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Religious freedom for corporations? The Hobby Lobby decision breaks new ground

By Darcie Falsioni and Jeffrey Tanenbaum

The U.S. Supreme Court has delivered its much-anticipated opinion in *Burwell v. Hobby Lobby* and *Conestoga Wood v. Burwell*, 573 U.S. ____ (2014). In a 5–4 ruling, the Court held for the first time that a for-profit corporation has free exercise of religion rights and can qualify for a religious exemption from an otherwise generally applicable law. The Court then found that federal regulations mandating contraception coverage violate the Religious Freedom Restoration Act of 1993 ("RFRA"), at least as applied to closely held corporations with sincerely held religious beliefs on the subject. The Court described its holding as limited (Slip Op at p. 3), but the dissent took a very different view calling it "a decision of startling breadth" holding that "commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. (Dissent Slip Op at p. 1)

The decision leaves open questions concerning how (or if) the federal government will ensure coverage for female employees of corporations that opt out, as well as how far reaching this opinion will prove to be. An attempt at a legislative response may also be made, but such an effort seems unlikely to succeed in the current political climate.

Background

Federal regulations issued under the preventive care provisions of the Affordable Care Act require that employers providing non-grandfathered health insurance coverage to their female employees cover, at no cost, access to several forms of birth control. Hobby Lobby and Conestoga Wood challenged the regulations arguing that the mandate violated the RFRA.

Under the RFRA, the government may not substantially burden a person's exercise of religion even if that burden is the result of a rule of general applicability unless the government can demonstrate a compelling governmental interest and the burden is the least restrictive means of furthering that compelling governmental interest.

The plaintiffs objected based on a religious belief that life begins at conception. The companies and their controlling families argued that their religious rights would be violated if forced to include

four forms of birth control that prevent fertilized embryos from implanting in a woman's uterus, and argued that this would make them complicit in abortion.

The companies brought suit in separate actions under the RFRA and the Free Exercise Clause to enjoin application of the mandate. Both companies were denied preliminary injunctions. The Third Circuit upheld Conestoga Wood's denial on the grounds that a for-profit corporation could not engage in religious exercise under the RFRA or the First Amendment. The Tenth Circuit took an opposite approach in the Hobby Lobby case holding that: (a) corporations are "persons" under the RFRA; (b) the mandate substantially burdened the exercise of religion; (c) the government had not demonstrated a compelling purpose in enforcing the mandate; and (d) the government had not proved the mandate to be the least restrictive means of furthering a compelling interest. For purposes of the Supreme Court's decision, the two cases were consolidated into one opinion.

The Court's decision

In rendering its decision, the Court focused on four key issues:

1. whether for-profit corporations are "persons" who have the right to exercise religious beliefs and bring suit under the RFRA,

2. whether the contraception mandate substantially burdens the exercise of religion,

3. whether the mandate is in furtherance of a compelling governmental interest, and

4. whether the mandate is the least restrictive means of furthering that compelling governmental interest.

<u>Definition of "person" protected under the RFRA</u>

The opinion, written by Justice Alito, holds that closely held, for-profit corporations are "persons" under the RFRA, and capable of exercising religion. The Court found that protecting the free-exercise rights of closely held corporations protects the religious liberty of the individuals who own and control them. Although the RFRA does not specifically define "person," the Court looked to the Dictionary Act's definition of "person" and its extension to corporations and companies. In addition, the Court reasoned that since nonprofit corporations have been treated as persons for purposes of bringing RFRA and free-exercise claims, the same should hold true for for-profit corporations. The dissent criticized this broad interpretation arguing that corporations are artificial beings, not natural persons who can exercise religious beliefs, and that Congress did not intend for the RFRA to provide corporations with the right to opt out of laws incompatible with their religious beliefs.

<u>Substantially burdensome</u>

Once the Court concluded that the RFRA applied, it turned to the question of whether the mandate substantially burdens the exercise of religion. Here the Court did not focus so much on whether the exercise of religion will itself substantially burden, but instead the Court looked to the economic consequences of not complying with the mandate and quickly concluded the penalties assessed upon both corporations would be substantial based upon a tax of $100 per day for each affected individual. In the event Hobby Lobby failed to provide the mandated coverage, the tax was estimated to be $1.3 million per day. In addition, should the corporation not provide insurance

coverage altogether (as suggested as an alternative) in the event at least one-full time employee were to qualify for a subsidy on the federal exchange, the corporation could be subject to penalties of $2,000 per employee each year estimated at $26 million for Hobby Lobby. The Court also noted that the corporations would be at a competitive disadvantage if forced to not offer health insurance at all or increase wages to account for the elimination of this coverage.

Compelling governmental interest

Since the Court concluded the mandate imposed a substantial burden, it next addressed whether the mandate is in furtherance of a compelling governmental interest. Noting the government's position that the mandate promotes public health and gender equality, as well as ensuring that all women have access to all FDA-approved contraceptives without cost sharing, the Court assumed a compelling interest.

Least restrictive means

Upon assuming a compelling interest, the Court moved to decide the final prong of the RFRA test—whether the mandate is the least restrictive means of furthering the compelling governmental interest. Here the Court concluded the government did not show a lack of other means of achieving the desired goal without imposing a substantial burden. In reaching this conclusion, the Court suggested the government itself could assume the cost of the four objectionable contraceptives. The Court also pointed to the accommodations already being provided for nonprofit corporations with religious objections as evidence of a less restrictive means. Under this accommodation, the Court reasoned female employees would continue to receive the contraception without cost sharing and would have minimal logistical or administrative obstacles to obtaining this coverage. The suggestion that the government and general public should "pick up the tab" has been met with substantial criticism. (Dissent Slip Op at p. 2)

What can we expect next?

The Court went to great lengths to describe this decision as very narrowly tailored to address a closely held corporation's exercise of religion with respect to mandated contraception coverage. However, the Court's ruling does raise serious concerns over how far reaching the decision will be and what doors have now been opened.

1. ***Expansion of the definition of person under the RFRA***—The Court narrowly applied its decision to closely held corporations, noting the beliefs of the families who control them and suggesting it would be rare for a large publicly traded company to rely upon the protections of the RFRA. However, the Court's application of the Dictionary Act's definition of person seemingly creates a much broader opening for other for-profit corporations (closely held or otherwise) to raise claims under the RFRA.

2. ***Use of religious beliefs to challenge other mandates***—It has been suggested that a ruling in favor of Hobby Lobby and Conestoga Woods could invite additional religious objections for insurance coverage mandates (such as immunizations and blood transfusions) or cause discriminatory employment practices veiled as religious practice or belief. The Court attempted to ease these fears by noting this opinion does not mean that all mandates will fail. Each challenge must separately consider the government's compelling interest and whether the least restrictive means in achieving that interest has been applied.

3. ***Extension of existing accommodation to for-profit entities***—The Court noted the government has already provided an accommodation to the mandate for nonprofit corporations with religious objections. Under the regulations, an eligible organization that holds itself out as a religious organization entity must self-certify its intent to not provide the coverage. As noted in the dissent, this certification is currently being challenged under a separate case before the Court. Before this accommodation can be utilized by a for-profit corporation, additional regulations or guidance will be required.

Employers who may want to make a religious exemption claim should monitor post-*Hobby Lobby* developments carefully and review their options with counsel.

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