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Tenth Circuit Rules in Favor of Religious For-Profit Corporations in Birth Control Litigation under the Affordable Care Act

By Darren Nadel and William E. Trachman

In *Hobby Lobby Stores, Inc. et al. v. Sebelius, et al.*,[1] an en banc panel of the U.S. Court of Appeals for the Tenth Circuit held that Hobby Lobby Stores Inc. and Mardel Inc., two for-profit corporations owned and operated by a religious Christian family, had standing to challenge certain birth control mandates under the Patient Protection and Affordable Care Act (ACA), and also (1) had shown that complying with the mandates would cause irreparable harm to their religious beliefs; and (2) were likely to succeed in defeating the mandates themselves.

However, rather than issue a preliminary injunction declaring that the mandates were unenforceable, the court of appeals remanded the case to the U.S. District Court for the Western District of Oklahoma to resolve two other legal issues involved in the test for whether to issue a preliminary injunction. The lower court is directed to examine: (1) the balancing of the equities between the parties; and (2) whether an injunction is in the public's interest. That decision (whether to issue a preliminary injunction) will determine whether the birth control mandates may be applied to Hobby Lobby and Mardel going forward, though that decision, too, will likely be appealed, regardless of the outcome.

Almost immediately after the Tenth Circuit opinion was issued, the district court entered a temporary restraining order precluding the government from enforcing the mandates while it considers whether to issue an injunction on a more permanent basis, and announced it will hold a hearing in the case on July 19, 2013.

Birth Control Mandates under the Affordable Care Act – a Refresher

The ACA mandates that employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) provide certain types of preventive health services. One provision requires that employers follow guidelines regarding preventive care and screenings for women, as promulgated by the Health Resources and Services Administration (HRSA), an agency of the U.S. Department of Health and Human Services (HHS).

1 2013 U.S. App. LEXIS 13316 (10th Cir. June 27, 2013).

After requesting a report and recommendation from the Institute of Medicine, an arm of the National Academy of Sciences, HRSA and HHS adopted the organization's recommendations requiring that employment-based group health plans covered by ERISA include FDA-approved contraceptive methods as part of the preventive care mandate for women's health.

The FDA has approved 20 contraceptive methods, four of which function, the Tenth Circuit found, to prevent the implantation – as opposed to the fertilization – of an egg.[2] These four methods of birth control are two intrauterine devices, and contraceptives commonly known as Plan B and Ella.[3]

Although the ACA contains a number of exemptions regarding religious institutions and grandfathered entities, none of those exemptions apply to for-profit entities like Hobby Lobby and Mardel. The penalties for non-compliance are steep: $100 per day for each individual employee not covered, or $475 million annually for these corporations. Alternatively, if the corporations dropped employee health insurance coverage altogether, they would face annual regulatory penalties of $26 million.[4]

Factual and Procedural Background

Hobby Lobby Stores, a craft store chain, and Mardel, a Christian bookstore chain, are both run as for-profit, closely held family businesses that "operate … according to a set of Christian principles." Their owners are the Greens, and the entities' business operations are managed by a trust of which each Green family member is a trustee. The businesses and the management trust all contend that they are organized according to biblical principles, and allow faith to guide their business decisions. The stores are not open on Sundays, and Hobby Lobby refuses to engage in activities that promote alcohol use. The government did not contest the sincerity of the Greens' beliefs or contest the manner in which the corporations are run.

Importantly, as part of their religious beliefs, the Greens believe that human life begins when sperm fertilizes an egg. The Greens also believe it is immoral for them to facilitate any act that causes the death of a human embryo.

The Religious Freedom Restoration Act and its Effect on Federal Statutes

Congress enacted the Religious Freedom Restoration Act (RFRA)[5] in 1993 in response to the Supreme Court's *Employment Division v. Smith*[6] decision regarding Native American peyote use. Prior to *Smith*, case law regarding the Free Exercise Clause of the First Amendment required the government to show a compelling state interest in enacting neutral laws that nevertheless had the incidental effect of impairing religious practices. The laws, moreover, had to be narrowly tailored to further that interest. When the Supreme Court changed course in *Smith* – eliminating the compelling state interest test for most laws of general applicability – Congress enacted the RFRA to restore the compelling state interest test. Although the Supreme Court in *City of Boerne v. Flores*[7] struck down the RFRA as applied to state laws, it continues to apply to federal congressional statutes such as the ACA.

The RFRA provides, as a general rule, that the federal government "shall not substantially burden a person's exercise of religion."[8] But the Tenth Circuit noted that whether a for-profit corporation meets the definition of "a person" is a complicated issue.

For-Profit Corporations are "Persons" Under the RFRA

In defending the birth control mandates, the government argued that no Supreme Court decision has ever held that a for-profit corporation has met the definition of a person under the RFRA. The Tenth Circuit wrote, in response, that no Court decision had ever held the opposite, and that

2 2013 U.S. App. LEXIS 13316 at *9.

3 Although the court recognized that there is an ongoing medical debate as to whether Plan B and Ella prevent fertilization or implantation, the Tenth Circuit noted that the government's concession regarding the IUDs alone was sufficient to establish the corporations' standing. *Id.* at 13 n.3.

4 The majority opinion did not discuss how much the corporations currently spend on healthcare for their employees. In his partial dissent, Judge Matheson noted that this was a glaring omission with respect to whether the penalties were a substantial burden. *See* id. at 147 n.4 (Matheson, J., concurring in part and dissenting in part).

5 42 U.S.C. § 2000bb.

6 494 U.S. 872 (1990).

7 521 U.S. 507 (1997).

8 2013 U.S. App. LEXIS 13316 at *25.

whether a for-profit corporation was a person for RFRA purposes required extensive analysis. The Tenth Circuit evaluated dictionary definitions, employment law statutes, and case law from other contexts in holding firmly that Congress did not mean to exclude for-profit corporations from the coverage of the RFRA. The corporations, therefore, possessed standing to bring their challenge to the ACA under the RFRA.

In his concurrence with the en banc majority, Judge Hartz emphasized that the corporate form is simply one adopted by individuals to lessen their individual financial liability. A kosher butcher, he noted, works for profit, but is no less a "person" under the RFRA if he decides to incorporate his butcher shop. And he would have no less standing to challenge a law prohibiting merchants from selling kosher meats.[9] Comparatively, while the five judges in the majority opinion acknowledged the difficulty in evaluating the sincere religious beliefs of large, publicly-traded corporations, there was no question of sincerity with regard to the Greens and the corporations they own.

The ACA Places Substantial Pressure on the Corporations to Violate Their Religious Beliefs

The Tenth Circuit noted that several Supreme Court cases interpreting the Free Exercise Clause of the First Amendment before the *Smith* decision established that even neutral laws can have a "coercive impact" by placing "substantial pressure on an adherent … to engage in conduct contrary to a sincerely held religious belief."[10]

It was immaterial whether the pressure placed on an adherent was direct (because the government directly restricted an adherent's religious practice) or indirect (because of a third-party's choices). For instance, the court noted, a cafeteria located in a federal prison that failed to offer a Muslim prisoner a halal-compliant meal placed a substantial burden on that prisoner by "presenting him with a Hobson's choice." He could either go hungry or violate his religious beliefs.[11]

Similarly, the corporations in this case were faced with either compromising their religious beliefs or paying enormous fines by continuing to offer non-compliant healthcare coverage or dropping coverage altogether. This, the Tenth Circuit noted, was sufficient to establish a substantial burden on the corporations' religious beliefs.

In response, the government contended that the corporations had no more right to object to their employees' healthcare decisions than they did the manner in which their employees spent their earned wages. The Tenth Circuit disagreed, saying that a religious practitioner's sincere beliefs are generally protected from judicial scrutiny, even if a legal argument exists that they are incompatible with one another. In this context, the court stated: "[T]he plaintiff is not required to articulate a legal principle for the line he draws, let alone point to an analog from potentially related fields of constitutional law. … [T]he question here is … how the plaintiffs themselves measure their degree of culpability."

The Government Did Not Pursue a Compelling State Interest with the Least Restrictive Means

Importantly, the Tenth Circuit noted that the RFRA imposes a heavy burden on the government, even at the preliminary injunction stage. It must demonstrate that the restriction on religious liberty is necessary to further a compelling state interest, and that the restriction is narrowly tailored to further that interest. It cannot rely on broad formulations of federal policy; instead, it must argue that the compelling interest exists with respect to the particular litigants in the case.

Thus, the government's assertions that the birth control mandates are necessary to protect the public health and promote gender equality were unavailing. Such interests, the court noted, justify "the general applicability of government mandates," as opposed to justifying why Hobby Lobby and Mardel, in particular, must be forced to comply with the mandates.[12]

The Tenth Circuit then noted that the mandates already do not apply to tens of millions of people – those individuals who work for religious non-profit companies or who otherwise are not within the reach of the statute. Moreover, it noted that employees of Hobby Lobby and Mardel would still have 16 methods of birth control to choose from, all of which were consistent with the corporations' religious beliefs. Analogizing this case to one involving the use of hallucinogenic tea for religious ceremonies, the court noted that in that case the government's decision

9 *Id.* at *82-84.

10 *Id.* at *53-54.

11 *Id.* at *54.

12 *Id.* at *69.

not to prohibit sacramental use of peyote was fatal to its argument that it was important to ban the tea.[13] Why, asked the Supreme Court in that case, does the government have a compelling interest in prohibiting one Schedule I drug in religious ceremonies if it continues to let other similar drugs be used? To the same end, why must Hobby Lobby and Mardel be compelled to comply with the mandates if thousands of other employers need not because the ACA does not reach them?[14]

Having failed this test, the Tenth Circuit held that Hobby Lobby and Mardel are likely to succeed on the merits of their challenge to the birth control mandates.

Remand

Although a majority of judges held that Hobby Lobby and Mardel possessed standing to challenge the birth control mandates of the ACA, and could likely show both irreparable harm and a likelihood of success in challenging the mandates, only a plurality of judges would have granted the preliminary injunction at this stage. Instead, the Tenth Circuit remanded the case to the district court for an initial determination of the balance of equities between the parties, and the public interest involved in whether to grant an injunction. The district court will hold a hearing on July 19, 2013, to address these issues.

Practical Considerations

In light of the Tenth Circuit's ruling, employers – even those organized as for-profit corporations – have a much stronger argument for declining to offer health plans covering forms of birth control that they find objectionable on religious grounds.

However, religious employers should:

- Only decline to offer health plans that cover certain forms of birth control if they have a sincerely held belief that such forms of birth control are contrary to their religious beliefs.
- Continue to monitor this issue pending the remand to the district court and any subsequent action by federal appellate courts.
- Recognize the risks involved in developing business and healthcare policies based on legal proceedings that are not yet final.

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13 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

14 2013 U.S. App. LEXIS 13316 at *71-72.