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Outlook 2015

Court Watchers Looking at Plan Fees, Retiree Benefits, Church Plans in 2015

Just as 2014 brought big rulings on stock-drop litigation and equitable remedies like reformation and surcharge, 2015 is shaping up to be another big year for ERISA litigation, with pending cases involving retiree health benefits, plan fee cases and ERISA's church plan exemption.

In a series of recent interviews, Bloomberg BNA spoke with attorneys about their predictions in two high-profile Employee Retirement Income Security Act cases currently pending before the U.S. Supreme Court. Those cases pose questions that could have big implications for ERISA plan sponsors, participants and litigators, including when retiree health benefits become vested for life under a collective bargaining agreement and whether Section 401(k) plan participants can challenge high-cost plan investments that were selected by plan fiduciaries more than six years before litigation commenced.

Attorneys also weighed in on a spate of recent district court decisions offering conflicting viewpoints on whether large hospital and health-care organizations with ties to churches can treat their pension plans as church plans exempt from ERISA's funding and disclosure requirements. With several cases still pending at the district court level, a number of circuit courts are expected to address this issue in 2015, with the potential for a circuit split on the horizon.

Retiree Health Question

Later this term, the U.S. Supreme Court is expected to issue its decision in *M&G Polymers USA, LLC v. Tackett*, U.S., No. 13-1010, *argued*, 11/10/14, a case that could affect the ability of employers across the country to reduce or eliminate lifetime health-care benefits for their retirees (41 BPR 2361, 11/18/14).

The case comes from the retiree friendly U.S. Court of Appeals for the Sixth Circuit, which has adopted a controversial inference—dubbed the ''*Yard-Man*'' inference—to find that the health benefits of union retirees are vested for life in the absence of specific language to the contrary in a plan document or collective bargaining agreement.

Other circuits—including the Second and Seventh—have required stronger language in order to infer vesting, with the Third Circuit applying nearly the opposite presumption to require a clear statement of vesting in order to find retiree benefits vested for life.

During oral arguments in *Tackett*, both parties appeared to agree that the *Yard-Man* inference should be jettisoned in favor of ordinary contract principles, but what those principles could look like in application is an open question.

Attorneys Weigh In. Steven W. Suflas, an employer-side attorney and managing partner of Ballard Spahr LLP's Cherry Hill, N.J. office, agreed that the *Yard-Man* inference is unlikely to survive the Supreme Court's ruling.

''I think it's pretty clear from the oral arguments that the Supreme Court is going to void the presumption,'' Suflas told Bloomberg BNA, noting that even the attorney representing the retirees did little to defend it at oral arguments.

With the inference likely gone, Suflas predicted that the Supreme Court would provide a new standard for weighing legal claims for vested retiree benefits, although that analysis may ultimately lack clear-cut rules.

''In the Sixth Circuit, you had a presumption in favor of vesting,'' Suflas said. ''If that goes away, then what you're left with is traditional notions of contract interpretation, which—again—are very case-specific and fact-specific. I don't think you're going to get bright-line rules that people are going to be able to easily apply, but I think what you'll be left with is a more coherent rubric for analyzing these types of claims involving retiree health care benefits.''

Pamina Ewing and Joel R. Hurt, both partners with Feinstein Doyle Payne & Kravec LLC in Pittsburgh, also told Bloomberg BNA that the justices appeared poised to rely on basic rules of contract interpretation rather than any inferences or presumption in favor of a particular party.

''The justices did not appear ready to embrace any formal tipping of the scales toward retirees or employers, whether favoring retirees, as per the Sixth Circuit's *Yard-Man* inference, or employers, as per the Third Circuit's standard addressed in *Skinner Engine* requiring that an employer's commitment to vested benefits must be stated in 'clear and express' language,'' they said in a joint e-mail to Bloomberg BNA.

Ewing and Hurt said they were interested to learn whether the Supreme Court would adhere to earlier precedent instructing that collective bargaining agreements ''be interpreted as contracts, but as a different sort of contract.''

According to Ewing and Hurt, under *Transp.-Commc'n Emps. Union v. Union Pac. R.R.*, 385 U.S. 157 (U.S. 1966), CBAs aren't ordinary contracts, but are rather a ''generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.''

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Ewing and Hurt, who represent employees and retirees, said they saw the potential for ''diverging opinions from the justices on whether the 'generalized code' of labor contracts remains a controlling concept.''

Suflas also said that, although the court's ruling will almost certainly be limited to the context of union retirees, it has the potential to have a big impact generally on employers with unionized workforces, given the ballooning costs associated with providing retiree healthcare benefits. He brought up an anecdote that came from GM's 2009 bankruptcy proceedings—namely, the company's claim that it was paying more per car for retiree medical benefits than it was for steel.

''That's an astonishing concept, and it really heightens the struggle right now in the health care arena, because retiree benefits are terribly expensive,'' Suflas said. ''The whole structure back in the '50s, '60s and '70s when those very favorable benefits were negotiated was that the economic model would always be the same, but it's not the same anymore.''

Suflas added that these types of collectively bargained multiemployer health plans may have other rising costs to navigate in the coming years, particularly with the anticipated arrival of the Affordable Care Act's ''Cadillac tax'' in 2018, which will impose an excise tax on the cost of health plans whose costs reach a certain threshold.

Finally, in addition to predicting the death of the *Yard-Man* inference, Suflas also said he thought the Supreme Court's ultimate ruling was likely to be favorable to employers, despite the ''understandable social reasons'' supporting the inference.

Ewing and Hurt offered a slightly different prediction, saying that, ''if the court reaffirms that basic rules of contract interpretation should apply in these cases, we do not believe that its decision in *Tackett* will have a huge impact on this area of the law.''

''The circuit courts already are nearly unanimous in applying basic contract rules to retiree health cases,'' Ewing and Hurt said. ''In most cases where retirees have prevailed, they have done so largely on the basis of contract interpretation. We believe that retirees who have prevailed in most cases in unionized facilities did not need the *Yard-Man* inference in order to demonstrate vesting.''

Suflas, Ewing and Hurt aren't involved in the *Tackett* litigation.

Plan Fee Litigation

On Feb. 24, the high court is scheduled to hear oral arguments on one of the biggest stumbling blocks for 401(k) plan participants challenging plan fees: ERISA's six-year statute of limitations for fiduciary breach claims (*Tibble v. Edison Int'l*, U.S., No. 13-550, *cert. granted* 10/2/14 (41 BPR 2083, 10/7/14)).

Tibble asks the justices to decide whether 401(k) plan participants can hold plan fiduciaries liable for including higher-cost investment funds in a plan when those funds were initially selected more than six years before the lawsuit, or whether such claims are barred by ERISA's six-year statute of limitations.

In the past two years, three federal appellate courts—the Fourth, Ninth and Eleventh circuits—have used ERISA's statute of limitations to reject lawsuits challenging investment funds added to plans more than six years before plan participants filed suit (*David v. Alphin*, 704 F.3d 327, 54 EBC 2437 (4th Cir. 2013) (40 BPR 189, 1/22/13); *Tibble v. Edison Int'l*, 711 F.3d 1061, 56 EBC 1245 (9th Cir. 2013) (40 BPR 772, 3/26/13)(40 BPR 1914, 8/6/13); *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685, 57 EBC 2089 (11th Cir. 2014); (41 BPR 496, 3/4/14)).

Much of the dispute in these cases concerns whether the participants have challenged the initial selection of the funds by plan fiduciaries—a claim that is often found to be time-barred—or whether they have alleged that intervening circumstances caused the funds to become imprudent within the six-year window. So far, the appellate courts that have considered this issue have found that participants' claims concerned the initial selection of the disputed funds, allowing plan fiduciaries to escape liability on statute-of-limitations grounds.

The *Tibble* case has already drawn a number of amicus briefs, with the U.S. solicitor general urging the justices to rule in favor of plan participants and find that ERISA's statute of limitations doesn't bar lawsuits challenging plan investments selected outside of the six-year window (41 BPR 2528, 12/16/14). The solicitor argued that ERISA's duty of prudence requires plan fiduciaries to ''revisit'' plan investments from time to time to ensure that they remain prudent.

A number of other groups have filed amicus briefs in support of the plan participants, including the Pension Rights Center, AARP, Cambridge Fiduciary Services LLC and a group of law professors.

The brief of Cambridge Fiduciary Services is particularly noteworthy, since the company provides fiduciary consulting and investment adviser services to ERISA plan sponsors. According to Cambridge Fiduciary, many plan fiduciaries already follow good monitoring practices for their investments and therefore wouldn't be overly burdened by a Supreme Court decision extending liability for plan investments selected outside ERISA's six-year period. The company also called the Ninth Circuit's standard of looking for material changes in plan investments ''unworkable and illogical.''

Plaintiffs' Attorneys Mull *Tibble*. In a series of recent interviews, attorneys involved in plan fee litigation told Bloomberg BNA that a ruling either way by the Supreme Court could have an effect on the way fiduciaries across the country manage plan investments.

Erin M. Riley and Gretchen Obrist, attorneys with Keller Rohrback LLP's Seattle office, told Bloomberg BNA in a joint e-mail that plan fee litigation like the *Tibble* case had already had an impact on 401(k) plan administration, with fiduciaries ''taking their prudential duties more seriously with respect to costs.'' This trend has already resulted in lower plan fees across the country over the past several years, they said.

Riley and Obrist, who represent plan participants, said that a ruling in favor of the *Tibble* participants would continue this favorable trend, while a contrary ruling could protect fiduciaries from any liability for high-cost investments selected outside of ERISA's six-year window.

''A ruling in petitioners' favor will only continue progress in this positive direction, while a ruling in respondents' favor will allow fiduciaries to avoid monitoring a fund after six years has passed by, no matter how imprudent,'' Riley and Obrist said. ''In the context of fee litigation, that means immunity to fiduciaries for investments selected more than six years before, no matter how costly.''

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James A. Moore, a partner with McTigue Law LLP in Washington who also represents plan participants, noted a different trend in plan administration—namely, that fiduciaries have been all too willing to load plans with high-cost investments that hurt plan participants by eating into their retirement savings.

According to Moore, that's one reason he hopes the Supreme Court will reverse the Ninth Circuit and rule in favor of the plan participants.

''If the Supreme Court were to affirm *Tibble*, it will likely mean private-sector employees across the country will have significantly less money to fund their retirements,'' Moore said. ''It will significantly weaken litigation pressure on plan fiduciaries to retain prudent, low-cost, good-performing investments in 401(k) plans. There is a widely recognized problem in the industry that many fiduciaries have done just the opposite: loaded employees' 401(k) plans with high-cost, poor-performing investments.''

Moore, Riley and Obrist all expressed optimism that the court will rule in favor of the participants, with Riley and Obrist adding that the protection of 401(k) assets has become increasingly important, given that these types of plans are now the ''primary source of retirement income for tens of millions of Americans.''

''Hopefully, the Court will recognize that the duty of prudence—which includes cost-consciousness—is inherently ongoing in nature, and find in favor of petitioners,'' they said.

Moore also took issue with an argument he said he'd heard defense attorneys advance—namely, that a ruling in favor of the *Tibble* participants would ''open the floodgates'' to more litigation.

''Hopefully, the Court will recognize that the duty of prudence—which includes cost-consciousness—is inherently ongoing in nature, and find in favor of petitioners.''

—Erin M. Riley and Gretchen Obrist, Keller Rohrback

''This is nonsense,'' Moore said. ''*Tibble* and the few other recent decisions all represent clear changes in the law, and changes to well-settled trust principles, which ERISA was intended to incorporate.''

''No appeals court prior to 2013 had ever found such claims untimely,'' Moore added. ''Hence, prior to 2013, the ERISA plaintiffs' bar had assumed such claims were timely, and had been acting accordingly.''

Riley, Obrist and Moore aren't involved in the *Tibble* litigation.

Defense Counsel on *Tibble*. James O. Fleckner, a defense-side attorney and a partner in Goodwin Procter LLP's Boston office, took issue with the idea that a Supreme Court decision in favor of the *Tibble* fiduciaries would have much effect on the way retirement plans are managed.

''While plaintiffs' counsel argue that the sky is falling and fiduciaries across the country will stop reviewing plan investments that have been held for more than six years if the Ninth Circuit decision is affirmed, there is no basis in fact to believe that that will occur or that it is occurring under current law,'' Fleckner told Bloomberg BNA. ''To the contrary, even the facts of the *Tibble* case showed that the plan fiduciaries there reviewed all options on a regular basis, even those which had been selected more than six years earlier.''

Fleckner added that fiduciaries don't need an adverse Supreme Court ruling in order to have plenty of incentives to prudently manage plan investments.

''I believe that there will continue to be sufficient incentives on plan fiduciaries to continually review discretionary investment options,'' Fleckner said, adding that ''there will be no change in the administration of plans if the Supreme Court rules for the defendants and affirms the Ninth Circuit and the status quo.''

On the other hand, Fleckner said that a ruling for the plan participants could ''indirectly'' affect fiduciary behavior to the extent that it sparks more plan fee litigation.

''A reversal might embolden plaintiffs' lawyers to bring more claims, and more litigation—or greater threat of litigation—could chill innovation and can lead fiduciaries to be overly cautious for fear of liability,'' Fleckner said. ''Personally, I don't think that such an outcome is in the best interests of participants or the nation's retirement system.''

According to Fleckner, the statutory view adopted by the Ninth Circuit in *Tibble* is both ''persuasive'' and ''consistent'' with ERISA's statutory text.

It's also properly protective of plan fiduciaries, Fleckner said, because it ''meaningfully delivers to plan fiduciaries and sponsors the protection codified in the statute that they can only be sued for six years after they make decisions affecting a plan and that creative plaintiffs' lawyers cannot circumvent that protection by seeking the same damages for the same acts by merely changing the words they use to describe the action.''

Fleckner declined to offer a tentative prediction of how the Supreme Court will rule in *Tibble*.

However, he noted that the court's recent ruling in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 58 EBC 1405 (U.S. 2014) (41 BPR 1360, 7/1/14)), indicated that the court was likely to focus heavily on the statutory text, rather than on any arguments based on factors outside that text.

''Earlier this year, the Court unanimously reversed the nearly 20-year-old *Moench* presumption of prudence—a presumption that had been employed by every circuit to have addressed the question—largely because the justices held that the presumption was not found in the words of the statute,'' Fleckner said.

''The statute of limitations is spelled out in the statute, and plaintiffs have largely asked the court to apply trust law principles to overrule the actual words of the statute, which seems like a stretch and not an argument that the court will countenance.''

Flecker isn't involved in the *Tibble* litigation.

What About Deference? Regardless of how the justices rule in *Tibble*, one issue they aren't expected to address is the level of judicial deference afforded to plan fiduciaries when they defend allegations that they failed to follow plan terms. Although the *Tibble* participants asked the high court to address this issue, the justices followed the U.S. solicitor general's recommendation and declined to grant certiorari on that issue.

Even so, some court-watchers thought the high court might take up this issue in an upcoming term, when the solicitor advised the court that a different recently filed case might provide a better vehicle for considering the question (41 BPR 1842, 9/9/14).

However, the Supreme Court declined to review that case as well, leaving the fiduciary deference question up in the air (*Tussey v. ABB, Inc.*, U.S., No. 14-130, *cert. denied*, 11/10/14 (41 BPR 2363, 11/18/14)).

The deference question stems from the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 10 EBC 1873 (U.S. 1989), which established a bedrock principle of ERISA litigation—namely, that a plan fiduciary's decision denying benefits is to be reviewed de novo, unless plan terms give the administrator discretionary authority to determine benefit eligibility or interpret plan terms, in which case the appropriate standard of review is for an abuse of discretion.

In *Tibble*, the Ninth Circuit extended this grant of judicial deference beyond the world of benefit denials and applied it to claims that plan fiduciaries failed to follow the terms of the plan, a move that surprised some practitioners.

Riley and Obrist said it ''isn't surprising'' that the court declined certiorari in these cases, noting that ''few courts have yet considered this issue.''

Further, they speculated that the court may be ''waiting to take this issue up until it is presented with the deference question in a case where applying the *Firestone* standard was *outcome determinative* to a plaintiff's loyalty or prudence claims.''

Fleckner said he saw ''very real potential'' for the Supreme Court to weigh in on the deference question at some point, although he said that the court's decision not to do so at this time was unsurprising, given the recommendation of the solicitor general and the lack of a clearly identified circuit split on the issue.

''However, as more courts address the deference question, in more varying scenarios, the Supreme Court might one day believe, in a different case, that the time is ripe to address the question,'' Fleckner said. ''I do believe Supreme Court guidance in the area would be helpful, as it is an area that causes some lower courts to struggle.''

Riley and Obrist argued in favor of a Supreme Court pronouncement that fiduciaries weren't entitled to judicial deference on duty of prudence or loyalty claims.

''To defer to fiduciaries and rely on them to police themselves in a world where *Firestone* deference shields them from liability for most of their conduct would be a disservice to the participants and beneficiaries to whom they owe the highest duties known to law,'' they said.

Church Plan Cases

One other major expected development in ERISA litigation for 2015 is the arrival of the first federal appellate court interpretations of Section 3(33), which provides the definition of a ''church plan'' for the purposes of exemption from ERISA's funding and insurance requirements for defined benefit plans.

In each case, the parties have disputed the seemingly conflicting language present in Section 3(33) that has resulted from an amendment to the statute in 1980.

Specifically, the debate centers around Section 3(33)(A), which was part of ERISA when it was originally enacted in 1974 and defines a church plan as one that is ''established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches.''

The parenthetical limitation in that subsection refers to a requirement in Section 3(33)(B)(ii) that ''substantially all'' of the individuals covered by a plan be employees of a church or a church-affiliated organization or their beneficiaries.

However, Section 3(33)(C)(i), which was added as part of the Multiemployer Pension Plan Amendments Act in 1980, states: ''A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.''

Cases Potentially Before Four Circuit Courts. The use of the exemption by a religiously affiliated health-care organization is currently the subject of a docketed appeal before the U.S. Court of Appeals for the Sixth Circuit (*Overall v. Ascension Health,* 6th Cir., No. 14-01735, *appeal docketed* 6/11/14), as well as an interlocutory appeal before the Third Circuit (*Kaplan v. Saint Peter's Healthcare Sys.,* 3d Cir., No. 14-08125, *motion for leave to appeal granted* 1/7/15).

There is also a petition for interlocutory appeal currently before the Ninth Circuit (*Rollins v. Dignity Health,* 9th Cir., No. 14-80177, *petition for leave to appeal filed* 12/3/14) and a motion for leave to appeal to the Seventh Circuit granted by the district court in the Northern District of Illinois (*Stapleton v. Advocate Health Care Network & Subsidiaries,* N.D. Ill., No. 1:14-cv-01873, *motion for interlocutory appeal granted* 1/13/15).

These four cases are the first of 11 cases filed in federal district courts throughout the country challenging the use of the exemption to approach the federal appellate courts, although six district courts have written opinions interpreting the section of the statute, with three supporting the interpretation that allows religiously affiliated organizations to use the exemption and three ruling that the defined benefit plans of those organizations weren't established by a ''church'' in the first instance and thus fail to qualify for exemption from ERISA.

In the first of the currently active cases to be decided, Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California ruled in *Rollins* that ''both the text and the history confirm that a church plan must still be established by a church,'' indicating that Section 3(33)(A) remained largely unchanged by the addition of Section 3(33)(C)(i) (40 BPR 2937, 12/31/13; 57 EBC 1346).

In the *Kaplan* case, Judge Michael A. Shipp of the U.S. District Court for District of New Jersey found Henderson's reasoning persuasive in determining that the pension plan established by a religiously affiliated health-care organization wasn't covered by the exemption (41 BPR 793, 4/8/14; 58 EBC 1831).

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However, a month later in the *Overall* case, Judge Avern Cohn of the U.S. District Court for the Eastern District of Michigan disagreed with the reasoning of both the *Rollins* and *Kaplan* courts, finding instead that ''a plan need not be established by a church in order to qualify as a church plan'' because the wording of Section 3(33)(C)(i) provided an alternate means of qualifying for the exemption (41 BPR 1028, 5/13/14; 58 EBC 1885).

The most recent court to weigh in on the statutory construction is the U.S. District Court for the Northern District of Illinois, for which Judge Edmond E. Chang sided with the *Kaplan* and *Rollins* courts in finding that a church plan must be established by a church in the first instance and that the plan established by Advocate Health Care Network wasn't a church plan exempt from ERISA (42 BPR 20, 1/6/15).

Chang ended his opinion with an acknowledgement that his ruling would either lead to a motion for a judgment on the pleadings by the plan participants or a motion by the plan sponsor for interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit.

On Jan. 8, Advocate Health Care Network made its motion for leave to appeal and Judge Chang indicated in a minute entry on the docket on Jan. 13 that he would grant the motion in a forthcoming order.

The participants in *Overall* appealed Cohn's dismissal of their claims to the Sixth Circuit, which has docketed the appeal and received merits briefs along with a series of amicus briefs from the Pension Rights Center, GuideStone Financial Resources of the Southern Baptist Convention, the Catholic Health Association of the United States and the Becket Fund for Religious Liberty (41 BPR 2413, 11/25/14).

Meanwhile, as the decisions in California, New Jersey and Illinois weren't final dispositive decisions on the full merits of the cases before those courts, the religiously affiliated organizations in those cases have filed for interlocutory appeals to the respective federal appellate courts.

On Jan. 7, the Third Circuit granted Saint Peter's Healthcare System's motion for interlocutory appeal in the *Kaplan* case. The Ninth Circuit has yet to rule on the motion for appeal made by Dignity Health in the *Rollins* case, and the district court has agreed to the motion by Advocate Health for leave to file an interlocutory appeal in *Stapleton*, but no petition has yet been filed with the Seventh Circuit.

No Appeals to Eighth and Tenth Circuits. The other two district court opinions that have interpreted the statute have come from district courts controlled by the U.S. Courts of Appeals for the Eighth and Tenth Circuits.

In one of the first cases to rule on the statutory construction, Judge Michael J. Davis of the U.S. District Court for the District of Minnesota decided in January 2011 that a single-employer plan sponsored by a religiously affiliated nonprofit corporation qualified for exemption under Section 3(33)(C)(i) (*Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 50 EBC 2154 (D. Minn. 2011) (38 BPR 225, 2/1/11).

In April 2013, the parties in the *Thorkelson* case settled the claims for $4.5 million, thus foreclosing any appeal of that ruling to the U.S. Court of Appeals for the Eighth Circuit.

Judge Robert E. Blackburn of the U.S. District Court for the District of Colorado in August rejected a report and recommendation by Magistrate Judge Kristen L. Mix urging the court to find Section 3(33)(A) required that a church plan be established by a church in the first instance and that Section 3(33)(C)(i) only increased the types of organizations that could maintain such plans (*Medina v. Catholic Health Initiatives*, 2014 BL 240546 (D. Colo. 2014) (41 BPR 1793, 9/2/14).

In his opinion, Blackburn found the *Overall* court's reasoning more persuasive in finding that the amendment to the statute increased the group of organizations that could establish an exempt church plan under the statute. However, he limited his ruling to the statutory interpretation and refused to apply it to the merits of the case before him, finding instead that more discovery and litigation was required to determine if the plan at issue in his case was in fact a church plan.

The participants moved for interlocutory appeal of his order, but Blackburn denied that motion in October, finding that an appeal to the U.S. Court of Appeals for the Tenth Circuit would actually delay the determination of the merits, which is scheduled for trial in January 2016 (41 BPR 2280, 11/4/14).

Other Church Plan Cases. The remaining five cases, which have not yet reached a determination on the statutory construction include:

- *Chavies v. Catholic Health E.*, E.D. Pa., No. 2:13-cv-01645, *complaint filed* 3/28/13 (40 BPR 831, 4/2/13);
- *Owens v. St. Anthony Med. Ctr., Inc.*, N.D. Ill., No. 1:14-cv-04068, *complaint filed* 6/2/14 (41 BPR 1190, 6/10/14);
- *Lann v. Trinity Health Corp.*, D. Md., No. 8:14-cv-02237-PJM, *complaint filed* 7/11/14 (41 BPR 1512, 7/22/14);
- *Morris v. Daughters of Charity Health Sys.*, N.D. Cal., No. 3:14-cv-04681-LB, *complaint filed* 10/21/14 (41 BPR 2229, 10/28/14); and
- *Griffith v. Providence Health & Servs.*, W.D. Wash., No. 2:14-cv-01720, *complaint filed* 11/7/14 (41 BPR 2364, 11/18/14).

Reasons for Litigation. One of the main questions that has arisen in forums that have discussed the church plan exemption and in the pleadings and amicus briefs filed with the court concerns the timing of these suits.

With the exception of *Thorkelson*, which was filed in 2010 and asserted different grounds for disallowing the exemption than the other 10 cases, all of these cases have been filed since March 2013, more than 33 years after the MPPAA added Section 3(33)(C)(i) to the law.

According to Robert W. Rachal, a senior counsel in the New Orleans office of Proskauer Rose LLP, who is involved in the defense of several of the pending church plan cases, these claims have come 30 years too late.

''The time to fight this battle was 30 years ago when the Congress first amended the statute,'' he said. ''Now, after we have had 30 years of consistent precedent from agencies such as the IRS, DOL and the courts interpreting the definition in one way, and Congress repeatedly building on this exemption after this agency interpretation, the proper forum to address this contention would be Congress, not the courts.''

Professor Norman P. Stein of Drexel University's Thomas R. Kline School of Law, who is also senior policy adviser to the Pension Rights Center, which filed an amicus brief in the *Overall* case, cited withdrawal from ERISA regulation and the return of premiums as why hospitals and other agencies seek classification as church plans.

''Many of these plans had been subject to ERISA for 20 or more years,'' he said. ''Then they had management consultants come in and advise them that they could claim that their retirement plans were church plans as a way to save some money because they then didn't have to pay premiums to the PBGC or meet the funding requirements of the statute.''

Stein points to data that the Pension Rights Center recently obtained from the PBGC as part of a Freedom of Information Act request that shows the agency issued premium refunds to 91 retirement plans that claimed to be church plans between 1992 and 1998 and in 2013.

According to Karen Ferguson, director of the Pension Rights Center, this data strongly suggests that many plans, including some of those involved in the lawsuits, operated as ERISA plans with full pension insurance, funding and other ERISA protections for 20 or more years until they received Internal Revenue Service private letter rulings.

''The time to fight this battle was 30 years ago when the Congress first amended the statute. Now, after we have had 30 years of consistent precedent from agencies such as the IRS, DOL and the courts interpreting the definition in one way, and Congress repeatedly building on this exemption after this agency interpretation, the proper forum to address this contention would be Congress, not the courts.''

—Robert W. Rachal, Proskauer Rose

According to Stein, until the issuance of an IRS revenue procedure in September 2011 (38 BPR 1743, 9/27/11), the organizations that obtained these refunds ''didn't even have to inform the employees that they got the letter rulings from the IRS, so the affected employees were often unaware that their pensions weren't protected anymore.''

Question of Church Status. Karen L. Handorf, a partner at Cohen Milstein Sellers & Toll PLLC in Washington, one of the major firms involved in most of the current church plan cases, said that one of the main reasons for the recent litigation comes from the changed circumstances of the health-care industry since the amendments to ERISA were passed.

''While we believe that the exemption was never intended to include plans established by hospitals and other non-church organizations, the impact of misapplication of the exemption on participants is much greater with the consolidation of health-care systems into multibillion-dollar organizations that swallow up not only religiously affiliated hospitals, but secular hospitals as well. Now you have big health-care organizations that didn't exist back then and employ tens of thousands of employees, some of whom lose their ERISA rights when the hospital they work for is acquired and their previously covered plan is consolidated into a so-called church plan,'' she said, in reference to the plan sponsors subject to the currently active church plan suits.

''In most situations now, you have these big corporate entities that are operating in a competitive environment with other nonprofits, as well as secular systems, and using an exemption from ERISA that does not serve the original purpose of the exemption—to avoid entanglement in church affairs,'' she said.

Catha Worthman, a shareholder in Lewis Feinberg Lee Renaker & Jackson PC in Oakland, Calif., who represents the plan participants in the *Morris* case, agreed that ''these health-care organizations are major hospital corporations. They were never church agencies, but now they have become less and less like them.''

She added, ''they are run by corporate boards of directors, and some even have for-profit subsidiaries and issue debt through municipal channels.''

According to Worthman, the use of the church plan exemption for these organizations ''leaves the pension plans that the employees of these companies rely on for their retirements vulnerable to being underfunded.''

Stein said that ''no one is saying that churches won't do everything in their power to make sure that their employees are taken care of in their retirement.'' But, he added, ''this idea that churches will stand behind their commitments doesn't necessarily apply to businesses, even if they have some connection to a church. They are in competition with other large corporations, and if they see an opportunity to free themselves from regulation and funding requirements, they are going to take it.''

But Eric Rassbach, deputy general counsel for the Becket Fund for Religious Liberty in Washington, which has filed an amicus brief with the Sixth Circuit in the *Overall* case, argued that such a contention clearly implicates the First Amendment to the U.S. Constitution.

''It is quite disturbing that the plaintiffs are asking courts to enforce a government-specified level of orthodoxy. Courts should be asking whether employers are affiliated with a church, not how strict their observance is,'' he said. ''There is a problem when the government takes too heavy a hand in regulating religious organizations and the organizations start changing their practices to deal with that.''

Rachal pointed to the IRS rulings as well as the various federal court opinions in which the courts had assumed that a church-affiliated organization could establish and maintain a church plan as support that the defenders of the plans ''have the better of the statutory argument.''

But the key support is the statute itself, which Rachal submits explicitly ''includes'' as exempt ''church plans'' plans of church-affiliated organizations.

He also agreed with Rassbach that the First Amendment looms large in courts making determinations as to

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whether organizations are affiliated with or considered part of a church so as to qualify for ERISA exemption.

''It's a theological and doctrinal issue,'' Rachal said. ''Different faiths have different definitions of what they consider 'church' and what is their religious ministry and mission, and the federal courts generally should defer to the definitions used by those faiths when deciding these issues.''

Jeffrey J. Greenbaum, a member of Sills Cummis & Gross PC in Newark, N.J., who represents Saint Peter's Healthcare System in the *Kaplan* case, agreed.

''Very simply, part of the mission of these agencies of the Catholic Church is to provide health care to the poor and to the underserved,'' he said. ''The Church has pursued this healing mission since its earliest days and Saint Peter's is owned by the bishop of Metuchen, who is the health-care system's sole member.''

Statutory Construction and Legislative History. In the recent decision in *Stapleton*, Judge Chang focused heavily on the word ''includes'' as it is used in the statute to determine that the plans described in Section 3(33)(C)(i) still had to be established by a church in the first instance.

According to Rachal, the court's opinion reaches the nub of the issue even if he disagrees with the ultimate interpretation.

''The court in this case identified a potential latent ambiguity of the word 'includes' as it is used in this statute,'' Rachal said.

According to Rachal, the word could either be used in the manner that Chang did in his opinion, to signal that the following items in the statute are a subset of a previously defined larger group, or it could be used as it is in the ''governmental plan'' definition in ERISA Section 3(32), to indicate that the following items are in addition to the base category.

''I think in context the later meaning is clear, and accords with the same approach Congress used to expand the governmental plan exemption'' Rachal said.

''But even if you have this kind of latent ambiguity lurking in statutory construction, then you should look at the 30 years of agency and congressional action that supports using one definition over the other, and which clearly favors the plan's use of the exemption,'' Rachal added.

Handorf disagreed, ''The statute itself assumes that these organizations are not churches and that for a plan to be afforded the exemption, it must be established by a church but can then be maintained by a corporation under the control of the church whose purpose is to run that plan.''

''Congress didn't want organizations that could claim some religious affiliation to be able to establish plans on their own and claim the exemption,'' she added.

And that is where much of the discussion between the courts that have ruled on the statutory construction has landed, not just on the words of the statute itself, but on the history and intent behind those words when they were added in 1980.

According to Ferguson, ''hospitals, schools and social service agencies never asked Congress for an exemption.''

Instead, she said, the group that spearheaded the language in the MPPAA ''was made up of church pension boards, and their main concern was that a plan established by a church could also include agency employees and could continue to be maintained by the pension boards, which were separate nonprofit corporations or trusts.''

''That was the fight,'' agreed Stein, ''the supporters of the amendment chose what they wanted and that was an extension of the grandfather rule to allow actual church plans to also provide benefits for employees of their affiliated agencies. There is nothing in the legislative history that indicates a desire to separately allow an agency alone to establish its own church plan unless it was part of a plan that was sponsored by a church or a church pension board.''

According to G. Daniel Miller, a partner at Conner & Winters LLP in Washington, which filed an amicus brief in the *Overall* case on behalf of GuideStone Financial Resources of the Southern Baptist Convention and supporting the plan sponsor, Section 3(33)(C)(i) was drafted to be intentionally broad.

''We were mindful of all of the various types of church benefit plans and programs when suggesting changes to the law,'' said Miller, who was involved with the efforts to amend the statute in the late 1970s by the Church Alliance for the Clarification of ERISA, which eventually led to the addition of Section 3(33)(C)(i).

''The provision was written broadly on purpose so as not to leave anyone out or favor one form of church polity over another,'' he added, pointing to the various Catholic dioceses and their social service agencies, and the Catholic religious orders, as examples of groups that were not involved with the amendment but could be harmed by too narrow of a reading of the addition.

Effects of Litigation. The expected effect of the litigation naturally turns on which interpretation of the statute is supported by the federal appellate courts and, potentially, the U.S. Supreme Court.

According to Handorf, if the plans are determined to be not exempt, it would go a long way to protecting the employees of the organizations.

''Right now, they can have extensive cutbacks in their benefits and don't even know what has been lost until they retire,'' she said. ''These cases were brought to address the underfunding that we know is there, but it could be greater.''

According to Greenbaum, this purpose may not be served by the current litigation that seeks a ruling that the plans aren't exempt from ERISA.

''I believe that the participants bringing these suits are trying to protect the employees of the organizations, but it may backfire on them even if they are successful.''

He added, ''If these plans have to qualify, make back payments of PBGC premiums and meet funding requirements that they haven't been required to meet before, there will be less money available for the plans.''

According to Miller, an interpretation that disqualifies the current plans on the basis that the health-care systems are not part of the church for purposes of the church plan rules might cause excessive entanglement with religion that is forbidden by the First Amendment.

''As with the contraceptive care cases under the Affordable Care Act,'' he said, ''such an interpretation could divide the church into two classes of citizens, those that are entitled to maintain church plans and those that are not because they are not sufficiently related to the church.''

Echoing Rachal's comment on what it means to be a church, Miller added, ''Another reason to support the plans' interpretations in these cases is because it avoids the court having to decide what is a church and what is not.''

While there is pretty firm agreement between all experts that only a split in the federal appellate decisions could lead to this issue being taken up by the U.S. Supreme Court, all seem to also agree that the current political climate makes it unlikely that a final, uniform answer will come through legislation.

However, given that differences in opinion that have shown through at the district court level with the judges in *Thorkelson*, *Overall* and *Medina* interpreting the statute one way and the judges in *Kaplan*, *Rollins* and *Stapleton* interpreting the same words in the opposite manner, the likelihood that the circuit courts will split on the issue and this ends up before the high court is good.

By Matthew Loughran and Jacklyn Wille

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