NEW ENGLAND LEGAL FOUNDATION

LITIGATION REPORT

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Recent Decisions

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

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

For over thirty years NELF joined with other property rights organizations in urging the Supreme Court to overrule the so-called *Williamson County* ripening requirement. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court issued one of the most controversial rulings in the history of constitutional property rights. It ruled that a Fifth Amendment takings claim against a state agency or local government cannot be brought in federal court until after the property owner has sued for compensation in state court and lost. Only then, the Court reasoned, would the property owner have exhausted state remedies and have received a final determination that just compensation would not be forthcoming, thereby "ripening" the claim for federal litigation. Typically, however, after the property owner filed a federal action, the "ripe" claim was dismissed because the state court's judgment was afforded preclusive effect under the full faith and credit statute, 28 U.S.C. § 1738. If dismissal did not befall the claim under that statute, a host of other grounds for dismissal were found, such as claims-splitting, all tracing back to *Williamson County's* ripening requirement.

This bait-and-switch ruling remained the law for over three decades. As commentators noted, under *Williamson County* the property rights secured by the Takings Clause were the only federal rights denied a federal forum in this way, even when pursued under 42 U.S.C. § 1983, which is intended as a federal bulwark against the states for the protection of such rights. Courts and commentators exhausted the resources of the English language in denouncing the requirement, calling it "ill-considered," "bewildering," "worse than mere chaos," "misleading," "deceptive," "inherently nonsensical," "shocking," "absurd,"' "unjust," "pernicious," "a weapon of mass obstruction," etc. In a stream of petitions since 1985, landowners and their amici implored the Court to reconsider. In 2011 alone, NELF joined an amicus brief supporting the petition in one such case and filed its own brief in another. Despite misgivings expressed by four justices over the course of these years, the Court denied all such petitions as recently as 2016. So the grant of certiorari in the present case — in which a Pennsylvania property owner contested the constitutionality of a town ordinance requiring her to open her property to the public — came as a long-sought opportunity to persuade the Court to overrule a requirement that never made any sense and whose operation has been wholly pernicious to the defense of Fifth Amendment property rights.

While many powerful amicus briefs were filed in support of Mrs. Knick, NELF's brief was unique in critiquing each step of the *Williamson County* Court's reasoning. NELF first criticized the Court's reliance on *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1013 (1984), for support of the view that state litigation can supply an "adequate [post-deprivation] process" for obtaining just compensation. NELF pointed out that *Monsanto* involved private negotiations and arbitration intended to determine only the extent of a taking, if any, not to award just compensation. Next, NELF highlighted the circularity of the Court's analogy under which federal litigation under the federal Tucker Act supposedly ripens takings claims for just compensation against the federal government. In fact, NELF observed, litigation under the Tucker Act cannot *ripen* a takings claim because the Act is the mandatory statutory vehicle for *resolving* such claims, which, by definition, must be already ripe!

The confusion between ripening a claim and resolving it runs through much of *Williamson County*. NELF stressed that the Court's fundamental error lay in believing that the state's refusal to pay just compensation culminates only when a state court denies a money damages remedy to the aggrieved owner. But just compensation is not a remedy; it is a condition placed on the government's power to take. Only when just compensation has *not* been paid does an injury arise requiring a money damages remedy. These two forms of compensation are not the same; they are mutually exclusive alternatives. Hence, the Court erred in relying on *Cherokee Nation v. Southern Kan. Ry. Co*., 135 U.S. 641 (1890), which set out strictures for an "adequate [post-deprivation] process" for paying just compensation when there has been an admitted taking whose valuation still must be determined. Such procedures are legally distinct from a post-deprivation lawsuit aimed at establishing liability in the first place and then obtaining a money damages remedy. Admittedly, NELF pointed out, before *Williamson County* a line of cases had rested on the same confusion. NELF concluded that the *Williamson County* decision "was ill supported and badly reasoned," and urged the Court to abandon it.

On June 21, 2019, the Supreme Court delivered a major victory for property owners, overturning *Williamson County* in its entirety. Calling its state litigation requirement a "Catch-22" that relegates the Takings Clause to the status of "a poor relation among provisions of the Bill of Rights," the Court identified some of the same faults in that case's reasoning as NELF had critiqued, and the Court concluded, in words echoing NELF's own, "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." It had, the Court said, wrongly held that "the presence of a state remedy qualifies the [constitutional] right, preventing it from vesting until exhaustion of the state procedure." As the Court repeatedly now stressed, a claim for just compensation is ripe "at the time" when property is taken without just compensation. Also, echoing a point NELF made in a 2011 amicus brief, the Court now recognized that any state litigation itself presupposes a ripe Fifth Amendment claim.

Perhaps understandably, the Court partly played down *Williamson County's* reign of error by portraying it as an aberration from the Court's sound takings jurisprudence both before and after that decision and by noting that the unfortunate consequences that would flow from the 1985 decision were not unforeseeable at the time. Though overturning *Williamson County* and "restoring takings claims to the full-fledged constitutional status the Framers envisioned," the Court did so without addressing the confusion between just compensation and a money damages remedy, and thereby afforded the dissent an opportunity to cite a line of cases which, in the dissent's view, the majority inexcusably slighted.

Rather melodramatically, the dissent also predicted that the ruling will open the floodgates to federal courts and "will inevitably turn even well-meaning government officials into lawbreakers." Declaring that under "modern takings law" it is frequently difficult to know whether government interference works a taking, the dissent said that up to now officials could work "without fear of wrongdoing" as long as there was a means to compensate the property owner later. In its view, later "compensation" precludes a violation of the Takings Clause. As the majority rightly notes, however, implicitly accepting the distinction NELF drew between just compensation and money judgment compensation, the availability of the latter does not mean that no violation of the Takings Clause occurred; rather, a violation is "the only reason compensation was owed in the first place." Moreover, takings litigation has long regularly sought to prove that officials have unlawfully taken, and yet officials seem undeterred, even when they encroach on property physically. *See Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012) (officials argue no taking in intermittently flooding forest for six years and destroying trees). Indeed, three of the dissenting justices once dismissed their present concerns as empty alarmism. *See id*. at 36. ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest.").

Pending Cases

Arguing that a participant in an ERISA defined benefit plan does not have standing to sue under Article III of the United States Constitution when he merely alleges that the plan administrators' alleged breach of their ERISA duties caused afunding shortfall in the plan,, without alleging how that loss harmed his pension benefits in any way.

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

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

Article III of the United States Constitution limits the federal courts' jurisdiction to "cases" or "controversies." And the Supreme Court has repeatedly held that this requires the plaintiff to establish an *injury in fact* (along with causation and redressability of the injury through litigation). An injury in fact, in turn, requires the plaintiff to establish a concrete and *particularized* harm that is actual *or imminent*, not conjectural or hypothetical. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (in which NELF had filed an apparently influential amicus brief). At minimum, then, the plaintiff must demonstrate the imminent risk of harm to her own personal interest. The Court is really asking, then,whether the petitioners established *a sufficiently imminent risk of harm* to their pension benefits when they filed suit.

Petitioners are retired employees of the respondent, U.S. Bank, one of the nation's largest banks. Petitioners are also vested participants in their employer's "defined benefit pension plan," which is heavily regulated under ERISA, precisely to minimize (if not *eliminate*) the risk of any financial loss to plan participants. Under ERISA's comprehensive statutory scheme, the plan participant in a defined benefit plan (unlike the now more common defined contribution/individual account plan, such asa 401(k)), the plan participant has no claim to any of the plan's assets. Instead, the participant only has a personal stake in receiving her fixed periodic payments guaranteed under the plan. This reflects the fact that ERISA requires the employer to bear the entire risk of maintaining adequate funding in the plan at all times. Accordingly, ERISA imposes stringent and detailed *minimum funding requirements* on the employer to restore any loss to the plan whenever there is a funding deficiency, i.e., whenever the present value of the plan's assets is less than the present value of all benefits that have vested or accrured at the beginning of each plan year (i.e., 100% actuarial funding)., Moreover, if an employer does not or *cannot* fulfill its minimum funding requirements when the plan suffers a deficiency, and the plan must be terminated, Congress has created the elaborate safety net of the FDIC-like *Pension Benefit Guaranty Corporation* (PBGC), to assume all payment obligations under the plan, up to a certain monthly amount (According to the respondents, the petitioners in this case would have been covered 100% by the PBGC if that had ever been necessary.) In short, ERISA does all that it can do to *eliminate* the risk of any actual or imminent harm to plan participants by ensuring their uninterrupted receipt of pension benefits, *even* under dire financial circumstances (which were not alleged here).

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

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

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

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

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance.

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

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

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

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

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

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

Finally NELF will argue that, even though a plan participant may not have Article III standing to sue under ERISA on behalf of the plan, that should not prevent the Secretary of Labor from doing so. *See* 29 U.S.C. § 1132(a)(2) ("A civil action may be brought . . . by *the Secretary*, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [29 U.S.C. § 1109].") (emphasis added). Moreover, an Article III injury is *presumed* whenever the United States brings suit to " 'take Care that the Laws be faithfully executed." U.S. Const., Art.

II, § 3. *See also Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that" federal government suffers "injury to its sovereignty arising from violation of its laws . . . ."). Indeed, any other judicial interpretation of Article III would obstruct the federal government's exercise of its Article II duty to ensure compliance with federal law. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) ('[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."' (citation and internal quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive Branch] . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3.'"). In short, public enforcement of ERISA duties is always an option if a private party cannot establish Article III standing.

Opposing the Massachusetts Department of Revenue's position that when a company charges a fee for its online services, the company has engaged in a taxable sale of its software under the Massachusetts Sales Tax Statute, even though the software remains on the company's remote system and can *only* function on that system.

Citrix Systems, Inc. v. Commissioner of Revenue (Massachusetts Supreme Judicial Court)

This important tax case is before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review. Its disposition will affect the many companies that provide online services for a fee in the Commonwealth. At issue is whether such a transaction constitutes a taxable retail sale of the company's software, as the Appellate Tax Board (ATB) concluded below, or whether it is instead a *non-taxable* sale of the company's *services*, as the taxpayer, Citrix Systems, Inc., argues. Citrix offers its paying subscribers online screen-sharing services. NELF has filed an amicus brief in the case in support of Citrix.

The Massachusetts Sales Tax Statute, G. L. c. 64H, defines a taxable sale as "the transfer of title or *possession . . . of tangible personal property* . . . for a consideration." G. L. c. 64H, § 1 (definitions of terms) (emphasis added). "Tangible personal property," in turn, expressly includes "[a] transfer of *standardized computer software*, including but not limited to electronic, telephonic, or similar transfer." *Id*. (emphasis added). The statute does *not* apply to the sale of services (except for the sale of telecommunications services, which is inapplicable here). Therefore, the issue in this case is whether Citrix has "transferred possession" of its software to its customers, and has thereby engaged in a taxable sale of its software, when it charges its customers a fee for its online services.

Complicating matters is a Department of Revenue (DOR) regulation that includes "transfers of rights to use *software installed on a remote server*" in its definition of the taxable sale of software. 830 C.M.R. § 64H.1.3 (emphasis added). The DOR has illustrated that regulation with an important example, the so-called "TurboTax example," in which a customer "wants to acquire prewritten computer software to prepare her personal income tax return." 830 C.M.R. § 64H.1.3(14)(a) (Example 2). According to that example, a taxable transfer of software occurs when a vendor gives "the option of purchasing the software on a disk . . . or . . . on the vendor's server . . . . *In either case, the functionality of the software is the same.*" *Id*. (emphasis added). That is, a company's transfer to the customer of the right to use its software, housed on the company's remote server, can constitute the necessary "transfer of *possession*" of that software under the statute, but only when the software is *self contained* and could also run directly on the customer's own computer.

In its amicus brief, NELF argues, in support of Citrix, that Citrix has sold its customers a service, not its proprietary software that is an integral and *integrated* part of that service. Citrix simply allows its customers to submit requests to Citrix's system, which in turn runs and controls the software that delivers the desired service. Consistent with its ordinary meaning, "transfer of possession" of property under the Sales Tax Statute means the transfer of the ownership-type right to control or direct the use of that property. *See Browning-Ferris Ind., Inc. v. State Tax Comm'n*, 375 Mass. 326, 330 (1978) (discussing same, and finding taxable sale when customers paid for use of company's garbage dumpsters placed on customers' property, because dumpsters were under customers' control). Under that clear definition, Citrix's customers do not possess its software, let alone even have direct access to the software. Instead, Citrix alone possesses the software, because the software *must* remain at all times on Citrix's vast infrastructure to function at all. And that vast infrastructure of software and hardware is subject to the constant oversight and control by Citrix's employees. Moreover, Citrix "controlled the code, maintained it, and updated it as it saw fit. [A customer] only accessed [the endpoint software] that allowed it to submit requests to the [Citrix] system that controlled the code." *Auto-Owners Ins. Co. v. Department of Treasury*, 313 Mich. App. 56, 72 (2015) (subscription to Westlaw not taxable sale of software under substantially similar Michigan sales tax statute).

Indeed, a brief consideration of this Westlaw example illustrates why this case should be resolved in Citrix's favor. As with Citrix and its customers, neither Westlaw nor *its* customers would ever think that, by subscribing to Westlaw's online research services, attorneys and judges have also purchased Westlaw's software. Nothing of the kind. Attorneys and judges have simply paid for the ability to research on Westlaw, which alone directs and controls the software that yields the research results.

In that light, the customer who pays for Citrix's online services is really no different from the customer of yesteryear who paid to operate a juke box or a coin-operated laundry machine. "In matters of taxation we should follow the pattern of our decisions . . . ." *City of Boston v. Mac-Gray Co., Inc.*, 371 Mass. 825, 828 (1977). In all of these examples, the customer has simply paid for the receipt of a service, which the company's underlying system delivers. Never does the customer access, direct, or control that underlying system. *See id*. (company placing coin-operated laundry machines in apartment buildings sold a service, not the underlying property providing the service: "The taxpayer is in the business of *selling opportunities* to use equipment for laundering and drying purposes and is not in the business of selling or leasing washing machines and clothes dryers.") (emphasis added).

Since Citrix did not "transfer possession" of its software to its customers, as required by the statute, there can be no taxable sale of that software. Clearly, the ATB's reliance on the DOR regulation, discussed above, was misplaced. The ATB apparently failed to recognize that, while the regulation's "transfer of the right to use software installed on a remote server" *might* amount to the necessary transfer of possession of that software under the Sales Tax Statute, such as in the TurboTax example discussed above, no such transfer of possession occurred here. That is, the regulation does not announce a *per-se* rule of taxation but instead requires a case-specific application. The ATB apparently "confuse[d] control over application software with mere receipt of a service from an [Application Service Provider] that itself uses the application software." *Tax Management Multistate Tax*, Vol. 17, No. 11 (BNA Nov. 26, 2010). In sum, NELF will argue that, for all of these compelling reasons, the Court should reverse the ATB's decision and decide in favor of Citrix.

Arguing that. when an employer has breached the employment contract of a research professional by withdrawing its promised support of the research laboratory that the employee had established with federal grant money, resulting in the loss of the lab, the employee is not entitled to damages for the cost of replacing the lost lab, but is instead limited to damages for her *expected use* of the lost lab.

Lynn Hlatky, Ph.D. v. Steward Health Care System, LLC (Massachusetts Judicial Supreme Court)

This case is before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review, and the Court has requested amicus briefing on an important issue of Massachusetts contract law. Simply put, what is the proper measure of damages when an employer has breached the employment contract of a research professional, by withdrawing its promised support of the laboratory that she had established (with no money or property of her own) to conduct her scientific research, resulting in the loss of the lab? Is such an employee entitled to a multi-million-dollar damages award equal to the replacement value of the lost lab, as the trial court concluded here? Or is the employee limited instead to compensation for her *expected use* of the lost lab to conduct her research? This would include any demonstrable economic harm to her professional career, such as the loss of identifiable future earnings.

The plaintiff is Dr. Lynn Hlatky, a radiobiologist who established a laboratory to conduct her cancer research several years prior to her employment with the defendant, Steward Health Care System LLC. Hlatky conceded that she had no ownership interest in the lab, which she had established with federal grant money a and with institutional support from her prior employers. Hlatky brought the lab's equipment, staff, and grant money with her when she became an employee of Steward. Hlatky entered into a written employment contract with Steward, in which Steward promised to "continue to provide support and suitable office space" for the lab. However, Steward soon withdrew its support, reallocating funding to clinical trial research. As a result, the lab became mismanaged and was ultimately dissolved in a federal bankruptcy proceeding. Hlatky was no longer able to pursue her research.

Hlatky sued Steward for breach of contract and sought damages for the cost of replacing the lost lab. The jury found for Hlatky and awarded her nearly *$23,000,000*, representing the cost of reconstituting the lab and running it for six more years--the length of time that Hlatky had expected to continue her research before retiring. On remittitur, the trial court reduced the award to $10,000,000 (based on Hlatky's testimony of the cost of reestablishing the lab) and excluded the future costs of running the lab.

Steward appealed the damages award--but *not* the finding of liability--arguing that Hlatky was only entitled to damages for her personal financial losses (such as , not for the lost lab itself.

Accordingly, Steward now asks the SJC to vacate the $10 million damages award and either (1) reduce the award to Hlatky's $200,000 out-of-pocket mitigation expenses or (2) remand the case to the trial court to determine whether Hlatky had submitted sufficient evidence of her future lost earnings.

In its amicus brief in support of Steward, NELF argues that Hlatky is only entitled to recover for her *expected use* of the lost lab, not for the lost lab itself. It is black letter contract law that Hlatky can only recover "the value of the *bargained-for benefit* of which [she] ha[s] been deprived." *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374 (2008) (emphasis added). Hlatky bargained for Steward's support of the lab, so that she could continue with her cancer research there. That alone was her compensable expectation interest under the agreement. She did not bargain for ownership of the lab. She only bargained for her uninterrupted *access* to the lab. Accordingly, Hlatky can only recover for that lost access to the lab. To be sure, the trial court may have been correct when it stated that Hlatky "had an expectation interest in the continuation of the research program that she created." But this can only mean that, since her lab research was the mainstay of her career, Hlatky's damages could entail any demonstrable and foreseeable economic harm to her career, such as the lost growth in her earning capacity, or the loss of identifiable future earnings. Clearly, the trial court erred when it concluded that Hlatky's expectation interest in the continuation of the lab warranted damages for the cost of replacing the lab itself, as if Hlatky's creation of the lab were tantamount to outright ownership of the lab.

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

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

The Massachusetts Supreme Judicial Court (SJC) has taken this case for direct appellate review and has requested amicus briefing on an important issue of corporate (and ensuing individual) liability under the Massachusetts Wage Act, G. L. c. 149, § 148. When an employee brings a Wage Act claim against his employer--i.e., the entity that pays him for his services--under what circumstances, if any, can the employee also sue an affiliated corporate entity and its managing officers for the same alleged violation? As the Superior Court in this case aptly put it, the issue is "whether and when an officer of Company A must answer to a Wage Act claim lodged by a person who gets his paycheck from Company B, an affiliate of Company A." Stated more precisely, the question here is, *how much* direction and control can one entity and its management exercise over another entity before they become a co-employer of the other entity's employees under the Wage Act?

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

The plaintiffs are Cooper Cerulo and Jordan Tetrault, who were each employed as a car salesperson by a Herb Chambers auto dealership located in Massachusetts. Cerulo and Tetrault filed a putative class action complaint against the dealerships, alleging that they failed to pay their employees overtime pay and Sunday premium pay, in violation of Massachusetts wage laws. But the plaintiffs also sued Jennings Road Management Corp. (JRM), a Connecticut corporation registered to do business in Massachusetts as "The Herb Chambers Companies," and JRM's top-ranking executives. The plaintiffs argue that those parties were their co-employer under the Wage Act because they allegedly directed and controlled the Massachusetts dealerships' business operations, including the terms and conditions of the plaintiffs' employment with those dealerships. (The plaintiffs do not specify the corporate relationship between JRM and the dealerships, other than alleging vaguely that the Massachusetts dealerships were "subcorporations" of JRM.)

JRM and its named executives filed a motion to dismiss, arguing that the dealerships were the plaintiffs' sole employer under the Wage Act. The defendants also argued that the plaintiffs' allegations of direction and control were insufficient to pierce the corporate veil that separated the defendants from those dealerships. The plaintiffs argued in opposition that they did not need to satisfy the veil-piercing test. Instead, they argued that the so-called "independent contractor" statute, G. L. c. 149, § 148B(a), should determine whether the defendants had established an employer-employee relationship with the plaintiffs. And under that statutory provision, argued the plaintiffs, the defendants had allegedly exercised sufficient direction and control to constitute their employer.

The Superior Court agreed with the defendants and dismissed them from the case. The court also concluded that the independent contractor statute was irrelevant to resolving the *inter-corporate* issue that the plaintiffs had raised. As the court observed: "[T]he issue [addressed by the independent contractor statute] is whether a person is an employee or an independent contractor . . . . Whether and when the term 'employer' should extend to corporate affiliates, however, is not addressed in [that statutory provision]."

NELF argues in its amicus brief, submitted in support of the defendants, that the "employer" under the Wage Act is the person or entity that hires a worker and pays him for his work. Moreover, an employee cannot sue a corporate entity and its management who are allegedly affiliated with his employer unless he can *pierce the corporate veil* that separates those third parties from his employer. The SJC has held the Wage Act should be interpreted "to avoid doing violence to bedrock principles of corporate law." *Segal v. Genitrix, LLC,* 478 Mass. 551, 563 (2017) (internal quotations omitted). One such principle is "that corporations--*notwithstanding relationships between or among them*--ordinarily are regarded as *separate and distinct entities*." *Scott v NG U.S. 1, Inc.*, 450 Mass. 760, 766 (2016) (emphasis added). Accordingly, the SJC has held that a plaintiff suing more than one entity under the Wage Act cannot "characteriz[e] the defendants as a singular employer" without first piercing the corporate veil. *Sebago v. Boston Cab Dispatch, Inc*., 471 Mass. 321, 328 (2015). But the plaintiffs' mere allegations of pervasive control in this case fall far short of the "dubious manipulation and contrivance and finagling" required by that demanding test. *Scott*, 450 Mass. at 768.

As indicated above, NELF also argues that the independent contractor statute is irrelevant here because it serves the unrelated purpose of characterizing the relationship between a worker and the entity that has engaged him for his services, as opposed to characterizing the relationship between that entity and another corporate entity. "[That statute's] underlying purpose . . . is to protect workers by [presumptively] classifying them as employees, and thereby grant them the benefits and rights of employment . . . ." *Sebago*, 471 Mass. at 327 (citation and internal quotation marks omitted). No one disputes that the plaintiffs in this case are indeed employees of the dealerships and are therefore protected by the Commonwealth's wage laws. Hence the independent contractor statute's purpose has already been fulfilled, and that statute should play no role here.

As noted, the plaintiffs argue that the independent contractor statute should apply to their claims because they are employees of the dealerships, and those dealerships are subject to the direction and control of the defendants. But neither the statute nor corporate law would recognize an employer-employee relationship between the plaintiffs and the defendants merely because they were each associated with the dealerships in some way. *Cf. Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n*, No. SUCV201302229C, 2014 WL 7506345, at *9 (Mass. Super. Aug. 18, 2014) (Gordon, J.) ("[T]he fact that [an individual] had an arguable affiliation with each of these two [corporate] parties will not . . . supply the connective tissue for an . . . . *If statutory liabilities could pass between businesses in such circumstances, corporate law as we know it would cease to exist*.") (emphasis in original).

Opposing regulatory encroachment on coastal property rights.

Hall v. Department of Environmental Protection (Massachusetts Division of Administrative Law Appeals)

In 1991, the Massachusetts Department of Environmental Protection (DEP) adopted a new regulation under G. L. c. 91 that reversed longstanding common law presumptions about the ownership of shorefront property. Because the most common means of shoreline increase is accretion (slow and gradual addition of upland at the mean high tide line) and because it is so difficult to prove imperceptible, gradual growth, Massachusetts courts have adopted a rebuttable presumption that a shoreline increase is due to accretion. The presumption is important because accretion accrues to the property owner, whereas shoreline increases due to major storms or unpermitted filling do not. The 1991 DEP regulation, 310 CMR § 9.02, reversed this presumption and placed the burden on property owners to prove that all land seaward of the "historic high tide" level has resulted exclusively from "natural accretion not caused by the owner . . . ."

Following promulgation of its regulation, DEP suggested that owners of shorefront property seaward of the “historic” high tide line, as mapped by DEP, apply for amnesty licenses. NELF’s client, Elena Hall, owns a parking lot on shorefront property in Provincetown that provides Ms. Hall with her sole significant source of income. Approximately one-third of the parking lot and a portion of a small rental cottage on the property are seaward of DEP’s “historic” high tide line. Ms. Hall applied for an amnesty license and DEP issued a license imposing several onerous and costly conditions on Ms. Hall’s right to use her property seaward of the “historic” line.

Ms. Hall filed an administrative appeal with DEP and NELF agreed to take over Ms. Hall’s representation in this test case of DEP’s regulation. During the administrative and any subsequent judicial proceedings in this case, NELF will challenge DEP’s mapping of the “historic mean high water mark” and argue that DEP’s regulation exceeds that agency’s statutory authority and effects an unconstitutional taking of private property. NELF will further argue that a license condition requiring a four-foot-wide public access way across the entire width of Ms. Hall’s upland property to the beach effects a taking of her property requiring just compensation. This is so because the public’s limited rights in tidelands do not include a right of access across private upland property to reach the water or coastal tidelands. DEP has therefore imposed a license condition that bears no relationship to any recognized public right, let alone a public right protected under c. 91 and affected by the licensed use of Ms. Hall’s property.

NELF filed a potentially dispositive memorandum of law, accompanied by a detailed and thorough expert affidavit, with multiple map overlay exhibits, arguing that DEP simply has no jurisdiction over Ms. Hall’s property. In particular, NELF staff worked closely with the experts in scrutinizing carefully the historical maps pertaining to Provincetown Harbor and in determining that the application of the mean high tide line derived from the earliest reliable historical map to Ms. Hall’s property leaves the disputed portion of her property free and clear of the designation “Commonwealth tidelands.” NELF received a piecemeal, informal response from DEP challenging various aspects of NELF’s expert’s methodology.

The Administrative Law Judge then ordered the parties’ experts to meet, with the attorneys present, to exchange opinions and determine whether settlement was possible. While the meeting was productive, settlement is not possible at this time. DEP’s most salient challenge concerned the historic location of a lighthouse upon which Ms. Hall’s expert relied in determining the location of the historic mean high water mark. This challenge led the expert to reexamine the historic location of other lighthouses which he used in his methodology. NELF has also researched and briefed potential legal challenges to DEP’s regulation and license conditions under the Takings Clause and the *ultra vires* doctrine, which NELF would be prepared to reach should it not succeed on its position with respect to the historic high water mark.