A First Look at Post-DOMA Case Law

Is *Tobits* Predictive of a Greater Extension of Benefits in Illinois?

By Lawrence Smith and Britta Sahlstrom

On July 29, 2013, just over one month from the date the U.S. Supreme Court struck down the federal Defense of Marriage Act (DOMA) in *United States v. Windsor*, a lower court issued a decision interpreting the Supreme Court case. In *Cozen O'Connor P.C. v. Tobits et al.*, the U.S. District Court for the Eastern District of Pennsylvania held that a same-sex spouse was entitled to federal death benefits based on the use of the term "spouse" in a law firm's Profit Sharing Plan under ERISA.

The couple at the heart of *Tobits*, Sarah Ellyn Farley and Jean Tobits, were a same-sex couple who resided in Illinois, but were legally married in Canada. From 2004 until her unfortunate death from cancer in 2010, Farley worked at Cozen O'Connor P.C., a Pennsylvania based law firm with an office in Illinois. While at Cozen O'Connor, Farley became eligible to participate in the Firm's Profit Sharing Plan (the "plan"). The plan required that upon the death of the plan participant, the firm pay death benefits to "the Participant's surviving Spouse" in the form of a Pre-Retirement Survivor Annuity. In the event that no spouse or otherwise designated beneficiary existed, the plan designated the participant's surviving parents as the next beneficiaries. Both Farley's wife and parents requested the benefits.

Ultimately, the court granted the benefits to Farley's wife, Jean Tobits. The decision turned on the term "Spouse" within the firm's plan. If Jean Tobits was Sarah Ellyn Farley's "Spouse," then Tobits recovered. If Tobits was not the "Spouse," then Farley's parents recovered. In light of Windsor, the *Tobits* court determined that the term "Spouse" was "no longer unconstitutionally restricted to members of the opposite sex…." The *Tobits* court further noted that "Windsor makes clear that where a state has recognized a marriage as valid, the United States Constitution requires that the federal laws and regulations of this country acknowledge that marriage."

Interestingly, neither Pennsylvania, where the headquarters for the firm is located, nor Illinois, where the couple resided, recognize same sex-marriage. When determining to grant the spousal benefits, the *Tobits* court concluded that Pennsylvania law was preempted by ERISA. In reviewing the issues under ERISA, the court chose to look to Illinois law for guidance.

What is the Status of Same-Sex Marriage in Illinois?

Illinois does not grant same-sex marriages, nor do they recognize the same-sex marriages legally entered into in other states. If fact, Illinois law states that if any individual prohibited from marrying under Illinois law travels to another state to contract a marriage prohibited in Illinois, "such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

Instead, Illinois grants civil unions and recognizes any same-sex marriage legally entered into in another jurisdiction as a civil union. In Illinois, these civil unions provide all the "obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses."

How Did the Court Interpret Illinois Law?

As the *Tobits* court recognized, the Supreme Court in *Windsor* reached its decision "because the state of New York recognized same-sex marriages as valid," including the Canadian marriage at issue in that case. However, as stated above, Illinois does not permit same-sex marriage or recognize same-sex marriages performed by other states.

Despite this fact, the *Tobits* court found "no doubt" that Illinois would consider Ms. Tobits to be Ms. Farley's "surviving Spouse." The court supported this conclusion by citing an Illinois probate court decision that declared Ms. Tobits to be Ms. Farley's sole heir as a party to a civil union. In a footnote addressing its evaluation of Illinois law, it appears the court concluded that since Illinois civil unions are statutorily granted all the protections and benefits afforded to spouses under Illinois law, that Ms. Tobits fit the definition of "Spouse" under the plan.

However, the plan defines "Spouse" as "the person to whom the Participant has been married throughout the one-year period ending on the earlier of (1) the Participant's annuity start date or (2) the date of the Participant's death." Notably, the *Tobits* court considered a valid Canadian marriage, even one officially unrecognized by Illinois, sufficient. In fact, the court appeared to consider Illinois' recognition of Ms. Tobits' and Ms. Farley's marriage as a civil union a de facto recognition of the marriage by the state. The court stated, "As this Canadian marriage [between Ms. Tobits and Ms. Farley] was deemed valid, albeit under the nominal title of "civil union" in Illinois, there can be no dispute that Ms. Tobits is a 'surviving Spouse' pursuant to the Plan."

The question remains: had Ms. Tobits and Ms. Farley been parties to a civil union, but not to a valid marriage in any state, would the court still consider them to be spouses entitled to federal benefits under Illinois law? Additionally, will Illinois follow the *Tobits* court's prediction and grant federal benefits to "Spouses" of foreign marriages despite not recognizing those marriages in the state?

What Does the Future Hold for Employers in Illinois?

Tobits is not precedent in Illinois, and therefore, courts and employers are not bound by the holding of this case. Currently, the U.S. Supreme Court case *United States v. Windsor* remains controlling, and same-sex couples residing in states that permit same-sex marriages or recognize same-sex marriages performed in other states may receive federal benefits. However, this does not necessarily implicate Illinois, as Illinois does not recognize same-sex marriage.

To date, under *Windsor*, a federal benefit granted to married couples only applies to couples whose marriages are legally performed in or recognized by their state of residence. However, where a benefit is simply granted to a "Spouse," *Tobits* indicates that courts may permit recovery by same-sex couples despite prohibitory same-sex marriage statutes when the state (1) recognizes and grants full spousal benefits to civil unions and (2) when, in granting the civil union, the state must first validate a marriage from a foreign jurisdiction.

Additionally, a currently pending Illinois Senate bill proposes striking the prohibition of same-sex marriage, repealing the statute which states that same-sex marriages are contrary to public policy, and recognizing the same-sex marriages of other states. Should this legislation pass, all married same-sex couples, whether married within Illinois or in another state that recognizes same-sex marriage, will be entitled to federal benefits if they continue to reside in Illinois.

Next Steps for Employers

Employers should carefully follow the progression of the law, and give special attention to the language used to designate beneficiaries and benefit recipients, both by internal plans and federal requirements. Given the pending legislation in Illinois and the language in Windsor, employers may be vulnerable to lawsuits if their benefit policies specifically deny coverage to same-sex couples. Post-*Tobits*, employers must also consider the possibility that broad terms like "Spouse" may include same-sex spouses.

As a result, employers should evaluate and update the language used in benefit policies so as to comply with federal law. Should the pending Illinois legislation be enacted, employers will be required to comply with all applicable federal agency requirements. Furthermore, employers should consider the risks of employee claims for back-due-benefits, whether retroactive tax refunds may be obtained, and whether benefits must apply to the children of an employee's same-sex spouse.

In light of *United States v. Windsor*, and *Cozen O'Connor P.C. v. Tobits et al.*, and in anticipation of pending Illinois legislation, employers may wish to consider providing same-sex marriage benefits to employees despite no legal requirement to do so at this time. At a minimum, employers should be ready to change benefit handbooks if same-sex marriage legislation is passed in Illinois.

Larry Smith is a founding partner at SmithAmundsen and Britta Sahlstrom is a 3rd year law student at the University of Wisconsin and a participant in the summer associate program at SmithAmundsen.