

## BigLaw Attys Praise High Court's Gay Marriage Rulings

*Law360, New York (June 26, 2013, 9:07 PM ET)* -- Life-changing, monumental, a historic day for human rights in America — BigLaw attorneys were effusive Wednesday in their praise for the U.S. Supreme Court's rulings in two gay marriage cases.

They commended the court's decision to strike down the Defense of Marriage Act, calling it a crucial first step to ensuring gay married couples receive equal protection under the law and the myriad federal benefits that come with it. And they welcomed the practical impact of the court's avoidance of a broad ruling on the constitutionality of state gay-marriage bans, which will allow gay couples to marry in California.

### **Michelle Anderson, Fisher & Phillips LLP**

"Employers with pension and 401(k) plans may be required to recognize same-sex spouses for purposes of determining surviving spouse annuities or death benefits and administration of qualified domestic relations orders. Federal income tax treatment of health and welfare coverage may also be affected, in that employees will no longer be taxed on the value of the coverage for a same-sex spouse that is not a federal tax dependent. Employers will also have to offer [Consolidated Omnibus Budget Reconciliation Act] continuation and [Health Insurance Portability and Accountability Act] special enrollment rights to same-sex spouses. Federal leave laws, such as the Family and Medical Leave Act, are also implicated."

### **Christian V. Badali, Weber Gallagher Simpson Stapleton Fires & Newby LLP**

"Overall, the [Hollingsworth v. Perry decision] applies in California only, whereas the [United States v. Windsor] case has a broader application and might even cause grounds for litigation in states that are silent or negative on the issue of same-sex marriage, spousal definition and benefits. The court states the unconstitutionality of DOMA is based upon its unjustifiable injury upon a politically unpopular group. Therefore, those citizens in states that do not recognize same-sex couples and benefits or are silent on the issue are still facing this discrimination for baseless grounds and the laws in those states still remain inconsistent with federal law, creating the 'two regimes of marriage' discussed by the Supreme Court."

### **John L. Barlament, Quarles & Brady LLP**

"One immediate impact for employers is when the change becomes effective. The Supreme Court's opinion did not specifically address this. But it is important. For example, a health plan generally must offer COBRA coverage to the 'spouse' of an employee if there is a COBRA event, such as termination of employment. Suppose an employee terminated coverage the day after the Supreme Court's decision. If that employee has a lawful same-sex spouse, the employer may have to offer COBRA immediately to that spouse. That could be difficult because employers may not yet have that information or the proper processes in place."

**Angela Bohmann, Leonard Street and Deinard**

"From a benefits perspective, a major question is the extent to which the decision is retroactive. If DOMA is unconstitutional, presumably it is unconstitutional from its passage years ago. Does this mean that employer pension plans are disqualified for having failed to offer survivor benefits to same-sex spouses for deaths that occurred years ago? What is the statute of limitations on such a claim? Can employers allow employees to make midyear election changes under cafeteria plans now that same-sex spouses are eligible for tax free medical benefits? We can hope that the IRS will provide guidance on at least some of these issues."

**Richard Broughton, University of Detroit Mercy School of Law**

"For now, states will still be permitted to ban same-sex marriages, and most do. And this arrangement is likely to create great confusion and frustration for same-sex couples around the country. I think the court will likely keep same-sex marriage on its radar, looking for that next case that will squarely present — with the proper parties — the broader question about the constitutionality of same-sex marriage bans everywhere. So this issue may very well get to the court again soon. The movement among state legislatures, though, suggests that lawmakers may well be ahead of the courts on this issue."

**Winston Calvert, Armstrong Teasdale LLP**

"The rulings' impact is felt on two levels. Most importantly, today's opinions emphatically declare to the world and to our children that the American Constitution respects the dignity, worth and equality of every person. The court's testimony to what it means to be free in a free country has also put the weight of the Supreme Court on the gas pedal of other lawsuits around the country that challenge discriminatory state laws."

**Hunter T. Carter, Arent Fox LLP**

"Today's ruling will be seen pro-equality by removing a major barrier to same-sex marriage. Opposition to marriage equality was exposed today as pure discrimination with no valid purpose, only meant to demean or harm same-sex couples. Courts and legislators in other countries often look to the U.S. for leadership on equal protection of the laws, and those weighing whether to legalize same-sex marriage will see it more favorably after today."

**Jennifer Collins, Nixon Peabody LLP**

"Today's DOMA ruling allows those same-sex married couples to be treated equally under federal law and to have access to the full benefits associated with marriage. Such recognition allows couples to, among other things, file joint federal taxes, access widow's or widower's Social Security benefits and utilize the unlimited marital deduction for estate and gift tax purposes. Same-sex married couples will now be treated as a unit for federal purposes — opposed to creating legal fictions to divide and segregate income, assets and liabilities. Same-sex spouses will no longer be taxed on the health care benefits as if they are strangers. The Prop 8 decision will allow the lower court ruling that Prop 8 is unconstitutional to go into effect and California will become the 13th state to allow same-sex marriage. These benefits are real and tangible and come with powerful intangible benefits — same-sex marriages will now be treated with dignity and respect by the government."

**Cathy Connors, Pierce Atwood LLP**

"The impact of the decision is clear: recognition of states' authority to adopt marriage equality. While many questions remain, a key point is reflected in [Justice Samuel Alito's] dissent. He identifies two different views of marriage: one grounded in 'conjugal' concepts, by which he seems to mean biology, and the other based on consent. He characterizes the majority ruling as recognizing the latter. That's exactly right. As the amici brief we filed on behalf of the American Historical Association and 20+ historians noted, consent has been a linchpin of the concept of marriage throughout our nation's history."

**Elizabeth Cooper, Fordham University School of Law**

"In the Windsor case, the court today recognized that marriages of same-sex couples and marriages of opposite-sex couples are inherently the same and, most importantly, that the federal government must recognize them as such. This will allow most same-sex married couples to enjoy the full panoply of over 1,100 rights and responsibilities provided by the federal government — from Social Security and immigration to taxes and family medical leave. Although the court declined to address the question of whether same-sex couples have a constitutional right to marry in Perry, that question will one day come squarely before the court and it will answer in the affirmative."

**Lisa Cukier, Burns & Levinson LLP**

"Don't pop a cork just yet — the fight for marriage equality has not yet concluded. Same-sex marriages are still largely a second-class status. Even with today's ruling, the federal government will still deny same-sex marriages and will still not recognize the marriages of same-sex spouses who marry in states that permit same-sex marriage, and then relocate to or travel to any of the 36 other states that have state DOMA laws. Until same-sex marriage is portable across state lines, it is a second-class status. And separate is not equal."

**Elizabeth B. Davis, Thompson Hine LLP**

"The decisions came down exactly as those of us watching anticipated they would. However, it remains unclear whether they will have any meaningful effect on people who are legally married in one jurisdiction but reside in a state that does not recognize same-sex marriages. That is the next tide of cases — challenging disparate treatment, even under federal law, from state to state. At risk are rights such as inheritance, treatment under federal tax laws and Social Security and many others."

**Kelly M. Dermody, Lieff Cabraser Heimann & Bernstein LLP**

"Today is a historic day for human rights in America. While there is still much work to do to ensure that all lesbian, gay, bisexual and transgender people enjoy equality under the law in every state in the country and on issues far beyond marriage, today's Supreme Court DOMA ruling illustrated a seismic shift in societal recognition of the inherent dignity of same-sex relationships. While the Prop 8 ruling stopped short of a complete constitutional victory, in California, we rejoice that the marriage licenses will now issue."

**B. Dane Dudley, Day Pitney LLP**

"The Windsor ruling greatly impacts the trusts and estates practice because attorneys can now give same-sex married couples who reside in states that recognize same-sex marriage the same federal estate and gift tax advice that they give heterosexual married couples. These same-sex couples are now able, among other things, to take advantage of the unlimited federal estate and gift tax marital deduction and to claim any unused federal estate tax exemption of a deceased spouse. However, given the limited scope of the Hollingsworth v. Perry ruling, the couples must beware that if they move to a state that does not recognize same-sex marriage, some of those federal tax benefits may disappear unless the federal government clarifies that marital status is determined based on where the marriage was celebrated rather than where the couple resides."

**William T. Eveland, Arnstein & Lehr LLP**

"Today's decisions are monumental. By striking down DOMA, the court ensured that the federal government can no longer refuse to recognize same-sex marriages. Protections involving health care, taxes, employment and retirement benefits are now available to married same-sex couples. Additionally, the court's decision in the Prop 8 case will soon restore same-sex marriage in California. Although much work remains with the end of DOMA and the reimplementing of equal marriage in California, today's decisions provide a road map for equality for the LGBT community."

**Mark Fleming, WilmerHale**

"At long last, same-sex couples who are lawfully married under the laws of Massachusetts, New York and other states will have their marriages recognized under federal law as well. This is critical, because over a thousand federal laws turn on marital status. While the court did not decide the merits of the Proposition 8 challenge, the issues of equality raised in that case are highly likely to reach the court again soon. Meanwhile, the court's DOMA decision is a major victory for equality, reason and common sense."

**Ingrid Fredeen, NAVEX Global**

"The decision may elicit emotional responses within the workplace, leading to harassment issues. ... Companies need to help employees understand that expression of a position on gay marriage is not permission to engage in intolerant or disrespectful speech. Personal opinions should not be expressed if they are offensive — and doing so can violate the organization's harassment policy. Harassment training should be a priority post-DOMA because it teaches employees about the limits on expressing personal beliefs and opinions, and explains the consequences for violating policy, ultimately mitigating liabilities."

**Ara Beth Gershengorn, Foley Hoag LLP**

"Windsor is life-changing. But how quickly remains to be seen. In states recognizing same-sex marriage, it can happen immediately. In the many states banning marriage equality, it may take longer. Many federal programs look at state of residence to decide if someone is married. Even after Windsor, a same-sex couple married in Massachusetts but living in Texas is not married in their place of residence and is deprived of many federal benefits. But if federal programs are directed to look instead at the 'place of celebration' — where the marriage took place — Windsor's impact will be much broader much more quickly."

**Ruth E. Harlow, Pepper Hamilton LLP**

"The court has rightly told the federal government that it must stand aside and recognize the equal dignity of all marriages conferred by the states. The Windsor opinion continues to expand the liberty and equality rights established by [Lawrence v. Texas] 10 years ago."

**William J. Hibsher, Bryan Cave LLP**

"The court ruled that by denying recognition to same-sex couples who are legally married, DOMA discriminates against them. This decision means that same-sex couples who are legally married must now be treated the same under federal law as married opposite-sex couples. By premising this landmark ruling on equal protection grounds, the court invites a next wave of court challenge to numerous laws, state and federal, which discriminate against LGBTQ people."

**James Holmes, Sedgwick LLP**

"What a great day for the LGBT community and for all of us who are working for the cause of inclusion and diversity! Brick by brick we are removing the vestiges of animus and discrimination against lesbians, gays and transgenders. Today's Supreme Court decisions eliminate federal bias against same-sex marriage and allow for such marriages to resume in California. What has been even more exciting is realizing all of the support from our straight allies in the cause of LGBT equality — here at Sedgwick, the legal community and the ABA."

**Rana Jazayerli, Dilworth Paxson LLP**

"From an immigration perspective, this ruling could have a very significant impact. U.S. citizens in heterosexual marriages to foreign nationals have always been able to petition to bring their spouse to the U.S. as a permanent resident. However, same-sex couples have never been accorded this right under U.S. immigration laws, even where a couple is legally married under the laws of a U.S. state. This has meant that many gay U.S. citizens have had to choose between giving up being with the person they love or giving up living in the U.S. With the Supreme Court's DOMA decision, it appears that [U.S. Citizenship and Immigration Services] will no longer be able to deny same-sex couples this federal right."

**Lynn Kappelman and Laura Maechtlen, Seyfarth Shaw LLP**

"There are significant implications for employers following the Supreme Court's decisions. Multistate employers now face a nonuniform mixture of state and federal law that impacts their provision of benefits and employment protections. In states where same-sex marriage is legal, employers will likely face a flood of questions regarding whether and how employers are required to recognize lawful same-sex marriages, including issues such as provision of, design and operation of employee benefit plans; how payroll is taxed; availability of certain leave entitlements; applicability of COBRA continuation; and applicability of nondiscrimination statutes that include marital status as a protected basis."

**Susan Katz Hoffman, Littler Mendelson PC**

"The Windsor decision will have a substantial impact on the design and operation of benefit plans. An employee with a valid same-sex marriage will be treated as having a spouse for any benefit plan referring to 'spouses.' Employers can provide spousal medical benefits without imputing income to the employees. Same-sex spouses will receive spousal status for purposes of 401(k) and other retirement plans. But there are many open questions. What if the couple lives in a nonrecognizing state? Can the employer still define 'spouse' narrowly? Is the decision retroactive? Will domestic partnerships be treated as marriages for federal purposes?"

**Daniel Lange, Katten Muchin Rosenman LLP**

"Today's ruling should have a broad impact on employers in states that recognize same-sex marriage. For example, for employers in those states who treat same-sex and opposite-sex spouses as equal under their medical plans, today's ruling should cause those benefits to have the same tax-favored treatment for both opposite-sex and same-sex couples. Before today's ruling, same-sex couples were taxed on the value of a same-sex spouse's medical coverage. For self-insured employers in those states who deny medical coverage to same-sex spouses but cover opposite-sex spouses, today's ruling may signify the need to cover same-sex spouses or risk discrimination-based lawsuits."

**Rita Lin, Morrison & Foerster LLP**

"First, though the court did not formally adopt heightened scrutiny, Windsor emphasizes that laws that single out gay people for 'moral disapproval' must be subject to particularly careful review. That raises the bar above traditional rational basis scrutiny. Second, the court recognized that refusing the benefits of marriage to same-sex couples demeans their relationships, humiliates their children and treats them as second-class citizens, and that there is no legitimate basis for that discrimination. That logic applies just as clearly to state refusals to provide equal treatment to same-sex couples."

**Lisa A. Linsky, McDermott Will & Emery LLP**

"This is the first time the highest court has ruled in cases involving our relationships and families, and in so doing, has changed the course of history by striking down DOMA. On this day, the 10th anniversary of the landmark decision in Lawrence v. Texas, [Justice Anthony Kennedy] has again advanced equality by writing the majority decision in the Windsor case. With 13 states in the country now permitting the freedom to marry, the court essentially validated the relationships of same-sex couples, and reminded us of the values on which our country was founded. June 26, 2013, is the day that equality prevailed."

**Paul Linton, Thomas More Society**

"The court's decision in Hollingsworth, determining that the proponents of Proposition 8 had no legal standing to appeal the judgment striking it down, obviously has no effect on the constitutionality of same-sex marriage bans outside of California. The court's decision in Windsor cannot be understood apart from federalism concerns, i.e., the federal government refusing to recognize marriages that are valid under state law. Both by its reasoning and its express statements, Windsor does not address whether states may prohibit same-sex marriages."

**Lawrence S. Lustberg, Gibbons PC**

"As counsel for New Jersey plaintiffs seeking marriage equality, we applaud today's decision. Windsor eviscerates any argument that couples relegated to civil unions are treated equally to those who can marry. The latter, whether same- or opposite-sex, receive over 1,000 federal statutory benefits, but because New Jersey will not let same-sex couples marry, they are denied these rights. That is, same-sex couples in New Jersey are not treated equally, just because they state has chosen to limit them to civil unions. We are seeking emergent relief and are confident that the courts of New Jersey will not let this injustice stand."

**Mimi L. Magyar, Lerch Early & Brewer Chtd.**

"When states approved marriage between same-sex couples, they couldn't guarantee federal benefits because that was contrary to DOMA. This task was left to the Supreme Court. Hollingsworth involved the right to marry under California law. Because the court dismissed the appeal for lack of standing, the constitutionality of same-sex marriage was not decided and shouldn't affect couples in other states. Windsor's question does affect same-sex couples permitted to marry legally. In striking DOMA's definition of marriage, ironically the court cleared the way for same-sex couples to share the same benefits as heterosexual couples: marriage AND divorce."

**Christopher Man, Chadbourne & Park LLP**

"The impact of the decision is sweeping. It means that more than 1,000 federal statutes that address the rights and responsibilities of married couples must be read to include same-sex couples who legally marry under the laws of 13 states and the District of Columbia. That will have profound impacts on legally married gay and lesbian couples on matters like Social Security, taxation and veteran's benefits. Just as importantly, it ensures the federal government will not undermine the dignity these legally married couples are entitled under state law."

**Vicki Nielsen, Ogletree Deakins Nash Smoak & Stewart PC**

"As a result of the Windsor ruling, same-sex spouses should be eligible for benefits that have been provided on a tax-free basis to opposite-sex married couples. Furthermore, employers should no longer be required to impute income on the value of such benefit coverage for employees' nondependent same-sex spouses or continue to withhold and pay [Federal Insurance Contributions Act] taxes on the imputed amount. In addition, the value of spousal health and other fringe benefits that were included in wages because of DOMA represents a wage overstatement, presumably entitling employers and employees to FICA tax refunds and entitling employees to income tax refunds."

**Bret Parker, New York City Bar Association**

"The New York City Bar Association applauds the Supreme Court's decision to invalidate DOMA on Fifth Amendment grounds. We have long maintained that DOMA is unconstitutional and are pleased that same-sex married couples will now be afforded the full range of marital rights and benefits under federal law."

**Wendy Parmet, Northeastern University School of Law**

"Seen in conjunction with yesterday's decision invalidating the key enforcement provision of the [Voting Rights Act], as well as its affirmative action decision last week, it becomes clear that the current Supreme Court is in the process of significantly changing our understanding of equal protection. Under this court, equal protection is being severed from its historical roots, aimed at securing the rights of African-Americans and historically disenfranchised groups. Instead, it is being applied in a more ahistorical and formal manner, which may open the door to equality for some but close it for others."

**Andrew Pincus, Mayer Brown LLP**

"The effect of the ruling is to leave in force the district court's decision declaring Prop 8 unconstitutional. That ruling was framed broadly to apply throughout California. It is not completely clear whether the district court had the power to issue such a broad ruling, but the Supreme Court's decision means that the defenders of Proposition 8 cannot raise that issue and it appears unlikely that the relevant California officials will do so. Although the court's ruling addresses only Prop 8, its reasoning could well have a broader impact on the ability of private parties to bring lawsuits under both state and federal law."

**Steven M. Rabinowitz, Pryor Cashman LLP**

"The same-sex marriage debate is now effectively dead in the Congress. The battle, however, remains very much alive in the states, since the Supreme Court, in its DOMA decision, has signaled that it will support a state's right to either allow or bar same-sex marriage. The court's Prop 8 decision will inform that battle, as it will keep those without a personal or governmental stake effectively on the sidelines. But the battle over same-sex marriage will continue to rage; today's pair of decisions merely limit the eligible combatants and set the stage for battle in the states."

**Sarah Riskin and Katie Connelly, Nilan Johnson Lewis PA**

"From an employer perspective, the Windsor decision simplifies the administration of benefits for employees in same-sex marriages. Employers in states with same-sex marriage may also see a more diverse workforce, as the benefit of living in a state that recognizes same-marriage now carries greater significance due to federal recognition. These employers may also see decreased mobility if employees resist relocation to states where their marriages will not receive recognition. The primary impact for employers of Perry is that California employers will see additional requests for spousal benefits now that same-sex couples are once again able to marry."

**William D. Rohr, Carlton Fields**

"It is important to note that United States v. Windsor only overturned Section 3 of DOMA which defines marriage as between a man and a woman. Section 2 of DOMA, which allows states that do not recognize same-sex marriages to refuse to recognize same-sex marriages performed outside of said state, is still valid law. Therefore, employers may have to make different determinations for federal laws/benefits vs. state laws/benefits in states such as Florida, which do not recognize same-sex marriages performed outside of the state."

**Jerome C. Roth, Munger Tolles & Olson LLP**

"As counsel to scores of amici, I was overwhelmed by three emotions. First, pride in the result of the efforts of many lawyers working together in a coordinated, compelling way. Second, gratitude to the parties, to the court and to our society for debating and resolving issues without the rancor and violence plaguing other nations. Third, joy and awe that, for the first time in my 55 years, I am finally fully adult, confronting the fundamental question other adults face — should I ask my partner in life to marry me. Getting to ponder that question makes me feel older and more responsible, yet younger and giddier."

**George W. Schein, Thompson Hine LLP**

"The Supreme Court's decision will have a significant impact on employee benefit plans. In the retirement plan context, employers will be required to recognize same-sex spouses for certain purposes. In the welfare plan context, the decision will simplify life for employers who provide welfare benefits to same-sex spouses by eliminating the requirement to tax benefits to same-sex spouses differently from benefits to opposite-sex spouses. The Supreme Court's decision leaves many questions to be resolved by subsequent regulation and undoubtedly litigation. Conspicuously unresolved is the interplay between the states that recognize same-sex marriage and those that do not."

**Nonnie Shivers, Ogletree Deakins Nash Smoak & Stewart PC**

"Today's significant ruling will likely spur further expansion of protections for LGBT individuals. Employers must keep abreast of these rapidly expanding protections under federal, state and local laws for not only gay, lesbian, bisexual and transgender individuals, but also covering gender identity and gender expression. Employers should expect changes to federal laws impacting the workplace based on today's rulings, in particular the inclusion of same-sex partners in leave considerations under the Family and Medical Leave Act and potentially sponsorship of same-sex partners for immigration purposes, as well as expanded state and local protections."

**Paul Smith, Jenner & Block LLP**

"The Supreme Court's decision in Windsor recognizes correctly that the Defense of Marriage Act serves no rational federal purpose and was enacted only to demean those married couples who happen be same-sex couples. As Justice Kennedy explains, the Constitution does not allow the government to discriminate solely based on a desire to label some people, or some marriages, less worthy than others."

**Todd Solomon, McDermott Will & Emery LLP**

"There are many employee benefit implications that will impact private employers now that Section 3 of DOMA has been found unconstitutional, rules that will only apply to same-sex spouses who were married in and live in a state where same-sex marriage is legal. Federal laws governing employee benefit plans will require employers to treat employees' same-sex and opposite-sex spouses equally for purposes of the benefits that the employer extends to spouses. The big open question is what happens to same-sex spouses who live in Florida or Texas, for example. No one can answer the question until additional guidance is issued."

**Catherine Stetson, Hogan Lovells**

"On the federal level, DOMA is no more; the federal government will have to dismantle the many programs, codified or enforced in practice, that discriminate against legally married gays and lesbians. On the state level, California's Proposition 8 is no more, but the court's ruling potentially leaves power in the hands of state officials to enforce — or decline to enforce — state laws with which they disagree. And on the Supreme Court level, all eyes remain on Justice Kennedy. With Perry dismissed, an army of pundits awaits Justice Kennedy's opinion in the next case — a merits challenge to a state anti-gay-marriage law — to learn which of his developing narratives wins out in the end: states' rights or human rights."

**Bryan Sullivan, Early Sullivan Wright Gizer & McRae LLP**

"The Supreme Court's decision on same-sex marriage today is a big step forward in ensuring equality for all under the law. The Defense of Marriage Act and California's Proposition 8 were discrimination codified in law and represented the worst in us as a society by treating same-sex couples and homosexuals as a lesser class of people undeserving of the rights, benefits and protections of the law."

**Jeff Trachtman, Kramer Levin Naftalis & Frankel LLP**

"The Windsor decision is a huge step forward for equality. It reflects a broad shift in society towards acceptance and respect for the relationships of same-sex couples. Our amicus brief demonstrated that shift among mainstream religions, but it cuts across all institutions of American society."

**Susan von Herrmann, Schiff Hardin LLP**

"The Windsor case provides a safe harbor for same-sex married couples who are living in states that recognize same-sex marriage. Those spouses will clearly have the federal rights of marriage, including the right to transfer property to each other during life and after death without incurring gift or estate tax. The picture is less clear for married couples living in nonrecognition states and couples who are in marriage equivalent relationships. All same-sex couples should revisit their estate plans to determine whether adjustments are necessary to take advantage of the fact that certain federal benefits now may apply to them."

**Scott Weston, Fox Rothschild LLP**

"In this ruling, the Supreme Court was able to avoid any discussion regarding whether same-sex marriage is a constitutionally protected 'equal protection' right that would apply to all states. Unfortunately, given that a majority of the states has not approved same-sex marriage, same-sex couples will continue to have to move to states that have approved of same-sex marriage in order to marry and to divorce as well. However, given the decisions of our highest court, the future looks bright for same-sex couples."

--Editing by Katherine Rautenberg.