

DOMA: HOW TAX COMPLIANCE POST WINDSOR HAS CREATED A FISCAL TIME BOMB FOR JURISDICTIONS THAT DENY SAME-SEX MARRIAGES

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Abstract

During the Summer of 2013, the United States Supreme Court (“the Court”) decided two landmark cases that will have major ramifications on both civil and business matters within the United States for decades. In both cases, *United States v. Windsor*¹ (“*Windsor*”) as well as *Hollingsworth v. Perry* (“*Hollingsworth*”) ², the Court was asked to review and question the validity of same-sex marriages at the federal (*Windsor*) and state (*Hollingsworth*) level. This article analyzes one aspect of the financial ramifications for jurisdictions that fail to recognize and address same-sex marriage. This potential “fiscal time bomb” will ignite April 15, 2014.

What Created This Article

During the Summer of 2013, the United States Supreme Court (“the Court”) decided two landmark cases that will have major ramifications on both civil and business matters within the

¹ *United States v. Windsor*, 570 U.S. 12 (2013).

² *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

United States for decades. In both cases, *United States v. Windsor*³ (“*Windsor*”) as well as *Hollingsworth v. Perry* (“*Hollingsworth*”) ⁴, the Court was asked to review and question the validity of same-sex marriages at the federal (*Windsor*) and state (*Hollingsworth*) level. This article analyzes one aspect of the financial ramifications for jurisdictions that fail to recognize and address same-sex marriage. This potential “fiscal time bomb” will ignite April 15, 2014.

In general, both cases before the Court were seeking the Court’s review of the Defense of Marriage Act⁵ (“DOMA”). The Court in *Windsor* was asked to rule on the constitutionality of Sec. 3 of DOMA whether the federal government could restrict the definition of “marriage” and “spouse” to apply only to heterosexual unions thereby barring federal recognition of same-sex marriages. The Court in *Hollingsworth* was asked to rule on the constitutionality of Sec. 2 of DOMA allowing States, Territories, Possessions of the United States and federal recognized Indian Tribes to deny recognition of a same-sex marriage legally entered into and recognized in another jurisdiction.

The Court via *Windsor* ruled the federal government could not justifiably restrict one party’s ability to marry (fundamental constitutional right) by limiting the definition of “marriage” and “spouse” to heterosexual couples. In *Hollingsworth*, the Court ruled it did not have the ability to resolve the case because the parties who filed suit lacked “legal standing” to address the question. The Court’s bifurcated decision process has therefore created an unequal system of recognition of same-sex marriages in the United States. The federal government will now recognize a same-sex marriage that is legally entered into in any domestic or

³ *United States v. Windsor*, 570 U.S. 12 (2013).

⁴ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁵ Public Law 104-199

foreign jurisdiction but allows each individual State to determine if it will permit same-sex marriages and/or recognize legally valid same-sex marriages entered into in other domestic and foreign jurisdictions.

While the outcome of both cases may appear to appease the various factions on this contentious matter, it fails to grasp the financial time bomb this nuance creates April 15, 2014. Parties that have entered into a valid same-sex marriage in a permitting jurisdiction that are domiciled in a jurisdiction that does not recognize that same-sex marriage will create disparate tax results thereby creating grounds for litigation which several jurisdictions may not be fiscally capable of withstanding if aggrieved parties pursue punitive damages for infringement of constitutional rights.

This article attempts to assist readers with the financial realities tax filing season will create post *Windsor* and *Hollingsworth*. The author neither advocates nor opposes the Court's decision. As a baseball fan, I will give this analogy. If you are a major league baseball player and the league informs all players the size of the strike zone has been modified, while you may advocate the modification or despise it, if you want to continue to play baseball, you have to understand the boundaries of the new strike zone and incorporate it into your game. As such, this article tries to explain common questions regarding the Court's decision in both cases including but not limited to the legal review and decision process utilized by the Court, as well as the current and future financial ramifications of the decisions as it relates to federal and state tax compliance.

To grasp the financial implications for States that refuse to recognize same-sex marriages this upcoming tax season, the author has highlighted the history of DOMA, the Court's traditional review process of legal controversies regarding the United States Constitution, litigants ability to seek remedies including punitive

damages for constitutional infringements as well as the general process of how States “piggyback” from federal tax compliance for their respective State tax compliance. This path should educate the reader why April 15, 2014 may be a fiscal time bomb.

Background of DOMA

To better understand the ramifications post *Windsor* and *Hollingsworth* as well as address a common question and/or misconception regarding the Court’s decision, it is wise to summarize the background of DOMA and its purpose.

The late 1980s saw an increase in same-sex awareness as well as the advocating of same-sex marriages and unions. Several foreign countries began to recognize the legality of same-sex partnerships and/or unions granting many of the rights and benefits associated with what many deemed a “traditional” marriage. Advocates began to seek legal recognition of the existence of same-sex marriages, unions and/or partnerships by filing lawsuits in state court. In 1993, the Hawaii Supreme Court (“HSC”) in *Baehr v. Miike*, ruled the State of Hawaii had to show compelling interest in prohibiting same-sex marriages. HSC considered whether the Hawaiian Constitution’s right to privacy included a fundamental right to same-sex marriage and concluded it did not. However, the HSC did find denying marriage licenses to a same-sex couple was in violation of Hawaii’s equal protection clause. The HSC sent the case back down to lower Hawaiian Courts to analyze if the denial of same-sex marriage license further compelled a Hawaiian state interest and if so, was it drafted to avoid unnecessary abridgements of constitutional rights.⁶ Before the lower Hawaiian Courts could answer the HSC questions, the voters of Hawaii approved an amendment to the Hawaiian

⁶ Supreme Court of Hawaii No. 20371.

Constitution that reserved marriage to opposite-sex couples, thereby rendering the lower Court's review unnecessary.⁷

Concern that the Hawaiian constitutional amendment would not survive legal scrutiny or another jurisdiction would begin to grant same-sex marriage licenses, several jurisdictions became concerned with two clauses of the United State Constitution, the Full Faith and Credit Clause (Article IV, Sec. 1) and the Equal Protection Clause (Fourteenth and Fifth Amendments). The Full Faith and Credit Clause states "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."⁸ Jurisdictions were concerned a same-sex marriage license in another jurisdiction would force that jurisdiction to recognize the marriage. For purposes of this matter, the Equal Protection Clause declares "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"⁹ In an attempt to mitigate these concerns, Congress created DOMA.

DOMA was overwhelming passed by Congress with support from both political parties. It was so overwhelming approved; it was "veto proof" on its arrival for the President's signature. President Clinton signed DOMA into law in 1996. Section 1 of DOMA declared the Act to be named the "Defense of Marriage Act." Section 2 of the Act declared powers reserved to the states, territories, possession of the United States or federally

⁷ Hawaii State Constitution, Article 1, Section 23.

⁸ United States Constitution, Article IV, Section 1.

⁹ United States Constitution, XIV Amendment.

recognized Indian tribes shall not be required to recognize a same-sex marriage nor its benefits of such a relationship recognized in another jurisdiction. Section 3 of the Act defined “marriage” in any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, to mean only a legal union between one man and one woman as husband and wife and “spouse” only refers to a person of the opposite-sex who is a husband or a wife.

United States Supreme Court Review Process

Now that the background of DOMA’s creation and purpose has been summarized, a brief outline the United States Supreme Court’s power to review a case and how a case gets before the Court for review is necessary. It is the only court specifically established by the United States Constitution (our founding fathers could never have imagined how litigious a nation we would become). Based on the founding fathers’ desire for checks and balances, the Court in our trilateral form of government is the final destination of federal legal controversies. The Court is not a court of general jurisdiction, meaning you cannot walk into the Court and ask for any controversy to be heard. Rather, the Court is a court of limited jurisdiction, meaning only controversies arising from a federal matter that fall within the designated guidelines are permitted to be reviewed. The two most common avenues for which a case appearing before the Court are a) conflicting opinions on the same matter from different lower level courts (example two conflicting opinions from different federal Court of Appeals circuits) or b) matters from state court when the subject matter is federal in nature (one party asking the Court if a state court correctly interpreted a federal matter).

The core foundational principles of the Court are to maintain stability and structure with the review and decision process. One way to ensure these principles is the use of Stare

Decisis, a legal principle by which judges are obliged to respect the precedent established by prior decisions. This allows continuity as the Court's justices are replaced. Stare Decisis is never more relevant than when the Court reviews controversies arising from the United States Constitution. The Court's scrutiny of constitutional matters falls within one of three categories, strict, intermediate and rational.

Strict scrutiny, the Court's most stringent constitutional review standard, arises in two contexts 1) when a fundamental constitutional right is infringed or 2) when a government action is applied to a suspect classification (example: race, national origin). To pass this standard, the government must convince the Court it has a compelling government interest that is narrowly-tailored and the method of the least restrictive means available is being used to accomplish that goal. Laws and/or policies being challenged as unconstitutional under intermediate scrutiny must show it furthers an important government interest. The Court has utilized this standard for reviewing constitutional matters arising from sexual orientation and gender disputes. Though the Court does not state it reviewed *Windsor* via Intermediate Scrutiny, this appears to be the standard applied. The least restrictive of the three constitutional standards, rational scrutiny, is applied when considering questions of due process or equal protection. The Court is trying to determine if matter in dispute is "rationally related" to a legitimate government reason.

Fact Pattern of *Windsor* & the Court's Decision

Edith Windsor and Thea Spyer, a same-sex couple residing in New York, were lawfully married in Canada in 2007. Spyer died in 2009, leaving her entire estate to Windsor. Windsor claimed the spousal exemption on the federal estate tax return (worth \$363,053) which was denied by the Internal Revenue Service (IRS). In November 2010, Windsor filed suit over the

IRS's denial of her claim for the federal estate tax spousal exemption in the federal district court of New York. In February 2011, the attorney general of the United States released a statement regarding Windsor's pending lawsuit indicating "that the Obama administration had determined that classifications based on sexual orientation should be subjected to 'heightened scrutiny' and therefore the federal government could not defend constitutionality of DOMA Sec. 3."¹⁰ The attorney general for the State of New York filed a brief supporting Ms. Windsor's refund claim under the premise that DOMA Sec. 3 was an "intrusion on the power of the State to define marriage."¹¹ Due to the Executive Branch's decision not to defend a law passed by the United States Congress, the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives filed a motion to intervene on behalf of the Administration and filed a motion opposing Ms. Windsor's claim for refund.

In June 2012, the federal district court ruled in favor of Windsor that Sec. 3 of DOMA was unconstitutional under the equal protection clause. While the Justice Department publicly stated it agreed with Windsor's original claim, it filed an appeal of the federal district decision. Again, BLAG argued on behalf of the United States because the executive branch chose not to do so. In October 2012, the United States Court of Appeals agreed with lower federal district court decision in favor of Windsor. However, before the United States Court of Appeals decision was decided, the Administration filed a motion for certiorari before the Court to determine the validity of DOMA Sec. 3. In March 2013, the Court

¹⁰ Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, United States Department of Justice Press Release February 23, 2011.

¹¹ Brief For the State of New York as Amicus Curiae In Support of the Plaintiff, Eric T. Schneiderman, Attorney General of the State of New York, July 26, 2011, No.1:10-cv-8435-BSJ-JCF Windsor v. The United States of America, United States District Court Southern District of New York.

heard oral arguments from both sides.

While some may believe this was a new issue before the Court, the Court has ruled multiple times (as far back as 1888) regarding the constitutionality of a person's decision to marry. The Court had previously stated "the decision to marry is a fundamental right"¹²; that the "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause;"¹³ and "without unjustified governmental interference are personal decisions relating to marriage."¹⁴ In essence, this was a question the Court had seen before, just delivered in a new format.

On June 26, 2013, the Court determined DOMA Sec. 3 was unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment." Justice Kennedy, writing the majority opinion, stated the principal purpose of DOMA was to impose "inequality" for no reason that could withstand Constitutional scrutiny; rather, DOMA was created in fact to discriminate. The Constitution's guarantee of equality "must at the very least mean that a bare Congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." Therefore, the Court ruled the federal government must recognize marriages from "foreign and domestic jurisdictions" that allow same-sex marriages. The Court's holding in *Windsor*, effectively indicated "marriage" must be defined by the "state of celebration" (where the ceremony is performed) rather than the state of domicile (state of citizenship of the wedding parties). The rules of the jurisdiction in which the marriage takes place will dictate for federal purposes whether a party is legally wed.

¹² Loving v. Virginia, 388 U.S. 1 (1967).

¹³ Moore v. East Cleveland, 431 U.S. 494 (1977).

¹⁴ Carey v. Population Services International, 431 U.S. 678 (1977).

The Court's opinion indicated that the validity of DOMA Sec. 2 was not being questioned by petitioners, therefore the Court did not have the authority to review the matter (in essence the Court will not answer a question that is not asked). The opinion further highlighted that defining marriage has long been a right held by the states and not the federal government (therefore DOMA Sec. 2 survived). While a state's right to define marriage still exists, the likelihood of same-sex marriage bans surviving scrutiny going forward is highly doubtful (discussed in detail in later).

Fact Pattern of *Hollingsworth* & the Court's Decision

In May 2008 the California Supreme Court ruled California statutes limiting a marriage to opposite-sex applicants violated the California Constitution. As a result, in November 2008 California voters passed Proposition 8 as a California constitutional amendment that restored limitations of marriage to opposite sex.

Due to questions regarding the legality of the California constitutional amendment in regards to the United States Constitution, several same-sex couples sought marriage licenses from various California municipalities. Several municipalities ignored Proposition 8's amendment to the California constitution and began providing marriage licenses to same-sex couples while other municipalities chose to deny similar requests.

Based on the dichotomy of results emanating from the various municipalities, several same-sex couples brought suit in federal court to determine the validity of Proposition 8's California constitutional amendment with regard to the United States Constitution. Proposition 8 was overruled at the State and Federal appellate level in favor of same-sex marriages disregarding the California constitutional amendment as unconstitutional under the

United States Constitution.

The State of California chose not to appeal the State and Federal Appellate decisions, rather special interest groups intervened on behalf of California (stepped into the ring on behalf of California). The Court granted certiorari in December 2012 and heard oral arguments from both sides in Spring 2013. On June 26, 2013 the Court vacated the earlier federal appellate decision for lack of standing (in effect leaving original federal district court decision intact).

Post *Windsor* & *Hollingsworth*: Where States Stand

Prior to the Court's decisions in *Windsor* and *Hollingsworth*, the United States of America were not so "united" on the recognition of same-sex marriages. In addition, several jurisdictions prior to *Windsor* and *Hollingsworth* recognized a variant of same-sex union but did not recognize a full same-sex marriage. However, the existence of inequality between a "civil union" and "marriage" therefore created litigation to push for full "marriage" rights similar to heterosexual marriages. Based on the Court's decision in *Windsor* and the avalanche of same-sex marriage lawsuits in jurisdictions that fail to recognize same-sex marriages, civil unions may become extinct.

States were typically bifurcated into three general categories: 1) those jurisdictions that recognized same-sex marriages entered into in another jurisdictions as well as allowed same-sex marriage ceremony within their boundaries; 2) those jurisdictions that recognized same-sex marriages entered into in another jurisdiction but refused to allow same-sex marriage ceremony within their boundaries; and 3) those jurisdictions that denied the recognition of same-sex marriage regardless if the ceremony was validly performed in another jurisdiction or within the confines of its own borders.

Pursuant to *Windsor*, ANY same-sex marriage legally entered into in one of the states, territories, possession of the United States, federally recognized Indian tribes or foreign country will be recognized for federal purposes. The *Windsor* opinion does NOT cover registered domestic partnerships, civil unions or other similar formal relationships that are not defined as a “marriage” under state law.

At the time of the Court’s *Windsor* decision, thirteen (13) States and the District of Columbia recognized same-sex marriages. Several federally recognized Indian tribes do as well but the number and unique requirements (both members of the tribe, one member of the tribe, etc.) are too much detail for purposes of this article.

Jurisdictions Allowing Same-Sex Marriages - June 2013					
California	Connecticut	Delaware	Iowa	Maine	Maryland
Minnesota	New Hampshire	New York	Rhode Island	Vermont	Washington
District of Columbia					

As I write this article, virtually every jurisdiction that does not recognize a same-sex marriage on par with a heterosexual marriage has ongoing legal cases regarding the recognition and associated benefits of same-sex marriages. As of January 1, 2014 the number of jurisdictions that recognize same-sex marriages has increased to sixteen (16) jurisdictions plus the District of Columbia.

Jurisdictions Allowing Same-Sex Marriages – January 2014			
California	Washington	New Mexico	Maryland
Minnesota	Iowa	Illinois	Delaware
New Jersey	Rhode Island	Connecticut	Massachusetts
Hawaii	Maine	New Hampshire	Vermont
DC			

In addition several jurisdictions including but not limited to Ohio, Michigan, and Utah have ongoing legal controversies whose outcome may be resolved before the publication of this article.

In the legal world, the speed at which these matters are being reviewed is astounding (in the legal world, speed is typically calculated in decades not months). For example, the Court's decision in *Brown v. Board of Education*¹⁵ (landmark case for the desegregation of public schools) took more than ten years for several jurisdictions to comply with the Court's ruling. Discussions with other legal scholars are almost unanimous in agreement; the *Windsor* opinion will not take that long to implement in jurisdictions that ban same-sex marriages. And one strong catalyst that will trigger speedy compliance is the fiscal time bomb that tax compliance will create on April 15, 2014.

While the *Windsor* opinion was derived from a federal estate tax controversy, striking DOMA Sec. 3 has far reaching ramifications beyond the Internal Revenue Code ("IRC"). Because the Federal Dictionary Act's definitions of husband, wife, spouse, and marriage have been modified to accept same-sex marriages, all federal benefits, programs, etc. that utilize "marriage", "husband", "wife" and "spouse" must now conform with the holding in *Windsor*. These changes are at federal agency level as well as local level that must comply with federal program guidelines.

Examples: Federal Agency

Examples at the federal agency level include the Office of Personnel Management ("OPM") and Immigration and Naturalization Service ("INS") just to highlight a few. OPM post *Windsor* extends benefits coverage to same-sex spouses (health

¹⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

insurance, fringe benefits, etc.). However, OPM has NOT extended the benefits to same-sex couples who are in civil union, domestic partnership or similar formal relationship that does not meet the definition of a legally valid marriage (remember at time of celebration). INS has started processing same-sex spouse immigration VISAs in the same manner as those filled on behalf of opposite-sex spouse if the marriage was legally valid in the jurisdiction it took place (State or Foreign jurisdiction).

Examples: Federal Program Compliance

Federal program compliance requires careful examination of rules and guidelines. A quick review indicates most programs require compliance with *Windsor*, regardless if the participant is located in a jurisdiction that currently does not recognize same-sex marriages. Qualified beneficiaries under COBRA are limited to participants, their “spouses,” and their children. “Spouses” now includes a same-sex spouse if the marriage at the time of ceremony was entered into legally (example – a North Carolina same-sex couple goes to New York, gets married and returns to live in North Carolina after the ceremony). In addition, under COBRA guidelines, divorce is a qualifying event so a same-sex divorce will be a qualifying event (remember this issue for later discussion in this article).

Another example of federal program compliance regardless of location is the Family and Medical Leave Act (“FMLA”). Employers are required to provide time off from work where certain events impacting an employee’s “spouse” such as a serious health condition, qualify the employee for PROTECTED leave (regardless of the employee’s state of domicile law). Now under Medicare, same-sex spouses will be treated as “spouses” for secondary payor and late enrollment rules. This may require employer health plans to provide coverage that is primary rather than secondary to Medicare where an active employee has a same-

sex spouse who is over 65 covered under the employee's health plan.

It has long been known by plan administrators that death benefits from retirement and 401k plans to beneficiaries other than participant's spouse require spousal consent. Same-sex spouses now need to consent to beneficiary designations. Employers with employees in same-sex marriage will be required to gather same-sex spousal consent prior to any change in beneficiaries. Prior to *Windsor*, retirement plan administrators were precluded from dividing a participant's account upon the divorce from same-sex spouse if a state court issued a "qualified domestic relations order." Now, the division must be followed pursuant to state court order, just as for an opposite-sex spouse. Retirement plans typically provide special hardship distributions, required minimum distribution, and rollover rules that apply to spouses. Same-sex spouses are now included in these provisions. Defined benefit plans typically must provide special annuity retirement benefits for a spouse upon retirement or death of the employee, unless spouse consents otherwise (same-sex spouses now fall within this catch).

Fringe benefit programs fall under the holding of *Windsor* including the extension of tax-free fringe benefits to same-sex spouses in accordance with plan rules regarding opposite-sex spouses. This includes but is not limited to: tuition benefits, group life insurance, no cost additional services, and employee discounts. However, employee insured health, life and disability benefits may still be limited in jurisdictions that do not recognize same-sex marriages. Most of the aforementioned programs are governed by state insurance law and the Court's holding does not appear to change this at the present time.

Post *Windsor* & How State Tax Compliance is a Fiscal Time Bomb

For federal individual income taxes, the IRS released Revenue Ruling 2013-17 on August 29, 2013 with an effective date of Sept. 16, 2013. The Revenue Ruling was released two months after the Court's holding (the IRS has never moved this quick in its existence). The Revenue Ruling states it was the intention and most logical result that the IRS as far back as the 1950s intended "marriage," "husband," "wife," and "spouse" to be gender neutral! It further states IRC Sec. 7701 definitions of husband and wife were meant to be interchangeable. The Revenue Ruling clarifies earlier Revenue Ruling 58-66 regarding "common law" marriages. The IRS has publicly stated it will NOT audit nor increase tax liabilities for legally married same-sex couples whose filing status was other than "married filing jointly" in previous years, although taxpayers may seek refund claims if legally married at the time of filing for earlier federal returns that remain open under the statute of limitations.

The above is just the tip of the tax iceberg created by *Windsor*. Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming currently do not have an income tax on wages. New Hampshire and Tennessee have a state tax on interest and dividend income only. Alabama, Arkansas, Mississippi, New Jersey and Pennsylvania state income tax calculations do not reference the individual federal return. The rest "piggy back" off the IRC and/or some federal income figure from Form 1040 to determine state taxable income. In those jurisdictions that do not recognize the validity of a same-sex marriage, tax compliance is a conundrum.

Under federal income tax filing guidelines, an individual's filing status is determined on the last day of the tax year. Thus, if a party was legally married on the last day of the tax year, the

taxpayers must choose between married filing jointly (“MFJ”), married filing separately (“MFS”) or head of household if the taxpayer meets the provisions of abandoned spouse. If the taxpayer files MFJ for federal individual income taxes and resides (domiciled) within a jurisdiction that does not recognize same-sex marriage but has an individual income tax, how does the taxpayer file for state purposes? If the state does not recognize the same-sex marriage, the taxpayer cannot file MFJ at the state level. Further, since the state does not recognize the same-sex marriage, the taxpayer cannot file MFS at the state level either. Therefore, the taxpayer will be forced to utilize a filing status of single. When both parties in a same-sex marriage are forced to file as single for filing purposes and the resulting net state income tax liability is higher than if the parties had filed as MFJ, an actionable tort for infringement of constitutional right has been created. In the legal community we call that “buying a lawsuit”. Herein lays the fiscal time bomb.

How do those states that do not recognize same-sex marriages avoid this pitfall? Permit taxpayers to “split” a joint federal return down the middle for each single return similar to a “community property” state? Decouple from the IRC as a starting point by creating its own tax code? Create a new filing status permitting any taxpayer that files MFJ to file MFJ for state tax purposes? Make everyone file “single” regardless of marital status?

Not one of the jurisdictions that fail to recognize same-sex marriages has addressed this upcoming potential pitfall. Why should these jurisdictions be concerned with the impending fiscal time bomb? Very simply stated, “The Civil Rights Act of 1871” coupled with “The Civil Rights Attorney’s Fees Awards Act of 1976”.

The Civil Rights Act of 1871 & The Civil Rights Attorney's Fees Awards Act of 1976

The primary means by which an individual can seek monetary or equitable relief for federal constitutional violations by a federal or state government or one of its officials is through The Civil Rights Act of 1871¹⁶ or more commonly known by its federal code as 42 U.S.C. §1983 (“Section 1983”). The relevant portions of Section 1983 for this article states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 1983 was enacted in 1871 and is commonly known as the “Ku Klux Klan Act” because its primary purposes was to provide a civil remedy to combat attacks upon the suffrage rights of African Americans during the Reconstruction Era. While it was designed to protect and provide a format of redress for African American's whose civil rights had been infringed, it protects all citizens in theory. The Act was intended to provide a private remedy for such violations of constitutional rights and has

¹⁶ 42 U.S.C. §1983

subsequently been interpreted to create a species of tort liability.

The Civil Rights Act of 1871 was extremely effective in dismantling the Ku Klux Klan during the Reconstruction Era and was largely underutilized for almost fifty years until the Court in 1961 heard arguments for *Monroe v. Pape* (“*Monroe*”).¹⁷ In *Monroe*, the Court held that a police officer was acting “under color of state law” even though his actions *violated* state law. This was the first case in which the Court allowed liability to attach where a government official acted outside the scope of the authority granted to him by state law. Since *Monroe* was decided, an extensive body of law has developed to govern Section 1983 claims.

To start, the plaintiff claims that the defendant(s), while acting “under color of state law”, intentionally deprived the plaintiff of rights under the Constitution of the United States such as the First, Fourth, or other Bill of Rights or for a substantive violation of the Due Process Clause of the Fourteenth Amendment. The plaintiff must prove each of the following by a preponderance of the evidence:

1. That the defendant(s) committed acts that violated one or more of the plaintiff’s federal constitutional rights;
2. That in so doing the defendant(s) acted “under color” of the authority of the State; and
3. That the defendant’s(s’) acts were the legal cause of the plaintiff’s damages.

The first aspect of the plaintiff’s claim is that he was deprived of liberty “without due process of law”. This means he was deprived of liberty without authority of law. If the defendant is liable for the plaintiff’s injuries, the plaintiff is entitled to the compensatory damages that he has proven. Damages must be in an

¹⁷ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

amount that is fair compensation for all of the plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole, that is, to compensate the plaintiff for the damage that the plaintiff has suffered. Compensatory damages are not limited to expenses that the plaintiff may have incurred because of his injury. If the plaintiff wins, he is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of the defendant's conduct. The law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

The Civil Rights Attorney's Fees Awards Act of 1976¹⁸ or 42 U.S.C. §1988 ("Section 1988") entitles the prevailing plaintiff in a Section 1983 action to recover attorneys' fees. There is little doubt that the addition of this attorney's fee provision fueled the growth in the number of Section 1983 cases that have been filed because it has been held that prevailing plaintiffs are entitled to recover attorneys' fees unless special circumstances would render such an award unjust, while a prevailing defendant may be awarded attorneys' fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith".¹⁹

By now it is apparent same-sex couples that have legally married in one jurisdiction but domiciled in a jurisdiction that fails to recognize the same-sex marriage may have a Section 1983 claim for which they can seek redress and potential attorney fees under Section 1988. How do States address and defend themselves from potential litigation?

¹⁸ 42 U.S.C. §1988

¹⁹ *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978).

States and state agencies are entitled to immunity of the United States Constitution via the Eleventh Amendment, but local governments have no immunity from damages flowing from their constitutional violations, and may not assert the good faith of its agents as a defense to liability. Further, state law sovereign immunity and state law limitations on damages do not protect local governments from liability under Section 1983 (always remember federal trumps state), and state laws requiring pre-suit notification prior to initiating an action against the state or its subdivisions similarly do not apply. Therefore, local governments are left in the unique and unhappy situation of being subject to suit without the benefit of any form of immunity.

In contrast to the distinct lack of immunity available to local governments, individual capacity defendants are protected by qualified immunity. Qualified immunity is a powerful tool that shields individual officials who are performing discretionary activities unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” A government official is entitled to qualified immunity unless his “act is so obviously wrong, in the light of preexisting law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing.” The qualified immunity inquiry is purely objective, the subjective intentions of the actor is irrelevant. Qualified immunity is not only immunity from liability, but it is immunity from suit as well, and shields individual capacity defendants even where a constitutional violation may have occurred.

Therefore, governmental agencies and/or officials plead immunity to Section 1983 litigation claims when feasible. But it is extremely difficult to plead immunity when either the agency or official had sufficient means of notice that a constitutional infringement was taking place. Thus if governmental agencies and/or officials were unaware their actions, laws, policies, etc.

were creating an infringement upon a constitutional right in the past, the agency and/or official could seek immunity for the past action if the action was done in “good faith”. However, if the governmental agency and/or official are made aware the action, law, policy, etc. is creating an infringement upon a constitutional right AND continues to push for the infringement, the governmental agency and/or official utilization of immunity will more than likely fall on deaf ears.

Herein lies why the Court’s decision in *Windsor* has provided sufficient notice to the jurisdictions failing to recognize same-sex marriages is an infringement upon a person’s constitutional right. The Court’s decision in *Hollingsworth* did not in fact keep Section 2 of DOMA alive, rather it was like the Court acting as a doctor telling a patient, you have a year or less to live. Not one State could with a straight face argue before a judge that it was not aware of the Court’s decision in *Windsor*.

Conclusion

When April 15, 2014 rolls around and a same-sex couple legally married in a jurisdiction that permits same-sex marriages but residing in a jurisdiction that does not recognize same-sex marriages goes to file a State tax return that creates disparate negative financial results for that same-sex couple, that same-sex couple has the ability to seek redress via a Section 1983 litigation claim against that jurisdiction. Because these same jurisdictions had sufficient knowledge of the Court’s decision in *Windsor* and with intent kept the infringement of constitutional rights in place, the jurisdictions are facing not only compensatory and punitive damage awards, the jurisdictions veiled attempts at immunity will more than likely fail to garnish support from judges.

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