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## **Living on a Prayer? Recent Challenges to the Church Plan Exemption**

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A “church plan” is a plan that is established and maintained “by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.”<sup>1</sup> Church plan status may also extend to plans sponsored by “an organization, whether a civil law corporation or otherwise, [that] is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.”<sup>2</sup> Within the last year, at least five lawsuits have been filed challenging the application of the exemption to pension plans sponsored by nonprofit hospital systems affiliated with the Roman Catholic Church.<sup>3</sup> This article addresses the issues raised by those five lawsuits, recent decisions in those cases, and the potential impact of these lawsuits on the controversial church plan exemption.

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## RECENT LITIGATION

Recently filed lawsuits are challenging the ERISA church plan exemptions for organizations that have obtained favorable rulings from the IRS that their plans do satisfy the exemption. The stakes are high for these organizations. Because church plans are not subject to the reporting, disclosure, participation, vesting, and funding requirements that are imposed on most retirement plans (as well as health and welfare plans) under ERISA, such participant lawsuits, if successful, could require plans to provide additional benefits, vesting, eligibility, and funding, and impose liability for failure to give certain participant notices, for periods going back potentially for decades. In addition, such plans may be liable for Pension Benefit Guaranty Corporation (PBGC) premiums, failure to apply mandatory benefit restrictions, liability for events such as partial plan termination or facility closures, failure to provide summary plan descriptions, and a host of other failures with respect to requirements the organizations did not believe were applicable. A favorable IRS ruling may provide only limited protection.

In 2013 alone, at least five lawsuits were filed against major non-profit hospital systems that are connected with the Roman Catholic Church:

- *Starla Rollins v. Dignity Health et al.*, No. 4:13-cv-01450-DMR (N.D. Cal.)
- *Laurence Kaplan v. St. Peter's Health Care Sys. et al.*, No. 3:13-cv-02941-MAS-TJB (D.N.J.)
- *Albert R. Chavies et al. v. Catholic Health East et al.*, No. 2:13-cv-01645-CDJ (E.D. Pa.)
- *Janeen Medina v. Catholic Health Initiatives et al.*, No. 1:13-cv-01249-REB-KLM (D. Colo.)
- *Marilyn Overall v. Ascension Health et al.*, No. 2:13-cv-11396-AC-LJM (E.D. Mich.)

In these lawsuits, the plaintiffs contend that the pension plans sponsored by the nonprofit hospital systems are not subject to the church plan exemption under ERISA. As such, the plaintiffs assert that the defendants violated, *inter alia*, the minimum funding, notice, plan document, and fiduciary rules of ERISA in their sponsorship and maintenance of defined benefit pension plans. The plaintiffs also contend that the church plan exemption violates the Establishment Clause of the First Amendment of the US Constitution, which states that “Congress shall make no law respecting an establishment of religion. . . .”

The arguments regarding why the plans are not subject to the exemption are relatively similar across the complaints in each lawsuit. Essentially, the plaintiffs argue that the plans in question are not plans that are “established and maintained” directly by churches as defined by 29 U.S.C. § 1002(33)(A) or by “pension boards” as defined by 29 U.S.C. § 1002(33)(C)(i). The plaintiffs also argue that the plans are not established or maintained by organizations that are “associated with” a church, as defined by 29 U.S.C. § 1002(33)(C)(ii)(II), such as a school or hospital, such that the employees of these organizations could be defined as employees of a church. To be “associated with” a church means the organization “shares common religious bonds and convictions with that church or convention or association of churches” as defined by 29 U.S.C. § 1002(33)(C)(iv). The plaintiffs further contend that informal guidance from the Internal Revenue Service (IRS) and the Department of Labor (DOL) has led to the church plan exemption being impermissibly extended to allow a nonchurch organization to sponsor its own “church plan,” as long as the organization is controlled by or associated with a church. The plaintiffs assert that this interpretation violates the plain language of the statute, which allows only church plans that are established or maintained by an actual church.

In arguing that the Catholic-affiliated hospital systems are not “associated with” the Roman Catholic Church, the plaintiffs assert, *inter alia*, that the systems provide nondenominational worship spaces at their facilities, that some facilities and physicians provide contraceptives and perform other services that are allegedly inconsistent with the Catholic canon, and that some of the plan sponsors have acquired or affiliated themselves with other entities that do not have significant ties to the Roman Catholic Church.<sup>4</sup>

## **RECENT DECISIONS REGARDING THE CHURCH PLAN EXEMPTION**

Defendants in all five of the recent church plan lawsuits responded to the complaints by filing motions to dismiss. These motions to dismiss all focused largely on establishing the applicability of the church plan exemption, including a rebuttal of plaintiffs’ interpretation of the scope of the exemption and the argument that, even if plaintiffs’ interpretation applied, the plans still qualify for the church plan exemption. These motions to dismiss have also included a fact-specific review of each defendant’s connections with the Roman Catholic Church. The motions to dismiss have also attempted to refute plaintiffs’ First Amendment claims, arguing that the plaintiffs lack standing and that there has been no establishment of religion in violation of the First Amendment.

As of today, the motions to dismiss are in various stages of review. However, so far the opinions have come out mostly in favor of plaintiffs, with one notable exception. Two motions to dismiss were denied outright, and a third motion to dismiss was denied to allow discovery on the issue of whether the defendant is a “church.” Another motion to dismiss was voluntarily withdrawn. However, in a sharp departure from the other rulings, the motion to dismiss in the final lawsuit was granted.

### **Rollins v. Dignity Health**

On December 12, 2013, Judge Thelton Henderson of the US District Court for the Northern District of California issued the first order considering a motion to dismiss in one of the five similar lawsuits filed in the last year.<sup>5</sup> Judge Henderson denied Dignity Health’s motion to dismiss, finding that Dignity Health’s plan is not a church plan exempt from ERISA. In reaching this conclusion, Judge Henderson acknowledged the series of IRS private letter rulings supporting the applicability of the church plan exemption to Dignity Health’s plan. However, Judge Henderson found such letters to be conclusory and not entitled to deference. Judge Henderson was also not persuaded by contrary case law from other jurisdictions.

Instead, Judge Henderson held the text of the statute is conclusive and requires that a church plan be established by a church or convention or association of churches. Dignity Health did not argue that it was a church or convention or association of churches. Instead, it sought church plan status by arguing that the statute also extends to plans maintained by church-associated organizations. Judge Henderson rejected this argument, finding that the statute simply allows churches to delegate the administration of their benefit plans to specialized church pension boards without losing their church plan status; it does not broaden the scope of organizations “who” can start a church plan. Judge Henderson noted that this interpretation of the statute is supported by the legislative history, which reflects concerns by church leaders that plans managed by pension boards maintain their status.

Following denial of the motion to dismiss, Dignity Health filed an answer, denying the plaintiffs’ allegations.<sup>6</sup> At the same time, Dignity Health also moved to certify the court’s order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>7</sup> On March 17, 2014, Judge Henderson denied the motion for interlocutory appeal, noting there was “no reason to view the instant issue as an ‘exceptional situation’ warranting interlocutory appeal.”<sup>8</sup>

After the denial of the motion for interlocutory appeal, the parties have briefed cross-motions for partial summary judgment. Plaintiff

is asking for declaratory relief that the Dignity Plan is not a “church plan” within the meaning of ERISA and thus is subject to the provisions of ERISA.<sup>9</sup> Meanwhile, Dignity Health is seeking judgment on the basis of affirmative defenses—including a statute of limitations defense and the defense that the declaration sought by plaintiff is not “appropriate equitable relief.”<sup>10</sup>

### **Kaplan v. St. Peter’s Health Care System**

On March 31, 2014, Judge Michael Shipp of the US District Court for the District of New Jersey became the second judge to consider a motion to dismiss in the five recent church plan cases.<sup>11</sup> Judge Shipp found the decision in *Rollins* “persuasive” and agreed that a church plan must actually be established by a church for the exemption. Similarly to *Rollins*, the opinion by Judge Shipp acknowledges contrary IRS private letter rulings and DOL advisory opinions. However, both opinions noted that such guidance is conclusory and not entitled to deference. Judge Shipp also found unpersuasive *Thorkelson v. Publishing House of Evangelical Lutheran Church*<sup>12</sup> in which a district court faced similar facts and arguments yet reached the opposite result and upheld the application of the church plan exemption.

As in *Rollins*, the defendant in *Kaplan* has now filed an answer<sup>13</sup> denying the plaintiffs’ allegations, while also moving for interlocutory appeal following the court’s order denying its motion to dismiss.<sup>14</sup> In its motion for interlocutory appeal, Saint Peter’s Healthcare System argues that the public importance of the church plan exemption and the broad impact the ruling will have on other cases and institutions justifies interlocutory review. This motion for interlocutory appeal remains pending.

Meanwhile, plaintiff filed a motion for partial summary judgment.<sup>15</sup> Plaintiff seeks a declaration that the Saint Peter’s Healthcare System Retirement Plan is not a “church plan” as defined by ERISA and an order requiring Saint Peter’s Healthcare System to operate its plan in compliance with ERISA. This motion also remains pending, and it remains to be seen whether Saint Peter’s Healthcare System will file a cross-motion for summary judgment.

### **Albert R. Chavies et al. v. Catholic Health East**

On March 28, 2014, Judge C. Darnell Jones II of the Eastern District of Pennsylvania denied without prejudice the defendants’ motion to dismiss.<sup>16</sup> The defendants had moved to dismiss the complaint in the *Chavies* case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, which allows a defendant to challenge a complaint that is filed in federal district court on the grounds that the court lacks

subject matter jurisdiction to hear the case.<sup>17</sup> Judge Jones is allowing the parties to “take jurisdictional discovery on the issue of whether Catholic Health East is a ‘church,’ pursuant to 29 U.S.C. § 1002(33)(A).”<sup>18</sup> Upon completion of discovery, the defendants will be free to challenge the subject matter jurisdiction of the court through another motion to dismiss or through summary judgment.<sup>19</sup>

### **Janeen Medina v. Catholic Health Initiatives**

On September 23, 2013, the defendants in this case withdrew their pending motion to dismiss.<sup>20</sup> The defendants then filed their answer, denying the plaintiffs’ allegations.<sup>21</sup> The plaintiffs have moved for partial summary judgment, arguing that, as a matter of law, the Catholic Health Initiatives Retirement Plan is not exempt from ERISA as a “church plan.”<sup>22</sup> The decision on the plaintiffs’ motion for partial summary judgment is pending. The ruling on the plaintiffs’ motion for class certification is also pending.<sup>23</sup>

### **Marilyn Overall v. Ascension Health**

In a sharp departure from the rulings in the *Kaplan* and *Rollins* cases, Judge Avern Cohn granted Ascension’s motion to dismiss, on May 9, 2014.<sup>24</sup> Judge Cohn determined that Ascension’s pension plans are church plans because Ascension is controlled by the Roman Catholic Church. Judge Cohn also determined that Ascension is associated with the Roman Catholic Church because the Church declared Ascension to be a Catholic organization in the Official Catholic Directory and acknowledged Ascension as being part of the Catholic community through other public documents and public actions.

Judge Cohn dismissed the claim that the church plan exemption violates the Establishment Clause of the First Amendment, after determining that the plaintiff lacked standing. He found “no specific allegations in the [class action complaint] to suggest plaintiff would have a better funded pension if the Court were to strike down the church plan exemption provisions of ERISA, or the exemption as applied to Ascension.”<sup>25</sup> Therefore, the class action complaint failed to show that the plaintiff suffered any harm or that the relief that she sought would address an alleged injury.

In a postscript or “coda” to his decision to grant Ascension’s motion to dismiss, Judge Cohn noted that “[w]hile plaintiff may not have the benefit of ERISA’s protections,” the pension plans are “governed by state law.”<sup>26</sup> He also stated that “[t]he church exemption is a congressional choice of historic proportion. And while it may appear to be an irrational distinction, it is a distinction mandated by law.”<sup>27</sup>

## CONCLUSION

The outcome of the five cases discussed in this article will have far-reaching consequences for employers that currently rely on the church plan exemption based on their affiliation with a religious institution. If the plans are not “church plans” subject to the exemption, they will be subject to ERISA and could be targeted with litigation regarding their failure to comply with ERISA’s requirements.

Certainly, the stakes are high for the numerous employers that do have faith in their church plan exemptions. For example, the plaintiffs allege that the plans at issue for Catholic Health Initiatives and for Dignity Health are underfunded by \$892 million and \$1.2 billion, respectively.<sup>28</sup> These cases are certainly worth watching, especially by the large numbers of religiously affiliated employers that are praying that the church plan exemption stands.

We also note that guidance offered by the IRS, DOL, and other courts permits church plan sponsorship by church-affiliated organizations, such as the hospitals affiliated with the Roman Catholic Church. Thus, we anticipate that we have not seen not the last word on the scope of ERISA’s church plan exemption.

## NOTES

1. 29 U.S.C. § 1002(33)(A).
2. 29 U.S.C. § 1002(33)(C)(iv); *see* 29 U.S.C. § 1002(33)(C)(ii)(II).
3. On March 17, 2014, a sixth church plan lawsuit was filed against a nonprofit hospital affiliated with the Evangelical Lutheran Church in America and the United Church of Christ. *Maria Stapleton, et al., v. Advocate Health Care Network & Subsidiaries, et al.*, No. 1:14-cv-01873 (N.D. Ill.). At this point, defendants have neither answered nor filed a motion to dismiss. Therefore, the focus of this article will be on the five lawsuits filed in 2013.
4. These plaintiffs are not the first to challenge the applicability of the church plan exemption. In *Thorkelson et al. v. Publishing House of the Evangelical Lutheran Church in America et al.*, No. 0:10-cv-01712-MJD-JSM (D. Minn.), the plaintiffs also included various state law claims, which were not included in the complaints filed in the more recent crop of church plan litigation. On January 27, 2011, the District Court granted the motion to dismiss regarding the ERISA claims. The parties agreed to settle on the remaining claims, and on April 9, 2013, the District Court entered the final judgment approving the settlement.
5. Order Denying Defs.’ Mot. to Dismiss, Dec. 12, 2013, ECF No. 84.
6. Defs.’ Answer to Pl.’s Compl., Jan. 13, 2014, ECF No. 85.
7. Defs.’ Notice of Mot. to Certify Interlocutory Appeal, Jan. 13, 2014, ECF No. 86.
8. Order Denying Defs.’ Motion for Interlocutory Appeal, Mar. 17, 2014, ECF No. 102, at p. 5.

9. Pl.'s Notice of Motion for Partial Summ. J., Feb. 20, 2014, ECF No. 91.
10. Defs.' Notice of Mot. for Partial Summ. J., Apr. 21, 2014.
11. Mem. Op., Mar. 31, 2014, ECF No. 68.
12. 764 F. Supp. 2d 1119 (D. Minn. 2011).
13. Defs.' Answer and Affirmative Defenses, Apr. 14, 2014, ECF No. 73.
14. Defs.' Mem. of Law in Supp. of Mot. to Certify, Apr. 14, 2014, ECF No. 74-1.
15. Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J., Apr. 30, 2014, ECF No. 77.
16. Order, Mar. 28, 2014, ECF No. 67.
17. See Defs.' Mot. to Dismiss the Compl., June 17, 2013, ECF No. 33.
18. Order, Mar. 28, 2014, ECF No. 67, at p. 1.
19. *Id.* at p. 2.
20. Mins. Order, Sept. 23, 2013, ECF No 62.
21. See generally Defs.' Answer to Pl.'s Class Action Compl., Oct. 7, 2013, ECF No 73.
22. Pl.'s Mot. for Partial Summ. J., Jan. 29, 2014, ECF No 140.
23. See Pl.'s Am. Mot. for Class Certification, Dec. 23, 2013, ECF No. 127.
24. Order on Motion to Dismiss, May 9, 2014, ECF No. 73.
25. *Id.* at 29-30
26. *Id.* at p. 28
27. *Id.*
28. *Medina v. Catholic Health Initiatives*, No. 1:13-cv-01249-REB-KLM (D. Colo.), Compl. ¶ 55, May 10, 2013, ECF No. 1; *Rollins v. Dignity Health*, No. 3:13-cv-01450-DMR (N.D. Cal.), Compl. ¶ 55, Apr. 1, 2013, ECF No. 1.

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