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BENEFITS LITIGATION UPDATE

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February 2013 Issue 3

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A Short Message from ERIC President Scott Macey:

The various participants in the economy and many other aspects of American society, including unfortunately employee benefits, have become the subject of seemingly endless litigation over the years. The courts are inundated with cases dealing with a variety of employee benefit related issues. In fact, a summary of current and recent benefit litigation could be encyclopedic. We, of course, will spare you such a broad summary.

However, ERIC and Epstein Becker Green (EBG) continue to be on the lookout for critical issues and cases that deserve attention because the outcome could directly and immediately impact the design and administration of benefit plans in general, not just for the litigants. Two of those issues and types of cases discussed in this issue of the Litigation Update are the continuing challenges to a variety of Affordable Care Act (ACA) matters and the current Supreme Court review of the same sex marriage issue. These cases go well beyond employee benefit matters, but depending on the outcome, may change the rules and regulations regarding a variety of benefit plan requirements, including minimum health plan coverage and benefit design, the scope of and liability for ACA employer shared responsibility payments, the health plan coverage and taxation of same sex marriage spouses, and the retirement plan beneficiary and survivor benefit rights of such spouses.

These are all important issues to sponsors and administrators. Thus, we thought that we would address the current litigation that could affect these matters in some detail in this Update. We also briefly review a few other benefit cases that are either reflective of more general litigation on the subject or involve an important matter for sponsors.

As we did with the last issue in the fall of 2012, we will be following up the distribution of this Update with a FocusOn call on March 6 from 2 pm to 3:30 pm so that counsel from EBG can discuss the cases and issues addressed herein and answer your questions. We will be sending out a formal invitation for that call. If you want specific matters or issues addressed on that call, please send me your requests very soon.

We do intend to address in the future topics such as ERISA preemption, fiduciary responsibilities and other significant issues either through the written Update or through separate FocusOn calls. Also, ERIC and EBG want the periodic Benefit Litigation Update to be responsive to your interests and concerns. Thus, we welcome your suggestions as to what issues or cases you would like to see addressed in future Updates or FocusOn calls.

FEATURED ARTICLES

DOMA Update

By: Paul Friedman and John Houston Pope

The last issue of the Litigation Update discussed the emerging body of cases holding Section 3 of the Defense of Marriage Act ("DOMA") unconstitutional. Subsequently, the Supreme Court granted a petition to review a decision of the U.S. Court of Appeals for the Second Circuit, *United States v. Windsor,* 699 F.3d 169 (2d Cir. 2012), *cert. granted*, No. 12-307, to examine this issue. On the same day, the Court also granted review in *Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, No. 12-144, a decision that invalidated a California voter initiative (Proposition 8) that barred a right to marriage by same-sex couples that the state supreme court had previously recognized.

Windsor is a case about the estate tax. Edith Schlain Windsor married her longtime partner, Thea Clara Spyer, in Canada in 2007. Ms. Speyer thereafter died, in 2009. Ms. Windsor paid the estate tax on her inheritance, which would have been $363,000 less if she had received the benefit of the marital deduction. She challenged the denial of the deduction through a claim for refund. The sole reason that Ms. Windsor did not receive the marital deduction on the estate tax is Section 3 of DOMA, which refuses recognition to same-sex marriages, even if they are considered valid in the state where the couple resides. The federal district court ruled in her favor, following the reasoning of the First Circuit decision discussed in the prior issue of this Update, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012). The Second Circuit affirmed.

The Supreme Court had ten petitions addressing same-sex marriage rights from which it could choose when it selected *Windsor* and *Hollingsworth* for review. Many legal commentators supposed that the two cases presented a pair of bookends for a federalism-oriented decision – the Court could uphold California's Proposition 8 as an exercise of state prerogatives on marriage and invalidate DOMA as interfering with those same prerogatives. Alternatively, the Supreme Court could invalidate Proposition 8 on grounds unique to the California situation or on the broader basis of a federally protected right to same sex marriage.

Some commentators, though, have recognized another similarity in the two cases. In each case, the governmental actors responsible for defending the statute refused to do so. The Obama Administration has not defended DOMA and the California governor has not defended Proposition 8. The Court directed briefing in both cases on the impact of this refusal. The DOMA case is prosecuted by the Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives. A court-appointed counsel has submitted a brief challenging BLAG's standing to do so. The respondents in *Hollingsworth* will raise their own arguments in the same vein; the petitioners in that case are the supporters of the Proposition 8 initiative. These standing issues open the risk that a decision in *Windsor* will not resolve the constitutionality of DOMA. If the Supreme Court decrees a general principle that it will not hear a case where the governmental officials charged with defending a law have admitted the law is indefensible, then *Windsor* will not be decided on the merits and DOMA's constitutionality will fall into limbo until a future Administration declares a change in course.

As the prior Update article pointed out, Section 3 of DOMA imposes additional costs on same-sex couples who receive employee benefits (*e.g.*, employer premium contributions made to a group health plan benefiting a same-sex spouse and the dependent children of that spouse are not excludable from the employee's federal income tax and therefore increase the taxable burden of the employee) because those benefits are not recognized as

marital benefits under federal law. Interestingly, in *Windsor*, the BLAG has latched onto this cost difference – characterized in their brief as a savings to the federal treasury – as a rational basis for the congressional determination to differentiate same-sex couples under federal law. In any case, the two Supreme Court cases could clarify the legal status of same sex couples both in general and with respect to various employee benefit matters.

Briefing on the two cases is underway. Oral argument is set for March 26 & 27, 2013. A decision is not expected before the end of the term in June.

Obamacare: Round 2

By: Paul Friedman and John Houston Pope

The greatest drama in the Supreme Court's last term came from the legal challenges to the Patient Protection and Affordable Care Act of 2010 ("PPACA"), as amended by the Health Care and Education Reconciliation Act of 2010, aka "Obamacare". The Court considered substantive challenges to the constitutionality of changes to Medicaid and to the so-called "individual mandate" to purchase health insurance, and a procedural challenge to the ability of certain plaintiffs to challenge the constitutionality of the Act. Three consolidated cases received two full days of oral argument before the Court last year.

In *National Federation of Independent Businesses v. Sebelius,* 132 S. Ct. 2566 (2012), or "*NFIB*," a fractured Court held: (1) the individual mandate provision could be construed as imposing a "tax" for choosing not to buy insurance, rather than a legal compulsion to buy coverage, and therefore could be upheld under the congressional power to impose taxes; (2) although a "tax" in the constitutional sense, the provision was not a "tax" for the purposes of a statute, the Anti-Injunction Act, that otherwise could impose a procedural barrier to deciding the case; and (3) the condition imposed by Congress in its expansion of Medicaid – that a State fully opt into the expanded program or drop out of Medicaid entirely – exceeded the congressional power to impose conditions on the receipt of federal monies. Notably, one of the most highly publicized and interesting issues raised in the litigation, the reach of congressional power under the Commerce Clause, continues to be unsettled. While the Chief Justice and the four dissenting justices agreed that the individual mandate exceeded Congress' power to regulate commerce, the Court does not usually consider itself bound by a "holding" that has to be cobbled out of a combination of majority and dissenting opinions (as in the *NFIB* case), and lower courts view such dispositions through this lens. The fact that five justices expressed that opinion, however, suggests what the answer can be expected to be if an issue similar to the individual mandate again squarely presents itself to the current Court (although the effect of their view on other cases involving the commerce clause remains unknown at this time).

As the Administration breathed a sigh of relief at the win in *NFIB* and proceeded apace to issuing implementing regulations for the law, a second round of litigation began to gear up. These cases raise a variety of new challenges to the law, some of which could result in complete invalidation of the law or overturn certain provisions applicable to employers and their plans. We examine these new challenges in this article. These cases could have a significant impact on health plans and their sponsors depending on the ultimate outcome of the various cases.

One group of cases (some of which were pending, but stayed, during the Court's consideration of *NFIB* case, and revived thereafter) focuses on broad challenges to key elements of the law (such as the employer mandate

or shared responsibility provisions). A distinct group of cases challenges the regulations implementing the preventive health provisions of the mandatory coverage requirements because those regulations guarantee employees access to coverage for certain forms of contraception that offend the religious principles of the challengers. While exemptions were carved out for some overtly religious (*e.g.*, churches) not-for-profit employers, a number of both church-affiliated employers and for-profit employers, engaged in otherwise secular businesses, have objected based on their contention that they operate their businesses in accordance with religious principles or to further their religious purposes and therefore should receive an exemption to avoid the offense to their sincerely held religious beliefs.

Broad Challenges

Five suits present interesting issues broadly challenging Obamacare's constitutionality that likely will be resolved within the coming year. Of course, if the Supreme Court ultimately determines that the law is unconstitutional on grounds not addressed in the 2012 NFIB decision, it would invalidate any further requirements of states or private employers to comply with its requirements. If the Court ultimately determines that only some portion of the law was unconstitutional, those particular provisions (*e.g.* all or part of the employer shared responsibility provisions) would presumably be invalidated.

In *Liberty University, Inc. v. Geithner*, Dkt. No. 10-2347 (4th Cir.), the U.S. Court of Appeals for the Fourth Circuit will consider a challenge to the constitutionality of the employer mandate in PPACA. In *U.S. Citizens Ass'n v. Sebelius, Dkt.* No. 11-3327 (6th Cir.), the Sixth Circuit recently ruled on a suit seeking to invalidate the individual mandate on various grounds (not considered in the *NFIB* case), such as the right to liberty, the right of association, and the right to privacy. In *Coons v. Geithner,* Case No. 2:10-cv-1714 (D. Ariz.), the Ninth Circuit soon will be asked to consider similar arguments, as well as to address the preemptive effect of PPACA on state "health care choice" laws. In *Sissel v. U.S. Dep't of Health & Human Services*, Case No. 1:10-cv-1263 (D.D.C.), the federal district court in the District of Columbia will decide a challenge to the individual mandate based on the Constitution's Origination Clause. In *State of Oklahoma ex rel. Pruitt v. Sebelius*, Case No. 3:11-cv-30 (E.D. Okla.), the Attorney General of Oklahoma seeks to set aside IRS regulations that approve tax credits and subsidies for users of a federal health insurance exchange in states, such as Oklahoma, that have declined to establish a state exchange. We briefly explain each of these cases in more detail.

Employer Mandate: Liberty University, Inc. v. Geithner

Liberty University may be known to our readers for the Fourth Circuit's pre-NFIB ruling that the Anti-Injunction Act ("AIA") barred a pre-implementation challenge to PPACA. The AIA bars the consideration of a lawsuit regarding a federal tax before it is actually imposed and collected. The Supreme Court in *NFIB* effectively held that the individual mandate/penalty was not a tax for AIA purposes, but was a tax for substantive ruling purposes. After *NFIB* held a challenge to the individual mandate was not so barred, the Supreme Court denied Liberty's petition for review. Liberty then successfully obtained reconsideration of that denial – a rarity in Supreme Court practice – and obtained a remand to the Fourth Circuit to obtain review of a federal district court ruling rejecting its arguments on the merits. On January 17, 2013, the appellate court requested additional briefing on three issues: (1) the applicability of the Anti-Injunction Act, after *NFIB*, to a challenge to Obamacare's employer mandate (the *NFIB* case only addressed the AIA as it applied to the individual mandate); (2) whether the employer mandate "exceeds Congress' powers under the Commerce, Necessary and Proper, and taxing and Spending Clauses" of the Constitution; and (3) any new developments affecting the constitutionality of the individual mandate and the employer mandate under the Free Exercise, Establishment, and Equal Protection Clauses.

The most interesting aspect of the request for additional briefing is the willingness to consider the constitutional challenge to the employer mandate. The district court rejected those arguments out of hand, citing the New Deal era cases upholding the federal minimum wage and federal labor laws. *See Liberty Univ., Inc. v. Geithner,* 753 F. Supp. 2d 611, 635 (W.D. Va. 2010). The district court viewed the minimum benefit requirements in the employer mandate as equivalent to imposition of a floor on compensation through the minimum wage laws. Those precedents certainly distinguish the employer mandate from the individual mandate, which did not have any comparable precursor legislation upheld by any court.

Liberty University will be briefed on these issues over the next three months and is set for oral argument in mid-May.

Other Individual Mandate Challenges: U.S. Citizens Ass'n v. Sebelius

As we prepared this issue for publication, the Sixth Circuit issued its decision in *U.S. Citizens Ass'n*. The case involves a challenge by individuals and a "citizen's group" to the individual mandate to purchase health insurance. The plaintiffs failed on all counts.

The plaintiffs in *U.S. Citizens Ass'n* claimed that the individual mandate (albeit construed by the Supreme Court to be a "tax") burdens an individual's right to liberty because it forces individuals, under the threat of penalties, to be financially responsible for medical care that they may wish to refuse in the future. (The courts have endorsed an individual's right to refuse medical treatment.) The Sixth Circuit held that the choice between payment of the "tax" and obtaining insurance did not interfere with an individual's right to decide to refuse medical treatment in the future.

The plaintiffs also claimed that Obamacare burdens an individual's right to intimate association with his or her physician and invades medical privacy because certain information must be disclosed to insurers. The Sixth Circuit held that the relationship between an individual and his or her physician did not qualify for constitutional protection as an "intimate association" and, in any event, did not suffer any impairment under the law, which does not dictate physician-patient choices. The court also noted that any invasion of medical privacy could be avoided by opting out of any insurance scheme and simply paying the tax.

Privacy/Preemption Challenges: Coons v. Geithner

In *Coons*, an individual and two Congressmen launched another high level attack on the constitutionality of PPACA. Also commenced before *NFIB*, the plaintiffs raised many arguments that were resolved by that case. They also asserted that the law violates separation of powers principles, by delegating legislative powers to the Independent Payment Advisory Board, and invades constitutionally protected medical privacy because it compels individuals to authorize access to personal medical records and information to health insurance issuers. They additionally sought a declaration that the federal law does not preempt certain state laws, including Arizona's Health Care Freedom Act, that are designed to thwart PPACA's implementation. In decisions issued in August and December of last year, a federal district court in Arizona rejected all of these arguments and dismissed the lawsuit. The time for appeal has not yet expired. Plaintiffs are represented by the Goldwater Institute, which has noted on its website that an appeal can be expected.

Notably, another suit seeking to challenge Obamacare on medical privacy grounds, *Walters v. Holder,* Case no. 2:10-cv-76 (S.D. Miss.), was dismissed in August 2012 on ripeness grounds. The district court concluded

that two of the plaintiffs lacked standing – they could not show an injury that could be redressed by the court. More importantly, the court concluded that the claims themselves were not ripe for judicial review because regulations designed to govern the potential disclosure of medical information have yet to be written. An appeal initially was filed; it was dismissed when the plaintiffs did not file their initial brief by a deadline in December.

Congressional Process: Sissel v. U.S. Dep't of Health & Human Services

Sissel bases its challenge on a clever twist of "it's a tax" holding in *NFIB*. The Constitution's Origination Clause states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." *Sissel* asserts that PPACA in fact originated in the Senate and, since the Supreme Court says it's a law that imposes a new tax, it must be invalid under the Origination Clause. Were the facts and law so simple, this challenge might succeed. But the facts and law are more complex.

The substance of the Obamacare reforms did, in fact, originate in amendments first passed in the Senate. In recognition of the Origination Clause issue, the Senate employed a "shell" bill tactic that has been used several times before. A bill previously passed by the House of Representatives, in which a revenue issue had been addressed, was "amended" by striking out its entire contents and substituting the Senate's version of healthcare reform. The House then passed the Senate's bill.

The government defends the law against the Origination Clause challenge, then, on the argument that, if PPACA could be described as a bill raising revenue, it originated in the House and was amended by the Senate. The courts have accepted less dramatic versions of the shell bill tactic in the past. However, the Obamacare litigation poses the first test of the constitutionality of the practice of completely gutting of a House bill to substitute entirely new Senate content.

The government additionally argues that PPACA does not qualify under the Constitution as a bill for raising revenue. Past cases allowed Senate-originated bills that raise taxes when the tax provisions are incidental to changes in the law in other, nonrevenue raising ways. (For example, the Supreme Court upheld changes to federal criminal sentencing law that included special assessments that could be characterized as raising revenue because the primary purpose of the bill was to change sentencing law.) The government argues that the health care reform legislation predominantly concerned other changes, with the "tax" involved in the individual mandate merely a small, incidental part of the overall reform.

Sissel commenced before the *NFIB* decision but added the Origination Clause challenge in an amended complaint after the Court's decision. The claim, if successful, would presumably invalidate the entire healthcare reform law. The government has moved to dismiss the amended complaint. Briefing on the motion was recently completed; whether it will be argued orally, and how long a decision might take, remain unknown. The Pacific Legal Foundation represents Matt Sissel, the plaintiff, and can be expected to pursue an appeal to the D.C. Circuit, if unsuccessful in the district court.

State Requirements and Federal Exchanges:
State of Oklahoma ex rel. Pruitt v. Sebelius

Pruitt is being prosecuted by the Attorney General of Oklahoma. Again, a suit initiated before NFIB has morphed after the decision to focus on new issues. The State of Oklahoma challenges the application of the minimum coverage employer mandate to itself as employer, asking the district court to conclude that existing Supreme

Court precedent on the application of federal law to States as employers has become antiquated. The suit also challenges, on Tenth Amendment (federalism) grounds, the federal government's intervention with a federal insurance exchange, in any State that had elected not to implement a State-sponsored exchange.

Importantly, for private employers, however, Oklahoma seeks a determination that the IRS has exceeded its statutory authority with implementing regulations for federal exchanges in States that decline to establish State-sponsored exchanges. Obamacare unambiguously applied certain tax credits and subsidies to participants in State-sponsored exchanges that the IRS has now applied to participants in the federal exchange. Employers may be subject to tax penalties if their employees participate in exchanges to which these credits and subsidies apply. With about half of the States declining to establish exchanges, the application of the tax credits and subsidies to the federal exchange operating in those states broadens employer exposure to these penalties. Notably, the language of the statute that the regulations purport to implement can be read to limit the IRS to a narrower scope than it has followed (*i.e.*, that the shared responsibility payments assessed against employers only apply to state run exchanges). Oklahoma argues in its brief that PPACA gives states the authority not to implement a state exchange and not to have the shared responsibility provisions apply in a state.

This case is in an early stage, with the government having moved to dismiss, on standing and ripeness grounds, and briefing just having completed. Also, a group of private employers have asked to intervene in the case, ostensibly to ensure that any ruling expressly covers private employers. Any decision is unlikely before the second quarter of 2013.

Contraceptive Mandate

The PPACA contains a preventive services coverage requirement which includes a direction that the minimum coverage of group health plans contain "such additional preventive care and screenings" for women as provided for in "comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA"), an agency within HHS. In August 2011, HRSA adopted guidelines that brought FDA-approved contraceptive methods within the list of covered preventive care services. These methods cover ones to which some religious groups object, such as oral contraceptive pills, emergency contraceptives (*e.g.*, so-called morning after pills), and intrauterine devices. To accommodate the religious objections, HHS, the Department of Labor and the Treasury Department promulgated regulations that exempted "religious employers" from providing plans covering contraceptive services.

Litigation over the definition of "religious employer" has spawned over 100 cases brought by a wide range of businesses. For present purposes, two types of suits are examined below.

In one group of cases, overtly religious organizations operate non-profit businesses, such as a college, that have direct counterparts operated by secular organizations. These religious organizations did not qualify under the initial definition of "religious employer" because the business did not serve exclusively adherents to the church's faith (*i.e.*, a Catholic college admits non-Catholic students) and, while acting to implement tenets of their faith through good works, the church-sponsored enterprise did more than teach religious doctrine. The Obama Administration recently represented to the U.S. Court of Appeals for the District of Columbia that new regulations will be promulgated to address the contraceptive mandate for such employers. The Court accepted this representation as binding and has held in abeyance the appeal of a challenge to the contraceptive mandate. *See Wheaton College v. Sebelius*, Dkt. No. 12-5273 (D.C. Cir. Dec. 18, 2012). On January 30, 2013, the Obama Administration made good on its representation, releasing proposed regulations to expand the definition of

"religious employer" and providing other accommodations to affiliated employers. Several major religious employers, such as the Catholic Church, have expressed dissatisfaction with the new proposal. A period of collecting comments is underway and a final regulation can be expected later this year. If significant revisions to the new proposal do not occur, renewed litigation seems likely.

The other group of cases concerns employers who would appear to be secular – for profit corporations involved in non-religious business activities, such as manufacturing, mining or retail sales. (Individual shareholders also have joined the suits, but the focus in these suits is on the corporation as the actual employer. There seems to be little doubt that an individual directly employing another individual could assert his or her religious rights.) Because the religious employer exemption specifies that it applies only to not-for-profit businesses, these for-profit businesses cannot invoke the exemption by its terms. Nonetheless, these employers contend that the business owners act according to religious principles or tenets and their sincere religious beliefs will be offended by providing health care insurance that covers certain forms of contraception. These challenges rest either on constitutional grounds (free exercise of religious belief) or on the Religious Freedom Restoration Act ("RFRA"), a 1993 federal law enacted to address a Supreme Court case that Congress felt was insufficiently protective of religious freedoms. RFRA provides individuals with a statutory right to contest legal requirements that substantially burden the exercise of practices dictated by their sincerely held religious beliefs.

No court has yet issued a final decision on the merits in favor of any of the challenges, although several courts have entered preliminary injunctions against enforcement pending further resolution of the merits. In *O'Brien v. U.S. Dep't of Health & Human Services*, Case No. 4:12-cv-476 (E.D. Mo. Sept. 28, 2012), a federal district court dismissed a suit bringing one such challenge. A panel of the U.S. Court of Appeals for the Eighth Circuit (with one judge dissenting) granted a stay pending appeal, allowing the plaintiff to avoid having to comply with the law, or face significant penalties, pending the outcome of the appeal. *O'Brien v. U.S. Dep't of Health & Human Services*, Dkt. No. 12-3357 (8th Cir. Nov. 28, 2012). Briefing proceeded on an expedited basis, as would be expected with a stay in place, and was completed in mid-January. Oral argument has yet to be scheduled.

A panel of the U.S. Court of Appeals for the Seventh Circuit (also with a dissenting judge) likewise imposed a stay pending the disposition of an appeal of a denial of a preliminary injunction application. *Korte v. Sebelius*, Dkt. No. 12-3841 (7th Cir. Dec. 28, 2012). The court concluded that the plaintiffs had a reasonable likelihood of prevailing on the merits of a RFRA claim and would suffer irreparable injury to their religious beliefs if required to comply with the law. It's important to emphasize that the panel looked to the statutory cause of action, the problems of which are further explained in the next paragraph. (The Seventh Circuit seems unmoved by the positions taken by other courts; however, it recently accepted a second case to hear with Korte and issued a stay of the lower court ruling in it as well. *Grote v. Sebelius,* Dkt. No. 13-1077 (7th Cir. Jan. 30, 2013).) The appellants-employers filed their opening brief on January 28, 2013. Briefing should conclude in the first quarter of 2013 and proceed to argument thereafter.

In contrast, in a highly publicized case, a federal district court in Oklahoma refused to enter a preliminary injunction, the U.S. Court of Appeals for the Tenth Circuit upheld the denial, and Justice Sotomayor, in her role as Circuit Justice, refused to enter a stay. *Hobby Lobby, Inc. v. Sebelius*, Case No. 5:12-cv-1000 (W.D. Okla. Nov. 19, 2012), aff'd, Dkt. No. 12-6294 (10th Cir. Dec. 20, 2012), *stay denied*, No. 12A644 (U.S. Dec. 26, 2012) (Sotomayor, J.) (chambers opinion). The Oklahoma federal court concluded that the RFRA did not confer any rights on corporations (an important contrast to the Seventh Circuit's rationale in granting a stay in *Korte*) and the RFRA

only bars the substantial burdening of the exercise of sincerely held religious beliefs. The contraceptive mandate did not impose a substantial burden, according to this court, because it lacked a sufficiently direct relationship, given that the "burden" fell on the for-profit corporate entity and only indirectly fell on the individuals (*i.e.*, owners or managers) who professed the religious belief at issue, and because the "burden" involves an indirect and attenuated set of decisions that result in some part of plaintiffs' money subsidizing an activity condemned by their religion. The district court stayed proceedings while the federal appellate court hears the appeal of the denial of a preliminary injunction. Briefing in the Tenth Circuit will occur in February through April, 2013. The appellants-employers have requested that the entire (en banc) Tenth Circuit hear the appeal as an initial matter. This strategy suggests that the appellants are concerned that the application of existing precedent in the Circuit may lead to a loss. Notably, the Tenth Circuit also has on its docket, and in the briefing stages, the government's appeal of a lower court order that enjoined enforcement of the contraceptive mandate, obtained by a Colorado employer. *Newland v. Sebelius,* Dkt. No. 12-1380.

Evening up the split among appellate courts, the Sixth Circuit, in *Autocam Corp. v. Sebelius,* Dkt. No. 12-2673 (6th Cir. Dec. 28, 2012), also refused to enter a stay pending appeal after the employer failed to obtain a preliminary injunction in the district court. Among the reasons cited by the lower court for concluding that the plaintiffs would not likely prevail on the merits was the fundamental differentiation between a corporation and its shareholders. "The law protects the separation between the corporation and its owners for many worthwhile purposes. Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own." *Autocam Corp. v. Sebelius*, Case No. 1:12-CV-1096 (W.D. Mich. Dec. 24, 2012). The Sixth Circuit expedited its consideration of the appeal, for which briefing will be complete by the end of March.

The split among the circuits tilted slightly in favor (for the time being) of allowing the contraceptive mandate to take effect with the Third Circuit's ruling in *Conestoga Wood Specialties Corp. v. Secretary of the Dep't of Health & Human Services*, Dkt. No. 13-1144 (3d Cir. Feb. 7, 2013). The appellate order (from which one judge dissented) simply endorsed the reasoning of the district judge. His opinion relied on the same reasoning as the other opinions that have refused to enjoin the mandate on the behalf of for-profit corporations.

This set of for-profit business cases will be important to all private employers because they will flesh out the principles for application of the RFRA to corporate entities (if it applies at all) and the manner in which a "substantial burden" is deemed to have occurred. The injunctions and stays issued in various cases mean the cases will be given priority and decisions will be issued promptly, raising the likelihood that answers to these questions will be obtained sometime later this year.

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IMPORTANT ISSUES IN PENDING CASES

We lead this Issue's set of Noteworthy Cases with cases that share the common theme of ERISA preemption. While preemption remains an ever present issue in benefits litigation, it currently enjoys a renaissance. In a future Issue, we will present a feature article examining the developments in this area in more detail.

Nat'l Sec. Sys. v. Iola, 700 F.3d 65 (3d Cir. 2012)

a. Plaintiff employers sued defendants plan administrator and financial planner for violating ERISA and state statutes and common law.

b. Explaining the case, the court wrote that in the late 1980s, "a financial planner . . . induced the plaintiffs . . . to adopt an employee welfare benefit plan . . . [that] advertised tax benefits, the plaintiffs discovered years later, were illusory; the scheme masqueraded as a multiple employer welfare benefit plan, but in fact was a method of deferring compensation." *Id.* at 73.

c. The lower court found some state common law claims preempted and tried the remaining state law claims, ERISA claims, and RICO claims. Defendants incurred substantial liability.

d. The Third Circuit affirmed in most respects. It concluded on the state common law claims, however, that the district court had dismissed claims that were not preempted by ERISA.

e. The Third Circuit drew a bright line between the planner's alleged misrepresentations made after the plans' adoption, which were preempted, and the state law claims based on alleged misrepresentations before adoption of the plans, which were not preempted. The court held that pre-plan misrepresentations are actionable, even if they require an examination of the plan that was adopted to determine what was not delivered, because imposing liability for such misrepresentations does not impair or interfere with plan administration.

Loffredo v. Daimler AG, ___ F.3d ___, 2012 U.S. App. LEXIS 20219 (6th Cir. 2012)

a. Plaintiffs lost most of their benefits under Chrysler's top-hat SERP when Chrysler went bankrupt in 2009. They sued in state court on state law claims promissory estoppel, breach of fiduciary duty, age discrimination, fraud and statutory conversion. They contended that had the plan been properly managed, it would have survived the bankruptcy.

b. Defendants removed to federal court, which dismissed the claims as preempted by the ERISA. Plaintiffs appealed.

c. State fiduciary duty law could not be applied to the administration of a top hat plan because ERISA completely preempts the area of fiduciary duties applicable to ERISA-governed plans. ERISA does not provide a basis for relief, because top hat plans are exempt from the fiduciary duty provisions, but state law may not be used to impose the duties that ERISA specifically chose not to.

d. Age discrimination claims under state law survived preemption because the ADEA, a federal counterpart statute, was expressly saved under 29 U.S.C. § 1144(d) and the ADEA contemplates state-law counterparts will bolster enforcement of the law. This preservation extended only to state-law claims to the extent they mirrored ADEA claims (in this instance, based on disparate impact theory).

Self-Insurance Inst. of Am., Inc. v. Snyder, 2012 U.S. Dist. LEXIS 124405 (E.D. Mich. Sept. 7, 2012), appeal pending, Dkt. No. 12-2264 (6th Cir.)

a. The Michigan Health Insurance Claims Assessment Act ("Act") imposes an assessment of one percent on the value of all claims paid by every carrier or third party administrator for medical services that are rendered in Michigan to a resident of Michigan. Plaintiff, a trade association of sponsors of self-funded ERISA welfare plans, sought a declaration that the Act was preempted by ERISA.

b. The court dismissed the action. The law did not single out ERISA plans, but rather treated them the same as any entity that makes actual payments, net of recoveries, to a health and medical services provider. It did not impermissibly burden ERISA plans because it imposed essentially a tax after a coverage decision has been made and a claim paid. This did not alter the administration of any plan and imposed only a slight economic effect.

c. The SIAA is appealing the decision. ERIC has discussed the case with counsel for SIAA and supports its argument that the Michigan assessment law is preempted by ERISA for self-insured plans.

America's Health Insurance Plans v. Hudgens, 2012 U.S. Dist. LEXIS 182922 (N.D. Ga. Dec. 31, 2012), appeal filed, Dkt No. 13-10349 (11th Cir.)

a. In 1999, Georgia enacted a Prompt Pay Statute to penalize insurance companies if they did not pay claims within a prescribed period of time. In 2011, concerned that the growth of self-funded health plans had eroded the coverage of the Statute, the Georgia Legislature enacted a law to extend the requirements of the Statute to self-funded health plans.

b. A national trade association representing third-party administrators of self-funded plans, sued to enjoin enforcement of the 2011 law.

c. Federal District Court entered an injunction against enforcement of the law against ERISA-regulated self-funded health plans and the administrators of them, concluding that the 2011 law "relates to" ERISA plans and is not saved under the exemption for the regulation of the business of insurance.

We also note a case in which ERIC is appearing as an amicus to the employer on appeal:

Abbott v. Lockheed Martin Corp., 2012 U.S. Dist. LEXIS 135848 (S.D. Ill. Sept. 24, 2012)

a. Plaintiffs, participants in two defined contribution plans initiated a class action suit against Lockheed Martin Corporation, the plan sponsor, and Lockheed Martin Investment Management Company, its subsidiary that was responsible for the plans' investments (collectively, "Lockheed"), under Section 502(a)(2) of ERISA for breach of fiduciary duties.

b. The case is currently before the Seventh Circuit on an interlocutory appeal with respect to one issue, the class certification of plaintiffs who invested in the Stable Value Fund ("SVF"), an investment option offered under both plans.

c. In the district court, plaintiffs argued that Lockheed had imprudently managed the SVF by allocating an excessive amount of the SVF assets to risky money market investments rather than to more stable products. The plaintiffs further contended that a prudently managed stable value fund would typically have not allocated more than a small percentage of its assets to money market investments.

d. The district court in denying plaintiff's motion to certify a class of all participants who had invested in the SVF during a certain time period and whose assets had underperformed relative to the Hueler Index ruled that the class could not be certified because the plaintiffs had divided SVF investors into two groups: participants whose investment in the SVF had outperformed the Hueler Index and those whose investment in the SVF had underperformed the Hueler Index.

e. The court ruled (1) that the plaintiffs had failed to demonstrate that the Hueler Index was the appropriate benchmark by which to determine whether the SVF was an imprudent investment option, and (2) that plaintiffs' claim that a typical stable value fund would have achieved better returns than the SVF, by using the Hueler Index as a comparator, failed to demonstrate at all that Lockheed's investments had been imprudent.

Please send questions, comments, and related requests to Scott J. Macey or Joan Disler.