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New tactics being deployed in challenging church plans

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Karen Ferguson is hoping the shift will change the landscape and have the courts 'do right by the retirees.'

Participants in pension plans exempt from federal regulation due to their church plan status are forging ahead with legal and legislative challenges and some new tactics, despite a 2017 Supreme Court decision that did not go their way.

"We are optimistic that both the federal and state courts will do right by the retirees," said Karen Ferguson, director of the Pension Rights Center in Washington, which often files amicus briefs in church plan lawsuits.

Legal battles over which sponsors are entitled to be exempt from the Employee Retirement Income Security Act and its detailed rules on funding obligations, vesting, reporting and disclosure center around religiously affiliated health-care systems that have operated as exempt. Federal lawsuits brought by plan participants against large health-care companies

claiming church plan status ask courts to revoke that status and force sponsors to go by ERISA rules. While the health-care organizations may be non-profit, argues plaintiffs law firm Keller Rohrback LLP, "they often have assets on par with Fortune 100 companies."

Three such sponsors — Dignity Health, Advocate Health Care and Saint Peter's Healthcare System — welcomed a unanimous Supreme Court decision in June 2017 that pension plans did not have to be established by a church to be exempt from ERISA, as long as they are controlled by or associated with one.

It was a case closely watched by similarly situated plans sponsored by health-care systems involved in related cases that according to the Supreme Court petition had an estimated \$4 billion in combined underfunding and roughly 300,000 plan participants.

It was also keenly tracked by participants in those plans, who zero in on the fact that the Supreme Court ruling was limited to interpreting what Congress intended when it created the church plan exemption in 1980, and did not decide whether other requirements for exemption were met, leaving it to lower courts to decide those.

The key issues being argued now center around the degree of connection between a pension plan and the religious organization, including how the pension plan is maintained or controlled, and the sponsor's principal purpose. District and appellate courts have offered differing opinions on whether the church plan statutory exemption applies only to plans established and maintained by churches or church pension boards, or if it extends to plans established by other church-affiliated non-profit organizations such as hospitals, schools and social service agencies.

While court rulings have gone both for and against plan participants, the filing of such cases has often led to several multimillion-dollar settlements in recent years, for practical and financial reasons.

The less-successful plaintiffs involved in the three sponsors' combined Supreme Court case have since amended their complaints to keep the legal challenges alive in federal courts, and some are headed for settlement, including the one against

Dignity Health. Those cases, and more expected to be filed shortly, including a possible challenge to a church-affiliated defined contribution plan's vesting rules, are now likely to be more fact-specific, legal experts on both sides say.

Taking it to state courts

Other plaintiffs are pursuing different arguments at the state court level. The latest lawsuit, filed May 7 against the Archdiocese of Newark in New Jersey by former employees of St. James Hospital over at least \$2.7 million in unpaid pension benefits, is claiming violations of state law, including breach of contract and breach of fiduciary duty. State law applied, the lawsuit says, when the plan sponsor elected to no longer be covered by federal law.

The receiver for the insolvent St. Joseph Health Services of Rhode Island Retirement Plan is taking it one step further. In addition to overseeing several state and federal lawsuits against the plan sponsor and the Diocese of Providence, Receiver Stephen Del Sesto is trying a new tactic: to have the pension plan reclassified and administered as if it had been covered by ERISA for years, and to have the Pension Benefit Guaranty Corp. assume responsibility for it. Mr. Del Sesto even made an initial premium payment to the PBGC, which has no precedent for such a request.

While Mr. Del Sesto acknowledges that the tactic "has no assurances" that it will work, with no source of income for the plan after sponsor Prospect Charter Care LLC was sold, the \$74 million in plan assets will not last long, so it is worth a try, he said. In the meantime, a proposed settlement in the court cases calls for an immediate lump-sum payment of at least \$11.15 million and an admission that the plaintiffs' damages are at least \$125 million, including unfunded liability.

Rhode Island Treasurer Seth Magaziner is also getting involved. He actively promoted state legislation passed May 22 and headed for the governor's signature requiring pension plans managed by religious organizations in the state to send regular financial updates to plan participants. While some of the church-related health-care systems involved in current litigation have reporting and disclosure regimes in place, Mr. Magaziner, who oversees the Rhode Island State Investment Commission, including the \$8.1 billion Rhode Island Employees' Retirement System, Providence, pushed to close what he called an "unnecessary loophole" for a simple reason: "Any member of a pension plan, no matter who administers the plan, should have access to information about their pension."

Another legal question

Another legal question that could come up more often involves churches related to plan sponsors seeking bankruptcy protection. That was the case with the Roman Catholic Archdiocese of San Juan, Puerto Rico, which filed for bankruptcy in August after a \$4.7 million judgment in a case brought by pension plan participants against the Superintendence of Catholic Schools of the Archdioceses of San Juan. With the Puerto Rico Supreme Court authorizing immediate seizure of church assets, including bank accounts, cars, works of art, furniture and real estate to pay the judgment, the archdiocese tried but failed to seek bankruptcy protection.

Among all the court cases, with varying degrees of success so far, and the court of public opinion, the willingness on the part of the IRS to approve ERISA exemption status for church-affiliated plans in the first place may be waning, said Susan Rees, an ERISA attorney with Wagner Law Group in Washington. With most rulings now being handled by the IRS Chief Counsel's office, "I think the applications will be given stronger legal scrutiny. Because so many earlier rulings were problematic, the Service may do less of them," Ms. Rees said.

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