New England Legal Foundation

2016

Year in Review

Vigorous Advocacy of Free Market Principles

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.

Inside This Review

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We are pleased to present this review of NELF's activities and accomplishments in 2016. As you will read in the following report, 2016 was another busy year for us. Once again, our filing of numerous amicus curiae briefs in the state and federal courts demonstrated the range of NELF's efforts both regionally and nationally (in the United States Supreme Court) to advance the principles of a balanced approach to regulation, free enterprise, and property rights. The cases we litigated in 2016 once again demonstrated the importance of judicial decisions to both the business community and the everyday lives of all Americans.

In 2016 NELF litigated cases involving issues ranging from whether the National Labor Relations Act's guarantee of the right of employees to engage in "other concerted activities for . . . other mutual aid or protection" creates a substantive right to pursue group litigation that overrides the Federal Arbitration Act's mandate to enforce class action waivers in employment arbitration agreements; to whether the Due Process Clause permits a state court to exercise personal jurisdiction over an out-of-state business solely because a plaintiff alleges that the business was in a conspiracy with an in-state defendant; to whether, in a state employment discrimination case, an employer should not be held liable for punitive damages for the egregious actionable conduct of a supervisory employee toward a subordinate, unless the employer itself has engaged in blameworthy conduct in failing to prevent such discrimination in the workplace; to whether the Federal Arbitration Act permits a state court to refuse to enforce an arbitration provision that is contained in a contract that the plaintiff has voided based on a technicality of state law, long after the contract was performed; to whether the "first-to-file" provision of the federal False Claims Act, which bars the filing of a claim against a government contractor when there is a related claim pending in the federal courts, permits a federal court nonetheless to stay the improperly filed claim indefinitely until the related claim is dismissed; to the circumstances under which a shareholder may be permitted, 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; to the standards for determining the "parcel of the whole" in a regulatory takings case; to whether a court must defer to a business's decision to dismiss an employee for cause when the employment agreement specifies that the decision is solely to be made by the business's board. Continuing the trend of the past few years, half of NELF's 2016 briefs were filed in the United States Supreme Court, which, under Chief Justice Roberts, continues to take major business cases for review. The decisions in these cases affect the New England region, as well as the rest of the country.

In 2016 we also continued our public programming. In the spring we presented a breakfast seminar on the legacy of the late Supreme Court Associate Justice Antonin Scalia and the potential impact of his untimely death on pending and future business cases at the Supreme Court. Our fall 2016 breakfast program explored the increasing flexibility of business arbitration and the tools now available to businesses to get the business-focused, speedy, and efficient arbitration that they want. In December 2016, NELF's 19th CEO Forum focused on the vital question of reducing the cost of electricity in New England, which unhappily continues to have some of the highest energy costs in the nation. Finally, in October, 2016, we held our third annual John G. L. Cabot Award Dinner, the aim of which is to honor a leader of the New England legal community who exemplifies NELF's principles to a high degree. Last year's award was presented to James F. Kelleher, Executive Vice President & Chief Legal Officer of Liberty Mutual Insurance. Jim, a longtime member of NELF's Board, is renowned not only for his work at Liberty Mutual, but also for his many volunteer activities both in the legal field and in service to the wider community. He richly deserved the honor bestowed on him at the award dinner.

As in past years, NELF's vigorous advocacy of free market principles on so many different fronts was 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.

NELF's 3rd Annual John G. L. Cabot Award Dinner

New England Legal Foundation held its third annual John G.L. Cabot Award Dinner at the Fairmont Copley Plaza in Boston. The evening's guest of honor was James F. Kelleher, Executive Vice President and Chief Legal Officer of Liberty Mutual Insurance Company.

James F. Kelleher (left) receives the Cabot Award from NELF President Martin J. Newhouse.

Jim Kelleher addresses the guests.

The event's chairman, Michael T. Williams, Senior Vice President and General Counsel of Staples, warmly congratulates Jim Kelleher.

Stephen P. Hall (left) of Holland and Knight with Eric B. Mack of Littler Mendelson

Brian G. Leary of Holland and Knight chats with Jim Kelleher.

From Ernst & Young (left to right): Christopher Murphy, Christopher E. Scudellari, Michael Thater, and Ben Lewis

Sarah Woznicki and Judy Roberts of Grant Thornton with Lisa C. Wood (right) of Foley Hoag

From left: Richard M. Yanofsky of Holland and Knight, David A. Roundtree of First Republic Bank, and Christopher M. Morrison of Jones Day

Jim Kelleher with John N. Love of Robins Kaplan (left), and Sean B. McSweeney of Liberty Mutual

Retired Supreme Judicial Court Chief Justice Margaret H. Marshall of Choate Hall & Stewart, Nigel Long (left) of Liberty Mutual, and Steven Wright of Holland & Knight

The Year in Review describes selected cases in which NELF participated in 2016 and demonstrates the variety of issues that NELF confronted in advancing the principles of the free enterprise system.

Government Regulation, Administration of Justice, and Other Business Issues

To fulfill its mission, NELF seeks to identify cases that could set precedents substantially affecting the free enterprise system or reasonable economic growth.

Supporting the Broad Sweep of ERISA Preemption with Regard to State Law Requirements

Alfred Gobeille, in His Official Capacity as Chair of the Vermont Green Mountain Care Board v. Liberty Mutual Insurance Company
(United States Supreme Court)

This United States Supreme Court appeal determined whether the preemption provision of the federal Employee Retirement Income Security Act ("ERISA") barred a State from imposing reporting requirements on ERISA plans beyond what ERISA itself requires.

The case arose when Liberty Mutual instructed the third-party administrator of its ERISA plan in Vermont not to comply with a subpoena from the State seeking certain health claims information pursuant to Vermont law. Vermont, like a number of other States (including the other five in New England), has a statute that requires health care providers and health care payers to provide claims data and related information to the State's specialized health care database. The State says that it relies on the data collected to inform its health care policy decisions in a number of ways. As the basis for its refusal to comply with this Vermont law, Liberty Mutual argued that since ERISA requires certain forms of reporting by ERISA plans, any additional form of reporting imposed by State law is preempted.

On June 29, 2015, the Supreme Court granted certiorari and NELF filed an amicus brief in support of Liberty Mutual on October 20, 2015.

In its brief, NELF focused on the Supreme Court's use in recent ERISA decisions, of a "presumption against preemption," and argued that the Court should abandon or limit its use of that presumption. The presumption is usually traced back to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), where the Court adopted a working "assumption" that the "historic police powers of the States" should not be deemed to be superseded when "Congress legislate[s] . . . in [a] field which the States have traditionally occupied," unless to do so was "the clear and manifest purpose of Congress." NELF argued since the Court has declared preemption to be a matter of congressional intention, the presumption is unwarranted when one is dealing with an express preemption provision, as in ERISA. Such an express provision clearly establishes the fact of preemption. From that point on, the actual language, purpose, and context of the statute provide much surer guidance to the scope of preemption intended by Congress than could be given by any presumption unmoored to the statutory text.

Moreover, NELF explained, use of the presumption in instances of express preemption is bedeviled by the problem of deciding how narrowly or expansively to define the relevant field of supposed traditional State regulation. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). The present case exemplified that problem, as the two sides contended over whether the field should be viewed broadly, with the emphasis falling on traditional State health and welfare concerns, or narrowly, with the focus on the novelty of the means by which data is to be collected under the Vermont law.

NELF argued, finally, that because the judicially fashioned presumption against preemption necessarily works to narrow interpretation, it gives the safeguards of federalism a kind of double weight, beyond the weighting intended by Congress as manifested in the statutory text enacted by that body.

For these reasons, NELF urged the Court not to adopt the presumption in this case when determining the scope of the express preemption provision found in ERISA.

In its decision on March 1, 2016, the Supreme Court agreed with NELF and Liberty Mutual, ruling (6-2) that ERISA preempts Vermont's statute as applied to ERISA plans.

Arguing that Article III's "Case or Controversy" Requirement Bars a Plaintiff from Suing in Federal Court for the Technical Violation of a Statute That Has Not Caused Any Concrete Harm

Spokeo, Inc. v. Robins
(United States Supreme Court)

In this case, the plaintiff and putative consumer class representative, Thomas Robins, sought statutory damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), for a technical violation of that statute that had not caused him any harm.By its terms, FCRA permits recovery for the bare violation of a statutory right. The case thus raised a constitutional separation of powers issue: does Article III of the United States Constitution, which limits the federal judiciary's jurisdiction to "cases" and "controversies," confer standing on a plaintiff who alleges a violation of a federal statute but who does not allege any resulting injury? The Supreme Court has interpreted Article III's case-or-controversy requirement as requiring "injury in fact"—i.e., a "concrete" and "particularized" harm that is "actual or imminent." *Clapper v. Amnesty Internat'l USA*, 133 S. Ct. 1138, 1147 (2013).

NELF, joined by Associated Industries of Massachusetts, filed an Amicus brief supporting Spokeo, Inc. arguing that Article III required dismissal of Robins' complaint because it failed to allege any injury in fact. NELF argued that the bare violation of a statutory right cannot satisfy Article III's requirement that the violation must cause some concrete harm. In short, Congress cannot create an injury in fact and the injury-in-fact requirement under Article III was not satisfied merely because Congress had authorized an award of statutory damages for the bare violation of a statutory right. Thus, the Article III inquiry to determine an injury in fact "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 (1998). As the Court has emphasized, "[i]t 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 . . . ." *Raines v. Byrd*, 521 U.S. 811, 820 (1997). Simply put, statutory standing to sue in federal court does not automatically create constitutional standing under Article III.

On May 23, 2016, the Supreme Court issued its decision, agreeing with NELF, 6-2. The Supreme Court vacated and remanded the Appeals Court's decision, instructing the lower court to take the concreteness requirement seriously, by engaging in a careful, case-specific analysis of the statutory rights at issue and the facts alleged to determine whether the plaintiff had identified a concrete harm arising from the alleged statutory violation.

Arguing that the First-to-File Bar under the Federal False Claims Act, Which Requires Dismissal by a District Court of a Qui Tam Claim that is Brought While a Related Claim is Pending, Does Not Permit an Appellate Court to Vacate the Dismissal if the Related Claim Has Been Dismissed While the Qui Tam Plaintiff's Appeal of the Dismissal of His Case is Pending.

Pharmerica Corporation v. U.S. ex. rel. Robert Gadbois
(United States Supreme Court)

To prevent the proliferation of duplicative or parasitic lawsuits against government contractors, Congress in 1986 added the "first-to-file" provision to the False Claim Act ("FCA"): "When a person brings an action under this subsection, *no person* other than the Government *may* intervene or *bring a related action* based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). At issue here, on a petition for certiorari to the United States Supreme Court, was whether the "first-to-file" provision is an absolute bar requiring a court to *dismiss* any lawsuit brought by a "whistleblowing" plaintiff on behalf of the Federal Government during the pendency of a related case, or whether, instead, the provision grants courts the discretion to stay the improperly filed lawsuit *indefinitely*, until the first-filed suit is dismissed. The First Circuit alone among all of the other federal circuit courts to have decided the issue took the latter view in this case and reversed the District Court's dismissal of the lawsuit filed by *qui tam* plaintiff, Robert Gadbois, against PharMerica Corp. *U.S. ex rel. Gadbois v. PharMerica Corp*., 809 F.3d 1 (First Cir. 2015).

In his FCA *qui tam* complaint, Gadbois alleged that PharMerica had overbilled the Medicare and Medicaid programs by seeking payment for medications dispensed

without legally valid prescriptions. When Gadbois filed suit, however, a related case against PharMerica was pending in another Federal District Court. Accordingly, the trial court in this case dismissed Gadbois' suit under the first-to-file bar. During Gadbois' appeal to the First Circuit, however, the related case was dismissed. And the First Circuit ruled that the lower court erred in dismissing the claim and, instead, should have *stayed* the action indefinitely, pending resolution of the first-filed case.

PharMerica petitioned for certiorari, and in its amicus brief in support, NELF urged the Supreme Court to grant certiorari to resolve the Circuit split created by the First Circuit and to rule that the First-to-File bar requires a federal court to dismiss any *qui tam* that is brought while a related claim is pending. NELF argued, first, that the plain language of the statute clearly prohibited the filing here and mandated dismissal of plaintiff's complaint. Second, NELF argued that the jurisdictional facts under the First-to-File bar must be determined as of the time when the relator files suit, not at some point after that has occurred. Finally, NELF argued that the First Circuit's decision undermined Congress's intent in passing the First-to-File bar and defeated the very purpose for which the provision was enacted.

Despite NELF's arguments, the Supreme Court denied certiorari on June 27, 2016.

Arguing that, Under the Due Process Clause of the United States Constitution, a Court May Not Exercise Long-Arm Jurisdiction Over an Out-of-State Business With No Contacts of its Own in the Forum State, Simply Because the Plaintiff Alleges a Civil Conspiracy Between the Out-of-State Defendant and Another Party with In-State Contacts.

Fitch Ratings, Inc. v. First Community Bank
(United States Supreme Court)

At issue in this case was whether the United States Supreme Court should grant certiorari to decide whether the due process clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over an out-of-state company with *no* contacts of its own in the forum state, based solely on the forum contacts of another party who has allegedly engaged in a civil conspiracy with the non-resident defendant.

The out-of-state defendant here was Fitch Ratings, Inc., a financial-products ratings agency headquartered in New York. Fitch had no contacts of its own with the forum state, Tennessee. However, the plaintiff, First Community Bank, which does business in Tennessee, alleged that Fitch should be imputed with the Tennessee contacts of its alleged co-conspirators, various issuers and placement agents for certain asset-backed securities rated by Fitch and purchased by the bank, with whom, the bank alleges Fitch conspired to over-value the worth of those securities. The Tennessee Supreme Court permitted the attribution of the Tennessee contacts of those co-defendants to Fitch, the out-of-state defendant, if the bank could substantiate its claim that the defendants all engaged in a conspiracy to defraud.

Under the Tennessee law of civil conspiracy, as with the law of most states, each co-conspirator is vicariously liable for the conduct committed by co-conspirators in furtherance of the conspiracy, i.e., each co-conspirator is an "agent" of the other co-conspirators for *liability* purposes. Due process, by contrast, serves the altogether different purpose of protecting the non-resident *defendant's* liberty interest in not having to litigate in a remote and unanticipated forum and have to submit to that court's coercive judgment. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985). While vicarious *liability* under civil conspiracy law is broad and serves to protect the plaintiff's interests, vicarious *personal jurisdiction* is a narrow and uncertain concept that serves to protect the defendant's liberty interests.

In its amicus brief supporting Fitch's petition for certiorari, NELF argued that due process should not permit a court to impute the forum contacts of one party to another, unless the out-of-state defendant has purposefully availed itself of the forum, such as by substantially directing and controlling the alleged co-conspirator's in-state conduct. Nowhere did the bank allege any such facts. Moreover, NELF pointed out that the Supreme Court has long rejected as constitutionally inadequate the exercise of personal jurisdiction based on the mere foreseeability of Fitch's ratings for various financial products winding up in the Tennessee financial market. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) . In sum, NELF argued that the notion of a separate category of "civil conspiracy jurisdiction" is an unnecessarily confusing and conclusory doctrine that should be summarily rejected by the Supreme Court.

Despite NELF's arguments and the importance of the jurisdictional issue, the Supreme Court denied certiorari on June 27, 2016.

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 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. The Superior Court dismissed the case on the ground 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. The issue before the Massachusetts Supreme Judicial Court ("SJC") was whether the directors of a Massachusetts public corporation owed a separate fiduciary duty to the corporation's shareholders in addition to do their duty to the corporation.

The plaintiffs made three arguments to the SJC. First, they argued that both the Massachusetts Business Corporations Act, G. L. 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 under 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 showed that 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. 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 that the plaintiffs' claim of post-merger standing to sue the directors directly was also flatly wrong. For this contention the plaintiffs essentially relied on *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 March 6, 2017, decision, the SJC agreed with NELF on all of these points and, most significently, held that under Massachusetts law, a director of a Massachusetts public corporation owes a single fiduciary duty to the corporation itself, and not a separate duty to the shareholders.

Opposing a State Court's Refusal to Enforce an Arbitration Agreement Contained in a Contract that the Plaintiff Has Voided Based on a Technicality of State Law.

Initiative Legal Group v. Maxon
(United States Supreme Court)

This case, a putative class action which was before the United States Supreme Court on a petition for certiorari, asked whether the Federal Arbitration Act ("FAA") permits a state (here California) to refuse to enforce an arbitration provision that is contained within an agreement that the plaintiff has voided based on a technicality of state law, long *after* the contract was performed, in an obvious attempt to evade his contractual obligation to arbitrate his claims arising from the agreement.

The plaintiff here, David Maxon, signed a contingency-fee agreement with the Petitioner, Initiative Legal Group ("ILG") to pursue his wage-hour claim against his former employer, the Wells Fargo Bank. The contingency-fee agreement contained a mandatory arbitration clause covering all disputes between the attorney and the client. After ILG had completed its legal services under the agreement, Maxon filed this court action alleging that ILG had committed legal malpractice in representing him. ILG moved to compel arbitration. It turned out, however, that ILG had inadvertently failed to sign the contingency-fee agreement, and Maxon, invoking a California statute that permits a client to void a contingency-fee agreement unless both parties have signed it, gave notice to ILG that he was exercising his right under state law to void the fee agreement because ILG had not signed it. Maxon then argued that, because he exercised his statutory right to void the fee agreement, the entire agreement, including the arbitration provision, no longer had any force or effect. The California trial court and Appeals Court agreed with Maxon, and the California Supreme Court denied further appellate review.

As NELF argued in its amicus brief in support of the petitioner, the California courts were wrong because under well-settled United States Supreme Court precedent, the voiding of the fee agreement should not also void the arbitration clause. As the Supreme Court has held, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). This principle of severability is mandated by the plain language of section 2 the FAA. *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

NELF argued that the Supreme Court should grant certiorari to compel state courts, like those in California, to adhere to the Supreme Court's arbitration decisions, and to hold that the arbitration provision is enforceable even if the overall agreement is voided under state contract law. Unfortunately, on October 3, 2106, the Court denied certiorari.

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 issue of online contract formation of great importance to the large and growing category of online standardized consumer agreements. At issue is whether a business provided an online customer with sufficient notice of its mandatory arbitration policy and class action waiver, and whether the customer consented to those terms, when the arbitration provisions were viewable only by clicking on a hyperlink to the agreement's terms and conditions, and the customer was not required to check an online box indicating that she had accepted those terms. Instead, the business had clearly provided that the customer would be deemed to have accepted all of the contract terms once she created an online account.

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

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

NELF has filed an amicus brief in support of Uber in the United States Court of Appeals for the First Circuit

arguing that, under well-established principles of Massachusetts contract law, a customer has indeed consented to a business's arbitration policy once the customer has indicated her consent to all of the terms contained in the agreement, in the manner of acceptance *defined by the business*. It is well settled in Massachusetts that a party who enters into a contract is presumed to know all of the agreement's terms and has a *duty* to read them. This duty applies equally to contract terms that are incorporated by reference in that agreement, such as Uber's arbitration provisions that are viewable through a hyperlink in this case. It is also well settled in Massachusetts that the offeror, here Uber, controls the manner of acceptance. Accordingly, Cullinane accepted Uber's arbitration policy once she completed the online registration process, because Uber clearly stated that completion of that process would indicate her acceptance of Uber's contract terms.

NELF also argues that a decision in Cullinane's favor would contravene these bedrock Massachusetts principles of contract formation and would allow a consumer to evade her contractual responsibility to read and understand an agreement's terms before she accepts them. This, in turn, would disrupt and undermine free enterprise on the internet, to the financial detriment of the business community.

Arguing that an In-State Errand by a Trucking Company Employee Resulting in an Accident Does Not Trigger the Applicability of a Federally Mandated Insurance Endorsement, Which Only Applies When a Vehicle is Engaged in Interstate Travel For Hire

Martinez v. Empire Fire & Marine Insurance Co.
(Connecticut Supreme Court)

This case presented an issue of first impression in Connecticut dealing with the interplay of federal interstate commerce jurisdiction and motor vehicle insurance law, which is usually the province of the states. Congress has given the Secretary of Transportation carefully delimited jurisdiction over the interstate transport of property by motor carriers and directed the Secretary to impose minimum liability insurance coverage amounts in order to protect the public. These limits are often higher than state-imposed minimums, and thus are a preferred source of recovery in law suits.

At issue here was how to determine whether the federally mandated insurance coverage applies to particular accidents. The defendant was the insurer of a New Haven towing company. The plaintiff, Martinez, was injured in a collision with one of the company's trucks while the driver of the truck was running a purely local errand for the company to pick up truck parts. Having obtained a judgment against the company in an earlier action, in this action the plaintiff invoked the terms of the federal insurance endorsement in order to obtain from the insurer the unpaid portion of the earlier judgment. To establish interstate commerce jurisdiction (which is required by the federal endorsement), she argued that the court should look to the company's operations as a whole (which did encompass commerce outside Connecticut), rather than to the route taken by the truck on this specific trip. She also argued that the vehicle parts that were the purpose of the truck driver's errand, once installed in the towing company's trucks, would travel in interstate commerce. She also invoked general public policy grounds.

NELF filed an amicus brief in support of the defendant, in which it emphasized that this is an issue of federal, not state, law. The brief closely read the statutes, regulations, and the endorsement and demonstrated that, as courts elsewhere have overwhelmingly ruled, jurisdiction is to be determined by the nature of the specific trip that caused the accident and not by other, more general considerations.

On July 12, 2016, the Connecticut Supreme Court issued its decision adopting the trip-specific rule by a vote of 6 to 1. The decision clearly showed NELF's influence. The court not only followed NELF's unique approach in how it distinguished the plaintiff's cases, it also followed NELF in noting that some of plaintiff's public policy arguments could be ruled out because they are inconsistent with how federal law addresses *intrastate* commerce with respect to liability coverage. A little surprisingly, the majority stated that they would have adopted the trip-specific rule even if they had thought it wrong (which they did not) because it is the rule used by the U.S. Court of Appeals for the Second Circuit. The state court explained that, because Connecticut lies within the federal jurisdiction of that circuit, it customarily follows the Second Circuit on federal questions in order to avoid problems like forum-shopping. It is worth noting that NELF alone had argued in favor of the trip-specific rule in part by reminding the state court of this customary deference.

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)

In this case, the Massachusetts Supreme Judicial Court was asked to determine under what circumstances a shareholder may be permitted to inspect a corporation's books and records after the board of directors has refused his litigation demand concerning alleged corporate wrongdoing. Under the Massachusetts Business Corporations Act, G. L. c. 156D, § 16.02(1), a shareholder has the right to inspect certain corporate books and records if he establishes a "proper purpose" with "reasonable particularity," among other statutory requirements. At issue, then, was what constituted a "proper purpose" sufficient to permit a shareholder to inspect the board's books and records after the board has refused the shareholder's litigation demand.

NELF filed an amicus brief in support of Vertex arguing that 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 the shareholder should be required to show that the board's decision fell short of at least one of the three statutory requirements containd in the statutory codification of the business judgement rule in the context of shareholder demands: good faith, reasonableness, and independence.

The Supreme Judicial Court decided this case on March 20, 2017. While the Court argreed that "the categories of records that the shareholder demanded . . . far exceed the scope of the records that are within the right of inspection under § 16.02," it also 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."

In short, while the Court did not, as NELF had asked it to do, reverse the ruling below, it in effect narrowed the shareholder's victory substantially.

Arguing that the Pervasive Federal Regulation of Aircraft Safety and the FAA's Certification of the Design of the Aircraft Engine in a Plane that Crashed Preempts the Plaintiff's State Law Claims of Product Liability Based on Design Defect and Failure to Warn

Sikkelee v. Lycoming, et al.
(United States Supreme Court)

This matter involved a Third Circuit appeal, *Sikkelee v. Lycoming.* The respondent, Lycoming Engines, is a division of AVCO, a Textron subsidiary, that is headquartered in Providence, RI. Lycoming sold a certain aircraft engine in 1969. Nearly thirty years later the engine was installed "factory new" on a Cessna aircraft, even though the engine was not actually certified for that particular airframe (Lycoming was not involved in the installation of the engine). Lycoming and others were sued by Jill Sikelee, the widow of a newly licensed pilot who died in a crash of the Cessna, under product liability theories of design defect and failure to warn. Textron obtained summary judgment in the trial court on preemption grounds, namely that state law standards of care are preempted by the pervasive federal regulation of aircraft safety, and that the FAA's certification of the design of the engine preempted Sikkelle's claims. Because this appeal is in the Third Circuit, NELF joined with the Atlantic Legal Foundation, whose remit includes

Pennsylvania, to file an amicus brief supporting Lycoming, arguing that the pervasive nature of federal air safety regulation required preemption of the state law claims. On April 19, 2016, the Third Circuit issued its opinion. Disagreeing with NELF and ALF, it held that the plaintiff's claims in this case were not pre-empted by federal law. Lycoming moved for a rehearing *en banc*, which NELF and ALF supported, and, when that was unsuccessful, sought certiorari from the Supreme Court. NELF and ALF also filed an amicus brief in support of the petition for certiorari. Ultimately, however, the Supreme Court did not grant certiorari.

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 presents the Supreme Court with an opportunity to take a first step toward clarifying, and hopefully setting some limits to, the "parcel as a whole," 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, the term has been adapted to a variety of circumstances. As used in *Penn Central*, it meant that the economic impact of a government regulation should be evaluated in terms of the entire piece of property in question and not solely in terms of the specific property right targeted by the regulation.

Since *Penn Central*, the concept has been extended by analogy to account for the great diversity of factual circumstances met with in regulatory takings cases. Now, when some or all of a parcel is affected by a regulation, the "parcel as a whole" concept is sometimes invoked as the reason for evaluating the impact of the regulation on that parcel by grouping the parcel with other, related but legally separate parcels. While a wide variety of factors has been employed by courts in determining when to aggregate parcels in this manner, the most common major factors probably are: (i) common ownership, (ii) contiguity of parcels with each other, and (iii) unity of use.

This case focusses on whether *the mere contiguity of commonly owned parcels* requires, as a rule of takings law, that such parcels be considered together as the parcel as a whole, even when unity of use or any other factor is absent. NELF filed an amicus brief supporting the petitioners, the Murrs, in their contention that the proposed rule of takings law should be rejected because it is overly inclusive and unfair to property owners.

The Murrs are four siblings. In 1960, their parents purchased a certain Lot F in rural St. Croix County, Wisconsin. Their father owned a plumbing business, and he placed title to Lot F in his business. Soon after the purchase, the parents built a three-bedroom recreational cabin on the lot. Recognizing the growth potential of the area, in 1963 they purchased a second parcel, Lot E, as investment property. They held the title to Lot E in their own names. Lot E is adjacent to Lot F; both are waterfront parcels. Since its purchase, Lot E has remained vacant and undeveloped. There is no dispute that, as created and as originally purchased, the parcels were separate, distinct legal lots, and that each could have been separately developed, used, and sold.

In the 1990s, the parents made donative transfers to their children, the present petitioners, of developed Lot F and investment Lot E, and for the first time the adjacent lots came under common ownership. In 2004, when the Murr children wanted to sell Lot E and use the proceeds to finance improvements to Lot F, they discovered from

officials that they could not develop or sell Lot E separately. Twenty years earlier, in 1975, while the lots were still owned separately by their parents and the plumbing business, local environmental regulations had been adopted requiring a "net project area" of at least one full acre as a prerequisite to development of any lot in that lakeside, environmentally sensitive area of the county.

Lot E has a net project area of only 0.5 acres. The regulations do contain a grandfather provision for any substandard lot created before 1976, as Lot E was, but it permits the separate development and sale of such a lot only if the lot "is in separate ownership from abutting lands." Because Lots E and F abut and are now both owned by the Murr siblings, the grandfathering exception does not apply to Lot E; the two lots are treated as merged, and the Murrs cannot sell Lot E separately, although it was acquired by their parents specifically as an saleable asset.

The Wisconsin Court of Appeals rejected the Murrs' takings claim, ruling that the "parcel as a whole" rule requires combining the two parcels for takings analysis "under a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Murr v. State of Wisconsin*, 2014 WL 7271581, at *4 (Wis. App. Ct. Dec. 23, 2014) (per curiam) (unpublished). After the Wisconsin Supreme Court denied further review, the Murrs petitioned the U.S. Supreme Court for certiorari, and the petition was granted on January 15, 2016.

In its amicus brief supporting the Murrs, NELF argues 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 expresses its concern that the tendency of courts to unduly expand the parcel as a whole creates an unfair risk of under-compensation to property owners. NELF then goes on to illustrate the insufficiency of the two factor rule (adjacency and common ownership) applied by the Wisconsin court. NELF argues that these factors alone are too tenuous, and that the Court should require at least integrated "unity of use" as a third factor in deciding whether to aggregate legally separate. NELF's argument draws a close analogy to well-established principles of eminent domain law. As NELF points out, eminent domain law and takings law sometimes share a common question: what parcel (if any), other than the one directly affected by government action, must be considered along with it 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 the 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 was encouraged to see that its analogy played a role in the oral argument of the case.

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 after 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 NELF 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, agreeing with NELF, 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.

Arguing that the Housing Appeals Committee Did Not Exceed Its Authority by Supposedly "Invalidating" Town Bylaws and, In the Process, Failing to Presume their Validity While Also Misallocating to the Town the Burden of Proof as to the Issue

Town of Lunenburg Zoning Board of Appeals v. Hollis Hills LLC and Massachusetts Housing Appeal Committee
(Massachusetts Appeals Court)

In 1969, in order to facilitate the construction of affordable housing, Massachusetts enacted General Law c. 40B, which enables a developer to obtain a single, comprehensive permit for the construction of any project that includes affordable housing units. Should a town deny the application for such a permit, the developer may appeal to the state-wide Housing Appeals Committee (HAC). The law arose in response to towns using their local laws to exclude affordable housing from their locale. In the present case, Hollis Hills sought a comprehensive permit, believing the sewer fees for its project would be about $17,000 under applicable town bylaws, only to discover that the town invoked different bylaws, under which the fees soared to about $1.75 million.

Against its will, Lunenburg had previously been required by the HAC to grant Hollis Hills a comprehensive permit (see *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38 (2013)), with the issue of sewer fees reserved for later determination. Subsequently, when reviewing the sewer fees, the HAC ruled, after taking extensive evidence, that the bylaws relied on by the town for setting the fees so high had not even been enacted at the relevant time (i.e., the date the permit application was submitted) and therefore they could not be used to calculate the fees applicable to the project. The town appealed to the Superior Court, arguing that the HAC was wrong about the relevant time, had erroneously placed the burden on the town to prove what bylaws were in effect at that time, and had exceeded its powers by, supposedly, "invalidating" the bylaws, whose validity should have been presumed by the HAC. The court dismissed the appeal on grounds that the town had failed to preserve these issues below. The town then appealed to the Appeals Court, where it repeated its arguments.

NELF filed a brief supporting Hollis Hills and asking the Appeals Court to affirm the judgment below, albeit on substantive grounds, rather than on the procedural grounds cited by the trial judge. NELF pointed out that Massachusetts courts and adjudicatory agencies are not permitted to take judicial notice of either the text or the effective date of local laws. These are questions of fact that must be proven by their proponent, just like any other facts a party wishes to establish. The burden of proof was therefore properly placed on the town by the HAC, NELF contended, and the HAC's ruling that the town had failed to carry its burden was therefore not an "invalidation" of the bylaws. NELF then demonstrated that the principle that the validity of laws is to be presumed applies only when there is a direct judicial challenge to a law's validity, as occurred in all ten of the cases the town relied on to argue its point. Here, by contrast, the HAC was dealing with the antecedent evidentiary problem of determining

what legal text counts as the apparently applicable law in the first place. NELF concluded its brief by discussing the aims of the comprehensive permitting law and how the past use of local laws to exclude projects like Hollis Hills makes it imperative that a permit not be subject to local laws enacted after the developer submits its application.

In its decision dated March 3, 2016, the Appeals Court, agreeing with NELF, affirmed the dismissal of the town's appeal.

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.

Supporting the Lower Court's Decision that, in a Constructive Discharge Case Brought Under Title VII, the Administrative Filing Period Begins to Run With the Last Allegedly Wrongful Act By the Employer, Not When the Employee Chooses to Resign

Green v. Brennan
(United States Supreme Court)

The question presented in this case was, in a claim of constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., does the administrative limitations period begin with the last discriminatory or retaliatory act of the employer before the employee resigns, or does it begin when the employee resigns? A constructive discharge claim can be understood as "an aggravated case" of discrimination or retaliation, in which the employee resigns and then alleges that the employer committed acts of discrimination or retaliation that were so severe that the employee reasonably felt compelled to quit. For employers, and thus of great importance to many of NELF's supporters, the crucial difference between a constructive discharge claim and the underlying claim of discrimination or retaliation is remedial. The prevailing employee in a constructive discharge case can recover not only for the employer's discrimination or retaliation but also for his own act of resigning, as if it were a termination for damages purposes. Thus, the prevailing constructive-discharge plaintiff can recover back pay, and possibly front pay, along with any other (economic and non-economic) damages attributable to the employer's discriminatory or retaliatory conduct, *and* punitive damages.

An employee suing under Title VII for any claim must first exhaust his administrative remedies by filing or initiating contact with the Equal Employment Opportunity Commission ("EEOC") within a specified period of time. Failure to do so will most likely bar the employee from suing in court. In particular, a private-sector employee must file his charge of discrimination or retaliation with the EEOC within 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). A federal employee, such as the employee in this case, must initiate contact with an EEOC counselor for potential settlement "*within 45 days of the date of the matter alleged to be discriminatory* or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1) (emphasis added). The parties in this case have focused on the italicized language as the applicable regulatory provision. As with a statute of limitations, the purpose of this filing deadline is to require employees to act promptly in enforcing their rights, to protect employers from having to defend old claims, and to provide employers with certainty and repose that, after a date certain, they will not have to defend their actions in litigation.

NELF argued, in its amicus brief on the merits, that in a claim for constructive discharge, as with most any other claim of discrimination or retaliation under Title VII, the administrative limitations period should begin with the employer's last discriminatory or retaliatory act, not with the employee's resignation in response to that conduct. NELF argued that this conclusion is required by the plain language of the limitations provision applicable to federal-sector employees under the EEOC regulation, and by Title VII's general provision applicable to both private-sector and state employees. And, NELF pointed out, the Court has already interpreted Title VII's limitations provision as focusing on the employer's challenged conduct, not on the injurious consequences to the employee. *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

On May 23, 2016, the Supreme Court issued its decision. Despite NELF's arguments, the Court held that because "the matter alleged to be discriminatory" in a constructive discharge claim is an employee's resignation, the limitations period for such actions begins running only after an employee resigns. Justice Alito filed a concurring opinion in which, while he agreed with the Court's conclusion, he pointed out the problems with the majority's conclusion and suggested a slightly different framework of analysis. Justice Thomas was the sole dissenter.

Arguing that a Plaintiff Who Alleges that his Employer Retaliated Against him for Taking Leave Under the Federal Family and Medical Leave Act must Prove that his Leave was the But-for Cause of the Alleged Retaliation

Chase v. U.S. Postal Service
(U.S. Court of Appeals for the First Circuit)

This case raised an issue of first impression in the First Circuit in an important area of federal employment law. In 2013, the Supreme Court, invoking traditional principles of tort law, declared in a Title VII retaliation case that the default rule is that "federal statutory claims of workplace discrimination" must be proven by but-for causation, i.e., a plaintiff must show that the injury done to him would not have occurred but for his protected status or conduct. *See University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2525 (2013). Since then, outside of Title VII, lower courts have shown reluctance to take the Supreme Court at its word, continuing to allow liability to be established in the context of employment discrimination law when an improper motivating factor has been shown to have played a role in the employer's decision, even though that factor was not the but-for cause of it.

In this case, a federal district court judge, faced with the task of deciding the causation standard for a retaliation claim arising under the Family and Medical Leave Act, declined to follow the teaching of *Nassar*. In what NELF argued was the mistaken belief that the act is ambiguous on this point because no standard of causation is spelled out there, he deferred to a U.S. Dept. of Labor (DOL) regulation that adopts motivating-factor causation. In light of *Nassar*, that standard of causation seemed clearly wrong. Although the defendant employer was the U.S. Postal Service (USPS), an independent agency of the federal government, the law in question applies equally to private businesses, and therefore the outcome of the case was of concern to NELF and its supporters in the business and legal communities.

In its amicus brief filed in support of the USPS, NELF set out detailed arguments to greatly supplement and strengthen the Post Office's argument that *Nassar* governed this case. Simply put, NELF made two points. First, as NELF explained, *Nassar* establishes that but-for causation is a common law background principle of all federal legislation, and so, as a default presumption, but-for causation does not have to be signaled by any special words in order for it to be the statutorily prescribed standard.

Second, turning to the ruling of the trial judge, NELF argued that he erred in giving *Chevron* deference to the DOL's regulation. Because FMLA's silence does not create ambiguity as to the standard of causation, his deference to the department's resolution of a supposed ambiguity was misplaced.

On December 14, 2016, the First Circuit issued its opinion. While upholding the dismissal of the action on other grounds, the court inserted an extended footnote conceding the need for the First Circuit to revisit the issue of causation in light of the arguments made in this case about significance of *Nassar*. NELF continues to track the issue in both the First and Second Circuits, hoping to find a case in each circuit that will provide an opportunity to persuade the circuit judges to recognize but-for causation in FMLA retaliation claims.

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
(United States Supreme Court on certiorari)

This U. S. Supreme Court appeal consolidates two cases in each of which NELF has now filed an amicus brief on the merits, arguing that the National Labor Relations Act, (NLRA) does not repeal the mandate of the Federal Arbitration Act (FAA)to enforce class and collective action waivers in employment arbitration agreements. NELF argues that an employee's NLRA "right to . . . engage in . . . concerted activities for mutual aid or protection" lacks the specificity and directness required by the Supreme Court to override the FAA's mandate to enforce arbitration agreements according to their terms. NELF argues that, to displace the FAA's mandate, the NLRA would have to state clearly that employees have the nonwaivable right to pursue group legal action against their employer.

Nowhere does the NLRA announce this "contrary congressional command" to displace the FAA's mandate. Therefore, NELF urges, the FAA should require courts to enforce class and collective action waivers in employment arbitration agreements. The background facts and procedural history for each case are provided below.

Epic Sys. v. Lewis (7th Cir.): Jacob Lewis was a technical writer for Epic Systems, a health care software company. Epic required Lewis and certain other groups of employees, as a condition of continued employment, to agree to to submit any future wage-hour and other employment claims to binding individual arbitration only. Lewis consented by email to Epic's arbitration agreement. (The agreement also contained a nonseverability or "jettison" clause, in which the parties agreed that if the class arbitration waiver were declared invalid, Lewis could only bring a class action in court.) A dispute arose concerning whether Lewis was entitled to overtime pay under the FLSA and state wage-hour law. Lewis filed both a Rule 23 class action and collective (opt-in) under the FLSA. Epic moved to dismiss the complaint and to compel the arbitration of Lewis' claims on an individual basis. Lewis argued in opposition that Epic's arbitration agreement was an unfair labor practice, in violation of § 8 of the NLRA, because it interfered with his right to engage in concerted activity for mutual aid or protection under § 7 of the same statute. The federal district court agreed, and the Seventh Circuit affirmed the lower court's decision.

Ernst & Young v. Morris (9th Cir.): Stephen Morris and Kelly McDaniel were employees of the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements promising to pursue any future work-related claims exclusively through arbitration, and on an individual basis only. Notwithstanding the arbitration agreement, Morris brought a class and collective action against Ernst & Young in federal court, which McDaniel later joined, alleging that Ernst & Young had misclassified Morris and similarly situated employees as exempt from overtime pay under the FLSA and California law. The trial court granted Ernst & Young's motion to compel, but a 2-1 panel of the Ninth Circuit reversed, agreeing with the employees that the NLRA provided them with a nonwaivable right to pursue group legal action. The dissent agreed with Ernst & Young and with the Fifth Circuit that the NLRA's "concerted activities" language falls short of the "contrary congressional command" required by the Supreme Court to override the FAA's mandate.

In particular, NELF argues that, to escape their contractual obligation to arbitrate disputes on an individual basis only, the employees in these cases would have to show that the NLRA announces a "contrary congressional command" that employees have a right to pursue group legal action against their employer that cannot be waived. But the NLRA contains no such contrary congressional command. The statute makes no mention of class actions and was enacted decades before the advent of the modern class action. Nor does the NLRA mention collective legal actions or even provide for an individual right of action. Congress could not have intended to provide employees with certain non-waivable procedural rights associated with a nonexistent right of action.

Because the NLRA covers most employees in the private sector, the Supreme Court's decision in these consolidated cases could have a very significant impact on employment arbitration agreements.

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. Before 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 a showing of the employer's bad faith, willfulness, or other culpable conduct, in order to avoid due process problems. The 2008 amendment worked a major change in § 150—it made the treble damages unconditionally mandatory. Perhaps to get around the due process problem such mandatory treble damages might create, the 2008 amendment expressly characterized the new mandatory treble damages as "liquidated," hence compensatory and not punitive.

The present case raises the question of what effect, if any, the amendment has on a plaintiff's right to prejudgment interest, which is the primary means of compensating a plaintiff for the loss of the use of money during the time

before judgment enters. Put another way, the case raises the question whether the declared "liquidated" character of the new treble damages means (as it ordinarily would) that they are intended to compensate comprehensively for all injuries, suffered by a plaintiff, including those that pre-judgment interest would compensate for.

The plaintiffs here have 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 take literally the apparently mandatory language of the pre-judgment interest statute. The company's view, by contrast, is that § 150's treble liquidated damages function as any liquidated damages provision would and 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 has 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 focuses on the term "liquidated," noting that it sharply alters the nature of the treble damages from punitive, with all the attending legal complications of due process, to simply compensatory. In particular, NELF observes 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 cites 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 critiques the plaintiffs arguments directly. First, NELF cites SJC cases holding that the mandatory language of the prejudgment interest statutes must not be accepted 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 rejects the plaintiffs' contention that there is a "clash" between the mandatory prejudgment interest statutes and mandatory language of § 150. NELF also rebuts the contention that plaintiffs would be under-compensated if they do not receive prejudgment interest. NELF points out that all liquidated damages are an approximation of full compensation, and NELF urges 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 argues, 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.

Opposing Plaintiff's Argument That Her Copying and Dissemination of Her Law Firm Employer's Sensitive and/or Confidential Documents In Order to Advance Her Discrimination Claim Constituted "Protected Activity" Such That Her Termination for Such Conduct Constituted Unlawful Retaliation

Verdrager v. Mintz Levin
(Massachusetts Supreme Judicial Court)

The question presented in this appeal to the Massachusetts Supreme Judicial Court was whether an employer may lawfully terminate an employee who violated the employer's confidentiality policies to gather evidence in support of a discrimination claim. The Massachusetts anti-discrimination statute, Mass. G.L. c. 151B, § 4(4), makes it unlawful for any employer "to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding" before the Massachusetts Commission Against Discrimination ("MCAD"). Mass. G.L. c. 151B § 4(4) (2015). Under this and other anti-retaliation provisions like it, courts have identified certain employee actions as "protected activities," declaring that adverse employment actions with a causal connection to such protected activities establish at least a prima facie case of unlawful retaliation.

In this case, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. ("Mintz Levin") terminated Verdrager, an associate attorney, for violating its computer use and confidentiality policies, when it discovered that, over the course of a year, Verdrager had accessed, copied, and transmitted a multitude of her employer's confidential and sensitive internal documents, including some arguably subject

to protection under the attorney-client privilege, all in support of her gender discrimination claim against the firm. Verdrager, who lost on summary judgment in the Superior Court, contended in this appeal that, when it fired her for violating the firm's policies, Mintz Levin unlawfully retaliated against her for engaging in "protected activity" in support of her discrimination claims.

NELF filed an amicus brief in support of the employer, Mintz Levin, making two principal arguments. First NELF argued that, based on the clear language of the Massachusetts employment discrimination statute, "self-help" discovery is simply not a protected activity. The statute, on its face, restricts an employee's protected activity only to three categories of conduct: opposing discriminatory practices with one's employer (such as by informal complaints or use of an employer's grievance procedures); the formal filing of a charge of discrimination; or participation in an administrative or judicial proceeding. An unauthorized breach of an employer's confidentiality policies to obtain confidential documents is simply not covered.

Second, NELF argued that, even if the type of activity at issue here might be protected in other circumstances, in this case the deliberate and unnecessary violation of her employer's legitimate confidentiality polices robs what the plaintiff did of any protection. Put another way, the employee's actions were not reasonable in the circumstances, given the firm's written polices and even its ethical duty, as a law firm, to maintain the strict confidentiality of its internal documents.

In its decision issued on May 31, 2016, the SJC's disagreed with NELF and reversed the Superior Court's summary judgment in Mintz Levin's favor. Finding that the defendant was not entitled to summary judgment, the court remanded the case to the Superior Court for further proceedings, consistent with the SJC's decision, on the plaintiff's G.L. c. 151B claims.

With regard to the amicus question addressed by NELF, the Court noted that it did not need to address the question "as it is relevant only to the plaintiff's claim that her termination was retaliatory, and we have determined that the defendants are not entitled to summary judgment on that issue." However, to provide guidance to the trial court, the Court did address the issue, which was one of first impression in Massachusetts, and, disagreeing with NELF's first argument that c. 151B on its face did not protect self-help discovery, ruled that "[t]aking into consideration the interests at stake and the views of other courts that have addressed the matter, we conclude that such conduct may in certain circumstances constitute protected activity under [G.L. c. 151B], but only if the employee's actions are reasonable in the totality of the circumstances."

In this connection, the Court emphasized that the seriousness of this test, and adopted as a non-exhaustive framework the seven factors suggested by the court in *Quinlan v. Curtiss-Wright Corp*., 204 N.J. 2329 (2010). Further, the Court directed that the reasonableness determination had to be made with respect to each document or record at issue, and made clear that, even if self-discovery of most of the documents at issue was reasonable, the retaliation claim might still fail if other documents were not reasonable for the plaintiff-employee to have taken.

Arguing that, in a Discrimination or Retaliation Case Under Massachusetts Law, an Employer Should Not Be Vicariously Liable for Punitive Damages Awarded Because of a Supervisor's Egregious Misconduct Towards a Subordinate Employee, Where the Employer Has Made Good Faith Efforts to Prevent Such Misconduct.

Gyulakian v. Lexus of Watertown
(Massachusetts Supreme Judicial Court)

In this case, the Massachusetts Supreme Judicial Court was presented with the novel issue whether an employer should be held strictly liable under the Massachusetts anti-discrimination statute Mass. G. L. c. 151B, for punitive damages based on the egregious misconduct of a supervisor toward a subordinate employee. The issue arose because the SJC held many years ago, in *College-Town v. Mass. Comm'n Against Discrimination*, 400 Mass. 156 (1987), that employers are strictly liable in actual damages for actionable supervisory misconduct under c. 151B. Now the Court was presented with the question whether the same *College-Town* standard of strict liability should apply to employers with respect to punitive damages, given the markedly different purposes that distinguish punitive from actual damages.

The plaintiff, Emma Gyulakian, was an employee of Lexus of Watertown from 2003 through 2012. In 2014, she prevailed in a jury trial on her claim that her immediate supervisor had sexually harassed her for an extended period of time and had thereby created an unlawful hostile work

environment in violation of c. 151B. The jury awarded her $40,000 in compensatory damages and $500,000 in punitive damages. On Lexus' post-trial motions, the trial court vacated the award of punitive damages.

Solely on the issue of whether punitive damages could be imputed to the employer, NELF filed an amicus brief, arguing that the *College-Town* standard of strict liability should not apply, and that an employer should not be liable for punitive damages unless it itself had engaged in blameworthy conduct. Recognizing such a standard would be appropriate, NELF argued, because punitive damages serve to punish and deter an employer's wrongful conduct, not to provide the injured employee with a remedy for the actual harm inflicted by the rogue supervisor. Accordingly, NELF argued that an employer should not be held liable for punitive damages if it can show that it has taken affirmative steps to eliminate discrimination in the workplace, such as by implementing an antidiscrimination policy, through education and training, and by providing internal grievance procedures and acting appropriately on grievances. Indeed, NELF argued, recognizing such a standardwould create an incentive for employers to take measures to carry out c. 151B's important social goal of eradicating discrimination in the workplace.

In its decision of August 24, 2016, the SJC adopted NELF's position that an employer should not be held liable in punitive damages for a supervisor's egregious misconduct unless the employer itself has engaged in blameworthy misconduct. The Court announced that the standard to be applied is whether the employer was on notice of the supervisor's misconduct and egregiously or outrageously failed to respond. "We consider first whether the employer was on notice of the harassment and failed to take steps to investigate and remedy the situation; and, second, whether that failure was outrageous or egregious." The Court then applied this two-step test to the record, concluded that Lexus was liable in punitive damages for the supervisor's harassment of Gyulakian, and reinstated the award of punitive damages. Nonetheless, the principle proposed in NELF's amicus brief is now the law in Massachusetts. Employers cannot be held liable for punitive damages based on a supervisor's discriminatory conduct unless they have engaged in outrageous or egregious misconduct of their own.

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 Massachusetts Supreme Judicial Court appeal, 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. 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 provided a definition of "cause" and also provided, 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, after a full trial on the merits, *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 argues 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.

Public Presentations and Seminars

During 2016 NELF extended its advocacy of market freedom and a balanced approach to business and economic issues outside the courtroom with two breakfast seminars, its annual CEO Forum, and the third annual John G.L. Cabot Award Dinner

Spring Breakfast Program

Our spring breakfast program in May was entitled **"The Untimely Death of Justice Scalia: His Legacy and the Potential Impact of his Passing on Business Cases at the Supreme Court."** Moderated by NELF President **Martin J. Newhouse**, our panel, consisting of former Supreme Court clerks and Supreme Court litigants discussed both Justice Scalia's legacy in the area of business law and whether his untimely passing might affect the outcome of pending and future business disputes before the High Court. This was a subject close to NELF's heart, since Justice Scalia had written the majority opinions in a number of important business cases in which NELF had appeared as amicus curiae. Our panelists were **Mark C. Fleming**, Partner, WilmerHale; **Traci L. Lovitt**, Partner, Jones Day; **Kevin P. Martin**, Partner, Goodwin Procter LLP; and **Ben Robbins**, Senior Staff Attorney, New England Legal Foundation.

Fall Breakfast Program

In November, our fall breakfast program was on the topic **"Reassessing Arbitration in 2016: Making It Work for Business,"** and sought to dispel certain negative views of arbitration by presenting the real world experiences and data regarding litigation and arbitration time tables and costs; discussing when arbitration makes sense and when it might not; and providing an overview of the tools available to business users to achieve the business-focused, speedy, efficient, and economical arbitration that they want. The discussion was moderated by **Conna A. Weiner**, Mediator and Arbitrator, Conna Weiner, ADR, and our panelists were **David L. Evans**, Shareholder, Murphy & King, member of the Board of the American Arbitration Association; **Steven M. Greenspan**, Vice President and Chief Litigation Counsel, United Technologies Corporation; and **John S. Kiernan**, Partner, Debevoise & Plimpton; Board Chair for the International Institute of Conflict Prevention and Resolubion.

John G. L. Cabot Award Dinner

October saw NELF's third **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 2016 recipient of the Cabot Award was **James F. Kelleher**, Executive Vice President & Chief Legal Officer of Liberty Mutual Insurance. Jim, a longtime member of NELF's Board, is renowned not only for his work at Liberty Mutual, but also for his many pro bono activities both in the legal field and service to the wider community, and was the perfect recipient for the 2016 Cabot Award. Over 300 guests gathered to honor and celebrate Jim and to learn about his achievements and also, importantly, the work and mission of NELF. The evening celebration included a biographical video of Jim's life and achievements and a powerful video describing NELF's origins, its mission, and its ongoing work.

CEO Forum

Finally, in December our annual CEO Forum dealt with the topic **"Reducing the Cost of Electricity in New England."** Moderated by **William W. Hogan**, Raymond Plank Professor of Global Energy Policy and Harvard's Kennedy School, our CEO Forum panel discussed existing and emerging solutions to the problem of how to supply the New England states with more abundant and reasonably priced energy. Joining Professor Hogan to discuss this vitally important topic were **Dan Dolan**, President, New England Power Generators Association (NEPGA); **Zeryai P. Hagos**, Director, U.S. Growth & Strategy, GE Power; **Martin Honigberg**, Chair, New Hampshire Public Utilities Commission; **Suedeen Kelly**, Partner, Akin Gump Strauss Hauer & Feld LLP, and Former Commissioner, Federal Energy Regulatory Commission; and **Gordon van Welie**, Chief Executive Officer, Independent System Operator, New England.

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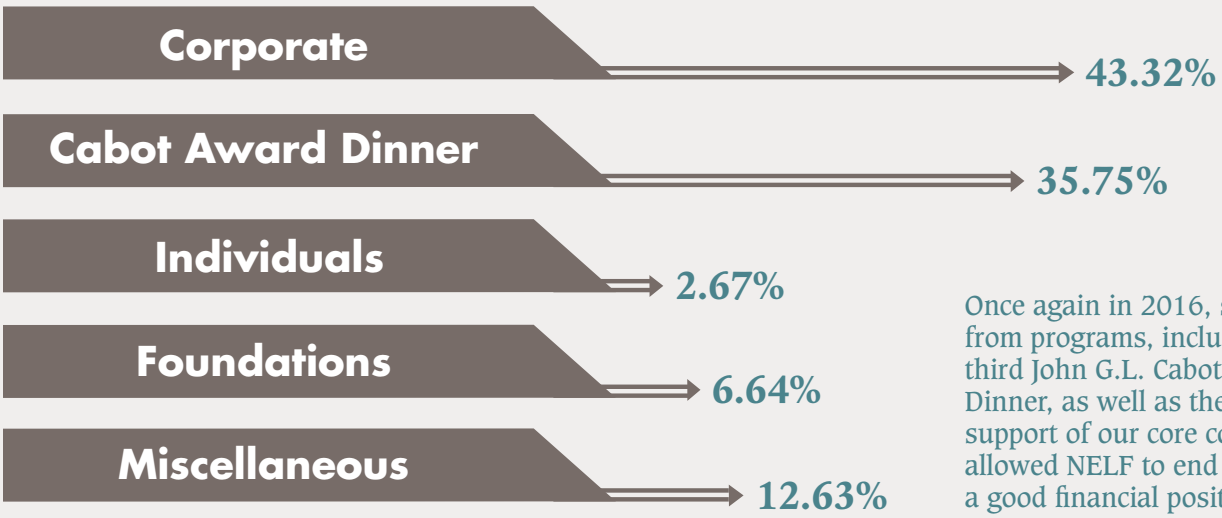
NELF 2016 Financial Review

2016 Revenue



Once again in 2016, support from programs, including the third John G.L. Cabot Award Dinner, as well as the continuing support of our core constituency, allowed NELF to end the year in a good financial position.

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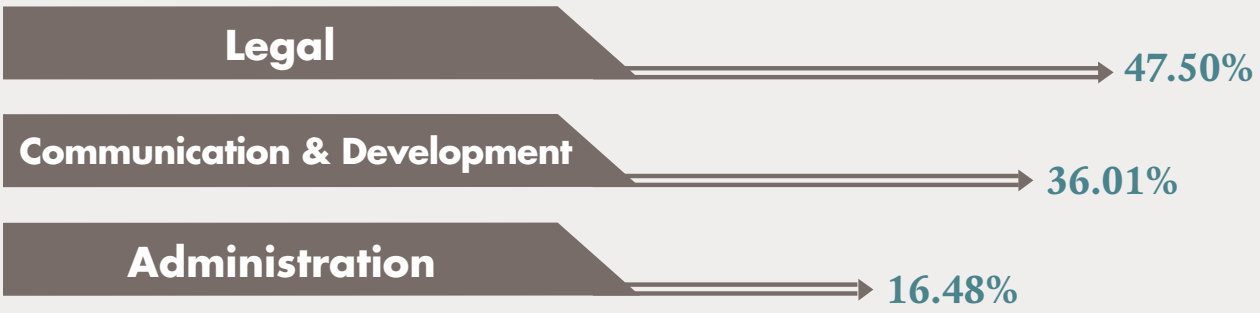

NELF maintained in 2016 its disciplined approach to cost containment, helping it to end the year with a surplus.

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{C} **John G.L. Cabot Award Dinner Committee.** Oversees the planning and success of NELF's annual John G.L. Cabot Award Dinner.

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Councils in each New England state remain critical to the success of NELF. The councils have several important functions. Among these are insight at the state level into crucial economic issue and assistance to NELF in locating cases in all parts of the region.

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NELF appreciates the hard work and dedication throughout 2016 of Senior Staff Attorney Ben Robbins, Staff Attorney John Pagliaro, Finance and Operations Manager Maria Karatalidis, and Office Assistant Shannon Flynn. Without their efforts, the accomplishments described in the 2016 Year in Review would not have been possible.

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