

LEGAL UPDATE

CLIENT NEWSLETTER OF
CARR, MORRIS & GRAEFF, P.C.

1120 G STREET, N.W., SUITE 930 • WASHINGTON, D.C. 20005-3801 • (202) 789-1000

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EVIDENCE

TRAFFIC COURT SHOOTOUT OVER RADAR GUNS

The admission of new forms of scientific evidence in a case often first requires an in-depth review of the science behind the evidence. For instance the District of Columbia Circuit Court in the case of *Frye vs. United States*, 293 F. 1013 (D.C. Cir 1923) disallowed admission of evidence from polygraph testing, finding that the science behind polygraph testing had not risen to “general acceptance” by a meaningful segment of the associated scientific community. More recently, the U.S. Supreme Court delivered a landmark decision in the case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), finding that the admission of scientific evidence requires the following four elements: (1) that the theory is testable, (2) that the theory has been peer reviewed, (3) the reliability and error rate (100% reliability and zero error are not required, but the rates must be reported), and (4) the extent of general acceptance by the scientific community. The *Daubert* decision was later codified in Rule 702 of the Federal Rules of Evidence.

In a case of first impression at any level in the District of Columbia, a court has considered the admissibility of police hand-held radar gun readings into evidence. Every traffic court docket is littered with accused speeders insisting that the science and practice of police using radar guns (actually Light Imaging and Ranging [“LIDAR”] guns) to target speeders is untrustworthy and prone to error – e.g., “Your Honor, there is no way the officer could have picked my car out of the pack of traffic with

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TAX EXPATRIATION

The United States has had tax expatriation provisions since 1966, with major amendments in 1996 and 2004. Section 301 of the Heroes Earnings Assistance and Relief Tax Act of 2008 signed into law by President Bush on June 17 of this year is a major departure as it contains both a mark-to-market regime and a succession or inheritance tax regime for tax expatriates.

A “covered expatriate” is someone who renounces his or her U.S. citizenship or terminates his or her status as a long-term lawful permanent resident. A long-term permanent resident is someone who was a “green card” holder for at least eight of the fifteen taxable years preceding expatriation. In addition the expatriate must have had an average income tax liability of \$139,000 (2008 figure indexed for inflation) for the preceding five years or a net worth of at least \$2 million (not indexed for inflation). Finally, if the expatriate fails to certify on Form 8854 that he or she has satisfied all applicable U.S. tax obligations for the five years before expatriation, the expatriate will be subject to tax regardless of income tax liability or net worth. (There are exceptions for certain dual nationals at birth who have not met a substantial presence test for more than ten of the fifteen years and for persons losing their citizenship before age 18 ½ who have not met the substantial presence test for more than ten years.)

The “expatriation date” is the date a citizen gives up his U.S. citizenship or a long-term resident alien ceases to be a “green card” holder. A citizen is considered to have renounced his citizenship at the earliest of the following dates: renounces citizenship before a diplomatic or consular officer; provides a statement of voluntary renunciation to the Department of State; the Department of State issues a Certificate of Loss of Nationality; a U.S. court cancels the certificate of naturalization of a naturalized citizen.

A person ceases to be a lawful permanent resident when the person commences to be treated as a resident of a foreign country under the provisions of a tax treaty, does not waive treaty tax benefits, and notifies the Secretary of the Treasury of the commencement of such treatment. An example of this would be claiming treaty benefits on Form 8833. The Internal Revenue Service (IRS) will need to issue regu-

lations covering expatriates who commence residence in a foreign country with which the U.S., at the time of expatriation, does not have a tax treaty. Moreover, it is not altogether clear whether a “green card” holder can effectively cease to be a lawful permanent resident by turning in his or her card and obtaining from the Department of Homeland Security a letter to the effect that the expatriate’s lawful permanent residence has been “administratively determined to have been abandoned” under Internal Revenue Code Section 7701(b)(6).

The clear implication is that until expatriation taxpayer continues to be a U.S. citizen or permanent resident for tax purposes, so the taxpayer continues to be taxed on worldwide income and, upon death, on worldwide estate.

Under Code Section 877A, the first tax an expatriate will be subject to is a mark-to-market tax on gains exceeding \$600,000 (indexed for inflation) from a “deemed sale” of the person’s worldwide assets on the day prior to the person’s expatriation. The expatriate may irrevocably elect, on an asset by asset basis, to defer payment of the tax until the due date of the return for the year in which the asset is sold or exchanged. In order to make this election the person must provide the IRS with a bond to ensure payment and must also irrevocably waive the benefit for any U.S. tax treaty which would preclude assessment of the tax. During the period of deferral, interest will accrue at the rate applicable to tax underpayments.

Certain assets such as deferred compensation and interests in nongrantor trusts are excepted from the mark-to-market regime. Nevertheless, tax on deferred compensation is only deferred until the expatriate receives a “taxable payment”—that is, a payment which would be taxable if the person were a U.S. person for tax purposes. The tax is a 30% withholding tax. The detailed rules for deferred compensation are extremely complex and, therefore, beyond the scope of this article. For example if the deferred compensation is not “eligible” an amount equal to the present value of the person’s account is treated as received and taxable on the day before expatriation. If an expatriate has an interest in a “specified tax deferred account” it is treated as distributed on the day before expatriation.

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PRIVACY CELLULAR TELEPHONES/ FOURTH AMENDMENT RIGHTS

As in any area of social evolution engendered by technical advancement, it often takes time for the legal system to process and incorporate change into the fabric of existing legal precedent. Such is evidenced by a September 10, 2008 decision rendered by U.S. District Court Judge Terrence F. McVerry, sitting in the Western District of Pennsylvania. Judge McVerry was reviewing the government's appeal of an earlier order by Magistrate Judge Lisa Pupo Lenihan, also of the Western District of Pennsylvania, concerning the government's application for an order directing a provider of electronic communication services to disclose cell phone records to the government. Specifically, the government was appealing the Magistrate's denial of its *ex parte* application seeking disclosure of certain cell phone subscriber information without the showing of *probable cause* that the Magistrate held was required by the Fourth Amendment of the U.S. Constitution.

The records the government was seeking concerned an investigation into a drug suspect—a suspect who had proven adept at dodging visual surveillance and tracking. The government argued in its application that the records would allow prosecutors to discern where the suspect had made calls from in the past as well as where he was currently receiving calls. By way of background information, most cell phone towers in urban areas can identify a user's location on an ongoing basis to within several hundred feet. In essence the government's application was predicated on a position that the Fourth Amendment guarantee against unreasonable searches and seizures and its probable cause requirement did not apply. Rather a specific federal statute required only that the government establish "specific and articulable facts" in order to obtain a court order to obtain the information sought. In ruling that the government must first obtain a warrant based on probable cause of criminal activity, a much higher standard, before directing a wireless provider to turn over personal cell phone records, the Magistrate and then the District Court Judge basically held that individuals have a reasonable expectation of privacy concerning records which would identify location and travel whereabouts. In her Opinion and Memorandum Order Magistrate Lenihan stated that, "The Court notes that it is entrusted with the protection of the individual civil liberties, including rights of privacy and rights of free association, so paramount to the maintenance of our democracy." She continued to say, on behalf of the Magistrate's panel that was hearing the government's application, "The Court

also observes that the location information so broadly sought is extraordinarily personal and potentially sensitive; and that the *ex parte* nature of the proceedings, the comparatively low cost to the Government of the information requested, and the undetectable nature of a CSP's {cellular service providers} electronic transfer of such information, render these requests particularly vulnerable to abuse."

While the Justice Department is considering an appeal of Judge McVerry's affirmation of Magistrate Lenihan's Opinion and Memorandum Order—and prosecutors certainly believe it curtails their effectiveness in using a legitimate and valuable investigative tool—civil libertarians are hailing the decision as a significant victory. A representative of the Electronic Frontier Foundation, which had filed a friend-of-the-court brief in the case, stated that, "This is a great ruling for location privacy and for people who think the government should have probable cause before they track you." A lawyer with the American Civil Liberties Union stated that the government's position was "flawed" and that "People place a certain privacy value on their movements." Undoubtedly expecting government consternation and criticism of her denial of the application as impeding investigations of important matters of public well being, Magistrate Lenihan stated in her decision, "The Court emphasizes that the issue is not *whether* the Government can obtain movement/location information, but *only the standard* it must meet to obtain a Court Order for such disclosure and the basis of authority."

The case has specific significance in a post-9/11 environment in which the government has taken extraordinary steps during investigations at the arguable expense of civil liberties. Although it certainly can be argued that the current world environment provides sufficient justification for such extraordinary steps, it is also important not to lose sight of fundamental constitutional freedoms that the Framers of the Constitution have afforded. The Framers certainly could not have envisioned the Fourth Amendment ramifications and body of law that would be established concerning vehicular searches and most certainly did not envision Fourth Amendment implications concerning cellular telephone communications. Nonetheless, Fourth Amendment Constitutional protections do exist concerning these areas and, regardless of one's political leaning or ideological bent, it is heartening to see courts apply fundamental constitutional rights to evolving technology; and, it will certainly be interesting to see how the law evolves in this area. We will keep you informed in future *Legal Update* articles.

STEPHEN GRAEFF

EVIDENCE EXPERT WITNESS REJECTED UNDER DAUBERT STANDARD

The U.S. Supreme Court's 1993 ruling in *Daubert v. Merrill Dow Pharmaceuticals* is the starting point for analysis of the worthiness of any technical expert witness testimony. Generally under *Daubert* and applicable rules of evidence, expert opinion evidence is admissible if it would aid the factfinder. But such evidence must reflect a degree of recognizable reliability, such as might be demonstrated by empirical testing, known error rates, peer review and replicability. In layman's terms, science is probative but conjecture in the guise of science is not. Easier said than done, trial courts wrestle daily with the challenge of serving as *gatekeeper* of expert testimony.

In the recent case of *Young v. Burton and Lewis & Tompkins, P.C.*, D.D.C. No. 07cv0983 (136 WDLR 161), Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia confronted a challenge to proffered expert testimony that led her to a detailed examination of applicable precedent—and ultimately to rejection of the expert opinion testimony.

The *Young* lawsuit is actually a legal malpractice suit, although the decision turns on medical evidence. Plaintiff sued her former lawyers for malpractice, alleging that her meritorious tort claim was lost because they missed the statutory filing deadline. In order to make that claim, Ms. Young had to show that she would have prevailed in the underlying matter. This is what is known as the case-within-the-case, *i.e.*, Plaintiff must prove the lawyer's negligence but must also put on evidence to show she would have won the initial case. In the initial matter Ms. Young and another claimant asserted that their exposure to toxic mold in their apartment caused certain physical ailments. At the heart of that proof was the proffered testimony of Dr. Ritchie Shoemaker, who offered opinion testimony that certain conditions caused the injuries alleged.

While medical causation issues are commonly the subject of expert testimony, defendants challenged Dr. Shoemaker's methodology as unsuitable under *Daubert* and its progeny. Dr. Shoemaker had no specific information about the substances to which Ms. Young had been exposed, and he had only briefly examined her five years post-exposure. The doctor's self-developed methodology involves a two-tier, multi-factor approach, but one of the more dubious components is his own untested premise that some individuals have a genetic predisposition to react adversely to damp indoor environments.

Judge Huvelle provides a succinct but comprehensive review of how other courts have dealt

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EVIDENCE*Continued from page 1*

his radar gun.” Finally, this contingent of D.C. speed limit scofflaws had their day in court to impress upon the court the spurious nature of radar guns.

In early June (*District of Columbia v. Chatilovicz*, D.C. Super. Ct. No. 2006-CTF-2633), the D.C. Superior Court conducted an extensive four-day evidentiary hearing which was expanded to include numerous brands of radar gun devices and during which attorneys for the D.C. Government and for all nine defendants charged in various cases during the last few years presented oral and written arguments. The government presented one expert witness (the designer and patent holder of the ProLaser III used by D.C. law enforcement) and two fact witnesses (D.C. police officers.). Defense counsel offered two of their own expert witnesses to contradict the government’s expert. The court reviewed the basic science of laser technology, the technical methodology of, and theoretical challenges to, the reliability of radar guns, including the chance of other “pulses” in the vicinity, difficulties in target identification, the impact of vehicle license plates, vehicle shape, windshield wipers, vehicle color and device malfunction. Additionally, the court reviewed six scientific publications on the subject, along with two police studies in Florida, one in New Jersey, and an independent study in Florida, all of which were performed in compliance with standards set by the National Highway Safe Administration and the International Association of Chiefs of Police. The court did everything short of real-world testing behind the courthouse with taxicabs.

The court found that the device, properly calibrated and used, is able to gauge speeds within plus or minus one MPH. Based on this finding the court approved the admission of LIDAR evidence into D.C. courts, provided that certain safeguards are in place. The device must be on the approved Conforming Products List, have a certification of proper calibration, the operating officer must have had a minimum of four hours of training and proper certification, and, lastly, all maintenance tasks and daily tests must have been performed on the device in compliance with the manufacturer’s standards. Upon request the government shall be responsible for producing these records. Although a defeat for lead-footed motorists, I am confident that ingenious traffic court defendants are already preparing alternative justifications for why “there is no way I was going that fast.”

JUSTIN BANFORD**TAX***Continued from page 1*

A trustee is required to withhold tax at a 30% rate from the taxable portion of any direct or indirect distribution from a nongrantor trust to an expatriate. The taxable portion is that part of the distribution which would be taxable if the expatriate had remained a U.S. person. One would, therefore, assume the tax applies only to distributions of income and not principal. Nevertheless, if the trust distributes appreciated property, gain is recognized to the trust as if it had sold the property to the expatriate.

For purposes of the mark-to-market tax, all nonrecognition deferrals are terminated on the day before expatriation. Moreover, the basis of property held when the person first became a U.S. resident is stepped up or down to its fair market value on that date. The expatriate may elect not to have this basis rule apply, undoubtedly because of the difficulty in computing basis as of that particular date.

Under Code Section 2801, the second tax imposed by the new legislation is a succession or inheritance tax at the highest gift or estate tax rate on the receipt by a U.S. person of a covered gift or bequest from an expatriate who expatriated on or after June 17, 2008. The tax is paid by the recipient of the gift or bequest and reduced by any foreign gift or estate tax paid. The succession tax does not apply to annual exclusion gifts (\$12,000 indexed for inflation), gifts or bequests entitled to the marital or charitable deductions, gifts of \$128,000 (indexed for inflation) to noncitizen spouses, and bequests to noncitizen spouses covered by the qualified domestic trust (QDOT) provisions. It should be kept in mind, however, the QDOT provisions merely defer estate tax until principal distributions are made. The succession tax will not apply to taxable gifts reported on a timely filed gift tax return or to property included in the estate of an expatriate which is reported on a timely filed estate tax return.

The succession tax regime also has separate provisions for gifts and bequests to trusts. Transfers to a domestic trust are taxed to the trust. If gifts are made to or bequests received by a foreign trust, the succession tax will apply to the receipt by a U.S. person of a distribution, whether of income or principal, attributable to a transfer from an expatriate. A foreign trust may, however, elect to be treated as a domestic trust for purposes of these separate trust provisions. In calculating his or her income tax liability on the receipt of a taxable distribution from a foreign trust attributable

to a covered gift or bequest, the U.S. person may deduct the amount of the tax imposed by Section 2801 attributable to the income part of the distribution but not the principal portion thereof. This provision is clearly designed to avoid double-taxation of income.

Under prior law expatriates had a continuing reporting requirement using Form 8854. The IRS will need to issue regulations interpreting the new tax provisions and providing for a new continuing reporting form tailored to the new, specific requirements of the Act. Nevertheless, expatriates should continue to file Form 8854 and continue reporting to the IRS under prior law until the new regulations are issued. Proceeding conservatively might serve to avoid interest and penalties for noncompliance.

From a tax policy point of view, there are so many things wrong with this legislation it is hard to determine where to begin and end. Therefore, only four points will be covered. First, there is little or no evidence U.S. citizens and “green card” holders expatriate in large numbers for tax reasons. U.S. citizenship and residence are unique honors and distinct privileges very few people give up. Thus, the proper response to tax expatriation should be “good riddance.” Second, even if an exit tax for tax expatriates is appropriate, the thresholds in the Act are too low. Specifically, the \$2 million net worth threshold is absurdly low in this day of inflation, high home prices, and large 401(k) balances. A threshold of at least \$20 million would be more realistic.

Third, there should not be a conclusive presumption of tax expatriation for those over the thresholds. Rather, there should be at the most a permissible inference giving taxpayer the right to a hearing before the U.S. Tax Court to rebut the presumption by presenting evidence of expatriation for legitimate non-tax reasons. Finally, the expatriation tax regime is too complex, and follows the expatriate and his U.S. relatives for too long. It would be cleaner and neater if net worth in excess of the \$20 million threshold were taxed at a flat rate of, say, 15%. Of course, the estate and gift tax should be amended to provide for a \$20 million exemption and a flat rate of 15% for amounts over the exemption to make both laws consistent. Even so, it would be better if Congress would just repeal the expatriation tax and concentrate on more pressing matters rather than attempt to solve non-problems.

NÉSTOR CRUZ

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

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The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions—the District of Columbia, Maryland and Virginia.

STAFF NOTES

In July Phil Schwartz and his playing partner won their flight in the Virginia State Golf Association Stonewall Four-Ball golf tournament, thereby earning an invitation to the VSGA's Four-Ball Championship at Independence Golf Club in Richmond. Stay tuned for further results.

Roy and Marie Morris recently completed a bicycle tour of the Peloponnese in Greece, led by a former university classics professor. Starting from Corinth, the cyclists visited Mycenae, Olympia, and other ancient sites. Roy's favorite ride was up to the mountain town of Kalavryta from the beach on the Gulf of Cornith.

Justin Banford's one-box-at-a-time move to his new home in Virginia is almost complete...actually, he disclaims domicile until cable is installed. Justin is now an expert painter, light fixture replacer, carpet steam cleaner, wallpaper remover, electrical outlet replacer, powerwasher (deck & siding), drywall hanger, lock changer, and lifter of heavy pieces of furniture.

SPECIAL WARNING, EARLY ANNOUNCEMENT: AT THE END OF OUR CURRENT LEASE—THAT IS, FEBRUARY 28, 2009—CMG WILL BE RELOCATING TO TYSONS CORNER—THE BUSINESS HUB OF NORTHERN VIRGINIA. OUR NEW ADDRESS WILL BE:

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EVIDENCE

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with causation issues in toxic tort and mold cases. She explains that a showing of temporal relationship between exposure and symptom onset is typical but that the most common method of proving causation "is to present scientifically-accepted information about the dose-response curve for the toxin which confirms that the toxin can cause the health effects experienced...." She also notes the mixed success counsel have had in offering Dr. Shoemaker's opinions in other courts.

The judge does not, however, dismiss Dr. Shoemaker merely because his approach is

unique or because other courts have rejected his testimony. She undertakes a thorough review of his two-tier methodology. Perhaps most significantly, she finds his "use of HLA DR genotypes to determine mold susceptibility is completely unsupported by the scientific literature." This and other criticisms of Dr. Shoemaker's methodology ultimately lead Judge Huvelle to the conclusion that, "Given that Dr. Shoemaker arrives at his opinions as to both general and specific causation based on novel and unaccepted theories and methodologies, plaintiffs cannot sustain their burden under *Daubert* as to causation."

LAWRENCE CARR

CARR, MORRIS & GRAEFF, P.C.

1120 G STREET, N.W., SUITE 930
WASHINGTON, D.C. 20005-3801

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