiffs cited two Massachusetts cases. Because one of the cases was entirely dependent on the other for the supposed proposition, NELF focused on the latter case, *Samia v. Central Oil Co.*, 339 Mass. 101 (1959). NELF showed that standing was never an issue in that case and that the equitable relief fashioned there depended on the close nature of the corporation and the necessity to avoid granting relief that would reward a wrongdoer, all concerns remote from the EMC case. Finally, NELF noted that the relevant case on post-merger standing is *Billings v. GTFM, LLC*, 449 Mass. 281 (2007), and NELF explained why the present plaintiffs fell short of standing under that case. In its decision, the SJC agreed with NELF that *Billings* governs the issue of post-merger standing and that the former EMC shareholders had no standing under *Billings* to sue the directors.

Of greatest significance, in its March 6, 2017, decision, the SJC, firmly differentiated Massachusetts law from that of Delaware, and held that, fundamentally, a director of a Massachusetts public corporation owes a fiduciary duty to the corporation itself, and not to the shareholders. Agreeing with NELF, the Court clarified that, although in the *Coggins* case it would appear that the director of a public corporation was found to owe such a duty to the shareholders, the director in *Coggins* owed that duty not as a corporate director, but solely as the controlling shareholder who was trying to implement a self-in-
ReJECTING THE MASSACHUSETTS COMMISSIONER OF REVENUE’S POSITION THAT, UNDER THE MASSACHUSETTS SALES TAX STATUTES, A PURCHASER OF GOODS WHO BELIEVES SHE HAS BEEN ERRONEOUSLY CHARGED A SALES TAX MAY SUE A VENDOR FOR BREACH OF CONTRACT TO RECOVER THE AMOUNT PAID

Worldwide TechServices v. Commissioner of Revenue, et al.
(Massachusetts Supreme Judicial Court)

This case arises from litigation related to the long-running dispute between Dell (the plaintiff in this case is a Dell subsidiary) and Massachusetts purchasers of Dell computers who allege that Dell improperly charged them a Massachusetts sales tax on service contracts that they purchased with their Dell computers. Initially, the purchasers attempted to bring a Mass. G.L. c. 93A class action in the Massachusetts courts. NELF was extensively involved in supporting Dell’s eventually successful arguments before the Massachusetts Supreme Judicial Court that the dispute was subject to the service contracts’ mandatory arbitration provisions and class action waivers. Accordingly, the case was ordered to arbitration on an individual basis, and Dell prevailed before the arbitrator.

While the challenge to Dell’s collection of sales taxes was pending in court and, then, in arbitration, Dell, as a protective measure, applied to the Massachusetts Department of Revenue (“DOR”) for an abatement of the disputed sales taxes so that, if it lost on the merits, it would have funds to pay back the sales taxes it had collected. (This was done because, as required under Massachusetts law, Dell had already remitted to the Department of Revenue the disputed sales taxes that it had collected from its purchasers.) When the DOR denied the abatement request, Dell appealed that decision to the Massachusetts Appellate Tax Board (“ATB”). While Dell’s appeal was pending before the ATB, one of the plaintiffs in the c. 93A action, Econo-Tennis Management Corporation, d/b/a Dedham Health and Athletic Complex (“Dedham”), successfully intervened in the ATB appeal. The ATB issued a preliminary decision finding that the sales tax had been wrongly collected by Dell.

Dell, having won in the arbitration, moved to dismiss its ATB appeal, with which motion the DOR concurred. The ATB dismissed the appeal over Dedham’s objection.

The central issue before the Massachusetts court in this appeal is whether the ATB was correct in dismissing Dell’s appeals, even though Dedham objected.

NELF’s participation was requested because the DOR, in its brief supporting the dismissal of the cases, argued that, even if the ATB appeals were dismissed, Dedham supposedly still had a statutory right to sue Dell for the improper sales tax under a theory of breach of contract. Dell’s attorneys asked NELF to file an amicus brief disputing the DOR’s position on this issue.

In its amicus brief, NELF argues that neither the Massachusetts sales tax statutes nor the common law of agency authorizes a purchaser to sue a vendor to recover an allegedly erroneous sales tax, which the vendor has collected as an agent of the Commonwealth. Nowhere does the relevant provision of the sales tax code, G. L. c. 64H, § 3(a), mention or even suggest any right of action by the purchaser against the vendor. By contrast, the plain language of § 3(a) protects the rights of the vendor, not the purchaser. Section 3(a) requires the purchaser to reimburse the vendor for the sales tax that the vendor must pay to the Commonwealth under § 2 of the same statute. Simply put, the sales tax statute establishes the respective obligations of the vendor and the purchaser in the payment of a sales tax to the Commonwealth. The statute creates a steady stream of revenue flowing from the purchaser through the vendor to the Commonwealth, and nothing more.

Under these circumstances, NELF argues, it is black letter law that Dell, as an agent acting on behalf of the Commonwealth, the known principal, cannot be held liable for any acts performed within the scope of its authority. NELF also argues that adoption of the DOR’s position would contravene the purposes of the tax statutes and would lead to untenable results. In particular, permitting purchasers to sue vendors every time they disputed a sales tax would contravene the basic purpose of the sales tax statute, which is to secure a reliable stream of revenue for the Commonwealth. Recognizing such a right of action would actually encourage vendors to under-collect a sales tax whenever the tax law is unclear (a not infrequent occurrence), to avoid their potential exposure to civil liability. As a result, the Commonwealth could suffer a decrease in the amount of
sales tax collected. And vendors would be forced to make the impossible choice of incurring either state penalties for under-collection or civil liability for over-collection. The Legislature could not have intended such absurd results.

Moreover, NELF argues, the Commissioner’s position would create the untenable result of allowing purchasers to sue vendors over a sales tax after the expiration of the time period for seeking an abatement of the sales tax. And the Commissioner’s position would allow a court to decide in the first instance whether a tax abatement is due. This would deprive both DOR and the ATB of their primary jurisdiction to decide such tax issues.

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

**Allison v. Eriksson**
(Massachusetts Supreme Judicial Court)

The Massachusetts Supreme Judicial Court, which has taken this case on direct appellate review, requested amicus briefing on the issue of what remedies are available to a minority member of a Massachusetts limited liability company who alleges that the controlling members have structured a “freezeout” merger. NELF has submitted an amicus brief on the question. Section 60(b) of the LLC statute provides, in relevant part:

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

G. L. 156C, § 60(b) (emphasis added).

Notwithstanding this unambiguous statutory language, the Superior Court held that a minority member may also sue the controlling members of the company for breach of fiduciary duty, under Donahue v. Rodd Electrotype Co. of New England, 367 Mass. 578 (1975), and its progeny. Accordingly, the lower court conducted a bench trial and found that Dr. Elof Eriksson, the defendant and controlling member of Applied Tissue Technologies, LLC (ATT), a failing Massachusetts biotech start-up, had breached his duties to the minority member, W. Robert Allison, a graduate of Harvard College and Stanford University Law School, when Dr. Eriksson voted to approve a merger of ATT with another Delaware limited liability company (“Ilc”) to salvage the company’s business. The lower court found for Allison and ordered Eriksson to rewrite the terms of the merger agreement, to comport with the court’s own conception of fairness.

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

(Maine Supreme Judicial Court Sitting as the Law Court)

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

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

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

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.

Arguing that, in a Regulatory Taking case, Penn Central Does Not Establish a Rule that Two Legally and Economically Distinct Parcels Must be Combined as the “Parcel as a Whole” in the Takings Analysis Simply Because They are Contiguous and Commonly Owned.

Murr v. States of Wisconsin and St. Croix County
(United States Supreme Court)

This case had presented the Supreme Court with an opportunity to take a first step toward defining, or at least setting some limits to, the “parcel as a whole,” which has been a key concept in regulatory takings law since the phrase first appeared in the Court’s 1978 decision Penn Central Transportation Co. v. City of New York, 438 U.S. 104. It is against the value of the parcel as a whole that the extent of any alleged regulatory taking is measured.
The Murrs had attempted to sell one of two contiguous lakeside lots they own. The lot, left (unlike the neighboring lot) undeveloped, was bought and retained specifically for the purpose of appreciation and sale. They found, however, that the sale was blocked by environmental regulations that rendered the lot individually unsaleable and largely worthless. After the Wisconsin courts had found that there had been no regulatory taking of the lot because the regulations had legally merged it with the developed lot, the Murrs petitioned the U.S. Supreme Court.

NELF filed a brief in support of the Murrs, urging the court to clarify the concept of the parcel as a whole and arguing that the court should reject the rigid rule used by the Wisconsin courts whereby contiguity of lots plus common ownership equals the parcel as a whole.

NELF first argued on equitable principles that the Court should strike a fair and just balance when identifying the “parcel as a whole.” Invoking the principles of fairness and justice on which the Court has avowedly founded its takings jurisprudence, NELF expressed its concern, echoed by distinguished legal commentators, that the tendency of courts to expand the “parcel as a whole” concept has created a serious risk of under-compensation of property owners.

NELF then went on to illustrate analytically the insufficiency of the rigid two factor rule (based on adjacency and common ownership) that had been applied by the Wisconsin court. NELF argued that these two factors alone are too tenuous to justify evaluating separate parcels as one, and it urged the Court to require at least integrated “unity of economic use” as a third factor (the Murrs’ two parcels, of course, always had different economic uses, one being a developed residential parcel and the other being an investment asset). NELF developed its argument by drawing a close analogy to well-established principles of eminent domain law. As NELF pointed out, both eminent domain law and takings law sometimes must answer a common question: what parcel (if any), other than the one directly affected by government action, must be considered along with the affected parcel in order to evaluate the claim for compensation in a fair and just way in relation to the whole of the relevant property? In eminent domain law this question arises when there has been a taking of one parcel, and additional damages are sought for the economic effects of that taking on a second parcel. The key factor, widely recognized by the states, is that there must be an integrated unity of economic use of the two parcels; mere contiguity and common ownership are insufficient. NELF urged the Supreme Court to reject the two-factor test of the Wisconsin court and to adopt “unity of economic use” as the crucial factor.

When the case was argued before the Supreme Court on March 20, 2017, NELF was encouraged to see that its analogy played a role in the oral argument.

However, on June 23, 2017, the Supreme Court, in a five-justice majority opinion written by Justice Kennedy, rejected NELF’s arguments and affirmed the judgment below. The majority rejected the “formalistic” appeals to state rules made by both sides for determining the parcel as a whole. The state parties had relied on the merger regulation to supply the defining principle, while the Murrs had argued that state laws that establish the identity of legally separate lots should be taken to identify the presumptive parcel as a whole (a position NELF endorsed). Instead, the Court used a multifactor test that first gives substantial weight to state laws regarding how land is bounded and divided, then looks at the physical characteristics of the land in question, especially its topography and environmental features, and then assesses the value of the land under the regulation, with special attention to the value of the burdened land to other holdings. By this test the Court found that the parcel as a whole comprised both Murr lots, and it then concluded that there had been no regulatory taking because the lots, taken together, retained sufficient value.

In a “dissent” which read more like a concurrence in the judgment, Chief Justice Roberts, joined by Justices Alito and Thomas, wrote that while the outcome “does not trouble me,” the majority’s methodology does. He said that the majority double-counted the factors of the takings analysis proper by incorporating them into the threshold analysis of what constitutes the parcel as a whole. The result of this error, he said, is to “tip the scales in favor of the government.” He favored the methodology of the Murrs for identifying the presumptive the parcel as a whole, but apparently believed that the facts of the case overcame the presumption. (Justice Gorsuch did not take part in the decision.)
Massachusetts’ Highest Court Agrees with NELF that an Otherwise Valid Foreclosure Is Not Rendered Void Because the Foreclosing Bank Did Not Comply With a Post-Foreclosure Requirement to Notify Third Parties

_Turra v. Deutsche Bank Trust Company Americas_  
(Massachusetts Supreme Judicial Court)

After the collapse of the residential mortgage market in 2008, the Supreme Judicial Court, in a string of cases, was faced with the task of clarifying and updating Massachusetts’s non-judicial foreclosure law. Typically, these cases involved a homeowner who sought to thwart or undo a foreclosure on the ground that the foreclosing mortgagee allegedly failed to comply strictly with some aspect of Massachusetts foreclosure law. In the present case, the plaintiff, citing passages from those earlier decisions, asked the Court to find the bank’s foreclosure on his house void because the bank had failed to comply with one of the ten statutes that, he claimed, set out the procedures required to effect a valid foreclosure. The statute in question, G.L. c. 244, § 15A, requires that, within 30 days of a foreclosure sale, the foreclosing party give notice of the sale to the municipal tax assessor, any sewer or water provider to the property, and any tenants. Since there was no dispute about the bank’s failure to comply with this post-sale notice requirement, this case boiled down to whether the plaintiff correctly understood what the SJC meant in the passages he cited—and, if so, whether the SJC should continue to mean it, now that the question of the interpretation of § 15A has been squarely put before it for the first time and fully briefed. Because we believed that the passages were loosely expressed dicta and because Turra’s position was unequivocally contradicted elsewhere in the statutes, NELF filed an amicus brief supporting the bank and urging the Court to affirm the dismissal of the case.

NELF first contested Turra’s claim that the passages in question were part of the holdings of the cases from which they were drawn, explaining in detail why even Turra’s strongest citation was clearly nothing more than dictum. NELF then pointed out that the post-sale notice statute could not possibly set out a requirement for a valid foreclosure because the statute controlling non-judicial foreclosures by the power of sale, G.L. c. 183, § 21, expressly states that all such requirements must be fulfilled _before_ foreclosure and sale. NELF elaborated on this point by highlighting the deficiencies and contradictions found in Turra’s understanding of the ten statutes that were the subject of the SJC’s dicta. NELF concluded by explaining that the language of § 15A is not, in fact, even mandatory; rather, the statute is a mere “housekeeping” measure intended to ensure post-sale continuity in the supply of certain residential services and in the payment of taxes, and its violation is attended by no legal consequences whatsoever, let alone the voiding of an otherwise valid foreclosure. NELF further noted that § 15A is not even intended to protect any interest of a mortgagor like Turra, who therefore lacks standing to bring any action based on it. For these reasons, NELF urged the Court to uphold the trial court’s judgment of dismissal.

On January 30, 2017, the SJC issued a rescript decision affirming the dismissal of Turra’s case. The Court confirmed that the passages relied on by Turra are all dicta, just as NELF had characterized them, and, like NELF, it cited G.L. c. 183, § 21, in adopting NELF’s view that statutes that perfect the power of sale are limited to those that require compliance before foreclosure and sale.

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.” NELF is now awaiting DEP’s response, and attorneys for the parties will then meet in chambers to decide whether the case must go to a full adjudicatory hearing or can be settled. 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.

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

*Epic Systems v. Lewis; Ernst & Young LLP v. Morris; National Labor Relations Board v. Murphy Oil USA, INC.*

(United States Supreme Court on the merits)
on the employees and the NLRB, as the parties opposing the class action waiver, to show that the NLRA displaces the FAA's mandate to enforce that contract provision. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227 (1987). And to meet their burden, the parties must show that “such an intent [if any] will be deductible from [the NLRA's] text or legislative history, or from an inherent conflict between arbitration and the [NLRA's] underlying purposes.” McMahon, 482 U.S. at 227. And even if this issue of statutory interpretation were a close one, any doubts should be resolved in favor of enforcing the class action waiver under the FAA. See CompuCredit Corp. v. Greenwood, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring) (“[W]e resolve [any] doubts in favor of arbitration.”).

The Seventh and Ninth Circuits in this consolidated case held that § 7 of the NLRA, enacted in 1935 at the height of the Great Depression, contains a “contrary congressional command” that displaces the FAA's mandate to enforce class action waivers in employment arbitration agreements. That section protects an employee's right to “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (emphasis added).

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

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

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

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

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

Does the Dodd-Frank Act’s whistleblower anti-retaliation provision apply to employees who have not reported a violation of the securities laws to the Securities Exchange Commission, when the Act defines a “whistleblower” as an individual who “provide[s] information relating to a violation of the securities laws to the Commission?”

Digital Realty Trust v. Somers
(United States Supreme Court).

NELF, joined by Associated Industries of Massachusetts, filed an amicus brief at the certiorari stage and now at the merits stages of this case, on behalf of the employer, Digital Realty Trust. At issue is the meaning of a subsection of Dodd-Frank’s “Securities whistleblower incentives and protection” section, 15 U.S.C. § 78u-6, which protects “a whistleblower [from retaliation in the workplace] . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act [SOX] . . . .” 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . .” 15 U.S.C. § 78u-6(a)(6). SOX, however, affords protection to the employee who only reports a potential securities law violation to his employer. And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to his employer.

This case matters to NELF and its supporters because an employee who sues for whistleblower retaliation under Dodd-Frank is entitled to very generous remedies, namely a six-to-ten year limitations period, double back pay damages, and a direct right of action in federal court, without having to exhaust any administrative remedies. 15 U.S.C. § 78u-6(h)(1)(B)-(C). Dodd-Frank also awards the whistleblower a substantial monetary bounty if his or her reporting to the SEC results in a successful administrative or judicial enforcement action by that agency. § 78u-6(b).

NELF argues that the lower court erred because it abandoned Dodd-Frank’s clear provision that a “whistleblower” is an employee who reports to the SEC. This definition must apply whenever the word “whistleblower” appears in the disputed subsection of Dodd-Frank. And applying this definition to the disputed language yields only one meaning. The employee who reports information to the SEC is protected when he also reports that information to his employer and then suffers retaliation because of his internal reporting.

This subsection of Dodd-Frank therefore protects an employee who has reported to both the SEC and her employer, when the employer does not know that the employee has reported to the SEC. And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank. She would only be protected under SOX for her internal reporting. By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

The Ninth Circuit apparently rejected the statute’s plain meaning. In that court’s view, the disputed language identified a set of circumstances that was “narrow[] to the point of absurdity . . . .” But it is not for the courts to pass judgment on congressional line drawing of this sort. Nor is it a court’s role to conform an unambiguous statute such as this one to the court’s own notion of what Congress may have had in mind.

But this is precisely what the Ninth Circuit did here, when it “interpreted” the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. The Ninth
Circuit impermissibly substituted the word “employee” for the defined term “whistleblower.” And Dodd-Frank’s specific definition of a whistleblower excludes all other possible meanings of that term. Moreover, Congress chose the word “employee” in SOX’s whistleblower provision but did not do so when it later enacted Dodd-Frank. It must be presumed that this choice was deliberate.

In any event, it is hardly absurd for Congress to assume that an employee may choose to report to both the SEC and her employer, and that the employer may not know that such an employee has reported to the SEC. Consistent with SOX’s purposes, an employee may wish to report a potential violation to her employer, for speedy internal resolution of the matter. But, consistent with Dodd-Frank’s purposes, that same employee may also wish to alert the SEC to the matter, to secure her right to pursue Dodd-Frank’s special financial incentives (a potentially large bounty) and legal protection (including the right to recover double back pay). And the employer may not know that such an employee has reported to the SEC because Dodd-Frank and the SEC regulations both preserve the confidentiality of a whistleblower’s identity.

If allowed to stand, the Ninth Circuit’s decision would certainly eviscerate Dodd-Frank’s definition of a whistleblower. But in so doing, the lower court’s approach would also contravene Congress’ purpose of linking Dodd-Frank’s special financial incentives with its enhanced remedial protection. In the lower court’s view, an employee can sue for retaliation under Dodd-Frank even though he is not eligible for a bounty under that statute, because he has not reported to the SEC. But Dodd-Frank’s incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting information to the SEC.

Arguing that, When a Stockholder/Employment Agreement Provides that a Corporation’s Board of Directors Has the Exclusive Authority to Decide Whether a Senior Executive Should Be Terminated for Cause, a Reviewing Court Should Defer to the Board’s Good-Faith Employment Decision.

_Balles v. Babcock Power, Inc._
(Massachusetts Supreme Judicial Court)

This case, which was before the Massachusetts Supreme Judicial Court on the merits, asked how a court should review a decision of a corporation’s board of directors to terminate a senior executive for cause under the terms of a stockholder/employment agreement. A high-ranking executive is generally an employee at will who can be terminated without cause, as in this case. Nonetheless, under the typical stockholder/employment agreement, such as the one here, an executive who is terminated for cause can lose his stock ownership in the corporation, along with any severance package. And, as with many other such agreements, the contract at issue provides a definition of “cause” and also provides, significantly, that “a determination of ‘Cause’ may only be made by the Board of Directors . . . .” (Emphasis added.) Under this clear contractual language preserving the board’s fact-finding prerogative, should a court defer to the board’s decision so long as the board has acted in good faith? Or should a court instead have the discretion to disregard the board’s decision and determine the issue for itself in a trial _de novo_? The Superior Court in this case took the latter view and reversed the decision of the board of directors of Babcock Power, a high technology company headquartered in Danvers, Massachusetts, to terminate for cause the employment of Dr. Eric Balles, a high-ranking, senior executive employee. As a result, the lower court awarded Balles approximately $2 million in damages and attorneys’ fees.

This case raised an important issue of internal corporate governance that warranted NELF’s support when Babcock Power sought direct appellate review. The SJC granted DAR and NELF then filed an amicus brief on the merits. In its amicus brief, NELF argued that, under the plain terms of the stockholder agreement, the board’s decision should be upheld unless the employee could show that the decision was made in bad faith or was otherwise tainted by fraud, and that the Superior Court’s review should have been limited to those issues alone.

In its March 6, 2017, decision, the Massachusetts Court disagreed with NELF, holding, _inter alia_, that the language in the stockholders’ agreement that “a determination of ‘Cause’ may only be made by the Board of Directors,” did not require deference by a reviewing court. Agreeing with the Superior Court, the SJC held that the contract language only spoke to who within the company could make such a determination, and was
“silent as to an appropriate standard of judicial review for disputes relating to that determination.” The SJC held, therefore, that the Superior Court’s de novo review of the Board’s decision was appropriate and found no error in the trial judge’s decision, which it affirmed.

Arguing that, When an Employee Prevails in An Action Brought for Wages Under G.L. c. 149, § 150, and Receives the “Liquidated” Treble Damages Mandated By the Statute, Prejudgment Interest is Not Available on Any Portion of the Recovery.

George v. National Water Main Cleaning Co.
(Massachusetts Supreme Judicial Court)

In 2008, the Massachusetts legislature amended G.L. c. 149, § 150, which governs the right to bring suit for violation of a number of state wage laws. As relevant here, previous to the amendment, § 150 had permitted an award of treble damages to be made to a prevailing plaintiff, but the Supreme Judicial Court had held that such an award was discretionary and that, because the enhanced damages were punitive in nature, they required the plaintiff to prove the employer’s bad faith, willfulness, or other culpable conduct, in order to avoid due process problems connected with the imposition of punitive damages. The 2008 amendment worked a major change in § 150—it made the treble damages unconditionally mandatory so that plaintiffs no longer would have the burden of proving bad faith. Perhaps to get around the due process problem such mandatory treble damages might create, in the 2008 amendment the legislature expressly characterized the new mandatory treble damages as “liquidated,” hence compensatory and not punitive.

The present case raised the question of what effect, if any, the amendment had on a plaintiff’s right to prejudgment interest, which is the primary means of compensating a plaintiff for the loss of use of money or its unlawful detention during the time before judgment enters. In other words, does the declared “liquidated” character of the new treble damages mean (as it ordinarily would in other legal contexts) that the damages are intended to compensate comprehensively for all injuries, including those that may be difficult to prove or quantify, such as those arising out of loss of use of money or its wrongful detention?

The plaintiffs here had settled their wage claims with the employer, with the exception of a dispute over their alleged right to prejudgment interest under one of the state’s general prejudgment interest statutes. They construed literally the apparently mandatory language of the prejudgment interest statute. The company’s view, by contrast, was that § 150’s treble liquidated damages function as any liquidated damages provision would, i.e., they displace all other forms of compensatory damages, including prejudgment interest. At the parties’ request, the U.S. District Court certified to the Massachusetts Supreme Judicial Court the question of whether plaintiffs who are awarded liquidated treble damages under § 150 retain a right to separate prejudgment interest in addition.

NELF filed an amicus brief in support of the employer, asking the court to answer no to the question. In the first half of its brief, after recounting the history leading up to the amendment to § 150, NELF focused on the term “liquidated,” noting that it sharply alters the nature of the treble damages from punitive, with all the latter’s attending legal due process complications, to simply compensatory. In particular, NELF observed that the SJC itself has stated that courts owe deference to the legislature’s legal characterizations, like “liquidated,” when the constitutionality of a law may be involved. NELF cited also the U.S. Supreme Court’s decision in *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945). There, against the background of a mandatory state prejudgment interest statute, much like the one in this case, the court ruled that the liquidated multiple damages awarded under the federal Fair Labor Standard Act precluded application of the state prejudgment interest statutes because liquidated damages compensate for all harms, including those usually addressed by prejudgment interest.

In the second half of its brief, NELF critiqued the plaintiffs’ arguments directly. First, NELF cited SJC cases holding that the mandatory language of the prejudgment interest statutes must not be taken literally when to do so would defeat the purpose of the statutes and over-compensate a party by awarding duplicative damages. For this reason, NELF rejected the plaintiffs’ contention that there is a “clash” between the mandatory prejudgment interest statutes and mandatory language of § 150. NELF also rebutted the contention that § 150 plaintiffs would be under-compensated if they do not receive prejudgment interest. NELF pointed out that all liquidated damages inherently are an approximation of full compensation, and NELF urged the Court not to modify by judicial
decision the general “treble liquidated damages” formula inserted into § 150 by the legislature in its sound discretion. Moreover, NELF argued, the Court should not violate its traditional policy of not taking a “second look” at liquidated damages, in order to see, after the fact, whether they provide full compensation. NELF concluded by pointing out the deficiencies in the plaintiffs’ understanding of the 1945 Brooklyn decision and by explaining to the Court the difficulties that would arise if it accepted the plaintiffs’ last-ditch suggestion to treat the “liquidated” treble damages as punitive.

In its decisions, issued in June, 2017, the Supreme Judicial Court disagreed with NELF and answered yes to the certified question. The court expressed doubt that the legislature would have intended some plaintiffs to receive smaller damages after the amendment than they would have received before the amendment, as might happen in certain circumstances if prejudgment interest were no longer to be available. In effect, the court took a “second look” at the statutory damages and second-guessed the sufficiency of the liquidated formula decreed by the legislature.

**Arguing That Neither An Outside Director Nor An Investor in a Failed Startup May Be Held Personally Liable for Unpaid Wages and Treble Damages Under the Massachusetts Wage Act**

*Segal v. Genitrix, et al.*

(Massachusetts Supreme Judicial Court)

At issue in this case was whether the directors and outside investors of a Massachusetts employer could be held personally liable for mandatory treble damages under the Massachusetts Wage Act, G. L. c. 149, § 148, for the company’s nonpayment of an employee’s wages. This question arose because the Wage Act carves out a narrow exception to the bedrock principle of corporate separate-ness by imposing personal liability for a violation of the Wage Act on “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation . . .” G. L. c. 149, § 148 (emphasis added). In its December 28, 2017 decision, the Court agreed with NELF that directors carrying out their management oversight and policymaking duties, and investors exercising the ordinary management of their investments, are not “agents having the management” of a corporation within the meaning of the Wage Act. They therefore may not be held personally liable for a violation of the Wage Act.

The plaintiff in this case, Dr. Andrew Segal, was the president, CEO, and, as the SJC emphasized repeatedly in its opinion, the sole officer “having the management of” a failed biotech start-up company called Genitrix, LLC. The SJC also emphasized that Segal himself admitted that he had decided to forgo his salary, for the benefit of another employee and the company’s precarious financial state. Nonetheless, Segal prevailed in a jury trial in his claim to hold the defendants, H. Fisk Johnson, III and Stephen Rose, personally liable for Genitrix’s nonpayment of his wages, as “agents having the management of” the company under the Wage Act. Neither Johnson nor Rose was ever the president, treasurer or officer of Genitrix. And neither was ever appointed an agent of Genitrix with regard to the company’s management.

Johnson was a one-time board member of Genitrix who had invested in Genitrix through his venture capital firm, Fisk Ventures LLC. Rose was a board member of Genitrix and managed Fisk Ventures for Johnson.

In its decision, the Court reversed the lower court’s verdict for the plaintiff. Consistent with NELF’s analysis, the SJC concluded that neither directors nor investors are ordinarily agents of the company, let alone agents “having the management of” the company, as required by the Wage Act. With regard to directors, the Court agreed with NELF that directors are, by definition, not agents of the company, because they are not under anyone’s control and they do not act individually, but only as a collective body that supervises the company’s activities. (In its brief, NELF surveyed several other related corporate statutes to show that the Legislature has consistently recognized the common law distinction between directors and agents, and to show that the Wage Act’s omission of directors from the personal liability section was therefore deliberate.) The Court explained that a director can only become an agent of the company when, through mutual consent, the board has expressly or impliedly appointed him or her to that role. The Court concluded that the facts of this case fall far short of this high standard. The Court also emphasized that directors are supposed to exercise management oversight of the company, and that this high-level stewardship of the company is far removed from the day-to-day “management of the corporation” contemplated by the Wage Act.

As for outside investors, the Court adopted in some detail NELF’s approach that investors and their managers should be allowed to take an active role in protecting the
venture capital firm’s investments without risking the loss of their separate legal identities and becoming “agents” of the employer under the Wage Act. As the Court aptly put it, “[m]uch like board members, investors invariably exercise some control over the businesses they invest in,” especially when the business is failing and needs the injection of additional outside capital. As NELF had argued, the Court agreed that investors are permitted to specify the purpose of their capital contributions, to monitor the employer’s performance, and to supervise its financial and capital budget decisions. As with directors, the Court explained that an outside investor may only become an agent if the board expressly or impliedly confers such authority upon the investor. Agreeing again with NELF, the Court emphasized that “the exercise of ordinary financial control over an investment does not give an investor the management of the company in which he or she invests.”

Public Presentations and Seminars

Spring Breakfast Program

Continuing our tradition of outreach through public presentations, in 2017 NELF offered a breakfast program in May entitled “The Impact of the Supreme Judicial Court’s March 8, 2017, Decision in IBEW Local No. 129 v. Tucci.” In this seminal case, in which NELF participated as an amicus, the Massachusetts Supreme Judicial Court clarified the question of directors’ fiduciary duty under Massachusetts corporate law, holding that, unlike under Delaware law, directors of Massachusetts corporations only owe a single fiduciary duty to act in the best interests of the corporation, and do not owe a separate fiduciary duty to shareholders. The panel discussion was moderated by Thomas J. Dougherty, Partner, Skadden, Arps, Slate, Meagher & Flom LLP. The panelists were Ian D. Roffman, Partner, Nutter, McClennan & Fish, LLP, Kurt Wm. Hemr, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, John Pagliaro, Staff Attorney, New England Legal Foundation, and Elizabeth M. McCarren, Senior Vice President, Business Litigation, Dell Technologies.

John G. L. Cabot Award Dinner

October saw NELF’s fourth annual John G.L. Cabot Award Dinner. The purpose of the dinner is to honor an outstanding individual in the New England community who shares NELF’s commitment to a balanced approach to free enterprise, reasonable regulation, traditional property rights, and the rule of law. The 2017 recipient of the Cabot Award was Brent L. Henry, a former member of NELF’s Board, and the retired Vice President and General Counsel of Partners HealthCare System, Inc., the largest healthcare provider in New England and largest employer in Massachusetts. Brent is well-known among his peers, not only for his legal acumen, but also for his wide-ranging public service, focusing largely on access and diversity. Over 300 guests drawn from distinguished regional and national law firms, government, and businesses, joined us to honor Brent for receiving this richly deserved award. As at the past dinners, the evening celebration included a biographical video of Brent’s life and achievements and a powerful video describing NELF’s origins, its mission, and its ongoing work. The event received nearly full-page pictorial coverage in Massachusetts Lawyers Weekly.

NELF in the News

In December, Massachusetts Lawyers Weekly sought out Senior Staff Attorney Ben Robbins for comment on the SJC’s favorable decision in Segal v. Genitrix, LLC, a case in which NELF filed an amicus brief authored by Ben. In his quoted remarks, Ben emphasized the great importance of the decision in establishing a presumption that “if you are acting as a director with management oversight of the company or an outside investor exercising a degree of responsibility or control over how your own funds are being used, you are not an ‘agent’ of the employer” and are not exposed to personal liability for wage claims. Ben also noted that the decision provided helpful guidance for proper jury instructions for such situations.
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Once again in 2017, support from programs, including the fourth John G.L. Cabot Award Dinner, as well as the continuing support of our core constituency, allowed NELF to fund its operations throughout the year.

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