Five More Appeals Courts Poised to Decide If Religious Nonprofits Must Follow Mandate

By Mary Anne Pazanowski

Dec. 16 — The possibility of a circuit split and the seeming certainty that the U.S. Supreme Court will step in to resolve whether nonprofit religious groups must abide by an accommodation that would allow their employees access to no-cost coverage of contraceptive drugs, devices and related services over the groups' objections comes a step closer at the end of 2014 as five more federal courts of appeal entertain oral argument on the issue.

Between November 2014 and February 2015, the Second, Third, Eighth, Tenth and Eleventh circuits have heard or will hear debate on whether the contraceptive coverage provisions of the Affordable Care Act's preventive services mandate for women, as modified by the accommodation, violate the groups' rights to exercise their religion without undue interference from the federal government, in accordance with the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. RFRA says the government shall not substantially burden a person's exercise of religion unless the burden furthers a compelling government interest and is the least restrictive means of doing so.

The sheer number of cases pending in the federal circuit courts of appeal means "there are opportunities for differing opinions," Leila Abolfazli, senior counsel in health and reproductive rights at the National Women's Law Center (NWLC) in Washington, told Bloomberg BNA. And, although she doesn't believe a circuit split is inevitable, Abolfazli said there is "significant potential" for the issue to reach the Supreme Court. The NWLC has filed amicus briefs favoring the government's position in the appeals courts.

On the other hand, Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute in Washington, said that a circuit split is virtually certain. He added that he "doesn't see how the Supreme Court could avoid" deciding the issue, though a grant isn't likely to come this term, given the timing of the appeals. "Ultimately, the Supreme Court will have to" review the nonprofits' challenge, he said.

Challenge to Accommodation

At issue in these cases is whether an accommodation to the mandate designed to relieve the nonprofits' concerns about providing insurance coverage for contraceptive services, an action

they argued their religious beliefs deem sinful, goes far enough. The groups would like to be exempt from the requirement entirely, as are a narrow group of religious employers.

The pending cases are: *Roman Catholic Archbishop of N.Y. v. Sebelius*, 2d Cir., No. 14-427, oral arg. set for 1/22/15; *Geneva Coll. v. Burwell*, 3d Cir., No. 13-3536, oral arg. 11/19/14; *Sharpe Holdings, Inc. v. HHS*, 8th Cir., No. 14-1507, oral arg. 12/10/14; *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 10th Cir., No. 13-1540, oral arg. 12/8/14); and *Eternal Word Television Network, Inc. v. Burwell*, 11th Cir., No. 14-12696, oral arg. set for week of Feb. 2, 2015.

In addition, the U.S. Court of Appeals for the Seventh Circuit, which already has rejected the claims of a faith-based university, heard oral argument Dec. 3 in two consolidated cases, *Grace Sch. v. Burwell*, 7th Cir., No. 14-1430, oral arg. 12/3/14, and *Diocese of Fort Wayne-South Bend, Inc. v. Burwell*, 7th Cir., No. 14-1431, oral arg. 12/3/14.

The U.S. Court of Appeals for the Fifth Circuit also will be considering the government's appeal from an order enjoining enforcement of the mandate against several Texas groups in *Roman Catholic Diocese of Fort Worth v. Burwell*, 5th Cir., No. 14-10661, filed 6/10/14. The government filed its reply brief Dec. 17. Oral argument hasn't been scheduled yet.

Objections Follow Announcement

Religious groups began objecting to the contraceptive coverage provision when it first appeared in August 2010. The government subsequently adopted an accommodation through which they could opt out of providing the coverage by filing a form, known as the EBSA 700 form, with the Health and Human Services Department (HHS).

The form required the groups to certify that they were nonprofits organized for religious purposes and that they had religious objections to providing the coverage. The accommodation also required the groups to provide their insurers or third-party administrators (TPAs) with written notice of their objections, along with a list of employees, so that the insurer or TPA could take over responsibility for providing the coverage.

The groups opposed the accommodation, saying that the acts of filling out, signing and filing the form and providing their insurers with the required information facilitated or triggered the provision of contraceptive coverage, a sinful act in their eyes.

In January 2014, the Supreme Court granted the Little Sisters of the Poor a limited injunction against the accommodation, saying the group only had to tell the HHS in writing of its objection, rather than sign a form.

The high court echoed that decision in July, telling a Christian college that it need not file a form, but was required to give HHS written notice of its objection (*Wheaton Coll. v. Burwell*, 2014 BL 185569 (U.S. July 3, 2014)).

Dissenting, Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Elena Kagan, argued that the decision on the school's emergency application for injunctive relief undermined confidence in the high court's rulings because the majority in *Burwell v. Hobby Lobby Stores, Inc.*, 2014 BL 180313 (U.S. June 30, 2014), cited the accommodation as an example of the least restrictive means of achieving the mandate's goals. In *Hobby Lobby*, the court said for-profit entities that objected to the mandate on religious grounds didn't have to comply with the government's directive.

The government in August 2014 issued a new accommodation that follows the *Wheaton College* ruling. The groups object to this accommodation as well.

Three Courts Rule for Government.

The Sixth, Seventh and District of Columbia Circuits already have said that the contraceptive mandate, as modified by an accommodation, doesn't substantially burden the groups' exercise of religion.

In *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 2014 BL 47166 (7th Cir. 2014), the Seventh Circuit affirmed the denial of a preliminary injunction pending resolution of the college's claim that the government's requirement interfered with its religious exercise.

The majority found that the university's actions wouldn't "trigger" or "enable" the provision of contraceptive services in contravention of the school's religious beliefs. "Federal law, not the religious organization's signing and mailing the form, requires" the coverage of contraceptive services, it said. The burden placed on the school's exercise of religion was minimal, the court said.

Notre Dame Oct. 3 filed a petition in the Supreme Court, asking it to GVR, or grant, vacate and remand, the Seventh Circuit's decision. It argued that the decision was inconsistent with *Hobby Lobby* and *Wheaton College*. Abolfazli said the limited relief requested in the petition probably means it won't be given a full hearing.

The U.S. Court of Appeals for the Sixth Circuit, in *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 2014 BL 161584 (6th Cir. 2014), affirmed the denial of an injunction against enforcement in two consolidated cases. The court said the accommodation didn't require the organizations to alter their behavior in any way. The "only thing" required of the plaintiffs "is conduct in which they already engage," the court said. "They will continue to sponsor health plans, contract with insurance issuers or third-party administrators, and declare their opposition to providing contraceptive coverage to their insurance issuer and third-party administrator."

Because the plaintiffs "may obtain the accommodation from the contraceptive-coverage requirement without providing, paying for, and/or facilitating access to contraception, the contraceptive-coverage requirement does not impose a substantial burden on these appellants' exercise of their religion," the court said. The Michigan Catholic Conference filed a petition for Supreme Court review Dec. 12. The government's response is due Jan. 15, 2015.

The U.S. Court of Appeals for the District of Columbia Circuit Nov. 14 held that the accommodation didn't violate RFRA (*Priests for Life v. HHS*, No. 13-5368, 2014 BL 320877 (D.C. Cir. Nov. 14, 2014).

The court said the accommodation was a simple solution that didn't impose a substantial burden for purposes of RFRA, but even if it did, the accommodation was the least restrictive means of achieving the government's compelling interest in ensuring "seamless application of contraceptive coverage to insured individuals." After the ruling, attorneys for the plaintiffs said they would seek Supreme Court review.

On the other hand, the Eleventh Circuit said in a June decision on a motion for an injunction pending appeal that the plaintiffs had a high likelihood of succeeding on their claim (*Eternal Word Television Network, Inc. v. Burwell*, 756 F.3d 1339, 2014 BL 182177 (11th Cir. 2014). The court will rule on the merits sometime after an oral argument scheduled for the week of Feb. 2, 2015.

Split, High Court Review Inevitable?

A circuit split is possible, but the consistency of the appeals court opinions so far left NWLC's Abolfazli questioning whether the remaining circuits will diverge from their view. She told Bloomberg BNA that there may not be a split if the courts in the pending cases give credence to "strong" language upholding the accommodation in the Sixth, Seventh and D.C. circuit opinions.

Shapiro, however, said the three circuit court panels that ruled against the nonprofits were "unusually stacked with Obama appointees." He pointed out that the district courts that have considered the issue overwhelmingly have favored the groups.

In any event, the absence of circuit split might not have any bearing on whether the Supreme Court hears the issue, given its grant of certiorari in *King v. Burwell*, U.S., No. 14-114, *review granted* 11/7/14, while appeals were pending in other cases in the appeals courts.

While no one can predict what the Supreme Court will do, supporters of the mandate argue that both Justice Samuel A. Alito Jr.'s majority opinion and Justice Anthony M. Kennedy's concurring opinion in *Hobby Lobby* support the accommodation. The justices cited the accommodation as an example of a least restrictive means of ensuring the nonprofits' employees have access to contraceptive coverage, Abolfazi said.

Hobby Lobby was a different case, Shapiro said. The for-profit corporations seeking relief from the mandate there weren't offered any type of accommodation. Still, he said, he wouldn't be surprised to see the religious nonprofits' case similarly decided on the least restrictive means prong. What he doesn't see, Shapiro said, would be the court "looking beyond the theological veil" to determine whether signing a form or informing the HHS in writing of their objections violates the nonprofits' sincerely held religious beliefs.