

# Victories

## **Reasonable Accommodation for Religion under Title VII**

*Kimberly Cloutier v. Costco Wholesale Corp.*

No. 04-1475

U. S. Court of Appeals for the First Circuit

Agreeing with NCLC and affirming the district court's grant of summary judgment in favor of Costco, the First Circuit held that an employee's insistence that she be exempted from Costco's dress code ban on all facial jewelry (except earrings), based on her "religious beliefs" as a member of the Church of Body Modification, constituted an undue hardship on Costco. Accordingly, Costco did not violate Title VII when it terminated Cloutier's employment for her failure to adhere to Costco's dress code. The Court emphasized Costco's legitimate interest in presenting its customers with a workforce that has a reasonably professional appearance.

*Amicus* brief in support of Petitioner filed 8/2/04. Decision 12/1/04. Petition for rehearing and rehearing *en banc* denied 12/20/04.

## **Federal Preemption of California Labor Law**

*Prachasaisoradej v. Superior Court*

No. S128576

Supreme Court of California

NCLC successfully urged the California Supreme Court to grant review of this case in which the court of appeal illogically ruled that the state's law governing wage deductions prohibits an employer from deducting the costs associated with workers compensation and "shrinkage" in determining profit for purposes of its profit sharing plan, even though such deductions are required by "standard accounting principles" when making profit calculations. NCLC also argued that since the profit sharing plan was part of the collective bargaining agreement, the state law claim was preempted by federal labor law.

*Amicus* letter in support of review filed 11/19/04. Review granted (state law issues only) 12/15/04.

## **Medical Monitoring Class Actions in West Virginia**

*Chemtall Inc., et al. v. The Honorable John T. Madden, et al.*

No. 31743

Supreme Court of West Virginia

The Court vacated a West Virginia trial court's decision to approve class treatment of medical monitoring claims by plaintiffs from West Virginia and six other states. Under the Court's ruling, trial lawyers now cannot use the class action device as a way to "export" West Virginia's liberal medical monitoring standard to nonresidents living and injured in states where medical monitoring has not been adopted or is applied in a more restrictive manner. In its *amicus* brief, NCLC argued that the trial court abused its discretion when it certified a multi-state medical monitoring class action despite wide variation in each state law's governing medical monitoring, where three of the seven jurisdictions did not even recognize such claims.

*Amicus* brief filed 8/2/04. Decision 12/2/04.

### **Weingarten Rule in Nonunion Workplace (Epilepsy Foundation Case)**

*Schult, et al. v. IBM Corporation*

U. S. Court of Appeals for the District of Columbia Circuit

After NCLC indicated its intention to file an *amicus* brief in this case in the D.C. Circuit, the appellants withdrew their appeal, thereby leaving an important NLRB precedent on the books for the business community – namely, NCLC’s 6/9/04 victory in *IBM Corporation, International Brotherhood of Electrical Workers, Local 236, AFL-CIO, and Wal-Mart Stores, Inc.* In that case, the National Labor Relations Board limited the so-called Weingarten rights to unionized workers and reversed its holding in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) that non-unionized workers are entitled to the presence of a co-worker at an investigatory interview in which the employee reasonably believes may result in disciplinary action.

## **Partial Victories**

### **Federal Arbitration Act**

*Adler v. Fred Lind Manor Corp., et al.*

No. 74701-6

Washington Supreme Court

NCLC argued that a standard arbitration agreement in an employment contract is valid and enforceable, as the trial court had ruled in this case involving an employee of a Washington state nursing home. On discretionary appeal to the Washington Supreme Court, the employee contended that the state constitution’s standard for a valid waiver of the right to a jury trial, as well as state law of unconscionability, rendered the employee’s signed agreement to arbitrate null and void. The high court agreed with NCLC that the Federal Arbitration Act requires the enforcement of arbitration agreements using the same legal standards as those governing all other contract terms, but held that two parts of the arbitration agreement were unconscionable, and remanded for the trial court to determine whether the agreement as a whole was procedurally unconscionable.

*Amicus* brief filed 5/10/04. Decision 12/23/04.

### **Fiduciary Duty under ERISA**

*Tatum v. R.J. Reynolds Tobacco Co., et al.*

No. 04-1082

U. S. Court of Appeals for the Fourth Circuit

This ERISA case involved a challenge to a 401(k) pension plan trustee’s liquidation of two particular investment funds (the “Nabisco funds”) based on two plan amendments by the employer/plan sponsor. NCLC filed an *amicus* brief after the Department of Labor (“DOL”) argued that a plan trustee has a duty to ignore plan amendments if the trustee’s implementation of the amendments

would constitute a violation of the trustee's duty of prudence or loyalty under ERISA. NCLC argued forcefully that adopting the proposition advanced by the DOL would nullify the right of plan sponsors to amend their plans free of fiduciary responsibility, in contravention of ERISA and applicable Supreme Court precedent. In reversing the dismissal of the complaint, the Fourth Circuit did not accept the troublesome DOL argument, but instead held that nothing in the language of these particular plan amendments required liquidation of the funds, so that plaintiff could assert a claim that the liquidation of the Nabisco funds was a discretionary act by the trustee that violated ERISA's fiduciary duty of prudence.

*Amicus* brief filed 6/7/04. Decision 12/14/04.

## Dismissed

### **Antitrust Class Action**

*Gilchrist v. State Farm Mutual Automobile Insurance Company*

No. 03-10799-HH

U. S. Court of Appeals for the Eleventh Circuit

In the course of considering whether a class action was properly settled, the Eleventh Circuit became concerned about whether the plaintiffs' claims were barred by the McCarran-Ferguson Act, which creates an exemption from the antitrust laws for the business of insurance. The appellate court decided that the plaintiffs' claims fell within the scope of the exemption and ordered the district court to dismiss the case. Although the court did not reach the class certification issues raised by NCLC – which argued that the standard adopted by the district court results in erroneous certifications, which in turn compels defendants to settle even meritorious cases – the dismissal is nevertheless a victory for the defendants and a loss for the class action lawyers on the plaintiffs' side.

*Amicus* brief in support of Petition to Appeal Class Certification filed 12/13/02. Motion to file *amicus* brief granted 1/2/03. Interlocutory appeal of the class action order granted 2/18/03. *Amicus* brief filed 7/17/03. Order to district court to dismiss case issued 11/18/04.

## Defeats

## **Rigorous Analysis of RICO Class Certification Standard under Rule 23**

*UnitedHealth Group, Inc., et al. v. Klay, et al.*

No. 04-522

U. S. Supreme Court

In seeking *certiorari*, NCLC asked the U. S. Supreme Court to consider whether a federal court is required, before certifying a class action, to conduct a rigorous analysis that goes beyond the bare allegations of the complaint. NCLC hoped that the high court would squarely address the proper standards for certifying class actions under Rule 23 of the Federal Rules of Civil Procedure. In its friend-of-the-court brief, NCLC noted a persistent and deepening split in the circuits regarding the finding courts must make in order to certify classes.

*Amicus* brief in support of *cert.* filed 12/3/04. *Cert.* denied 1/10/05.

## **Living Wage Ordinance**

*RUI One Corporation v. City of Berkeley, et al.*

No. 04-582

U. S. Supreme Court

In seeking *certiorari*, NCLC urged the U. S. Supreme Court to consider whether a California living wage ordinance (“LWO”) that establishes minimum wages and benefits to be paid by various employers throughout the City of Berkeley, California is unconstitutional. NCLC argued that the ordinance has been written so narrowly that it applies to only one employer, and that by refusing to address the City’s improper motive, the U.S. Court of Appeals for the Ninth Circuit effectively eliminated judicial review of the city’s living wage ordinance. In addition, NCLC contended that the city’s efforts on behalf of the local union is a clear violation of both the National Labor Relations Act, which mandates that the balance of power between unions and employers be “controlled by the free play of economic forces” and not by state regulation.

*Amicus* brief in support of *cert.* filed 12/1/04. *Cert.* denied 1/10/05.

## **Contract Recovery and the Economic Loss Rule**

*Robinson Helicopter Company, Inc. v. Dana Corporation*

No. S114054

Supreme Court of California

The California Supreme Court overturned an intermediate appellate court and rejected NCLC’s argument that the proper application of the economic loss rule bars attempts to circumvent limits on contract recovery in a case involving an ordinary breach of contract, where plaintiffs recast their contract claims as negligent or intentional torts. The Court held that Dana breached a “separate” duty, and thus could recover in tort, in issuing certificates of conformance for its clutches.

*Amicus* brief in support of Defendant-Respondent filed 11/3/03. Decision 12/23/04.

## **“Pattern and Practice Cause of Action under California’s FEHA**

*Alch v. Superior Court (Time Warner Entertainment)*

No. S128628, Second District Court No. B165638, et al.

## Supreme Court of California

NCLC urged the California Supreme Court to review a court of appeal's decision recognizing, for the first time, a "pattern and practice" cause of action under California's Fair Employment and Housing Act ("FEHA"), despite the fact that the FEHA is limited to challenges of individual employment actions. The trial court rejected the "pattern and practice" claim that was brought by TV scriptwriters and which complained of industry-wide age discrimination by television networks and studios, and talent agents. The claim was based solely on anecdotal evidence of a "youth-oriented corporate culture." The court of appeal reinstated the claim despite the absence of any specific allegations or proof that any named plaintiff was discriminated against in violation of the FEHA, and even approved the inclusion of non-applicant plaintiffs who allegedly did not apply for work because they were discouraged by pervasive age discrimination in the industry.

*Amicus* letter in support of review filed 12/14/04. Review denied 12/22/04.

## Nationwide Air Bag Class Actions

*Delmas Ford, et al. v. The General Motors Corporation*

No. 1004747

Supreme Court of Oklahoma

Following its previous decision in *Ysbrand v. DaimlerChrysler*, the Oklahoma Supreme Court refused to decertify a nationwide class of 50,000 GM owners with defective airbag claims, rejecting arguments that choice-of-law issues should be resolved before certification and that the National Highway Traffic Safety Administration is the appropriate forum to resolve the claims, which create the functional equivalent of nationwide recall. NCLC argued that certification would open the courthouse doors of the State to a cavalcade of claimants demanding that Oklahoma courts become the national regulators of a myriad of goods and services.

*Amicus* brief filed 8/12/04. Decision 12/3/04.

## Personal Jurisdiction Over Foreign Parent Corporations

*Dassault Aviation v. Anderson*

No. 04-222

U. S. Supreme Court

NCLC joined with the Organization for International Investment to urge the Supreme Court to review a decision of the Eighth Circuit that allowed an Arkansas court to exercise jurisdiction over the French parent of a domestic corporation. In this case, the French parent – Dassault Aviation – wholly owns a subsidiary located in Little Rock that customizes jet bodies, but has no direct contacts *itself* with the forum state. The court held that it was proper to exercise jurisdiction over the parent by attributing the subsidiary's contacts to the parent because of the "synergistic" business relationship between the two. NCLC argued that this decision – which threatens a stable and predictable legal environment for national and international business – conflicts with the Supreme Court's due process precedent.

*Amicus* brief in support of *cert.* filed 10/18/04. *Cert.* denied 11/29/04.

## **The Information Quality Act**

*The Salt Institute and the Chamber of Commerce of the United States v. The Honorable Tommy G. Thompson and the Department of Health and Human Services*

No. 04-CV-359

U. S. District Court for the Eastern District of Virginia

NCLC filed a lawsuit on behalf of the Salt Institute and the Chamber charging that the government violated the Information Quality Act by failing to release scientific information from a study on the effects of dietary salt consumption on blood pressure, known as The Dietary Approaches to Stop Hypertension Sodium Trial or “DASH Sodium Trial”. The government published its conclusions from the study on its web site and elsewhere, but refused an information request from the plaintiffs for all of the data and methods underlying the study. NCLC’s complaint for declaratory and injunctive relief contends that by failing to release the information requested, by reporting the results of the study, and by making recommendations about sodium intake based on the study’s results, the government is in violation of the Information Quality Act; NCLC also contends that by refusing to release the data requested, the agency is obstructing additional scientific investigation into an important public policy and human health issue.

The court granted the defendant’s motion to dismiss, holding that plaintiffs lacked standing to sue, that there is no private right of action under the Information Quality Act, and that judicial review was not available under the Administrative Procedure Act because there was no final agency action involved and the agency actions at issue were committed to the agency’s discretion.

Complaint filed 3/31/04. Memorandum in Opposition to Defendant’s Motion to Dismiss filed 7/15/04. Moot court held 9/2/04. Oral argument held 9/3/04. Defendant’s Motion to Dismiss granted 11/15/04. Appeal to the Fourth Circuit filed 1/11/2005.

## **Abusive Nationwide Class Actions in State Court**

*Sutton Steel Supply, Inc., et al. v. BellSouth Mobility Inc.*

No. 2004-C-1654

Supreme Court State of Louisiana

The Louisiana Supreme Court refused to review the intermediate court’s decision to certify a multi-state class action of two to four million putative class member who had agreed to arbitrate their claims against BellSouth. NCLC argued that by determining that the arbitration clauses in BellSouth’s service contract were unenforceable under Louisiana law, the lower court ran roughshod over fundamental constitutional principles prohibiting one state from applying its laws to transactions occurring wholly outside its borders.

*Amicus* brief in support of application for Writ of *Certiorari* filed 8/31/04. Motion for leave to file *amicus* brief granted 9/9/04. *Cert.* denied 11/15/04.

## **Trade Secrets**

*State Farm Mutual Automobile Insurance Company v. Garamendi*

No. S10225

## California Supreme Court

NCLC argued that a California Court of Appeals' decision allowing regulatory disclosure of confidentially filed trade secret information under the Insurance Code violates due process and threatens to undermine all trade secret privileges, including the state's longstanding recognition of trade secrets as constitutionally protected property rights. The California Supreme Court ruled that the insurers could not claim a trade secret privilege with regard to information that was legitimately related to rate information.

*Amicus* brief filed 6/19/02. Decision 4/26/04.

# New Litigation

## **Abuse of Consolidated Claim Procedures**

*Flexible Products Company, et al. v. Micon, Inc., et al.*

No.

Supreme Court of Alabama

NCLC joined the defendants as *amicus* in asking the Alabama Supreme Court to intervene in this case, in which the trial judge consolidated the claims of 1,675 plaintiffs into a single proceeding to be tried by a single jury. The case arose out of the plaintiffs' alleged exposure to a mine-wall sealant at their respective work sites. NCLC urges Alabama's high court to establish strict standards for adopting such an onerous case-management order in light of the serious dangers posed by "mass actions": the obviation of individual issues such as the nature and extent of exposure; the coercion-by-numbers that leads to forced settlements; the deprivation of appellate rights; and the harm to plaintiffs created through generalized treatment of claims.

*Amicus* brief in support of Joint Petition for Writ of Mandamus filed 12/29/04.

## **Punitive Damages Liability and Excessiveness**

*Douglas v. DaimlerChrysler Corporation*

No. 1 CA-CV 04-0554

Court of Appeals State of Arizona, Division One

NCLC filed a brief arguing that the \$50 million punitive damage award against DaimlerChrysler – more than 13 times greater than the compensatory damages – was unconstitutionally high. The case arose out of the design of the Dodge Ram's seatbacks. NCLC told the court that the verdict could be affirmed only by watering down both Arizona's strict standards for the imposition of punitive damages and the U.S. Supreme Court's guideposts for evaluating the amount of punitive awards, especially because DaimlerChrysler chose among experts' opinions regarding the safety of the design. In sum, the case focuses on the standards for determining liability for punitive damages – in addition to the appropriate measure of punitive damages – which is newly important after the Supreme Court's limits in *State Farm v. Campbell*.

*Amicus* brief in support of Defendants/Appellant filed 12/23/04.

### **Securities Litigation Reform under the PSLRA**

*Simpson, et al. and the California State Teachers' Retirement System v. Homestore.com, Inc., et al.*  
No. 04-55665

U. S. Court of Appeals for the Ninth Circuit

NCLC argued to the Ninth Circuit that companies with whom Homestore.com conducted business cannot be held liable, as a matter of law, under the Private Securities Litigation Reform Act (PSLRA) for the events that led to Homestore's restatement of revenue. This is because the PSLRA's language, statutory history, and Supreme Court precedent preclude aider-and-abettor liability in a shareholder suit. Nonetheless, the SEC filed an *amicus* brief arguing that Homestore's business partners should be held liable for participating in a "scheme" to defraud, an argument that the district court rejected.

*Amicus* brief in support of Defendant-Appellees and affirmance filed 12/22/04.

### **Unilateral Cleanup Orders under Superfund**

*General Electric Company v. Leavitt and the United States Environmental Protection Agency*  
No. 1:00CV02855

U. S. District Court for the District of Columbia

In this case, General Electric challenges the constitutionality of the "unilateral administrative order" (UAO) provisions of CERCLA, the Superfund statute. NCLC filed an *amicus* brief that argued that these provisions, as implemented by EPA, violate due process because EPA uses the UAO process to force Superfund clean-ups in a manner that completely by-passes the opportunity for judicial review. This is the second time that NCLC filed a brief in this case, which arises out of the Hudson River clean-up; NCLC previously filed a brief in support of GE when the EPA moved to dismiss GE's challenge for lack of jurisdiction; GE won in the D.C. Circuit, and the case was remanded to address the due process claims.

*Amicus* brief in support of Plaintiff's opposition to Defendant's motion for summary judgment filed 12/22/04.

### **Excessive Punitive Damages**

*Johnson, et al. v. Ford Motor Company*  
No. S121723

Supreme Court of California

In this post-*State Farm* case, the California intermediate appellate court reduced a punitive damages verdict from \$10 million to \$50,000, on the ground that the jury had improperly awarded unconstitutionally high punitive damages based on Ford's alleged out-of-state conduct with regard to non-plaintiffs. The case arose from Ford's alleged decision to ignore California's lemon laws in running its certified used car program. NCLC argued that while this reduction was welcome and necessary, the California courts must give real force to *State Farm's* analysis of single-digit ratios, prohibition of out-of-state conduct, and alleged harm to parties not before the court as the basis for

such awards.

Leave to file *amicus* brief and *amicus* brief in support of Defendant/Respondent filed 12/9/04.

### **Document Retention and Criminal Acts**

*Arthur Andersen LLP v. United States of America*

No. 04-368

U. S. Supreme Court

In this case, the government charged now-defunct Arthur Andersen & Co. with the willful obstruction of justice because Andersen employees requested compliance with the company's *lawful* document retention policy at a time when a formal investigation by the SEC was possible but far from certain. NCLC and the Washington Legal Foundation argued that, unlike the view of the Fifth Circuit, "knowing, corrupt persuasion" to destroy documents in the federal witness tampering statute cannot mean merely persuasion with "improper purpose" without violating the rule that ambiguous criminal statutes must be interpreted with lenity.

*Amicus* brief in support of Defendant/Appellant/Cross-Appellee filed 12/8/04.

### **Abusive Class Actions**

*Dukes, et al. v. Wal-Mart Stores, Inc.*

Nos. 04-16688 and 04-16720

U. S. Court of Appeals for the Ninth Circuit

The Ninth Circuit in this case granted review of Wal-Mart's challenge of the certification of a nationwide class of 1.5 million women in a gender discrimination case under Title VII, the largest class action in history. Filing in support of Wal-Mart's efforts to de-certify the class, NCLC argues that the trial court made serious errors in certifying the case as a class action by permitting the use of statistical evidence of discrimination; ignoring the requirements of proof of individual discrimination; and allowing the plaintiffs to bring a their class claim based on a "common" allegation that Wal-Mart *decentralized* its hiring and promotion practices. NCLC warns that class certifications based on these types of decisions would lead to an avalanche of similarly unmanageable and impossible to defend nationwide class actions.

Motion for leave to file and *amicus* brief in support of interlocutory review filed 7/14/04. Interlocutory granted 8/13/04. *Amicus* brief on the merits filed 12/8/04.

### **Lead Paint and Products Liability**

*Smith, et al. v. Lead Industries Association, Inc., et al.*

No. 68

Court of Appeals of Maryland

In a case regarding the standards for proving products liability claims in Maryland, NCLC filed a brief with the state's highest court in Maryland urging it to uphold the decision of a lower court in a case involving the plaintiffs' recent exposure to lead paint. NCLC agreed with the lower court that the plaintiffs had not pleaded or shown that they themselves had "relied" on the lead-paint manufacturers'

representations when the paint was sold decades ago, and that manufacturers of non-lead-paint had no duty to warn that lead-paint abatement can be hazardous.

*Amicus* brief in support of Respondents filed 12/7/04.

### **Federal Preemption of State Labeling Requirements**

*Bates, et al. v. Dow Agrosciences LLC*

No. 03-388

U. S. Supreme Court

NCLC's *amicus* brief urges the high court to affirm a court of appeals decision prohibiting individuals from bringing state tort actions based on pesticide labeling. NCLC argues that allowing state-law tort claims in areas of comprehensive federal regulation would "create a crazy quilt of preemption," where contrary labeling requirements imposed by positive law, like statutes and regulations, would be preempted, but common law obligations imposed by judges and juries in state court suits for damages would not.

*Amicus* brief on the merits filed 11/24/04. Oral argument held 1/10/05.

### **Campaign Finance**

*Voters Education Committee, et al. v. Washington State Public Disclosure Commission, et al.*

No. 04-2-23551-1 (SEA)

*Amicus* brief in support of Plaintiffs' motion for summary judgment filed 11/19/04.

*State of Washington ex rel. Washington State Public Disclosure Commission v. Voters Education Committee*

Superior Court for the State of Washington for King County

No. 04-3-33247-8 (SEA)

This case arose from issue ads that were aired by the Voter Education Committee (VEC) prior to the 2004 Washington State Democratic primary for Attorney General. The ads discussed the public record of Intervenor Deborah Senn, a Democratic primary candidate, during her term as the Washington State Insurance Commissioner. The Washington State Public Disclosure Commission (PDC) believed that the VEC's ads violated Washington State law in that the VEC had not registered with the PDC or complied with Washington State disclosure requirements. The VEC filed suit for declaratory judgment that its ads were issue ads protected by the First Amendment and by the Washington State Constitution. NCLC's *amicus* brief on behalf of the U. S. Chamber of Commerce supports VEC's motion for summary judgment, arguing that the VEC's ads constituted issue advocacy rather than express advocacy, and are therefore outside the scope of the Washington statutes. Further, NCLC argues that notwithstanding the U.S. Supreme Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct 619 (2003), the distinction between express and issue advocacy is still in force and was not eliminated by *McConnell*. NCLC asserts that the PDC's contention that any speech attacking a candidate's "character" is express advocacy is implausible, and finally, that VEC's advertisements did not attack Intervenor Senn's character, but rather, simply raised questions about her performance of her public duties as Insurance Commissioner.

Motion for leave to file an *amicus* brief in opposition to Plaintiffs' motion for summary judgment filed 11/24/04. Oral argument held 12/3/04. Order granting motion for leave to file brief *amicus curiae* 12/15/04.

### **Frivolous Lawsuits and Recovery of Attorneys' Fees**

*Mealey, et al. v. Pre-Paid Legal Services, Inc., et al.*

No. 02-0082

Circuit Court of Wilkinson County, Mississippi

In seeking to recover attorneys' fees and expenses following an earlier court victory, NCLC argues that plaintiffs' counsel failed to make any reasonable inquiry about the basic facts before filing the Complaint in issue in the earlier lawsuit filed against Pre-Paid Legal Services. NCLC also maintains that they did not provide any responses to discovery requests until some two years after filing suit; the responses provided at that time were unverified and inaccurate; subsequent verified responses directly contradicted information provided in the original responses; the majority of plaintiffs were dismissed from the case before trial; and the only two cases that went to trial resulted in quick defense verdicts.

Motion for leave to file as *Amicus Curiae* and *amicus* brief in support of defendants filed 11/19/04.

## **Pending Litigation**

### **Small Business Challenge to Procedural Rules**

*National Association of Home Builders v. U. S. Army Corps of Engineers*

Nos. 04-5009, 5110, 5111

United States Court of Appeals for the District of Columbia

NCLC joined the American Trucking Association and Hon. Donald A. Manzullo, chairman of the House small business committee in urging the D.C. Circuit to overturn a district court's ruling that the plaintiff organizations could not challenge the Army Corps' failure to consider the impact on small business of a change in a general permitting scheme until the permitting scheme had been "applied" to the groups' members. NCLC argued that the Small Business Regulatory Enforcement Fairness Act armed small businesses with a private right of action to prevent agencies from promulgating new regulations without considering the impact on small business.

*Amicus* brief in support of petitioners filed 10/29/04. Oral argument scheduled for 4/19/04.

### **Certification of Class Action under Title VII**

*Reeb, et al. v. Ohio Department of Rehabilitation & Correction*

No. 04-3994

U. S. Court of Appeals for the Sixth Circuit

NCLC urges the Sixth Circuit to reverse the district court's certification of a class of female state prison employees who allege sex discrimination in violation of Title VII. This is the second time the Sixth Circuit has granted interlocutory review to evaluate the district court's certification of the class in this case. NCLC argues that, even upon its second review, the district court still has failed to conduct a "rigorous analysis" as was so ordered by the appellate court and is required under Federal Civil Rules of Procedure Rule 23(a). In addition, NCLC argues that the fact that the plaintiffs are asking for compensatory and punitive damages in this case renders it unsuitable for Rule 23(b)(2) certification.

*Amicus* brief in support of defendant-appellant and in support of reversal filed 10/19/04.

### **Extraterritorial Reach of California 17200 Consumer Protection Law (Nevada)**

*Snowney, et al. v. Harrah's Entertainment, Inc., et al.*

No. S124286

Supreme Court of the State of California

NCLC urged the California Supreme Court to overturn an intermediate appellate court's ruling that California can exercise specific personal jurisdiction over a Las Vegas hotel based on the hotel's advertising in California. The lower court's decision refused to connect the harm claimed by this class action – that Harrah's had illegally exacted a \$3 nightly energy surcharge – with Harrah's limited advertising contacts with California. As a result, NCLC argued that minimal harm to California residents could illegally result in jurisdiction over a foreign defendant there, based on any number of business practices that are typical of firms that do business nationwide.

Application for leave to file brief and *amicus* brief in support of defendants/petitioners filed 10/14/04.

### **Excessive Punitive Damages**

*Simon v. San Paolo U.S. Holding Co., Inc.*

No. S121933

Supreme Court of the State of California

In one of two cases that the California Supreme Court will hear regarding punitive damages, NCLC filed a brief that urges the court to apply the constitutional limits on punitive damages established by the Supreme Court in *State Farm Mutual Automobile Insurance v. Campbell*. Specifically, NCLC argues that an appellate court can only defer to *specific* findings of reprehensibility made by a jury in awarding punitive damages, and not "implied" findings; and further, that evidence of a corporate defendants' financial condition is not a valid basis for justifying a high punitive award, and should only be admitted if the defendant wants to introduce evidence of its lack of ability to pay. The 340:1 ratio of punitive to actual damages in this case was vacated by the Supreme Court in *State Farm*; but the intermediate state appellate court upheld the verdict.

*Amicus* brief filed in support of appellant 10/13/04.

### **Extraterritorial Reach of California 17200 Consumer Protection Law (Georgia)**

*Kearney v. Salomon Smith Barney Inc.*

No. S124739

Supreme Court of the State of California

Based on choice-of-law principles, NCLC agreed with an intermediate appellate court that the law of Georgia, not California, should apply to govern a telephone call between a Georgia office of the company and a California customer. Recording the call was legal under Georgia law but not under California's consumer protection statute; California law requires permission of both parties to record a telephone conversation, but Georgia requires only the permission of one party. NCLC urged the California Supreme Court to uphold the decision as consistent with due process and the Commerce Clause, and critical to the efficient conduct of interstate commerce.

Application for leave to file brief and *amicus* brief in support of defendants/respondents filed 10/13/04.

### **Standards for Pleading Fraud In Securities Class Actions**

*Nursing Home Pension Fund, Local 144, et al. v. Oracle Corporation, et al. (In re Oracle Corporation Securities Litigation)*

No. 03-15883

U. S. Court of Appeals for the Ninth Circuit

Contradicting the Private Securities Litigation Reform Act's heightened standard for pleading securities fraud, a panel of the Ninth Circuit considered a combination of vague facts to overturn the district court's dismissal of a case against Oracle. The Ninth Circuit accepted the plaintiffs' allegations of securities fraud, which stemmed from company statements related to a new program, based chiefly on general accusations that deals had been lost because of the new product, and claims assumed Oracle's officers had access to daily sales reports, some of which were negative. NCLC argued that this contradicted the Ninth Circuit's own pronouncement that PSLRA plaintiffs must plead particular facts that give rise to a strong inference of recklessness.

*Amicus* brief in support of in support of defendants-appellees' petition for rehearing *en banc* filed 10/8/04.

### **Certification of Class Action under Title VII**

*Grosz v. The Boeing Company*

No. 04-55428

U. S. Court of Appeals for the Ninth Circuit

NCLC urges the Ninth Circuit to affirm the district court's decision to deny certification of this class of employees who are alleging employment discrimination in violation of Title VII. NCLC argues that certification of this class is improper in that it involves thousands of individual employment decisions made by several hundred different managers using both subjective and objective criteria. Further, NCLC argues that certifying a large Title VII class action for damages pressures employers to settle the claims regardless of their merits or lack thereof.

*Amicus* brief in support of Petitioner filed 10/4/04.

## **Review of Excessive Arbitration Awards**

*Stark, et al. v. Sandberg, Phoenix & Von Gontard, et al.*

No. 03-2366

U. S. Court of Appeals for the Eighth Circuit

NCLC filed a brief in support of rehearing and rehearing *en banc* in this Eighth Circuit case, in which a panel of the court upheld a \$6 million punitive damages arbitration award in a case in which statutory damages were capped at \$2,000. NCLC urged the court to consider that such an award, with a ratio of punitive damages to actual damages of 3,000 to 1, would not pass muster in any court; therefore, upholding such an award in arbitration undermines Congress' stated preference in the Federal Arbitration Act for arbitration as an alternative to litigation.

*Amicus* brief in support of the petition of defendant/appellee EMC Mortgage Company for rehearing or rehearing *en banc* filed 9/30/04.

## **Certification of Securities Class Action**

*In Re Initial Public Securities Offering*

No. 04-

U. S. Court of Appeals for the Second Circuit

NCLC urges the Second Circuit to review the district court's certification of a class of millions of plaintiffs on the ground that the district court abandoned the "rigorous analysis" standard that trial courts must use to examine plaintiffs' class action allegations. The district court ruled that 55 investment banks must face at least six class-action suits over charges that they used IPO allocations to inflate stock prices during the market boom. The court's relaxation of the certification standard meant that the plaintiffs were not required to show that an efficient market took account of any of the defendants' alleged misrepresentations, that the plaintiffs actually relied on the price of the securities as an accurate reflection of their value, or that there was a causal link between the allegedly fraudulent scheme and the price of the securities at issue.

*Amicus* brief in support of appeal filed 10/27/04.

## **Commercial Speech under the First Amendment**

*BASF Corporation v. Peterson*

No. 04-81

U. S. Supreme Court

NCLC urges Supreme Court review of the extent to which the First Amendment protects corporate speech in consumer fraud cases, here an admittedly truthful article that BASF placed in an industry publication that a jury found misleading. NCLC argues that the Court has sent conflicting signal on the treatment of commercial speech and should take this opportunity to clarify the commercial speech doctrine and to hold that the "commercial speech label" should not dictate the level of constitutional protection on matters of public policy.

Brief in support of *certiorari* filed 9/24/04.

## **Pre-dispute Jury Waivers**

*Grafton Partners L.P. v. Superior Court of Oakland*

No. A102790

Supreme Court of California

NCLC urges the California Supreme Court to review a decision by an intermediate appellate court that, if allowed to stand, would invalidate all pre-dispute jury waivers in the state of California. The California constitution states that “a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.” The appellate court held that, therefore, the state legislature and only the state legislature may decide how and whether the right to a jury trial may be waived; because the legislature has not addressed the validity of pre-dispute jury waivers that are contained in commercial agreements, the court held, they are not valid. NCLC argued that this is not the natural reading of “prescribed by law,” and moreover, that this ruling wreaks havoc with contracting parties of all types in California.

*Amicus* letter in support of review filed 4/7/04. Review granted and appellant’s brief filed 8/26/04.

*Amicus* letter brief on the merits filed 9/24/04.

## **Validity of State Tax Incentives Under the Commerce Clause**

*Cuno v. DaimlerChrysler, Inc.*

No. 01-3960

United States Court of Appeals for the Sixth Circuit

NCLC urges *en banc* review of a Sixth Circuit ruling that Ohio's investment tax credit violates the Commerce Clause. The appellate court held that that the tax credit – which incentivized new capital investment in the state, especially depressed regions – discriminated against interstate commerce. NCLC argues that the Sixth Circuit’s ruling would wreak havoc with commonly used tax incentives across the nation, and undermine efforts to create new jobs.

*Amicus* brief in support of rehearing *en banc* filed 9/17/04. Motion for leave to file granted 10/12/04.

## **Pleading Standard for Loss Causation Under the PSLRA**

*Dura Pharmaceuticals, Inc. v. Broudo*

No. 03-932

U. S. Supreme Court

NCLC urges the Supreme Court to reverse the Ninth Circuit’s erroneous interpretation of “loss causation,” the standard for pleading actual harm under the Private Securities Litigation Reform Act (PSLRA). NCLC argues that the Ninth Circuit’s standard – which does not require pleading a stock price drop following a corrective disclosure – unduly favors plaintiff class action lawyers because it enables them to assert that any alleged error in a company’s financial statements or other disclosures inflated its stock price.

*Amicus* brief on the merits filed 9/13/04. Oral argument held 1/12/05.

## **“Global Forum Shopping”: Post-*Empagran* View of Foreign Antitrust Injury**

*MM Global Services, Inc. v. The Dow Chemical Co.*

No. 04-4802

U. S. Court of Appeals for the Second Circuit

NCLC urges the Second Circuit to reverse the trial court’s refusal to dismiss antitrust claims that allege that defendants imposed minimum resale prices on products sold by plaintiffs exclusively in India. NCLC argues that the Supreme Court’s decision in *F. Hoffman-LaRoche Ltd. v. Empagran, SA* makes clear that federal courts do not have subject-matter jurisdiction to hear antitrust claims concerning foreign commerce unless *the U.S. effects* of that conduct gives rise to an antitrust claim *by the plaintiff*. NCLC also argues that, as sellers of product in India, these plaintiffs could not claim injury because higher prices in the U.S. would benefit, rather than harm, sales in India.

*Amicus* brief filed in support of Petition for Writ of Mandamus filed 9/10/04.

## **Sarbanes-Oxley Whistleblower Protection**

*Platone v. Atlantic Coast Airlines Holdings, Inc.*

ARB Case No. 04-154

ALJ Case No. 2003-SOX-27

U. S. Department of Labor Administrative Review Board

In one of the first cases to be brought under the whistleblower provisions of Sarbanes-Oxley, NCLC urges the Administrative Review Board to reverse the decision of the Administrative Law Judge for several reasons. First, NCLC argues that the ALJ did not require the complainant to meet her burden of establishing all four elements of the *prima facie* case and, instead, improperly shifted the burden of proof to the employer on the first element. Further, NCLC argues that the ALJ adopted an inappropriately broad definition of securities fraud. In addition, NCLC states that the ALJ disregarded the employer’s patently legitimate, nondiscriminatory business reason for discharging the complainant in this case.

*Amicus* brief in support of Respondent and in support of reversal filed 9/10/04.

## **SEC Mutual Fund Independent Chair and 75% Independent Director Rule**

*Chamber of Commerce of the United States of America v. United States Securities and Exchange Commission*

No. 04-47

U. S. District Court for the District of Columbia

No. 04-1300

U. S. Court of Appeals for the District of Columbia Circuit

NCLC challenges the validity of a new Securities and Exchange Commission Rule “investment company governance” rule requiring that the vast majority of mutual funds change their management structure so that the chairman of the board of directors is not affiliated with the firm that provides advisory services to the fund and that mutual funds be composed of a minimum of 75 percent independent directors. NCLC contends that the rule exceeds the SEC’s statutory authority under the

Investment Company Act of 1940 and was adopted in violation of the Administrative Procedure Act.

Complaint filed in the U. S. District Court for the District of Columbia 9/2/04. Petition for review in the U. S. Court of Appeals for the District of Columbia Circuit file 9/2/04. SEC motion to transfer the Chamber of Commerce's district court rulemaking challenge to the D. C. Circuit filed 9/9/04. Chamber's request for stay denied by SEC 9/9/04. Plaintiff's statement in response to defendant's motion to transfer filed 9/20/04. Reply in support of emergency motion for stay, or, alternatively for expedited briefing by petitioner filed 10/7/04. Chamber's opening brief in support of Petition for Review of the SEC's Final Rule filed 12/13/04. Oral argument to be held 4/15/2005.

### **Disparate Impact Cause of Action under the ADEA**

*Smith, et al. v. City of Jackson, Mississippi & Police Department of the City of Jackson, Mississippi*  
No. 03-1160

U. S. Supreme Court

NCLC argues that the Supreme Court should uphold the Fifth Circuit's decision that the Age Discrimination in Employment Act (ADEA) does not provide for a disparate impact cause of action. This case involves pay raises given to newer police officers in Jackson, Mississippi, to correct a discrepancy in pay between junior and more senior officers. A group of officers age 40 and over allege that this raise to newer officers had a disparate impact upon older officers. Previously, NCLC had filed an *amicus* brief with the Court on the same issue in *Adams v. Florida Power Corporation*. The Court, however, later dismissed the writ of *certiorari* in the case as "improvidently granted."

*Amicus* brief on the merits filed 8/23/04. Oral argument held 11/3/04.

### **Medical Monitoring in Michigan**

*Henry, et al. v. The Dow Chemical Company*  
S.C. No. 125205

Michigan Supreme Court

NCLC argues that allowing a claim for medical monitoring absent present physical injury is poor public policy that will lead to a flood of litigation, clog access to the courts and deplete resources that would be better used to compensate the truly injured, instead of providing an undeserved windfall to healthy plaintiffs.

*Amicus* brief in support of Dow's application for leave to appeal filed 12/15/03. Leave to appeal granted 6/3/04. *Amicus* brief on the merits filed 8/3/04.

### **Expansion of Civil RICO - Disgorgement**

*United States v. Philip Morris USA Inc.*

U. S. Court of Appeals for the D. C. Circuit  
No. 04-5252

NCLC argues that the district court's novel interpretation of RICO threatens the demise of an entire industry by expanding the racketeering statute's remedy provisions to include "disgorgement of ill-gotten gain" in the amount of \$280 billion - the largest amount of monetary damages in history.

*Amicus* brief filed 8/3/04. Motion for leave to file granted 8/5/04. Oral argument held 11/17/04.

### **Personal Jurisdiction over “Single Business Enterprises”**

*Bridgestone Corporation v. Lopez*

No. 04-0563

Supreme Court of Texas

Even though this case arose from a car crash that occurred in Mexico, involving tires made in Mexico, a Texas appellate court ruled that Texas could exercise jurisdiction over Bridgestone, a Japanese parent company of the subsidiary manufacturer (Firestone), merely because Bridgestone and Firestone operated as a "single business enterprise" under Texas law. In support of a petition for review before the Texas Supreme Court, NCLC argued that the "single business enterprise" theory, which treats parents and subsidiaries as one in the same based on factors such as shared directors and business practices, flies in the face of long-established precedent: that the acts of a subsidiary can only be attributed to a parent company for the purposes of exercising personal jurisdiction in case of fraud or a clear attempt to avoid liability.

*Amicus* letter filed 8/3/04.

### **Abusive Class Actions**

*Engle, et al. v. Liggett Group Inc., et al.*

No. SC03-1856

Supreme Court of Florida

This case was originally filed in 1994 and was certified as a class of Florida-only residents. It resulted in July 2000 in a punitive damages verdict of \$145 billion. A three-judge panel of Florida's Third District Court of Appeal set aside the verdict because, among other reasons, the class failed to meet virtually every legal requirement for class certification. On appeal to the Florida Supreme Court, NCLC as *amicus* argued that personal injury cases are unsuited for adjudication because they necessarily involve individual factual inquiries, are substantial enough to be brought individually, and force defendants into exorbitant settlements. For similar reasons, NCLC argued that fraud cases are unsuited for class treatment, and finally, that class certification is inappropriate where the court must apply numerous states' laws.

*Amicus* brief in support of Respondents filed 7/23/04. Oral argument held 11/3/04.

### **Recognition Bar and Neutrality/Card-Check Agreements**

*Dana Corporation and Clarice K. Atherholt and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*

Case 8-RD-1976

*Metaldyne Corporation and Alan P. Krug and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*

Cases 6-RD-1518 and 6-RD-1519

National Labor Relations Board

In response to a request by the Board for *amicus* briefs in these combined cases, NCLC urges the Board to overturn the recognition bar doctrine. The recognition bar doctrine prohibits the filing of decertification petitions after a “reasonable period of time” after an employer recognizes a union based on a card-check agreement. NCLC argues that an NLRB-supervised secret ballot election is the most accurate method of determining employees’ support for a union. NCLC further notes that the Board has developed a disturbing trend of restricting employee free choice once a union has been recognized, thus making it virtually impossible for any party (employer, employee or rival union) to challenge a union’s majority status.

*Amicus* brief filed 7/15/04.

### **Excessive Statutory Damages**

*Lowry’s Reports, Inc. v. Legg Mason, Inc.*

Nos. 04-1433 & 04-1434

U. S. Court of Appeals for the Fourth Circuit

NCLC urges reversal of a district court decision that held that there are no due process limitations on the amount of damage awards that a jury can award under laws with statutory caps, such as the Copyright Act at issue in this case. NCLC argues that the \$20 million verdict awarded in this case should have been reviewed for unconstitutional excessiveness in the same manner as punitive damages, and that Legg Mason’s financial condition should not have been considered in setting the amount of damages.

*Amicus* brief filed 7/12/04.

### **Abusive Discovery In Violation of the First Amendment**

*In Re: All Asbestos Litigation Filed by the SimmonsCooper Firm, LLC., v. Chesterton, Inc., et al.*

In the Circuit Court Third Judicial Circuit, Madison County, IL

Counsel for Plaintiffs in numerous asbestos actions pending in Madison County, Illinois have served discovery demanding to know if the defendants are members of one of thirty-three business organizations, including the U. S. Chamber of Commerce, and the extent of defendants’ financial support of those organizations. NCLC has filed an *amicus* brief objecting to the discovery as violative of both defendants and the Chamber’s First Amendment Rights to freedom and privacy.

*Amicus* brief filed 6/25/04.

### **Antitrust Arbitration Agreements**

*Academy of Medicine of Cincinnati, et al. v. Aetna Health, Inc., et al.*

No. 04-0001

Supreme Court of Ohio

In this case, a group of physicians sued their HMOs, alleging various state antitrust violations. The physicians had contractually agreed to arbitrate “any and all claims arising out of or relating to” their contracts as well as their “business relationship[s].” Contrary to the majority of federal and state courts to consider the issue, the lower court held that this did not require arbitration of the antitrust

claims because these claims could be decided without reference to the contracts themselves. NCLC argued in an *amicus* brief to the Ohio Supreme Court that this holding flouted well-established state (and federal) law that favors the broad construction of arbitration agreements, that antitrust claims do arise from the parties' business relationship, and that the crabbed reading of the agreement's language contravenes the public and private benefits of arbitration.

*Amicus* brief filed on behalf of Appellants filed 6/21/04.

### **Government Contract Liability for Lump Sum Appropriations**

*Cherokee Nation and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson and Thompson v. Cherokee Nation of Oklahoma*

Nos. 02-1472 & 03-853

U. S. Supreme Court

Along with the National Defense Industrial Association and the Aerospace Industries Association, NCLC argued in support of the named tribes that federal agencies cannot exhaust congressional appropriations prior to payment on a government contract when there were sufficient appropriations to make full payment at the time the contract was awarded. This would leave contractors at the mercy of the contracting agency for payment on many government contracts and upset 120 years of consistent case law--not to mention render many government contracts illusory. NCLC also argued that the Antideficiency Act is no defense for the government, because it prevents a federal employee merely from entering a contract in advance of congressional appropriations.

*Amicus* brief filed 6/18/04. Oral argument held 11/9/04.

### **General Jurisdiction over Internet Sales**

*Gator.com Corp. v. LL Bean, Inc.*

No. 02-1535

U. S. Court of Appeals for the Ninth Circuit

NCLC urges an *en banc* panel of the Ninth Circuit to rule that LL Bean, which has no brick-and-mortar presence in California, cannot be sued in California based on its sales in California over its interactive website under the doctrine of general personal jurisdiction. General jurisdiction usually requires "physical presence" in the forum state before a non-resident can be sued for claims that do not directly arise out of its contacts with the forum state. NCLC argues that the Ninth Circuit's rule --which evaluates a business's non-physical contacts to find general jurisdiction -- is a dangerous and unwarranted expansion of federal court jurisdiction.

Motion for Leave to File and *amicus* brief in support of LL Bean filed 6/7/04. Motion for leave to file granted 6/17/04. Oral argument held 6/22/04.

### **"Loss Causation" and Pleading Securities Fraud**

*Lentell, Raynes and Raynes v. Merrill Lynch & Co., Inc. and Henry M. Blodget*

U. S. Court of Appeals for the Second Circuit

No. 03-7948

NCLC urges the Second Circuit to affirm a district court decision holding that at the pleading stage, a plaintiff in a securities class action must show that the defendant's alleged fraud or misstatements actually caused the plaintiff's loss. A district court had dismissed the case in favor of Merrill Lynch's research analysts on the grounds that the plaintiffs had not pleaded that the defendants' actions were the cause of their investment losses, or that their losses were not the result of the market wide decline in Internet stock values.

*Amicus* brief in support of Merrill Lynch filed 6/4/04. Oral argument held 8/12/04.

### **Political Free Speech and Electoral Advocacy**

*In re William O. Hammond, et al.*

No. 04-0089

Supreme Court of Texas

During the 2002 Texas State election cycle, the Texas Association of Business (TAB) mailed information on candidates for the Texas House and Senate to voters. The mailings contained no express advocacy (i.e. did not expressly advocate the election or defeat of any candidate). NCLC argues that a Texas trial court's order compelling TAB to answer discovery posed by a losing candidate violates the First Amendment.

*Amicus* brief in support of Relators filed 5/19/04.

### **Employer Rights Under the National Labor Relations Act**

*Chamber of Commerce of the United States, et al. v. Lockyer, Attorney General of the State of California, et al.*

Nos. 03-55166 and 03-55169

U. S. Court of Appeals for the Ninth Circuit

In a major victory for employers' rights, the Ninth Circuit affirmed the district court's holding striking down provisions of a California law that prohibits the use of State funds "to assist, promote, or deter union organizing." By restricting the use of State funds, the statute prevents employers from exercising their rights under Section 8(c) of the National Labor Relations Act (NLRA) to speak with employees about the benefits and drawbacks of unionization. The court held that in imposing these restrictions the State was acting as a regulator, not a proprietor, and that certain provisions of the statute are preempted by the NLRA.

Letter to NLRB submitted 3/12/02. Complaint for injunctive and declaratory relief filed 4/10/02. Defendants' motion to dismiss for lack of subject matter jurisdiction denied 7/2/02. Decision 9/16/02. Chamber's brief filed 5/23/03. NLRB *amicus* brief supporting the Chamber's position filed 6/4/03. Oral argument held 9/12/03. Decision 4/20/04. Petition for Rehearing and Rehearing *en banc* filed by Appellants 5/18/04. Chamber's Answer to Petition for Rehearing on 6/30/04.

### **Government Contracts under the Federal Acquisition Regulations**

*Tesoro Hawaii Corporation, et al. v. United States*

No. 04-5064

## U. S. Court of Appeals for the Federal Circuit

NCLC argues to the Federal Circuit that a government contractor cannot be said to have waived the right to object to a contract clause that is illegal under the Federal Acquisition Regulations simply by continuing to perform under the contract, contrary to the ruling of the trial court. The substance of the appeal deals with the legality of certain clauses, referred to as economic price adjustment (“EPA”) clauses, which seek to balance the risks of contract pricing in the context of the procurement of goods with volatile costs. In this case, the government incorporated these EPA clauses in contracts for the purchase of certain military fuels, primarily military jet fuels, in the 1980s and 1990s. Plaintiffs-appellants contend that the clauses are unlawful. The government disagrees and has responded further that, even if they were illegal, appellants should have challenged their illegality earlier.

*Amicus* brief filed 5/5/04.

### **Exhaustion of Administrative Remedies Under ADEA**

*Shikles v. Sprint/United Management Co.*

No. 03-3326

U.S. Court of Appeals for the Tenth Circuit

NCLC asks the Tenth Circuit to affirm the lower court’s holding dismissing an employee’s claims under the Age Discrimination in Employment Act (ADEA). NCLC argues that an employee’s refusal to cooperate with the investigator from the Equal Employment Opportunity Commission constitutes a failure to exhaust administrative remedies as required under the ADEA, therefore precluding litigation of those claims in federal court.

*Amicus* brief filed 4/20/04. Oral argument held 9/29/04.

### **Flat Tax under the Commerce Clause**

*American Trucking Association v. Michigan Public Service Commission*

No. 03-1230

U. S. Supreme Court

NCLC urges review of a Michigan state court decision that upheld a flat tax levied uniformly on both interstate and intrastate truckers. NCLC argues that because the tax is the same amount for truckers regardless of whether they use 50 miles of the state’s highways or 50,000 miles, it runs afoul of the Commerce Clause’s prohibition on unlawful burdens on interstate commerce. NCLC also argues that if the court’s ruling were to stand, it could potentially affect many other participants in interstate commerce.

*Amicus* brief filed in support of petition for *cert.* filed 4/31/04.

### **Separate Legal Entity under the OSH Act**

*Secretary of Labor v. Avcon, Inc., et al.*

OSHRC Docket Nos. 98-0755 and 98-1168

*Secretary of Labor v. Altor, Inc, et al.*  
OSHRC Docket No. 99-0958

*Secretary of Labor v. Sharon and Walter Construction, Inc.*  
OSHRC Docket No. 00-1402

NCLC – along with Associated Builders and Contractors, The Associated General Contractors of America, and The National Federation of Independent Business Legal Foundation – argue that the Occupational Safety and Health (OSH) Act states that because only an “employer” may be cited and permits individual liability only if the statute speaks directly to the issue that the Secretary of Labor’s attempt to “pierce the corporate veil” and hold company principles liable is neither supported by the OSH Act nor entitled to deference.

*Amicus* brief filed 3/24/04.

### **Punitive Damages Award Disguised as Emotional Distress**

*Ceimo v. General American Life Insurance Company, et al.*  
Nos. 03-16882 and 03-16930  
U. S. Court of Appeals for the Ninth Circuit

NCLC urges the Ninth Circuit to strike down a \$5.47 million emotional distress award that a jury approved in conjunction with a bad-faith insurance claim that the parties stipulated was worth \$1.2 million. NCLC argues that this record-setting emotional distress award was actually a punitive damages award disguised as emotional distress, presented grave future risks if allowed to remain as precedent in the field of bad faith torts and other areas, and was wholly unsupported by the evidence.

*Amicus* brief filed on behalf of Defendants-Appellants/Cross-Appellees 3/11/04.

### **Expert Causation Testimony Without Trial Court Scrutiny**

*Michael Roberti v. Andy’s Termite & Pest Control, Inc.*  
No. B158393  
California Supreme Court

In seeking review by the California Supreme Court (or an order that the appellate court’s decision be depublished), NCLC argues that the Court of Appeals erred in allowing a plaintiff in a toxic exposure case to present expert causation testimony without trial court scrutiny and that the decision, if upheld, would make California the jurisdiction of choice for such lawsuits.

*Amicus* letter in support of review or an order requiring that the *Roberti* decision be depublished filed 1/26/04.

### **Improper Standards for Certifying Consumer Fraud Class Actions**

*Price, et al. v. Philip Morris Incorporated*  
No. 96236  
Illinois Supreme Court

NCLC argues that Judge Nicholas Byron of the Madison County, Illinois 3<sup>rd</sup> Judicial Circuit improperly certified a mammoth class action of approximately 1.14 million members without regard to whether the individual class members were personally deceived into believing that Marlboro Lights and Cambridge Lights were safer cigarettes because they delivered less tar and nicotine. NCLC argues that Judge Byron not only ignored the requirement of Illinois' class action statute that common issues must *predominate* for a class to be certified, but also the decisions of courts throughout the country which have overwhelmingly held that the predominance of individual issues renders class certification inappropriate when the plaintiff alleges a misrepresentation of the safety of cigarettes.

*Amicus* brief in support of the defendant-appellant filed 12/3/03.

### **Regulation of CO<sub>2</sub> and other “Greenhouse Gases” under the Clean Air Act**

*Commonwealth of Massachusetts, et al. v. United States Environmental Protection Agency*

Nos. 03-1361 and 03-1365

U. S. Court of Appeals for the District of Columbia Circuit

In the first case, NCLC intervening in support of the Environmental Protection Agency's denial of an administrative petition filed by the International Center for Technology (ICTA), an environmental group that insists the agency has a “mandatory duty” to regulate CO<sub>2</sub>, methane, nitrous oxide, and hydrofluorocarbons (or “greenhouse gases”) as air pollutants, in a lawsuit filed by ICTA and eleven states. In the second case, NCLC intervening on the agency's side in a suit seeking judicial review of a legal memorandum from EPA issued in conjunction with the denial of ICTA's petition. These cases represent the first opportunity for a court to address whether EPA has an existing obligation to regulate greenhouse gases under the Clean Air Act.

Motion to intervene on behalf of EPA filed 11/24/03. Motion to intervene on behalf of EPA granted 12/23/03. Petitioners brief filed 6/22/04. Defendant's brief to be filed 10/12/04. Joint Intervenor-Respondents' brief filed 11/2/04.

### **Employer Rights Under the National Labor Relations Act**

*Healthcare Association of New York State, et al. v. George Pataki, et al.*

No. 03-CV-0413

U. S. District Court – Northern District of New York

NCLC argues that New York Labor Law CLS § 211-a, which prohibits employers from using state funds to assist, promote, or deter union organizing, are preempted by the National Labor Relations Act (NLRA) under the principles established by *San Diego Building & Trades Council v. Garmon* and *Lodge 76, Intl. Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.

*Amicus* brief filed 11/12/03. Oral argument on motion to dismiss held 9/13/04. Letter in support of objections filed by Plaintiffs filed 11/9/04.

## **Excessive Punitive Damages Based on Reprehensible Conduct**

*McClain, et al. v. Metabolife International, Inc.*

No. 03-127776-JJ

U. S. Court of Appeals for the Eleventh Circuit

NCLC argues that the lower court erroneously assumed that, because the Supreme Court in *State Farm v. Campbell* had indicated that any ratio of punitive damages to compensatory damages in excess of 9:1 is constitutionally suspect, ratios at or below that magnitude are *per se* constitutional. NCLC urges the court to reduce the award in this case to a ratio no greater than a 1:1 to avoid the prospects of an excessive aggregate punishment.

*Amicus* brief filed 12/17/03.

## **Excessive Punitive Damages Based On Potential Harm**

*Willow Inn, Inc. v. Public Service Mutual Insurance Company*

No. 03-2837

U. S. Court of Appeals for the Third Circuit

NCLC urges the appellate court to reverse a district court decision arising out of a bad faith insurance action, which resulted in \$2,000 of compensatory damages and \$150,000 in punitive damages, a ratio of 75:1. NCLC argues that this decision – which had been remanded in light of *State Farm v. Campbell* – improperly focused on the value of the plaintiff’s “potential harm” which the court said reflected a ratio of 1:1. This is one of the first appellate cases to examine how the issue of potential harm should be calculated in the post-*State Farm* era.

*Amicus* brief filed 12/17/03. Motion for leave to participate in oral argument filed 2/2/04.

## **When is an Employee a Supervisor**

*Oakwood Healthcare, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*

No. 7-RC-22141

*Beverly Enterprises-Minnesota, Inc. and United Steel Workers of America, AFL-CIO*

Case Nos. 18-RC-16415 and 18-RC-16416

*Croft Metals, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO*

Case No. 15-RC-8393

National Labor Relations Board

The National Labor Relations Board (the Board) asked interested parties to file briefs analyzing the impact of the U. S. Supreme Court’s decision in *NLRB v. Kentucky River*, 532 U.S. 706 (2001) on three cases pending before the Board regarding whether an employee is a supervisor for purposes of the National Labor Relations Act. Specifically at issue is the interpretation of 29 U.S.C. § 152(11). NCLC urges the Board to follow the guidelines in *Kentucky River* and return to a textually based, plain language interpretation of the statute, particularly with regard to the provision’s use of the terms “independent judgment,” “assign,” and “direct.”

*Amicus* brief filed 9/18/03.

### **Michigan Inactive Asbestos Docket**

*In Re Petition for an Administrative Order*

No. 124213

Supreme Court of Michigan

NCLC joined a number of business and trade associations in calling on the Michigan Supreme Court to establish by court rule or administrative order a system for resolving the state's asbestos injury lawsuit. The creation of the so-called "inactive asbestos docket" could help establish a national model to ensure that suits filed by the sickest asbestos claimants could be heard before cases filed by people who cannot show that they have been physically impaired. The benefits of the so-called "inactive asbestos docket" would preserve assets to compensate the truly sick, stem the recent flood of bankruptcy filings and slow the spread of litigation to small businesses and other remote defendants.

*Amicus* brief in support of Petition to Establish a Court Rule or Administrative Order filed 8/19/03. Hearing on the Petition held 1/29/04.

### **Unconscionability of Class-Wide Arbitration**

*Discover Bank v. Boehr*

No. S113725

Supreme Court of California

NCLC argues that the use of unconscionability principles to invalidate the class-action waiver in Discover Bank's arbitration provision would wreak havoc on countless arbitration provisions and that any rule of law that categorically impairs the enforceability of "form contracts" would have devastating implications on businesses and consumers alike.

Application to file *amicus* brief and *amicus* brief filed in support of defendant-petitioner filed 8/13/03. Application to file *amicus* brief in support of defendant-petitioner granted 8/18/03. Supplemental brief on new authority filed 12/16/04.

### **Employment Class Action**

*Anderson, et al. v. Westinghouse Savannah River Company, Inc.*

No. 03-1150

U. S. Court of Appeals for the Fourth Circuit

NCLC urges the Fourth Circuit to affirm the district court's decision declining to grant certification of a purported class action in a Title VII race discrimination case. The district court ruled, and NCLC argues, that there is a lack of commonality in an "across the board" attack based on claims of individual disparate treatment by numerous managers and supervisors.

*Amicus* brief filed 6/26/03.

### **Nationwide Punitive Damages Class Action**

*In Re Simon II Litigation/Simon II Litigation v. Philip Morris, U.S.A., et al.*

No. 03-7140-L

U.S. Court of Appeals for the Second Circuit

NCLC argues that this case – which involves millions of unidentified smokers – should never have been certified as a class action because the differences in substantive law between the jurisdictions of the various nationwide class members on fraud and punitive damages make a class-wide trial of plaintiff's claims impossible.

*Amicus* brief in support of appeal from a class certification order filed 6/3/03.

### **Disparate Impact Cause of Action under the ADEA**

*Sitko v. The Goodyear Tire & Rubber Company*

No. 5:00 CV 2599

U. S. Court of Appeals for the Sixth Circuit

NCLC argues that the Sixth Circuit should uphold the District Court for the Northern District of Ohio's decision that the Age Discrimination in Employment Act (ADEA) does not provide for a disparate impact cause of action.

*Amicus* brief filed 1/16/03.

### **Class Action Abuse**

*State Farm Mutual Automobile Insurance Company v. Avery, et al.*

No. 91494

Supreme Court of Illinois

NCLC urges the Illinois Supreme Court to overturn an unprecedented trial court decision to grant class action status to a lawsuit involving nearly five million plaintiffs in forty-eight states. NCLC argues that the state trial court's expansive class action ruling - which resulted in a billion dollar judgment - was based on a number of improper practices, including *ex parte* certification of a nationwide class and application of the state's consumer fraud statute on a nationwide basis. NCLC warns that Illinois' failure to properly enforce class action requirements has turned its certain plaintiff-friendly counties in the state to become meccas for filing nationwide class actions.

*Amicus* brief filed 11/06/02.

### **Class Action Forum Shopping**

*State Farm Mutual Automobile Insurance Company v. Gridley*

No. 94144

Supreme Court of Illinois

NCLC argues that the trial court's decision to allow nationwide class action – filed by a Louisiana plaintiff and arising out of a Louisiana cause of action, involving Louisiana witnesses and documents as well an interpretation of Louisiana law – to be brought in Madison County, Illinois underscores the

realities of forum shopping in a county that now has the highest per capita class action filing rate in the nation.

*Amicus* brief filed 11/06/02. Oral argument held 1/22/03.

### **Successor Employer and Collective Bargaining Agreements**

*Francisco Foods, Inc., d/b/a Piggly Wiggly and United Foods & Commercial Workers Union, Local No. 73A*

No. 30-CA-14738

NLRB

NCLC urges the Board to overrule its decision in *Love's Barbeque Restaurant*, 245 NLRB 89 (1979). Specifically, NCLC argues that the Board goes beyond its remedial "make whole" powers and is imposing a penalty when it denies a successor employer the right to adopt initial terms and conditions of employment if the successor employer discriminatorily fails to hire the predecessor employees.

*Amicus* brief filed 7/31/02.

### **Federal Preemption of State Litigation**

*San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service, et al.*

Docket No. EL00-95-031

Federal Energy Regulatory Commission

As counsel for the U. S. Chamber Institute for Legal Reform, NCLC urges the U. S. Federal Energy Regulatory Commission (FERC) to exercise its full and exclusive authority to preempt state courts from dictating how power companies determine electricity rates and compensate customers for overcharges. At issue is an ongoing dispute in California in which private class-action trial lawyers and state government officials are suing California generators of wholesale electricity for allegedly conspiring to fix prices above competitive levels during California's energy crisis in 2000. NCLC argues that only FERC can decide these matters under the law.

Intervenor's brief filed 11/26/01.

### **Abusive Class Actions for Hypothetical Defects**

*Crawley v. DaimlerChrysler Corporation*

Nos. 1741 EDA 2000, 1767 EDA 2000

Superior Court of Pennsylvania

NCLC argues that this case – which allowed uninjured plaintiffs to sue for hypothetical product defects – should never have been certified as a class action.

*Amicus* brief filed 6/22/01.

### **OSHA's Hazard Communication Standard**

*Secretary of Labor v. Cagle's, Inc.*

No. 98-485

Occupational Safety and Health Review Commission

NCLC argues that OSHA's Hazard Communication Standard – which requires training in the physical and health hazards of the chemicals in employee work areas – does not require an employer to name each chemical and tell employees of its specific hazards, but instead allows employers to cover categories of hazards.

*Amicus* brief in support of employer filed 4/19/00.

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