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*Church Plans*

## 6th Cir. Church Plan Case Against Ascension Remanded for Settlement Consideration

The first church plan case to reach the federal appellate courts is being returned to the district court to consider a proposed settlement between the parties, according to an order issued by the U.S. Court of Appeals for the Sixth Circuit (*Overall v. Ascension Health*, 6th Cir., No. 14-1735, 3/17/15).

The March 17 order held the appeal in abeyance and provided a limited remand to the U.S. District Court for the Eastern District of Michigan in order to consider a proposed settlement between the parties.

The appeal, the first of four to reach the federal circuit courts involving the proper construction of the definition of an exempt ''church plan'' under the Employee Retirement Income Security Act, was originally scheduled for oral argument on April 28.

If the settlement is approved, this case will join the very first case in recent years to test the church plan exemption, *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), as cases in which the district court ruled on the interpretation of the statute, but the parties settled before the court could rule.

In the *Thorkleson* case, the parties reached a $4.5 million settlement before the district court's decision allowing exemption for a religiously affiliated nonprofit corporation's defined benefit plan could be reviewed by the U.S. Court of Appeals for the Eighth Circuit.

According to the joint motion for a stay and limited remand that the parties filed on March 13, the proposed settlement agreement resulted from the mediation program sponsored by the Sixth Circuit.

**Case Was First to Be Appealed.** In the order, the Sixth Circuit retained jurisdiction over the appeal, which resulted from the dismissal of claims for violations of ERISA funding and notification requirements brought by a proposed class of participants in a defined benefit plan that was sponsored by a health-care organization affiliated with the Roman Catholic Church.

In his opinion dismissing the claims, District Judge Avern Cohn of the Eastern District of Michigan ruled that Section 3(33)(C) of ERISA was included in the statute in order to broaden the field of organizations that could sponsor an exempt ''church plan'' to include organizations that were affiliated with a church, such as hospitals or schools (41 BPR 1028, 5/13/14; 58 EBC 1885).

The participants appealed Judge Cohn's decision on June 11, 2014, and the appellate court was prepared to hear oral argument on the case, having received amicus curiae briefs from the Pension Rights Center, GuideStone Financial Resources of the Southern Baptist Convention, Catholic Health Association of the United States and Becket Fund for Religious Liberty (41 BPR 2413, 11/25/14).

After the Sixth Circuit docketed the instant appeal, three other circuit courts—the U.S. Court of Appeals for the Third, Seventh and Ninth Circuits—accepted interlocutory appeals on the same subject, which are all still pending.

**Other Appeals All Interlocutory.** The Ninth Circuit case, *Rollins v. Dignity Health*, 9th Cir., No. 15-15351, *appeal docketed* 2/26/15, reached the appellate court on interlocutory appeal of a decision by Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California denying a motion to dismiss identical claims brought by a different plan's participants.

In his opinion, Judge Henderson said that if ERISA Section 3(33)(C) was read as broadening the category of organizations that could establish a church plan, it would eliminate the need for the original provision, ERISA Section 3(33)(A), which required a church or association of churches to establish such a plan in the first instance (40 BPR 2937, 12/31/13; 57 EBC 1346).

Instead, the judge ruled, the addition Section 3(33)(C) to the statute was specifically targeted at removing the requirement that the church or association of churches continue to maintain the plans and instead permitted churches to delegate that function to a pension board created for the specific purpose of maintaining the plans.

The health-care organization petitioned for interlocutory appeal of the order in December 2014 and the Ninth Circuit docketed the appeal last month.

Unlike the *Overall* case, the *Rollins* appeal wasn't selected for mediation by the Ninth Circuit.

The Third Circuit case, *Kaplan v. Saint Peter's Healthcare Sys.*, 3d Cir., No. 15-01172, *appeal docketed* 1/20/15, is similar to the *Rollins* case in that it involves an interlocutory appeal by the health-care organization of a denied motion to dismiss nearly identical claims.

Like the district court opinion in *Rollins*, the decision by Judge Michael Shipp of the U.S. District Court for the District of New Jersey in the *Kaplan* case predated the district court decision in *Overall* but wasn't appealed until after the Sixth Circuit docketed its appeal.

In his opinion, Judge Shipp cited Judge Henderson's *Rollins* opinion favorably, finding that Section 3(33)(A) acted as a ''gatekeeper'' for the church plan exemption, providing the requirements that must be met for the es-

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tablishment of a church plan in the first instance (41 BPR 793, 4/8/14; 58 EBC 1831).

The health-care organization petitioned for interlocutory appeal in September 2014 and the Third Circuit docketed the appeal in January.

Finally, the Seventh Circuit has docketed another interlocutory appeal from a religiously affiliated health-care organization whose motion to dismiss was denied by the district court in *Stapleton v. Advocate Health Care Network*, 7th Cir., *appeal docketed* 2/25/15.

That appeal was generated by a decision issued by Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois who sided with the *Rollins* and *Kaplan* courts in finding that a church plan must be established by a church in the first instance to qualify for exemption under ERISA (42 BPR 20, 1/6/15).

Overall was represented by Monya Monigue Bunch of Cohen, Milstein, Sellers & Toll in Washington; Lynn Lincoln Sarko, Laura Ruth Gerber, Matthew Michael Gerend, Ron Kilgard, Havila C. Unrein and Laurie Bernice Ashton of Keller Rohrback in Seattle and Phoenix and Stephen Wasinger of Stephen F. Wasinger PLC in Royal Oak, Mich.

Ascension Health was represented by Howard Shapiro, Stacey C.S. Cerrone, Michael Todd Mobley and Robert W. Rachal of Proskauer Rose in New Orleans; Michael P. Coakley, Paul D. Hudson and Brian M. Schwartz of Miller Canfield in Detroit and Kalamazoo, Mich. and Heather M. Mehta and Daniel J. Schwartz of Greensfelder, Hemker & Gale in St. Louis.

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*Text of the order is at http://www.bloomberglaw.com/public/document/Marilyn_Overall_v_Ascension_Health_et_al_Docket_No_1401735_6th_Ci/5.*

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