The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

NEWSLETTER • SEPTEMBER 2010

President's Column

Greetings,

I hope you enjoyed the summer months with your friends and families. The Massachusetts Chapter of the Federal Bar Association is ramping up for a busy autumn and our "changing of the guard." New chapter officers and directors will start their terms next month. Chris Sullivan, President Elect, will automatically ascend to the chapter president's role. Chris is an extraordinary lawyer and leader. I know our chapter will flourish under his stewardship.

The Young Lawyers Division ("YLD") of our chapter recently completed its election of new officers. Election results are detailed in this newsletter. Congratulations and best wishes to the new leaders of the YLD.

Speaking of the YLD, it held a tremendous seminar and networking event on September 1, 2010 at Sherin and Logden, LLP in Boston. The program was entitled Evidentiary Issues In The Federal Courts. Speakers at the event included the Honorable Judith G. Dein, Chief Magistrate Judge for the USDC in Massachusetts, Chris Sullivan of Robins, Kaplan, Miller & Ciresi, LLP, and Mary Jo Harris, partner at Morgan, Brown & Joy, LLP. Many thanks to Sherin and Logden, LLP, the speakers, and the YLD for sponsoring a worthwhile and fun event.

Please plan to attend our fall blockbuster program, "The Future of the Civil Jury Trial In Federal Court." This event is taking place on Friday, September 17, 2010 ("Constitution Day") from 1:00 p.m. – 3:00 p.m. at Suffolk University Law School. The event involves a point/counterpoint discussion around the "disappearing jury trial" in America's courts and how this development impacts civil justice in America. We are honored to have Judge William G. Young, of the United States District Court for the District of Massachusetts, and Judge D. Brock Hornby, of the United States District Court for the District of Maine, conducting this moderated conversation. Judge Young and Judge Hornby have both written scholarly articles on this topic and will share their experience and insight on this important issue.

This is my final column as president of the Massachusetts Chapter of the Federal Bar Association. It has been a pleasure and privilege to work with you all over the past year. I am particularly grateful to the other FBA officers and directors for their enthusiastic support of our activities this year. I look forward to remaining an active, contributing member of our chapter for years to come.

Best regards.

Chris Kenney
FBA President, Massachusetts Chapter

Inside This Issue:

President's Column 1
MBA and BBA co-sponsor "The Future of the Civil Jury Trial in Federal Court" 2
Seeking Volunteers for September 22 Job Interviewing Skills Workshop 2
Young Lawyers Division Update 2
Application of the Nerve Center Test in Massachusetts 3
Massachusetts Federal Judge Rules Section 3 of the Defense of Marriage Act Denying Federal Benefits to Same Sex Couples Unconstitutional in Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010) 3
"The Future of the Civil Jury Trial in Federal Court" Program Details 6
Executive Officers Listing 7

MBA and BBA co-sponsor "The Future of the Civil Jury Trial in Federal Court"

The FBA is delighted to have its sister bar associations, the Massachusetts Bar Association and the Boston Bar Association, as co-sponsors of the upcoming program entitled "The Future of the Civil Jury Trial in Federal Court." This program is a moderated discussion between Judge William G. Young of the USDC in Massachusetts and Judge D. Brock Hornby of the USDC in Maine. It is being held on September 17, 2010 from 1pm to 3pm at Suffolk University Law School. Admission is free, and a reception will follow the program. *Full program details on page 6.*

Seeking Volunteers for September 22 Job Interviewing Skills Workshop

The FBA, Judges Sorokin and Hillman and the Federal Probation Office are holding a Job Interviewing Skills Workshop on Wednesday, September 22, 2010 from 11:45 AM until 2:00 PM in the Jury Assembly room at the John J. Moakley Courthouse. The workshop, which is part of the CARE and RESTART program, was successfully run last year and provides participants the skills to help them in interviewing for jobs. We are seeking volunteers as we need two volunteers for each participant. Materials for the coaches and interviewer will be provided. Please contact Chris Sullivan at cpsullivan@rkmc.com to sign up.

Young Lawyers Division Update

Young Lawyers Division Election Results:

On August 11, 2010, members of the Young Lawyers Division voted for new board members. Alex Henlin of Edwards Angell Palmer & Dodge LLP was elevated to YLD Chair from his former position as Chair-Elect. The Boston Law Department's Ian Prior succeeds Alex as the YLD's new Chair-Elect. After tallying the election results, Evan Ouelette of the Boston Law Department is the YLD's new Vice Chair. Lisa Skehill of the Boston Law Department narrowly edged out Erica Tennyson of Day Pitney LLP to become the YLD's new Secretary. Finally, Andrew Kepple of Kenney & Sams, P.C., secured the YLD's Treasurer position. The FBA thanks the outgoing YLD board members for their commitment, dedication, and hard work; and we congratulate Alex, Ian, Evan, Lisa and Andrew on their new positions.

Recent Successful YLD Seminar on Evidentiary Issues:

On September 1, 2010, the Young Lawyers Division sponsored a discussion on Federal Court evidentiary issues before an enthusiastic audience of attorneys and law students. The program was hosted by Sherin & Lodgen, LLP in Boston. Chief Magistrate Judge Judith Dein, of the United States District Court, led the discussion by examining the preparation and strategy required to effectively litigating a federal case. Among other topics, Judge Dein discussed the effective use of voir dire questions during jury selection, the necessity of explaining evidence to jurors, and the importance of disclosing potential witnesses and evidence before trial. Fellow panelists Chris Sullivan of Robins, Kaplan, Miller & Ciresi, LLP, and Mary Jo Harris of Morgan, Brown, and Joy, LLP, shared their experiences as litigators in federal court. Chris and Mary Jo spoke on a diverse range of topics including jury selection in federal versus state court, strategies for disclosing sensitive documents and witnesses before trial, and the effective use of pre-trial motions to clarify potentially confusing trial issues. By sharing their own experiences in federal court, the panelists provided valuable information to the young lawyers in the audience aspiring to practice successfully in the federal court system.

If anyone (law students included) is interested in joining the YLD, please contact a board member:

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Note: *Raquel Ruano, our treasurer, is out on maternity leave and hence the reason we are not listing her as a contact. Congratulations to Raquel and family!*

Application of the Nerve Center Test in Massachusetts

by Eric B. Goldberg, Esq., Kenney & Sams, P.C.

In the FBA's May 2010 Newsletter, Andrew J. Palid reported on the U.S. Supreme Court's adoption in *Hertz Corp. v. Friend, 130 S.Ct. 1181 (2010)*, of the "nerve center" test for corporate citizenship for diversity jurisdiction purposes. Seven Circuit Courts and 107 District Courts have cited *Hertz* since the Supreme Court issued its decision last February. Although the First Circuit has yet to apply *Hertz*, two Massachusetts District Courts have done so to resolve disputes concerning removal and choice of law.

Although not explicitly raised in *Hertz*, the Supreme Court's decision makes plain that establishing a corporate defendant's citizenship for removal purposes must not be confused with the extent of the corporation's contacts with the forum state for purposes of establishing personal jurisdiction. The District Court squarely addressed this precise issue in *McCarthy v. Bank of New York/Mellon f/k/a Mellon Trust of New England, N.A.*, 2010 WL 2144241 (O'Toole, J., May 27, 2010).

In *McCarthy*, the plaintiff brought a wrongful termination action in Suffolk Superior Court against his former employer. The Bank removed the case to the United States District Court for the District of Massachusetts based on diversity jurisdiction. McCarthy moved to remand the case on the grounds that the Bank's principal place of business was in Massachusetts. However, the Bank introduced evidence that it was headquartered in New York, and that its executive officers worked in New York. Citing *Hertz*, Judge O'Toole held that McCarthy "confuse[d] the concepts of personal jurisdiction and service of process with diversity jurisdiction. Whether the Bank transacted business here or accepted service of process here is irrelevant to locating its principal place of business. For purposes of diversity jurisdiction, a corporation has its principal place of business where its officers direct, control, and coordinate the corporation's activities." *Id.* at *1.

The second decision is *Watkins v. Omni Life Science, Inc.*, 692 F.Supp.2d 170 (2010), a product liability action commenced against a hip prosthesis manufacturer. In granting Omni's motion to dismiss, the Court first needed to resolve the parties' disagreement about the applicable state law. Omni, a Massachusetts company, argued that Oklahoma law governed because the plaintiffs were Oklahoma residents, and they underwent hip replacement surgery in Oklahoma. The plaintiffs argued that the deciding factor should be Omni's location. Citing *Hertz*, Judge Stearns found that "Massachusetts' interest in regulating the conduct of businesses operating under its laws trumped any interest that Oklahoma might have."

These two cases demonstrate that the Supreme Court's adoption of the "nerve center" test has promoted welcome predictability to a variety of issues involving corporate citizenship.

Massachusetts Federal Judge Rules Section 3 of the Defense of Marriage Act Denying Federal Benefits to Same Sex Couples Unconstitutional in *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010)

by Eric J. Huang, Esq., Foley Hoag LLP

In a landmark case challenging the constitutionality of the section of the Defense of Marriage Act ("DOMA") defining marriage as only between a man and a woman, a Massachusetts federal judge ruled that the section violates the equal protection principles guaranteed by the Fifth Amendment to the U.S. Constitution by denying to same-sex couples certain federal marriage-based benefits that are available to similarly situated heterosexual couples.

Plaintiffs were seven same-sex couples and three survivors of same-sex spouses, all legally married in Massachusetts, who were denied federal benefits. Prior to bringing this action, each plaintiff, or his or her spouse, made a request to a federal agency for treatment as a married couple for purposes of obtaining certain benefits available to married couples. Several of the plaintiffs were federal employees who sought benefits through certain federal health benefits programs. Other plaintiffs sought Social Security benefits based on marriage to a same-sex spouse, and others sought to file federal income taxes jointly with their spouse. The relevant agencies denied the requests, invoking DOMA's mandate that the federal government recognize only heterosexual marriages.

Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law, providing that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7.

Plaintiffs subsequently challenged to the constitutionality of Section 3 of DOMA and sued the federal government. On July 8, 2010, Judge Tauro granted summary judgment for plaintiffs.[1]

In its ruling, the court first observed that courts apply "strict scrutiny" to those laws that "burden a fundamental right or target a suspect class." If a law does neither, then courts apply the much more deferential rational basis test to determine if the law "bears a rational relationship to a legitimate government interest."

Plaintiffs made three argument as to why strict scrutiny was the proper standard of review of DOMA: (1) DOMA marks a departure from the respect and recognition that the federal government has historically offered state marital status determinations; (2) DOMA burdens plaintiffs' fundamental right to maintain the integrity of their existing family relationship; and (3) homosexuals, the class of persons targeted by DOMA, should be considered a suspect class. The court declined to address these arguments and apply strict scrutiny, holding instead that DOMA fails to even pass constitutional muster under the rational basis test.

In setting out the standards for the test, the court observed that a challenged law survives under rational basis only if it is "narrow enough in scope and grounded in a sufficient factual context for the court to ascertain some relationship between the classification and the purpose it serves." Reliance "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" is unconstitutional. Where the purposed justification of the law makes no sense in light of how the government treats other similarly situations groups in relevant respect, the law fails rational basis review, the court said. The court analyzed the four objectives identified by Congress in the House Judiciary Committee's Report on DOMA for enacting the law: (1) encourage responsible procreation and child-bearing, (2) defend and nurture the institution of traditional heterosexual marriage, (3) defend traditional notions of morality, and (4) preserve scarce resources. Even though the government disavowed these arguments during the litigation, the court nevertheless gave them consideration.

On the first objective, in addition to noting that the government conceded that it bears no rational relationship to the operation of DOMA, the court cited the findings of the medical, physiological, and social welfare communities that children raised by same sex parents are likely to do just as well as those raised by heterosexual parents. Moreover, the court observed that the ability to procreate has never been a precondition to marriage; indeed, the sterile and elderly have never been denied the right to marry. On the second objective, the court could not discern how the government's denial of benefits to same-sex couples might encourage homosexuals to marry members of the opposite sex. On the third objective, the court said that the fact that a governing majority views a particular practice as immoral is not a sufficient reason for upholding a law. On the fourth objective, the court observed that while conserving the public fisc is a legitimate government interest, such concern standing alone does not justify the classification used in allocating those resources.

Instead of resting its argument on these objectives, the government proffered two other justifications. First, it argued that enacting DOMA was a proper means of preserving the "status quo" while the dispute among the states as to whether to sanction same-sex marriage was resolved. Second, it argued that DOMA represented the type of "incremental response to a new social problem that Congress may constitutionally employ in the face of a changing socio-political landscape."

As with Congress's rationales, the court found that the government's present justifications did not demonstrate a rational relationship between the classification employed and a legitimate government interest, holding that the government does not have an interest in having a uniform definition of marriage for purpose of determining federal rights, benefits, and privileges. The court observed that there was no dispute that the subject of domestic relations and the power to establish eligibility requirements for marriage are "the exclusive province of the states." Additionally, the court found that the federal government had the historical practice of recognizing as valid for federal purposes any heterosexual marriage declared valid by state law, even as standards marriage eligibility varied among the states. In contrast, it found that DOMA marked "the first time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage," even despite past politically-charged debates at the state level as to who should be permitted to marry, such as with interracial marriage. The federal government's historical practice reflects the "reality of the federalist system" and the state's

[1] In a companion case, Judge Tauro also held DOMA unconstitutional under the Spending Clause of the U.S. Constitution and the Tenth Amendment. *Commonwealth of Mass. v. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. July 8, 2010)

authority to determine eligibility requirements in familial relationship. The federal government, the court held, therefore cannot have a legitimate interest in disregarding those determinations.

With regard to the "status quo," the court found that the status quo at the federal level prior to 1996, when DOMA was enacted, "was to recognize, for federal purposes, any marriage declared valid according to state law." The government in fact departed from the status quo by enacting DOMA, the court held.

The court also found unpersuasive the government's argument that DOMA is necessary to ensure consistency in distributing federal marriage-based benefits, because the classification under DOMA bears no rational relationship to the interest in consistency. DOMA does not provide for consistency in the distribution of benefits among married couples; instead, it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy. In ensuring consistency, the court held that only relevant characteristic by which to distinguish those entitled to benefits from those who are not is marital status: that is, those who are married versus those who are not. By premising eligibility on marriage in the first instance, it does not withstand scrutiny for the government to also argue that it had an interest in treating all same-sex couple alike, whether married or unmarried. The court also found arguments concerning the administrative burden on federal agencies an "utterly unpersuasive excuse for the classification created by DOMA."

Finally, the court found it "strains credulity" to suggest that the government intended to create a sweeping enactment that effected the more than 1,138 different federal laws containing the words "marriage" or "spouse" simply to further the goal of consistently distributing marriage-based benefits. There must be some "reasonable" between the classification and the purpose it serves, the court held.

In conclusion, the court held it could not find how DOMA is directed to any identifiable legitimate purpose or discrete objective, nor could it discern a relationship to any legitimate government interest. Instead, it found that Congress undertook this classification "to disadvantage a group of which it disapproves." Under DOMA, the court held, "it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue." The court continued: "to further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning." Concluding that only "irrational prejudice" motivated the classification, the court held that because such prejudice "plainly never constitutes a legitimate government interest," Section 3 of DOMA violated the equal protection principles of the Fifth Amendment in the U.S. Constitution.
On August 18, 2010, the parties agreed to a sixty-day stay of the judgment pending an appeal.

The Massachusetts Chapter
of the Federal Bar Association
cordially invites you to:

"The Future of the Civil Jury Trial In Federal Court"

Friday, September 17, 2010
"Constitution Day"

1:00p.m. – 3:00 p.m.

Suffolk University School of Law
The Honorable Walter H. McLaughlin, Jr.
Moot Court Room
Room 425

Featuring:
William G. Young
United States District Court Judge
For the District of Massachusetts

And

D. Brock Hornby
United States District Court Judge
For the District of Maine

This Program is Being Co-Sponsored by the
Massachusetts Bar Association and the Boston Bar Association

Kindly RSVP by September 15, 2010
to Charlene Cox at cmcox@KandSlegal.com
Kenney & Sams, PC

A wine and cheese reception will follow

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