Contraception Mandate Regs Violate Religious Freedom Statute: A Review of the Litigation

Executive Summary

On Monday, June 30, the U.S. Supreme Court in a 5-4 decision, the Supreme Court ruled that HHS regulations requiring employer-sponsored health plans to include all FDA-approved contraceptives among the preventive services covered without cost sharing could not be applied to for-profit corporations with religious objections to some of the contraceptive methods.

Since November 2012, Wolters Kluwer Law & Business has published over a dozen articles on the two cases at the heart of the litigation involving Hobby Lobby and Conestoga Wood Specialties Corp. These articles have appeared in Health Law Daily and Health Reform WK-EDGE. The decisions themselves, as well as related decisions on the contraception coverage controversy involving for-profit and not-for-profit institutions, appear in Wolters Kluwer’s Health Reform Knowledge™ Center.

In this Special Briefing, we have gathered together all of Wolters Kluwer’s reporting on these two cases, including the June 30 decision, Burwell v Hobby Lobby.

Closely-held ‘corporate Christians’ win crusade against contraceptive coverage

By Michelle Oxman, JD, LLM, Sheila Lynch-Afryl, JD, MA, and Danielle Capilla, JD

In a 5-4 decision, the Supreme Court ruled that HHS regulations requiring employer-sponsored health plans to include all FDA-approved contraceptives among the preventive services covered without cost sharing could not be applied to for-profit corporations with religious objections to some of the contraceptive methods. The Court ruled that the regulations violate the Religious Freedom Restoration Act (RFRA), which requires that federal government requirements that substantially burden religious freedom must serve a compelling interest and be the least restrictive means of furthering that interest. The Court rejected the government’s arguments that the corporate employers were separate from their owners and that for-profit organizations do not “exercise religion” (Burwell v Hobby Lobby, June 30, 2014, Alito, S).

Barbara Green, co-founder of Hobby Lobby, said in a statement, “Today the nation’s highest court has re-affirmed the vital importance of religious liberty as one of our country’s founding principles. The Court’s decision is a victory, not just for our family business, but for all who seek to live out their faith.”

The Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State, which filed a friend-of-the-court brief in the case,
said, “The justices have set a dangerous precedent. While the Obama administration may arrange for the government to provide contraceptives, a future administration could easily take that away. In years to come, many women may find their access to birth control hanging by a thread.”

The preventive services coverage requirement. The Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) amended Public Health Service Act sec. 2713 to require employer-sponsored health insurance plans to cover the preventive services rated A or B by the United States Preventive Services Task Force and any additional preventive services for women recommended in comprehensive guidelines issued by the Health Resources and Services Administration (HRSA). As Wolters Kluwer has reported, HRSA added all FDA-approved contraceptives to the list based upon the recommendations in a report by the Institute of Medicine. HHS adopted the HRSA list in a Final rule in July 2010.

The RFRA issues. Hobby Lobby, Inc. owns a national craft store chain. Conestoga Wood Specialties, Inc. (Conestoga) owns a for-profit business manufacturing wood parts that are incorporated into the products of others. Both Hobby Lobby and Conestoga are closely-held corporations owned by members of one family. The Greens, owners of Hobby Lobby and a chain of Christian bookstores called Mardel, are Christians who believe that both emergency contraception and two intrauterine devices (IUDs) cause abortion, so that coverage violates their beliefs. The Hahns, owners of Conestoga, believed that two forms of emergency contraception approved by the FDA cause abortion, so that coverage violates their Mennonite beliefs. The corporations and their individual shareholders sought injunctions against the enforcement of the contraceptive coverage mandate against them.

In both cases, the government argued that the rights of the individuals to free exercise of religion were not violated because the mandate applied to the corporations, not to them as individuals, and a fundamental principle of the law of corporations is that they are legal “persons” separate and apart from their owners. Further, the government argued, for-profit corporations do not exercise religion; they do not pray, perform sacraments, or have religious beliefs. Therefore, the corporations must be bound by the law just like any other employer of their size.

The lower court decisions. Initially, the district court in Oklahoma denied Hobby Lobby’s request for an injunction, and the district court in Pennsylvania denied Conestoga’s request. Both courts accepted the government’s argument that for-profit corporations do not exercise religion. Therefore, neither court found that the plaintiffs were likely to succeed on the merits. On appeal, the Tenth Circuit reversed and directed the district court to enter the injunction in favor of Hobby Lobby. The Third Circuit upheld the denial of the injunction requested by Conestoga.

The Solicitor General filed a petition for writ of certiorari for the Hobby Lobby case, asking the Supreme Court to determine whether the RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners. Conestoga also sought review in the Supreme Court, and the cases were consolidated.

Corporations as separate persons. The majority opinion rejected the government’s argument that closely held corporations’ legal obligations were separate from those of the owners. It framed the government’s position as forcing the owners of family businesses to choose between protection of their right to practice their faith in the operation of their business and the advantages of incorporation. The court reasoned that the corporate form exists to protect the human beings who create them and the corporation acts only through those human beings.

The application of RFRA. The Court found that the language of the RFRA referred to “persons” but did not define the term. Therefore, the Court determined that the definition in the Dictionary Act in the U.S. Code applied “unless the context suggests otherwise.” That definition included corporations as well as partnerships, individuals, and other entities, and it did not distinguish between for-profit and other corporations.

HHS argued that the RFRA was intended to restore the state of the law as it existed before Employment Division, Dept. of Human Resources of Oregon v Smith, 494 U.S. 872 (1990). It relied on the findings in RFRA, which cited specifically to two Supreme Court decisions. Wisconsin v Yoder (406 U. S. 205 (1972)) had upheld the right of Amish parents to keep their children out of public school, and Sherbert v Werner (374 U. S. 398 (1963)) held that the state could not deny unemployment compensation to a former employee who was terminated because she would not work on the Sabbath. Both of these cases involved religious practices of individuals.

For-profit corporations. All parties agreed that the RFRA had been properly applied to churches organized as nonprofit corporations. The majority referred to them as nonprofit corporations and held that there was no basis for distinguishing among nonprofits or between nonprofits and for-profit corporations.

Compelling interest test. The RFRA requires that the federal law serve a compelling interest and provide for the least restrictive means of accomplishing that interest. The Court declined to rule on whether the government’s interest was compelling because it found that the agency
did not use the least restrictive means to accomplish its goal. The agency had created an exemption for religious institutions, as defined in the tax code, and it had created an “accommodation” for certain related nonprofit entities, whereby the insurer administered the contraceptive benefit separately (76 FR 46621, August 3, 2011). The majority saw no reason why a similar accommodation could not be made for the for-profit plaintiffs.

Justice Kennedy’s concurring opinion stressed that the majority was ruling only on the contraceptive coverage mandate and that the logic of the case should not be extended to other medical procedures to which employers might object, such as blood transfusions. In addition, the RFRA could not be used as a back-door means to evade antidiscrimination laws.

**The dissents.** Justices Ginsburg, Sotomayor, Breyer, and Kagan dissented, guided largely by their concern for women’s health issues, as embodied in the Women’s Health Amendment to the ACA, which required coverage of preventive services specific to women. The dissent, written by Justice Ginsburg, accused the majority of stepping into a “minefield … by its immoderate reading of RFRA” and characterized the majority’s decision, one of “startling breadth,” as allowing commercial enterprises to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”

**Incidental effect.** The dissent concluded that any Free Exercise Clause claim the plaintiffs assert is foreclosed by the Supreme Court’s decision in *Smith*. In *Smith*, two members of the Native American Church were fired from their jobs after ingesting peyote at a religious ceremony. The Court in that case held that no First Amendment violation occurs when prohibiting the exercise of religion is an incidental effect of a generally applicable and otherwise valid regulation. Justice Ginsburg asserted that the ACA’s contraceptive coverage requirement applies generally, is “otherwise valid,” and “trains on women’s well-being,” not on the exercise of religion, such that the effect it has on such incidental is incidental.

**Interests of third parties.** Justice Ginsburg also cited the rule that accommodations as to religious beliefs must not significantly impinge on the interests of third parties. According to the dissent, the exemption sought by the plaintiffs would override the “significant interests” of the corporations’ employees and dependents and “deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.”

**RFRA claim.** The dissent criticized the majority’s view of the RFRA. Justice Ginsburg reasoned that the RFRA reinstated the law as it was before *Smith*; however, the majority saw the RFRA as setting a new course departing from pre-*Smith* jurisprudence. The RFRA applies to government actions that “substantially burden a person’s exercise of religion.” Justice Ginsburg contended, however, that there is no support for the idea that free exercise rights apply to a for-profit corporation. While religious organizations exist to serve a community of believers, no religion-based criterion can restrict the work force of for-profit corporations, which use labor to make a profit, not perpetuate religious values. For this same reason, Justice Ginsburg disagreed with the majority’s suggestion that the accommodation afforded to nonprofit religious-based organizations be extended to commercial enterprises.

Justice Ginsburg further found that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to be considered “substantial,” as required by the RFRA.

**Further response to verdict.** Lori Windham, senior counsel for The Becket Fund for Religious Liberty and counsel for Hobby Lobby, said “This ruling will protect people of all faiths. The Court’s reasoning was clear, and it should have been clear to the government. You can’t argue there are no alternative means when your agency is busy creating alternative means for other people.”

According to the Beckett Fund, over 100 cases against the mandate have been filed, almost equally divided between for profit and not-for-profit companies.

Louise Melling, deputy legal director of the American Civil Liberties Union, which also filed a friend-of-the-court brief, said that “for the first time, the highest court in the country has said that business owners can use their religious beliefs to deny their employees a benefit that they are guaranteed by law.”

The case numbers are 13-354 and 13-356.

**Retail store chain and its owners are unable to show they would be substantially burdened by having to provide contraception to its employees**

By Danielle H. Capilla, JD

Hobby Lobby (HL), a for-profit retail chain of crafting stores, along with its affiliated bookstore and owners,
was not granted a preliminary injunction under the Religious Freedom Restoration Act (RFFA) (42 U.S.C. §2000bb-1) against the enforcement of the preventative care coverage regulation requirement of the Patient Protection and Affordable Care (PPACA) (P.L. 111-148) (Hobby Lobby Stores Inc. v. Sebelius, November 29, 2012, Heaton, J). The court only determined whether or not the preventative services coverage provision passed muster under the Constitution and whether it violated the RFRA. HL, its bookstore and owners did not show that they were likely to succeed on the merits of their First Amendment claims because they are secular, for-profit corporations and do not have free exercise rights, nor did they show they were likely to succeed on their RFRA claims because HL is not a “person” and did not show it would be substantially burdened by complying with the regulation.

**Background.** To order a preliminary injunction the court must find that HL is likely to prevail on their constitutional claims. HL is a chain of 541 arts and crafts stores and is operated through a management trust with Mardel, a bookstore and educational supply company that specializes in Christian materials. Hobby Lobby and Mardel are family owned and operated by the Green family. HL and Mardel are for-profit, secular businesses but are operated under the Green’s Christian faith. They do not satisfy PPACA’s definition of a “religious employer” and are not eligible for the safe-harbor provision, nor are their health plans grandfathered. (A grandfathered plan is a plan that was in existence on March 23, 2010, and which has not undergone any of a defined set of changes; grandfathered plans are not subject to the preventative care provisions.) As a result, beginning on January 1, 2013, the beginning of the plan year for HL’s employee health plan, HL must comply with PPACA’s preventative coverage provision which requires HL and Mardel to provide FDA-approved contraception as a benefit of the employee health plan. HL contended that complying with the provision is at odds with the Green’s faith and the provision will force them to provide health insurance coverage for abortion-inducing drugs and devices. HL’s insurance policies have always excluded contraceptive devices that might cause abortions and pregnancy-terminating drugs.

**First Amendment.** The First Amendment provides for the free exercise of religion and HL alleged they exercise their religion by complying with beliefs that prohibit them from providing coverage or access to coverage, abortion causing drugs or devices, or related education and counseling. To determine if HL is likely to prevail on their constitutional claims, it must be decided if HL has a constitutional “free exercise” right that can be violated. Although the Greens have a constitutional right to free exercise of religion, HL and Mardel do not because they are corporations. As a result they are unlikely to succeed on the merits of their claim.

**Religious Freedom Restoration Act.** The RFRA prohibits the federal government from substantially burdening a person’s exercise of religion unless the government can demonstrate that the burden to the person is the least restrictive means of furthering a compelling governmental interest. The RFRA does not define “person” and HL and Mardel argued that under 1 U.S.C. §1, “person” includes corporations as well as individuals. However, businesses do not have religious beliefs that are separate from their individual owners or employees and cannot pray, worship, observe sacraments or take religiously motivated actions apart from those of individuals within the corporation. The Green’s argue that outside of HL and Mardel’s standing, their exercise of religion is also being burdened, and that the burden is substantial. The court acknowledged there is no bright-line test for determining what a substantial burden is, and determined it should look to the degree to which the challenged government action operates directly and primarily on the individual’s religious exercise. Because the preventative care requirement applies only to HL and Mardel, not its officers or owners, the relationship between the Greens and the subsidizing of someone else’s participation in certain contraceptive activities is indirect and not a substantial burden. Therefore it is unlikely HL, Mardel and the Greens would succeed on the merits of their claim, and the preliminary injunction was denied.

The case number is CIV-12-1000-HE.

[First published November 20, 2012] ■

**Appellate, Supreme courts dismiss commercial employers’ request for injunction against contraception mandate**

By Sarah E. Baumann, JD

Two closely held for-profit corporations and their owners did not demonstrate that the Patient Protection and Affordable Care Act’s (PPACA’s) (P.L. 111-148) requirement that they offer employees insurance plans that cover FDA-approved contraceptive devices substantially burdened their exercise of religion (Hobby Lobby Stores,
Inc. v Sebelius, December 20, 2012). Because they were unlikely to succeed on the merits of their case, the Tenth Circuit Court of Appeals denied their motion for injunctive relief. Supreme Court Justice Sonia Sotomayor also denied the request for an injunction at the Supreme Court level.

**Background.** PPACA required most group health plans to cover preventive care for women, which, according to an HHS interim final rule, included contraceptives approved by the FDA. HHS created an exemption for certain religious employers and enacted a temporary safe harbor provision for others. However, no provision of law exempts commercial employers from the requirement. Hobby Lobby, Inc., a chain of arts and crafts stores; Mardel, Inc., a chain of Christian bookstores; and their owners (collectively Hobby Lobby) filed suit against the government, alleging that the provision required them to offer insurance plans covering morning-after and week-after pills, which they believe cause abortions, and substantially burdened their free exercise of religion, as prohibited by the Religious Freedom Restoration Act of 1993 (RFRA) (P.L. 103-141).

They also filed a motion for an injunction asking the court to prevent the government from enforcing the rule, which will become effective for them on January 1, 2013, pending resolution of the lawsuit. A district court denied the motion for an injunction and Hobby Lobby filed a new motion for an injunction with the Tenth Circuit.

**District court decision.** The Tenth Circuit determined that Hobby Lobby did not demonstrate that it was substantially likely to succeed on the merits of its claim and denied the motion for injunction on that basis. The RFRA requires plaintiffs to demonstrate, among other requirements, that the law would substantially burden their exercise of religion. The Tenth Circuit agreed with the district court that Hobby Lobby’s concern that, by funding health plans, it “might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize someone else’s participation in an activity that its condemned by plaintiff[s’] religion,” was too tenuous to create a substantial burden.

**Supreme Court decision.** Justice Sotomayor, the Circuit Justice for the Tenth Circuit, similarly denied Hobby Lobby’s request for an injunction pursuant to the All Writs Act, which generally permits a Circuit Justice to issue injunctions when “legal rights at issue are indisputably clear.” Justice Sotomayor determined that the rights were far from clear, noting that the Supreme Court had never addressed RFRA or free exercise claims involving similar corporations and the provision of employee benefits.

Furthermore, lower courts reviewing similar requests for injunctive relief had issued different decisions and no court had yet granted permanent relief. Additionally, an injunction would not aid in jurisdiction. Justice Sotomayor noted, however, that Hobby Lobby could continue to litigate its case in district court and could eventually appeal an adverse decision to the Supreme Court.

The case number is 12-6294.

[First published December 27, 2012.]

**Temporary injunctive relief from the mandate to provide insurance coverage for contraceptive services granted pending evidentiary hearing**

By Geri Szuberla, JD, LLM

Federal agencies may not enforce the regulations regarding abortifacient contraception and counseling against a business or their group health plan for a period of fourteen (14) days, pending an evidentiary hearing (Conestoga Wood Specialties Corporation v Sebelius, December 28, 2010, Goldberg, J). This court order applies only to requirements regarding the provision of insurance coverage for the contraceptive services to which the company and its owners object on religious grounds. It should not be construed as applying to any other healthcare coverage required by law, including coverage of the other services required by the regulations regarding Women’s Preventive Healthcare.

The Tenth Circuit determined that Hobby Lobby did not demonstrate that it was substantially likely to succeed on the merits of its claim.

The company’s position. The Women’s Preventive Healthcare regulations (the mandate) require non-
exempt employers to provide health insurance coverage for all contraception methods approved by the Food and Drug Administration, including contraception that may have an abortifacient effect, such as Plan B, also known as the “morning after pill.” The owners of the company are practicing Mennonite Christians, who believe that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support any contraception with an abortifacient effect through health insurance coverage they offer for their employees.

Requirements for restraining order. For the Court to enter a temporary restraining order, a plaintiff must demonstrate (1) a likelihood of success on the merits; (2) the probability of irreparable harm if the relief is not granted; (3) that granting injunctive relief will not result in even greater harm to the other party; and (4) that granting relief will be in the public interest.

With regard to the harm to the company, it is agreed that the company does not meet any exemption under the Affordable Care Act (ACA), and is required to comply with the Women’s Preventive Healthcare regulations on or before January 1, 2013. If they do not purchase the required coverage by that date, they face penalties of $100 per employee per day, or $95,000 a day under 26 U.S.C. sec. 4980D.

Court analysis. The company and its owners have shown imminent, irreparable harm, the court found, because they must decide between paying substantial fines or committing an act which they have shown to have a likelihood of violating their rights to religious freedom. The court also found that a brief stay presents only a minimal burden on the government interest in carrying out the mandates of the ACA and there is a public interest in protecting First Amendments rights, including religious freedom, claimed by the company.

In light of the opinions of several courts favoring the company’s position in this case, it has a reasonable probability of success on the merits of its claim under the Religious Freedom Restoration Act (RFRA) at 42 U.S.C. sec. 2000bb.

Order. The court ordered that an evidentiary hearing and oral argument on the company’s motion for preliminary injunction would be held on January 4, 2013, and that regulations regarding abortifacient contraception and counseling that the company objects to on religious ground would not be enforced by federal agencies for a period of fourteen days.

The case number is 12-6744.

[First published January 11, 2013.]

PPACA’s contraceptive coverage requirement does not infringe on a corporation’s rights to practice religion or freedom of speech

By Jay Nawrocki, MA

Following an evidentiary hearing, the district court denied Conestoga Wood Specialties Corporation (Conestoga) motion for a preliminary injunction relating to the requirement of the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) that Conestoga provide contraceptive coverage to its employees free of cost sharing requirements (Conestoga Wood Specialties Corporation et al, v Sebelius et al, January 11, 2013, Goldberg, J.). Conestoga argued that the contraceptive requirement violated its: (1) free exercise of religion as guaranteed under the First Amendment to the U.S. Constitution; (2) rights to practice religion under the Religious Freedom Restoration Act (RFRA); and (3) free speech right. The court found that Conestoga as a corporation did not have a right to practice religion, that there was not a substantial burden placed on the owners of the corporation in the free practice of their religion, and that requiring Conestoga to pay for actions counter to their religious beliefs does not impede their ability to freely express their opposition to contraceptive use or abortion. In addition, these requirements of the ACA were found not to be in violation of the establishment clause of the U.S. Constitution as these requirements do not favor one religion or denomination over another. The court found that Conestoga was unlikely to succeed on the merits of its arguments and Conestoga’s motion for a preliminary injunction was denied.

Prior court actions. Conestoga was granted a temporary restraining order from these requirements on December 28th, 2012 that lasted for fourteen days, or pending the outcome of an evidentiary hearing which was held on January 4th, 2013. In addition, the district court noted that it was applying a different standard then has been applied by other courts considering these issues. This court would require that Conestoga demonstrate that it would be more likely than not to succeed on the merits of the case. This court did not use a sliding-scale approach as other courts have used. Under a sliding-scale approach an unusually strong showing of one factor lessened the burden of a plaintiff in demonstrating different factors. The court acknowledges that using a sliding-scale other courts ruling on similar facts have granted injunctive relief.
First Amendment. While members of the Hahn family, who own Conestoga, have a right to be free of a law “respecting an establishment of religion, or prohibiting the free exercise thereof,” Conestoga as a for-profit, secular corporation does not. While there is historical support showing that the First Amendment’s right to free speech applies to corporations, there is no history showing that the First Amendment’s right to be free of a law prohibiting the free exercise of religion applies to corporations. Conestoga argued that the right to the free practice of religion applied to corporations since the right to free speech that exists in the same amendment has been found to apply to corporations. The district court in this case found that the right to practice religion is reserved for an individual, even though other courts considering similar fact sets on this issue have found otherwise.

Even though Conestoga is a closely held corporation with shareholders who all practice the Mennonite faith, the corporation is not an “alter-ego” of the Hahns, the owners of the company. Corporations are separate legal entities different from the entities that own the corporation. The court reasoned that, “it would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations.” The court noted that individuals who own a corporation are granted shields as individuals from prosecution of certain laws, and this protection shows that corporations are different than individuals, even closely held ones. The court also acknowledged that courts, particularly in the Ninth Circuit and specifically in the Tyndale House Publishers v. Sebelius case that considered a similar fact set, have come to a different finding on this issue; a finding with which this court said it disagreed.

Religious Freedom Restoration Act. The requirements that Conestoga provide coverage for contraception, including abortifacients, does not place a substantial burden on their free exercise of religion as protected by the Religious Freedom Restoration Act. There are too many intervening actors for the burden imposed on Conestoga to be substantial. The burden placed on Conestoga is far removed and indirect. The burden that Conestoga argues is dependent on the decision of others and therefore not substantial.

Again, the court acknowledged that this reasoning is different from the reasoning another court reached in the Tyndale case which found that the financial liability in paying the penalty for not providing the coverage was a substantial burden. In addition, the court rejected the argument that a burden simply existed when one is claimed, as was found in the Legatus v Sebelius decision. To do so would result in any religious objector simply stating that it refuses to comply with a Congressional mandate based solely on a stated religious exemption, and this would radically restrict the actions of a legislative body to set laws.

The requirement of PPACA on Conestoga in no way limits its right to speak out against the use of contraceptives of abortifacients.

Free speech rights. The requirement of PPACA on Conestoga in no way limits its right to speak out against the use of contraceptives of abortifacients. As such, the requirements are not forcing Conestoga to support speech with which they disagree. Conestoga is free to speak to its employees about not using contraceptives of abortifacient, and the law does nothing to impede that speech. The requirements at issue affect what Conestoga must do, not what they may or may not say.

The case number is 12-6744.

[First published January 15, 2013.]

Third Circuit denies motion to stay in case challenging PPACA enforcement provisions

By Sheila Lynch-Afryl, JD, MA

The motion of a secular, for-profit corporation and five of its shareholders for a stay pending the appeal of their challenge to the contraception mandate of the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) was denied because they failed to prove a reasonable likelihood of success on the merits (Conestoga Wood Specialties Corp. v Secretary of HHS, January 29, 2013, Rendell, M). A preliminary injunction is an extraordinary remedy, and to qualify, a party must demonstrate (1) a likelihood of success on the merits, (2) that it will suffer irreparable harm if the injunction is denied, (3) that granting the preliminary relief will not result in even greater harm to the nonmoving party,
and (4) that the public interest favors such relief. The plaintiffs did not demonstrate likelihood of success on the merits because the corporation did not have free exercise rights under the First Amendment and was not a “person” under the Religious Freedom Restoration Act of 2012 (RFRA) (P.L. 110-148). In addition, the PPACA regulations were generally applicable and rationally related to a legitimate government objective, and the burdens imposed by the regulations did not constitute a “substantial burden” under the RFRA. The motion was, therefore, denied.

**Background.** The plaintiffs, Conestoga Wood Specialties Corp. and five of its shareholders (collectively, the Hahns), filed a case in federal court claiming that the contraceptive coverage mandated by PPACA would violate their religious beliefs. They filed a motion for preliminary injunction, which the district court denied. On appeal before the Third Circuit, the plaintiffs filed a motion for stay pending appeal.

**Third Circuit’s decision.** The Third Circuit denied the motion, finding that the plaintiffs did not meet their burden in demonstrating likelihood of success on the merits of their claims under the First Amendment or the RFRA. Conestoga, as a for-profit, secular corporation, had no free exercise rights under the First Amendment, and it was not a “person” under the RFRA.

The Hahns’ claims under the Free Exercise Clause of the First Amendment were not likely to succeed: the PPACA regulations were generally applicable because they were not specifically targeted at conduct motivated by religious belief and were neutral because the purpose of the regulations was to promote public health and gender equality. A neutral law of general applicability need only be rationally related to a legitimate government purpose, which the government proved here. The claims under the RFRA were not likely to succeed because the burden imposed by the regulations did not constitute a “substantial burden” under the RFRA. Finally, PPACA’s “religious employer exemption” did not violate the Establishment Clause of the First Amendment because it applied equally to organizations of every faith.

**Dissent.** Justice Kent Jordan wrote a dissent concluding that a stay pending appeal was warranted. Specifically, the dissent found that in situations like this, where the factors of irreparable harm, interests of third parties, and public considerations strongly favor the moving party, a stay may be appropriate even though the plaintiffs did not demonstrate a strong likelihood of ultimate success.

The case number is 13-1144. [First published February 11, 2013.] #

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**Tenth Circuit rules in favor of Hobby Lobby regarding HHS contraceptive mandate in employer provided health plans**

By Anthony H. Nguyen, JD

The U.S. Court of Appeals for the Tenth Circuit determined that the Religious Freedom Restoration Act (RFRA) (P.L. 103-141) and the Free Exercise Clause were applicable for two companies and their owners who operated businesses to reflect their religious values (Hobby Lobby Stores, Inc. v. Sebelius, June 27, 2013, Tymkovich, T.). By a 5-3 vote, the en banc Tenth Circuit reversed a district court’s ruling that denied the companies’ motion for a preliminary injunction against the HHS mandate that requires employers of a certain size to provide employee insurance coverage for contraceptive services. The appellate court held that the companies were entitled to bring claims under RFRA, established a likelihood of success that their rights under RFRA were substantially burdened by the contraceptive-coverage requirement, and established an irreparable harm. However, the Tenth Circuit remanded the case to the district court for further proceedings on two of the remaining factors, balance of equities and public interest, which controlled whether the preliminary injunction would be granted or denied.

**Background.** Hobby Lobby Stores, Inc. and Mardel bookstores (collectively, Hobby Lobby) contended that regulations implementing the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) forced them to violate their religious beliefs. Specifically, Hobby Lobby challenged the regulation that required, beginning July 1, 2013, employers to provide certain contraceptive services as a part of their employer-sponsored health care plan. Hobby Lobby argued that among the services are drugs and devices that it considered the usage of as contrary to its owners’ beliefs.

Under 42 U.S.C. sec. 300gg-13 and 29 U.S.C. sec. 1185d, employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of “preventive care and screenings” for women “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.” At the time of implementation, no HRSA guidelines existed regarding preventive care and screening for women, although
FDA-approved contraceptives were eventually adopted into the guidelines. A number of entities are partially or fully exempted from the contraceptive-coverage requirement. The exemptions typically are applicable to religious non-profits, companies with fewer than 50 employees or businesses that do not make certain significant changes to health plans after PPACA’s effective date. As a result, no exemption, proposed or otherwise, would extend to for-profit organizations like Hobby Lobby.

Religious beliefs. Hobby Lobby’s owners believe that human life begins at conception, and that they would be facilitating harms against human beings if the company’s health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation (Ella, Plan B, and the two IUDs). Hobby Lobby’s owners did not object to providing coverage for the sixteen remaining contraceptive methods; the owners stated willingness to cover, without cost-sharing, the remaining methods, from the original birth control pill to surgical sterilization.

Hobby Lobby filed suit in 2012 challenging the contraceptive-coverage requirement under the RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. Hobby Lobby also simultaneously moved for a preliminary injunction on the basis of their RFRA and Free Exercise claims. The district court denied that motion and a two circuit judge panel upheld the decision. Hobby Lobby requested an en banc review by the Tenth Circuit after the U.S. Supreme Court denied relief under the All Writs Act.

Jurisdiction. In holding that it had subject matter jurisdiction, the Tenth Circuit found that Hobby Lobby had Article III standing. Hobby Lobby faced an imminent loss of money, traceable to the contraceptive coverage requirement. Both companies would receive redress if a court held the contraceptive-coverage requirement unenforceable as to them. Additionally, Hobby Lobby’s injunction was not barred by the Anti-Injunction Act, which bars lawsuits used to restrain the assessment or collection of any tax. The Tenth Circuit found that Hobby Lobby was not seeking to enjoin the collection of taxes or the execution of any IRS regulation, but seeking to enjoin the enforcement, by whatever method, of an HHS regulation claimed to violate their RFRA rights.

District court’s ruling. Under the four-prong test for a preliminary injunction, the party moving for an injunction must show: (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest. The district court ruled that Hobby Lobby failed the likelihood-of-success element because even closely held family businesses like Hobby Lobby and Mardel were not protected by RFRA. The Tenth Circuit disagreed, noting that the contraceptive coverage requirement substantially burdened Hobby Lobby’s rights under the RFRA. The appellate court further found that the government had not shown a narrowly tailored compelling interest to justify this burden.

Religious Freedom Restoration Act. The government argued that RFRA did not apply to Hobby Lobby, because non-profit status was the objective criterion for determining whether an entity was a religious organization for purposes of civil rights statutes and labor laws. The government argued that the RFRA should be read to carry forward the preexisting distinction between non-profit, religious corporations and for-profit, secular corporations. The government also argued that Congress did not intend the RFRA to expand the scope of the Free Exercise Clause.

The Tenth Circuit also declined to conclude that the RFRA included a for-profit/nonprofit distinction.

The Tenth Circuit rejected the government’s line of reasoning, noting that the RFRA did not exclude for-profit organizations from its protection, as for purposes of the RFRA some corporations could be considered “persons.” The RFRA clearly defined persons to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies.” For-profit status could be one relevant factor among others when it pertained to certain religious exemptions, but was not dispositive of the issue. Hobby Lobby as a closely held family business with an explicit religious mission as defined in their governing principles made business decisions according to those standards; as a result, Hobby Lobby qualified as a “person” under the RFRA.

Free Exercise Clause. The Tenth Circuit also declined to conclude that the RFRA included a for-profit/nonprofit distinction. It noted that the enactment of the RFRA was a legislative overrule of a previous Supreme Court decision that eliminated the test of whether a neutral law of general applicability burdened Free Exercise.
Additionally, the appellate court noted that individuals have Free Exercise rights with respect to their for-profit businesses. Individuals were permitted to incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals were permitted to pursue profit while keeping their Free Exercise rights. The Tenth Circuit applied the Supreme Court’s rationale in Citizens United v Federal Election Commission, stating that it saw no reason why the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.

The appellate court held that a constitutional distinction would conflict with the Supreme Court’s Free Exercise precedent. Such a distinction would result in an individual operating as for-profit retaining Free Exercise protections but an individual who incorporated—even as the sole shareholder—did not, even though the individual engaged in the exact same activities as before. It did not follow that because religious organizations obtained protections through the Religion Clauses, all entities not included in the definition of religious organization were accorded no rights.

**Substantial burden.** The Tenth Circuit held that the government’s health plan requirement would place a substantial burden on Hobby Lobby. Fines of $100 per employee, per day, as mandated by 26 U.S.C. sec. 4980D(b)(1), that the plan did not meet the contraceptive-coverage requirement would come total $1.3 million per day, or close to $475 million per year for Hobby Lobby. Dropping health plans altogether would cost Hobby Lobby $26 million in fines. Thus, as a matter of law, the Tenth Circuit found that the requirement was a substantial burden.

**Compelling interest.** The Tenth Circuit held that the government’s interests of “public health” and “gender equality” were too generalized in regards to the mandate. The contraceptive-coverage requirement as written, did not apply to tens of millions of people, because of exemptions. The court noted that the exempted population included those working for private employers with grandfathered plans, for employers with fewer than 50 employees, and, under a proposed rule, for colleges and universities run by religious institutions. Larger interests of the government would not be undermined if the government granted Hobby Lobby an exemption, as Hobby Lobby requested exemption for only four of the twenty contraceptive methods and not to be excused entirely from covering contraceptive methods altogether.

**Disposition.** The five circuit judges in the majority agreed that Hobby Lobby had demonstrated a likelihood of success on their claim under the RFRA and had satisfied the irreparable-harm prong of the preliminary-injunction standard. However, only a plurality of the circuit judges resolved the remaining two factors, balance of equities and public interest, in Hobby Lobby’s favor. Thus, the district court’s denial of Hobby Lobby’s motion for a preliminary injunction was reversed and remanded with instructions that the district court address the remaining two factors to assess whether to grant or deny Hobby Lobby’s motion.

**Concurrences.** One circuit judge concurred with the opinion, but wrote separately that all corporations were persons and that the Supreme Court had never ruled that for-profit corporation did not have the right to free exercise of religion. In a separate concurrence, another circuit judge wrote that the business owners as individuals had standing to pursue the claims individually, because the owners were substantially burdened by the requirement.

The circuit judge who did not join the plurality on two of the factors for a preliminary injunction noted that balance of equities and public interest should be determined by a trial court and not an appellate court, since it was the latter’s duty to determine legal error.

**Dissent.** The chief judge dissented in part, noting that the majority opinion would open up the possibility that an “exercise of religion” could now be asserted by a corporation to avoid or take advantage of any governmental rule or requirement. The dissent noted that neither the U.S. Supreme Court nor any federal circuit court had ever used the phrase “faith-based company” or “religious mission” as a recognized distinct legal category of for-profit corporations. Between the adoption of the First Amendment and the RFRA’s passage, the Supreme Court has consistently treated free exercise rights as confined to individuals and non-profit religious organizations. Thus, it was improper to retroactively apply Citizens United to determine the congressional intent behind the RFRA.

The case number is 12-6294. [First published June 28, 2013.]  

**District judge grants Hobby Lobby preliminary injunction against contraception mandate**

By Sarah E. Baumann, JD

A federal judge granted two for-profit entities and their owners a preliminary injunction barring the federal government from enforcing the preventive services provision of the Patient Protection and Affordable Care
Act (PPACA) (P.L. 111-148) against them (Hobby Lobby Stores, Inc. v Sebelius, July 19, 2013, Heaton, J). The district court, which previously denied the injunction, reviewed the matter on remand from the Tenth Circuit Court of Appeals and determined that the balance of equities and the public interest weighed in favor of Hobby Lobby. As a result, the district court granted Hobby Lobby’s emergency motion for preliminary injunction and stayed proceedings until October 1, 2013.

**Background.** Hobby Lobby filed suit against HHS Secretary Kathleen Sebelius and various federal government entities, alleging that the preventive care services provision of PPACA, which requires it to cover forms of contraception that Hobby Lobby considers to be abortifacients, such as Ella, Plan B, and intrauterine devices, violated the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. It also requested a preliminary injunction based on the RFRA and Free Exercise claims. The district court denied the request for an injunction, determining that Hobby Lobby would not be substantially burdened by meeting the requirement. The Tenth Circuit Court of Appeals agreed, and upheld the decision. Supreme Court Justice Sotomayor denied Hobby Lobby’s request for an injunction pursuant to the All Writs Act, but noted that it could continue to litigate the case at the district court level.

**Tenth Circuit en banc ruling.** Hobby Lobby then requested an en banc hearing with the Tenth Circuit. The Tenth Circuit determined that the RFRA did not exclude-for-profit corporations from its protection and that the preventive services provision of PPACA placed a substantial burden on Hobby Lobby’s free exercise of religion without serving a compelling government interest, in violation of the RFRA. In evaluating the four-prong test for a preliminary injunction, the appellate court determined that Hobby Lobby had demonstrated a likelihood of success on the merits of the case and that it would suffer irreparable harm if it did not grant the injunction. However, the members could not agree as to whether the balance of equities between the parties and the public interest also weighed in favor of a preliminary injunction. As a result, the Tenth Circuit reversed the district court’s denial of the request for preliminary injunction and remanded it to the district court to determine whether the remaining two factors weighed in favor of a preliminary injunction.

**District court reconsideration.** Upon remand, the district court judge determined that both the balance of equities and the public interest weighed in favor of a preliminary injunction. As a result, he granted Hobby Lobby’s emergency motion for preliminary injunction and stayed further proceedings until October 1, 2013 to allow the government to determine whether it would appeal the decision.

The case number is CIV-12-1000-HE. [First published July 19, 2013.]

**Contraceptive coverage mandate binding on commercial corporation**

By Michelle L. Oxman, JD, LLM

A secular, for-profit corporation was properly denied an injunction against application of the requirement for employer-sponsored insurance to cover contraceptives because it had no rights to free exercise of religion under either the First Amendment to the United States Constitution or the Religious Freedom Restoration Act (Conestoga Wood Specialties Corp. v Secretary of HHS, July 26, 2013, Cowen, R). The purpose of the First Amendment Free Exercise Clause is to protect individual religious liberty from government intrusion. Secular, for-profit corporations do not have religious beliefs, and as separate, distinct legal entities, they cannot exercise the rights of the owners. Because the plaintiffs did not establish a likelihood of success on the merits, the court did not consider the extent of irreparable harm.

HHS said it “carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer.”

The corporation. Conestoga Wood Specialties Corp. (Conestoga) was a secular corporation engaged in a profit-making business; all of its shares were owned by members of the Hahn family. The family’s Mennonite beliefs treat human life as beginning at fertilization and prohibit its destruction from that point forward. After the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) was enacted, the board of directors
adopted the Hahn Family Statement on the Sanctity of Human Life, which articulates those views.

The family objected to covering two forms of emergency contraception on the ground that they may destroy an embryo after fertilization. Plan B, the “morning after pill,” is taken within 24 to 72 hours after unprotected sex, and ella, the “week after pill,” is taken within seven days.

**Prior proceedings.** After an evidentiary hearing, the district court denied the preliminary injunction on the ground that Conestoga did not engage in the exercise of religion, and therefore, was not likely to succeed on the merits. Conestoga did not qualify as a religious employer under 45 CFR sec. 147.130(a) because it was a for-profit entity whose purpose was profit, not the inculcation of religious values. Similarly, although HHS had announced a safe harbor for certain nonprofit entities while it considered changes to the exemption, Conestoga did not qualify.

**Application of Citizens United decision.** Conestoga argued that the 2010 Supreme Court decision in *Citizens United v Federal Election Commission*, which granted broad protection to corporations’ exercise of freedom of speech under the First Amendment, applied with equal force to the First Amendment Free Exercise Clause. However, both the district court and the appeals court rejected that argument. Some constitutional rights, for example, the right to privacy and the Fifth Amendment privilege against self-incrimination, have been held to be “purely personal,” and available only to natural persons. Individuals, based on their history, nature, and purpose.

The court found no support in cases decided before the enactment of PPACA for the idea that the Free Exercise Clause protects secular corporations formed for profit-making corporations do not practice religion. The government requests review, claiming the Tenth Circuit previously ruled that for-profit corporations could deny coverage that employees are otherwise entitled under federal law based on the religious objections of the individuals controlling the corporation. The government requests review, claiming in part that the Tenth Circuit’s holding conflicts with recent decisions of other appeals courts, and that the companies are not entitled to raise individual rights to raise religious exemptions when they chose to create a corporate entity.

**Background.** Hobby Lobby, a chain of arts-and-craft stores, along with Mardel, Inc., an affiliated chain of bookstores owned by the same family (the Greens), provide group health coverage for their employees. The Greens believe that human life begins at conception, and thus, on the basis of their religious beliefs, reexamined its insurance policies following the enactment of the contraceptive mandate and decided...
to exclude contraceptives that prevented the implantation of a fertilized egg, namely certain intrauterine devices (IUDs), Plan B, and Ella. They brought suit, claiming that this requirement violates the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), which provides that the government “shall not substantially burden a person’s exercise of religion” unless it is the least restrictive means to further a compelling government interest, and the Free Exercise Clause of the First Amendment.

Procedural history. The procedural history is extensive, and has been previously reported at length in Health Law Daily. The U.S. District Court for the Western District of Oklahoma considered the companies’ request for a preliminary injunction in November 2012. The district court denied the injunction, finding that the companies could not meet the burden of showing that they were likely to succeed on the merits of their First Amendment claims because they were secular, for-profit corporations lacking free exercise rights like individual “persons,” and that the companies did not show they would be substantially burdened by the contraceptive mandate. The Tenth Circuit, on June 27, 2013, found that the RFRA and the Free Exercise Clause applied to the two companies and owners so that they (1) were able to bring claims under the RFRA, (2) showed a likelihood of success that their rights under RFRA were substantially burdened by the contraceptive mandate, and (3) established irreparable harm. Thus, the Tenth Circuit reversed the district court’s ruling denying the companies’ motion for a preliminary injunction. Following the Tenth Circuit’s decision and remand to the district court, on July 19th, the district court granted the companies’ emergency motion for preliminary injunction and stayed the proceedings until October 1, 2013, to allow the government time to determine whether it would appeal to the Supreme Court. In its Petition, the government presents several reasons it believes the petition should be granted.

RFRA arguments. The government argues that RFRA does not allow for a for-profit corporation to deny its employees the benefits to which they are otherwise entitled by federal law. First, the government claims that the corporations are not “person[s] exercis[ing] religion” as are covered by RFRA. To that end, the government states that when RFRA was enacted, there was no case law that gave free-exercise right to for-profits, or granted them exemptions from corporate regulations because of religion, and yet, the Tenth Circuit held that “the religious beliefs of the Greens…trump the rights of the corporations’ 13,000 full-time employees and their family members to receive the health coverage to which they are entitled by federal law.”

Second, the government claims that the Tenth Circuit did not present evidence that Congress meant to disregard the corporate entity with respect to RFRA and treat owners as individuals. It is not the Greens individually that are required to provide health coverage to the corporations’ employees, or to pay their salaries, the government reasons, but rather, it is the obligation of the corporations. Citing the Conestoga Wood Specialties Corp. v HHS decision, it states that “[t]he Greens ‘chose to incorporate and conduct business through [corporations], thereby obtaining both the advantages and disadvantages of the corporate form” and cannot now “move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.”

Third, the government argues that the burden that is placed on the companies here is not “substantial” because it is too attenuated. The employees’ insurance plan covers many medical services, and the decision whether to “use contraception, treat an infection, or have a hip replacement” is best left to the individual and her doctor.

Last, the government argues that companies’ argument under heightened scrutiny also fails because the contraceptive coverage requirement is the least restrictive means of advancing compelling government interests. The compelling government interest in mandating contraceptive coverage is the promotion of public health, and the use of contraceptives decreases the likelihood of negative health consequences for both women and children, the government maintains. The government states, in response to the declaration by the Tenth Circuit that “Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here,” that
the women’s health preventive services requirement was enacted because women have disproportionately higher out-of-pocket health care costs than men, and the Tenth Circuit’s declaration is contrary to Congress’ intentions. Further, the companies argued that they are only excluding four types of contraceptives from coverage, but the government states that certain types are contraindicated for women with certain risk factors or conditions, so coverage of all methods is required.

**Conflict with other Circuits.** As the government notes, this question is “of exceptional importance concerning asserted RFRA rights of for-profit corporations,” and points out that contrary holdings have been reached by both the Third and Sixth Circuits in the Conestoga Wood and Autocam Corp. v Sebelius cases. [Comparable claims are also pending in the Seventh, Eighth, Eleventh, and D.C. Circuits.] Both involved similar RFRA and free exercise arguments against the contraceptive coverage requirement brought by secular, for-profit corporations. In Conestoga Wood, the Third Circuit rejects the company’s claims, stating that it was “not aware of any case preceding the commencement of litigation about the [contraceptive-coverage requirement], in which a for-profit, secular corporation was itself found to have free exercise rights” and rejected the company’s argument that the corporate form should be disregarded and treat the corporation as if it were indistinguishable from the individual shareholders. The Third Circuit said that if the individuals chose to utilize the corporate form to begin with, they cannot now request to be treated as individuals.

The Sixth Circuit found in the Autocam case that if the free exercise clause were expanded to cover corporations as if they were persons, it would “lead to a significant expansion of the scope of the rights the Free Exercise Clause [previously] protected.” The RFRA claims raised by Autocam’s owners were also dismissed for lack of standing because of a longstanding rule barring claims by shareholders “intended to redress injuries to a corporation.”

[First published September 20, 2013.]

**Supreme Court to hear controversial contraception cases**

By Patricia K. Ruiz, JD

The Supreme Court of the United States (SCOTUS) announced today that it will hear two major cases involving dispute over insurance coverage for contraceptives mandated by the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148). The two cases, Sebelius v Hobby Lobby Stores, Inc. and Conestoga Wood Specialties v Sebelius are both suits requesting an exemption from the PPACA mandate to provide contraceptive coverage to its employees on the basis of religious objection by the owners.

**Sebelius v Hobby Lobby.** The owners of Hobby Lobby, a chain of arts-and-crafts stores, believe that human life begins at conception and decided to exclude from its group health insurance coverage for contraceptives that prevent fertilized eggs from implanting in the uterus, namely intrauterine devices (IUDs), Plan B* (the morning after pill), and Ella* (the week after pill), we reported previously. They brought suit against the government alleging that the contraceptive mandate violates the Free Exercise Clause of the First Amendment, as well as the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), which states that the government “shall not substantially burden a person’s exercise of religion” unless it is the least restrictive means to further a compelling government interest.

As we reported previously, the Tenth Circuit ruled that for-profit corporations could deny contraceptive coverage to employees, even if otherwise entitled by federal law, on the basis of religious objections by the individuals controlling corporation. The government requested review by SCOTUS, arguing that the decision by the Tenth Circuit conflicts with recent decisions of other appeals courts and that religious exemptions are not available to for-profit corporations.

**Conestoga Wood Specialties v Sebelius.** Conestoga Wood Specialties (Conestoga), a secular, for-profit corporation, was previously denied an injunction preventing enforcement of the contraceptive mandate. The company, owned by a Mennonite family, objected to Plan B and Ella. In its decision the Third Circuit stated that the Free Exercise Clause protects religious freedom of individuals from government interference. However, secular corporations, which do not pray, worship, observe sacraments, or engage in other religious activity, are not entitled to Free Exercise Clause protection, and the rights of the owners do not pass through to the corporation. Conestoga petitioned for certiorari.

Following the announcement from SCOTUS, the White House released a statement, which said, “We believe this requirement is lawful and essential to women’s health and are confident the Supreme Court will agree.” The statement referenced the exceptions and accommodations offered under the contraceptive mandate and concluded, “These steps protect both women’s health and religious beliefs, and seek to ensure that women and families—not their bosses or corporate CEOs—can make personal health decisions based on their needs and their budgets.”

[First published November 26, 2013.]
STRATEGIC PERSPECTIVES:
Contraceptive mandate subject of ongoing rulemaking, litigation; now faces the Supreme Court

By Danielle H. Capilla, JD

The Patient Protection and Affordable Care Act (ACA) (P.L. 111-148), signed into law by President Obama on March 23, 2010, has endured controversy, criticism and praise prior to and during its implementation. One particularly controversial area stems from the requirement that health insurance policies include preventive care, including FDA-approved contraception, at no cost to the consumer. The so called “contraceptive mandate” has been the subject of interim and final rules, litigation, and in 2014 will be considered by the U.S. Supreme Court.

Preventive care. The ACA amended sec 2713 of the Public Health Service Act to require health insurance plans to cover specific preventive services. Generally, covered preventive services are those rated A or B by the U.S. Preventative Services Task Force (USPSTF). Preventive care requirements for adults and children were announced in the summer of 2010, with more specific requirements for women released in August of 2011.

Initial Interim final rule. Published by HHS along with the Department of Treasury, Employee Benefits Security Administration, Department of Labor, CMS and the Internal Revenue Service, the Interim final rule (76 FR 46621, August 3, 2011) was slated to go into effect on August 1, 2012. The Interim final rule announced that the recommendations from the Health Resources and Services Administration (HRSA), titled “HRSA’s Women’s Preventive Services: Required Health Plan Coverage Guidelines” (HRSA Guidelines), must be covered by group health plans and health insurance issuers. The HRSA Guidelines provide 22 preventive services for women, including: (1) breast cancer mammography screenings every 1 to 2 years for women over 40; (2) gestational diabetes screening for women 24 to 28 weeks pregnant and those at high risk of developing gestational diabetes; (3) breastfeeding comprehensive support and counseling from trained providers, and access to breastfeeding supplies for pregnant and nursing women; and (4) FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, as prescribed by a health care provider for women with reproductive capacity (not including abortifacient drugs). Although the list of covered services has not changed since its original unveiling, the Interim final rule has gone through numerous changes since 2011.

The Interim final rule noted that when developing guidelines (75 FR 41726, July 19, 2010), the departments received considerable feedback; the rule noted “most commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemptions.” The 2011 Interim final rule went on to allow the HRSA discretion to exempt certain religious employers from the guidelines regarding contraceptives, and following typical state exemptions (for states with contraceptive coverage requirements), the Interim final rule defined a religious employer as one who: (1) has an inculcation of religious values in its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Comments were requested regarding the exception; and subsequently the HRSA exercised its discretion and allowed group health plans established and maintained by religious employers to forego offering contraception coverage.

Initial Final rule. On February 15, 2012, HHS released its first Final rule (77 FR 8725) covering preventive health services for women. The Final rule acknowledged that HHS received over 200,000 comments on the amended Interim final regulations. HHS stated that it “carefully considered whether to eliminate the religious employer exemption or to adopt an alternative definition of religious employer.” Although HHS considered broadening the definition of religious

Secular, for-profit corporations do not have religious beliefs, and as separate, distinct legal entities, they cannot exercise the rights of the owners (3rd Cir.).
employer, it ultimately adopted the Interim final rule’s definition. It also created a temporary safe harbor, during which it could develop and propose changes to the Final rule that would include contraceptive coverage without cost sharing to individuals who want it and accommodate non-exempted, non-profit organizations’ religious objections. The details of the safe harbor were provided in a contemporaneously released guidance, “Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code.” CMS has re-released the guidance, which now bears a 2013 date, but has noted that the only changes in the guidance relate to the extension of the safe harbor to the end of 2013.

Blunt Amendment. In response to the Final Rule, Senator Roy Blunt (R-Mo) proposed the “Blunt Amendment” (S. Amdt. 1520 to S. Amdt. 1730, 112th Congress) to a highway safety bill, which would have amended the ACA to allow an employer to refuse to include contraceptive coverage in its health plan if such coverage violated the employer’s religious or moral beliefs. It was voted down by the Senate 51-48 on March 1, 2012.

Advanced notice of proposed rule making. On March 21, 2012, HHS, along with the Departments of Labor and Treasury released an Advanced notice of proposed rulemaking (77 FR 16501, March 21, 2012) asking for comments on potential means of accommodating religious organizations “while ensuring contraceptive coverage for plan participants and beneficiaries covered under their plans (or in the case of student health insurance plans, student enrollees and their dependents) without cost sharing.” The Advanced notice announced that HHS intended to propose that third-party administrators of group health plans, or another independent entity, assume the responsibility of the contraceptive coverage.

Proposed rule. The Advanced notice was followed almost a year later by a Proposed rule (78 FR 7348, February 1, 2013) which proposed eliminating the first three prongs of the definition of religious employer, which would prevent a religious employer that offers charitable services to a population beyond members of its own religion, or employs members of other religions, from falling outside the exemption. Religious employers would still have to meet the Internal Revenue Service definition of a religious employer. The Proposed rule also created a permanent exception for certain eligible organizations that oppose some or all of mandated contraceptive services, which are organized and operated as nonprofit entities, hold themselves out as a religious organization and self-certify that they meet the first three criteria. Under the Proposed rule, religious institutions of higher education would be specifically included in the eligible organizations. Secular employers would not meet the proposed exemptions.

Final rule. The Final rule (78 FR 39870, July 2, 2013), included the definition of a “religious employer” from the Proposed rule, along with explanations and clarifications. The definition of “religious employer” for purposes of the exception is one that is organized and operates as a nonprofit entity and is referred to in Sec. 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986. The agency noted that the simplified definition does not expand the universe of what was intended in the 2012 Final rule, but instead eliminates perceived potential disincentive for religious employers to provide educational, charitable and social services to their communities. The Final rule included the Proposed rule’s accommodations for nonprofit religious organizations.

Contemporaneously, HHS released an updated version of its guidance, extending the temporary safe harbor for plan years beginning on or after August 1, 2013 and before January 1, 2014, and a self-certification form for organizations to use. The Final rule applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, with the amendments to the religious employer exemption applying for plan years beginning on or after August 1, 2013.

Litigation. According to the American Civil Liberties Union, which has tracked all litigation regarding the contraceptive coverage mandate, 88 cases have been filed challenging the rule. Seventy-five cases are pending, 29 by nonprofit organizations, 43 by for-profit companies, and 3 cases brought by both nonprofit and for-profit plaintiffs. The Becket Fund, which has represented the plaintiffs in many cases, including Hobby Lobby v Sebelius, has the tally at 89 cases filed, with 46 by for-profits and 43 by non-profits, and two class action lawsuits.

As the cases have made their way through the court system a distinct “circuit split” was created, with the Third Circuit and Sixth Circuit denying injunctive relief to employers, the Tenth Circuit remanding a case back to the district court which subsequently granted injunctive relief, and the Eighth and Seventh Circuit’s granting injunctive relief pending appeal. While all of these cases have made headlines, the most followed, Hobby Lobby v Sebelius, came out of the Western District of Oklahoma.
and was the subject of the Tenth Circuit’s remand. The Becket Fund also reported that in “rulings on the merits”, 33 injunctions have been granted and six have been denied in for-profit cases, in nonprofit cases 5 injunctions have been granted and none have been denied.

Hobby Lobby. Hobby Lobby, a national craft store chain, filed suit against HHS Secretary Kathleen Sebelius and various federal government entities, alleging that the preventive care services provision of the ACA, which requires it to cover forms of contraception that Hobby Lobby considers to be abortifacients, such as Ella, Plan B, and intrauterine devices, violated the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. It also requested a preliminary injunction based on the RFRA and Free Exercise claims. The district court denied the request for an injunction, determining that Hobby Lobby would not be substantially burdened by meeting the requirement. The Tenth Circuit Court of Appeals agreed, and upheld the decision. Supreme Court Justice Sotomayor denied Hobby Lobby’s request for an injunction pursuant to the All Writs Act, but noted that it could continue to litigate the case at the district court level.

Hobby Lobby then requested an en banc hearing with the Tenth Circuit. The Tenth Circuit determined that the RFRA did not exclude-for-profit corporations from its protection and that the preventive services provision of the ACA placed a substantial burden on Hobby Lobby’s free exercise of religion without serving a compelling government interest, in violation of the RFRA. In evaluating the four-prong test for a preliminary injunction, the appellate court determined that Hobby Lobby had demonstrated a likelihood of success on the merits of the case and that it would suffer irreparable harm if it did not grant the injunction. However, the members could not agree as to whether the balance of equities between the parties and the public interest also weighed in favor of a preliminary injunction. As a result, the Tenth Circuit reversed the district court’s denial of the request for preliminary injunction and remanded it to the district court to determine whether the remaining two factors weighed in favor of a preliminary injunction.

On remand the district court granted Hobby Lobby a preliminary injunction barring the federal government from enforcing the preventive services provision of the ACA. The court determined that the balance of equities and the public interest weighed in favor of Hobby Lobby and granted Hobby Lobby’s emergency motion for preliminary injunction and stayed proceedings until October 1, 2013.

Supreme Court. On September 19, 2013, the Solicitor General filed a petition for writ of certiorari with the Supreme Court of the United States, asking the court to determine if the RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners. Numerous amicus curiae briefs were filed with the court, and the court granted the petition on November 26, 2013, allotting one hour for oral argument. (No date has been set for oral arguments.) The case is consolidated with Conestoga Wood Specialties Corporation v the Secretary of HHS.

The government argues that the burden that is placed on the companies here is not “substantial.”

Religious Freedom Restoration Act. The Supreme Court will be asked to determine if the RFRA protects Hobby Lobby, a for-profit secular corporation. The government had argued before the Tenth Circuit that the RFRA should be read to carry forward the preexisting distinction between non-profit religious corporations and for-profit secular corporations. The Tenth Circuit noted that for-profit status could be one relevant factor when it comes to religious exemptions but wasn’t dispositive on the issue, and declined to conclude it had a for-profit or nonprofit distinction. Conversely the Sixth Circuit, in Autocam Corporation v Sebelius, held that for-profit, secular corporations have no rights to the free exercise of religion, as did the Third Circuit in Conestoga Wood Specialties Corporation v the Secretary of HHS.

Deepening the divide between circuits, the Seventh Circuit held that the contraceptive mandate violates the rights of individual business owners and closely held business corporations under the RFRA and granted an employer an injunction against the mandate in Korte v Sebelius. The Court of Appeals for the D.C. Circuit overturned the denial of a preliminary injunction and ruled that the contraceptive mandate infringed the rights of owners of a Subchapter S corporation, but did not rule that secular, for-profit corporations have a right to free exercise of religion in Gilardi v Department of Health and Human Services. The Eighth Circuit has also granted
two injunctions pending appeal, first in *O’Brien v U.S. Dept. of HHS* without explanation, and in * Annex Medical Inc. v Sebelius*, noting it was too similar to O’Brien to deny the injunction. These cases represent a portion of the appeals pending at both the circuit and district court levels across the United States.

**Potential impact.** The impact of the Supreme Court’s decision, if it rules directly on the question presented, would have a lasting impact for American corporations. A U.S. News & World Report opinion article theorized that if the RFRA protections were extended to corporations, other medical services such as blood transfusions could be denied based on religious beliefs. As Marty Lederman wrote for “Balkanization”, “It is very easy to contemplate employers who have religious objections to other forms of mandated preventive health services such as vaccinations for chicken pox, Hepatitis A and Rubella.” The vaccinations for these diseases have come under controversy because the vaccines are *made in fetal embryo fibroblast cells* derived from elective termination of two pregnancies in the 1960’s.

In her dissent in *Korte v Sebelius*, Judge Rovner proposed several hypothetical situations that could potentially happen if for-profit corporations were given protection under the RFRA. First she theorized that if an employee with Lou Gehrig’s disease was accepted into a clinical trial testing embryonic stem-cell therapy on the disease, this could lead to a lawsuit under the RFRA, with the corporation arguing that the ACA is imposing a substantial burden on their right to free exercise of religion. Although the government could argue there is a compelling interest in the development of life-saving treatment, it could lead to the individual being unable to participate in the trial.

Another hypothetical Judge Rovner puts forward is that of a Christian Science employer who only wishes for his employee health plan to pay for care at Christian Science nursing centers, as he believes providing traditional medical care would be a violation of his religious beliefs. Outside of the sphere of health coverage, Judge Rovner also suggests that a corporation owned by devoutly religious family belonging to a church affiliated with the Southern Baptist Convention could use the RFRA in a suit involving denied unpaid leave under the Family Medical Leave Act for a homosexual employee wishing to take time off for the birth of a child.

Judge Rovner noted “These hypotheticals illustrate the uncertainty that the court’s expansive interpretation and application of the RFRA brings to a number of statutory schemes in which Congress has accorded specific rights to employees (not to mention other parties), the recognition and accommodation of which a corporation in addition to its owners can now say burden their religious interests.”

Hobby Lobby files brief in support of contraceptive mandate exemption

By Patricia K. Ruiz, JD

Hobby Lobby Stores, Inc., along with its owners, (Hobby Lobby, collectively) has filed a brief in the Supreme Court in support of its claim that it should not be required to comply with the contraceptive mandate under the Patient Protection and Affordable Care Act (ACA) (*P.L. 111-148*) because of the alleged burden the mandate places on the exercise of its religious beliefs. This brief comes as a result of the Supreme Court’s granting of a *writ of certiorari* in *Sebelius v Hobby Lobby Stores, Inc.* in late November of 2013.

**Religious Freedom Restoration Act of 1993 (RFRA).** The crux of Hobby Lobby’s argument revolves around RFRA (*P.L. 103-144*), which provides that the government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” Thus, the government must prove that the “application of the burden to that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

**Corporations.** Hobby Lobby argues in its brief that the corporate and individual respondents are both protected as “persons exercising religion” under RFRA, drawing comparisons to the “firmly rooted” protection of corporations under the First Amendment, as well as the Equal Protection Clause and the Due Process Clause. Hobby Lobby also argued that corporations are capable of exercising rights under the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. Hobby Lobby further noted the Court’s previous statement that “[t]he proper question . . . is not whether corporations ‘have’ First Amendment rights and, if so, whether [the challenged law] abridges expression that the First Amendment was meant to protect.”

**Violation of individuals’ rights.** Hobby Lobby argued a violation of the corporation’s rights under RFRA is also a violation of the owners’ rights. The Court, Hobby Lobby argued, must (1) identify the sincere religious exercise at issue, and then (2) determine whether the government has placed substantial pressure on the respondents to abstain from that religious exercise. To Hobby Lobby, providing coverage for contraceptives that it believes risk destroying a human embryo would make the owners complicit in abortion, in violation of their faith. However, to not provide such coverage would result in “crippling” multi-million dollar fines. Hobby Lobby argued that “this Court
has identified ‘substantial burdens’ in far less onerous circumstances as these.”

**Government’s position.** Previously, the government argued that RFRA does not allow for-profit corporations—which are not “person[s] exercis[ing] religion”—to deny their employees benefits to which they are entitled by law. To allow such would be to disregard the tenets of corporate law that distinguish a corporation’s rights and responsibilities from those of its owners. Furthermore, in support of the contraceptive mandate, the government argued that, because a group health plan covers many services other than just contraception, the decision as to which services to use are up to the employee and her doctor. Thus, “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.”

**Amici curiae brief.** A brief filed in late January 2014 in support of the government by amici curiae including church-state scholars and law professors states that the “Establishment Clause prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not.” The amici argue that allowing Hobby Lobby a religious exemption from the contraceptive mandate would shift those health-related costs onto its employees, even the ones who do not share Hobby Lobby’s beliefs. Such a result is unacceptable, said the amici in their brief, whether or not Hobby Lobby is determined by the court to be a “person” exercising religion.

[First published February 12, 2014.]

**STRATEGIC PERSPECTIVES:**

**Supreme Court showdown over the contraceptive mandate looms**

By Danielle H. Capilla, JD

The Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) resulted in a requirement that insurance policies provide various preventative care services, including FDA-approved contraception, at no cost to the beneficiary. The so-called “contraceptive mandate” will be the focus of oral arguments before the Supreme Court on March 25, 2014. In anticipation of the arguments, over 80 amici curiae briefs have been filed by interested individuals, groups and organizations as of early February 2014. Politicians have also weighed in on issue and tensions are rising on all sides.

**Preventive care.** As discussed in an earlier Strategic Perspective, “Contraceptive mandate subject of ongoing rulemaking, litigation; now faces the Supreme Court”, the ACA amended section 2713 of the Public Health Service Act to provide essential coverage and preventive services to beneficiaries. Under the ACA, group health plans and health insurance issuers must cover specific preventive services. Preventive care requirements for adults and children were announced in the summer of 2010, with more specific requirements for women released in August of 2011. These requirements included coverage of FDA-approved contraception and related appointments, counseling and education.

**Supreme Court.** Hobby Lobby, a national craft store chain, filed suit against HHS Secretary Kathleen Sebelius and various federal government entities, alleging that the preventive care services provision of the ACA, which requires it to cover forms of contraception that Hobby Lobby considers to be abortifacients, such as Ella®, Plan B One-Step®, and intrauterine devices, violated the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. At the direction of the Tenth Circuit, the district court granted Hobby Lobby a preliminary injunction barring the federal government from enforcing the preventive services provision of the ACA.

Subsequently the Solicitor General filed a petition for writ of certiorari with the Supreme Court of the United States, asking the court to determine if the RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners. The Court granted the petition on November 26, 2013. During the case’s arguments, the Supreme Court will be asked to determine if the RFRA protects Hobby Lobby, a for-profit secular corporation. The government had argued before the Tenth Circuit that the RFRA should be read to carry forward the preexisting distinction
between non-profit religious corporations and for-profit secular corporation.

The Tenth Circuit noted that for-profit status could be one relevant factor when it comes to religious exemptions but wasn’t dispositive on the issue, and declined to conclude it had a for-profit or nonprofit distinction. Conversely, the Sixth Circuit, in *Autocam Corporation v Sebelius*, held that for-profit, secular corporations have no rights to the free exercise of religion, as did the Third Circuit in *Conestoga Wood Specialties Corporation v the Secretary of HHS*. As the date for oral arguments draws nearer, entities around the United States have been filing *amicus curiae* briefs rapidly. The term *amicus curiae* translates to “friend of the Court,” and such briefs can be filed by interested parties. There are several noteworthy briefs among the filings, although the court will take all into consideration. The Hobby Lobby case has been consolidated with *Conestoga Wood Specialties Corporation v the Secretary of HHS*.

**Briefs by Democrats.** One brief that stole the headlines was filed by 19 Democratic Senators on January 28th, 2014. “*Brief amici curiae of United States Senators Murray, et al.*” in support of the government argues that the Tenth Circuit’s ruling is contradictory to the plain-text reading of the RFRA as well as its legislative history, and that Congress already balanced the government’s compelling interest in extending women’s access to preventive care with a full understanding of the RFRA and its purpose. The brief summarized its argument stating “Exempting secular, for-profit corporations from the Affordable Care Act’s contraceptive-coverage requirement is inconsistent with RFRA’s legislative history and intent, and undermines the Affordable Care Act’s carefully crafted balance between a compelling governmental interest and individual free-exercise rights.”

An *amicus curiae brief* on behalf of 91 members of the House of Representatives was also filed in support of the government, arguing that Hobby Lobby does not have free exercise rights under the RFRA. In the alternative, the Representatives argue that any challenges to the contraceptive coverage requirement under the RFRA should be rejected because: (1) the text and legislative history of the RFRA make it clear that the protections are only provided if requirements “substantially burdens” religious exercise, which they argue the mandate does not; (2) the legislative history of the ACA demonstrates that the preventive care provisions serve a compelling government interest by advancing public health and welfare while promoting gender equality and does so by the least restrictive means necessary; and (3) the mandate properly balances Congress’ compelling interests in enacting the preventive care provision and any burden on for-profit corporations and the rights of female employees of for-profit corporations.

**Briefs by Republicans.** An *amicus curiae brief* filed on behalf of 11 Republican Senators and Representatives argues that the term “person” in the RFRA “ordinarily encompasses corporations, companies, associations and individuals” but that Congress did not carve out any class of unprotected persons and made no distinction between those who engage in commercial activity in a non-profit corporate form or otherwise. The brief argues that the “judicially created carve-out the government advocates” is in opposition of the purpose of the RFRA, which the Congressional authors state was enacted to prevent laws from being implemented unfairly. Accusing the government of ignoring the RFRA during the preventive mandate’s administrative process and only considering religious freedom in response to litigation and the “pressures of public opinion” the brief alleges that the government has “undermined the RFRA’s central purpose of insulating the free exercise of religion from the forces of standard interest-group politics.”

Brendan Walsh, an associate with Pashman Stein, and the counsel of record for the brief on behalf of 11 Republican Senators and Representatives told Wolters Kluwer that he expects the Court to focus on the definition of the word “person” during the oral arguments in March. He noted that there is no controversy with non-profit corporations receiving protection from the RFRA, so he does not believe there should be an issue giving for-profit corporations protection.

Another *amicus curiae brief*, filed by Senator Ted Cruz (R-Tex.) along with Senators John Cornyn (R-Tex.), Mike Lee (R-Utah) and David Vitter (R-La.) supporting Hobby Lobby argues that the Obama Administration is trying to vigorously enforce one aspect of the ACA while repeatedly ignoring “the explicit language of the ACA in other contexts” and thus cannot “deny the same leniency to those acting on the basis of religious faith.” The brief goes on to argue that by not enforcing other provisions of the ACA for secular policy reasons, the contraceptive mandate is invalid under the First Amendment because it isn’t generally applicable. Arguing that by repeatedly disregarding aspects of the ACA, the government “lacks a compelling interest justifying the contraception mandate.”

**Reply briefs.** On Monday, February 10th 2014, both the government and Hobby Lobby filed their reply briefs with the Supreme Court. *Hobby Lobby*, categorizing the mandate as a “textbook substantial burden” on its religious exercise argued that the govern-
ment’s distinction between Hobby Lobby’s owners and the corporation itself was an “artificial wedge” because both parties are entitled to relief under the RFRA.

Hobby Lobby argued that the mandate is a substantial burden that fails the strict scrutiny test. The government, responding in the linked case, Conestoga Wood Specialties Corporation v the Secretary of HHS, acknowledged that the sincerity of the parties’ beliefs are not in question, but argues that their beliefs do not justify an injunction under either the Free Exercise Clause or the Religious Freedom Restoration Act. Arguing that the law is neutral and the RFRA does not apply to for-profit corporations, the government stated that the RFRA claim “violates fundamental corporate-law principles because it attributes the religious beliefs of the corporate shareholders to the corporation itself.” The government also argued that using the RFRA to give corporations religious-based exemptions would “have a perverse effect of undermining the special place of religious institutions in our society.”

**Missing argument?** An *amici curiae brief* filed by a group of church-state scholars in support of the government argues that other briefs and lower court opinions have “failed to examine the Establishment Clause implications of the RFRA exemption sought here.” Stating that the “Establishment Clause prohibits the RFRA’s application where –as here- a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties in the for-profit workplace” the brief argues that the RFRA exemption is a clear violation of the Establishment Clause, regardless of whether Hobby Lobby is a “person” under the Act. The same argument was proposed by the Editorial Board of the New York Times, who noted that the argument has been “relegated to a footnote” by the Justice Department, invoking the Establishment Clause of the First Amendment to enforce the separation of church and state and barring the government from favoring one religion over another or those who do not believe in religion.

**Potential slippery slope.** Professor Jeffrey M. Shaman, Vincent de Paul Professor of Law at the DePaul University College of Law, stated that because Hobby Lobby is a family-owned corporation, the impact of a decision in its favor might be murky for corporations with multiple shareholders. Speaking with Wolters Kluwer, Professor Shaman noted that “Hobby Lobby is a family-owned corporation, but what about a larger corporation that has many shareholders—may it assert the religious rights of its individual shareholders? What if the shareholders are not all of the same religion?

Does the individual mandate have to offend the religious views of a majority of the shareholders or will a significant minority suffice to allow the corporation to assert rights for its shareholders?” Professor Shaman also noted that Hobby Lobby and Conestoga Wood have selected one portion of the ACA requirements they believe violates their religious beliefs, asking “Do businesses have a right under the Free Exercise Clause or RFRA to pick and choose which requirements they will follow?” which could in theory lead to a slippery slope for individuals, and thus businesses, that object to other potentially controversial medical technology, such as vaccinations.

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**Because Hobby Lobby is a family-owned corporation, the impact of a decision in its favor might be murky for corporations with multiple shareholders.**

**Politicians speak up, businesses do not.** At the Republican National Committee’s winter session in January of 2014, former Arkansas Governor Mike Huckabee spoke out against the contraceptive mandate, stating “Democrats want to insult the women of America by making them believe that they are helpless without ‘Uncle Sugar’ coming in and for providing for them a prescription each month for birth control because they cannot control their libido or reproductive system without the help of the government - then so be it.” It was quickly pointed out in the news media that Arkansas has a contraception requirement known as the “Equity in Prescription Insurance and Contraceptive Coverage Act”, which was signed into law in 2005 by then-Governor Huckabee. The Arkansas Act did not provide for abortions, abortifacients or FDA approved emergency contraception, but it provided that any insurer covering prescription drugs also cover FDA approved contraceptive drugs and devices. The Act prohibits extraordinary surcharges and provides an exemption for religious employers.

Although politicians are speaking out on the issue, none of the 80 plus briefs was filed by a Fortune 500 company, the United States Chamber of Commerce
or the National Federation of Independent Business. Although some have interpreted this as a negative for Hobby Lobby, the converse could also be true, as none of them advocated for the government’s position either. Mr. Walsh of Pachman Stein wasn’t surprised by the lack of briefs by these entities, noting that the issue only impacts a small number of businesses, so there is no reason for large corporations or groups to weigh in on the issue. For now, the only known fact is that the oral arguments in March will be closely followed.

[First published February 25, 2014.]

STRATEGIC PERSPECTIVES: Oral arguments in Hobby Lobby case; Justices have many questions

By Danielle H. Capilla, JD

Supreme Court Justices had no shortage of questions for the attorneys arguing in front of them on March 25, 2014, in the widely followed cases Hobby Lobby v Sebelius and Conestoga Wood Specialties Corporation v Sebelius. Questions about the implications of different outcomes, costs to corporations, and how to determine if a corporation holds religious beliefs were asked of attorneys Paul D. Clement of Bancroft PLLC who argued on behalf of the private parties and Donald B. Verrilli, Solicitor General, who argued on behalf of the government. Arguments lasted 90 minutes, with Mr. Clement starting the arguments, a decision that was made by the Justices because Hobby Lobby is the petitioner in its case, while Conestoga Wood is the respondent in the other case. The decision is anticipated to be released in late June or early July of 2014.

Hobby Lobby. As discussed in earlier Strategic Perspectives, (Contraceptive mandate subject of ongoing rulemaking, litigation; now faces the Supreme Court and Supreme Court showdown over the contraceptive mandate looms,) Hobby Lobby, a national craft store chain, filed suit against HHS Secretary Kathleen Sebelius and various federal government entities, alleging that the preventive care services provision of the ACA, which requires large employers to cover forms of contraception that Hobby Lobby considers to be abortifacients, such as Ella®, Plan B One-Step®, and intrauterine devices, violated the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. At the direction of the Tenth Circuit, the district court granted Hobby Lobby a preliminary injunction barring the federal government from enforcing the preventive services provision of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-48).

The Solicitor General’s subsequent petition for writ of certiorari with the Supreme Court was granted, asking the court to determine if the RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners.

Conestoga Wood. Conestoga Wood Specialties Corp., a secular for-profit corporation filed suit alleging that because of their shareholders’ Mennonite beliefs they object to covering two forms of emergency contraception, and that requiring them to do so violated their free exercise of religion under the First Amendment or the RFRA. The district court denied Conestoga’s motion for a preliminary injunction on the grounds that a corporation did not engage in exercise of religion and was therefore unlikely to succeed on the merits. The Third Circuit upheld the denial, holding that secular, for-profit corporations do not have religious beliefs and as separate, distinct legal entities, cannot exercise the rights of its owner. Conestoga appealed to the Supreme Court and its case was consolidated with Hobby Lobby.

Oral argument of Paul D. Clement. Mr. Clement led the arguments and made it only a few sentences into his statements before being questioned by Justices Sotomayor and Kagan. Both Justices touched on the often-discussed potential fallout of a decision in favor of the private parties as it would relate to other medical treatment that has been met with disapproval from certain religious entities, such as vaccines, blood transfusions, products made of pork (arguably in reference to transplanted heart valves from porcine donors). Justice Sotomayor asked if Hobby Lobby’s claim was limited to contraception. Mr. Clement stated that he believes that in these situations each treatment “would have to be evaluated on its own and apply the compelling interest least restrictive alternative test and the substantial burdens part of the test.” Justice Kagan noted that due to the number of potentially objectionable medical treatments, this approach could lead to piecemeal application and lack of uniformity. Brendan Walsh, an associate with Pashman Stein, and the counsel of record for an amicus brief in the case filed on behalf of 11 Republican Senators and Representatives, attended the arguments and told Wolters Kluwer it was striking how quickly Justices Sotomayor and Kagan began asking questions.

RFRA. The arguments quickly turned to the intent of the RFRA, with Mr. Clement stating that the RFRA was passed by Congress to apply to “all manner of
Federal statutes” and Justice Ginsburg asking if that was so clear, then why did Congress continue “to write into Federal legislation specific religious exemptions for some, but not everybody, for individuals, sometimes religious institutions.” Likening Congressional specificity to using “belt and suspenders,” Mr. Clement argued that Congress could not have been clearer when passing the RFRA that it wanted it to apply to all preexisting statutes and to all subsequent statutes unless Congress specifically provided otherwise. Later in the arguments Justice Ginsburg noted that despite Mr. Clement’s argument of clear meaning, the Senate rejected a conscience amendment that would have enabled secular employers and insurance providers to deny coverage on the basis of religious beliefs or moral convictions.

Justice Kagan noted that the private parties’ interpretation of the law would “essentially subject the entire U.S. Code to the highest test in constitutional law, to a compelling interest standard” which could lead to religious objections to sexual discrimination, minimum wage laws, child labor laws and more. Calling the example a “parade of horribles,” Mr. Clement, answering a question of Justice Alito’s, stated that in the years since the RFRA has been law, claims against these types of laws have rarely been brought and “very few of them have succeeded.”

Corporate exercise of religion. Justice Sotomayor first brought up the notion of a corporate exercise of religion, asking Mr. Clement what cases show that a corporation exercises religion. Citing Church of Lukumi Babalu Aye v City of Hialeah (508 U.S. 510 (1993)) and Gonzales v O Centro Espiritu Beneficiente Uniao do Vegetal (546 U.S. 418 (2006)), Mr. Clement argued that no one took issue with a plaintiff as an “artificial entity.” The argument quickly turned on how to determine if a corporation has a belief, with Justice Sotomayor asking how much of a business has to be dedicated to religion and if it is determined by the beliefs of a majority of shareholders or corporate officers. Mr. Clement stated the approach is the same as any other question of corporate intent or motivation--look to the governance doctrines. Mr. Clement then argued that the line of questions goes to the sincerity of belief question, and said that the government would resist that type of analysis, as they have been long held as inappropriate. Justice Sotomayor quoted the Court in United States v Lee (455 U.S. 252 (1982), which stated “When followers of a particular sect enter into a commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are bind-

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**Do the religious beliefs of the employer trump that of the employee, who might not agree with its employer’s beliefs?**

**Tax or penalty?** This discussion of Lee quickly led the court and Mr. Clement into a discussion on the tax corporations must pay if they fail to offer health coverage that meets the government’s minimum standards. There was considerable back and forth discussing the financial aspect of the tax, with Mr. Clement calling it a penalty, stating that it “feels punitive,” despite the ruling in National Federation of Independent Business v Sebelius (567 U.S. ___ (2012)) that clearly defined the charge as a tax. The Justices repeatedly discussed the notion that if Hobby Lobby did not offer health coverage at all and instead paid the tax and increased employee’s wages to purchase their own insurance privately, that the financial bottom line would be similar to what the corporation pays now for health insurance. Mr. Clement also argued that while it hasn’t been principal to the theories on which the case is based, his clients have a religious tenant of covering their employees for health care. Mr. Clement also argued that when the government pursues a compelling interest, as it claims here, and demands immediate compliance, but then does not require grandfathered plans to provide contraception to its beneficiaries, the government is being fundamentally inconsistent with a compelling interest argument. Justice Sotomayor noted that the only reason Hobby Lobby’s plan wasn’t grandfathered was because it changed its plan to drop contraception coverage, which it previously provided. HHS defines a grandfathered plan as one that was created (or purchased, if an individual policy) on or before March 23, 2010. Grandfathered
plans are exempt from many requirements of the ACA, but plans or policies lose their status as grandfathered if they make certain changes to the benefits or costs.

Beliefs of employee. Justice Kennedy asked Mr. Clement if the religious beliefs of the employer trump that of the employee, who might not agree with its employer’s beliefs. Mr. Clement had four things to note about that, first that a third-party burden coming from an employer is less burdensome than one coming directly from the government. Second, he noted that, “The government has an argument that somehow third-party interests go into the substantial burden part of the analysis, where we bear the burden. And we don’t think that’s right at all.” Third, Mr. Clement argued that other significant interests that carry the most weight must be independent of the statute that is at issue in the case, and that the private parties seek an exemption from. Finally he argued, with impacts on third parties, not all of the burdens are created equally and the most relevant factor to consider is if there is an alternative way for the government to ameliorate the burden.

Alternatives. A discussion of alternatives was also had, and Mr. Clement suggested that the real question becomes who is going to pay for a subsidy that the government prefers, and that the question isn’t about access to contraception but about who will pay for the government’s preferred subsidy for the contraception. Justice Sotomayor, in response to Mr. Clement’s statement that alternatives existed, noted that “Those are alternatives that you’re asking the government to incur or the person to incur. There isn’t an alternative that doesn’t put a cost on someone else.” Mr. Clement pointed out that the government considered it a “cost-free mandate” because whatever you pay in contraceptive coverage you won’t have to pay for other coverage (arguably pregnancy and child birth costs). He suggested that a less restrictive alternative would be the one provided for nonprofit employers where the insurance carrier or plan administrator picks up the cost, so it is cost neutral to the employer and employee.

Oral argument of Donald B. Verrilli Jr., Solicitor General. Beginning with a quote from *Prince v Massachusetts* (321 U.S. 158(1944)), written by Justice Jackson, General Verrilli stated “Limitations which of necessity bound religious freedom begin to operate whenever activities begin to affect or collide with the liberties of others or of the public. Adherence to that principle is what makes possible harmonious functioning of a society like ours, in which people of every faith live and work side by side.” Chief Justice Roberts immediately pointed out that this statement is inconsistent with the RFRA, and that the point of the RFRA is to tell the court that there are not exemptions or limitations on religious beliefs unless the exception satisfies the strict scrutiny test. General Verrilli argued that when analyzing what is required under the RFRA, the court must take account of the way in which the requested accommodation will affect third parties’ rights and interests, as consistent with the ruling in *Cutter*, when the court held that in RFRA cases, when considering accommodations, you must weigh the effect on third parties.

Lee. General Verrilli argued that what Congress said in the RFRA was that the compelling interest test was to strike a sensible balance between claims for religious liberty and governmental interest. Going back to *Lee* General Verrilli argued that it is the only case from the Supreme Court in which the request for an exemption had the effect of extinguishing a statutorily guaranteed benefit. Justice Scalia then pointed out that the claim in *Lee* (pertaining to religious objections to Social Security) was denied because the government has to run a uniform system that applies to everyone, and that in the case of the contraceptive mandate, the government has already made a lot of exemptions.

Definition of person. Justice Alito asked General Verrilli to explain the government’s argument that for-profit corporations cannot bring RFRA claims. After much back and forth General Verrilli argued that the Dictionary Act provides a broad definition of person, but it doesn’t define “exercise religion” and the operative statutory language in the RFRA is “person’s exercise of religion.” Although the Dictionary Act does not define that, General Verrilli argued that Congress made it clear to look to pre-Smith case law to define “person’s exercise of religion.” General Verrilli also pointed out numerous cases in which for-profit enterprises were denied an exemption, but Justice Scalia noted that none of the mentioned cases had their exemption denied because of their for-profit status. Chief Justice Roberts asked General Verrilli about the eight courts of appeals that have determined corporations can bring racial discrimination claims as corporations, asking if the government has a position as to whether corporations have a race. General Verrilli answered affirmatively, that a corporation may bring claims of discrimination. However, General Verrilli noted that in that example the only word being interpreted is “person,” and in the Hobby Lobby case, the definition must be in the context of the exercise of religion. General Verrilli went on to argue that if the court recognized RFRA claims on behalf of for-profit corporations, it would give rise to exemptions imposing
burdens on third parties or would lead to third parties’ rights being extinguished.

Compelling-interest analysis. General Verrilli argued that the government had to show that the application of the law to Conestoga and Hobby Lobby is in the furtherance of the government’s compelling interest, and Justice Kennedy asked if that meant the government’s position was that part of the compelling interest is that the operational integrity of the whole Act had to be protected. General Verrilli answered that was part of the government’s argument.

Exemptions. Justice Kennedy further noted that the government had already exempted a whole class of corporations from providing all of the required essential benefits, and the exemption was not because of the RFRA. Justice Kennedy went on to ask what the constitutional structure is if Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined. General Verrilli argued it was appropriate for HHS to exercise its delegated authority and provide “special solicitude that under our constitutional order churches receive.” General Verrilli went on to note that the exemption given to churches was recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* *(565 U.S. _(2012))*). He made the distinction that while churches were given an exemption, nonprofit religious organization were given an exemption, but an accommodation, which results in their employees receiving contraceptive access. He also emphatically argued that despite the Tenth Circuit’s analysis, and the argument of the private parties, employers with less than 50 employees are not given an exemption, because if they offer health insurance, they are subject to exactly the same per-employee, per-day penalty as larger corporations if they choose not to provide essential benefits.

Grandfathered plans. The exemption argument then moved on to grandfathered plans (which are exempt) and began with Chief Justice Roberts asking General Verrilli if the government could give the court an estimate as to how long grandfathering would be in effect. General Verrilli was unable to provide more information other than there was a significant movement downward every year in the number of grandfathered plans and that was likely to continue. Chief Justice Roberts asked if the inability to pinpoint a timeframe meant that the court should assume that grandfathered plans would not end, to which General Verrilli answered no. General Verrilli stated that the government believes employers and insurance companies are going to make decisions that trigger the loss of grandfathered status. Justice Alito then asked if it was true that grandfathered plans were required to meet immediate compliance with some requirements of the ACA, but not the preventive care requirements. General Verrilli answered that the question would be whether there is a compelling interest in compliance with the requirements, noting that when the Americans with Disabilities Act (ADA) was passed, despite the fact that it advances interests of the highest order, Congress put a delay on the discrimination provision. Chief Justice Roberts pointed out that the delay with implementation of the ADA’s discrimination provision was imposed by Congress, not by an agency.

Justice Breyer asked if there was a less restrictive way to meet the compelling interest of the government.

Less restrictive means. Justice Breyer asked General Verrilli if there was a less restrictive way to meet the compelling interest of the government. General Verrilli noted that under *Ashcroft v ACLU* *(535 U.S. 564 2002)*, the burden on the government is to show that the proposed less restrictive alternatives are not equally effective, however, if something isn’t proposed, the government does not have the burden to refute it. Regardless, General Verrilli said the government could refute it, because if the burden were shifted to the insurance company to provide the coverage, the employer would still have to sign a form which would make them complicit in the central activity, which they would be exempted from. Because of that, the government’s interest would not be met, because the RFRA exemption will result in no coverage. Furthermore General Verrilli argued that the less restrictive means would lead to an enormous cost for the government to provide the coverage.

Sincerity of belief. The argument turned back to sincerity of beliefs, and General Verrilli noted that the court had, on numerous occasions, accepted the sincerity of a party’s belief but noted that it was up to the court to decide whether there was actually a substantial burden on the party. Justice Kennedy asked how HHS granted
an exemption to nonreligious corporations if it was not compelled by the RFRA and opined it must because the health care coverage was not that important. General Verrilli again noted that the only exemption was given to churches, and that religious nonprofits were granted an accommodation which still provided contraceptive coverage to the employees.

With a hypothetical about prohibiting kosher and halal slaughter methods due to inhumane treatment, Justice Alito asked the government about the implications of saying that no for-profit corporation can raise any a free exercise claim, and that nobody associated with a for-profit corporation can raise any sort of free exercise claim. In his response General Verrilli argued that if the exemption were granted it would be the first time under the Free Exercise Clause or the RFRA in which the court has held that employer may take an exemption that extinguishes a statutorily granted benefit the government sees as being of fundamental importance. He also emphasized the government was not drawing a line between non-profit and for-profit corporations. General Verrilli concluded by arguing that Congress was not authorizing the extinguishment of statutory benefits when it enacted the RFRA. Mr. Walsh told Wolters Kluwer that in person, Justice Breyer seemed unsatisfied with the answers he was given during the discussion of slaughter methods and the Free Exercise Clause.

**Rebuttal.** Mr. Clement began his rebuttal by discussing the abortion conscience clause, to give an example of where Congress has drawn the line. “Historically, those [conscience] provisions have applied to all medical providers, including for-profit medical providers. But we learned today that as far as the government’s concerned, that’s just Congress’ judgment. If Congress changes it judgment and says a for-profit medical provider has to provide an abortion, RFRA doesn’t apply.” Mr. Clement also argued that General Verrilli’s answers to the Justices regarding kosher markers would indicate corporations have no free exercise claims. Justice Sotomayor again asked about the implication of a ruling for the private parties in regard to other objectionable medical treatment and procedures, such as vaccines and blood transfusions, asking if Mr. Clement believed the government has to pay for all medical needs that an employer thinks or claims it has a religious exemption to. Mr. Clement answered “not necessarily.” Justice Sotomayor also asked Mr. Clement if his clients would claim filling out a form for a religious accommodation would be objectionable, but Mr. Clement stated his clients have not been offered the accommodation so they have not had to make that decision.

**Conclusion.** Mr. Walsh told Wolters Kluwer that based on the demeanor and questions of the Justices, he would anticipate Justice Kennedy providing a swing vote in the final opinion. He also noted that it was interesting that there was relatively little discussion of the Dictionary Act, which some thought might be central to the arguments on the definition of “person.” He also noted that the extensive discussion of the costs to Hobby Lobby and other corporations depending on whether or not they provided health care with essential health benefits, versus increasing wages and paying the tax for not providing health benefits was interesting, and not something that was extensively discussed in the lower courts.

*First published April 1, 2014.*
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