NATIONAL HEALTH LAW PROGRAM

Overview to the Upcoming Supreme Court Decision:
The ACA Contraceptive Coverage Cases

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Introduction

The Patient Protection and Affordable Care Act (ACA) is comprehensive, market-based health reform legislation enacted on March 23, 2010. In 2012, the United States Supreme Court upheld the constitutionality of the ACA. That decision, however, did not end attacks against the law, and lawsuits against it continue. The current round of litigation is dominated by cases challenging a requirement that most new health plans cover contraception without cost-sharing. On November 26, 2013, the Court granted review in two such cases: *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*, 724 F.3d 377 (3d Cir.), cert. granted 134 S. Ct. 678 (2013); and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), cert granted, 134 S. Ct. 678 (2013). A decision is imminent. This pre-decision memorandum provides a snapshot of the cases.

Background on the Cases

In *Conestoga Wood Specialties Corp.*, the owners of Conestoga, a for-profit corporation that manufactures wood cabinets, are Mennonites who object to certain contraceptives, like Plan B and Ella, on the erroneous belief that they are abortifacients. Below, a split Third Circuit panel held that a for-profit, secular corporation cannot engage in religious exercise and, thus, did not reach the merits of the company's claims. The company asked for Supreme Court review.

In the other case, the store owners of Hobby Lobby, a craft store chain, and Mardel, a Christian bookstore chain, object to providing coverage for four FDA-approved contraceptives (two types of intrauterine devices and two types of emergency contraception) that they erroneously view as abortion inducing. Unlike the Third Circuit, in *Hobby Lobby Stores, Inc.*, the Tenth Circuit, sitting en banc, concluded that companies are persons within the meaning of the Religious Freedom Restoration Act of 1993 (RFRA), that the contraceptive coverage requirement places a substantial burden on the companies' exercise of religion, and that the government failed to establish that the requirement is the least restrictive means of furthering a compelling interest. On remand, the district court preliminary enjoined the federal government from applying the contraceptive coverage provision to Hobby Lobby and Mardel. The government appealed that order to the Supreme Court.

U.S. Supreme Court Review

The Supreme Court consolidated the cases and, in March, heard oral argument. Two claims are before the Court, including whether the contraceptive coverage provision violates the Free Exercise Clause of the First Amendment. In the media and during the oral argument, however, attention has focused on the challenge brought under RFRA. In adjudicating this claim, the Court will consider four questions:

(1) Whether for-profits corporations have religious exercise rights within the meaning of RFRA?
(2) Whether the contraceptive coverage provision substantially burdens the plaintiffs' exercise of religion?
(3) Whether the contraceptive coverage provision furthers a compelling government interest?
(4) Whether the contraceptive coverage provision is the least restrictive means of furthering that interest?

A brief summary of each issue is provided below.

The Four Questions

(1) Can For-Profit Corporations Assert RFRA Claims?

The first prong of the RFRA test has received the greatest deal of attention, and the Court's decision here could have consequences in a variety of other contexts. The companies' RFRA claims will fail if the Court decides that for-profit companies lack religious exercise rights and/or that owners cannot claim such rights on behalf of companies. However, the Court will address the merits of the RFRA challenges if it finds that: (1) for-profit companies can assert RFRA claims, (2) closely-held family corporations, like the ones before it, can assert RFRA claims, or (3) owners of for-profit companies can assert RFRA claims.

(2) Does the Coverage Mandate Substantially Burden the Plaintiffs' Exercise of Religion?

If the Court finds that a corporation or its owner can assert a religious exercise claim under RFRA, it will consider whether the contraceptive coverage provision substantially burdens religious exercise. Generally, this prong of the RFRA test receives the least attention. The Court here could also merely assume that the alleged burden is substantial because the companies assert sincere religious beliefs as the basis for their objections to covering contraception in their employee health plans.

(3) Is There a Compelling Government Interest?

If the companies establish a substantial burden on their exercise of religion, the burden shifts to the federal government to show that it has a "compelling government

interest" that justifies that burden. The Court might not dispute that public health, women's autonomy, and gender equality are legitimate governmental interests. Instead, the Court could focus on whether applying the contraceptive coverage mandate to the particular companies before it furthers any such interests. Here, the Court could find that permitting certain religious entities to refuse to comply with the contraceptive coverage requirement fatally undermines the argument that the government interests are compelling.

(4) Has the Government Used the Least Restrict Means?

The government must establish not only a compelling interest but also that it has used the least restrictive means to further that interest. Under this prong of the RFRA test, the Court will consider whether the federal government can achieve its coverage goals by other means. The Court could conclude that alternative proposals set forth by the companies fail to achieve the government's goals. On the other hand, the Court could find for the companies on this prong by concluding that the government failed to sufficiently explain why the companies' proposals would not achieve the articulated governmental goals. During oral argument, for example, the Justices asked the government whether a less restrictive way of ensuring access to contraception would be for the government to pay for the contraceptive coverage of the companies' employees. The government's answer—that the companies never raised this alternative before and that they would in any event likely challenge any such alternative under RFRA—seemed inadequate to some of the Justices.

Conclusion

The Supreme Court is expected to issue a decision by the end of the month. Commentators are predictably on two sides in terms of possible outcomes. Some experts predict that, if the Court decides that the companies and/or their owners can assert RFRA claims, the decision will focus on two issues: (1) whether the exemptions to the contraceptive coverage rule undermine any purported government interests in increasing access to contraception and (2) whether there are less restrictive means of increasing such access. Of bottom line concern to advocates concerned with women's access to affordable health care, if the Court finds for the companies, it could open the door for employers to make health care decisions for their employees guided by their own religious or political beliefs as opposed to established standards of medical care.

NHeLP will provide initial and in-depth analysis of the decision after the Court issues a ruling.

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