

IRS Ruling Clarifies DOMA Decision

Arizona residents and businesses may be directly impacted by the recent United States Supreme Court decision in the case of *United States v. Windsor*. In June, the Supreme Court declared in the *Windsor* case that §3 of the Defense of Marriage Act (DOMA) is unconstitutional, effectively negating the federal law.

That section of DOMA provided, for purposes of federal law, that the word “marriage” meant only a legal union between one man and one woman as husband and wife, and the



word “spouse” referred only to a person of the opposite sex who is a husband or a wife. It also controlled more than 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Currently, by its constitution, Arizona only recognizes as a valid marriage a union of one man and one woman. Now that §3 of DOMA has been ruled unconstitutional, how marriage is defined is up to each individual state because §2 of DOMA, which was not challenged in *Windsor*, permits states to refuse to recognize same-sex marriages performed under the laws of other states. This means Arizona can continue to choose not to recognize marriages of same-sex couples that were performed in other states or foreign countries. However, there are some overriding changes on the federal level, including recent IRS guidance, which will likely affect Arizonans.

Revenue Ruling 2013-17 offers guidance on how same-sex couples will be affected for federal tax purposes, regardless of the

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Crime and Forfeiture: Government Confiscation of Property Associated with Criminal Activities

Crime has consequences, including triggering the ability of the federal or state government to confiscate property connected to the offense.

This type of loss of a property interest through involuntary forfeiture generally follows one of two paths. *Criminal* forfeiture is a so-called *in personam* proceeding—that is, one which requires conviction of the defendant personally of the crime. The government then can confiscate that person’s interest in specific property. The government can also pursue the divestiture of any third-party’s interests, such as that of a lender or spouse, through an ancillary post-conviction proceeding.

Civil forfeiture, by contrast, is an *in rem* action—one directly against the property itself. In a neat legal fiction, the property is treated as the defendant offender. Thus, one might see a case called “*United States v. Real*

Property located at 1313 Mockingbird Lane, Mockingbird Heights, California.” It does not require a criminal conviction of a person, and the criminal guilt or innocence of the property owner is technically irrelevant if the property is shown under the lesser civil standard to have been involved in a



violation of a statute that permits forfeiture. The owner of the property, and all third parties with interests in the property, are parties in the civil action, and the govern-

ment is required to give reasonable notice to all concerned.

The criminal and civil statutes which allow forfeiture are ever-expanding. They include crimes of violence such as murder, kidnapping, and robbery, as well as extortion, money laundering, customs and immigration violations, fraud, bribery, child sexual exploitation and trafficking in controlled products including weapons or substances such as drugs or alcohol, or in nuclear, chemical, biological or radiological weapons or technology.

Almost any type of property interest can be subject to a forfeiture action: cash, currency, real estate, commodities, vehicles, boats, weapons, securities and licenses.

Regardless of the type of forfeiture, third parties are permitted to prove that their

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Arizona Courts Clarify Economic Loss Rule

Arizona's economic loss rule precludes contracting parties from suing each other for economic loss, unless the loss results from physical injury to persons or property not covered by the contract. As a result, contracting parties are generally limited to contractual claims and barred from asserting tort claims seeking the same remedies. While cases in the past few years expanded application of this rule, recent Arizona court rulings have reined in the rule.

In 2010, the Arizona Supreme Court expanded the rule to include construction defect cases (*Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*), using such broad language that many attorneys speculated the rule would extend to other areas of the law, as well. A year later, the Arizona Court of Appeals confirmed that prediction, holding that the economic loss rule precluded homeowners from pursuing tort claims of negligence, misrepresentation and fraud against the pest control company with which they had contracted (*Cook v. Orkin Exterminating Co., Inc.*)

Two recent cases halted that expansion, however. In March, the Court of Appeals declined to expand the judicially created economic loss rule to fraud claims under the legislatively created Consumer Fraud Act, holding that the rule could not prevent the Legislature from creating "new remedies." (*Shaw v. CTVT Motors, Inc.*) In July, the Supreme Court declined to expand the economic loss rule to non-contracting parties. (*Sullivan v. Pulte Home Corp.*)

The Sullivan case was unusual because it involved a non-contracting party with a contract claim. The original owners of a home

constructed and sold to them by Pulte Homes resold the house to the Sullivan family. Six years later, the Sullivans discovered defects in the home; Pulte refused to repair the defects, so the Sullivans sued for both tort claims (including fraud, negligence and misrepresentation) and a contract claim (breach of implied warranty).

Because the Sullivans did not purchase the home directly from Pulte, they had no contract. However, Arizona law provides homeowners an implied home warranty whether or not a contract exists, so they had an actionable claim. Unfortunately, the warranty claim came a year too late and was barred by Arizona's Statute of Repose.

On appeal, the Supreme Court held that the economic loss rule only applies to contracting parties, explaining that the purpose behind the rule would not be advanced by applying it to non-contracting parties. Therefore, because the Sullivans had no contract with Pulte, the economic loss rule did not bar their tort claims.

Despite these recent refinements, the economic loss rule continues to be an invaluable tool to limit duplicative tort claims in contract-based actions. Plaintiffs should clearly articulate damages to persons or other property when asserting tort claims in contract-based actions to avoid dismissal under the rule. Conversely, defendants facing tort claims in contract-based actions should seek to have those claims dismissed.

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Tech Corner: Email Insecurity

The internet is filled with discussion, consternation, and hysteria over revelations of National Security Agency monitoring and data gathering, and has caused many to be highly skeptical of the security of online communications. In a motion related to a class action lawsuit against Google for scanning the emails of Gmail users, Google asserts that users of the Gmail service have "no expectation of privacy" in the sending and receiving of email. Google argues that ALL users of email have an expectation that their emails will be subject to "automated processing" and therefore, cannot expect any part of their email to be private. Google drew the analogy that a person writing and sending a business letter must expect the recipient's assistant will be opening the letter.

Google's argument, however, taken to its

logical conclusion, is that because Google can scan all email, and the user knows it, the information can be made available to anyone by Google without any input or objection by the user. All users of email understand the electronic "thing" that is the "email" has to be "processed" in some way after you hit "Send." It is a huge leap to then suggest the contents of those emails are also open to review.

Google's argument in this case adds to the current chorus of debate on the privacy of our information and with whom we choose to share it. Is it tenable to suggest that in today's society in order to have an expectation of privacy, one must not participate in the use of email or social media?



Related to this is the Silent Circle announcement of discontinuance of its Silent Mail service "in order to preempt governments' demands for customer information

in the escalating surveillance environment targeting global communications."

The law is notoriously slow to react to new technology. The ongoing debate on this issue will be fundamental to our modern society. In the meantime, watch what you say in email.

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Benefit Corporations Coming to Arizona

In 2015, Arizonans will be able to form a relatively new type of corporation called a benefit corporation or B Corp, which is designed to further public benefit. We do not recommend B Corps.

A benefit corporation has both general and specific public benefit purposes which must be stated in its articles of incorporation. Public benefit purposes may be used to make corporate decisions, even if those public benefits may not be strictly in the stockholders' interests.

Under the law, the general public benefit is a material positive impact on society and the environment, taken as a whole assessed against a third-party standard. The specified public benefit may come from a number of different categories, like providing products and services to underserved individuals or communities, promoting economic opportunity other than jobs, protecting the environment, improving human health, promoting the arts, and increasing the flow of capital to entities benefitting society.

After careful review of the issue, Gust Rosenfeld will not be recommending formation of benefit corporations. We find the specific benefit purposes to be narrow and likely will not fit the goals of many groups wanting to act for the public benefit.

Most important, however, is the requirement to meet a third-party standard. At present, B Lab—the nonprofit organization which is the principal lobbyist for passage of benefit corporation legislation in the United States—is the only organization active in promulgating such standards. For a fee, B Lab will assess the performance of the benefit corporation against its standard and will certify whether the benefit corporation has met its goal. Certification by an outside entity is not required, but B Lab, on its website, encourages it. The requirement of meeting outside standards will further restrict the directors of the benefit corporation in what they can do to act for the public benefit.

Business lawyers in Arizona have always believed that business corporations may act for the public benefit. A committee of the State Bar of Arizona has drafted proposed legislation for introduction in 2014 that will confirm the present law that directors do not violate their fiduciary duties to shareholders by approving actions that are in the public benefit, even if they don't create immediate profit to the corporation.

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John focuses his general corporate and commercial law practice on representing small- and medium-sized businesses.*

NEW FACES



Shelby Life

Shelby joins Gust Rosenfeld after clerking for the Honorable Frederick J. Martone on the United States District Court for the District of Arizona and working for another local litigation firm. She earned a Juris Doctor magna cum laude from Notre Dame Law School in 2011. During law school, she was a Senior Editor of the Notre Dame Law Review and Career Chairman of the Student Bar Association. She graduated summa cum laude with a Bachelor of Science in Economics from Bradley University, where she was a four-year member of the cross country and track and field teams. Shelby is licensed to practice in Missouri and Arizona.



Kyle Bate

Kyle practices in the areas of business, nonprofit and corporate law, taxation, wills, probate, trusts and estates. He received his LL.M. in Taxation from the University of Florida Levin College of Law and his J.D. cum laude from Creighton University School of Law. During law school, he served as a judicial extern to the Honorable G. Murray Snow of the United States District Court for the District of Arizona and the Honorable Thomas D. Thalken, Magistrate Judge of the United States District Court for the District of Nebraska. He graduated magna cum laude with a B.S. in Economics from Arizona State University. Kyle is fluent in Spanish.

SEC Sanctions School District For Continuing Disclosure Failures

Has your governmental organization issued bonds or other obligations? Take note. Earlier this year, the U.S. Securities and Exchange Commission (SEC) sanctioned a school district in Indiana for failing to make required annual disclosures. The action marks the seventh such action this year against an issuer and represents a concerning increase in enforcement proceedings against issuers of governmental debt.

According to the SEC, the school district agreed in a 2005 bond issue to disclose certain information every year. In 2007, the school district issued additional bonds and stated in its Official Statement that it had not failed, in the previous five years, to comply with its prior disclosure agreements. However, the SEC found that: the school district had not disclosed any of the data it had agreed to disclose in 2005; the 2007 Official Statement contained untrue statements of material fact and was materially false; and the school district knew, or was reckless in not knowing, it had failed to disclose the

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state in which they currently reside. Three key holdings apply for federal tax purposes: 1) the terms “spouse,” “husband and wife,” “husband,” and “wife,” include an individual married to a person of the same sex if the individuals are lawfully married under state law; 2) the IRS will use a “state of celebration” standard, which means it will recognize a marriage of same-sex individuals that is validly entered into in a state whose laws authorize such marriage, even if the married couple is currently living in a state that does not; and 3) couples in a domestic partnership, civil union, or other similar formal relationship that is not a legal marriage in that state, are not considered married.

Revenue Ruling 2013-17 also provides that an individual married to a same-sex spouse may file amended returns or claims for credit or refund of an overpayment of certain taxes if the period of limitations is still open.

Arizonans whose employers currently provide health benefits or cafeteria plan fringe benefits for same-sex spouses on an after-tax basis will get some federal tax savings because those employers now can provide the benefits to same-sex spouses on a pre-tax basis. This tax savings also applies to federal estate and gift taxes because same-sex spouses may transfer as much money as they want to one another without incurring federal estate and gift taxes, as long as the recipient spouse is a U.S. citizen. Same-sex couples may also receive more tax breaks from charitable giving and gains from the sale of a principal residence.

Although the IRS ruling may bring some federal tax relief to Arizonans that have entered into a same-sex marriage in a state where it is legal but now reside in Arizona, all such couples must now file their federal tax returns as either married filing jointly or married filing separately. This could potentially increase the income tax burden for couples in which both spouses work.

Moreover, these benefits only apply for federal taxes. Under current Arizona law, the same-sex couple’s marriage is not recognized and the married individuals cannot file their state returns in a married status. Also, the employer-provided health coverage and fringe benefits continue as after-tax deductions for state tax purposes.

Arizona businesses may have more administrative hassles because of the demise of §3 of DOMA. While the Supreme Court in *Windsor* recognized the disparity between state and federal law in states that *do* recognize same-sex marriage, this disparity now exists in states that *do not* recognize same-sex marriage. Businesses should review their qualified retirement plans because, as of September 16, 2013, those plans must recognize both same-sex and opposite-sex spouses of employees for federal tax and ERISA purposes. Employers also should review, among other things, their policies on providing health care benefits and cafeteria plans.

The repeal of §3 of DOMA may impact other issues for Arizona residents and businesses, including Social Security benefits, veterans benefits, immigration issues and retirement plan benefits. Such issues will remain unclear until federal agencies provide more guidance.

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Kyle practices in the areas of business, nonprofit and corporate law, taxation, wills, probate, trusts and estates.

Dating back to the beginning of Arizona statehood and continuing today, Gust Rosenfeld has been helping government clients issue bonds to build and grow our great state. With that in mind, we offer our latest entry.

ET·Y·MOL·O·GY COR·NER

The Tie That Binds

The word “bond” comes from Middle English (1175-1225) as a variant of the word “band” for anything that binds. Through the years it has variously referred to, among other things, a serf or a slave and masonry arrangements to increase strength. As a term of finance or commerce, we think of a bond as a debt instrument on which the issuer pays interest for a term, with repayment of principal at maturity.

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Rick, our etymologist, practices in the areas of commercial law and litigation.

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required information. Thus, the school district violated federal securities law.

SEC sanctions now impose additional compliance requirements upon the school district. The school district’s bond underwriter was also sanctioned and fined. If you have outstanding obligations, check that your disclosures are being made annually and that someone in your organization is in charge of disclosure compliance practices.

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PERSONAL NOTES



John L. Hay was a delegate to the 102nd Arizona Town Hall in Tucson in April. The subject was Higher Education in Arizona.

Susan Segal received the 8th annual John R. McDonald Award for her lifetime work on behalf of public school districts at the Arizona School Boards Association Law Conference.

Scott A. Malm spoke in September at the Arizona Land Title Association annual conference; the topic was Title Insurance Claim Issues.

Eric McGlothlin was elected Chairman of the Board of Directors of Esperança, Inc., a locally based international charity that transforms lives through volunteer surgical missions. Its programs focus on clean water and sanitation, home building and improvement, nutrition and food security, disease prevention and treatment, and health education and training.

Gust Rosenfeld has joined the Environmental Bankers Association. **Barbara U. Rodriguez-Pashkowski** attended the semi-annual meeting of the group in San Francisco in June.

Martin T. Jones Sr. was accepted as a member of the National Association of Commercial Real Estate Due Diligence Professionals.

In June, **Martin T. Jones II** presented on trademark and copyright law to the Arizona Brewers Guild in Flagstaff.

Christopher M. McNichol and **Kent E. Cammack** recently lectured at the Arizona Trustee Association's annual conference in Tubac, Arizona, on issues relating to real estate loan enforcement.

Charles "Chas" Wirken has been elected to membership in The American Law Institute (ALI). ALI is the leading independent organization in the United States producing scholarly work to clarify, modernize and otherwise improve the law. Wirken was inducted during ALI's 90th annual meeting in Washington, D.C., in May.

Christopher M. McNichol is a designated observer to the drafting committee on a Model Act on Appointment and Powers of Real Estate Receivers sponsored by the Uniform Law Commission.

Jody A. Corrales was nominated by Bankruptcy Judges Hollowell and Whinery to attend the 2013 National Conference of Bankruptcy Judges to be held in Atlanta, Georgia, in October where she will participate in the third annual Next Generation program. She is one of 40 candidates selected nationally to participate in the program, which is designed for up-and-coming bankruptcy practitioners who will become the leaders of the next generation of bankruptcy practitioners.

Robert M. Savage and **Jody A. Corrales** presented at the Southern Arizona Real Property Section meeting in September. The presentation topic was Post-Recession Real Estate Issues and the Law: the Impact of the Stabilizing Market.

Craig A. McCarthy has been elected to the executive board of the Arizona Association of Defense Counsel (AADC), the statewide association of civil trial lawyers. In 2015, he will serve as AADC president.

At the summer conference of the Public Risk Managers Association (PRIMA), **Christopher A. Schmaltz** and **Craig A. McCarthy** spoke on defamation liability issues for public officials. The conference was held in Cottonwood, Arizona.

The Arizona Association of Defense Counsel honored **Richard A. Segal** and the **Honorable Larry Winthrop** with its 2013 lifetime achievement awards in September.

Christopher M. McNichol was a faculty presenter on the topic of Arizona's anti-deficiency statutes at ASU's Sandra Day O'Connor College of Law. The presentation was co-sponsored by the Arizona Consumer Bankruptcy Counsel and the bankruptcy section of the State Bar of Arizona.

Charles "Chas" Wirken has been reappointed to a three-year term on the Civil Practice and Procedure Committee of the State Bar of Arizona. He has served on the committee since 1977, previously as its chairman. Wirken was also reappointed by the State Bar Board of Governors to a second five-year term on the Client Protection Fund Board of Trustees; he is in his second year as chairman.

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interest in the property is not subject to seizure. These include an "innocent owner" defense. However, the third party generally bears the burden of showing that it was unaware that the property was being criminally used and that it did all it could reasonably be expected to do to prevent criminal use of the property.

Timely and proper action in any forfeiture action is critically important for any third party to protect its interests from being extinguished in favor of the government.

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Best Lawyers® Names Gust Rosenfeld Attorneys

Fifteen Gust Rosenfeld lawyers were named Best Lawyers® in the 2014 edition of The Best Lawyers in America®. In addition, **John L. Hay** has been named the Best Lawyers® 2014 Phoenix Franchise Law Lawyer of the Year, while **Frederick H. Rosenfeld** was named the Best Lawyers® 2014 Phoenix Municipal Law Lawyer of the Year. Gust Rosenfeld attorneys who received this distinction include:

Tom Chauncey II	Corporate Law	Sean P. O'Brien	Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
Mark Collins	Litigation—Real Estate; Real Estate Law	Frederick H. Rosenfeld	Corporate Law; Municipal Law; Public Finance Law
Peter Collins Jr.	Commercial Litigation; Insurance Law; Personal Injury Litigation—Plaintiffs	Scott W. Ruby	Corporate Law; Public Finance Law
Robert D. Haws	Education Law; Employment Law—Management; Litigation—Labor and Employment	Richard A. Segal	Antitrust Law; Commercial Litigation; Litigation—Construction
John L. Hay	Franchise Law	Madeleine C. Wanslee	Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
Gerald L. Jacobs	Real Estate Law	Richard H. Whitney	Trusts and Estates
James W. Kaucher	Professional Malpractice Law—Defendants	Charles W. Wirken	Appellate Practice; Franchise Law
Christina M. Noyes	Franchise Law		

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