

## The Retro-Effect: Outstanding Issues in Qualified Plan Recognition of Same-Sex Marriage as Highlighted by *Schuett v. FedEx*

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On January 4, 2016, an order issued by U.S. District Judge Phyllis J. Hamilton in *Schuett v. FedEx Corp.*, (No. 15-CV-0189-PJH, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016)) brought light to a long anticipated question surrounding the retroactive application of the United States Supreme Court opinion in *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

When the Supreme Court handed down its opinion in *Windsor* on June 26, 2013, holding Section 3 of the Defense of Marriage Act ("DOMA") unconstitutional and requiring the federal government to recognize same-sex marriages entered into under state law, questions immediately began stirring in the qualified plan community as to the potential retroactive application of the decision. Federal recognition of same-sex marriage meant qualified plans would need to recognize same-sex marriages for Plan purposes (for example, qualified joint and survivor annuity and spousal consent requirements), but there was a lack of clarity as to whether *Windsor* would be applied retroactively. A determination by the U.S. Supreme Court that a law is unconstitutional generally means that the law is not only void going forward, but also that the law is and always has been void. This raised the concern that if *Windsor* invalidated all plan-related decisions since 2004 (when Massachusetts became the first state to permit same-sex marriages) with respect to participants with same-sex spouses, qualified plans might have to take corrective action.

The Internal Revenue Service ("IRS") addressed *Windsor's* retroactivity in April of 2014, issuing [Notice 2014-9](#), providing that qualified plans would not be required to apply *Windsor* prior to June 26, 2013 (the date of the *Windsor* opinion) for federal tax purposes. This served as welcome guidance for Plan sponsors concerned over the retroactive effect of *Windsor* on their plans. However, the Notice only protects plans for federal tax purposes (e.g., the qualified status of the Plan), not from civil actions brought under Title I of ERISA to enforce a benefits claim by a participant in a same-sex marriage who retired before June 26, 2013 (or the surviving spouse of such a participant who retired or died before that date). Stacey Schuett filed such a claim in January of 2014.

Stacey Schuett and Lesly Taboda-Hall began living together as a couple in the mid-1980s. The couple entered into a registered domestic partnership in California in 2001, and a marriage in California on June 13, 2013. At the time the couple was married in California, the marriage was not recognized due to a state Constitutional amendment barring same-sex marriage that was held invalid shortly thereafter. Nevertheless, the marriage was confirmed by the California Superior Court on September of 2013 as having been validly entered into on June 13, 2013. Taboda-Hall

passed away on June 16, 2013, ten days before the *Windsor* decision. At the time of her death, Taboda-Hall had been a FedEx Corporation (“FedEx”) employee for 26 years, and was fully vested in the FedEx Corporation’s Employees’ Pension Plan (the “FedEx Plan”).

Under the terms of the FedEx Plan, a Qualified Pre-Retirement Survivor Annuity (“QPSA”) is to be paid to the surviving spouse of a fully vested participant who dies before retiring. At the time of Taboda-Hall’s death, the Plan defined “Spouse” by applying a DOMA definition of marriage (a union between one man and one woman as husband and wife). Schuett submitted a claim as Taboda-Hall’s surviving spouse for a QPSA on November 26, 2013. The claim was denied by FedEx on the grounds that at the time of Taboda-Hall’s death, the Plan defined spouse by incorporating the DOMA definition of marriage. Following a denial of her appeal, Schuett filed a lawsuit in January 2015 against FedEx, the Plan, and the FedEx retirement committee, asserting three causes of action — (1) a claim for benefits; (2) a claim for breach of fiduciary duty for failure to administer the Plan in accordance with applicable law (under a theory that *Windsor* must be applied retroactively); and (3) a claim for breach of fiduciary duty for failure to inform and/or providing misleading communications (under a theory that had FedEx clearly communicated its position on marriage, Taboda-Hall could have retired prior to her death and Schuett may have received survivor benefits as a non-spouse beneficiary). On October 7, 2015, FedEx filed a motion for judgment on the pleadings.

Significantly, the court denied FedEx’s motion with respect to the claim for breach of fiduciary duty for failure to administer the Plan in accordance with applicable law, finding that Schuett had adequately alleged that FedEx violated Title I of ERISA by acting contrary to applicable federal law and failing to provide a benefit mandated by ERISA. In reaching this conclusion, the Court made several observations:

- The Supreme Court held in *Windsor* that the Equal Protection Clause of the Fourteenth Amendment prevented the federal government from refusing to recognize same-sex marriages entered into under the law of a state, and the decision in *Windsor* was applied retroactively to provide relief for the plaintiff.
- A Technical Release from the Department of Labor (“DOL”) issued on September 18, 2013 (Technical Release 2013-04), provided that the DOL would interpret the term “spouse” to include a same-sex spouse legally married in any state or foreign jurisdiction, thus providing that ERISA’s mandatory benefit provisions apply to all spouses.
- The FedEx Plan document provided that if any provision of the Plan were deemed to be at variance with or contrary to any law of the United States, the law of the United States would be deemed to govern.
- FedEx was not able to argue any basis upon which the court could determine that ERISA’s statutory scheme and regulations limited FedEx’s ability to retroactively apply *Windsor* absent an amendment to the plan to provide for such application.

The Court dismissed Schuett’s two other causes of action, finding that it was not an abuse of discretion for FedEx to interpret its Plan to bar Schuett from receiving benefits, and that Schuett was not entitled to pursue her claim for breach of fiduciary duty in providing misleading communications because she was not a plan participant and had no claim as a beneficiary of the non-spousal benefits in question.

Importantly, the Court's order is not a final determination — it simply allows Schuett to continue to pursue her claim against FedEx.

The *Schuett* case highlights the reality and potential impacts of a retroactive application of *Windsor*. Plan administrators and fiduciaries should remain aware of the possibility of claims brought under Title I of ERISA to enforce a benefits claim by a participant in a same-sex marriage who retired before the *Windsor* decision (or the surviving spouse of such a participant who retired or died before the *Windsor* decision). Furthermore, Plan administrators should be aware that plan amendments that provide for recognition of same-sex marriages beginning on the date of the *Windsor* decision will not protect the plan and fiduciaries from Title I claims stemming from events prior to the *Windsor* decision. If you have questions regarding such claims, please contact the Trucker Huss attorney with whom you normally work.

JANUARY 2016