Ole Miss Business Law Reporter

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Features

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From the Left: 3L Nader Jarun, Professor John Czarnetzky, Professor Mercer Bullard, 3L Cory Ferraez

Letter from the Founders

Welcome to the Ole Miss Business Law Reporter

Back in the summer of 2013, a group of students at the University of Mississippi School of Law had an idea to deliver current business related news to practicing attorneys. However, these students wanted to be different from the traditional published law school journal articles. They wanted something new, something current, something that attorneys can put to use in their day to day practice.

With the exception to few, each article is co-written with a practicing attorney who offers his or her own expertise. Our student-writer has the opportunity grow and learn as well as demonstrate his or her researched work.

The Reporter offers a fine balance of a wide range of topics that allows our students to be creative when delivering a message. We continually ask ourselves, does this have something to do with the business world and how can it help practicing attorneys in the present moment? Make no mistake, the content is filled with legal insight with a briefing on the given topic.

In this publication we discuss the new developments of Chapter 7 Bankruptcy in Mississippi as well as the changes to background checks in the work force. Furthermore, we discuss the harms to electronic spoliation of evidence and the tax benefits and penalties for same-sex married couples after the *United States v. Windsor* opinion.

We dedicate this issue to our predecessors who brought the Business Law Society back to the law school.

We give a special thanks to Professor and Director of the Business Law Institute Mercer Bullard and Professor John Czarnetzky. Without your continued support, hardwork and vision for the Business Law Institute, this publication would have never been possible.

Thank you to all of our supporters: Jack West, Richard Dooley, Dean Richard Gershon, Dean Matthew Hall, Dean Macey Edmondson, Dean Sandra McCarty, Paul Bennett, Poindexter Barnes, Stacey Rowland, Kris Gilliland, Jenny Kate Luster. Thank you to the Network's Executive Board: Austin Alexander, Stephanie Brown, Patrick Everman, Cory Ferraez, Nader Jarun, Joe Prempeh, and Drew Taggart.

Please check us out at *www.umbusinesslaw.com*

Thank you for reading!

Nader Jarun & Cory Ferraez

The Point of No “Return”: New Developments in Chapter 7 Bankruptcy for Mississippians

By: Marie Wicks

Previously Published *The Mississippi Business Law Reporter*

Marie Wicks is a first-year law student from Ocean Springs, MS. In addition to serving on the Ole Miss Business Law Reporter, she also represents the 1L class as a senator in the Law School Student Body Senate. She received the Mississippi Business Law Newsletter Award for her article titled The Point of No “Return”: New Developments in Chapter 7 Bankruptcy for Mississippians, which was published in the Fall 2013 edition of the Mississippi Bar’s Business Law Reporter. Prior to entering law school, Marie served as Miss Mississippi 2012. Marie graduated magna cum laude from The University of Mississippi with B.A. degrees in International Studies and French, and a minor in Chemistry. A member of Phi Beta Kappa and Phi Kappa Phi, Marie was inducted into the 2011-2012 Ole Miss Hall of Fame.

Acknowledgments: This opportunity would not have been possible without the time and effort of the Business Law Institute at The University of Mississippi School of Law. I would like to thank Prof. Mercer Bullard, Associate Professor of Law and Director of the Institute, for his assistance and expertise. I would also like to thank business law expert Prof. John Czarnetzky for his insight. In addition, I would like to thank Dean Richard Gershon for his enthusiasm and support of the Business Law Institute.

Sneak Peek: A recent Fifth Circuit decision in a Mississippi case has effectively precluded the discharge of a debtor’s tax liabilities in Chapter 7 bankruptcy if the return was filed late. This view is a rejection of established precedent that has since sparked a conflict with the other federal courts and the I.R.S. that may ultimately be resolved in the Supreme Court. While the facts of In re McCoy are far from extraordinary, the Fifth Circuit’s interpretation of a recent amendment to the Bankruptcy Code has ramifications that will impact the tens of thousands of individuals who file Chapter 7 bankruptcy each year.

A U.S. Court of Appeals ruling in a Mississippi case has effectively precluded the discharge of a debtor’s tax liabilities in Chapter 7 bankruptcy if the return is filed late. The Fifth Circuit decision rejected established precedent and thereby sparked a conflict with other federal courts and the I.R.S. that is likely to be ultimately resolved by the Supreme Court.

The factual narrative of In re McCoy is not unusual.[1] McCoy sued the Mississippi State Tax Commission (MSTC) in bankruptcy court after the court denied her request under Chapter 7 bankruptcy to discharge two years of debts for state income tax. She had filed both her 1998 and 1999 tax returns belatedly in 2002. The bankruptcy court sided with the MSTC, finding that McCoy’s late filings precluded her from counting them as “returns” that are eligible for discharge. The district court and Fifth Circuit upheld the bankruptcy court’s decision.

The Fifth Circuit applied Section 523(a) of the U.S. Bankruptcy Code to preclude the discharge of McCoy’s tax liabilities. Under Section 727 of the Code, a debtor may discharge all debts

1 In re McCoy, 666 F.3d 924 (5th Cir. 2012), cert. denied, 133 S.Ct. 192 (2012).

"[e]xcept as provided in Section 523."[2] The exceptions in Section 523 include those "with respect to which a return, or equivalent report or notice, if required was not filed or given."[3] In 2005, Congress amended the section to include subparagraph Section 523(a)(*)—no subparagraph number was provided, hence the "*"—to clarify that:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.[4]

The Fifth Circuit found that McCoy's returns did not satisfy "applicable filing requirements," which in Mississippi include filing before the mid-April deadline.[5] Therefore, her filings were not "returns" for discharge purposes. Further, Section 523(a)(*) permits discharge of returns prepared pursuant to I.R.C. Section 6020(a), which applies to debtors who have disclosed the necessary information to aid the Secretary in preparing a substitute and have provided a signatory authorization of the return. McCoy's filings also did not qualify for this safe harbor.

In interpreting 523(a) broadly, the Fifth Circuit rejected established precedent in determining whether taxes were dischargeable when the return was filed late. Since 1986, courts have applied the Beard test to examine whether a filing constituted a return to be discharged in Chapter 7 bankruptcy.[6] According to Beard, a document shall qualify as a return if it (1) purports to be a return, (2) is executed under a penalty of perjury, (3) contains sufficient data to allow calculation of tax, and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law.[7] Many federal courts have given the most weight to the "honest and reasonable attempt" prong of the Beard test to determine the validity of late filings as dischargeable returns.[8] Courts that have used the Beard test have concluded that returns filed before the debtor is prompted to do so by tax authorities are evidence of "honest and reasonable" compliance and therefore are eligible for discharge, even if the returns were filed late.[9] McCoy argued that if this test had been applied in her case, all of her tax debt would have been discharged, because she filed her income tax returns prior to the MSTC assessment of her tax liabilities.[10] Instead, the Fifth Circuit discarded the test and effectively prevented tax returns from qualifying as "returns" for the discharging of debts even if they are filed only one day after the deadline.

The Fifth Circuit's position has been specifically rejected by the Tenth Circuit,[11] bankruptcy and district courts across four other circuits,[12] and the I.R.S.[13] One reason is the Fifth

2 11 U.S.C.A. § 727 (1986) (amended 2005).

3 11 U.S.C. § 523(a)(1)(B)(i) (1978).

4 11 U.S.C. § 523(a)(*) (2005).

5 In re McCoy, 666 F.3d at 932.

6 Beard v. Comm'r, 793 F.2d 139 (6th Cir. 1986).

7 Id.

8 See, e.g., In re Wogoman, 475 B.R. 239 (B.A.P. 10th Cir. 2012).

9 See, e.g., In re Rhodes, No. 11-4074, 2013 WL 5291400, at *5 (Bankr. N.D. Ga. May 6, 2013); In re Brown, 489 B.R. 1, 6 (Bankr. D. Mass. 2013); In re Martin, 482 B.R. 635, 640 (Bankr. D. Colo. 2012).

10 McCoy v. Miss. State Tax Comm'n (In re McCoy), No. 08-00175, 2009 WL 2835258 (Bankr. S.D. Miss. Aug. 31, 2009), aff'd, 2011 WL 8609554 (S.D. Miss. 2011), aff'd, 666 F.3d 924 (5th Cir. 2012), cert. denied, 133 S.Ct. 192 (2012).

11 In re Wogoman, 475 B.R. at 239.

12 In re Mallo, No. 13-CV-00098-AP-LTB, 2013 WL 4873057, at *4 (D. Colo. Sept. 11, 2013); In re Rhodes, 2013 WL 5291400, at *7; In re Pitts, 497 B.R. 73, 73 (Bankr. C.D. Cal. 2013); and In re Brown, 489 B.R. 1 at 4.

13 See, e.g., I.R.S. Chief Council Notice CC-2010-016, Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities on Late Filed Returns and Returns Filed After Assessment, 2010 WL 3617597 (Sept. 2, 2010); See also, e.g., In re Smythe, No. 11-

Circuit's interpretation of the hanging paragraph renders redundant the additional proviso that I.R.C. Section 6020(b) returns are not "returns" for discharge purposes. As stated by one commentator, "If the parenthetical '(including applicable filing requirements)' in [523(a)(*)] created the rule that no late-filed return could qualify as a return, the provision … that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous."[14] In addition, the creation of a return under 6020(b) necessarily occurs after the filing deadline has passed. If 523(a)(*) was meant to broadly exclude all late-filed tax returns from discharge, as the Fifth Circuit held, why would the text further stipulate that late filings under 6020(b) are also excluded? Even the I.R.S. does not draw such a hard line as the Fifth Circuit, maintaining instead that a filing submitted after the deadline still constitutes a return as long as it was filed before an assessment was completed.[15] The text of 523(a)(*) suggests a more flexible application that does not assume all late filings to be nondischargeable.

The McCoy decision will likely have a large impact on debtors in the tens of thousands of Chapter 7 bankruptcy cases that arise in the Fifth Circuit each year.[16] This number pales in comparison to the hundreds of thousands of cases in the rest of the U.S. that will not be affected since no court has agreed with the Fifth Circuit's approach.[17] Due to the sheer volume of Chapter 7 bankruptcy cases and the circuit split that has resulted from the McCoy decision, it is not a question of whether this case will reach the Supreme Court, but a question of when. At the center of the conflict are the individual debtors, whose attempts to discharge their tax liabilities may be thwarted by a hanging paragraph in the Bankruptcy Code as they reach the point of no "return."

04077, 2012 WL 843435, at *4 (Bankr. W.D. Wash. March 12, 2012).

14 Morgan D. King, Tolstoy, Discharging Taxes, and the Fifth Circuit, 4 Norton Bankr. L. Adviser 3 (April 2012).

15 I.R.S. Chief Council Notice CC-2010-016, 2010 WL 3617597 (2010).

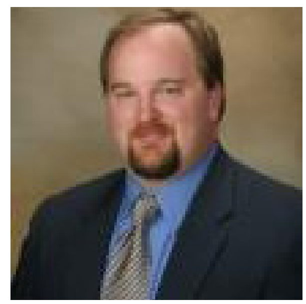
16 2013 Bankruptcy Filings, UNITED STATES COURTS (March 31, 2013), available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0313_f2.pdf.

17 Id.

EEOC v. Freeman: A Small Win for Employers Using Background Checks in the Hiring Process

By: Walt Montgomery & J.L. Wilson

Walt Montgomery is a member of the Business Law Reporter at the University of Mississippi School of Law. He is second year law student from Carrollton, MS. This past summer, Walt served as a legal intern at the Mississippi Secretary of State's Office. He graduated summa cum laude from Mississippi State University with a B.S. in Political Science. Walt plans to practice Tax Law when he graduates.



J.L. Wilson is a current resident of Greenwood, MS and an attorney at Upshaw, Williams, Biggers, and Beckham, LLP. He attended college and law school at the University of Mississippi. He graduated from Ole Miss with an BBA in 1993 and from Ole Miss Law School in 1997, where he served as Associate Editor of Mississippi Cases on The Mississippi Law Journal and on the Moot Court Board. He was admitted to the Mississippi Bar in 1997 and is admitted to all State and Federal Courts in the State of Mississippi, as well as the Fifth Circuit. His practice in civil litigation focuses on governmental liability and professional liability defense. He has successfully represented over 20 of Mississippi's county governments and their employees, defending against claims pursued under the Mississippi Tort Claims Act and 42 U.S.C. §1983. He also defends medical professionals against allegations of professional negligence, many of which are community hospitals and their employees covered by the MTCA. Mr. Wilson is an approved attorney to represent state entities on behalf of the Mississippi Tort Claims Board.

Sneak Peek: *EEOC v. Freeman* provides businesses with a small win against the EEOC, as it allows them to examine candidates' criminal and credit history in order to accurately assess whether the candidates they consider for employment are a risk to the business. In this case, the EEOC alleged that by using criminal background and credit checks in their hiring process Freeman Co. discriminated against African Americans and men; thereby, violating Title VII of the Voting Rights Act of 1964.

E *EOC v. Freeman*[1] provided businesses with a small win against the Equal Employment Opportunity Commission's (EEOC) attempts to prohibit all use of background checks into criminal and credit histories to assess whether applicants for employment are a risk to the business. The United States District Court for the District of Maryland granted summary judgment to the defendant based on the EEOC's failure to identify specific employment practices that resulted in a disparate impact on protected classes. This decision has potentially far reaching consequences in the numerous other cases alleging similar claims that have been filed by the EEOC against national corporations such as Dollar General and BMW.[2] The court's ruling in Freeman serves as persuasive authority to defend the legitimate use of background

1 *E.E.O.C. v. Freeman*, 2013 WL 4464553; 8:09-cv-02573-RWT (D. Md. Aug. 9, 2013).

2 Scott Thurm, *Employment Checks Fuel Race Compalints*, Wal St. J., June 11, 2013.

checks by employers as they make hiring decisions.

In Freeman, the EEOC alleged that the employer violated Title VII of the Voting Rights Act of 1964 by factoring a potential employee's credit history and criminal record in their hiring practice.[3] The EEOC argued that background inquiries were discriminatory against African Americans and men due to a disparate impact in disqualification from employment.[4] Freeman moved for summary judgment on the basis that the EEOC failed to provide sufficient information to show that background checks were in fact discriminatory.[5] A federal judge in Maryland agreed with Freeman and granted their motion for summary judgment.[6]

Freeman Co. had historically experienced issues with embezzlement, drug use, and violence in the workplace.[7] They subsequently incorporated background checks into their hiring process.[8] The background checks consisted of checking into the candidate's criminal history, credit history, education, and certifications.[9] Applicants that lied on their application and those that had been convicted of crimes that were concerning to Freeman, such as a felony drug conviction or a sexual offense, were automatically excluded from consideration for employment.[10] Freeman also had a list of credit offenses which automatically disqualified a candidate for a position that dealt with "credit-sensitive" information.[11]

Under the applicable burden-shifting framework, the EEOC possessed the initial burden to show that a class of candidates was excessively and harmfully impacted by an element of Freeman's hiring process.[12] Freeman's motion for summary judgment was granted because the EEOC failed to make a prima facie showing that the facially neutral hiring policies had a statistically significant disparate impact.[13] The EEOC's expert proof was deemed unreliable based on numerous and varied inaccuracies and failures to consider complete and relevant data.[14]

Alternatively, the court granted summary judgment because the EEOC never identified the specific element of the background checks that created the alleged disparate impact.[15] It is not enough to argue that a general policy, in this case background checks, creates a disparate impact; rather the specific element of the policy that creates the disparate impact must be identified.

A violation of the EEOC's guidelines regarding employer hiring practices does not necessarily translate into liability. This case is one example in which a violation of these guidelines occurred, yet the court found no violation of Title VII. In 2012, the EEOC issued new guidelines regarding employer hiring practices.[16] According to these new guidelines, an employer may inquire into the criminal history of applicants, but they cannot be used to automatically disqualify an individual from employment, as was done by Freeman.[17] These guidelines also warn that the EEOC will take legal action against any employer who conducts background checks that create a disparate impact against a protected class.[18] The ruling in Freeman is a major setback to the EEOC as it undermines their

3 Freeman, 2013 WL 4464553 at *1.
4 *Id.*
5 *Id.*
6 *Id.* at *18
7 *Id.* at * 5
8 *Id.* at* 6
9 *Id.*
10 *Id.*
11 *Id.*

12 42 U.S.C § 2000e-2(k).
13 *E.E.O.C. v. Freeman, 2013 WL 4464553 (D. Md. Aug. 9, 2013).*
14 *Id.* at* 10
15 *Id.* at* 18
16 Timothy M. Cary, *A Checkered Past: When Title VII Collides with State Statutes Mandating Criminal Background Checks*, 28 ABA J. Lab. & Emp. L. 499 (2013).
17 *Id.*
18 *Pre-Employment Inquiries and Arrest and Conviction*, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited August 25, 2013).

newly issued guidelines.

Though not controlling authority nationwide, employers should be cognizant of this case and other similar suits. It appears that the EEOC wishes to eradicate the use of criminal background checks in the hiring process, which could profoundly impact many companies' hiring practices. By ruling in favor of Freeman, the district court refused to rule the mere use of background checks in the hiring process inherently discriminatory. Rather, the court continued down the same path the Supreme Court laid out in *Wards Cove Packing Co., Inc v. Atonio*, requiring that the EEOC identify the specific employment practice allegedly responsible for any observed statistical disparities.[19]

This case is a small win for business in that it establishes a precedent that could turn into a trend. If this ruling does indeed become the trend, employers will continue to be able to defend the use of background checks in screening potential employees. Had Freemen been decided differently, the decision and other courts following suit may soon have forced employers using background checks to decide between conducting background checks and exposing themselves to potential employment discrimination claims, or abandoning background checks and hiring employees who may commit an act in which the employer may be held liable.

Although this case is a win for employers, employers should not consider this case a panacea. The EEOC has appealed this case to the U.S. Court of Appeals for the Fourth Circuit.[20] Further, the EEOC's lack of inclination to abandon the issue is reflected in the BMW,[21] Dollar General[22] and other suits. However, until and unless any of those cases are decided to the contrary, Freeman provides ammunition to defend "scattershot" claims that the mere existence of some discernible statistical variance supports a claim for employment discrimination. It requires the EEOC to identify a specific employment practice related to background checks that creates any disparate impact in order to make out a prima facie case of employment discrimination.

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19 *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989.)

20 *Equal Employment Opportunity Commission v. Freeman*, No. 13-2365 (4th Cir., filed November 7, 2013).

21 *Equal Employment Opportunity Commission v. BMW Manufacturing Co.*, No. 7:13-cv-01583-HMH-JDA (D. S.C., filed June 11, 2013).

22 *Equal Employment Opportunity Commission v. Dolgen Corp., LLC*, No. 1:13-cv-04307 (D. Ill., filed June 11, 2013)

Preserving the Dirt that Disappears With a Click

By: Ann Brian & Michael J. Shemper

Ann Brian is a second year law student from Hattiesburg, MS. She received her undergraduate degree from the University of Southern Mississippi. In addition to serving on the Business Law Reporter, she is currently involved in Phi Delta Phi, Phi Kappa Phi, Dean's Leadership Council, and The Business Law Institute. She hopes to pursue her interests in personal injury and employment law upon graduation in December 2014.

Hattiesburg, Mississippi, attorney Michael J. Shemper entered the practice of law in 2002 and has since built a track record of success in Gulf South maritime accidents, auto accidents and other personal injury matters, business litigation and criminal defense. He has substantial trial experience in both state and federal courts and is also admitted to the U.S. Court of Appeals, 5th Circuit. Mr. Shemper was selected for inclusion in the Rising Stars list published in 2011 Mid-South Super Lawyers, reflecting both the results he has achieved for many valued clients and a widespread reputation for skill and professionalism.

Sneak Peak: Social media information is relevant and discoverable during litigation, but what happens when it is destroyed? Attorneys and clients alike should be aware of the duty to preserve information stored on social media and the importance of having a preservation plan that protects both the firm and the client. *Gatto v. United Air Lines, Inc.* illustrates the necessity of preserving information on social media in order to avoid an adverse jury instruction due to spoliation sanctions. It is of paramount importance for attorneys to advise clients to take the proper steps to preserve relevant social media data and to understand the consequences associated with the seemingly innocent click of a mouse.

In *Gatto*[1], the plaintiff sued for injuries sustained during the scope of employment. His alleged damages included several physical injuries that left him permanently disabled and a loss of enjoyment of life. In the course of discovery, defendants obtained information from Gatto's Facebook[2] account that contradicted his claim. After receiving a notification that an unfamiliar IP address had accessed his Facebook account, Gatto deactivated the account.[3] Facebook permanently and automatically deleted Gatto's account fourteen days after deactivation, pursuant to standard company procedure. The defendants subsequently moved to impose spoliation sanctions for Gatto's destruction of relevant information.

The court in *Gatto* laid out two tests in deciding on defendant's motion to impose sanctions for spoliation. First, to determine which spoliation sanction was appropriate, the court considered the following:

1 *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

2 Facebook is an online social networking service.

3 The defendants admitted to accessing the account and further explained that a subpoena had been sent to Facebook requesting the entire contents of Gatto's Facebook page. Facebook declined to release the information due to apprehensions related to the Stored Communication Acts. see *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

(1) The degree of fault of the party who altered or destroyed the evidence;

(2) The degree of prejudice suffered by the opposing party; and

(3) Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the offending party is seriously at fault, will serve to deter such conduct by others in the future.[4]

The court did not discuss this three-part test further but turned its attention to the request of the defendant: an adverse inference instruction and monetary sanctions.

Regarding the second test, an adverse inference instruction allows a jury to infer that the plaintiff destroyed or failed to relinquish information because he feared it would adversely affect his case. In order for this instruction to be given, the court must find:

(1) the evidence was within the party's control;

(2) there was an actual suppression or withholding of evidence;

(3) the evidence that was destroyed or withheld was relevant to the claims or defense; and

(4) it was reasonably foreseeable that the evidence would be discoverable.[5]

The court found that only the second factor was in question— whether there was actual suppression or withholding of evidence.

Gatto argued that he did not intentionally withhold or destroy evidence; therefore, he did not meet the "actual suppression" standard. He maintained that his actions were reasonable in light of a recent divorce and past experiences with being "hacked." He further asserted that the permanent deletion was purely accidental. However, the court was not swayed. The court held that Gatto's actions did prejudice the defendants, and the spoliation instruction was necessary, regardless of whether Gatto intended the destruction. Even if Gatto lacked intent to deprive the defendants of the information stored on the account, it is clear that he did intend to deactivate his account, which ultimately led to the destruction. It is unclear whether the court determined the intent required by the first prong of the spoliation test set forth above. If intent were required, the court may not have applied an adverse jury instruction since it is possible that Facebook— not Gatto— caused the permanent deletion. The court focused instead on the prejudice to the defendants and the ultimate destruction of relevant evidence.

Spoliation risks with respect to social media raise special concerns of which lawyers may not be aware; therefore, practitioners should be careful to not allow their client's posts, images, videos, and comments to disappear from cyberspace. When considering the avoidance of spoliation sanctions, destruction of hard copy documents cannot be the only concern. It is critical to take the proper steps to preserve relevant data contained on all social media (e.g. Twitter, Facebook, YouTube, LinkedIn, Flicker, Instagram, Tumblr). Preservation efforts must be proactive and should not be viewed as measures taken only to avoid ill will or intentional destruction. As seen in *Gatto*, the duty to preserve exists even absent an intentional mindset.

In addition to spoliation sanctions, attorneys should be aware that technology is changing the discovery process and imposing new ethical duties on attorneys. According to the ABA Model Rules of

4 *Gatto*, 2013 WL 1285285 at 3 (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir.1994)).

5 *Gatto*, 2013 WL 1285285 at 3 (citing *Mosaid Technologies v. Samsung Electronics*, 348 F.Supp.2d 332, 335 (D.N.J.2004)).

Professional Conduct Rule 1.1[6] Comment 8,

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Although the rule itself does not refer to technology, the comment explains that competent representation of the client requires attorneys to stay current on the impact that relevant technology can have on litigation. While the discovery of material on social media and the duty to preserve that material have not yet been addressed in published cases in Mississippi, other states are dealing with the issues involving discovery of information on social media accounts.

To avoid situations like *Gatto*, the following are recommended steps to help identify the risks associated with social media.

(1) During the initial consultation determine what, if any, social media and/or electronically stored information (ESI) the client may have. Ask the clients to sign an agreement stating that they understand that social media posts may be discoverable and that they will refrain from posting information relevant to their claims.

(2) It is suggested before filing any action or lawsuit, (and in federal court prior to the FRCP 26 (f) conference[7]), attorneys should first engage in some research pertaining to the client's social media accounts in order to understand what kind of information in their possession is discoverable. Specifically, you may want to ask the following: What types of data do you use: email, Twitter, Facebook, YouTube, LinkedIn, Flicker, Instagram, Tumblr? How do you use these tools? Are they updated hourly, daily, or weekly? Are the accounts linked to each other to auto update Twitter when Facebook is updated?

(3) Also, as soon as possible, question the client and opposition about their social media accounts and how they might relate to the incident. (e.g. Did you post any pictures on the night in question?)

(4) Inform clients about the risks associated with deactivation or tampering with evidence on social media accounts, regardless of whether it is intended or done in bad faith. Warn them of the consequences associated with deleting or altering information. While it might seem like an invasion of privacy, interests in information will usually trump the individual's privacy.

(5) Be able to produce relevant documents in order to limit the potential complications that are foreseeable when passwords are exchanged. Producing documents better protects the client's privacy and avoids situations like the one in *Gatto*.

(6) In Federal Court, refer to FRCP 26 and pay close attention to the local rules, specifically L.U.Civ.R. 26(e)(2).

(7) Once conferring with counsel in the FRCP 26(f), discuss parameters of electronically stored information (ESI), if known, and disclose that in existence, if any.

(8) Most importantly, develop a preservation plan that protects the firm and the clients.

Attorneys who do not take these steps risk both spoliation sanctions and ethics violations. Because the rules of discovery tend to be slower in catching up with the trends of technology,

6 Model R. Prof. Conduct 1.1 (ABA 2013)("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

7 Fed. R. Civ. P. 26

the courts are left with the task of translating the existing guidelines to apply to electronically stored information (ESI). While email has been around longer than social media and is already frequently submitted into evidence, it is not the only electronic information that has relevance. The trend of using material from social media in litigation is growing quickly and should not be dismissed or taken lightly. *Gatto* should serve as a cautionary tale that at least one court will impose spoliation sanctions, regardless of whether the information was intended to be destroyed.

IRS Ruling 2013-17: Tax Benefits and Penalties for Same-Sex Married Couples after UNITED STATES V. WINDSOR

By: Joey Tramuta

Joey Tramuta is a second year law student from Fairhope, AL. He graduated cum laud with a B.A. in Political Science and a minor in Spanish from The University of Southern Mississippi. He previously worked as a summer law clerk for United States District Court Judge Kristi DuBose in the Southern District of Alabama, and upon graduation he intends to work in criminal prosecution.

The IRS issued Ruling 2013-17 as regulatory guidance following *US v. Windsor.*[1] Pursuant to *Windsor*, the ruling reinterprets the tax code to effectively extend marriage tax benefits to married same-sex couples. This is particularly relevant to the state of Mississippi, which according to the 2010 U.S. Census, has the highest per capita percentage of same-sex couples raising children in the country. Ruling 2013-17 offers the following new interpretations of the tax code:

• All terms in the Code referring to marriage status – ie: "husband," "wife," "spouse," "marriage," or any combination or derivation thereof – whether gender-neutral or gender-specific, include married same-sex couples.

• The validity of a marriage, for federal tax purposes, is determined according to the laws of the state in which the marriage is initially established, regardless of the laws of the state in which a couple is domiciled.

• Terms in the Code which refer to marital status do not include "individuals who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state."

This list is by no means exhaustive, but includes the most common areas of tax law affected by the new ruling.

<u>Estate Tax – 26 USC § 2056</u>:

For those subject to the estate tax, all interests in the property transferred from a decedent to his or her surviving spouse are exempt from taxation.

<u>Social Security Survivor Benefits – 26 USC § 86:</u>

A deceased's same-sex spouse qualifies as a survivor and may receive Social Security Survivor's Benefits.

<u>Rate structure – 26 USC § 1</u>:

In many cases, married couples – whether filing jointly or separately – are required to pay more taxes than single individuals on the same amount of taxable income. In this case, being recognized as married may turn out to be a disadvantage for same-sex couples.

<u>Standard Deduction – 26 USC § 63</u>:

Because married same-sex couples can now file jointly, they can receive deductions for both spouses, even if only one spouse has an income.

1 *United States v. Windsor*, 133 S.Ct. 2675, (2013)(declaring DOMA's exclusion of same-sex marriages as an unconstitutional equal protection violation).

Taxes on Employee Health Benefits – 26 USC § 106:

a. The costs of health benefits which an employer subsidized or provided to a worker's same-sex spouse were previously included in the employee's gross income. Now the employee may exclude that benefit from his or her taxable income.

b. Because an employer's payroll tax liability is calculated based on his or her employees' taxable income, employers who offer health benefits to their employees' spouses can expect to see their payroll tax liability shrink for every employee whose same-sex spouse receives health benefits.

Retirement Savings Tax – 26 USC Chapter 1, Subpart D:

a. Previously, a deceased's retirement plan assets could be distributed to his or her surviving same-sex spouse either in a lump sum or based on the minimum distribution requirements of § 401(a)(9). These plan assets are now transferable into the surviving spouse's IRA or retirement plan and beneficiary spouses may delay taking required minimum distributions until six months after reaching age seventy.

b. Married same-sex spouses filing jointly may now also make contributions into each other's IRA's subject to the same guidelines as married couples.

Home Sale Tax – 26 USC § 121:

a. The tax exclusion for profit from the sale of a primary residence is $250,000 for single individuals and $500,000 for married couples filing jointly.

b. In order to qualify for the full exclusion, same sex couples had to own the home jointly. By filing a joint return, the ownership requirements need only be met by one spouse to qualify for the full $500,000 exclusion.

Gift Tax – 26 USC § 2523:

a. Gifts between spouses, in any amount, are exempt from taxation – same-sex couples will not face tax liability on gifts to each other.

b. The amount a married couple may give jointly to others without incurring tax liability is double the amount for single individuals.

Earned Income Tax Credit – 26 USC § 32:

a. Earned Income Tax Credits (EITC's) are federal tax subsidies for low-income workers and their families. Refundable tax credits are determined by a worker's earned income, marital status, and number of qualifying children. Married couples' EITC's are determined by their joint income.

b. Filing jointly may make same-sex couples eligible to receive credits for which they were ineligible as individuals, such as credits for qualifying children:

Before: A same-sex marriage involving a working spouse with no qualifying children and an unemployed spouse with a qualifying child would receive minimal to no credit. The family could receive a tax credit for the working spouse's income if he or she fell into a qualifying income bracket, but not for the qualifying child because those credits are only available to the child's employed legal parents.

After: If the same couple files jointly, the working spouse's income will be considered joint income, for which the credits will phase out more slowly. The family will be eligible to receive a credit for not only their joint income, but also for the child.

c. Combining incomes will allow some same-sex couples to maximize the credit, but may cause families to exceed the qualifying income level and lose eligibility for credits they received previously, either for earned income or for qualifying children:

Before: Employed same-sex spouses with children, filing as individuals, may each have fallen within an EITC income bracket and been eligible for tax credits.

After: Having to file jointly, their combined income may be too high to qualify for tax credits for their earnings and children.

Refunds for Previous Tax Years – 26 USC § 6511:

Same-sex couples may file amended federal tax returns for the past three years in which they were married if they wish to retroactively receive benefits such as credits or refunds which are contingent on the recipient having been married. This three-year period also applies to employers who may be able to obtain tax refunds for employment benefits, such as health insurance, which they provided to their workers' same-sex spouses prior to *Windsor*.

For additional questions on the impact Windsor will have on same-sex couples, visit the list of frequently asked questions and answers created by the IRS:

http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples

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