LGBTQ Insureds after Windsor and Obergefell

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U.S. v. Windsor
133 S.Ct. 2675 (June 26, 2013)

- Facts: the plaintiff, as surviving spouse of a same-sex couple, was denied the benefit of a spousal deduction as a result of the definition of “marriage” and “spouse” under DOMA. Plaintiff brought action for refund of federal estate taxes.

- At issue: DOMA, section III, which applied to all acts of Congress, defined “marriage” as between one man and one woman; defined “spouse” as person of the opposite sex.
Held unconstitutional because it violates basic due process and equal protection under the 5th Amendment. DOMA could not infringe on states’ rights, if that state recognized and permitted same-sex marriages.

Although the Court upheld states’ rights on the question of marriage, it did not get into the issue of whether states could ban same-sex marriages.

Had effect of forcing federal recognition of same-sex marriage and marriage-related benefits for same-sex marriages performed in states that sanctioned such marriage.
Facts: same-sex couples challenged voter-approved same-sex marriage bans in various states.

Held: same-sex marriage bans are unconstitutional under the due process and equal protection clauses of the 14th Amendment.

Held: marriage is a fundamental right that extends to same-sex couples.
Obergefell v. Hodges
135 S.Ct. 2584 (June 26, 2015)

- Held: fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

- Held: States must recognize lawful same-sex marriages performed in other States.
Prohibition Against Discrimination Based on Sexual Orientation

- July 15, 2015 EEOC Ruling: Holds for first time that discrimination based on sexual orientation is discrimination prohibited under Title VII of the Civil Rights Act of 1964. The Equality Act, a proposed federal law is in the works.

- **Florida**: No protection at state level. 11 counties and 23 cities protect. 56 counties do not.

- Miami-Dade’s Human Rights Ordinance prohibits discrimination for housing, jobs and public accommodations. Two years ago, bathroom protections added for transgender community. Miami Dade also prohibits discrimination for custom services, health insurance, health care, adoption, foster care.

- 2016: Florida tried to pass state-wide “religious freedom” bill but it failed.
Florida

- **Adoption**: 1977 statewide gay adoption ban. 2010: ban found unconstitutional in violation of Equal Protection. *In Re Gill*. Governor makes repeal official 5 years later.

- **Marriage**: 1997: Statutory prohibition on recognition of marriages from other jurisdictions. 2001: Denial of licenses to same sex marriage couples does not violate state’s equal protection for gender classifications. *Frandsen v. County of Brevard*.

- 2008 Voters approved Amendment 2, banning both same-sex marriage and civil unions. 62% approval.

- Fla. added criminal penalties on clerks that issue same sex marriage licenses
2014: Florida begins rejecting Amendment 2


- *Huntsman v. Heavilin*, July 17, 2014: 16th Cir., P’s denied marriage license by Monroe County clerk. Held Florida's same-sex marriage ban is unconstitutional under 14th Amendment. Florida violated the plaintiffs’ fundamental right to marriage under both due process and equal protection clauses. Denied motion on question of recognition of same-sex marriages from other jurisdictions.

- *Brenner v. Scott*, ND Fla, 8/21/14. Married in Canada. Held Fla’s constitutional and statutory same-sex marriage ban was unconstitutional and that state officials were to recognize marriages established outside of Florida. Injunction against State stayed pending appeal to 11th DCA, who also stayed the appeal pending decision from the S Ct in Obergefell. Stay denied by S Ct, 12/14
2014: Florida watershed year, continued

- T&E carveout: *Estate of Bangor*, 2001: Civil union in VT. Nonresident Personal Representative must be relative. Applying Amendment 2, spouse is not a relative. Court held statutory bans were unconstitutional as applied to this case and allowed surviving spouse to be PR.

- *Brassner v. Lade*, 17th Cir., 8/4/14: civil union in VT; Judge held denial of marriage rights to same-sex couples and refusal to recognize same-sex marriages from other jurisdictions was unconstitutional and granted divorce.

Post- Marriage Equality
Post - Marriage Equality:

- Obergefell should have ended the debate: Same-sex marriage bans held unconstitutional.
- Supreme Court Justice from Alabama: ordered magistrate judges to not issue marriage licenses to same-sex couples.
State of Florida: Pam Bondi and Rick Scott continued to resist efforts to fully recognize marriage equality.

Post - Marriage Equality


- State of Florida argued issues related to same-sex marriage were now moot.

- Judge Hinkle ruled “it cannot be said that the state defendants have unambiguously terminated their illegal practices,” including a “history of resistance” to recognizing the marriages of same-sex couples, the refusal to issue birth certificates that recognize same-sex parents, even after *Obergefell* and the legislature’s refusal to take action to remove the unconstitutional language from the books.... Therefore, the case was not rendered moot by *Obergefell*’s June, 2015 holding that marriage bans are unconstitutional.
Post - Marriage Equality

- Immigration: same-sex partners can now petition their spouse for U.S. residency.
- Birth certificates: same-sex parents allowed to be listed on birth certificates.
- Death certificates: same-sex spouse allowed to be listed in death certificates.
Post - Marriage Equality

- Education: same-sex spouse, who was a Massachusetts resident and married a Florida resident in Massachusetts, recognized as a Florida resident. *Dousset v. Florida Atlantic Univ.*, 184 So. 3d 1133 (Fla. 4th DCA 2015).

- Same-sex couples allowed to adopt. (Prior to marriage equality, Florida’s ban on same-sex adoption held unconstitutional in 2010 but remained on the books. Rick Scott signed the repeal of the ban into law on June 5, 2015.)
Post - Marriage Equality

- Over 200 bills introduced allowing discrimination against LGBTQ persons on the grounds of “Religious Freedom” $\rightarrow$ “I won’t bake a cake.” “I won’t issue a marriage license.”

- 2016: Fla tried to pass Protection of Religious Freedom bill (HB 401), but it was so broad, it did not even make it to the Senate for a vote.

- Federal Judge in Mississippi declares “religious freedom” law, HB 1523, signed into law by conservative Governor, unconstitutional. Clerks cannot deny marriage license based on religious objections. *Campaign of Southern Equality v. Phil Bryant*, Case No.3:14-cv-818-CWR-LRA (S.D. Miss. 6/27/16) (argued by Roberta Kaplan, anti-DOMA attorney)

- These laws are not needed. There is still no protection for LGBT against discrimination in the workplace or housing at the countrywide or Fla. State level but many counties do prohibit. 56 out of 67 counties will allow discrimination based on sexual orientation.
Post - Marriage Equality

- Bathroom bills: anti-transgender.
- Marion County School Board: students must use bathroom of the gender that is on their birth certificate.
- Hate crimes against LGBT have risen dramatically.
- Orlando: Pulse.
FLORIDA LGBT LANDSCAPE
VIDEO: Did insurance adjuster lowball gay couple's claim?

Dr. Holly & Ellen’s Property Damage claim

- Claim made 2012
- Married in Massachusetts in 2005, where same-sex marriage has been legal since 2004.
- Discuss: What issues do you see?
- Under this fact pattern, does it matter who the insured is?
- What does the policy say?
Sample Homeowner’s Policy

Property Coverages

Perils Insured Against

- We insure against risk of direct physical loss to property described in Coverages A (Dwelling) and B (Other Structures).
To top things off, Ellen gets into a car accident. She’s rear-ended and needs medical treatment. She presents Holly’s PIP insurance as payment, but her PIP insurer denies the claim because Ellen is not a resident relative because Florida does not recognize same-sex marriages. Ellen and Holly consult their attorney and they file suit against Holly’s auto carrier for PIP benefits and another suit against the adverse driver’s auto carrier for her bodily injury and the property damage to her car.
Ellen’s auto claims

- Can Ellen recover for the property damage to Holly’s car from the adverse driver’s policy?
- Can Ellen recover for her bodily injury from the adverse driver’s policy?
- Can Ellen recover PIP benefits under Holly’s policy?
1) What does the policy say?
2) Does the statute mandate greater coverage?

The court’s inquiry always “begins with a review of the plain language of the insurance policy as bargained for by the parties.” *Koikos v. Travelers Ins. Co.*, 849 So.2d 263, 266 (Fla. 2003).

When a statute mandates (e.g. “shall,” “must,” “required”) greater coverage than the policy provides, the statute is given effect over the plain terms of the policy. *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 395 (Fla. 2013).

“PIP and UM are statutorily mandated coverages. . . fire, life, and property” are not. *Flores v. AllState Ins. Co.*, 819 So.2d 740 (Fla. 2002)

A policy can provide greater but not less coverage than that mandated by statute. Id. In other words, parties can contract for greater coverage than mandated by statute, but cannot contract around a statutory mandate.
Adverse Driver’s Auto Policy: “Liability to Others” Section: when an insured is at fault for damages to third person (e.g. BI or PD), issues 1 and 2

[W]e will pay damages, OTHER THAN PUNITIVE OR EXEMPLARY DAMAGES, for bodily injury, property damage… for which an insured becomes legally responsible because of an accident arising out of the ownership, maintenance or use of an insured auto.

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When used in PART I - LIABILITY TO OTHERS, insured means:
1. You* with respect to an insured auto.
2. Any person while using, with your permission, and within the scope of that permission, an insured auto you own, hire or borrow

[all terms in bold are specifically defined in the policy and specifically exclude any and/or all common sense definitions]

* “You,” “your” and “yours” refer to the named insured shown on the Declarations Page.
Holly’s policy: Commercial Policy with a PIP Endorsement: $10,000 in medical care for all insureds regardless of fault, issue 3

[W]e will pay benefits which an insured is entitled to receive pursuant to the Florida Motor Vehicle No Fault Law, as amended because of bodily injury:
1) caused by an accident;
2) sustained by an insured; and
3) arising out of the ownership, maintenance or use of an auto.

“Insured” means:
a. If the named insured shown on the declarations page is a natural person:
   (i) you or any resident relative sustaining bodily injury while occupying an auto or when struck by an auto while not occupying a self-propelled vehicle;
   (ii) any person sustaining bodily injury while occupying an insured auto, temporary substitute auto, or trailer while attached to an insured auto; or
   (iii) any person, if a resident of Florida, sustaining bodily injury when struck by an insured auto or temporary substitute auto while not occupying a self-propelled vehicle; and
b. If the named insured shown on the declarations page is a corporation, partnership, organization or any other entity that is not a natural person:
   (i) any person sustaining bodily injury while occupying an insured auto or temporary substitute auto, or trailer while attached to an insured auto; or
   (ii) any person, if a resident of Florida, sustaining bodily injury when struck by an insured auto or temporary substitute auto while not occupying a self-propelled vehicle.
“Resident relative” means a relative of any degree by blood or by marriage who usually makes his or her home in the same family unit, whether or not temporarily living elsewhere.

“Dependent resident relative” means, when the named insured is a natural person,* a resident relative:

a. who receives more than one-half of his or her financial support from you; or
b. whom you claim as an exemption on your federal tax return.

*Florida corporations may live in houses and have teenage children, who take the corporation’s insured auto without permission.
PIP Mandates

Fla. Stat. 627.736(1) provides:

REQUIRED BENEFITS.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in the motor vehicle, and other persons struck by the motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to subsection (2) and paragraph (4)(e), to a limit of $10,000 in medical and disability benefits and $5,000 in death benefits resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle.
Fla. Stat. s. 627.736(4) provides:

(e) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:

1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.

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3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., if the relative at the time of the accident is domiciled in the owner’s household and is not the owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405.

4. Accidental bodily injury sustained in this state by any other person while occupying the owner’s motor vehicle or, if a resident of this state, while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with such motor vehicle, if the injured person is not:

   a. The owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405; or
   b. Entitled to personal injury benefits from the insurer of the owner of such a motor vehicle.
The plot thickens. More stuff we made up.

The driver of the adverse vehicle is Mark, who may have intentionally rear-ended Ellen. The accident occurs in front of Holly and Ellen’s home. Ellen and Mark get into a heated altercation on the front lawn, which is unkempt and wild with weeds and tall grass. Ellen threatens Mark with a plastic flamingo she uproots from the lawn. Frightened of being hit with the flamingo, Mark backs off and begins to walk away, when he trips on a clump of high, uneven grass, falls forward on his hands and face and loses a tooth. Mark, who suffers from carpal tunnel and wears partial dentures, consults a lawyer. He files suit against Ellen.
Liability Coverages

Coverage E - Personal Liability

-If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable.

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Definitions

“Insured” means:

a. You and residents of your household who are:

   (1) Your relatives; or

   (2) Other persons under the age of 21 and in the care of any person named above.

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

   (a)”Bodily injury” or

   (b) “Property damage”
In 2011, Holly and Ellen adopted Hope, a child with HIV, after a Florida appellate court ruled that the gay adoption ban was unconstitutional. The child was now falling ill due to the mold in the house. Hope is hospitalized with a respiratory infection directly arising from the exposure to mold. Holly called the insurance company to include Hope’s sickness as a result of the mold damage but was forced to speak to Mark, who told her that the insurer had no responsibility for Hope’s illness and that it was “God’s will;” “that’s what happens when you expose children to your sick lifestyle.”
In January 2014, Holly hired an attorney and filed suit against insurer for water damage and Hope’s respiratory illness... and potential bad faith claim. During this ordeal, Holly, who happens to be a medical doctor, missed a lot of time from work. The hospital she works at, Holy Saint, learned about the lawsuit and about her sexual orientation. Holly was then terminated from her employment. Holy Saint told her that she was terminated due to her many absences, but Holly felt it had to do with her sexual orientation now that it became public knowledge from the lawsuit against the insurer. Holly consulted with her attorney, who advised her she had no claim under federal or Florida law for discrimination based on sexual orientation.
All Suits Go to Mediation Simultaneously!
You are the mediator...
Seminar Participants’ Reaction
How does the June 26, 2015 Obergefell decision impact all pending claims?

- Holly’s claims against the insurer (property damage, bad faith, Hope’s bodily injury)
- Ellen’s PIP claim
- Ellen’s BI and PD claims against Mark
- Holly’s discrimination suit against Holy Saint
- Mark’s premises liability claim against Ellen
HOLLY HAS A HEART ATTACK AND FALLS INTO A COMA! BUT MEDIATION MUST GO ON!

- Scenario 1: She has a Power of Attorney appointing Ellen as her Designee
- Scenario 2: She does not have a Power of Attorney appointing Ellen as her Designee
Holly dies. Mediation goes on.

- Does there need to be a formal substitution of parties?
  - Scenario 1: She has a will appointing Ellen as her Personal Representative
  - Scenario 2: She does not have a will appointing Ellen as her Personal Representative
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