NEW ENGLAND
LEGAL FOUNDATION

2015

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

To Our Friends and Supporters

Martin J. Newhouse
President

Mark T. Beaudouin
Chair

Joseph G. Blute
Vice Chair

As we had occasion to note in this space last year, 2015 opened auspiciously for us when NELF's amicus brief in one of our 2014 cases (*Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*) was the subject of an exchange from the bench of the Supreme Court in January 2015, a rare enough event for an amicus in any court, but all the more gratifying when it occurs in the nation's highest court. The good news continued in the Court's unanimous May 2015 decision in that case adopting NELF's position and relying heavily on Senior Staff Attorney Ben Robbins' insights into the text and history of the False Claims Act. While all of 2015 may not have remained on that lofty plane for NELF, we are happy to report that it was another successful year for the Foundation, not only financially but also in terms of our docket and other public activities. Our work last year only showed, yet again, how important NELF is both regionally and nationally in advancing the principles of a balanced, market-oriented approach to regulation, free enterprise, and property rights.

Kellogg Brown and NELF's other cases of 2015 are described in the Docket portion of this Year-in-Review. Those cases, and NELF's successes (especially before the Supreme Court), show that after 38 years of hard work, NELF is as vigorous and committed to its mission as at any time in the past. In 2015 the legal staff, consisting of Ben Robbins and John Pagliaro, supervised by NELF's President Martin Newhouse, litigated questions ranging from whether an employee can be terminated for searching her employer's confidential documents for evidence to bolster her own employment discrimination case, to whether Congress can create standing to sue for the bare violation of a statute where no actual injury has occurred, to whether a state wages law forbids a business owner from instituting a "no tipping" policy, to whether ERISA preempts a state law that imposes additional reporting requirements on ERISA health plans.

Last year also saw our second, very successful John G.L. Cabot Award Dinner, at which we honored longtime NELF supporter Paul T. Dacier, Executive Vice President and General Counsel of EMC Corporation. The event was very well attended and was the subject of a full page pictorial spread in Massachusetts Lawyers Weekly. We also presented two well-received breakfast seminars, one on hot topics in international arbitration, and the other on shifting sands in the class action landscape. Finally, 2015 saw the reinstitution of our annual CEO Forum. Last year's panel of experts discussed "Capitalism in the New Century: The Essential Role of Business in Ensuring Its Survival." All of these programs are described in the following pages.

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 2nd Annual John G.L. Cabot Award Dinner

October 2015

Paul T. Dacier, Executive Vice President and General Counsel of EMC Corporation, honoree of the event, receiving the Cabot Award from Martin J. Newhouse, President of NELF

Elisabeth Talbot (left) and Denise Duffy, of The Colony Group

From left: Kevin J. O'Connor of Hinckley, Allen & Snyder; Kevin P. Martin and John J. Falvey, of Goodwin Procter; and the event's chairman, Michael T. Williams, Senior Vice President and General Counsel of Staples, Inc.

Mary Beth O'Neil (left) and Thomas J. Gallitano, of Conn Kavanaugh Rosenthal Peisch & Ford, with Christina M. Licursi of Wolf, Greenfield & Sacks

Alyssa Caddle (left) and Kathrin Winkler of EMC Corporation

From left: retired Supreme Judicial Court Chief Justice Margaret H. Marshall of Choate Hall & Stewart; Paul Dacier; Donald R. Frederico of Pierce Atwood; and James D. Smealie of Holland & Knight

From left: William R. Clark, Joseph J. D'Angelo, Paul Dacier, and Krish Gupta, all of EMC Corporation

Paul Dacier addressing the attendees

Honoree Paul Dacier receives the warm applause of the attendees

The Year in Review describes selected cases in which NELF participated in 2015 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.

Arguing that, in an Arbitration Agreement Falling Under the Federal Arbitration Act, a Reference to State Law with Respect to the Enforceability of a Class Arbitration Waiver Does Not Displace the Federal Arbitration Act's Mandate to Enforce Such a Waiver.

DirecTV, Inc. v. Imburgia, et al.
(United States Supreme Court)

At issue in this Supreme Court case was whether, in an arbitration agreement falling under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), a reference to state law with respect to the enforceability of a class arbitration waiver displaced the FAA's mandate to enforce such a waiver.

The arbitration provision at issue was in satellite television provider DirecTV's customer agreement in 2007 with Amy Imburgia. The agreement required binding arbitration of any future disputes and also prohibited class-wide procedures. However, while the arbitration provision recited that it "shall be governed by the Federal Arbitration Act," it also stated that enforcement of the class action waiver, and indeed of the entire arbitration provision, would depend on the law of each customer's state: "If, however, *the law of your state* would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." *Id.* (emphasis added).

In 2008, Imburgia filed a putative class action complaint against DirecTV in California Superior Court, alleging that DirecTV violated state law by improperly charging early termination fees to its customers. At the time, DirecTV did not move to compel arbitration of Imburgia's individual claims because its arbitration agreement was unenforceable under California law. The Superior Court certified a class as to one of the plaintiff's claims.

On April 27, 2011, while class proceedings were still pending, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the FAA preempts the very California law that had invalidated class arbitration waivers. Under *Concepcion*, the FAA requires the enforcement of class arbitration waivers contained in valid arbitration agreements, notwithstanding any state law to the contrary. Soon thereafter, DirecTV moved to stay or dismiss the class action, to decertify the class, and to compel arbitration of Imburgia's claims. The Superior Court denied the motion, DirecTV timely appealed, and the California Court of Appeals affirmed.

The California Court of Appeals interpreted "the law of your state" as referring to the law of California *without regard to the preemptive force of federal law* and, therefore, read the 2007 contractual language as intending to oust the FAA's mandate to enforce the class arbitration waiver, as announced four years later in *Concepcion*. On that basis, the California court invalidated the class arbitration waiver under California law that bars class action waivers in consumer actions. In so doing, the court gave effect to the arbitration agreement's "jettison" clause by voiding the entire arbitration agreement, thereby forcing DirecTV to litigate a possible class action in court.

From NELF's point of view, the case raised one central issue: Did the parties' reference to "the law of your state" intend to elevate state law over the FAA on the subject of class arbitration waivers? NELF argued that reference to "the law of your state" in the 2007 agreement was never intended to oust the FAA in favor of state law. Rather, the language reflected the understanding, current in 2007, that the enforceability of class action waivers in arbitration agreements falling under the FAA was governed by state law. That is, the 2007 agreement

was intended to *comply* with the FAA as it was then understood, by consulting state law on the enforceability of class arbitration waivers. This widespread interpretation of the FAA, however, was dispelled by the Supreme Court in 2011 in *Concepcion*, discussed above. NELF argued that, since "the law of your state" was not intended to oust the FAA, and since "the law of your state" cannot, after *Concepcion*, impede enforcement of the class arbitration waiver, DirecTV's motion to compel arbitration of Imburgia's individual claims should have been allowed.

In its decision of December 14, 2015, a six-member majority of the Court agreed with NELF and enforced the class arbitration waiver, although for slightly different but nonetheless compelling reasons. In a skillful opinion written by Justice Breyer, the Court held that the FAA preempts the lower court's opinion, which singles out arbitration agreements for unfavorable treatment and interprets "the law of your state" as referring presumptively to *invalid* state law. The Court explained that, since the FAA limits the states to applying general contract law principles to arbitration agreements, "the law of your state" must be interpreted under California general contract law. The Court observed that, as an empirical matter, California cases interpreting such contract language (along with cases from every other state) read "the law of your state" as referring presumptively to the *valid* law of a state. This means that "the law of your state" in this pre-*Concepcion* agreement evolves with the times and reflects any intervening changes made by a state Legislature, a state supreme court, or, as in this case, any pronouncements of controlling federal law by the Supreme Court under the Supremacy Clause, such as the *Concepcion* decision.

Therefore, "the law of your state" no longer includes California law that invalidates class arbitration waivers, because *Concepcion* held that the FAA preempted such laws. Thus, the class arbitration waiver in the pre-*Concepcion* agreement at issue must be enforced under the FAA, and the jettison clause is never reached.

Notably, the Court explained that, while indeed the FAA allows parties to apply any body of law, even preempted state law, to their arbitration agreements, this is not what "the law of your state" means on its face. To override the presumptive meaning of "the law of your state," then, parties would have to refer expressly to preempted state law in their arbitration agreements (an unlikely but nonetheless enforceable contract clause).

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

Gobeille v. Liberty Mutual Insurance Co.
(United States Supreme Court)

This United States Supreme Court appeal concerns whether the preemption provision of the Employee Retirement Income Security Act ("ERISA") bars 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 requiring 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 in the State 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, in the suit it brought in the Vermont federal District court and, subsequently, in the Court of Appeals for the Second Circuit, Liberty Mutual argued that since ERISA itself requires certain kinds of reporting by ERISA plans, any additional reporting imposed by State law is preempted.

Liberty Mutual lost on summary judgment in the district court, but obtained a ruling its favor from the Court of Appeals in a split 2-1 decision. On June 29, 2015, the Supreme Court granted certiorari to hear the matter on the merits, and NELF filed an amicus brief in support of Liberty Mutual on October 20, 2015.

In its brief, NELF addressed the Supreme Court's use, in recent ERISA decisions, of a "presumption against preemption," and argued that there exist several reasons for the Court to 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." As preemption has long been declared by the Court to be a matter of congressional intent, the presumption is especially inapt when one is dealing with an express preemption provision like that found in ERISA. Such an provision dispenses with the need for any kind of presumption precisely because it expressly establishes the *fact* of preemption. From that point on, the actual language, purpose, and context of the statute provide much surer guidance to Congress's intended meaning than could be given by any presumption unmoored to the statutory text.

While the presumption formulated in *Rice* may have been adopted by the Court in order to assist it in discerning Congress's intent, NELF observed that there has been no shortage of scholars who, however much they may disagree among themselves on other legal points, agree that the Court has signally failed to employ the presumption in a consistent methodological fashion.

Moreover, 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) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional."). The present case exemplifies that problem, as the two sides spill a lot of ink in contending 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. This disagreement was mirrored in the differing views of the majority opinion and the dissent in the appeals court.

NELF concluded by arguing that the judicially fashioned presumption impermissibly 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.

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)

This case is a putative consumer class action pending before the United States Supreme Court on a petition for certiorari. The plaintiff and putative class representative, Thomas Robins, seeks statutory damages in federal court under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. ("FCRA"), for a violation of that statute that may not have caused any harm. In particular, Robins alleges that the defendant, Spokeo, Inc., a "people search enginge," published false biographical information about him, such as by overstating his educational level and financial status. The FCRA authorizes the plaintiff to recover statutory damages for a willful violation of any of his statutory rights under the statute.. The case thus raises a constitutional issue long familiar to NELF: 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? NELF, joined by Associated Industries of Massachusetts, argued, on behalf of Spokeo, that the Court should grant certiorari and decide that Article III requires dismissal of Robins' complaint because it fails to allege any injury in fact. "Injury in law" under FCRA, based on the bare violation of a statutory right, cannot satisfy Article III's standing requirement that the violation must cause some concrete harm. The injury-in-fact requirement under Article III is not satisfied merely because Congress has authorized an award of statutory damages for the violation of a statutory right, despite earlier Supreme Court precedent suggesting a deferential approach to Congress's recognition of new kinds of harms that warrant new statutory remedies in federal court. As the Supreme Court has

more recently stated, "[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). NELF, on its own behalf and also on behalf of co-amicus Associated Industries of Massachusetts ("AIM"), urged the Supreme Court to grant certiorari in order to resolve the confusion among the lower courts on this crucial issue and clarify that injury in fact is *not* coextensive with injury in law. When certiorari was granted in April 2015, NELF, again with co-amicus AIM, filed an amicus brief on the merits making essentially the same arguments.

Arguing the Wartime Suspension of Limitations Act Does Not Apply to Civil Qui Tam Claims Brought Under the False Claims Act

Kellogg Brown & Root Services, Inc. et al. v. United States ex. rel. Carter
(United States Supreme Court)

In this case the Supreme Court considered whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Act"), a *criminal code* provision of the federal False Claims Act ("FCA"), that suspends, during and for five years after times of armed conflict, the statute of limitations for "*offenses* involving [contractor] fraud . . . against the United States," also applied to civil *qui tam* actions brought under the FCA. The FCA, first enacted during the Civil War, provides both criminal and civil remedies against federal government contractor fraud. On the civil side, the FCA encourages private whistleblowers ("relators") to bring suit on behalf of the Government ("*qui tam*" actions); if successful, a civil *qui tam* plaintiff is awarded a share of the government's damage award (between 15% and 30%). Such civil *qui tam* claims under the FCA are subject to a *six-year* limitations period. 31 U.S.C. § 3731(b)(1). The Fourth Circuit in this case concluded that the Act applies to both criminal and civil claims of contractor fraud against the Government. Consequently, the lower court allowed the plaintiff-relator's otherwise untimely *qui tam* FCA claim to proceed on the merits against defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc. (collectively "KBR"). NELF submitted an amicus brief in support of KBR, arguing that the Fourth Circuit had erred and showing, based on an extensive analysis of the Act's legislative history, the source of its mistake. The lower court had misunderstood a crucial part of the Act's statutory history. Prior versions of the Act, enacted in 1921 and 1942, had applied to offenses that were "now indictable under existing statutes." I.e.,i.e, their coverage was retrospective only, applying to crimes, still timely, that had already occurred when those 1921 and 1942 statutes took effect.Iin 1944, however, Congress, made the Act prospective as well, by deleting the phrase "*now* indictable under existing statutes." I.e.,i.e, their coverage was retrospective only, applying to crimes, still timely, that had already occurred when those 1921 and 1942 statutes took effect. In 1944, however, Congress, made the Act prospective as well, by deleting the phrase "*now* indictable under existing statutes." However, the Fourth Circuit, along with virtually every other court and commentator, misinterpreted this 1944 amendment. In particular, the lower court concluded that Congress' removal of the phrase "now indictable" in 1944 expanded the meaning of the word "offenses" to include non-indictable, civil claims. NELF demonstrated compellingly that, to the contrary, that when Congress removed the phrase "*now* indictable" in 1944, it simply extended the Suspension Act to *future* offenses of contractor fraud. (Congress also preserved other language in the 1944 Act to make it clear that the 1944 statute applied to past timely offenses as well.) By no means did the 1944 amendment affect in any way the exclusively criminal meaning of the word "offense."

In what we believe is a NELF first, during oral argument of this case on January 13, 2015, Supreme Court Associate Justice Sotomayor specifically referred to NELF's amicus brief, when she asked the attorney for the Petitioner whether he was "adopting the argument of the New England [Legal] Foundation, the amic[us] brief?" Equally significantly, Petitioner's counsel indicated that he was indeed adopting NELF's argument.

In its unanimous decision issued on May 26, 2015, the Supreme Court agreed with NELF's arguments in the case. In an opinion that largely parallels NELF's brief, the Court held that the Act only applies to criminal offenses under the FCA and therefore does not suspend the limitations period for civil FCA claims.

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 Court of Appeals for the Third Circuit)

This matter involves an important question of preemption. It was referred to NELF by a corporate supporter headquartered in Providence, Rhode Island, whose subsidiary is a defendant in the case. The respondent, Lycoming Engines, a division of the subsidiary, sold a certain aircraft engine in 1969. At the time of its manufacture and sale, the engine had been federally certified as in compliance with safety standards. 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 later sued by Jill Sikelee, the widow of a newly licensed pilot who died in a crash of the Cessna. The suit was based on state law product liability theories of design defect and failure to warn. Because this appeal is in the Third Circuit, which is normally outside of NELF's geographic area of activity, we have partnered with Atlantic Legal Foundation, and have filed a joint amicus brief supporting Lycoming. Lycoming obtained summary judgment in the trial court based on the theory that, in this case, the plaintiff's state law claims are preempted. This was the issue that NELF and ALF focus on as well in our amicus brief. In essence, amici argue that, given the very extensive and comprehensive regulation of the aviation industry at the federal level—as well as the necessity that the industry be federally regulated—the plaintiff's claims are preempted.

Arguing that the First Amendment Should Prohibit Massachusetts from Criminalizing Knowingly False Political Campaign Speech

Commonwealth v. Lucas
(Massachusetts Supreme Judicial Court)

At issue here was whether Mass. G. L. c. 56, § 42 ("§ 42"), a 1946 Massachusetts statute that criminalized any knowingly false statement in relation to any candidate for nomination or election to public office, violated the First Amendment to the United States Constitution. The statute punished the convicted speaker with either a fine of up to $1,000 or imprisonment for up to six months. This case was initiated during the 2014 state elections by an incumbent (and subsequently re-elected) candidate, State Representative Brian Mannal, who successfully applied for the issuance of a criminal complaint against Melissa Lucas, the chairperson and treasurer of Jobs First, an independent-expenditure Political Action Committee. Mannal alleged that Lucas was responsible for the PAC's publication and circulation of a brochure falsely stating that Mannal, a criminal defense attorney, would benefit personally from the passage of a bill that he was sponsoring. Mannal's proposed legislation would earmark state funds for court-appointed criminal attorneys representing indigent convicted sex offenders in post-conviction proceedings. The SJC stayed Lucas' arraignment in Falmouth District Court until it decided the constitutionality of the statute, in the exercise of its general superintendence powers. The Court issued an amicus announcement and heard oral argument on May 7, 2015.

In its amicus brief in support of the defendant, NELF argued that this case was not about protecting the right to lie in political campaigns. Instead, it was about protecting the First Amendment right of everyone, including State Representative Brian Mannal himself, to engage freely in political debate about the qualifications of candidates for public office, without fear of criminal reprisal from the government. Such speech is "integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression …." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346 (1995) (citations and internal quotation marks omitted).

As NELF argued, political speech does not lose its First Amendment protection even if it is false (to the extent that political speech can be reduced to truth or falsity). This means that the disputed statute is a content-based prohibition on protected speech. Therefore, the statute violates the First Amendment unless Massachusetts can show that it survives "exacting scrutiny." It must be narrowly tailored to serve an overriding state interest.

This, NELF argued, Massachusetts could not show. Indeed, "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter . . . ." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340 (2010). This is because political campaign speech is the essence of self-government and thus occupies the highest rung of First Amendment values. To ensure the proper functioning of a representative democracy, core political speech must be afforded ample breathing space to flourish. The First Amendment thus requires that the electorate shall engage freely in political debate and shall decide whom and what to believe during an election campaign, without any governmental interference.

By contrast, the fact or threat of criminal prosecution is antithetical to this First Amendment value because it stifles political discourse, especially when that discourse is needed most, on the eve of an election. The statute thus impinged the rights of the electorate, both as speaker and listener. As a result, the political process suffers.

The First Amendment ensures a wide-open marketplace of ideas in which the appropriate remedy for allegedly false speech is simply more speech, and not enforced silence through actual or threatened criminal prosecution. As the Supreme Court has long recognized, counter speech is a particularly effective remedy during a political campaign, because a candidate is likely to respond immediately and forcefully to false accusations, as this case illustrates.

Not only did the statute fail exacting scrutiny. NELF argued it was also void for vagueness. Political speech is often an unruly mixture of fact and opinion that cannot be reduced to neat categories of truth and falsity. This means that the statute cannot provide adequate notice of what speech is permitted or proscribed. This can only result in widespread self-censorship among the electorate. The statute's vagueness could also invite prosecutorial abuse, such as the silencing of views that are critical of incumbents or government generally.

In its decision issued on August 6, 2015, the Supreme Judicial Court agreed with NELF that Mass. G. L. c. 56, § 42 was unconstitutional. The Court, however, based its decision entirely on the Massachusetts constitution holding that "§ 42 is antagonistic to the fundamental right of free speech enshrined in art. 16 of our Declaration of Rights and, therefore, is invalid." Agreeing with NELF, the Court held that the statute was a content-based restriction on political speech that was presumptively invalid and could not survive strict scrutiny, under the Declaration of Rights.

Assisting the Court in Evaluating a Proposed Consent Judgment Addressing Competition in the Business of Healthcare Services

Commonwealth v. Partners Healthcare System, Inc., et al.
(Massachusetts Superior Court, Business Litigation Section)

In 2014 the Attorney General of Massachusetts invoked the rarely used anticompetitive branch of the state's Consumer Protection Act, G.L. chapter 93A, to bring an action against Partners Healthcare System, Inc., a not-for-profit corporation that is the largest healthcare provider in the Commonwealth. The Attorney General sought to block Partners' acquisition of three hospitals outside of Boston, principally alleging that the acquisitions would have a substantial anticompetitive effect on the business of healthcare in the relevant state market and would therefore harm the public interest. After intense negotiations, Partners and the Attorney General agreed to entry of a consent judgment that would permit the acquisitions to take place, but would subject Partners' operations to a series of restrictions intended to lessen any anticompetitive effect of the acquisitions.

When the trial judge then solicited comments from the public at large concerning the proposed consent judgment, NELF, in a classic instance of playing its role as amicus curiae in the public interest, responded by filing with the court a letter in which it discussed the legal standard by which the court should evaluate the agreement struck by the parties. Having reviewed the submissions of the Attorney General and Partners on the question of the legal standard to be used, and after careful indepen-

dent review of the relevant legal authorities, NELF opined to the court that the Attorney General and Partners had accurately stated consensus legal principles, drawn from a variety of federal and state antitrust cases, that have guided other courts in a range of similar situations and that ought to guide this court as well. NELF summarized the court's inquiry into two areas. First, there were core judicial concerns, including whether the consent judgment was the product of genuine adversarial negotiations, whether the terms reasonably relate to issues over which the court has jurisdiction, whether the terms of any possible future enforcement envisioned under the consent judgment are sufficiently clear, and whether enforcement would be adequate and manageable. Second, there were concerns relating to the public interest. Here, the court should satisfy itself that the judgment does not clearly violate any well-established public policy, taking due account of the Attorney General's unique discretionary powers in protecting the public interest through the prosecution and settlement of law suits (a discretion recently reaffirmed by the Legislature specifically as to healthcare providers and anticompetitive conduct under G.L. c. 93A). One point that NELF thought especially important to emphasize was that the proposed consent judgment did not rest on either a finding or an admission of liability and therefore "the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation" (quoting U.S. v. Armour & Co., 402 U.S. 673, 682, 91 S.Ct. 1752, 1757 (1971)). In February 2015, the judge declined to approve entry of the consent judgment, finding that its substantive terms failed to address adequately the likely anticompetitive effects of the acquisitions and finding, also, that the terms of the settlement were not sufficiently clear as to render possible future enforcement reasonably manageable by the court.

Urging the Rhode Island Supreme Court to Affirm that Individuals and Businesses that Assist Law Enforcement when Asked to Do So Are Shielded from Civil Liability for Those Actions

David F. Miller v. Amica Mutual Insurance Co.
(Rhode Island Supreme Court)

The background to this case is the history of acrimonious relations between car insurers and the auto body repair industry in Rhode Island. Simply put, each side has long believed that it is being cheated by the other.

David Miller, the plaintiff in this case, is the former head of the trade association of repair shops and has long played a prominent role in the ongoing dispute between the shops and insurers like Amica. In 2001 he was the target of two sting operations. Apparently allegations had been made by several sources that Miller inflated the costs of repairs; in other words, Miller was alleged to have committed insurance fraud. As part of the undercover investigation, Metropolitan Property and Casualty Insurance Co. provided the Rhode Island State Police with a vehicle that was taken into Miller's shop for repairs. This sting operation led to Miller's being charged with billing more than $1,100 in fraudulent repairs. In a second sting operation, Amica provided a damaged vehicle and a fake insurance policy, and Miller supposedly billed $1,050 in fraudulent repairs on that job. Miller was arrested and charged with insurance fraud and with attempting to obtain money under false pretenses. The charges were later dismissed because of evidentiary problems, but Miller was required to surrender his license to run his repair shop.

In this case, he claimed that Amica and Metropolitan vindictively abused legal process in order to get him arrested. The case went to a jury, which found against both insurers. The trial judge, however, finding a dearth of evidence against Amica, granted Amica's motion for judgment notwithstanding the verdict (he, however, found ample evidence to justify the jury's verdict against Metropolitan). Miller appealed. Miller's argument urging reinstatement of the abuse of process verdict rested entirely upon an analysis of the sufficiency of the evidence presented at trial. He claimed that the evidence was sufficient to support a jury-finding that Amica initiated the investigation against him, rather than Amica's having merely assisted the police when called upon to do so.

On appeal, Amica argued that the evidence presented at trial was insufficient, as a matter of law, to support the verdict against it. It also responded that it merely did its civic duty in assisting police in an investigation that the insurer played no role in initiating.

NELF filed an amicus brief in support of Amica. While NELF was in no position to decide between conflicting views of the trial evidence, it laid out for the Court the ancient, widely-recognized Anglo-American public policy of protecting private individuals from civil liability when they have rendered assistance to law enforcement officials at the latter's request. First, NELF reviewed the numerous Rhode Island statutes, including insurance law statutes, that codify this policy, some of them acknowledging the living common law background of the policy. Then NELF discussed the policy's broader common law background as most memorably embodied in Justice Cardozo's decision in *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726 (1928). NELF concluded by examining two federal cases that it suggests clarify the situation in which Amica finds itself in this case. In filing its brief, NELF hoped to spur the Court to use the occasion of this appeal to acknowledge, for the first time in Rhode Island decisional law, the vitality of the common law principle.

In its March 20, 2015 decision, *Miller v. Metropolitan Property and Cas. Ins. Co.*, 111 A.3d 332 (R.I. 2015), the Court decided the appeal in Amica's favor on the basis of a release Miller had given as part of the dismissal of the criminal case against him. Unfortunately, therefore, the Court did not reach the issue of common law immunity that NELF had addressed in its amicus brief.

Arguing that an Agreement to Submit the Valuation of Stock to the Binding Decision of Arbitrators is an Arbitration Agreement Enforceable Under the Massachusetts Arbitration Act

Vale v. New England Cleaning Services, Inc.
(Massachusetts Supreme Judicial Court)

At issue in this case, before the Massachusetts Supreme Judicial Court ("SJC"), was whether a stock valuation provision in the articles of organization of a closely held Massachusetts corporation was enforceable under the Massachusetts Arbitration Act, G. L. c. 251, §§ 1-18 ("MAA"). The SJC requested amicus briefing on this issue. Under this familiar contract provision, the shareholders agreed in advance to submit any future dispute about the value of a departing shareholder's stock to a binding and final determination by an arbitral panel. Unlike the common law, the MAA provides for expedited specific performance of an arbitration agreement, via a motion to compel arbitration, along with other streamlined statutory mechanisms designed to enforce the parties' bargained-for expectations.

The departing shareholder in this case refused to complete the parties' agreed-upon process for arbitrating the value of his shares. Instead, he sought an accounting *in court*, as part of his claim for breach of fiduciary duty against the defendant, New England Cleaning Services, Inc. ("NECS"). The Superior Court denied NECS' motion to compel arbitration, concluding that the parties' valuation agreement was not an arbitration agreement. The lower court based its decision on *Palmer v. Clark,* 106 Mass. 373 (1871), and its progeny. In *Palmer*, decided nearly a century before the MAA's enactment in 1960, this Court drew a distinction between an appraisal and an arbitration agreement. The SJC has also requested amicus briefing on whether *Palmer* and its progeny survive the MAA.

In its amicus brief supporting NECS, NELF argued that the parties' valuation agreement is indeed an arbitration agreement enforceable under the MAA, which applies broadly to any "controversy" that the parties have designated in their agreement for resolution in binding arbitration. In fact, this Court has *already* enforced a property valuation agreement under the MAA. See *Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Auth.,* 363 Mass. 386 (1973) (enforcing railroad right-of-way valuation agreement under MAA). As the Court recognized implicitly in *Trustees of Boston & Maine*, the MAA allows the parties to decide in advance both *what* is to be arbitrated--however specific and factual the issue--and *how* it is to be arbitrated--however informal the procedures. See G. L. c. 251, § 1 (MAA applies to "*any controversy* thereafter arising . . . ."), § 5 (MAA requires certain arbitral procedures "*[u]nless otherwise provided by the agreement* . . . .") (emphasis added). In short, the MAA embodies the modern notion of party autonomy in the crafting of arbitration agreements tailored to each particular dispute. Therefore, NELF argued, the parties' valuation agreement should be specifically enforced under the MAA. As a result, the old distinction between an appraisal and an arbitration agreement under Palmer should not survive the MAA. That distinction was drawn under a predecessor arbitration statute that did not apply to valuation agreements. Moreover, *Palmer* was decided when predispute arbitration agreements were voidable. Thus, in its day, *Palmer* actu-

ally *protected* the rights of shareholders to an appraisal agreement. Such protection is no longer necessary now that such an agreement can be enforced under the MAA.

On May 22, 2015, the Supreme Judicial Court issued its opinion in this case. Agreeing with NELF, the Court concluded that Article 5 of NECS's articles of incorporation contained a valid agreement to arbitrate future controversies regarding the value of NECS's stock. (The Court, however, also concluded that no such controversy existed at the time of NECS's motion to compel arbitration and, therefore, affirmed the order denying the NECS's motion to compel arbitration.)

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 deals with the interplay of federal interstate commerce jurisdiction with automotive 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 for-hire motor carriers and directed him to impose minimum liability coverage amounts on such carriers in order to protect the public. Such coverage is documented in the form of an endorsement to the carrier's existing policy. At issue here is how to determine whether a federally mandated insurance policy endorsement applies to a motor vehicle accident that occurred in 2006.

The case, one of first impression in Connecticut, involves a Connecticut towing company that sometimes engages in interstate commerce. The plaintiff was injured in a motor vehicle collision with one of the company's trucks while an employee of the company was driving the truck on a purely local errand for the company to pick up some auto parts. The plaintiff, having obtained a judgment against the company in an earlier action, now seeks to hold the company's insurer liable for the unpaid portion of the judgment, and the endorsement is the means by which she aims to do so. On summary judgment, the trial judge decided that the endorsement did not apply. Of the two crucial issues in contention, he found that the trip was "for hire," as required for the federal law to apply, but that the accident did not occur during an interstate use of the truck, and hence there was no federal jurisdiction. The plaintiff appealed. The Appellate Court declined to reach the issue of interstate travel, but did rule that the truck had not been transporting property "for hire." The Connecticut Supreme Court has agreed to review both issues.

In its brief, NELF closely examines the language of the jurisdictional statute and the federal regulations (of which the endorsement form is a prescribed part), and argues that the liabilities covered do not broadly include those resulting from the operation of a business engaged generally in interstate commerce (as Martinez argues). Rather, they are limited to liabilities resulting from negligence that occurred when the motor vehicle that created the liability was itself engaged, at the time of the accident, in transporting property along one of the three paradigmatic interstate routes mapped out in the jurisdictional statute. After discussing key federal cases applying this "trip-specific" rule, NELF subjects cases cited by Martinez to a close analysis and shows that they were wrongly decided, are irrelevant, or have been overruled.

Turning to the "for hire" issue, NELF points out that the trial judge and Martinez have erred in stating that the accident occurred while the truck was being used in "for hire" motor carriage simply because the driver was paid wages and was transporting some auto parts for the company at the time of the accident. It is true that 49 C.F.R. § 387.5 defines "for hire" carriage as the "business" of transporting another's property for compensation. But NELF argues that the default definitions given in 49 C.F.R. § 390.5 clearly establish that it is the "employer" (here, the towing company), not the "employee," who is the person owning or leasing motor vehicles as part of its "business." By focusing on the driver employee, the trial court ruled incorrectly on this issue. The only relevant actor, the company, was not operating its truck in a "for hire" capacity at the time of the accident but merely sending it on a company errand. NELF therefore urges the Court to rule that the trip was, as commonsense would suggest, a mere local errand run for the company by one of its employees.

Arguing that, Without an Express Legislative Mandate, the Massachusetts Department of Transportation Does Not Have the Authority to Regulate Outdoor Advertising Throughout the Commonwealth.

Outfront Media VW Communications LLC v. Massachusetts Department of Transportation
(Massachusetts Supreme Judicial Court)

This case was before the Massachusetts Supreme Judicial Court on a certified question from the United States District Court for the District of Massachusetts. The question was whether the Massachusetts Legislature has authorized the Massachusetts Department of Transportation ("MassDOT") to regulate all "off-premise" outdoor advertising (billboards, outside signs, and the like) throughout the Commonwealth. The SJC issued an amicus call on the question and NELF filed an amicus brief in support of Outfront Media, arguing that the MassDOT had acted without legislative authorization when it promulgated regulations purporting to regulate all off-premise outdoor advertising in the Commonwealth.

The issue was of importance to NELF and its supporters because outdoor advertising companies have long been subject to detailed and demanding local regulation by towns and cities throughout the state, and do not need to be burdened with duplicative and costly regulations at the state level.

In its brief, NELF argued that when the Massachusetts Legislature created MassDOT in 2009 in an omnibus Transportation Act, that same Act abolished the Outdoor Advertising Board, a state agency that for several decades had regulated the placement and manner of outdoor advertising in Massachusetts. Notably, the 2009 Act did *not* re-delegate the former Outdoor Advertising Agency's regulatory powers to the MassDOT. By contrast, NELF argued that the Legislature, in the past, had indeed re-delegated the rulemaking authority of a predecessor outdoor advertising agency to its successor state agency, by so amending the relevant provisions of the enabling statutes. Therefore, the Legislature's failure to do so in 2009 can only be a deliberate choice to remove the state from regulating all outdoor advertisements throughout the Commonwealth. Moreover, the Legislature has for nearly 100 years authorized cities and towns to regulate outdoor advertising. And both the Legislature and the SJC have recognized that the regulation of outdoor advertising is primarily a local issue, because only local governments can respond to the particular aesthetic concerns and geographical details of each neighborhood. To reinforce this point, NELF provided an extensive analysis and summary of the ordinances and bylaws of several cities and towns throughout the Commonwealth. NELF demonstrated persuasively that several cities and towns have done far more than the disputed state regulations to restrict the size, placement, and manner of outdoor advertising. Therefore, state regulation of the same issue is unnecessary.

After filing its brief, NELF received word that the case had settled, leaving the legal issue unresolved.

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.

Defending the Rights of a Secured Judgment Creditor Against an Asserted Discharge of the Debt in Chapter 7 Bankruptcy

Christakis v. Jeanne D'Arc Credit Union
(Massachusetts Supreme Judicial Court)

This Massachusetts Supreme Judicial Court case presented what was essentially an issue of first impression in the Court, at least under modern bankruptcy law. The defendant credit union was a secured creditor that, in an earlier action on an unpaid credit card debt, obtained a judgment against the present plaintiff and perfected a post-trial judicial lien on her real property to secure the judgment, intending to sell the property in order to satisfy the judgment. About a year after the credit union won its judgment and lien, the plaintiff filed for bankruptcy, and her debts were later discharged under Chapter 7. She then brought this action to "remove cloud on title" in order to forestall the sale of her property by the credit union, arguing that the bankruptcy discharge voided the judgment on which the credit union's pre-bankruptcy lien rested. Other than a glancing remark in a short, 1937 decision, the Court had not discussed, let alone decided, whether, in circumstances like these, a creditor retains a secured interest upon which it may foreclose.

Concerned by the failure of the parties and the trial judge to discuss controlling federal case law, NELF filed a brief in support of the credit union. In its brief, NELF identified *Johnson v. Home State Bank*, 501 U.S. 78 (1991), as providing the rule of decision in this case. NELF explained the reasoning of *Johnson* and cited numerous lower court decisions acknowledging the precedential status of *Johnson*. Briefly put, a discharge of debts only reaches debts for which the debtor's personal assets in bankruptcy are liable; property interests (such as, here, liens interests) validly conveyed to another party before bankruptcy do not form part of the debtor's later bankruptcy estate, and thus the debts secured by such interests remain unaffected by a discharge. NELF also rebutted Christakis' attempts to exempt non-consensual liens, like the judgment lien in question here, from the rule of *Johnson*, a case which admittedly dealt with a consensual lien (a mortgage). NELF pointed out that *Johnson* itself relied on two cases involving judicial liens, noting further that Christakis conceded that she could not satisfy the sole statutory exception addressing judgment liens. Finally, NELF demonstrated that the few cases Christakis cited offer no support to her position for a variety of reasons; in particular, NELF observed that her strongest case actually rests on a serious misquotation of an earlier case on a crucial point of law.

In its May 6, 2015 decision, *Christakis v. Jeanne D'Arc Credit Union*, 471 Mass. 365 (2015), the Court agreed with NELF and applied *Johnson* as the rule of decision. Finding that the discharge did not reach the property interest transferred earlier by the judgment lien, it rejected the plaintiff's contention that the case turned on an issue of Massachusetts law, i.e., whether state courts should allow the credit union to execute on a judgment supposedly voided by the discharge. Interestingly, the Court went on to declare that other secured creditors, who had been defaulted in this case for failure to answer and were not part of the appeal, were also entitled to judgment in their favor because Christakis's complaint was legally insufficient as to them too for the reasons stated in the opinion.

The decision also had quick ramifications outside the case itself. In *Army v. CitiMortgage, Inc.*, 140 F. Supp. 3d. 149 (D. Mass. 2015), CitiMortgage called the judge's attention to the decision on a motion for reconsideration of its motion to dismiss. The judge, having previously declined to dismiss the complaint in the belief that the SJC would likely regard a judgment lien as unenforceable after the mortgagor's discharge in bankruptcy, reversed himself on the basis of *Christakis* and dismissed the action against the mortgage company.

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 Supposedly 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 1955, 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 was enacted in response to towns' using their local laws to exclude affordable housing from their neighborhoods. In the present case, developer Hollis Hills sought a comprehensive permit in Lunenberg, 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 town's preferred set of bylaws, whose validity should have been presumed by the HAC, the town said. 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 as 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 town 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 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.

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)

At issue here is whether, in a claim of constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the administrative limitations period begins with the last discriminatory or retaliatory act of the employer before the employee resigns, or whether it begins instead with the employee's resignation. 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 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 or her 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 a 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 argues in its amicus brief in support of the employer that, in a claim for constructive discharge, as with most any other claim of discrimination or retaliation under Title VII, the administrative limitations period begins with the employer's last discriminatory or retaliatory act, not with the employee's resignation in response to that conduct. This result 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. Additionally, the Court has already interpreted Title VII's 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). NELF argues that *Ricks* should apply here because the relevant language in the EEOC regulation is synonymous with Title VII's limitations provision, and because neither provision treats constructive discharge claims differently from the "traditional" discrimination claim discussed in *Ricks*.

Moreover, NELF argues, the Supreme Court has observed that Congress would have been well aware of constructive discharge claims when it enacted Title VII. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141-42 (2004). And yet Congress made no special allowance concerning the timeliness of constructive discharge claims. Therefore, Congress should be deemed to have rejected any differential treatment for the filing of constructive discharge claims by private-sector and state employees under Title VII. And the EEOC, in turn, should be deemed to have followed suit with its similarly worded provision for federal employees.

Suders also held that, in a constructive discharge claim under Title VII, the employee's decision to resign is *not* an action imputed to the employer. Instead, the resignation remains a separate act of the employee. Therefore, the resignation is not an "alleged unlawful employment practice" under Title VII or a "matter alleged to be discriminatory" under the EEOC regulation. While the employer may indeed be liable in damages for the employee's resignation as *if* it were a termination, *Suders* carefully distinguished the employer's monetary liability from any vicarious liability for the employee's resignation. The employer is liable in damages for the employee's reasonable resignation simply because the resignation is a foreseeable consequence of the employer's proven wrongful conduct.

After all, *Suders* explained that a constructive discharge claim is merely "an aggravated case" of discrimination or retaliation. A constructive discharge claim is a dependent claim that rides "piggyback" on the underlying claim of discrimination or retaliation. The only difference between a constructive discharge claim and the underlying claim of discrimination or retaliation is the severity of the employer's wrongful conduct, and hence the applicable measure of damages. There is no reason, therefore, why the limitations period should be any different for the constructive discharge claim merely because the employee is seeking additional remedies that would not apply in the underlying claim of discrimination or retaliation.

Finally, *Suders* teaches that a constructive discharge claim is an objective inquiry, asking whether the employee's resignation was a reasonable response to the employer's challenged conduct. The facts necessary to determine such reasonableness are generally established once the employer has taken official action against the employee, or when a supervisor or co-worker has committed the last in a series of related acts of harassment against the employee before he resigns. At that moment in time, the employee is most likely on notice that resignation may be the only reasonable response to the employer's allegedly severe conduct. Therefore, this inquiry focuses on the severity of the employer's disputed conduct. It does not concern the particular timing of each employee's resignation. Accordingly, the employer's conduct should begin the limitations period, not the employee's subsequent resignation in response to that conduct.

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 to Massachusetts's highest court in this case is 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), declares it an unlawful practice 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) (emphasis added). 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 retaliation.

The law firm 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 she had secretly copied internal documents from its computer systems to support a gender discrimination claim that she had made against the firm. It turned out 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. Verdrager, who lost on summary judgment in the Superior Court, contends 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.

In connection with its consideration of Verdrager's appeal, the Massachusetts Court issued a call for amicus briefs on the following question:

> Whether, and in what circumstances, an employee may engage in so-called self-help discovery during the course of her employment, by collecting and copying documents of the employer that she intends to use in a discrimination case against the employer; whether, and to what extent, an employee who obtains documents in such a fashion is engaged in protected activity for purposes of G. L. c. 151B, such that she may not be subject to adverse employment action as a consequence.

In answering this question, NELF's amicus brief in support of the employer, Mintz Levin, makes two principal arguments. First NELF argues that, based on the clear language of the Massachusetts employment discrimination statute, "self-help" discover is simply not a protected activity. The statute, on its face, restricts an employee's protected activity only to three categories of conduct that follow the chronological development of a case: first, opposing discriminatory practices with one's employer (such as by informal complaints or use of an employer's grievance procedures); next, the

formal filing of a charge of discrimination; and last, participation in the administrative or judicial proceeding engendered by the complaint. An unauthorized breach of an employer's confidentiality policies to obtain confidential documents is simply not covered.

Second, NELF argues that, even if the type of activity at issue were not *per se* excluded by the plain language of the statue, the statute, in this case the plaintiff's deliberate and unnecessary violation of her employer's legitimate confidentiality polices should not be protected activity. 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, maintain the strict confidentiality of its internal documents.

Arguing that the Massachusetts Wage Act Allows a Business to Maintain a No-Tipping Policy

Meshna v. Scrivanos
(Massachusetts Supreme Judicial Court)

At issue in this case, before the Massachusetts Supreme Judicial Court ("SJC"), is whether the tips provision of the Massachusetts Wage Act, G. L. c. 149, § 152A, allows a business establishment to maintain a no-tipping policy, under which patrons are requested not to tip employees, and employees are, in turn, required not to accept any such tips. The plaintiffs are employees of various Dunkin' Donuts franchises owned and operated by the defendants Constantine Scrivanos and the Scrivano Group (collectively "Scrivanos"). The plaintiffs claim, on behalf of themselves and all other similarly situated employees, that Scrivanos has violated their rights under the Wage Act by preventing them from accepting tips offered to them by customers. The Superior Court (Fabricant, J.) ruled that a no-tipping policy is permitted under the statute, so long as the policy is "clearly and conspicuously announced" to provide notice to patrons. The Massachusetts Supreme Judicial Court took the case on direct appellate review and requested amicus briefing on this issue.

NELF argued, in support of the defendants, that the Wage Act does not prohibit, or address in any other way, a no-tipping policy. While NELF is not opposed to the practice of tipping, nevertheless NELF does not believe that the statute *requires* a business to permit tipping on its premises. Nowhere does the statute say that a business must permit its patrons to tip its employees. Instead, the Act addresses only the consequences that result when a business *does* permit tipping—i.e., such a business cannot confiscate tips from its employees. And, since the statute does not require a business to permit tipping, its silence on the issue should be interpreted as leaving undisturbed "the traditional broad authority of owners and proprietors of business establishments to adopt reasonable rules regulating the conduct of patrons or tenants." *Butler v. Adoption Media*, LLC, 486 F. Supp.2d 1022, 1030 (N.D. Cal. 2007) (citation and internal quotation marks omitted). After all, "[a] statute is not to be interpreted as effecting a material change in or a repeal of the common law *unless the intent to do so is clearly expressed*." *Reading Co-Op. Bank v. Suffolk Constr. Co.*, 464 Mass. 543, 549 (2013) (citation and internal punctuation marks omitted) (emphasis added). Therefore, the Act, lacking any clearly expressed intent to the contrary, should be interpreted as preserving the bedrock common law principle that "[t]he status of an invitee is not absolute but is limited by the scope of the landowner's invitation." 62 Am. Jur. 2d *Premises Liability* § 100."). In short, the statute allows each business to exercise its own judgment and decide for itself whether tipping is a good idea for its particular establishment.

In its decision of April 10, 2015, the Court agreed with NELF and held that the tipping statute does not require an employer of wait staff to permit tipping. Instead, the statute only addresses the circumstances when the employer does permit tipping. "No language in [the tipping statute] prohibits an employer from imposing a no-tipping policy. The Tips Act addresses circumstances in which tipping is permitted and wait staff employees have been given tips, directly or indirectly; it prescribes what the employer is required to do with such tips." *Meshna v. Scrivanos*, 471 Mass. 169 (2015).

Defending the Immunity from Suit, under the Workers Compensation Act, of an Insured Alternate Employer

Molina v. State Garden, Inc.
(Massachusetts Appeals Court)

This case raised an important issue of first impression under Massachusetts workers compensation law. The plaintiff worked for a temporary staffing agency (his general employer) and was sent out on a job assignment to the defendant (his special, or alternate, employer). He was injured on the first day of the assignment while performing a task under the direct control of the defendant and on the latter's premises. Later, after collecting workers compensation benefits, he sued the defendant on the theory that the company had not been his employer under workers compensation law and so did not enjoy an employer's statutory immunity from suit. The trial judge granted the defendant summary judgment, and the plaintiff appealed. He argued that the defendant could not be regarded as his employer because the benefits he received were paid on the temp agency's workers compensation policy.

As NELF noted in its brief, filed with co-amicus Associated Industries of Massachusetts, the defendant was named as an additional insured on an "Alternate Employer Endorsement" attached to the temp agency's policy. As NELF successfully argued several years ago in another legal context, the effect of being named as an additional insured on a policy is to create a direct relationship between the insurer and the additional insured for the latter's own liabilities, without regard to which party paid the premium for the additional coverage or who was identified as the named insured on the policy. Of crucial importance in this connection is the fact that the workers compensation act specifically permits an insured special employer, like the defendant, to agree with the general employer that it, not the general employer, will be liable for workers compensation. The "Alternate Employer Endorsement" reflects precisely such an agreement and provides precisely such insured status to the defendant. In fact, as NELF pointed out, this particular endorsement form has been approved by the Massachusetts Division of Insurance for use in such situations, a fact of which both parties in the case were unaware.

NELF further showed that such endorsements are used nationally for this purpose, typically in the exact same standardized form found here (the form is promulgated by the National Council of Compensation Insurers). NELF called the Appeals Court's attention to the specific use of the form in certain other states (New York, North Carolina, Texas, Delaware, and Minnesota), where the form is officially approved and sometimes even prescribed for this use. Molina's contentions that the use of the endorsement amounted to "an illusory promise" and a nefarious "artifice" were therefore without merit. In short, NELF concluded that State Garden was clearly the relevant insured employer for purposes of the work-related injury Molina suffered and that the company was therefore entitled to employer immunity from suit.

In its decision issued on September 3, 2015, the Massachusetts Appeals Court agreed with NELF that State Garden, as the plaintiff's special employer, was immune from suit under the Workers Compensation Act. On September 23, 2015, Molina applied for further appellate review by the Supreme Judicial Court. The application was denied on December 3, 2015.

Public Presentations and Seminars
2015 Year in Review

During 2015 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 second annual John G.L. Cabot Award Dinner.

Spring Breakfast Program

Our spring breakfast program in April was entitled **"Class Actions: The Shifting Sands,"** and surveyed some recent, somewhat surprising developments in class action practice and how they might affect the strategic decisions of business parties and their counsel when confronted with class action litigation. The program was moderated by NELF Board member **Donald R. Frederico**, Partner, Pierce Atwood LLP. Don was joined by NELF Advisory Council member **Beth I.Z. Boland**, Partner, Foley & Lardner LLP; **Laurence A. Shoen**, Member, Mintz Levin Cohn Ferris Glovsky and Popeo PC; NELF Board member **John A. Shope**, Partner, Foley Hoag LLP; and **Thomas M. Sobol**, Partner, Hagens Berman Sobol Shapiro LLP.

CEO Forum

In May our annual CEO Forum took up the topic of "Capitalism in the New Century: The Essential Role of Business in Ensuring Its Survival." Moderated by **Joseph L. Bower**, Donald K. David Professor of Business Administration, Emeritus, Harvard Business School, the Forum focused on the threats to market capitalism at present and the need for the business community itself to step up to meet these threats and save the capitalist engine of prosperity for future generations. Joining Professor Bower to discuss this vitally important topic were **William P. Flanagan, PhD, LCACP**, Director, Ecoassessment Center of Excellence, Resource & Environmental Strategies, General Electric Company; **Akbar Sheriff**, Senior Vice President – Head of Investment Analytics, State Street Corporation; and **Irina Simmons**, Senior Vice President and Chief Risk officer, EMC Corporation.

Fall Breakfast Program

Our fall breakfast program in November took up the topic **"International Arbitration: Hot Topics and Smart Contract Terms,"** and presented a high-level panel discussion of practical advice for the negotiation of effective terms for dispute resolution by international arbitration. The discussion was moderated by **Jonathan W. Fitch**, Managing Partner, Sally & Fitch LLP. The other panelists were NELF Board member, **Pauline M. Booth**, Managing Director , Disputes & Investigations, Duff & Phelps, LLC; **Stephen L. Drymer**, Head of International Arbitration and ADR, Woods LLP; **Lucy Greenwood**, Foreign Legal Consultant, Norton Rose Fulbright US LLP; and **Richard W. Naimark**, Senior Vice President, International Centre for Dispute Resolution, American Arbitration Association.

John G.L. Cabot Award Dinner

Finally, October saw NELF's second **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 2015 recipient of the Cabot Award was **Paul T. Dacier**, Executive Vice President and General Counsel, EMC Corporation. Paul, a former Chair and longtime member of NELF's Board of Directors, was the perfect recipient for the 2015 Cabot Award. Over 400 guests gathered to honor and celebrate Paul and to learn about his achievements and also, importantly, the work and mission of NELF. The evening celebration included a biographical video of Paul's life and achievements and a powerful video describing NELF's origins, its mission, and its ongoing work.

NELF 2015 John G.L. Cabot Award Dinner
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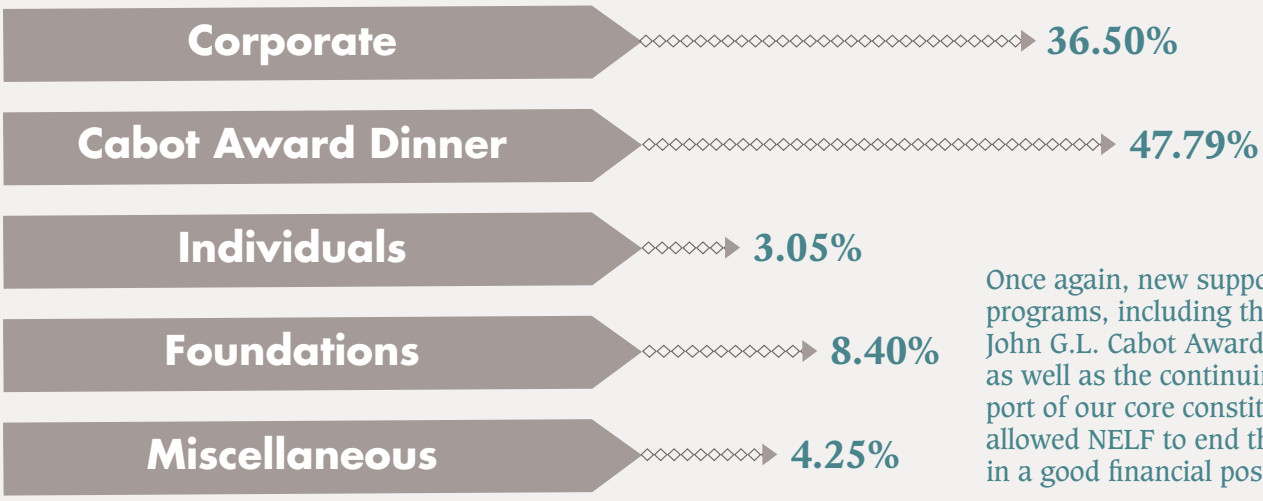
NELF 2015 Financial Review

2015 Revenue



Once again, new support from programs, including the second 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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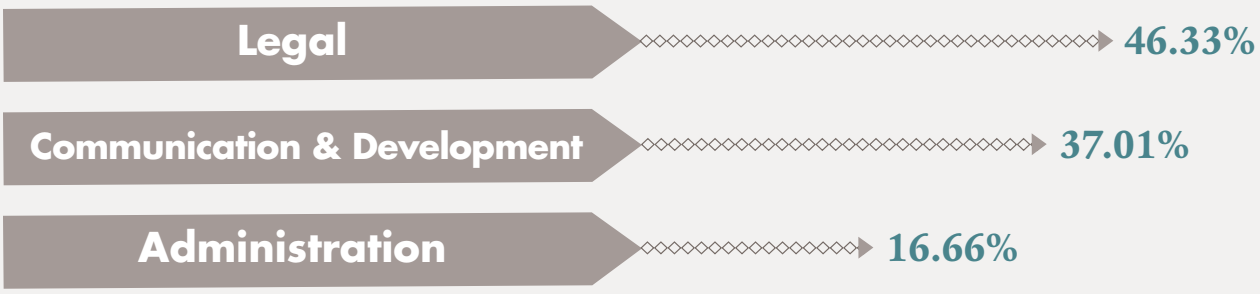

NELF maintained in 2015 its disciplined approach to cost containment, helping it to end the year with a surplus.

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2015 Year in Review

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{L} **Legal Review Committee.** Decides which cases merit NELF's participation as counsel.

{N} **Nominating Committee.** Ensures that those who are nominated as candidates to the Board of Directors meet the requirements of commitment, professionalism, and integrity.

{AU} **Audit Committee.** Oversees the preparation of NELF's annual audit and performs other duties as assigned by the Board of Directors.

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

{C} **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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The role of Trustees is honorary, enabling these leaders to provide support and counsel to the Foundation.

NELF appreciates the hard work and dedication through 2015 of Staff Attorneys Ben Robbins and John Pagliaro, and Finance and Operations Manager Maria Karatalidis. Without their efforts the accomplishments described in the 2015 Year in Review would not have been possible.

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