GDB LAW

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LEGAL UPDATE

Providing current information about legal developments for our clients and friends.

Privacy in the Digital Age?

An Update: The Supreme Court Examines Cell Phone Tracking and Privacy Rights

By: Adam M. Felsenstein, Esq.

In the Winter 2018 edition of this Newsletter, I wrote an article regarding a case pending in the United States Supreme Court regarding whether the government needs a warrant to collect cell tower location data maintained by a cellular carrier. In *United States v. Carpenter,* the Supreme Court was determining whether cell phone location data, obtained directly from a cellular carrier without a warrant, could be used against a defendant in a robbery trial. On June 22, 2018, the Supreme Court reached a decision on this important case which explores the contours of privacy in the digital age.

Mr. Carpenter had been convicted of armed robbery in Ohio and Michigan. Critical to his conviction was the Government's use of cell phone tower location data which placed Mr. Carpenter near the scene of two robberies at the approximate times when the crimes occurred. These records were obtained directly from the cellular carriers without a search warrant.

The Government argued that it did not need a warrant to obtain the information from the carrier because it was shared voluntarily by Mr. Carpenter's use of the phone. Accordingly, Mr. Carpenter could not have had a reasonable expectation of privacy in the records of his location data. Mr. Carpenter maintained that even though his location data was in the possession of the cellular company and was shared voluntarily with the cellular carrier, he had a reasonable expectation of privacy in his location. This rendered the collection and use of the data by the government without a warrant violative of the Fourth Amendment prohibition on unreasonable searches and seizure.

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Traditionally, records or information that a defendant voluntarily shares with a third party are not covered by the Fourth Amendment protections. This is known as the "third-party doctrine" first articulated by the Supreme Court in *United States v. Katz* over forty years ago. In Katz, the Court found that a defendant has no reasonable expectation of privacy in records that it voluntarily gives over to a third party. Obviously there have been dramatic changes in technology since the Fourth Amendment was adopted in 1791 and the Katz case was decided in 1967.

On June 22, 2018, the Supreme Court rendered its decision in the Carpenter case. Noting "seismic shifts in technology," Justice Roberts, writing for the majority (Justice Ginsburg, Justice Breyer, Justice Sotomayor and Justice Kagan), found that law enforcement officials do need to obtain a warrant before they can collect cell tower location data about a defendant.

In reaching this decision, Justice Roberts had to reconcile the "third-party doctrine" with current technology. When Katz was decided in 1967, the Supreme Court could not have

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ABOUT THE AUTHOR

Adam M. Felsenstein *is a partner at Gallet Dreyer & Berkey, LLP. An experienced litigator and trial lawyer, Mr. Felsenstein's practice focuses on commercial litigation and white collar defense. He has substantial trial experience in state and federal courts in a variety of complex business and criminal matters. Mr. Felsenstein can be reached at amf@gdblaw.com.*

Your Right to Counsel is Immediate

By: Roger L. Stavis, Esq.

I am often asked by potential clients facing criminal investigations whether retaining counsel will cause law enforcement agents to suspect that those clients are guilty. The answer is that it matters little what law enforcement agents suspect or think. The earlier defense counsel enters the investigation, the better positioned the client will be to defend against potential charges.

The New York Constitution, unlike the United States Constitution, extends the right to counsel to the pre-charge criminal investigation phase. See *People v. Skinner,* 52 N.Y.2d 24 (1980). But can the fact that a suspect retains counsel at such an early phase of the process be introduced by the prosecution at a potential trial as evidence of "consciousness of guilt?" Since this right exists, one would think that a suspect exercising it could not be penalized for doing so.

Incredibly, in a case I argued earlier this year, *People v. Suero,* _ A.D.3d _ (1st Dept., decided 3/29/18), the New York County District Attorney's office took the position that the defendant's text messages seeking to retain counsel demonstrated "consciousness of guilt." According to the District Attorney's brief: "…there is no question that defendant's text evinced consciousness of guilt." The trial court agreed and the evidence in the form of text messages regarding the defendant's efforts to retain counsel following a shooting incident figured prominently at trial.

Appeal to First Department

On appeal to the Appellate Division, First Department, however, the court made crystal clear that exercise of this constitutional right to counsel cannot be used against a defendant at trial. According to the First Department: "The People should not have been permitted to introduce, as evidence of defendant's consciousness of guilt, a text exchange the day after the crime in which defendant indicated that he needed money 'just in case for a lawyer.' This evidence was an improper infringement of defendant's right to counsel." While the appellate court ultimately found the error to be "harmless," its definitive statement of principle will serve as notice to prosecutors and courts not to attempt to tar a defendant at trial with his or her exercise of this important constitutional right.

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By protecting the right to counsel during the investigatory or even pre-investigatory stage of a criminal matter, the First Department has ensured that individuals concerned that they may have criminal exposure can seek out an attorney without fear that by doing so they are creating evidence that may ultimately be used against them.

ABOUT THE AUTHOR

Roger L. Stavis *is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's White Collar Criminal Defense Practice. Mr. Stavis is one of New York's most experienced and respected criminal defense attorneys. He has tried more than 100 cases to verdict in state and federal courts, many of which were high-profile, complex, multi-defendant cases. He has also argued more than 100 appeals in various state and federal courts around the country. Mr. Stavis can be reached at rls@gdblaw.com.*

Time to Revisit Some Key Provisions of the Tax Cuts and Jobs Act

By: David N. Milner, Esq.

As we approach the first anniversary of the passage of the Tax Cuts and Jobs Act, I thought it might be appropriate to revisit some of the Act's provisions and see how the changes may affect the preparation of income tax returns for the first tax year directly impacted by the Act. Except as indicated, these changes apply to income tax returns filed for the 2018 through 2025 tax years.

BUSINESS TAX CHANGES:

Corporate Income Tax Rate: Permanently reduced to 21%.

Section 199A Deduction: This new section provides for a deduction equal to 20% of an individual's "Qualified Business Income" which includes income earned by taxpayers who are self-employed, partners in partnerships, members of LLCs and shareholders of corporations that have elected to be taxed as Subchapter S corporations, but excludes W-2 wages. There are several limitations which apply to individuals filing a joint tax return that have taxable income greater than $315,000 ($157,500 for single individuals) and income earned by certain professionals, including lawyers, accountants, doctors and most other licensed professions.

Partnership Terminations: The former rule that treated partnerships where greater than 50% of the interests in the partnership's capital or profits were sold or exchanged within a 12-month period as having been technically terminated, has been repealed. This is a permanent change.

Business Interest Deduction: Now only allowed to the extent of 30% of EBITDA for the 2018 through 2021 tax years and to 30% of EBIT for subsequent years.

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Carried Interests: Gains from carried interests (a defined term) held for less than 3 years will be treated as short term capital gains rather than long term capital gains.

Business Losses: Business losses of non-corporate taxpayers can only be used to offset $250,000 ($500,000 for individuals filing jointly) of non-business income. Any excess loss can be carried forward as part of the taxpayer's net operating loss deduction.

INDIVIDUAL INCOME TAX CHANGES:

Individual Income Tax Rate: Maximum rate reduced to 37%.

State and Local Tax Deduction: Limited to $10,000. This limitation applies to both income and real estate taxes.

Mortgage Interest: Only deductible to extent of first $750,000 of indebtedness secured by a mortgage on debt incurred after the effective date of the change. Mortgage interest on debt of up to $1,000,000 secured by mortgage prior to the effective date of change can continue to be deducted.

Standard Deduction: Increased to $12,000 ($24,000 for those who file jointly).

529 Savings Accounts: can now be used to cover the costs of sending a child/dependent to elementary or secondary school in addition to the costs of attending college. This is a permanent change.

Increase in Available Credits:

- Child care credit increased to $2,000 for children under age 17 — still subject to phase-out based upon income.
- Non-child dependent credit - $500 for children over 16 or an elderly parent supported by the taxpayer.

Expenses No Longer Deductible:

- Moving expenses
- Personal casualty losses — except if incurred in a federal disaster area declared to be such by the President
- Entertainment expenses
- Un-reimbursed business expenses of employees
- Tax preparation fees
- Investment advisory fees
- Safe deposit box rental

ABOUT THE AUTHOR

David N. Milner *is a partner at Gallet Dreyer & Berkey, LLP. Mr. Milner's practice focuses on tax law, estate planning, corporate law, and real estate. Mr. Milner, who is also a certified public accountant, helps clients structure transactions in a manner calculated to reduce adverse tax consequences, and helps families develop estate planning strategies. He frequently speaks to community groups and trade organizations on matters relating to estate planning. Mr. Milner can be reached at dnm@gdblaw.com.*

Attorney's Fees — Beware the Tail that Wags the Dog

By: Randy J. Heller, Esq.

In our regular review and negotiation of contracts and leases, we frequently encounter provisions providing that the "prevailing party" in any litigation or arbitration is entitled to reimbursement of its attorney's fees and expenses from the losing party. In my experience, clients are initially quite happy with such clauses, never envisioning a situation in which they would be in breach themselves, or in which they might do something for which they could be held liable to another. In their view, it is a home run — allowing them to be made whole (attorney's fees and all) for the despicable conduct of the evil party with whom they have contracted.

It is sometimes forgotten, however, that the right to attorney's fees is contrary to the "American Rule" which provides that each party must bear its own attorney's fees and expenses. Other countries have approached this issue differently, but in the United States, the thinking of the legislature is that the risk of having to bear the attorney's fees of one's adversary might have a chilling effect on the vindication of one's legal rights.

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Despite the "American Rule," however, parties may nevertheless provide in their arms-length contracts and leases that the prevailing party shall recover attorney's fees from the other party. That right may also be contained in a statute addressing limited areas of the law. Such was the setting in two recent appellate decisions.

In the first case, a plaintiff commenced an action against a defendant for a garden variety breach of contract. There was a trial and the judge held in favor of the plaintiff, also awarding it $49,160 in legal fees. The defendant appealed, arguing that there was no basis to award counsel fees in this circumstance. The appellate court agreed with the defendant and reversed the lower court. It held that "counsel fees may not be recovered unless an award is authorized by agreement between the parties, by statute, or by court rule." Since none of those circumstances applied, no fees were permitted under the "American Rule." Simple enough.

In a separate case, a landlord brought an action against a residential tenant in Brooklyn to reform the lease, to provide that the landlord, not the tenant, had exclusive rights to use the backyard. The tenant fought back, arguing that it had the right to use the backyard, and counter-claimed for attorney's fees. When the court held for the tenant on the reformation action, the tenant sought its attorney's fees. Here, both a statute (Real Property Law §234), as well as a provision in the lease, addressed attorney's fees.

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ABOUT THE AUTHOR

***Randy J. Heller** is a partner at Gallet Dreyer & Berkey, LLP. He represents contractors and owners in a wide array of sophisticated construction related matters as well as litigation. In addition to being named a Super Lawyer for many years running, Mr. Heller is considered one of the top attorneys in construction law in the New York metropolitan area by the* New York Times Magazine, *and one of the Best Lawyers of New York by* New York Magazine. *In addition, Gallet Dreyer & Berkey, LLP has once again been given the highest "Tier 1" rating by* U.S. News & World Report *for its construction law and litigation practice. Mr. Heller can be reached at rjh@gdblaw.com.*

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- *Mergers and Acquisitions*
- *Real Estate Law*
- *Tax Law*
- *Trusts and Estates*
- *White Collar Criminal Defense*

GDB ANNOUNCEMENTS

GDB welcomes Kyle G. Kunst as a new attorney

Kyle G. Kunst joined Gallet Dreyer & Berkey, LLP in September as an associate. Kyle has litigated commercial disputes throughout the nation in both state and federal courts, servicing a wide array of industries and clients. His experience includes labor and employment, misappropriation of trade secrets, intellectual property and deceptive trade practices, products liability and construction defects. Kyle also regularly counsels clients through government investigations on the state and federal level.

FIRM NEWS AND HONORS

Scott M. Smiler

In June, partner Scott M. Smiler closed on a $42 million dollar loan from the New York City Housing Development Corporation (HDC) for one of GDB's Mitchell-Lama clients, Masaryk Towers Corporation. Masaryk Towers is set to undertake a major capital improvement project which included the negotiation of a $28 million dollar construction contract.

Jay L. Hack

In August, partner Jay L. Hack presented, "Anatomy of a Residential Mortgage Loan" as part of the New York State Bar Association's Bridging the Gap program for recently admitted attorneys.

Also, Mr. Hack moderated a panel on Funding Alternatives for Real Estate Capital Improvements at a meeting of the New York Association of Realty Managers.

David T. Azrin

In August, partner David T. Azrin was named to the 2019 Best Lawyers in America® for Franchise Law.

Randy J. Heller

In August, partner Randy J. Heller was named to the 2019 Best Lawyers in America® for Construction Law.

David L. Berkey

In September, partner David L. Berkey lectured on Pre-Contract Due Diligence at a CLE program sponsored by the New York City Bar Association entitled "Residential Real Estate Closings: What You Need to Know From Pre-Contract to Closing."

Roger L. Stavis

In September, partner Roger L. Stavis' papers from the famous terrorism trial of Omar Abdel-Rahman, the Muslim cleric known as "the blind sheikh" who was convicted of conspiracy in the 1993 World Trade Center bombing, *United States v. Rahman,* 189 F.3d 88 (2d Cir. 1999), have been accepted by the George Washington University Law School to be kept in their library as part of their collection.

Michelle P. Quinn

In October, senior associate Michelle P. Quinn conducted a seminar on landlord and tenant issues for Lorman Education Services.

Attorney's Fees

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The statute provided that where there is a provision in a lease which allows the landlord to collect counsel fees in connection with an action for a breach of a lease, the tenant is deemed to have a reciprocal right — even though the lease is silent on the point. Unfortunately for the tenant in this case, the landlord did not sue for "breach of a lease" but rather for "reformation of the lease," so the tenant was out of luck under the statute.

However, the lease also had a "prevailing party clause" (which, strangely enough, did not benefit solely the landlord). This clause kicked in for any action for "non-payment of rent or recovery of possession." The reformation action, which sought to "recover" the backyard, was deemed to satisfy the provision and the tenant was able to collect all its attorney's fees and costs.

> *What the parties generally don't appreciate is that the amount of attorney's fees can rapidly overwhelm the amount in controversy.*

A happy ending? What the parties generally don't appreciate is that the amount of attorney's fees can rapidly overwhelm the amount in controversy. Do you really want to sue General Motors for a strange clicking sound in the engine of your car if GM is going to be represented by a large Wall Street firm which has assigned six lawyers to the case, and six more just to carry their briefcases? Do you want to be in a situation where you must fight to the death just to escape the possibility that an inattentive judge or a confused jury rules against you and awards attorney's fees to your adversary in an amount well in excess of what you were suing for?

Sort of makes you want to consider making the "American Rule" great again.

Digital Age

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envisioned a device that could track a user's every move in real time. Prior cases regarding the third-party doctrine had involved the collection and storage of "limited types of personal information." The Court found that given the unique nature and incredible breadth of cell phone tower location data, the "third-party doctrine" did not apply.

Further, while prior precedents of the Supreme Court had held that one generally does not have an expectation of privacy in one's location, which is readily accessible by anyone in the public, constant tracking through cell phone tower location is an animal of a different stripe. Justice Roberts noted that this is not at all the same as a police officer following a suspect for a limited period. This is akin to near perfect surveillance where a police officer attached an ankle bracelet to a suspect for up to five years. Accordingly, the prior cases which held that one cannot have a reasonable expectation of privacy in one's location are inapplicable here.

In the end, the Supreme Court attempted to narrow its holding so that it applied only to cell phone tower location data. Justice Roberts explicitly stated that the ruling did not express a view on other privacy issues. However, the broad ramifications of this ruling are clear. The Supreme Court is ready and willing to update its view of the Fourth Amendment in light of a new technology that provides unprecedented levels of information about a user to a third party. Given the rapidly evolving pace of technology, it is only a matter of time until a new technological challenge to the Fourth Amendment comes before the Supreme Court.

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GDB PARTNERS

DAVID T. AZRIN
dta@gdblaw.com
Franchise, Trademark, Employment, Litigation

DAVID L. BERKEY
dlb@gdblaw.com
Real Estate, Co-op/Condo, Litigation, Crisis Management

MORRELL I. BERKOWITZ
mib@gdblaw.com
Litigation, Real Estate

MARK B. BRENNER
mbb@gdblaw.com
Corporate, Bankruptcy, Real Estate

DAVID S. DOUGLAS
dsd@gdblaw.com
Litigation

DAVID I. FAUST
dif@gdblaw.com
Corporate, Trusts and Estates, Tax, Real Estate, International Business Law

ADAM M. FELSENSTEIN
amf@gdblaw.com
Litigation, White Collar Criminal Defense

JAY L. HACK
jlh@gdblaw.com
Banking, Securities, Corporate

RANDY J. HELLER
rjh@gdblaw.com
Construction, Suretyship, Litigation

BEATRICE LESSER
bl@gdblaw.com
Real Estate Litigation, Co-op/Condo, Commercial and Residential Landlord/Tenant

MARC J. LUXEMBURG
mjl@gdblaw.com
Real Estate, Co-op/Condo, Corporate, Litigation

PETER R. MASSA
prm@gdblaw.com
Co-op/Condo, Real Estate, Corporate, Banking

DAVID N. MILNER
dnm@gdblaw.com
Tax, Trusts and Estates, Corporate, Real Estate

PERRY L. MINTZ
plm@gdblaw.com
Real Estate, Co-op/Condo, Corporate

SEYMOUR D. REICH
sdr@gdblaw.com
Trusts and Estates, Real Estate

ASHER RUBINSTEIN
ar@gdblaw.com
Asset Protection, Tax, Trusts and Estates

SCOTT M. SMILER
sms@gdblaw.com
Real Estate, Co-op/Condo, Corporate

ROGER L. STAVIS
rls@gdblaw.com
White Collar Criminal Defense, Investigations, Crisis Management

JERRY A. WEISS
jaw@gdblaw.com
Real Estate, Co-op/Condo, Litigation

GDB LAW GALLET DREYER & BERKEY, LLP

845 THIRD AVENUE, 5TH FL
NEW YORK, NY 10022-6601
T: 212.935.3131 ▪ **F:** 212.935.4514
WWW.GDBLAW.COM ▪ INFO@GDBLAW.COM

GDB LAW
GALLET DREYER & BERKEY, LLP

845 Third Avenue, 5th Fl
New York, NY 10022-6601